I-1.21: The Dodd-Franck Wall Street reform and Consumer protection Act: may an Act check all of Regulatory Law's boxes?

Margot Sève, Junior Editor and Member of the Editorial Committee

By Margot Sève[1]

Summary

On July 21th 2010 President Obama signed into law the United States' most important legislative change to financial supervision since the 1930's: the Dodd-Frank Wall Street Reform and Consumer Protection Act. This **paper suggests** that the Dodd-Frank Act, notwithstanding certain flaws, **reflects what the neo-realistic definition of Regulation** has been proposing in regards to **post-crisis reregulation**. *Inter alia*, it takes into account markets **interconnectedness, complexity and deregulation**. As regulatory law suggests doing, the Act **reconciles microeconomic and macroeconomic supervision** as well as **regulatory and prudential rules**, and resorts to certain regulatory tools in order to achieve certain regulatory goals. More specifically, it **revives four regulatory imperatives**: **oversight and systemic risk prevention**, **investor protection**, **transparency/information and prudential measures**.

Introduction

On July 21th 2010 President Obama signed into law the United States' most important legislative change to financial supervision since the 1930's: the Dodd-Frank Wall Street Reform and Consumer Protection Act. This 2,300 page long Act comes as the political and legislative response to the 2008 Financial Crisis. As President Obama underscored: "That crisis was born of a **failure of responsibility — from Wall Street all the way to Washington** — that brought down many of the

world's largest financial firms and nearly dragged our economy into a second Great Depression”[2]. In only a few words, President Obama describes the **crisis’ main causes**, which also happen to match some of Regulatory Law’s main precepts: **lack of supervision**, **lack of rules**, **lack of political decision-making** and the **systemic risk** inherent to global markets. As for the **Act’s main objectives**, they also correspond to **Regulatory Law’s main purposes**: first, **restoring confidence in the financial system** which can only be achieved with more **transparency imposed by regulation**, and second, **preventing the risk of any future crises**, which cannot be achieved without some kind of regulatory watchdogs -e.g. **regulators.** Many tools to fulfill those goals are proposed in the Act, such as the priority put on **consumer protection** (e.g. through **transparent information**, public disclosure), ***ex ante*** **powers** given to regulators, **both regulatory and prudential** (e.g. rulemaking power used on **actors’ certification, registration, on capital requirements, on corporate governance, on conflicts of interest or on marketing of financial products**), *ex post* **powers** (e.g. power **to sanction, to liquidate**) and an overall sophisticated yet **collaborative regulatory framework (e.g. inter-regulation**).

Why the Act represents what Regulation stands for.

Because the Act is about risk prevention and apprehension, it fits the now classic definition of Regulation[3]. Indeed, a **deregulated market**, i.e. the only necessity of a market that is solely governed by **pure antitrust law** is the space of the market: it does not need to be fitted out with any other device. In such a market, no network or infrastructure or *ex ante* coordination is provided. This type of deregulated market therefore represents the **ordinary economic framework**, governed by ordinary economic law, i.e. competition law. But in certain cases, a certain amount of **regulatory framework is technically needed** by the type of markets to which rules are applied in order to confront them with **issues of general**

interest and which are typically beyond their concerns, **such as the issue of risk prevention or consumer protection**. In such cases, **markets may no longer be self-regulated** but rather demand that regulatory mechanism interfere. A typical example is **financial markets** which, as the crisis demonstrated, **do not appear to be inherently capable of preventing systemic risk**, especially since financial markets are **global and dematerialized** and therefore do not answer to a single set of rules, nor are subject to any States' sovereignty. Consequently, in the case of **systemic risk prevention,** which is at the core of the Dodd-Frank Act, implementing **rigorous Regulation may allow avoiding failures** (where, in a **deregulated market** –i.e. only submitted to antitrust law– one **actor's bankruptcy is welcomed** by others), and also **avoid catastrophic panic,** which itself serves to **restore trust** on markets. This is typically why **banks and financial markets (even jnsurers**) need to be **definitively** (rather than temporally or superficially) **regulated,** because such markets demand to be *ex ante* **solidly organized to prevent the systemic risk** which is inherent to them.

Also, accordingly to classic Regulatory Law guidelines, the Dodd-Frank Act recommends that, to put up and conduct such regulatory framework, **Regulators** should be in charge, in that they provide "**independent and expert management of a sector, from within, by distancing political machinations from crucial issues of risk management**"[4]. Therefore, the Act gives them more funding, more information and especially more power[5]. The Act also goes as far as providing **Regulators** with **discretionary authority** to write and interpret new rules, which demonstrates that its drafters came to realize that only an **entity familiar with the sector's technicality** may be in charge and properly exercise such powers.

Moreover, the Act also reflects one of Regulatory Law's main aspects, since it is **interdisciplinary.** Indeed, **Regulation**, as it is understood and used in the Act, **does not refer to a specific branch of Law** nor a legal rule, but rather to **a method** used to

organize markets and to protect them from their own potential failures. Therefore, Regulation may not be identified as the supplement to corporate law, or contract law, or even procedural law, but rather demands that these **legal branches be used together, in a way that serves a particular goal**. In the case of financial markets and the Dodd-Frank Act, the goals pursued are **mainly risk prevention and consumer protection**. This is why Regulatory Law is often referred to as a **teleological law**[6], i.e. a discipline that, in the exclusive view of fulfilling a specific objective, will use any type of powers or rules to achieve this objective. Therefore, it is no surprise that the Dodd-Frank act, which claims to "Regulate" financial markets actually contains provisions which have to do with as much legal branches as needed to fulfill the goals of Regulation. **Regulation** is therefore interdisciplinary and does not concentrate on a specific branch of law but rather refers **alternatively to corporate law, financial law or bankruptcy law, real estate law, electronic payment etc.** and any other legal tool that could contribute to re-regulate the market and **restore lost equilibriums**. Another example is how the American legislator decided to **legislate in the same Act on markets** as **different as wholesale banking**, **retail banking** (including **credit cards**), **financial markets** and even **insurance**. The Act, by regrouping in a **single text three economic sectors,** which were for decades **considered as separate**, recognized that **Regulation is above any technical distinction or appellation of markets**, **but rather puts up principles which are applicable to any of these three sectors**. Moreover, this choice also demonstrates that the US legislator recognized that banks, financial markets and insurance are more than ever interconnected, and should therefore be put under the scope of a broader and interdisciplinary method of governance such as Regulation, rather than specific rules applicable to them individually. The Dodd-Frank Act therefore acts like Regulation, it acts like an interdisciplinary method, pursuing a purpose and using any appropriate tools to do so.

Finally, another aspect of the Act demonstrates its correct understanding of what Regulation is. Indeed, Regulation acts such as a **triangle between economics, politics and the law**[7]. In this view, as it is also the case for many new post-crisis regulations, the Act and the ideas it puts forth are not only the fruit of impressive legislative work, but are also forged by **two other forces: economics and politics**. Indeed, and as it will also be demonstrated through **European examples**, such a re-regulating post-crisis Act incarnates a true governance method, a type of market governance which can only be achieved by drawing the schematics of a truly balanced market by drawing inwards from the triangle's three angles towards its center of gravity.

All in all, the Act is, at least in regards to its purposes and breakthrough, a practical example of what Regulation means, aims at doing and how it must be implemented. We will underscore how **each provision of the Act** reflects and defends a **fundamental regulatory principle** (such as **transparency, regulator's broad powers** etc). Indeed, all these provisions correspond to what Regulation should be: the necessary application by powerful and informed institutions of **overriding mandatory principles of general interest, interdisciplinary rules**, decisions and mechanisms, in order for "certain sectors of the economy to grow and maintain equilibriums that they could not establish solely via their own economic strength"[8].

The Act is therefore a classic example of the will to regulate a formerly self regulated market, which proved to have failed and therefore needs to be re-regulated. Throughout the Act and the many ones its amends, **four key words** constantly appear, as they **delimit the goals pursued by financial regulation**. Financial regulation needs to be built on specific goals, since only *« l'esprit des lois* [9]» [the spirit of laws] will give it the legitimacy for such an outcome under the US legal framework. The main principles of the Act are:**oversight and systemic risk prevention (I), investor protection (II), transparency/information (III) and prudential measures**

(IV). These goals are also those the European Commission has chosen pursue in its financial reform for the EU[10], currently a draft.This is hardly coincidental because both the US and the EU have taken commitments at the supra-national and supra-regional level, within the G20. Therefore, it is a relief to observe that the **G20's commitments** have started making their way in national legislations. Indeed, "In the next six months, the G20 is scheduled to agree on the broad contours of a new global financial architecture for systemically important financial institutions, measures for crisis management and for a stronger capital framework"[11].

I) <u>Financial Stability oversight and systemic risk prevention</u>

One of the strongest statements made by the Act is the priority given to **regulatory oversight**, **mitigation of systemic risk** and **maintenance of financial stability** not only for one specific market but for the **entire system that links banks to insurance to financial markets**. "The Dodd-Frank Act extends the focus of banking regulators beyond the financial condition of individual institutions to **include systemic risk as a supervisory consideration**, along with tools to **minimize the likelihood of the collapse** of a firm that previously would have been regarded as too big to fail. In the event that a large institution does become troubled, the Act also equips **regulators with new powers** to facilitate the process of **managing such failure**"[12]. Therefore, in order to properly achieve this goal, the Act provides existing regulators with new **resolution authority** and also creates **a new Council** not only **to monitor but also address, if needed, systemic risk**.

A) <u>*Ex ante* powers over risk</u>

The way the **Act addresses systemic risk** is unprecedented, and is by far the most palpable measure took in regards to the series of events during the crisis. Indeed, whereas before the crisis systemic risk was thought to be inexistent because

markets had become sufficiently sophisticated and able to self regulate, the lessons learned from the crisis demonstrate otherwise. Therefore, the Wall Street reform creates from scratch a regulatory mechanism, intended to detect and **address systemic risk in order to insure the United States' financial stability**. This **macro-economic mission** is conferred to a new Council, **hosted by the Central Bank.** Under the Act, the new **Financial Stability Oversight Council** (the "Council") is chaired by the Secretary of the Treasury and brings together the principal regulators in order to monitor and manage systemic risk (Act §111), defined as "risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing **activities, of large, interconnected bank holding companies** or nonbank financial companies (companies "predominantly engaged in financial services" (§102), or that could arise outside the financial services marketplace" (§112). The Act also states that the Council's mission also encompass promoting "**market discipline**, by **eliminating expectations on the part of shareholders, creditors, and counterparties** of such companies that the Government will shield them from losses in the event of failure; and to respond to **emerging threats** to the stability of the United States financial system" (§112).

This new institution has the authority to **require reports from financial firms** that are not otherwise regulated by the Board of Governors of the Federal Reserve System, and to **examine any financial services firm** in order to identify those that may pose any current or future systemic risk. Should any nonbank financial firm be identified by the Council as posing a systemic risk, it will become subject to the supervision of the Board of Governors and to potential enhanced prudential supervision requirements (§115).

Any decision taken by the Council to **subject** a nonbank **financial company to enhanced prudential standards** is

accompanied by **procedural protections and a right to appeal**, which is what Regulatory Law recommends when it comes to giving such powers to a Regulator[13]. Indeed, it is more and more recognized that when it comes to Regulation, which demands that a wide range of powers be delegated to an independent entity, these powers shall be counterbalanced by the certain procedural guarantees (i.e. ***Audi alteram partem* rule**, right of appeal, the obligation of the administration to give reasons for its decisions etc.).

Moreover, because the Council's purpose is to manage any risk on the edge of becoming systemic, a broad scope of financial institutions' supervision has therefore been granted, and includes any financial institutions that have sufficient weight to pose a threat to other systemic institutions. This includes all investment banks, and a certain number of important hedge funds. Such enhanced power creates an important change for larger banking organizations with $50 billion or more in assets. Indeed, they can be subjected to "enhanced prudential" requirements that are deeper and broader than their current regulatory requirements. Those institutions subject to enhanced prudential supervision authority (banks' holding companies and nonbank financial companies) will need to provide prior notice for any nonbank acquisition involving a financial firm with assets of $10 billion or more[14]. As for financial firms, whether they are under Board of Governors' supervision or not, the **Council will be able to decide whether an "activity" (i.e., a product or practice) should be considered as systemically risky** and therefore should require that all federal regulatory agencies concerned by the institution draft rules to address the activity. The Act therefore makes a strong stand by regulating and subjecting financial institutions to supervision, which will require them to explain their activities in a much more detailed manner than before.

Moreover, the possibility to conduct *ex ante* **stress tests** (unlike those conducted in 2009, which were *ex post* because they took place after the crisis occurred), as soon as indicators

collected by the Council show a risk of market or institution failure, will contribute to forcing financial institutions to recapitalize. For example, very recently, on **November 12th 2010**, after the news that a Wall Street financial institution wanted to distribute **140 billion dollars of bonuses** and complementary remuneration to management teams, the American regulator used its power to **subject banks to stress tests**, in order to test whether or not they are sufficiently solvent to distribute such amounts [15].

Last but not least, an important *ex ante* provision comes as a complement to this system: the Act obliges banks to submit in advance **resolution plans (so called living wills**). Indeed, because the crisis demonstrated that certain activities were so inextricably connected that they were too difficult to separate under short notice, such living wills mechanism allows that a pre approved planned be immediately applied in case of company failure. Such *ex ante* resolution goes hand in hand with the Act's *ex post* provision on systemic risk: a new insolvency regime.

B) *ex post* powers over risk

More importantly, the Act puts into place a **special insolvency regime** applicable to Supervised nonbank companies, broker-dealers registered with the Securities and Exchange Commission (SEC) or supervised bank holding companies, should they pose a risk to the stability of the financial system. When a "systemic risk determination has been made" on a company (§203), the Federal Deposit Insurance Corporation (FDIC) must, on its own initiative or at the request of the Secretary of Treasury who is the chairman of the Council, make with the Board of Governors a written recommendation on whether or not the financial company in question does indeed pose systemic risk[16]. Should the recommendation prove the existence of a systemic risk, the Secretary must notify the financial company and the FDIC, the latter being **appointed as receiver**. There again, should the directors and officers of the

financial firms not consent, a Court hearing will be organized in order for the company to oppose the petition, every procedural right being here again respected (a highly expedited appeal of the Court's rulings has also been provided for by the Act).

C) When *ex post* becomes *ex ante*

Finally, the Act, true to Regulatory Law's teachings, contains provisions regarding the severe consequences to the management of the financial company placed into **receivership**. Indeed, not only does the Act provide that the managers responsible for the condition of the company will see their employment terminated (§206), but that they might bear the economic consequences consistent with their responsibility (§204). Last but not least, any **manager found guilty of irresponsible behavior may be banned from the financial services industry for at least two years** (Act §213)! These provisions certainly will have an adverse effect on companies' management for two reasons: first, because any manager who feels constantly watched by an entity in charge of supervising the sector (here, the Council) and on the lookout for any deviance which may create a systemic risk for the American economy, will behave more prudently[18]. This phenomenon refers to the theory of surveillance and was already recognized as efficient by Jeremy Bentham when he suggested referring to this theory to build a model prison, called **the Panopticon**[19] ; second, because the sanction of potential exclusion from the sector is, besides financial sanctions, one of the most dissuasive. Indeed, Regulation, which is interdisciplinary and is rooted in various sources, is in part grounded in sociological and economic literature[20]. The latter prescribes that, in order to **shield a market from opportunist behavior**, mechanisms of **incitation** and of severe sanctions should be implemented[21]. These sanctions need to be sufficiently **dissuasive** yet probable so that any economic agent will prefer to follow the rules,

because disobedience will harm both the outcome of the prohibited behavior and its instigator. Indeed, Regulatory Law has learned from sociology[22] that any social group made out of a business sphere exercises a certain pressure upon an **economic agent** because the group values his moral behavior. Therefore, the worst sanction for the agent who will violate a rule is by far collective **reprobation, up to banishment**[23]. The Dodd-Frank Act is therefore a true example of Regulatory Law's application, since it here pushes the right button in providing for the exclusion of guilty management from the sector for two years.

D) Resorting to the figure of an apolitical, overshadowing *gravitas* over the market

The Council created by the Act seems be the "**ultimate financial regulator**", with regard to the goal it pursues. Indeed, financial regulation is slightly different from economic regulation, since the prior, essentially intended to manage risk, aims at imposing on markets certain equilibriums that they could not otherwise generate (such as risk prevention which needs certain features such as transparent information), whereas the latter will simply find a balance between risk and the principle of competition[24]. Moreover, financial regulation does not only **stymie risk** (e.g. risk to investors due to speculation, which, in a market liberal conception, is a risk the investor takes), but is in charge of the **entire system's potential collapse,** also designated as systemic risk. **Systemic risk** is therefore financial regulation's main priority, which happens to also be the **Council's first mission**. Moreover, identifying and preventing systemic risk implies **identifying "systematically important financial institutions**" (identifiable mainly by their activities), whose failure could bring down other market participants. In order to achieve this analysis, the regulator needs as much information as possible and must be at all times in the position of observer. Therefore, the "ultimate financial regulator" is not merely the regular regulator in

charge of creating the rules for a specific sector (such as capital requirements or consumer information) and of sanctioning those who do not comply, but rather the entity which **collects, studies and generates conclusions** on the health of the market. The Council appears to be indeed the ultimate guardian of the system, above (but not hierarchically superior to) other regulators. In a way, the ultimate regulator intervenes at the **Macro-economic level**, whereas banking, financial and insurance regulators intervene at the micro-economic level. Like other regulators, its *ex ante* powers are wide and are exactly tailored to the goal it was appointed to fulfill. The Council however differs from regular regulators in that it does not benefit from as many *ex post* powers. But the ultimate financial regulator precisely does not need them, because its ***ex ante* powers suffice to establish its authority**: by **deciphering risk** and immediately **stopping it** (the Council having the power to have any company stop its activities), the regulator does not wait for the bubble to burst. Therefore, it does not need *ex post* powers, which are useful only once a certain event has happened. Finally, the Council may also be considered as a regulator based on **Hannah Arendt's** model in which, beyond the law, the regulator needs to have **authority** (also called ***gravitas***), which means "impressing the sector as well as the government is order for its prescriptions to be considered"[25]. Influence and authority may only be gained if the regulator has access to information and insight, which the Act seems to have provided for the "Financial Stability Oversight Council". In a way, the regulator, especially the **Council**, is like **a macro-economic owl**: observing from above while constantly ready to strike. Such a regulator has recently been adopted in Europe (see Section 3), to be put in place in 2011.

But from a European standpoint, Obama's reform shows that Europe is one step behind. Indeed, where most of Obama's intentions were also shared by Europe right after the crisis (and shared at the G20 level), the suggested European reform,

based on the Commission's request for a group of high level experts chaired by Mr. Jacques de Larosière to make proposals to strengthen European supervisory arrangements, has failed to be quickly implemented[26]. Indeed, where Mr. de Larosière, in line with the Dodd-Frank Act, has determined that the crisis was in part due to a strong lack of supervision, he insisted on refreshing Europe's regulatory framework and giving European agencies more funding, more information and more power, discussions have however been recently put on hold until September 2010, to finally on the day of the vote not grant them equivalent powers[27]. While the European version of the Council will be similar in terms of organization (chaired by the European Central Bank's governor and bringing together regulators of the sector, i.e. the European regulators for banks, finance and insurance), many are worried about the non-mandatory character of its decisions. Indeed, not only will Europe's new regulatory framework probably not be implemented according to the European Commission's calendar, but most fear that the soon to be created European Systemic Risk Board will only have powers relating to alerts and recommendations (nor will the future EU Securities and Markets Authority- ESMA), far from the range of powers of its American counterpart since most of Europe's model will not be granted powers over companies and the marketing of their products, especially in regards to its direct intervention (i.e. without passing through the national Regulator in charge). From that standpoint, the United States are far ahead of Europe in terms of Regulation, even though the Act will suffer from the timing of the implementation of its provisions (see below).

II) Consumer protection

One does not even have to begin reading the Act's provisions to understand that Consumer protection was close to congressmen' hearts when drafted; reading its title does the trick. Indeed, "The Wall Street Reform and Consumer Protection

Act" makes, with no further ado, a powerful stand. Further, it reflects in many ways other financial regulation reforms throughout the world, simply because consumer protection has become, since 2009, and through the G20's resolutions, no less than a universal goal when it comes to financial regulation. In the words of the G20's leaders, "we will launch a G-20 Financial Inclusion Experts Group. This group will identify lessons learned on innovative approaches to providing financial services to these groups, promote successful regulatory and policy approaches and elaborate standards on financial access, financial literacy, and consumer protection"[28]. Consumer protection has become one of Regulation's priorities, as it encourages prevention, i.e. *ex ante* regulation rather than waiting for taking *ex post* measures. Furthermore, and once again, the Act shows how Regulation cannot be enforced without clear goals to reach, which allows the legislator to implement technical *ex ante* rules (as well as increased powers given to Regulators) as broad as necessary (in terms of scope and persons concerned) to make sure the goal is reached. Consumer protection is nowadays recognized as one of Regulatory Law's priorities, which can, for example, be inferred from reading the recently created French *Autorité de contrôle prudentiel* (Prudential Control Authority's) main objectives: "ensuring (i) consumer protection, (ii) financial stability at a national and European scale"[29].

Four of the Act's main efforts to enhance consumer protection must be underscored.

A) <u>Consumer protection to reach transparent and symmetrical information</u>

First, as it was expected, one of the first actions taken to increase the protection of consumers of financial products, i.e. investor, was to **enhance their information,** especially when it comes to **complex and risky financial products**, mainly when it comes to **securitization**[30]. Indeed, even though information also contributes to increasing transparency on markets (see

below), it works in favor of consumer protection, which **leads to restoring trusts in markets.** This is why the Act provides that issuers of **asset-backed securities** will need to not only work on their **risk retention** (see below) but also to agree to **new disclosure, due diligence and reporting requirements**. The Act requires that issuers of asset-backed securities will need to disclose **asset-level or loan-level data** when such data are necessary for investors to independently perform **due diligence**. Such information does not merely include **information on the asset itself** but also on the **identity of its brokers or originators**, their **compensation** and the **amount of risk retained by the securitizer** (§942). In this regards, it appears as transparent and enhanced information given to investors is more and more identified as being an important step towards a better regulated and balanced financial market. For example, the recent recast of the European Directive on Undertakings for collective investment in transferable securities (UCITS) puts forth as one of its main goals the improvement of investors' information. Indeed, the Directive, which replaces the Simplified Prospectus by a new concept of Key Investor Information (i.e. marketing communications and obligatory investor disclosures by UCITS), emphasizes the need to achieve transparent, timely and yet comprehensible information for investors so they reach informed investment decisions[31]. "Consumer protection" is therefore starting to spread as one of regulation's main priority (i.e. it is one of the reasons why markets may not be left self regulated) but also as its tool to reestablish trust in markets.

B) Consumer protection via a regulator's sheltering

Second, one of the Act's most concrete innovation in terms of financial regulation and consumer protection is the creation of a new regulator named the **Bureau of Consumer Financial Protection,** which will also benefit from broad powers in terms of **regulating retail financial products and services** (see title X of the Act). Here again, the governmental agency has power to

supervise (and examine) specific institutions as well as enforcing **rules related to consumer finance**, which means more *ex ante* power in order to prevent "**abusive" financial practice**s (one may however already sense the potential litigation about the lack of clarity of what is an "abusive" act or practice). In a nutshell, the Bureau has been granted rule-making, investigation and enforcement powers that used to be found in federal consumer financial protections statutes. As mentioned, the Bureau will benefit from **supervisory power** as well as **examination and enforcement authority powers over any insured depository institutions** "with assets in excess of $10 billion", as well as over any **non-depositary institutions** which "broker, originate or service mortgage loans", and over any "larger participant" in the market for other consumer financial services (§1024 to 1026). Moreover, the supervision becomes even broader as States will come to play a part in the regulation of **federally charted institutions** and may bring actions against all institutions to enforce the Act's provisions (the Act even preempting states' consumer financial protection laws in certain cases). The Bureau will have the authority to **prevent institutions from engaging in unfair or abusive or deceptive acts** when providing consumer financial products and services (§1031).

Third, the bureau actually endorses several tasks, both contained in title X and in title XIV of the Act: indeed, the bureau is not only in charge of preventing abusive financial practices but also to enforce the **Act's mortgage reform** and **anti-predatory lending provisions,** as the financial crisis, which debuted with the "**subprime" crisis** and the "**originate and distribute" banking model**[32], demonstrated how interconnected the banking sector (providing for mortgage loans) and the financial sector (in charge of securitizing those same mortgages and marketing them) were. Moreover, even insurance firms may be considered systemically important as they might for example have a large lending arm. Therefore the bureau, headed by a director appointed by the President

for five years (subject to the Senate's confirmation) will be divided into separate offices: office for Fair Lending and Equal Opportunity, Financial Education and Service Member Affairs, but also units for Research, community affairs and complaints. These offices will be in charge of enforcing new **national underwriting standards and prohibited loan terms and practices provided for by the Act.** For example, §1411of the Act provides that **lenders will need to check a mortgage borrower's capacity to repay the loan while using**, in making his decision, certain **mandatory factors such as credit score and debt-to income ratio**. Such *ex ante* provision can be compared to what is currently being implemented in **France** based on the French financial markets authority recommendation: the requirements put on banks that, as of July 1st 2010, any **sales person within a banking institution will need to pass a series of tests** in order to attests that he/she is in fact sufficiently educated to advise or assist a client in making a commercial decision relating to financial services. The idea behind this new obligation put on banking institutions is consumer protection through a series of warnings and information on the financial transaction they are about to perform[33]. In this regard, financial education of banking or financial markets participants is essential.

C) Consumer protection as a prudential regulatory tool.

Moreover, combining regulatory actions and prudential actions[34], the Act "significantly increases **data gathering requirements on mortgage loans under the Home Mortgage Disclosure Act**. Among other things, the Act requires lenders to **collect and report borrower credit scores, collateral value, origination channel, pricing and fee data**, and borrower age"[35]. Therefore, more than ever, information comes as the key to efficient regulation: the more information the regulator gets, the more efficient its actions can be. **Fighting against asymmetric information** indeed is crucial.

The reasoning behind the Consumer protection section of the

Act seems clear: had consumers been informed and more protected at the time of signing their **mortgage loans** (or more informed during the contracts' performance, since the Act also develops consumer counseling programs), banks would not have had the opportunity to overflow so many **subprime borrowers with adjustable-rate mortgages** (to securitize them right after, which created opacity on markets – the so called "**originate and distribute**" banking model), the **prevention of real estate price bubbles** might have been possible[36]. Therefore, more than ever, consumer protection is one of Regulation's main objectives as it clears away one of the financial crisis' roots, and therefore participates in restoring trust in markets and, in the long run, to prevent future crises.

Therefore, to achieve this post-crisis regulatory objective, the drafters of the Act had no other choice than to grant the Bureau with broad powers and to make a strong stand by including it in the Act's section on consumer protection and retail banking.

Moreover, and as Joseph L. Barloon and Anand S. Raman underscored, "the law reflects a public policy shift from a "disclosure" regime towards a more paternalistic, rules-based products (…). Greater mandatory loan-level date reporting, the creation of an "Office of Fair lending and equal opportunity" and the release of mandated fair lending studies will affect fair **lending statistical screening practices**, and **robust internal statistical monitoring by regulators will take an enhanced importance"**[37]. This only shows how the Act reunites regulatory intervention with prudential actions, as only the two combined may lead to efficient regulation. Added to that the fact that the Act also provides in Section 1075 provisions on **payment card transactions** (mainly on interchange fees and exclusivity arrangements), it appears as though the Act shows once again that its drafters took notice that **retail banking, investment banking and financial markets are indisputably linked** and must be apprehended together when it comes to regulation.

D) Consumer protection to reinsert trust on markets

Finally, one last part of the Act, while not drafted under Section X (Consumer protection), may also be inferred as contributing to the Act's objective of enhancing consumer protection. Indeed, § 335 of the Act provides for important changes in deposit insurance coverage. Indeed, the Act increases **the standard maximum federal deposit insurance amount** to $250,000 (it used to be $100,000), making the change retroactive to January 1, 2008 (with respect to insured depository institutions for which the Federal Deposit Insurance Corporation was appointed receiver after that date). Here, "consumers" of financial products, i.e. investors, also find increased protection, which should, as regulators expect reinstate consumer confidence and trust in markets.

Such action echoes the recent communication made by the **European Commission** on July 12th 2010[38], which proposes a "package to boost consumer protection and confidence in financial services". The project aims at **protecting bank account holders and retail investors by improving protection for insurance policy holders**, including the possibility of setting up Insurance Guarantee Schemes in all Member States. In a nutshell, "for bank account holders, the measures adopted (…) mean that in case their bank failed, they would receive their money back faster (within 7 days), **increased coverage (up to € 100 000)** and better information on how and when they are protected. For investors who use investment services, the Commission proposes faster compensation if an investment firm fails to return the investor's assets due to fraud, administrative malpractice or operational errors, while the level of compensation is to increase from € 20 000 to € 50 000. Investors will also receive better information on when the compensation scheme would apply and get better protection against fraudulent misappropriations where their assets are held by a third party – such as in the recent Madoff affair"[39].

The reason why this proposal seems to echo the American Act

so well is simply because it is “fully in line with the EU's **commitments under the G20**”, which once again raises the question of the G20’s (or any supra-national political decision-making body) efficiency when it comes to putting forth broad yet common guidelines on how to regulate markets which are global as well as common principles and objectives to guide national legislators in drafting legislation (such as the objective of consumer protection).

III) Transparency / Information

One of the reasons why the crisis could not have been foreseen in time nor handled more efficiently was due to the **quality of information** (more exactly to its **asymmetry**) on markets and therefore their lack of transparency. Because financial markets are today globalized, that is to say that economic trades made on such markets occur without constraints of time, neither place nor in particular physical shape, the core of financial market’s business no longer revolves merely on the trade for financial titles but has become a **market of information.** And in such case of globalized markets, **information becomes one of regulation’s primary tools to prevent market failures.** In a way, as some have underscored, information has **become a collective good,** which demands not only protection, but is also **required when self regulated markets do not appear to be able to create transparent and safe information on their own.** That is the reason why the Dodd-Frank Act has provided for the disclosure of more types of information and for more transparency in market actor’s behaviors, so that any **information disclosed (on titles, on risk, on companies etc.) be reliabl**e, in order that the game of offer and demand be re-equilibrated so as not to put in danger the entire system. Once again, the Dodd-Frank Act shows that creating these equilibriums is regulation’s *raison d’être*.

A) Shedding light on opacity

The first significant measure regarding transparency and

information is the one imposed on **over the counter (OTC) derivatives**. For the first time, these products will be regulated. First of all, for those presenting the most risky profile, **such as swaps**, banks will simply be obligated to let go of these activities and transfer them to a nonbank affiliate (see below the Volcker rule), requiring that, for the rest of them**, clearinghouses be created**. "Swap" is broadly defined to include most types of OTC derivatives, subject to a carve-out for "security-based swaps" and certain other specified exceptions. The definition (...) specifies a number of categories such as (i) **puts, calls, caps, floors, collars or similar options** of any kind that are for the purchase or sale, or based on the value of one or more interest or other rates, currencies, etc., and (ii) **interest rate, currency, total return, equity, credit default**, energy, metal, **agricultural and commodity swaps**, which, among others, are listed as examples of a broadly described category of risk transfer instruments. The definition also includes the broad catchall categories of "**an agreement, contract or transaction that is or in the future becomes commonly known to the trade as a swap,**" and any combination or permutation of, or option on, any of the described types[40]. Therefore, "just as Germany has recently taken radical action to limit uncovered short selling[41], the United States is realizing the necessity of subjecting financial markets to stronger capital requirements, **limiting speculation**, and imposing structures such as **clearinghouses** and **registration on over-the-counter trading**"[42].

Moreover, besides a stricter declaratory and supervision regime imposed on over-the-counter trades in futures and derivatives in general, the Act imposes a **limitation on speculation on energy futures and derivatives.** For example, a company that trades energy such as fuels, emissions or other commodities using OTC contracts will need to clear these swaps with a **clearinghouse** and only trade them through an exchange.

These types of products can no longer be marketed without

sufficient information disclosure, which significantly decreases the risk on financial markets. Here again, regulation transforms information into an efficient tool to solve regulatory issues and persistent concerns of systemic risk and speculation on financial markets.

That is why **the "Derivatives" Title of the Act** also requires that as many products as possible be **centrally cleared and traded on exchanges**. The idea behind clearinghouses, and because Senator Blanche Lincoln proposal to simply put an end to the trading of derivatives did not go through, is to at least render the derivatives' market more polished and supervised since any payment will need to be centralized and "cleared". This minimizes risk and means that banks will no longer be able to **trade derivatives in a row** as they will only have from now on **one counterparty,** the clearinghouse asking them for daily value calculations and sufficient safeguards in regards to risks taken. Such framework considerably reduces the amount and accumulation of risk taken on OTC markets.
These clearinghouses will also be able to impose particular capital requirements on swap dealers and markets actors'. Finally, for both cleared and uncleared swaps, the Act requires public **reporting of transaction and pricing data**. Such measures should allow investors and regulators to know which assets were exchanged, at what price and between whom. The provision therefore aims directly at **offsetting information asymmetry**.
Moreover, the **SEC will be entrusted with new supervision powers on derivatives** as it does not suffice to impose **information** disclosure on participants: their **quality** must also be examined at all times. The SEC is therefore granted with broad regulatory powers to make sure information and transparency are restored on markets, and will work hand in hand with the Community Futures Trading Commission in charge of supervising those particular OTC derivatives on which banks will no longer be authorize to speculate via

proprietary trading.

B) Regulation through registration

But transparency and information are not just about market products but also market participants. Therefore, the **SEC** will also survey and demand **transparency** on **executive compensation**, **corporate governance**, and the **amount of risk taken** by financial institutions. The SEC will also be in charge of **supervising credit rating agencies** (see also below), which includes demanding of them that their **rating methods be transparent**. This last provision is very **close to what has been decided in Europe** for rating agencies[43].

Moreover, the Act seems to aim for more transparency through imposing more **registration requirements on private fund investments advisers (e.g. hedge funds).** For example, Title IV of the Act requires many **investment advisers** which are currently unregistered to register with the SEC. These investments advisers were formerly subject to the Investment Advisers Act of 1940 (amended by the Dodd-Frank Act), which used to offer an exemption from registration. This exemption will be abrogated as the Act imposes many **new information obligations such as recordkeeping or reporting obligations on investment advisers to certain private funds**. Moreover, as we will see below, the "**Volcker Rul**e" limits the possibility for **banking entities** and nonbank financial companies supervised by the Board of Governors **to invest in private funds** (which includes hedge funds and private equity funds). In a nutshell, based on §403 of the Act, the SEC will only provide a registration exemption for investment advisers with less than $150 million in assets under management. However, any investment advisers who should benefit from this exemption will still need to maintain records and annual reports to the SEC. The SEC will soon exercise its normative power to determine which of these institutions will need to disclose such information, regarding the level of public interest and of

investor protection involved. Moreover, the SEC will also be able, even for firms with less that $150 million in assets under management, to propose **registration and examination procedures for investment advisers** in order to leave no systemic risk posed by such funds out of its reach (§408). Indeed, the information that such registered firms will need to disclose is so broad that such intrusion in order to get information may only be justified by the need to prevent risk. Indeed, **recordkeeping and reporting requirements** include for example (§404): "the **amount of assets** under management and **use of leverage**, including off-**balance-sheet leverage**; **counterparty credit risk exposure**; **trading and investment positions**; valuation policies and **practices of the fund**; **types of assets held**; side arrangements or **side letters**; **trading practice**s"; and any information the SEC deems necessary in the public interest, to asses systemic risk and to complete investors' protection (see above)[44].

C) Shedding light on securitization: transparency for securitizers and credit rating agencies

Last but not least, one of the most anticipated provisions when it comes to clearing financial markets' sky in terms of transparency and information, is the one regarding **securitization**[45]. This process evokes such securities which, in particular, served as **vehicles** for a **pool of assets collateralizing asset-backed securities -ABS-** (therefore conducting the credit risk afferent to them), and which therefore was **identified as a factor in the subprime** crisis (cf. below), especially because practiced at the time the "**originate and distribute"** banking model ("traditional banking model, in which the issuing banks hold loans until they are repaid, was replaced by the "originate and distribute" banking model, in which **loans are pooled, tranched**, and then resold via securitization[46]. The creation of new securities facilitated the large capital inflows from abroad[47]").

As securitization broadly contributed to the opacity of the market, provisions of the Act exclusively concentrate on restoring as much transparency as possible in trades of these securities, in order to identify the risk contained in their tranches, therefore contributing to the rightful diffusion of information on markets (and to consumer protection, see above). Besides permitting investors to independently carry out due diligence based on information given on asset-level or loan-level data (see above), such as the **amount of risk retained by the originator or securitizer,** the Act imposes on **securitizers the disclosure of fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer**, so investors but also regulators may know the **identity of asset originators** (§ 942(b) (to be codified at 15 U.S.C. § 77g(c)(2)(B)). And because most investors rely on ratings made by **credit rating agencies,** the act compels these agencies to **include in their rating description explanations on the representations,** warranties and **enforcement mechanisms for the ABS** being rated (and the difference between such ABS and other more common securities).
The SEC already published on April 7, 2010, a release, under the Securities Act, in which it suggests amendments currently applicable rules to ABS issuers, especially regarding risk retention (see below prudential rules[48]). The SEC requires extensive **asset-level data requirements.** The SEC proposed 28 unique data items applicable for most ABS transactions, as well as specific data points (for example for residential mortgage-backed securities). As Skadden Arps partner, Andrew M. Faulkner, recommends, "despite the potentially lengthy implementation period for the provisions of the Act, **securitizers may wish to begin generating, assembling and disclosing the extensive asset level data required by the ABS Release and by the provisions of the Act as part of their efforts to implement "best practices**" in their securitization business and to **create the necessary facilities and processes that will allow them to comply with the new asset-level disclosure**

rules, once they have been implemented"[49].

IV) Prudential Measures

Ever since the financial crisis, it has become clear that **prudential rules** (applying to everything dealing with the internal functioning of market participants: corporate governance, capital requirement etc.) and **regulatory rules** (applying to the market itself) need to be **considered and applied together** at the same time in order to achieve their common goal: market stability. The Dodd-Frank Act seems to embrace such ideas since an important number of its provisions is devoted to the tightening of prudential rules, that is to say rules permitting to supervise and build *ex ante* the right conditions for market participants to be able to conduct their business without risking suffering the consequences of market failure. The Dodd-Frank Act sticks to that proposition by reviewing most of the regulation of banking organization, under a set of rules known as the "**Volker Rule**" (named after former Federal Reserve Chairman Paul Volcker.).

A) The Volcker Rule: Handling conflicts of interests through prudential requirements

First of all, the **Act separates certain activities, the excesses of which were revealed during the crisis, and imposes that they be carried on by separate affiliates, themselves independently capitalized**. More specifically, the Act prohibits proprietary trading and fund activities by depository institutions and their affiliates. Proprietary trading is defined in §619 of the Act as **engaging "as a principal for the trading account** of a banking organization or supervised nonbank financial company in any transaction to purchase or sell, or otherwise acquire or dispose of: **any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such security, derivative, or contract**; any other security or financial instrument that the appropriate federal banking agencies, the

SEC, and the CFTC (the "Regulators") may determine by rule". On the downside, because the definition of the "**trading account**" refers to "any account used for acquiring or taking positions in the **proprietary trading** of securities and instruments principally for the purpose of selling in the near term", the scope of the prohibition of "**prop trading**" seems limited. However, the Act also suggests that the Regulators (federal banking agencies, the SEC and the CFTC) decide that any other account be considered as proprietary trading, which potentially **broadens the definition**. Furthermore, even though the Volcker Rule does not prohibit proprietary trading or fund activities carried on by a designated nonbank financial company, it allows the Board of Governors to impose on the latter capital requirements and quantitative limits on the conduct of such activities.

Moreover, as already mentioned, the **Volcker Rule also prohibits** insured depository institutions and their affiliates **from sponsoring**[50] **a hedge fund or private equity fund** or investing in such funds since these funds ("hedge fund" and "private equity fund") refer to any issuer that is exempt from SEC registration under the Investment Company Act of 1940.
Moreover, the Volcker Rule provides certain exemptions to the prohibition on the ownership of any interest in a fund, provided all **such investments do not exceed** certain aggregate limits as **a percentage of Tier 1 capital.** Indeed, the exception applies in the case of a **seed investment** in a fund advised by the banking organization or its affiliates that falls under the above mentioned exception (permitting the sponsorship of certain funds), in order to provide the fund sufficient initial equity for investment to permit the fund to "attract unaffiliated investors" (§619). Should the banking organization make such "seed investment", it must help seeking unaffiliated investors to reduce the investment to not more than 3% of total ownership interest of the fund (within one year after the date of establishment of the fund). Finally, the overall investment in

all the investment interests in these funds cannot exceed 3% of the Tier 1 capital of the banking organization. Therefore, “While the Volcker Rule has been moderated since its inception, these limitations would have a significant impact on the ability of U.S. banking organizations to provide investment management products and services that are competitive with nonbanking firms generally and with non-U.S. banking organizations in overseas markets”. [51]

The Volcker Rule also provides for specific **anti-conflict of interest measures**. Indeed, although in the case of certain transactions, **proprietary trading or fund sponsorship** or investment are permitted, no transaction by a banking organization will benefit from the exemption should it result in any conflict of interest between the bank and its clients or any counterparties, or should it involve the bank in “**high-risk assets” transactions** § 619 (to be codified at 12 U.S.C. § 1851(f)(1)-(2)), nor expose the bank or the US financial system to any systemic risk.

In a way, the Volcker rule also had a systemic impact on the Dodd-Frank Act itself. Indeed, the fight against **conflict of interest** is even more pregnant in the case of **credit rating agencies**. Ever since these agencies have been identified as one of the causes of the crisis, regulators have attempted to identify in which way these institutions may have had such an impact on financial markets. The main reason appears to be conflicts of interest, since these agencies had for several years been living on two types of businesses: advising clients and rating financial products, which may from time to time be issued by the same institutions which the agency advised. Obviously as concerns conflict of interest, the Act, under 932(a) (to be codified at 15 U.S.C. § 78o-7(c)(3)), imposes **new supervision standards** on credit rating agencies**,** similar to prudential ones since they apply to their **functioning and organization**. The Act’s main goal is to remove conflicts of interests, impose **corporate governance guidelines,** while

improving **rating methods through enhanced controls and transparency**. Agencies will therefore need to undergo **internal controls** to monitor adherence to credit rating policies and procedures, and to disclose **annual compliance reports** to the SEC. They will also need to insure that their organization is made up of an **independent board of directors**, and finally **to apply qualification standards to credit analysts.** More importantly, to insure these provisions' effectiveness and the absence of conflict of interest, the **SEC will be granted supervision powers** over these agencies' course of business, and powers to adopt rules restricting the ability of rating agencies to provide services other than credit ratings, and p**rocedural prerogatives in order to encourage investors to bring lawsuits against them**. Moreover, although the Act does not seem to be putting too much pressure on agencies when it states that they will need to "try" to prevent sales and marketing considerations from having any influence of the rating issued, the SEC is nonetheless granted with the **broad power to suspend or revoke an agency's registration**, should the latter have failed to satisfy the above mentioned requirements. Finally, the Act provides for classic *ex ante* regulation, based on incitation to comply to the rule: indeed, by increasing the **level for potential fines and penalties**, the Act's drafters can expect to increase the transparency and integrity of the rating process. But the Act's prudential regulation does not end there.

B) Classic prudential measures of capital and risk retention requirements

The Act includes provisions regulating **banking organizations' capital standards** (as well as securities firms and other nonbank financial companies designated by the Council and supervised by the Board of Governors). Once again, the purpose of the rule is to increase the **amount of capital held by banks** or any other firms which pose **significant systemic issues**. However, while it is true that the Act does not provide

for substantive capital measures, it leaves them for adoption and **implementation by the regulators**, who are in fact in a better position to assess correct capital requirements. Finally, the Act includes an amendment named the **Collins Amendment** which elaborates on **the status of trust preferred securities** in the capital requirements for bank holding companies and nonbank financial companies supervised by the Board of Governors. Based on the Collins Amendment, bank holding companies will need to be holding the **same amount and same type of leverage and risk-based capital** as that required of an insured depository institution. Therefore, the direct consequence of the Amendment will be the exclusion of trust-preferred securities from the regulatory capital of bank holding companies. However, because many banking organizations (of all sizes) rely on this type of capital at the holding company level, the Collins Amendment will not be fully applicable before a certain time[52]. The Collins Amendment also creates a **capital floor based on Basel I capital standards** and instructs the Government Accountability Office (GAO) to conduct a study on **hybrid capital instruments** and the potential consequences of prohibiting the use of such instruments. For example, within 5 years, **hybrid capital instruments** will no longer be accepted as being **Tier-1 capital.** In this view, the United States seem to be complying with the current trend to review and amend prudential rules, more specifically those concerning capital requirements, which are also under negotiation within the Basel Comity (which just negotiated Basel III capital standards, which also aims at "**clearing" Tier-1 capital** as much as possible).

Moreover, the Act's prudential provisions also expand to those regarding **securitization** (besides those above mentioned). To prevent that too much risk be contained in one security before sending it off on to the market, the Act provides under § 941(b) (to be codified at Exchange Act § 15G(c)(1)(B)) that a **securitizer must keep at least 5% of the credit risk** in assets it

sells into a securitization (except for "qualified residential mortgages" – the term needing to be defined by the SEC- ABS backed by tranches of other ABS not being eligible for such exemption). However, and in order to be more efficient than the provisions bill drafters may have suggested, it is left up to the **SEC** and the federal banking agencies to create regulations detailing the **forms and duration of risk retention**.

As for **collateralized debt obligations**, securities collateralized by collateralized debt obligations and similar instruments collateralized by other **ABS**, the SEC and the federal banking agencies will also need to establish **risk retention standards**. **Regulators** will also be in charge of **establishing regulations on underwriting standards on as many asset classes are identified** (e.g. **residential mortgages, commercial mortgages and loans and even auto loans**).

"Under the Act, the federal banking agencies and the **SEC must allocate risk retention obligations between a securitizer and an originator by reducing the percentage of the retained risk required to be held by the securitizer by the percentage required to be held by the originator.** The following **factors** will also bear on the risk retention allocation: whether the **assets transferred into a securitization reflect a lower credit risk**; whether the form or **volume of the securitization transaction creates incentives for imprudent origination**; and the **possible impact of risk allocation on consumer credit** (which is not to include credit risk transfer to a third party)[53]". Behind the idea of risk retention lies the economic theory of incitation, which implies that although one cannot be forced to act against one's intentions, these intentions may be changed by other means. Therefore, while forbidding securitization would be constitutionally impossible (securitization being merely an addition of contracts), forcing securitizers to retain a certain amount of the risk held in these financial instruments would not only permit to keep track of some of them but also lead **securitizers to create less risky securities** (**in particular asset-backed securities**). Indeed, when it comes to global markets,

market participants have many opportunities to bypass legal standards, and information asymmetry weakens the regulator's control. "That is why regulators, judges and legal provisions must create **conditions to incite agents to adopt behavior in conformity with the goal** pursued by regulators because it is in their own interest"[54].

V) Conclusion

In many ways the Dodd-Frank lives up to the expectations of experts on regulation. Indeed, the turn taken here by the US legislator seems to be following many of regulation's precepts. First of all, and because regulatory law is a teleological branch of law[55], regulation of globalised markets such as financial markets, with regards to which the goals at stake are consumer protection and systemic risk prevention, demands that a wide and powerful system be deployed (this system used to be incarnated by the State but nowadays is closer to the regulatory model). In this view, regulation is about effectiveness, the quest for the effective fulfillment of the goal, such as risk management, itself sought out by the law. And when the law is instrumentalized, when it is created as a consequence of the sought out goal as well as being the tool to reach it, and since "**the end justifies the means**", it builds the legitimacy to **delegate important legal powers to its guardians**[56]. Indeed, "in a modern, or non-classical, conception, the Law grants the Regulator with a mission: necessity knows no law, and as long as the Regulator's action is proportional and necessary to fulfill its teleological mission, it is legally justified"[57]. This is the reason why regulators were given by the Dodd-Frank Act numerous new and broader powers, such as *ex post* sanctioning powers but also *ex ante* normative powers. Indeed, in most of the provisions described, the Act merely describes the goal to be reached by the new financial regulation, but **wisely leaves it to the regulator to take measures and define technical standards to complete the regulatory system**. Indeed, regulators are more apt at: first

studying the sector (regulators already have the leverage and the legal tools to get the information they need), second, at thereafter **promulgating the appropriate technical rules** which are bound to shape the new regulatory framework to which market participants will be subjected. Moreover, where the Act in many circumstances provides for **exemption to certain stipulations**, regulators are, most of the time, permitted by the Act to either **set higher standards** to reach the exemption or impose particular prudential or regulatory requirements on market participants which do not fall under the Act's provisions. Such provisions are welcomed in cases when the reader of the Act may have felt that certain provisions are not tight enough, such as the many criticisms brought against the classes of derivatives actually submitted to new clearinghouses requirements (only 10% of the market derivatives being concerned)[58]. In such cases, broad provisions which leave to regulators certain discretionary powers regarding for example a market participant's particular behavior, leaves the door open to the **regulation of certain exempted instruments**.

On the downside, even though regulatory rules and standards will be more adapted to the economic field to which they apply, the **workload put on regulators** will endure two negative consequences: first, no less that 533 rules, 60 studies, and 94 reports are expected from them within the next two years (in particular regarding liquidation processes)[59], which **hinder their day-to-day role of market surveillance**; second, the date market participants will effectively need to comply with these new rules is pushed back to the day these reports and rules are ready, which is significantly longer than just having to wait for the day the Act will be applicable and enforced (or the end of the mere transition period foreseen by the Act's provisions – approximately 2012). However, such inconveniences might be a small price to pay as the Act finally recognizes that regulators are more than ever regulation's right hand man. And certain measures, which were meant to be quickly implemented, such as the separation of certain activities (i.e.

hedge funds), have already been taken into account by powerful financial institutions such as **JP Morgan or Goldman Sachs** in order to **comply with the Volcker rule**[60]. Moreover, a recent example shows how regulators have already started taking things under control. On **November 9th 2010,** the SEC provided for new rules in orderto prevent **flash stock market crashes**. More specifically, the SEC now limits "**stub quotes",** which consists in placing quotes (orders) at ridiculously low prices or high prices on electronic trading facilities. Their effect can be catastrophic when "high-frequency traders destabilized the New York Stock Exchange's trading by submitting and then canceling thousands of **rapid-fire orders**", and which therefore creat the worry that "**some firms submit "fraudulent" quotes** to get a sense of where asset prices are heading[61]". Such "stub quotes" were responsible for the brief but massive flash crash on May 6, 2010 (the May 6 plunge), when the Dow Jones lost more than 9% in just a few minutes. "Because of that crash, many futures had lost unreasonable value, mainly due to the amount of stub quotes passed that day. Whereas they used to be allowed because the former legislation required that price for sell or buy be always accessible, Mary Schapiro, Chair of the SEC, notes that "by prohibiting stub quotes, we are reducing the risk that trades will be executed at irrational prices, and then need to be broken, if the markets become volatile*"[62], and alsoavoid* investor confidence being eroded by concerns that **high-frequency traders** have better access to markets and information. *Market actors will no longer be* ***allowed to place quotes beyond a certain*** **threshold**, assessed based on **their reference price**. Therefore, for certain financial assets which are put in a **"short cut" system**, the order cannot depart more than 8% from two prices of reference (30% for unregulated assets). The **interest of short circuit**, which "would set temporary price ceilings and floors for single stocks and could slow big price changes without stopping trading"*[63]* is to avoid intense variations while not having to suspend quotation

completly.

Moreover, the Act's reasoning also proves that **the vision of the "market"** itself has shifted. Indeed, financial markets, banking sector and insurance are no longer considered separately. Their **inter-connexion** and their **systemic relationship** is clearly avowed throughout the Act, proof being for example the creation, within an Act named "the Wall Street reform", of a regulator devoted to the insurance sector; or the prohibition for *banking* institutions to engage in any "prop trading" on certain *derivatives markets*, including trade of derivatives resembling *insurance* instruments (such as credit default swaps).

Overall, the main defect is the Act's reach, both over time and over the objects to which it applies. Indeed, most **critics** focus on the fact that provisions on derivatives such as OTC derivatives and securitization do now encompass every financial instrument belonging to these classes, or that they establish too many exemption provisions. Moreover, the time length before actual enforcement of the Act's provisions is too long so as to be already able to assess its impact on the market and its participants (it might take the Volcker rule up to 4 to 12 years to be fully implemented).

These two flaws echo the more general flaw of our traditional legal system, which has not yet sufficiently integrated economic law. First of all, economic law knows too well that market participants will always find a way to take advantage of any act's exemption[64]. For example, many fear that **Wall Street's ingenuity**[65] has already found a way to bypass the Volcker rule (through the merger of their "prop trading" activities and their retail banking activities)[66]. Moreover, timing in the economic world is everything. Nonetheless, our legal systems have not yet found a way to cope with the fact that **the time of the economy is quicker than the time of the law.** In this view, it is regrettable that the Act does not insist more on remedies or mechanisms to make sure that gap is filled. For example, the founders of economic law often

suggest that when the rule making authority does not react fast enough faced with a new type of market conduct, it is for **the judge to intervene** before too much damage is done. Such a role could also be put in the hands of regulators, granted that they respect the same procedural guarantees as a national judge, which the Act merely suggests when it implies that regulators will have more *ex post* powers, although it did not dedicate a separate section on how to reconcile the timing of the law with the one of the financial world.

What the Act however does bring to regulation, is an interesting and clear **summary of the crisis' main causes and even of certain capitalistic excesses** (from "originate and distribute" banking model to non regulated securitization and disinformation of consumers; from the bank's excessive risk taking in regards to their capital, to their prop trading activities, which invested in toxic assets without regards for their amount of capital, these toxic assets being rated as AAA by credit rating agencies, themselves in conflict of interests etc.) and the will to put an end to it. Indeed, as M. Volcker underscored: "**At least the Act puts a definite end to self regulation"**[67]. The reason why such optimism is reasonable is because, while the Act indeed is not perfect (mainly for technical reasons), it is **the political message** behind it that will probably make this Act historic: because of its **incredibly large scope** over so many **financial, banking and insurance activities**, the message is clear that the Government has the will and the means, through a powerful yet legitimate regulatory entity, to show that certain markets do indeed vehicle a certain amount of risk that they cannot, by themselves (through self regulation), control nor eradicate. Markets such as financial ones are globalized (because they dematerialized and mainly built on private contracts) and require permanent regulation, which is nothing less than a political decision.

The Act therefore incarnates what France's founder of the study of regulation, Marie-Anne Frison-Roche evokes as the figure of regulation: a triangle between economics, politics and

the law[68]. Therefore, and to take the opposite view of Richard Shelby, opponent of the Act: "this project does nothing less than to expand federal bureaucracy and the control of the administration over the activities of the private sector"[69]. But this is exactly what regulation is about: accepting that politics is as much needed as the law or the economy to reach balanced markets, especially when a certain facet of the economy has proven to be "incapable of handling its own functioning"[70], while preventing any market failures. One needs however to be able to tell the difference between a political decision and political involvement. Indeed, it would be objectionable to have the State also be the regulator, especially because the prior is blinded by its own political agenda. But the political decision to regulate is essential to put into place the legitimate and neutral management of specific sectors. It is up to politics to decide on the goal that the regulator, navigating between legal tools and economic phenomenon, will pursue. For financial regulation, which is by nature weighted down by systemic risk, fixing and preventing market failures is the goal imposed through the political decision to regulate. And because teleological regulatory law finds its legitimacy in the objective it is assigned to reach, such as risk-free markets, such goal is therefore the license itself granted to **regulation to impose its fury.**

One can only hope that the United States will contribute to the greater cause of regulating financial markets globally. At the moment, faced with globalization, the only way to regulate globalized markets is for States to agree, through mechanisms such as the G20, on common rules and principles applicable globally. The principles set forth by Dodd-Frank will hopefully reach the next **G20** session in November 2010 (in Korea), in order for States to start sharing common guidelines when it comes to financial regulation, as common guidelines seem to be, for the time being, the only way to reach some sort of global consensus on the way to govern global markets. The European Union, which is currently one step behind the US in

its legislative process, is nonetheless basically on the same track in regards to its intended financial reform and thrives to implement rules as similar as possible as those implemented by other nations. "Co-ordination with the EU's major international partners, some of which are also introducing fundamental reforms, will be key. **International regulatory convergence**, including in accounting rules, will help improve **confidence in markets**, and **divergences can hinder recovery**[71]. The G20 has a key role to play in this respect [72]". Such supra-national decision making would also not only contribute to legal efficiency, but also would permit **bypassing the risk of State regulatory competition** (the laxest regulation would therefore attract all investments). A top down approach, such as the one initiated with the G20, remains for the moment **the only solution States have managed to come up with to regulate markets bigger than them**.

---

[1] PhD Candidate, Sorbonne Law School; Trainee Lawyer, Paris Bar.

[2] President Obama's speech in New York, "Obama: Wall Street, Washington share blame", April 23, 2010, CNN.

[3] Marie-Anne Frison-Roche, « Définition du droit de la régulation économique », D. 2004, chron., p.126-129.

[4] Raiffe, Alex, **"Provision of the financial reform bill (Dodd Bill) currently being examined by the United States Congress would empower the Commodities Futures Trading Commission (CFTC) to impose speculative limits on energy futures positions", *The Journal of Regulation*, II-5.3, 2010.**

[5]Marie-Anne Frison-Roche, « Ambition et efficacité de la régulation économique », in *L'appréhension du risque financier par le droit*, sous presse.

[6]**Rapport d'office parlementaire,** « Les autorités

administratives indépendantes : évaluation d'un objet juridique non identifié (Tome 1 : Rapport) », Rapport N° 404 tome 1 (2005-2006) de M. Patrice Gélard, fait au nom de l'Office parlementaire d'évaluation de la législation. http://www.senat.fr/rap/r05-404-1/r05-404-16.html. *« Ce lien téléologique conduit le législateur à dessiner non seulement les pouvoirs mais encore les contours mêmes des Autorités administratives indépendantes à l'aune des missions. Cette considération d'efficacité est première pour organiser les compétences au sein des Autorités, pour mesurer les moyens humains et financiers requis pour la bonne exécution des missions. C'est pourquoi les compétences techniques présentes dans les Autorités administratives indépendantes, au sein de leur collègue ou de leur service, doivent être favorisées. Elle doit demeurer la considération première pour envisager des fusions des Autorités ou améliorer l'interrégulation, et les relations entre les Autorités administratives indépendantes et les autres institutions, telles que l'administration traditionnelle ou les juridictions ».* [This teleological link leads the lawmaker to set forth both the powers and the very contours of Independent Administrative Authorities in function of their missions. Taking efficacy into account is fundamental in order to organize responsibilities within the agencies, and to take into account the human and financial resources needed to accomplish its missions. This is why technical expertise must be encouraged within Independent Administrative Authorities, both amongst their commissioners and in their administrative staff. It must remain the primary consideration in order to consider merging Authorities or improving interregulation, and the relationships between Independent Administrative Authorities and other institutions, such as traditional administrations and the judiciary.]

[7] Marie-Anne Frison-Roche, « L'évolution conceptuelle et technique du cadre juridique européen et français relatif à la propriété intellectuelle sur les médicaments et le vivant », in

M.-A. Frison-Roche et A. Abello, *Droit et Economie de la propriété intellectuelle*, LGDJ, 2005, pp.289-321.

[8] Marie-Anne Frison-Roche, « Presentation », The Journal Of Regulation, www.thejournalofregulation.com

[9] See for ex. Benoît Frydman, *Le sens des lois,* Bruylant - LGDJ, 2005, 695p.

[10] "The Commission will complete its full financial reform programme in the coming months, articulated around four main principles: enhanced transparency, effective supervision and enforcement (…), enhanced resilience and financial stability [i.e. prudential measures], and finally (…) consumer protection". Communication from the Commission to the European Parliament, the Council, the European Economic and social committee and the European Central Bank, "Regulation financial services for sustainable growth", COM(2010) 301 final, June 2nd 2010.

[11] Id.

[12] Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates "The Dodd-Frank Act : Commentary and insights", July 2010, p. 9

[13] Guy Canivet, « Propos généraux sur les régulateurs et les juges », in *Droit et économie de la régulation,* vol. 1*, Les régulations économiques : légitimé et efficacité*, Presses de Sciences-Po / Dalloz, 2004, pp. 184-193

[14] "In addition, supervised nonbank financial companies will be required to obtain approval to acquire 5% or more of the voting stock of a banking organization.", Skadden Arps, op. cit. p.9

[15] Agence France Presse, « Hausse des dividendes des grandes banques aux USA: la Fed prône la prudence », Paris 12 nov. 2010

[16] Act §203 States that : "Any written recommendation pursuant to paragraph (1) shall contain—

(A) an evaluation of whether the financial company is in default or in danger of default;

(B) a description of the effect that the default of the financial company would have on financial stability in the United States;

(C) a description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities;
(D) a recommendation regarding the nature and the extent of actions to be taken under this title regarding the financial company;
(E) an evaluation of the likelihood of a private sector alternative to prevent the default of the financial company;
(F) an evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company;
(G) an evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants; and
(H) an evaluation of whether the company satisfies the definition of a financial company under section 201".

[17]Federal Deposit Insurance Corporation, "**FDIC Board Proposes Implementation of Dodd-Frank Assessment Changes and a Revised Assessment** for large institution", Press Release, Nov. 9, 2010, available at: http://www.fdic.gov/news/news/press/2010/pr10248.html.
[18] Marie-Anne Frison-Roche, « Considérations générales sur la confiance dans l'industrie des services financiers », in *La confiance au cœur de l'industrie des services financiers*, Collection CÉDÉ (Centre d'études en droit économique),Raymonde Crête, Mario Naccarato, Marc Lacoursière, Geneviève Brisson, Éditions Yvon Blais, 2010.
[19] The Panopticon ("all-seeing") was designed as a round-the-clock surveillance machine. Because of its design, no prisoner could ever see the watcher who was in charge of surveillance from its central location within the radial designed space. Therefore, the prisoner can never know when he is being surveilled - the uncertainty in itself is consequently a fundamental instrument of discipline. Michel Foucault, French philosopher, also described the implications of 'Panopticism' in

Discipline & Punish: The Birth of the Prison (1975) : "Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary; that this architectural apparatus should be a machine for creating and sustaining a power relation independent of the person who exercises it; in short, that the inmates should be caught up in a power situation of which they are themselves the bearers. To achieve this, it is at once too much and too little that the prisoner should be constantly observed by an inspector: too little, for what matters is that he knows himself to be observed; too much, because he has no need in fact of being so. In view of this, Bentham laid down the principle that power should be visible and unverifiable. Visible: the inmate will constantly have before his eyes the tall outline of the central tower from which he is spied upon. Unverifiable: the inmate must never know whether he is being looked at at any one moment; but he must be sure that he may always be so. In order to make the presence or absence of the inspector unverifiable, so that the prisoners, in their cells, cannot even see a shadow, Bentham envisaged not only venetian blinds on the windows of the central observation hall, but, on the inside, partitions that intersected the hall at right angles and, in order to pass from one quarter to the other, not doors but zig-zag openings; for the slightest noise, a gleam of light, a brightness in a half-opened door would betray the presence of the guardian. The Panopticon is a machine for dissociating the see/being seen dyad: in the peripheric ring, one is totally seen, without ever seeing; in the central tower, one sees everything without ever being seen." Michel Foucault *'Panopticism'* Discipline & Punish: The Birth of the Prison*,* NY Vintage Books 1995, pp. 195-228, translated from the French by Alan Sheridan (translation 1977).

[20] Benoît Frydman, *Le sens des lois,* Bruylant - LGDJ, 2005, 695p.
[21] On the role played by trust in the functioning of economics see the work of K. J. Arrow, Nobel Prize in 1972, and in particular, *Essays in the Theory of Risk- Bearing*, Chicago, Markham Publishing Co, 1971

[22] Marie-Anne Frison-Roche, « L'utilisation de l'outil sociologique dans l'élaboration de la jurisprudence », in *Revue de Recherche Juridiques,* 1993, p. 1271.
[23] Marie-Anne Frison-Roche, « élément d'une sociologie de la déontologie financière : la déontologie financière constitue-t-elle un progrès de la justice ? », in *Les cahiers de Droit,* vol. 42, n°3, septembre 2001, pp. 807-826
[24] Marie-Anne Frison-Roche, « Définition du droit de la régulation économique », D. 2004, chron., p.126-129
[25] Marie-Anne Frison-Roche, *Les 100 Mots de la régulation,* Paris, PUF, coll. Que sais-je?, 2010, sous presse.
(see *"Régulateur*").
[26] European Commission's Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority, Sept. 23, 2009.http://ec.europa.eu/internal_market...
[27] Claire Gatinois and Philippe Ricard« Régulation financière : l'UE peine à tenir ses ambitions », Le Monde, 7 juillet 2010.
[28] G20, "Leaders' Statement: The Pittsburgh Summit", September 24-25 2009, §41, available at : http://www.pittsburghsummit.gov/mediacenter/129639.htm
[29] Marie Cullin,"**The Ordinance of 21 January 2010 merges the regulatory authorities for the banking and insurance sectors", in The Journal of Regulation, II-6.7, 2010.**
[30] J.W. Kolari, D. Fraser, A. Anari, « The effects of securitization on mortgage market yields: a cointegration analysis", Real Estate economics, 1998, vol. 26, p.677-693.
[31][31] See Margot Sève, "Recast Directive on Undertakings for collective investment in transferable securities (UCITS): a new

step towards a liberal yet regulated single market in financial services", The Journal of Regulation, 2010: "Key investor information provides information on the UCITS's identification, a short description of its investment objectives and investment policy, a presentation of its past-performance presentation (and if possible performance scenarios), costs and associated charges and risk/reward profile of the investment, "including appropriate guidance and warnings in relation to the risks associated with investments in the relevant UCITS" (art.78). The Directive finally provides that a level 2 regulation (implementation measures) will have to be taken on the format and content of Key Information Document disclosures for UCITS, and the methodology for the calculation of the synthetic risk and reward indicator".

[32] "At the same time, the banking system underwent an important transformation. The traditional banking model, in which the issuing banks hold loans until they are repaid, was replaced by the "originate and distribute" banking model, in which loans are pooled, tranched, and then resold via securitization. The creation of new
securities facilitated the large capital inflows from abroad". Markus K. Brunnermeier, "Deciphering the Liquidity and Credit Crunch 2007-2008", *Journal of Economic Perspectives—Volume 23*, Number 1—Winter 2009—Pages 77-100.

[33] See the French *Autorité des Marchés Financiers*' *Règlement Général*, article 313-7-1.

[34] Marie-Anne Frison-Roche, *Les 100 Mots de la régulation,* PUF, coll. « Que sais-je?", 2010, sous presse (see in particular « Finance », and the distinction between regulatory and prudential measures).

[35] The Harvard Law School Forum on Corporate Governance and Financial Regulation, "Dodd-Frank Act becomes law", available at http://blogs.law.harvard.edu.corpgov/2010/07/21/dodd-frank-act-becomes-law/ ; see also Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates "The Dodd-Frank Act :

Commentary and insights", July 2010, p. 96

[36] J.-S. Mésonnier, « Le paradoxe de la crédibilité en question », Bulletin de la Banque de France, n°122, feb. 2004

[37] Op. cit., p. 97

[38] European Commission, Press release, July 12th 2010, IP/10/918

[39] Id.

[40] Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates "The Dodd-Frank Act : Commentary and insights", July 2010, p.126

[41]Lorraine Boris, **"The "Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin" (the German Federal Financial Supervisory Authority), by three decrees published on May 18th 2010, prohibits uncovered short sales and CDS from May 19th 2010 to March 31th 2011",** ***The Journal of Regulation***, 2010, II-6.15

[42] Marie-Anne Frison-Roche**, "A provision of the financial reform bill (Dodd Bill) currently being examined by the United States Congress would empower the Commodities Futures Trading Commission (CFTC) to impose speculative limits on energy futures positions",** ***The Journal of Regulation*****, II-6.16, 2010.**

[43] See **European Union Regulation of 16 September 2009 (*Règlement (CE)* No 1060/2009).** The regulation provides specific rules on the rating agencies' methodologies and ratings models, as they are expected (i) to be disclosed to the public and (ii) to be "rigorous, systematic, continuous and subject to validation including by appropriate historical experience and back-testing" (§23).

[44] D. Greenlaw, J. Hatzius, A.K Kashyap, H.S. Shin, "Leveraged Losses: Lessons from the mortgage market meltdown", US Monetary Policy Forum Conference, Working paper, 2008.

[45] Pierre Minor, "La titrisation: mécanisme décrié mais toujours utilisé », in La semaine juridique Entreprise et Affaires, n°23, 4 juin 2009, 1572

[46]Ch. J. Mayer, K. Pence, "Subprime Mortgages: What, where,

and to whom?", NBER Working paper, n°14083, 2008.

[47] Markus K. Brunnermeier, "Deciphering the Liquidity and Credit Crunch 2007-2008", *Journal of Economic Perspectives—Volume 23*, Number 1—Winter 2009—Pages 77-100

[48] The SEC proposals apply to "sponsors" of securitizations (same entities as securitizers while not including "issuers of ABS"). "Sponsors must retain an interest in the issued ABS rather than in the underlying assets. They must retain a 5% "vertical slice" of each ABS transaction, consisting of 5% of each tranche of securities issued", Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates "The Dodd-Frank Act : Commentary and insights", July 2010, p. 69

[49] Id. 70

[50] i.e., under §619, "serving as a general partner, managing partner, or trustee of a fund; selecting or controlling (or having employees, officers, directors, or agents constituting) a majority of the directors, trustees, or management of a fund; or sharing the same name of the banking organization or any affiliate or a similar name with the fund"

[51] Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates "The Dodd-Frank Act : Commentary and insights", July 2010, p. 19

[52] Transitions provisions being included in the Act, for example 'for institutions with consolidated assets of $15 billion or more on December 31, 2009, the Collins Amendment will phase in over three years beginning on January 1, 2013. And for Holding companies that were not subject to supervision by the Board of Governors on May 19, 2010, would become subject to the Collins Amendment five years after enactment of the Act", §171.

[53] Act § 941(b) (to be codified at Exchange Act § 15G(d)(2))., Skadden, Arps, Slate, Meagher & Flom LLP, op. cit., p.68

[54] Marie-Anne Frison-Roche, *Les 100 mots de la régulation* , op. cit., see. *« Incitation ».*

[55] P. Pescatore, « Le recours aux objectifs de la loi dans son application au droit communautaire et international », *Le recours aux objectifs de la loi dans son application*, 133. ,

Story Scientia, Bruxelles, 123 ss. ; *contra* : J-L. Bergel, *théorie générale du droit,* Paris, Dalloz, 2ème ed., 1989, 247.
[56] Id. See *« Régulation »*
[57]**Raiffe, Alex, "The CME Group challenges the Commodity Futures Trading Commission's January 26, 2010 proposition to regulate speculation on energy futures, option contracts, and derivatives", *The Journal of Regulation*, II-5.1, 2010.**
[58] « Les grandes mesures de la loi de réforme de la finance », Le point, 15 juillet 2010.
[59] « La réforme financière américaine voit enfin le jour », Les Echos, 17 juillet 2010.
[60] Anne Michel, "Aux Etats-Unis, les banques ferment leurs activités pour compte propre", Le Monde, 6 septembre 2010. As for Citigroup, it had foreseen the Volcker rule and already complied to it in 2008 by stopping its trading on energy derivatives. Morgan Stanley will certainly sell its hedge fund FrontPoint, bought out in 2006.
[61]**Gregory Mott, William Ahearn, SEC Finds No Evidence Cancellations Caused May 6 Crash", Bloomberg, Bloomberg November 4, 2010 04:00 AM Copyright Bloomberg. All rights reserved. This material may not be published, broadcast, rewritten or redistriNovember 4, 2010**
[62] Securities and Exchange Commission, " SEC Approves New Rules Prohibiting Market Maker Stub Quotes", Press Release, 2010-216, Nov. 8th 2010, Available at: http://www.sec.gov/news/press/2010/2010-216.htm
[63] **Christopher Doering and Rachelle Younglai, « U.S. securities regulators are close to approving a plan to ensure markets remain liquid even in times of crisis, the chairman of the Securities and Exchange Commission said on Friday », Reuters, 5 nov. 2010, available at http://www.reuters.com/**
[64] W. Silber, "The process of Financial Innovation", American Economic Review, vol. 72, 1983, n°2, pp.89-95
[65] U. Jermann, V. Quadrini, "Financial innovations and macroeconomic volatility", NBER Working Paper, n°12308, 2006.

[66] R.G. Rajan, 'Has Financial Development made the world riskier?", NBER Working paper, n°11728, 2005.
[67] Id.
[68] Georges A. Lebel, « La mondialisation : une hypothèse économique galvaudée aux effets dramatiques », in *Mondialisation des échanges et fonctions de l'Etat,* Bruxelles, Bruylant, dir. François Crépeau, pp.17-35
[69] « La réforme historique de Wall Street adoptée par le Congrès », Le nouvel Obs, 22 Juillet 2010.
[70] Pierre de Gasquet, « Paul Volcker décerne un « B » au texte final », Les Echos, 17 juillet 2010
[71] F.S. Mishkin, "Globalization, Macroeconomic performance, and monetary policy", NBER Working paper, n°13948, 2008
[72] European Commission, "Regulating Financial services for sustainable growth", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Central Bank, June 2nd 2010, COM(2010) 301 final, p. 8