10-2007

From Federal Rules to Intersystemic Governance in Securities Regulation

Robert B. Ahdieh
Texas A&M University School of Law, ahdieh@law.tamu.edu

Recommended Citation
Robert B. Ahdieh, *From Federal Rules to Intersystemic Governance in Securities Regulation*, 57 Emory L.J. 233 (2007).
Available at: https://scholarship.law.tamu.edu/facscholar/1212

FROM FEDERAL RULES TO INTERSYSTEMIC GOVERNANCE IN SECURITIES REGULATION

Robert B. Ahdieh[*]

In my introduction to this symposium, I outlined core characteristics of a regulatory pattern I term "intersystemic governance"—characteristics derived from the important work collected in this volume. Successively, I note the sense of *complexity* in those contributions and the emphasis on jurisdictional *overlap* as a critical source of that complexity; the authors' perhaps resulting attention to dynamics of *coordination* in law and regulation; their suggestion of a certain *interdependence* of regulatory actors; and their orientation to dynamics of *persuasion*, rather than more hierarchical mechanisms of regulatory control.[1] Drawn together, these elements suggest the emergence of a distinct regulatory paradigm, both derivative and determinative of growing patterns of jurisdictional overlap and regulatory dependence across traditional jurisdictional lines.

Both to explore this possibility further and to further concretize the elements enumerated above, I want to briefly play this analysis out in the realm of domestic and transnational securities regulation. In the latter sphere, I would argue, patterns of intersystemic governance are increasingly apparent and deserving of our attention. Three cases are representative: the operation of Rule 14a-8, promulgated under the Securities Exchange Act of 1934; the interventions of then-Attorney General Eliot Spitzer in the national securities markets; and the Securities and Exchange Commission's recent moves to better align U.S. and international accounting standards.

---

[*] Visiting Professor & Microsoft/LAPA Fellow, Program in Law and Public Affairs, Princeton University; Professor of Law & Director, Center on Federalism and Intersystemic Governance, Emory University School of Law. Many thanks to Bill Buzbee, Judith Resnik, Robert Schapiro, and Mark Tushnet for their helpful counsel, and to the student editors of the *Emory Law Journal* for their hard work in organizing this symposium and their patience and assistance in the editorial process.

[1] *See* Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007).

THE INTERSYSTEMIC GOVERNANCE OF RULE 14A-8

Promulgated by the Securities and Exchange Commission to encourage heightened shareholder participation in corporate governance, Rule 14a-8 creates one of the most significant opportunities for cross-jurisdictional engagement in U.S. securities law. First enacted in 1947, the rule requires public corporations to include any properly submitted shareholder proposal in their proxy materials, unless it falls within one of several enumerated categories of excludable proposals.[2] Three such exclusions are relevant for our purposes: (1) where a proposal is "not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization";[3] (2) if a proposal would, upon implementation, "cause the company to violate any state, federal, or foreign law to which it is subject"[4]; or (3) if the proposal "deals with a matter relating to the company's ordinary business operations."[5]

As to each of these exceptions, it falls to the SEC—at least as a preliminary matter—to assess the decision of a corporation to exclude a proposal.[6] Application of these exceptions, however, turns on the law of the state of incorporation.[7] Under Rule 14a-8(i)(1), for example, one must define the scope of shareholder and managerial authority in the relevant jurisdiction. Similarly, under Rule 14a-8(i)(2), one must determine the corporation's legal obligations under state (as well as federal and foreign) law. Even Rule 14a-8(i)(7) demands such an inquiry, if somewhat less obviously, given the demarcation of "ordinary business operations" according to applicable state law.[8]

As I have suggested elsewhere, these are rarely easy questions.[9] Even assuming an expertise in relevant state law, ambiguity in the operative terms

[2] *See* 17 C.F.R. § 240.14a-8 (2007); *see also* Robert B. Ahdieh, *The Dialectical Regulation of Rule 14a-8: Intersystemic Governance in Corporate Law*, 2 J. BUS. & TECH. L. 165, 171 (2007).

[3] 17 C.F.R. § 240.14a-8(i)(1).

[4] *Id.* § 240.14a-8(i)(2).

[5] *Id.* § 240.14a-8(i)(7).

[6] *See* Ahdieh, *supra* note 2, at 171. Specifically, the Division of Corporation Finance does so in responding to no-action letter requests asserting one or more of the applicable provisions to justify exclusion of a shareholder proposal. *See id.*

[7] *See id.*

[8] *See id.* at 171 n.47.

[9] *See id.* at 172; *see also* Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205 (2005).

presents real difficulty.[10] The complexity of the exercise in the absence of such expertise—and recurrent exposure to the relevant state rules—seems a recipe for paralysis or, more realistically, arbitrary rule.

In light of this predicament, I have previously highlighted the foregoing terms of Rule 14a-8 as creating a fruitful occasion for intersystemic governance to play itself out.[11] Relevant incidents of cross-jurisdictional regulatory engagement can already be identified, as in federal courts' certification of shareholder proxy access questions to state courts.[12] Delaware's recent amendment of its constitution to allow the SEC to directly certify questions to the Delaware Supreme Court holds even greater promise.[13] By more broadly embracing a dynamic of intersystemic governance, we can expect further improvements in substantive outcomes.

The features of intersystemic governance identified above are readily evident in Rule 14a-8. This begins with the *overlapping* scope of federal securities law and state corporate law when it comes to the proxy.[14] The content of the corporate proxy, including many shareholder proposals, directly implicates governance of the modern public corporation.[15] As such, it is directed to state law. Access to the proxy and shareholder voting, on the other hand, have long been regulated by federal securities law; Rule 14a-8 is but one example. The pattern of overlap could not be more apparent: While the content of the proxy speaks to state law, shareholder access to, and voting on, it is largely regulated by federal law.

Given such overlap in the "substance" of law, it is unsurprising that the SEC and relevant state actors, legislative and judicial alike, likewise play overlapping roles in proxy regulation. Under Rule 14a-8, in fact, these roles are so intertwined that it becomes difficult to tell a coherent story about discrete federal versus state law and analysis. Admittedly, a certain preeminence emerges in actual practice; the SEC has, in operationalizing Rule

---

[10] *See* Ahdieh, *supra* note 2, at 172.

[11] *See generally id.*; *see also* McDonnell, *supra* note 9, at 254–58.

[12] *See, e.g.*, Int'l Board of Teamsters Gen. Fund v. Fleming Cos., 173 F.3d. 863 (10th Cir. 1999); *see* Ahdieh, *supra* note 2, at 175.

[13] S.B. 62, 144th Gen. Assem., Reg. Sess. (Del. 2007); *see also* Maureen Milford, *New State Law Expands Delaware's Role in Corporate Governance*, NEWS J. (Wilmington, Del.), May 19, 2007.

[14] I have already noted the *complexity* of the interpretative project under Rule 14a-8. *See supra* notes 9–10 and accompanying text; *see also* Ahdieh, *supra* note 1, at 7–11.

[15] *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 612–14 (2003).

14a-8, placed itself in the forefront.[16] On its face, however, the rule would seem to the contrary.

Rule 14a-8 might thus be understood as a *coordination*-forcing mechanism. The SEC's need to evaluate perhaps inherently ambiguous state law makes such coordination invaluable. If consistency of interpretation is to be maintained, it is necessary for state legislators and judges, on the one hand, and the SEC staff, on the other, to align their expectations of what is possible—and desirable—in the proxy solicitation process.[17]

This dynamic can fairly be described as one of *dependence*.[18] Within a scheme of intersystemic governance under Rule 14a-8, each regulatory actor is dependent on the other in important respects. Nominally, the SEC can assert any interpretation it prefers when evaluating relevant state law. State courts and legislatures, however, are likely to ignore arbitrary SEC analysis. Post hoc corrections are costly for the states, however, such that they too might prefer engagement. The structural incentives might therefore be expected to motivate both federal and state agencies to attend more closely to one another.[19]

The nature of this dependence warrants explicit attention. Rather than a hierarchical interaction, in which one party is dependent on the other, the relevant pattern under Rule 14a-8 cuts both ways; it is a kind of *interdependence*. Desired outcomes cannot be secured by force alone; they require a capacity for *persuasion* as well. Effective advocacy—the pattern of externally directed persuasion described above—is all-important.[20] If the SEC—or state judges, for that matter—can articulate effective arguments for any given interpretation, it is far more likely to prevail within the available range of analysis and decision.

Going a step further, we might see the concurrent role of federal and state actors under Rule 14a-8 as creating the kind of locus for effective persuasion that I described in the introduction.[21] Within this regime of structured—even

---

[16] *See* Ahdieh, *supra* note 2, at 172–74. This might be seen to exemplify the resistance to overlap I described in my introductory remarks to this volume. *See* Ahdieh, *supra* note 1, at 16–17.

[17] *See* Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 230–33 (2004).

[18] *See* Ahdieh, *supra* note 2, at 180–81.

[19] *See id.* at 181; *cf.* Robert B. Ahdieh, *Dialectical Regulation*, 38 Conn. L. Rev. 863, 900, 907–08 (2006) [hereinafter Ahdieh, *Dialectical Regulation*]; Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. Rev. 2029, 2088–91 (2004).

[20] *See* Ahdieh, *supra* note 1, at 27–29.

[21] *See id.* at 25–27.

unavoidable—engagement and conflict, there emerges the opportunity for significant evolution in relevant legal norms. The dynamic of regulatory engagement in an intersystemic approach to Rule 14a-8, with its central role for persuasion, might consequently be expected to look quite different.

WHEN SPITZER MET THE SEC, ON WALL STREET

A similar story of intersystemic governance can be found in Eliot Spitzer's forceful charge against Wall Street during his tenure as Attorney General of the State of New York. Together with other state officials[22]—if perhaps more forcefully and flamboyantly than them—Spitzer broke with the longstanding allocation of federal and state regulatory authority over the capital markets. Traditionally, major financial market actors were left to the SEC, while smaller-scale fraud was handled by state attorneys general, comptrollers, securities market regulators, and other state-level officials.[23]

Dispensing with this traditional allocation of jurisdiction, Spitzer directed his fire at the heart of Wall Street, a locale he saw as fully within his formal jurisdiction and enforcement authority—even if much of the relevant conduct had occurred well beyond the latter. In cases targeted at investment bank conflicts of interest, the selective provision of access to IPO shares, impermissible executive compensation, and mutual fund trading practices,[24] Spitzer pressed broad-bore challenges to longstanding, nationwide financial market practices. By way of legal authority, he invoked the open-ended terms of the Martin Act[25]—state anti-fraud legislation that had basically lain fallow until Spitzer's crusade. By the end, he had extracted wide-ranging concessions from the industry, including structural reforms going well beyond the scope of his actual suits and well beyond the scope of his New York state jurisdiction.[26]

Here, as under Rule 14a-8, the dynamic of substantive *overlap* suggested in the introduction to this volume is apparent. Especially under Spitzer's expansive reading of the Martin Act, relevant Wall Street activity came within

---

22 *See* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 874 n.39; Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107, 114–15 (2004).

23 *See* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 872; *see also* Michael D. Mann & William P. Barry, *Developments in the Internationalization of Securities Enforcement*, 1487 PLI/CORP 399, 406 (2005).

24 *See* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 872–74.

25 N.Y. Gen. Bus. Law § 352 (2006).

26 *See* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 873–74; *see also* Cary Coglianese et al., *The Role of Government in Corporate Governance*, 1 N.Y.U. J. L. & BUS. 219, 221 n.5 (2004).

the State of New York's civil and criminal jurisdiction, while remaining under the regulatory umbrella of the federal securities laws. Exposure to both federal and state law was hardly a new phenomenon for these, and other, firms. Consider their need to comply with both state employment law and federal tax obligations. The latter, however, involves the regulation of discrete legal arenas. With Spitzer's broad invocation of the Martin Act to pursue alleged fraud in the financial markets, the overlap was far more stark; now, federal and state law were targeting precisely the same conduct.

A relevant horizontal dimension of overlap also deserves mention. Part of the rationale for allocating jurisdiction over broad claims against Wall Street to the SEC was the nature of the subject firms. Most, if not all, of the targets of Spitzer's claims were national firms doing business across multiple jurisdictions. Here, overlap arises from the nature of the regulated entity. Recognizing as much, yet unwilling to await action by what he saw as an overly passive SEC, Spitzer instead reached out to other state regulators directly, seeking to coordinate their enforcement efforts with his own.[27] His final settlements thus reflected not only the vertical dimension of overlap, but a horizontal dimension as well, with their inclusion of both the SEC and other state authorities.[28] In Spitzer's enforcement initiatives, then, we can see the overlapping nature of both private and public actors highlighted in the introduction.

The regulatory pursuits of Spitzer and the SEC were likewise characterized by a certain *interdependence*. Nominally, each exercised their authority free-and-clear of the other. Neither had any duty to cooperate—or even coordinate—with the other. In practice, however, the efforts of each to pursue the regulatory ends dictated by their mandates and shaped by their own priorities depended heavily on the other. Neither could ignore the other without substantial cost.[29]

The dynamic of *coordination* that emerged during Spitzer's tenure is particularly interesting. I have already noted the horizontal coordination among state regulators that Spitzer encouraged.[30] What of Spitzer and the SEC? In the standard account, their interaction has been conceived as

---

27 *See* Ahdieh, *supra* note 1, at 15–16.

28 *See* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 874.

29 *See id.* at 907–08.

30 *See supra* note 27 and accompanying text.

distinctly non-coordinative. It looks on the surface like a story of conflict.[31] Yet the indisputable dimension of conflict does not render their engagement non-coordinative. Contrary to quite common misconceptions, even among legal scholars, strategic dynamics of coordination need not lack in conflict. In pure coordination games—commonly represented in narratives of where to meet or to drive—conflict is absent. But the most interesting coordination games, including those explored in Thomas Schelling's studies of the strategy of conflict, are those that incorporate a certain degree of conflict alongside a dominant incentive to coordinate.[32] In the "conflict" of the SEC and Spitzer, thus, we actually have a competition to secure coordination outcomes more or less favorable to one party or the other.

It should consequently come as little surprise that, for all the conflict that has been highlighted, Spitzer's settlements were almost invariably joined by the SEC.[33] Although Spitzer was largely successful in securing settlements he desired—itself a process of coordination[34]—these almost always required meaningful compromise with the SEC. Cutting across their varied conflicts, then, one finds a dominant goal of coordination.

A certain pattern of *persuasion*, finally, can also be seen in the engagement of Spitzer and the SEC. But a more meaningful effort at persuasion may be evident in Spitzer's engagement of regulators across state lines. In each of his cases, Spitzer sought to proceed in conjunction with other state regulators.[35] Yet even independent initiatives in other states to regulate the financial markets might be seen as outgrowths of these efforts at persuasion. Spitzer's success in New York can thus be understood to have triggered prosecutions in other states as well.

Most of all, one might see a kind of persuasion in the very breadth of Spitzer's cases. As suggested above, there can be little doubt about the gap between Spitzer's formal enforcement authority and the scope of the relevant conduct. Most of that conduct, most of its victims, and most of the beneficiaries of Spitzer's settlements were outside the state of New York. His

---

[31] *See* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 875; Stefania A. Di Trolio, *Public Choice Theory, Federalism, and the Supply Side to Blue-Sky Laws*, 30 WM. MITCHELL L. REV. 1279, 1279–80 (2004); Jones, *supra* note 22, at 118–19.

[32] *See* Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1038–39, 1051–53 (2006).

[33] *See* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 874.

[34] *See* Ahdieh, *supra* note 32, at 1038–39.

[35] *See* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 873–74.

local success served a persuasive function of sorts, however, allowing him to leverage his formal, internally directed enforcement power to establish a broader, externally directed authority.[36] At least in their breadth, then, Spitzer's successes might be seen as less a function of power, than of persuasion.

EARLY SIGNS OF INTERSYSTEMIC GOVERNANCE IN INTERNATIONAL ACCOUNTING

Finally, the characteristics of intersystemic governance that I outline in the introduction to this symposium can also be discerned in recent shifts in the regulation of financial accounting standards. The latter have long been a subject of transnational contention, with the United States insisting that disclosures mandated by U.S. securities law utilize U.S. Generally Accepted Accounting Principles (U.S. GAAP) rather than alternative international standards.[37] Scholarly debate over the issue has been substantial,[38] as has been the pressure on the SEC to ease access to U.S. capital markets, by accepting foreign disclosures compliant with international standards.[39] Until recently, however, there has been little suggestion of any potential change.

Whether motivated by a sense of the United States' faltering position in the global competition for capital,[40] a sudden realization of the efficacy of international standards, or otherwise, the SEC appears to be increasingly open to the use of international accounting standards—now termed International

---

[36] Here, we quite clearly see the flattening of power suggested in my introductory remarks. *See* Ahdieh, *supra* note 1, at 25.

[37] *See* Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61, 92 (1999); Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207, 243 (1999).

[38] *See, e.g.*, Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411 (2007); John C. Coffee, Jr., *Racing Toward the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1785 n.111 (2002); James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200 (1999).

[39] *See, e.g.*, Roberta S. Karmel & Mary S. Head, *Barriers to Foreign Issuer Entry into U.S. Markets*, 24 LAW & POL'Y INT'L BUS. 1207, 1208–10 (1993).

[40] *See* MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE U.S.'S GLOBAL FINANCIAL SERVICES LEADERSHIP (2007); COMM. ON CAPITAL MARKETS REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION (2006); COMM'N ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY, U.S. CHAMBER OF COMMERCE, REPORT AND RECOMMENDATIONS (2007).

Financial Reporting Standards (IFRS). The U.S. has long been willing to participate in discussions of international disclosure standards. Since 1973, the International Accounting Standards Committee, now succeeded by the International Accounting Standards Board (IASB), has been developing and refining proposed international accounting standards.[41] The United States has participated in that dialogue, both directly and indirectly, for much of that time.[42]

Yet it has resisted efforts to operationalize those standards—at least in ways that might impact the singular orientation of U.S. law to U.S. GAAP. Whatever their ultimate role, it seemed the U.S. had drawn a clear line against the use of international accounting standards to gain access to U.S. securities markets.[43] Given as much, U.S. participation seemed to be intended to shift the standards in our direction, rather than actually accepting them, or moving U.S. standards in their direction.

The SEC would now seem to be shifting course.[44] On August 7, 2007, it issued a concept release proposing to permit U.S. issuers to prepare their financial statements in accordance with the International Financial Reporting Standards issued by the IASB.[45] This might help to reduce disparities in disclosure practices, the release suggested, while still providing for adequate disclosure of financial information. It would also serve to sustain transnational

---

41 *See* Cox, *supra* note 38, at 1207–08.

42 *See* Concept Release on Allowing U.S. Issuers to Prepare Financial Statements in Accordance with International Financial Reporting Standards, SEC Release No. 33-8831, at 4, 23 (Aug. 7, 2007), *available at* http://sec.gov/rules/concept/2007/33-8831.pdf; Douglas W. Arner, *Globalisation of Financial Markets: An International Passport for Securities Offerings?*, 35 INT'L LAW. 1543, 1559–60 (2001); Roberta A. Karmel, *Will Convergence of Financial Disclosure Standards Change SEC Regulation of Foreign Issuers?*, 26 BROOK. J. INT'L L. 485, 523 (2000).

43 *See supra* note 37.

44 Predicates to the SEC's recent moves might be found in decisions of the U.S.-based Financial Accounting Standards Board (FASB). In October 2002, the FASB and IASB announced their entry into the Norwalk Agreement, by which they committed to make their "best efforts" to achieve convergence in U.S. and international accounting standards. *See* Financial Accounting Standards Board & Int'l Accounting Standards Board, Memorandum of Understanding ("The Norwalk Agreement"), Sept. 18, 2002, *available at* http://www.fasb.org/news/memorandum.pdf. They re-affirmed that agreement in February 2006. *See* "A Roadmap for Convergence between IFRS and U.S. GAAP—2006–2008 Memorandum of Understanding between the FASB and the IASB," Feb. 27, 2006, *available at* http://www.iasb.org/NR/rdonlyres/874B63FB-56DB-4B78-B7AF-49BBA18C98D9/0/MoU.pdf. As to the SEC's own baby steps in this direction, see Release 33-8831, *supra* note 42, at 24–27.

45 SEC Release No. 33-8831, *supra* note 42.

capital markets—and implicitly the U.S. markets' centrality to them—even in the face of increasing regulatory compliance costs in the United States.[46]

Beyond such substantive integration, the SEC release sketches an institutional frame for intersystemic governance. It describes a far closer pattern of engagement between the IASB and the U.S. Financial Accounting Standards Board—a "robust and active process" of dialogue and engagement by which differences in standards will be minimized.[47] Among the functional features of such engagement, the SEC cites coordinated agendas, as well as concurrent work on major projects. Further, it envisions an ability of the boards to episodically act in tandem in response to exigent needs.[48]

In this final example, *overlap* and *complexity* begin with the ease of capital flows in present-day financial markets, as highlighted in the introduction.[49] Funds can now move almost instantaneously to almost any market across the globe. It is increasingly difficult to speak of U.S. markets in isolation from other markets. Capital of U.S. investors is widely invested overseas, while funds in the U.S. markets can be traced to myriad foreign sources.[50]

As I described in the introduction, regulatory overlap naturally follows, as issuers seek capital across multiple markets. Such issuances raise the possibility of divergent disclosure demands from the multiple masters of those respective markets.[51] Here, patterns of overlap are keyed to significantly heightened transaction costs of capital formation. This becomes only more true as the use of IFRS spreads.[52]

---

[46] *See id.* While no further regulatory action has yet been taken on the Concept Release, it is worth noting the SEC's November 15, 2007 decision to permit "foreign private issuers" to submit financial statements prepared using international accounting standards. *See* SEC Takes Action to Improve Consistency of Disclosure to U.S. Investors in Foreign Companies, SEC Release No. 2007-235 (Nov. 15, 2007); *see also* SEC Release No. 33-8831, *supra* note 42, at 12 (noting connection of proposed change in standards for foreign private issuers and broader initiative outlined in Concept Release). Notably, this represents the first time the SEC has permitted general use of financial statements neither prepared in accordance with U.S. GAAP, nor reconciled to it. *See* The Convergence Blog, http://www.theconvergenceblog.com (Nov. 18, 2007).

[47] *See* SEC Release 33-8831, *supra* note 42, at 16.

[48] *See id.*

[49] *See* Ahdieh, *supra* note 1, at 12; *see also* Robert W. Hillman, *Cross-Border Investment, Conflict of Laws, and the Privatization of Securities Law*, 55 LAW & CONTEMP. PROBS. 331, 351 (1992).

[50] *See* Edward F. Greene & Linda C. Quinn, *Building on the International Convergence of the Global Markets: A Model for Securities Law Reform*, 1372 PLI/CORP 561, 563 (2003).

[51] *See* SEC Release 33-8831, *supra* note 42, at 34.

[52] *See id.* at 6.

U.S. markets, meanwhile, are heavily *dependent* on the ready flow of funds. Much has been made of the holding of U.S. public debt by overseas entities—including strategic competitors such as China.[53] With huge (and daily increasing) ownership stakes of foreign entities in U.S. firms, U.S. corporations are no less dependent on global capital markets.[54] The same is true, of course, in the reverse direction. No economy, it is increasingly clear, is an island unto itself.

The efficient flow of capital, with all that it entails for efficient pricing, the optimal financing of investment opportunities, and the market for corporate control, has thus come to involve a significant dimension of *coordination*. The coordination game of standard-setting—in this case, in the harmonization of disclosure standards—is central to global markets.[55] This is perhaps the clearest lesson of the recent shift in U.S. policy on international accounting standards. As elusive as consensus on common standards may be, overlapping markets and resulting financial dependence demand that it occur; if recent events are any indication, it is beginning to happen.

The recent Concept Release outlines the efforts of national securities market regulators to coordinate their regulatory pursuits. Central to these efforts is the work of the International Organization of Securities Commissions (IOSCO), "the largest international cooperative forum for securities regulatory agencies."[56] Most recently, by way of example, IOSCO has sought to encourage such coordination by creating a database for the compilation and dissemination of national regulators' experiences with IFRS.[57] The ultimate complexity of the task of coordination, however, is evident in the existence of other regimes of coordination as well, including the SEC's active coordination of its efforts with the Committee of European Securities Regulators.[58]

---

[53] *See* CONG. RESEARCH SVC, IS CHINA A THREAT TO THE U.S. ECONOMY? 2–3 (2007).

[54] Significant recent investments in distressed U.S. banks and other firms by so-called "sovereign wealth funds," for all the attention they have received, represent only one facet of this trend. *See* Floyd Norris, *A Worrisome New Wrinkle in Bailouts*, N.Y. TIMES, Dec. 14, 2007, at C1.

[55] In this case, we see both the public and private dimensions of coordination described in the introduction. *See* Ahdieh, *supra* note 1, at 18–20.

[56] *See* SEC Release 33-8831, *supra* note 42, at 23; *see also* Ahdieh, *Dialectical Regulation*, *supra* note 19, at 878; David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 561–69 (2005).

[57] *See* SEC Release 33-8831, *supra* note 42, at 34.

[58] *See id.* The engagement of the SEC with the Committee of European Securities Regulators (CESR) also serves to highlight the layered patterns of coordination noted in my introductory remarks, given CESR's own substantial coordination project, among national regulators in Europe. *See* Ahdieh, *supra* note 1, at 19.

Finally, much of this coordination is happening through patterns of engagement heavily inflected by advocacy and *persuasion.* In the development of international accounting standards, a debate has been playing itself out, as various public and private entities seek to advance their own conceptions and models of disclosure. The SEC's Concept Release highlights as much, in its juxtaposition of the need for national securities regulators to avoid conflicts in IFRS interpretation and a strong emphasis on the fact that "each securities regulator retains the responsibility, *and accordingly the right,* to make its own final decisions."[59] Between these poles, of course, is the realm of effective persuasion.[60] Ultimately, success in this debate is not a product of any given participant's capacity for coercion. Rather, it relies on a meaningful appreciation and understanding of competing standards and the persuasion of other participants as to the optimality of one's own.

CONCLUSION

Much remains to be considered in assessing the operation of a regime of intersystemic governance in U.S. securities law. Even as to the selected case studies here, the actual parameters of implementation remain unresolved. Normative concerns attendant to jurisdictional overlap and regulatory dependence are likewise left implicit in the discussion above. Most broadly, the foregoing leaves open the question of the episodic versus broader utility of schemes of intersystemic governance. Whatever promise intersystemic governance might have in the selected spheres described above, does it mean anything for securities regulation more generally?

All of that said, this brief essay may nonetheless serve certain valuable ends: First, it may highlight the ways in which complexity and overlap, coordination, dependence, and persuasion are an unavoidable reality, at least in selected areas of modern law and regulation. Softening the blow, however, it also reveals the potential utility of these patterns in the design and operation of regulatory regimes. Especially given the orientation of most legal scholarship

---

[59] *See* SEC Release 33-8831, *supra* note 42, at 35 (emphasis added).

[60] An even more concrete example of the dynamic of persuasion at work is the SEC's analysis of how the need for prompt interpretation of an IFRS provision might be reconciled with coordinated—and perhaps centralized—interpretation of its terms. In essence, the Concept Release sees the national regulator as expressing a view by way of interim measure, and then referring the question to the IASB or other transnational standard-setting body, for final assessment. *See id.* at 35. It bears emphasizing that such a discursive scheme would rely heavily, and in both directions, on effective persuasion.

to law's traditional project of line-drawing,[61] this may be a critical aspect of any effort to move forward.

Finally, the foregoing may suggest the value of greater "microanalysis" of the institutions of the securities markets.[62] Through more targeted study of particular institutions and institutional interactions, we may gain significant traction on the actual dynamics at work in securities regulation. By more closely studying institutional patterns in each of the areas described above, I would posit, we may achieve substantially greater insight into the appropriate design of relevant law and regulation. To reiterate, I do not suggest that I have engaged in the requisite level of precision and detail herein. This essay may nonetheless have done a service, if it helps to point us in the right direction.

---

[61] *See* Ahdieh, *Dialectical Regulation* , *supra* note 19, at 867–68.

[62] *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).