Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA, and the Future of Financial Reform

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For the last twenty years, the dominant narrative of the over-the-counter derivatives market has been one of absent regulation, deregulation, and regulatory conflict, predictably resulting in disaster. This Article challenges this narrative, arguing that the global derivatives market has been subject to pervasive and harmonized regulation by what should be recognized as transnational private regulators. Recognizing the reality of widespread transnational private regulation of derivatives has significant implications, which this Article explores. Appreciating the actual regulatory status quo is essential if policymakers are to correctly diagnose problems, avoid past regulatory errors, and plan effective remedies. There are also advantages to relying on private transnational regulation, as increased governmental effort to regulate the OTC derivatives space may undermine and fracture existing regulation. To be sure, private transnational regulation carries risks that have sometimes materialized, such as the manipulation of LIBOR. Thus, this Article also evaluates best practices in regulating through transnational private governance.

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INTRODUCTION

There is a consensus that in order to avoid the mistakes that precipitated the global financial crisis, new and internationally coordinated regulatory solutions are needed. Indeed, both proposals and recently enacted legislation have already dramatically altered the regulatory requirements for major commercial and investment banks, as well as targeted the over-the-counter (OTC) derivatives markets, which have been viewed as a key causal factor in the crisis. The narrative for the OTC derivatives market has almost uniformly been described in the following manner: for the last twenty years it was a largely unregulated market, and this lack of regulation was key to the role OTC derivatives played in causally contributing to the financial crisis and subsequent market woes. In brief, OTC derivatives were deregulated and this led to disaster — or so the story goes.

This narrative, however, is incorrect and dangerously so. We dedicate the first part of this Article to demonstrating why. The basic contours of this argument have been noted by other derivatives scholars in recent work. Far from being unregulated, the OTC derivatives market was subject to pervasive regulation and governance, although by transnational private regulators rather than government. Most prominently, these private

2. See infra notes 37, 39.
regulators have been the International Swaps and Derivatives Association (ISDA) and the British Bankers’ Association (BBA). Indeed, we argue that the U.S. and U.K. governments are best understood as having consciously chosen to regulate the OTC derivatives through reliance on transnational private regulation.

We join with other scholars of the OTC derivatives market in finding it crucial to appreciate the significance of its underlying transnational private regulatory structure. But we go further in asking about the implications of understanding the underlying regulatory structure of the OTC derivatives market. This Article is about assessing these implications — for harmonization, reform, and responsibility — of taking transnational private regulation seriously. We make a series of arguments concerning lessons to be learned from ISDA and the BBA, ways to improve the regulation of derivatives, and the promise of governmental leveraging of transnational private regulation. Above all, we conclude that we cannot hope for better, more successful regulation — and to avert the next financial crisis — until we understand and appreciate the actual regulatory character of the past two decades.

I. TRANSMATIONAL PRIVATE REGULATION OF OTC DERIVATIVES

This Section begins by introducing the OTC derivatives market. It then describes the view of the OTC market as unregulated. Next, it considers the possibility of transnational private (i.e. non-state) regulation of the OTC market. Finally, we examine the ways in which the OTC market can be considered to have been subject to extensive transnational private regulation.

A. Introduction to Derivatives

Financial derivatives are investment instruments that derive their value from some other financial asset. For example, a call option, a type of derivative, gives the owner of the option the privilege, but not the obligation, to purchase a specified asset at a specified price at some future date. That privilege may someday be of great value if the underlying asset appreciates, in which case the right to purchase it at a low price represents a guaranteed profit. On the other hand, if the underlying asset depreciates, the call option is unlikely to be used to any gain. Since the call option is an alienable asset, its sale price will reflect in some way the movement in price of the underlying asset.

3. ALAN N. RECHTSCHAFFEN, CAPITAL MARKETS, DERIVATIVES AND THE LAW 159 (2009) ("A derivatives transaction is ‘a bilateral contract . . . whose value derives . . . from the value of an underlying asset or underlying reference rate or index.’").
Financial derivatives serve at least three purposes for their users. First, they can be used to hedge, or offset, risk. Farmers have long used futures, obligations to deliver a given asset at some upcoming date, to lock in their profits now and avoid the volatility of the market for their crop. Swaps, which are promises on the part of two parties to exchange a stream of payments, are now used by the majority of large firms to reduce their interest-rate risk. Companies agree to pay a fixed rate to their bank in exchange for a payment stream that varies with the interest rate, thus assuring themselves an income stream that will vary inversely to their borrowing costs.

Second, derivatives are also used for speculation. Call options can be a more cost-effective way to bet on the appreciation of a security than the direct purchase of the security. Call options entitle their owner to similar gains akin to owning the underlying security, but with a lower initial cost. Similar derivatives allow investors to cheaply bet that a security will decline in value, or simply change in some direction.

Finally, derivatives can be used for a variety of arbitrage activities. Arbitrage refers to investment or business activity that notes the economic similarity between two seemingly different assets. The notorious hedge fund Long-Term Capital Management used financial derivatives to bet that the prices of similar assets would eventually converge. Arbitrage can also be regulatory: where a transaction has substantial regulatory costs, derivatives may sometimes be used to reconstruct the transaction in terms not covered by the regulation, preserving the economics of the transaction but avoiding the regulation. For example, a corporation may incur tax liability if it sells a given security. Instead of selling the security, the corporation may initiate a total return swap in which it promises to pay another party an amount reflecting any change in value in the asset, in exchange for a fee. Now the corporation has achieved the equivalent of a sale but has not actually “sold” anything for regulatory purposes.

4. See generally id. at 159–73.
5. Access to similar returns comes paired with a greater risk of no return at all. If the option expires while the security’s price is below the option’s strike price, the investor receives no payment at all.
6. A “straddle” is a combination of a call and a put option that rewards its owner if the security’s price changes in either direction.
8. See MERTON H. MILLER, MERTON MILLER ON DERIVATIVES 6 (1997) (explaining and praising regulatory arbitrage); Kenneth C. Kettering, Securitization and its Discontents: The Dynamics of Financial Product Development, 29 CARDOZO L. REV. 1553, 1661–67 (2008) (arguing that although bank loans and standby letters of credit expose banks to similar credit risks, the Office of the Comptroller of the Currency (OCC) treated standby letters of credit to the more favorable regulatory treatment of regular letters of credit. In this way, the OCC created a profitable regulatory arbitrage for banks to issue standby letters of credit rather than make loans).
Derivatives come in two well-recognized forms: exchange-traded and over-the-counter. The former are standardized contracts traded on regulated exchanges, such as the Chicago Board Options Exchange. The latter are bilateral, designed for customizability, and comprise the vast proportion of the derivatives market.9

Given the OTC market’s focus on customization, it is perhaps surprising how closely different OTC swaps resemble one another. This notable fact is largely a result of the standardization of customizable terms provided by ISDA’s Master Agreement form contracts and accompanying documentation. Hundreds of trillions of dollars of OTC derivatives are governed by documents written by a single organization, the ISDA, and derive their payments from a single rate governed by another, the BBA. These two organizations are critical in generating the infrastructure that has ordered transactions in the OTC derivatives markets for much of the last two decades — an infrastructure that provides the multiple economic benefits of liquidity, certainty, and reduced transaction costs.10

ISDA is “the largest global financial trade association,”11 with over 800 members from fifty-five countries.12 ISDA’s trade documentation is the market norm for OTC derivatives,13 and the organization exercises tremendous influence over the form that transactions take.14 As just one

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9. See, e.g., Colleen M. Baker, Regulating the Invisible: The Case of Over-the-Counter Derivatives, 85 NOTRE DAME L. REV. 1207, 1300 (2010) (citations omitted) (“OTC derivative markets are many times the size of exchange-traded markets and compromise [sic] roughly eighty-three percent of the derivative market.”).

10. RECHTSCHAFFEN, supra note 3, at 172–73.


14. See, e.g., Adam J. Krippel, Regulatory Overhaul of the OTC Derivatives Market: The Costs, Risks and Politics, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 280 (2011) ("The International Swaps and Derivatives Association, Inc. (‘ISDA’) provides a standard form agreement called the ‘ISDA Master Agreement’ that most market participants use for their OTC derivatives transactions."); Adam Glass, Helpful Hints for the New Derivatives Regulators, FINREG21.COM (Aug. 31, 2009), http://www.finreg21.com/lombard-street/helpful-hints-new-derivatives-regulators (explaining that ISDA “is the forum in which the swap dealers and other market participants create and administer the terms and conditions of every major class of OTC derivative. It publishes and updates standard contract terms, takes positions or seeks outside counsel on interpretive questions under those standardized terms, and, in the case of credit derivatives, is single-handedly responsible for rewriting
indicator of the extent of ISDA’s penetration, eighty-five percent of the approximately 138,000 collateral agreements in use in the OTC derivative market at the end of 2011 were ISDA agreements.15 “The [ISDA] Master Agreement serves as an industry-standard contract available for off-the-shelf use by counterparties.”16

The importance of the BBA over the last two decades is similarly indisputable.17 The BBAs importance to the derivatives market began in 1986 when it first published a daily interest-rate benchmark called the BBA London InterBank Offered Rate (LIBOR).18 Assembled from banks’ self-evaluated borrowing costs, LIBOR is meant to provide insight into the cost of funds in the most liquid market in the world. Because of the importance of the banks that operate in the London market, LIBOR is thought to correlate with interest rates all around the world. That benchmark rate is now the price term in essentially all USD-, Yen-, and Sterling-denominated OTC derivatives.19

Although they are small private entities, ISDA and the BBA produce standards of tremendous public influence and importance20: the standard form documentation that is the norm for the OTC derivatives market, and the rate by which hundreds of trillions of dollars in interest-rate derivatives are traded.

16. RECHTSCHAFFEN, supra note 3, at 173.
B. The Dominant Narrative

Despite a growing chorus claiming that the OTC derivatives market has been subject to private regulation,21 much discussion of this market has generally assumed that it was essentially unregulated, or subject to rapid wholesale deregulation — and regulatory inactivity where regulation was possible22 — on both sides of the Atlantic.23 This version of history has familiar milestones. In 1989, the U.S. Commodity Futures Trading Commission (CFTC) provided a “safe harbor” from regulation for most OTC swaps.24 In 1992, Congress followed suit and gave the CFTC general exemptive power over swaps.25 At that time, the size of the OTC market was about $12 trillion, notional, excluding the foreign exchange market.26

In 1993, Metallgesellschaft AG, Germany’s fourteenth-largest corporation, lost $1.3 billion in derivatives transactions.27 That same year, a G30 report on the OTC market advised no new state regulation, but instead provided extensive commentary on best practices that the private sector itself could implement.28 That report was directed by officers at JP Morgan, ISDA, and others.29

The cornerstone of the deregulatory narrative was laid in the late 1990s. In a momentary reversal of the trend up until this point, the CFTC issued a Concept Release announcing its intentions to increase scrutiny of OTC derivatives in 1998.30 The reaction was swift. Congress responded with the Commodity Futures Modernization Act (CFMA), enacted in 2000,31 which is typically characterized as a “sweeping deregulation of OTC derivative

21. See infra Part I.D.
22. Dan Awrey, The FSA, Integrated Regulation, and the Curious Case of OTC Derivatives, 13 U. PA. J. BUS. L. 1, 33 (2010) (“Not surprisingly, the enactment of the [Commodity Futures Modernization Act] ushered in a period of relative inactivity in the U.S. with respect to the regulation of OTC derivatives markets. This regulatory stasis stood in stark contrast, however, with the precipitous growth and proliferation of OTC derivatives markets.”).
23. Id. at 46–47 (The U.K.’s Financial Services Authority is also non-interventionist).
28. WORKING GRP. ON GLOBAL DERIVATIVES, DERIVATIVES PRACTICES AND PRINCIPLES (1993) [hereinafter G30 PAPER].
29. Id. at *7.
activity.” Among other things, the CFMA specified that OTC swaps between sophisticated parties could be transacted off of regulated exchanges and exempt from most of the Commodity Exchange Act.

Turf wars between the Securities and Exchange Commission (SEC) and CFTC may have also contributed to a lack of aggressive governmental regulation. From its founding, the CFTC and the SEC were at odds about the proper shape and distribution of regulation in their respective areas, as well as the borders of those jurisdictions. In 1982, the Shad–Johnson Accord, named for the agency heads who helped cobble together an uneasy truce, gave regulatory authority over options on individual securities to the SEC and the rest to the CFTC. This trend of governmental inaction has also been explained by large lobbying expenditures by the finance industry, which succeeded in spreading a pro-financial innovation ideology and beating back regulation wherever it could.

This apparent absence of regulation of financial instruments generally, and of derivatives in particular, has been cited as a major catalyst of the global financial crisis. Without regulation, derivatives users were free to take imprudent risks, sometimes with the encouragement of brokers and advisors who may not have held their clients’ interests very highly. With the proliferation of an infinite variety of bespoke derivatives, it became increasingly difficult to assess one’s indirect exposure to the failure of a counterparty’s counterparty. The results of these trends were daisy chains of risk and a reduction of available credit. As Professor Stout has put it, “[i]t was the deregulation of financial derivatives that brought the banking system to its knees.”

32. Baker, supra note 9, at 1299.
34. RECHTSHAFFEN, supra note 3, at 195.
35. Baker, supra note 9, at 1311.
37. See Krippel, supra note 14, at 278; see also FIN. CRISIS INQUIRY COMM’N, supra note 1, at 52–66 (describing various deregulatory changes and arguing they causally contributed to the financial crisis).
A similar story of deregulation (and disaster) is also frequently told about the most important interest-rate benchmark in the world — LIBOR. It is by now well known that at least one of the major banks contributing to the setting of LIBOR also manipulated it. This manipulation was possible in part because of the way that LIBOR was compiled: each day, the BBA would ask six or more large banks “at what rate could you borrow funds ... in a reasonable market size just prior to 11 am?” The BBA discarded the top and bottom quartile of answers and averaged the remaining answers. This trimmed mean methodology was meant to eliminate problematic outliers from this benchmark of bank borrowing costs, but no data was required to substantiate banks’ answers to this broad question, and there was clearly opportunity for an answering bank to tailor its response in order to influence the average. The deregulatory narrative suggests that the manipulation of LIBOR was due to the fact that it was unregulated, and that mischief has thrived in the vacuum of regulation since the early days of LIBOR. It does seem that there was no clear civil and criminal liability applicable to benchmark manipulation in the United Kingdom, or in most other jurisdictions.

Private or poor regulation, however, is not deregulation, and only by appreciating the OTC derivatives space in its full complexity can an optimal regulatory strategy be designed. In the next Section, we lay out the

40. Others have admitted that their employees attempted to manipulate LIBOR. See generally, Gabriel Rautenberg & Andrew Verstein, Index Theory: The Law, Promise and Failure of Financial Indices, 30 YALE J. ON REG. 101 (2012).
43. See, e.g., Sean Vanatta, Libor’s Risks Emerged from Clubby London Banking Culture, BLOOMBERG (Aug. 14, 2012, 1:58 PM), http://www.bloomberg.com/news/2012-08-14/libors-risks-emerged-from-clubby-london-banking-culture.html (arguing that manipulation of “Libor,” as a general term for interbank lending rates, predates the BBA LIBOR now used); see also Mary Campbell, Euromarkets in Low Gear, FIN. TIMES, Sept. 16, 1974, at 26 (“Bank A agrees to quote a slightly above realistic LIBOR for the purposes of fixing the rate payable by a customer of bank B — on the understanding that bank B will do the same for bank A when the time comes.”).
scholarly literature that has emerged concerning the reality of regulation by non-state and private actors.

C. Governance Outside the State

In October 2012, the U.K. government adopted a proposal that panel bank submissions for the LIBOR rate should be unavailable to the public for three months.\(^4^6\) The motivation behind the proposal was that initial submission anonymity would permit contributor banks to more frankly represent their cost of borrowing, and the U.K. government’s move represented a paradigmatic attempt at incremental financial regulation. More than four years earlier, the BBA had considered the same proposal for the same reason. The BBA controlled the LIBOR-setting mechanism and easily could have imposed the same scheme.\(^4^7\) If it had, it would have in most respects been functionally identical in its operation, and it would have similarly represented financial regulation, albeit by a private non-profit rather than by a government.

The functional consequences of a supervisory directive can be identical irrespective of whether the state or a private actor imposes it. Indeed, the reality that rule-making for private entities by a non-governmental institution can be regulation is widely acknowledged and allows for a far richer and subtler analysis of the regulation applicable to any particular arena of our financial markets. As Ian Ayres and John Braithwaite put it over twenty years ago, “the intellectual stalemate between those who favor strong state regulation of business and those who advocate deregulation” is pejoratively academic, because financial participants themselves realized that “regulation occurs in ‘many rooms’” and that “good regulatory policy [involved] acceptance of the inevitability of some sort of symbiosis between state regulation and self-regulation.”\(^4^8\) Different forms of this broadened perspective on regulation have taken on various names across time, from Reisman’s celebration of the New Haven School\(^4^9\) to more recent New Governance scholarship.\(^5^0\)

\(^4^6\). Press Release, HM Treasury, Gov’t Accepts Recommendations from the Wheatley Review of LIBOR in Full (Oct. 17, 2012), available at https://www.gov.uk/government/news/government-accepts-recommendations-from-the-wheatley-review-of-libor-in-full; see also THE WHEATLEY REVIEW, supra note 44, ¶ 5.15. ("Real-time publication of submissions can create incentives to submit a lower rate than would otherwise have been submitted."). We will explore this proposal in greater detail along with other relevant portions of the Wheatley Review.


Applications of this approach to private financial regulation have already borne fruit. Janet Koven Levit has explored an international trade finance regime under the banner of what she calls “[b]ottom-up lawmaking . . . [which does] not feature state policymakers but rather the very practitioners — both public and private — who must roll up their sleeves and grapple with the day-to-day technicalities of their trade.”51 A process can become functionally regulated even where no sovereign authoritatively imposes the norms and practices.

D. Transnational Private Regulation of the OTC Derivatives Market

ISDA is well-recognized as a transnational private regulator. Indeed, noting this feature has been one of the first and principal insights of almost every scholar to survey the terrain of OTC derivatives.52 Some have observed the private governance character of the OTC derivatives market and have attempted to place it in a broader theoretical perspective. Professor Baker has noted that “the Credit Derivative Determination Committees of [ISDA] exemplify the highly successful and rapid growth

50. See, e.g., Saule T. Omarova, Wall Street as Community of Fate: Toward Financial Industry Self-Regulation, 159 U. PA. L. REV. 411, 417 (2011) (“The New Governance scholarship posits, generally, that the traditional top-down model of regulation, in which the power to create rules belongs exclusively to the state, is being replaced by a more flexible ‘governance’ model, in which power to set and enforce the rules is increasingly diffused among a variety of societal actors working alongside the governments.”); Robert F. Weber, New Governance, Financial Regulation, and Challenges to Legitimacy: The Example of the Internal Models Approach to Capital Adequacy Regulation, 62 ADMIN. L. REV. 783, 786 (2010).

51. Janet Koven Levit, A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments, 30 YALE J. INT’L L. 125, 126 (2005); see also Peer Zumbansen, The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of “Context,” 13 GERMAN L.J. 1260, 1278–79 (2012) (“Faced with a multitude of overlapping, fast-evolving private regulatory governance regimes in areas ranging from financial to environmental regulation, investment law or commercial transfers, lawyers must continue to both expand their expertise with regard to specialized, technical transactional areas and appreciate the relevance of non-legal ordering and regulatory concepts which underlie and inform many of the emerging governance regimes.”).

of global private governance of the OTC derivative markets.”

Professor Biggins has echoed ISDA’s accomplishments in discussing its successful standardization of OTC derivatives contracts, which has “result[ed] in the creation and sustenance of a highly successful transnational private regulatory regime.”

Similarly, Professor Omarova, while arguing for a new, more comprehensive understanding of financial self-regulation in the wake of the financial crisis, used ISDA’s creation of standardized contracts for OTC derivatives transactions as a “leading example of . . . efficiency-enhancing private industry self-regulation in today’s financial markets.”

Professor Howell said that the swap market “has functioned surprisingly well and constitutes what must be regarded as a premier example of private regulation in financial markets.”

Others have discussed private regulation as the sole regulatory force in parts of the derivatives markets, essentially replacing international regulatory agencies with the actual market participants.

ISDA and the BBA’s roles as transnational private regulators can be seen in its inputs (market constituents forming bureaucracies to design governing rules, mirroring and working alongside state regulation), outputs (regulatory directives and standardized documentation), results (a harmonized and partially regulated market), and the way in which state actors have deferred to them. ISDA has successfully imposed upon the market a remarkable degree of regulation and harmonization of practices.

From the beginning, ISDA worked with the G30 to draw up detailed best practices guidelines for the swap business.

ISDA’s most important contribution has been the creation of its standard form documents.

The earliest iteration came in the 1985 Swaps

53. Baker, supra note 9, at 1296.
55. Omarova, supra note 50, at 444.
57. See, e.g., Nathaniel G. Dutt, Current United States Credit Default Swap Regulatory Initiatives: A New World Standard or Just a Play?, 16 ILSA J. INT’L & COMP. L. 169, 188–89 (2009) (“[T]here is no international regulatory agency that directly monitors or regulates the CDS market . . . . [T]he true regulators of the CDS market are the participants themselves.”); id. at 192 (discussing “ISDA’s self-regulatory system”); see also Paul Lejot, Cover Up! Hong Kong’s Regulation of Exchange-Traded Warrants, 36 H.K. L.J. 277, 279 (2006) (discussing ISDA as the OTC derivatives market’s self-regulatory organization and its documentation-creating role).
60. See, e.g., Barry Le Vine, Comment: The Derivative Market’s Black Sheep, Regulation of Non-Cleared
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Code, abbreviated from the Code of Standard Wording, Assumption and Provisions for Swaps. Newer versions of the documentation contain three components: the Master Agreement, where harmony lies and all the standard terms reside; the Schedule, which modifies the Master Agreement where choices are to be made; and the Confirmation, which covers the details of the instant transaction. Other documents are also commonly appended, such as collateral documents, bridging documents, which provide for netting across all ISDA documented transactions between the parties, and other definitions. Though other bodies have offered standard documents, the ISDA Master Agreement is used in more than ninety percent of OTC derivative transactions. These standard documents have been called a “modern international law merchant.” Without these standard documents, “parties would be plagued by arduous negotiation.”

ISDA’s process of updating and implementing these documents has numerous regulatory characteristics. ISDA employs about 3000 people in its documentation committee, which reacts quickly to modify documents—striking and redefining terms—to remain efficient as legal and economic circumstances change. This process also preserves international harmony of treatment. For example, the 1992 version of the ISDA Master Agreement provided a thirty-day cure period during which a debtor might contest involuntary bankruptcy and thereby avoid the characterization of “default.” The 2002 version shortens this period to fifteen days. Some practitioners have criticized this durational shift, emphasizing that it can take more than fifteen days to even issue a summons in an involuntary bankruptcy, if only because of a “dilatory clerk.” Yet this shorter rule provides international certainty that is largely immune from domestic variation in bureaucratic delay.
Though scholars have often described the ways in which legislatures will respond to clear judicial determinations to confirm or override judicial decisions, we observe little of this dialogue in practice.\textsuperscript{71} By contrast, transnational private regulators lead the state sector in harmonizing quasi-legislation with an iterative interpretation process. For example, the 2002 version of the ISDA Master Agreement provides in Part (2)(a)(iii) that a non-defaulting party can withhold payments to a defaulting party during the period of default, creating a valuable option that permits the non-defaulting party to maintain its claim. The question in the \textit{Lomas} case was how long can the non-defaulting party wait?\textsuperscript{72} Forever? Until the next payment date?\textsuperscript{73} Or until the natural end of the transaction?\textsuperscript{74} ISDA supported giving the non-defaulting party essentially unlimited time to revive its claim,\textsuperscript{75} while some prior decisions had suggested shorter “use it or lose it” rules. Recent judicial decisions have clarified the clause consistently with ISDA’s suggestion. But ISDA is contemplating an amendment to clarify the clause in any case, and perhaps even to contradict its prior position now that its constituents can evaluate a clear rule. This illustrates that ISDA is legislative and in dialogue with the courts.

Through the use of protocols, ISDA is able to update contracts on an ongoing basis.\textsuperscript{76} Protocols are multilateral contractual amendments, drafted by ISDA, which then solicits letters of adherence from swap participants. When all parties to a swap accept the protocol, the protocol becomes binding on the parties, allowing them to assent contingently to multiple contract amendments at once.\textsuperscript{77} This is much the same way as Delaware’s legislature and courts are able to update the default corporate form from time to time, retroactively modifying the guiding documents for Delaware incorporated firms.\textsuperscript{78} In other words, ISDA is a forum for the provision of authoritative directives with quasi-precedential force.

ISDA also functions as a sort of adjudicator through the use of its Credit Determinations Committees.\textsuperscript{79} Key terms, such as “default” in a


\textsuperscript{72} \textit{Lomas v. JFB Firth Rixson, Inc., [2010] EWHC 3372 (Ch).}

\textsuperscript{73} \textit{Marine Trade S.A. v. Pioneer Freight Futures Co. BVI, [2009] EWHC 2656 (Comm).}

\textsuperscript{74} \textit{Lomas, [2010] EWHC 3372 (Ch).}

\textsuperscript{75} \textit{Id.}


\textsuperscript{77} \textit{About ISDA Protocols, ISDA,} http://www2.isda.org/functional-areas/protocol-management/about-isda-protocols/ (last visited June 2, 2013).

\textsuperscript{78} \textit{See, e.g., Henry Hansmann, \textit{Corporation and Contract,} 8 AM. L. & ECON. REV. 1 (2006).}

\textsuperscript{79} \textit{See Verstein, supra note 76; see also Anna Gelpern & G. Mitu Gulati, CDV Zombies (Am. Univ.}
credit default swap (CDS), cannot be described in granular detail *ex ante*, so ISDA contracts specify that a Credit Determinations Committee will have the power to define any such term. Thus, when parties want contractual clarity, any party can make a request to the appropriate committee to define the contractual term. In some cases, this amounts to a determination as to whether the CDS is or is not in default at the present time. These determinations can be fast, giving parties clarity as to their entitlements in near real-time. They can then move to seize collateral, renegotiate, or litigate as need be. Because these determinations are binding on the contract but not enforceable as judgments, and are based on general facts about the contract and the market rather than specific investigations of a party-specific dispute, they are akin to administrative proceedings rather than outright adjudication. In the absence of speedy, trustworthy courts for arbitration, the market’s need for timely determination is met by a non-state actor. Just as norms can be promulgated by a transnational private regulator, rather than a legislature, they can be adjudged by a transnational private regulator rather than a court.

In addition to playing legislative and judicial roles, ISDA materials are frequently incorporated in state law and regulation. Sometimes, legislative materials refer to ISDA and its documentation by name, such as when the New York Insurance Law specifically mentions ISDA documentation in the definition of a credit default swap.80 Usually, incorporation is not by name.81 Yet, nameless reference can be equally powerful, such as when the Bankruptcy Code defines a swap by way of a Master Agreement.82 Incorporation of this ISDA innovation, though without ISDA’s name on it, is part of how domestic law implements international norms of netting. And, of course, ISDA’s pervasive role in structuring the shape of the OTC space — the space that is largely exempt from the Commodity Exchange Act — is not mentioned in any such statute or rule.83

State reliance on, and reference to, the ISDA regime is consistent with Cunningham’s analysis of the public implementation of private standards into law.84 Cunningham discusses different forms of interaction between formal state law and private governance norms. He identifies three levels of state recognition of private norms: (1) when the law merely mentions

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80. N.Y. INS. LAW § 6901(j)(1) (McKinney 2005); see also id. at (g)(5)(A)(ii) (defining collateral in terms of ISDA documentation).
83. See, e.g., Partnoy, *supra* note 81, at 186.
private norms, (2) when the law incorporates private norms into law after their creation, and (3) when the law formally recognizes a private body as a state-endorsed standards creator. ISDA and the BBA, as will be discussed below, operate principally at the first two of these levels. Partnoy similarly analyzes the OTC space: “[O]ne might argue that Congress implemented a de facto strong standards regime, relying on ISDA, based on ISDA’s dominance at the time.”

Partnoy surveys evidence of the strength of ISDA’s standards and their direct incorporation into law, as well as the law’s sometimes-silent reliance on those standards. As an example of the former, there are a large number of legal decisions relying on ISDA; as an example of the latter, globally there are a vast number of statutes and regulations that reflect provisions of ISDA form contracts, but do not mention ISDA by name.

No doubt, some of this incorporation reflects the influence ISDA has had in shaping state regulation. But even ISDA’s influence on state regulation does not imply a passive, deregulatory state. States can sometimes stoop to conquer. If ISDA is known to have a harmonizing, rationalizing agenda, states know that rendering themselves open to ISDA’s influence will tend to advance harmonized, rational governance. The passive stance toward ISDA can be an active stance toward the OTC derivatives market.

By comparison, the BBA’s operation as a private regulator with international power has gone remarkably unnoticed, especially when the prominence of LIBOR in the last year is taken into account. Nonetheless, its regulatory role is undeniable. Like ISDA, the BBA’s most important contribution to the OTC derivatives market is as a harmonizing force within its sector. ISDA created a viable and harmonized set of terms for agreements, but in the early days of interest-rate swaps, “nonuniformity was a significant problem” in price as well. Difficulty agreeing upon a

85. Id. at 293.
86. Partnoy, supra note 81, at 187.
87. Id.
88. Id.
89. G30 REPORT, supra note 28.
90. It is easy to focus on anti-regulatory activity. The BBA’s founding activity was resisting harmonization at the pan-European level, and, in general, state and inter-state regulation and harmonization wherever possible. Notebook International: Brussels: Initiative Required, 123 THE BANKER 1421, at 1421 (Dec. 1973) (“harmonization should be limited to as few issues as possible and be based on the principles of maximum flexibility and self-regulation.”). Yet even as the BBA resisted governmental harmonization efforts, it worked to rationalize the norms of a disorderly banking landscape.
91. Interestingly, the BBA drafted the first model swap agreement, which was quickly superseded by ISDA documentation. See, e.g., Vanatta, supra note 43.
92. Id.
rate within a given document could be a major sticking point in a negotiation. As Jeffrey Golden put it:

Market participants fought about everything, even the fallback rate. That is to say there were pitched battles about what the rate would be and how it would be determined if it was impossible to find a reference bank in London that would quote an offered rate for deposits in the interbank market. Do you go to another market, and, if so, which one? Do you seek quotations from one, three or five reference banks in that market?93

There are also large network benefits associated with using a single price in many transactions. Some of these benefits are the same as with non-price terms: Common terms make it easier to find a third party willing to assume one’s responsibilities and more likely that a court will honor those responsibilities; common terms create liquidity through ease of use and standardization; and common terms eliminate transaction costs. But price commands an additional reason for widespread use, because when a price term is well-known financial actors can generate extensive knowledge about the rate and its relation to their other options and positions. LIBOR is sufficiently well-known that financial models predict its motion in relation to other benchmarks, and parties are likely to have multiple LIBOR exposures to which they can relate the newly contemplated swap. They can minimize basis risk with little difficulty, rather than trying to estimate how a non-LIBOR rate might link with their other exposures.

Like ISDA, the BBA’s role as a transnational regulator has been both reflected and endorsed through governmental decisions. Indeed, LIBOR’s ubiquity arose in part through the choices of state agents. Courts have long adverted to LIBOR in their assessment of damages.94 Many laws require or prefer the use of a well-known index, and parties who select LIBOR are essentially granted a safe harbor due to judicial and administrative preferences.95 For example, the Parity Act allows non-federally chartered housing creditors to lend with adjustable rates, provided that they use “a national or regional index,”96 which the Office

93. Jeffrey B. Golden, Setting Standards in the Evolution of Swap Documentation, 13 INT’L FIN. L. REV. 18 (1994). Golden actually refers to “Libor” in the foregoing, but means by it only a generic term for an interest rate benchmark, not the BBA LIBOR that would come to be synonymous with LIBOR.

94. See, e.g., Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 566 F. Supp. 1558, 1579 (D. Del. 1983) (“In such cases, the rate employed has been the average borrowing rate an average plaintiff would have had to pay to receive the same amount of money . . . . It follows that the LIBOR rate, which represents the cost of borrowing US$ (the currency at issue here) should be utilized in this case.”).


of the Comptroller of the Currency and courts have consistently found LIBOR to be.97

State actors also use LIBOR in their own transactions. U.S. regulators used LIBOR as a key rate in making loans to troubled firms during the financial crisis, such as the Federal Reserve and the Treasury's bailout loans to AIG.98 Furthermore, LIBOR is the Department of Commerce's preferred rate when engaging in foreign currency transactions.99 This is consistent with the notion that powerful network effects are often established (or exacerbated) by public institutions.100 But it also shows the ways in which powerful private governance exists as an extension of, and in conversation with, the public regulatory state, such as the way in which the U.S. government deferred to credit rating agencies and incorporated them into law.101

Considering its origin as a private institution, it is interesting just how public a character and outlook the BBA's LIBOR regulation has assumed. Prior to the widespread allegations of manipulation in 2007, 2008, and 2011, the BBA initiated major efforts to formalize and professionalize its governance activities. These efforts are what John Ewan, former director of LIBOR, called his most important early task at the BBA.102 He set about formalizing a set of rules for rate calculation, data contribution, and determination of veracity. The BBA enacted and clarified rules requiring certification of contributor banks' processes by their own auditor and risk management or compliance department. Without legal coercion, the BBA adopted a set of regulations that aimed at improving veracity.

These safeguards were obviously inadequate. Yet, when news broke indicating that these efforts may have been insufficient to prevent manipulation, the BBA initiated a consultative inquiry as to how the LIBOR rate could be rendered more useful and secure. The 2008 consultation was released in December of that year.103

97. See id.
100. See DAVID SINGH GREWALL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION (2009).
101. Concerns of network power will also be especially apt where the value of harmonization to a market is especially significant, as many have recognized it to be in the OTC derivatives market. We thus should not neglect the BBA and ISDA's valuable (and dangerous) achievement in effectively becoming monopolists over two highly valuable public goods — the transactional structure of OTC derivative customization and the interest rate reference for short-term loans.
102. Interview with John Ewan, Former Dir. of LIBOR, British Bankers' Ass'n., in London (June 15, 2011) [hereinafter Interview with John Ewan].
103. See generally FX & MM COMMITTEE SECRETARIAT, LIBOR GOVERNANCE AND SCRUTINY:
The results of that process were modest changes to the governance structure. Chairs were created for additional constituencies, such as non-contributor banks in the United States and Europe, the principal options exchanges in the United States and London, and fund and corporate borrowers, to help administer the rate. As of January 2010, BBA LIBOR has also been governed by an independent board.104

These changes appear to have done little to stop subsequent attempts at manipulation from taking place. Procedures remained lax, chummy, informal, or ineffective. But this is not to say that there was no regulation. After all, the light touch approach — governance by stern looks, and the like — has long characterized English state governance as well.105

It is also interesting that the BBA’s investigation appears to have considered nearly every option both suggested and implemented by subsequent state regulators.106 Many of these options were rejected by the BBA, for reasons we may or may not accept. But they undeniably engaged in public rulemaking by interviewing the relevant constituencies and sharing the results of that inquiry and the reasons that guided them.

LIBOR assumed some public functions as the state sector increasingly withdrew from those functions. For example, until October 1979 the Federal Reserve took an interest in providing stable interest rates, and therefore concerned itself with reducing interest rate risk. Under Paul Volcker’s leadership, the Federal Reserve shifted its focus to combating inflation in the real economy and allowing the federal funds rate to move as it might.107 Interest rate volatility increased enormously and the market had to look away from government regulators for protection and stability. At the same time, a confluence of forces led to the rise of offshore interbank dollar funds, or Eurodollar deposits, as a source of financing.108

LIBOR provided banks with just such a tool to reduce volatility. Banks wishing to make long-term loans could provide LIBOR loans, a variable

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104. Governance, BBA LIBOR, http://www.bbalibor.com/governance. Note, however, that the members of the board are secret.
105. See, e.g., Alicia Davis Evans, A Requiem for the Retail Investor?, 95 VA. L. REV. 1105, 1110–11 n.24 (discussing whether U.K. regulation is appropriately described as “light touch”).
106. See discussion infra Part II.A–C.
108. See Hugh S. Piggott, The Historical Development of Syndicated Eurocurrency Loan Agreements, 10 INT’L BUS. L. 199, 199 (1982) (arguing that interest rate caps on time deposits in America and interest prohibitions on demand deposits made raising funds in America more difficult); Philip R. Wood, Essay: Sovereign Syndicated Bank Credits in the 1970s, 73 LAW & CONTEMP. PROBS. 7, 8 (2010) (noting that interest-equalization tax discouraged loans outside of the United States, and that oil price hikes led to dollar outflows into overseas accounts).
rate loan that moved with their funding costs. Borrowers unwilling to accept the interest rate risk inherent in the loan could engage in swap transactions to receive an offsetting payment and pay a fixed rate. The variable liability could be reassigned to whomever was best able to accept interest rate risk. Financial engineering with LIBOR-priced loans and swaps became a source of interest rate stability at precisely the moment that the Federal Reserve withdrew from the task, allowing banks to lend at a rate reflecting their true cost of funds. This transition took place with the tacit approval of regulators.109

The history of the Commodity Futures Modernization Act’s enactment also suggests that a government can decide to regulate through deploying a transnational private regulator. Some have gone as far as to suggest that ISDA basically drafted the CFMA — the legislation that created almost two decades of de facto exclusive regulatory jurisdiction of the OTC derivatives market for ISDA. As one author put it, Senators Lugar and Gramm “quietly inserted this 262-page bill (written by the ISDA) into a $384 billion, 11,000-page omnibus budget bill.”110 Indeed, the role of ISDA may have been even stronger.

ISDA lobbied successfully for enactment of the U.S. Commodity Futures Modernization Act in 2000, which exempted OTC derivatives from regulation by the federal agency that supervises futures and commodities exchanges. ISDA’s skill in promoting standardization in swap market practice, documentation, and settlement was important in this decision, and effectively ended pressure for direct regulation of OTC derivative products, both in the United States and elsewhere.111

Frank Partnoy draws something like the same causal connection in the context of ISDA’s important role as a standards-setting organization.112 As he puts it, “one might argue that Congress implemented a de facto strong standards regime, relying on ISDA, based on ISDA's dominance at the time. Judicial reliance on ISDA standards would support such a strong

109. Hillbrandt, ICI’s finance director, asserts that the Bank of England was briefed on the use of swaps to facilitate the Eurodollar market and was “favorably inclined to the use of swap arrangements of this type.” Raphael Hodgson, The Birth of the Swap, 65 FIN. ANALYSTS J. 32, 34 (2009).


111. Lejot, supra note 57, at 292–93 (“ISDA lobbied successfully for enactment of the US Commodity Futures Modernization Act in 2000, which exempted OTC derivatives from regulation by the federal agency that supervises futures and commodities exchanges. ISDA’s skill in promoting standardisation in swap market practice, documentation and settlement was important in this decision, and effectively ended pressure for direct regulation of OTC derivative products, both in the United States and elsewhere.”).

112. See, e.g., Partnoy, supra note 81, at 187.
The foregoing is not an argument that ISDA or the BBA have been consistently excellent regulators. Numerous complaints can be made, from the manipulation of LIBOR to the backlog in derivatives confirmations. Though it can be rational for states to outsource regulation, the recipients of that power may be venal or inept; but they are still regulators. The next Part considers the implications of characterizing the OTC market as having been subject to private regulation.

II. IMPLICATIONS OF THE TRANSNATIONAL PRIVATE REGULATION OF THE OTC DERIVATIVES MARKET

A. Moderating Reactive Regulation

There is a well-documented process by which laws are written in great number and length in the wake of regulatory failure and crisis, and these laws may be unduly punitive, rushed, or otherwise problematic. This phenomenon seems to be especially prevalent in the financial space.

This is not just a pathology of lawmaking; once the deregulated status quo is accepted, new regulation stems from common sense. A new sweep of regulation may bring unanticipated problems, but who will decline the offer of “regulation” when the discredited alternative is “no regulation”?

Recognizing that the status quo was regulated may hold some promise of tempering this cycle. The regulation was insufficient, co-opted, corrupt, or mistaken, so reform is required. However, the resultant reform is from regulation to regulation, regulator to regulator, which necessarily involves a more sophisticated approach. Consider, in comparison, the criticism of thrift regulation under the Office of Thrift Supervision (OTS).

113. Id.

114. See Baker, supra note 9, at 1315; see also Siona Robin Listokin, MetaRegulation of OTC Derivatives Contracts Post Reform (Nov. 4, 2009), available at http://ssrn.com/abstract=1499964 (discussing industry’s failure to address confirmation backlog).


Washington Mutual, AIG, Countrywide Financial and other prominent financial institutions held charters as thrifts, regulated by the OTS.117 These institutions performed poorly during the financial crisis, having been allowed to binge on risky mortgage-backed instruments, swaps, and subprime assets.118 The OTS was savagely criticized and then disbanded — the nuclear option in administrative discipline. We did not act, however, as though thrifts were roaming brigands, free from all regulation. We knew that they were regulated, but badly, and so we set about integrating them into a regulatory regime that made more sense.

If the problematic past had zero regulation, then it makes sense to think that any non-zero amount of regulation is likely to be an improvement. However, if the past was regulated, then any change is a change in regulation rather than an initiation of regulation. Proposals must be justified as superior to existing regulation rather than simply superior to no regulation. Substantively, this framing is likely to lead to more nuanced and moderate regulatory responses.

What would this more nuanced approach to regulatory reform look like? LIBOR’s failure has prompted numerous reform proposals, some of which have been adopted, and some of which may yet be. It is nonsense to act as though these proposals are against a blank slate when most of these proposals were explicitly considered by the BBA. Even if that body has been discredited, it bears considering the arguments that might have justified resisting the proposals previously.

The Wheatley Review is a blue ribbon report prepared by Martin Wheatley, the CEO designate of the United Kingdom’s soon-to-be new financial regulator, the Financial Conduct Authority (FCA). The FCA will have control over most non-stability related financial regulation.119 Wheatley’s September 2012 report made a series of proposals,120 which the U.K. government has endorsed in full and has already begun to implement.121 The recommendations suggest increased public oversight of the index (LIBOR), including substantive requirements for how the index must be created, and increased penalties for malfeasance.

Fascinatingly, almost all of the 2012 Wheatley reforms were considered by the BBA in its 2008 consultative paper. Many were rejected, often for reasons acknowledged by Wheatley in his reports. As regulators consider

117. See Dain C. Donelson & David Zaring, Requiem for a Regulator: The Office of Thrift Supervision’s Performance During the Financial Crisis, 89 N.C. L. REV. 1777, 1779 n.5 (2011).
118. See id. at 1777 (evaluating relative performance of thrifts).
120. THE WHEATLEY REVIEW, supra note 44.
moving forward, they should take stock of the evaluation of their regulatory predecessor.

The BBA also considered changes to the index that might better serve the public, but declined to do so for avowedly public interest reasons. If taken at its word, the BBA’s inaction was a deliberate regulatory decision. At a minimum, the BBA showed sophistication about what others would take to be its responsibility. Taking stock of the BBA report, the lesson is that with any reform effort, the reforms necessarily involve trade-offs that prior BBA regulatory consultations highlighted.\textsuperscript{122} We will provide numerous examples of this later. For now, at least three trade-offs are notable in discussing any improvement of LIBOR:

(1) Reform versus stability (or, the “grandfathering problem”): Any proposal that makes important changes to the index will upset market expectations for those who began using the index prior to reform. Many market participants may prefer the devil that they know. Others may be concerned about distributional effects of even efficient improvements in LIBOR. If an improved LIBOR skews higher as a result, it will disadvantage the payor on a LIBOR instrument. Finally, substantial changes to the rate could result in legal challenges to the validity of linked instruments.

(2) Transparency versus opacity: It is easy to be upset about the lack of transparency in LIBOR, which allows bad behavior to go unnoticed or unverified. However, opacity has its virtues since reputational manipulation of LIBOR was a direct result of banks’ fears that true but embarrassing submissions would be revealed to the public. Likewise, rules and data make it easier for third parties to game the system by engaging in transactions pitched to the rules.

(3) Public accountability versus optimal incentives: Government ownership of an index, stipulation of rules, or harsh punishment for index wrongdoers may increase a sense of public oversight. However, the government may lack incentive and the knowledge to craft an index correctly, and harsh rules and penalties may drive participants away from contributing to the index.

An improvement to one aspect of the indexing processes necessarily increases risks in another. The rest of this subpart examines the reforms recommended by the Wheatley Review, the reforms implemented by settlements with three banks, and reforms suggested but not yet implemented. For each, understanding the trade-offs involved in regulatory change helps sensitize us to the costs of any particular proposal.

\textsuperscript{122} Rauterberg & Verstein, supra note 40.
1. **Fewer LIBORs**

The Wheatley Review proposes that LIBOR will be quoted in fewer tenors and currencies. As it stands, LIBOR is quoted in ten currencies and at fifteen different borrowing durations. Some of these are based on markets with substantial volume, such as the overnight USD rate. Some are extensively used by third parties, such as the three-month USD rate, which is among the most important for U.S. subprime mortgage pricing. Yet, some are little used by third parties and based on very few underlying transactions, such as the eleven-month Swedish Krona. Recognizing the potential to manipulate such a thinly-traded market, Wheatley recommends eliminating 130 of the 150 LIBOR rates.

The BBA considered eliminating tenors as well, but declined to do so. While the Wheatley review asserts that the cost of eliminating lesser tenors is low, the BBA considered them significant. As John Ewan said, “Should we stop doing these? Somewhere, someone is doing a product that links to the unlikely rate.” Without knowing who was using the unlikely rate and why they deemed it better than a market favorite, the BBA was unwilling to act. The BBA recently published a consultative report surveying various market participants as to their feelings on eliminating such little-used tenors. This report confirmed Wheatley’s sense that many LIBORs were not favorites of the market, but also confirmed Ewan’s sense that there remain devoted users of these benchmarks who will be the losers in any elimination plan.

For example, a majority of respondents agreed that the BBA could eliminate its little used tenors, as well as the Australian Dollar, New Zealand Dollar, Canadian Dollar, Danish Krone, and Swedish Krona fixing. Nevertheless, for each of these, between nine percent and twenty-nine percent of the respondents opposed discontinuing the rate. There appears to be a significant group of users that finds these rates to be at least sometimes useful.

Here, as with elsewhere, the BBA appears to have taken grandfathering concerns seriously. Again, recent market surveys substantiate the BBA’s caution. More than half of the market participants surveyed expressed

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123. Fifty-nine percent of USD-denominated swaps and floating rate notes that cite LIBOR utilize the three-month tenor. See, e.g., THE WHEATLEY REVIEW, supra note 44, at 36 tbl. 5.A.
124. Essentially zero percent of interest rate swaps and floating rate notes quote the one-, three-, six-, or twelve-month Swedish Krona. Id.
125. Less than seven of the LIBOR banks engaged in Swedish Krona borrowing in any substantial quantity, and none did so at the eleven-month maturity. Id. at 30 tbl. 4.A.
126. Id. ¶¶ 5.9–5.10.
127. Interview with John Ewan, supra note 102.
129. Id. at 3–5.
concern about rapid removal of lightly-traded tenors, and substantial minorities expressed concern about removal of such tenors and currencies even within the longer time horizon suggested by Wheatley.130

Wheatley’s response acknowledged that eliminating tenors would decrease cross-tenor corroboration.131 Likewise, there was reported concern “about the impact on those contracts that reference these rates and the associated market disruption, suggesting a cautious approach in this respect and that, in each case, an appropriate consultation with the relevant domestic authorities should be undertaken to ensure minimal disruption.”132

2. Quote Anonymity

Wheatley also proposes that LIBOR-rate contributions be unavailable to the public for three months. The thought is that this will allow contributor banks to more honestly represent their cost of borrowing, since they need not fear that high costs will be immediately reported to the market and interpreted as a sign of weakness.133 It may also make it more difficult for a cartel to enforce an agreement to manipulate the rate, since a breach of the agreement would remain invisible for some time.134 Additionally, would-be manipulators could not so easily predict the effect of their quote upon the overall field,135 since they could not observe how close the rate was to being rounded up or down.136

Once again, looking at the BBA provides insight into the trade-offs of this regulation. The BBA considered such a proposal and declined after consultation with its constituents. Sixty-one percent of respondents told the BBA that the existing level of anonymity was best, and only fifteen percent wished an increase in opacity of rates.137 Wheatley’s compromise between transparency and opacity, a period of delay before data are released, was endorsed by exactly two of the BBA respondents.138

130. Id.
131. THE WHEATLEY REVIEW, supra note 44, app. ¶ B.13.
132. Id. app. ¶ B.12.
133. Id. ¶ 5.15 (“Real-time publication of submissions can create incentives to submit a lower rate than would otherwise have been submitted.”).
134. See, e.g., BAINBRIDGE, supra note 115, at 32. This hardly seems significant since cartel members could voluntarily show their participation through any number of means.
135. See, e.g., THE WHEATLEY REVIEW, supra note 44, ¶ 5.15.
136. However, given the ease with which contributors, traders, and voice brokers communicated, it would seem that this reform will have little effect unless other dynamics are substantially changed.
137. BRITISH BANKERS’ ASS’N, BBA LIBOR CONSULTATION, supra note 47, ¶ 1.14 (“Many respondents, and particularly those of the contributing banks, considered that a decrease in the current level of transparency would not necessarily be interpreted as positive move.”). This is consistent with the information gathered by the Wheatley Review. THE WHEATLEY REVIEW, supra note 44.
138. See, e.g., BRITISH BANKERS’ ASS’N, BBA LIBOR CONSULTATION, supra note 47, § 3.18.
participants were concerned that a lack of transparency on submissions could further cast a shadow over the rate, as participants could not readily compare submission data to comparable metrics. Many of the important studies identifying LIBOR manipulation relied on bank-level data to determine where banks’ self-evaluation of creditworthiness did not match the market.

B. The Settlements

Not only are new regulations emerging from explicit, legislative reforms in the United States and United Kingdom, but enforcement and action through the judicial system are making an equally important impact. The recent internationally-coordinated settlements between state regulators and LIBOR panel banks illustrate how settlements can function as regulation. Furthermore, they underscore the interaction of domestic governmental regulators (operating through both enforcement and legislation) and transnational private regulators in regulating aspects of the OTC derivatives market.

In June 2012, Barclays PLC settled Commodity Exchange Act violations with the CFTC. Barclays’ settlement involved numerous non-financial terms. It agreed to substantive provisions for how it will contribute to benchmark rates. Within six months of the Barclays order in December 2012, UBS similarly settled claims with the CFTC and Britain’s market conduct regulator on essentially the same terms.¹³⁹

The settlement provides directives for how Barclays must calculate its LIBOR quote submissions. Barclays must give its own transactions the greatest weight in determining submissions,¹⁴⁰ though it may modify that data with subjective assessments of market and counterparty conditions.¹⁴¹ The settlement also extensively specifies the oversight and governance structures within the firm.¹⁴² Firewalls, both bureaucratic and geographic,


¹⁴¹. Id. at 33 (noting that other factors may include time, market events, term structure, credit standards, counterparty conditions and baselines).

¹⁴². Id. at 34 (requiring the daily submissions to be reviewed every day by a supervisor experienced in the market and prohibiting supervisors and submitters from having compensation linked to derivatives trading or being derivatives traders); id. at 39 (requiring compliance personnel to physically visit trading floors at least monthly).
are to be established. Extensive records are to be kept — even of factors that are notoriously intangible — and the data must be coded along eighteen axes. Regular disclosures to regulators are required, as are audits. The settlement even includes public advocacy requirements.

It is fair to say that these settlement-imposed changes to the rate-setting process are far more extensive than those proposed by the Wheatley Review. Settlements for past wrongdoing entail an avenue for substantial public oversight and substantive prescription of business conduct. This is regulation by settlement, and it comes as a replacement to a governance regime that was deemed to be inadequate, but which contemplated many of these prescriptions.

The BBA declined to provide extensive ex ante guidance as to how banks must produce their submissions and to put “twenty minions at each bank to make sure they are flying straight.” They deemed themselves comparatively less well-equipped than banks to tell each bank how best to craft its own compliance and risk management, and to draft extensive rules that would apply in various and future cases. Instead, the BBA required banks to have their own compliance and auditing services certify their submissions. The BBA also deemed it appropriate to offer only minimal guidance, such as that the cash dealer and not the swap trader must submit the quotes. Likewise, the BBA played a role in clarifying the

143. Id. at 34–35.
144. Id. at 37 (requiring that essentially all communication about the index be preserved, with preservation time depending on the media format and location of the individuals); id. at 37 (requiring trades and positions, and those of other traders dealing with these markets, to be recorded and kept); id. at 36 (requiring supervisor identity be recorded and kept for five years); id. at 35 (requiring the preservation of all models and methods included in submissions); id. at 35 (requiring the preservation of all voice broker offers and information, including identification (company, person, etc.) of specific offers upon which submission is based).
145. Id. at 35–36 (requiring the preservation of the definition of “reasonable market size” used in the submission); id. at 36 (requiring that submissions note which specify market announcements or effects entered into their assessment and what effects those events were deemed to have had); id. at 35 (requiring Barclays to keep a record of each submission for five years, including the factors that influenced the submission and their relative weight, and a list of the transactions deemed non-representative and therefore not included).
146. Id. at 36 (requiring transactional data to note, inter alia, customer number, interest basis (360/365-day year) and maturity date).
147. Id. at 40 (requiring Barclays to make an interim report to the CFTC about its progress every four months); id. at 41 (requiring the immediate report of any attempted manipulation or improper conduct to the CFTC); id. at 35 (requiring that all of these records be available to the CFTC at any time, without subpoena).
148. Id. at 38 (requiring an internal audit every six months, including random sample of submissions and evidence); id. at 35 (requiring a third-party audit annually).
149. Id. at 42 (requiring Barclays to advocate for the index provider to signal whether rates are based on actual transactions).
150. Interview with John Ewan, supra note 102.
151. Id.
rules whenever changing circumstances made clarification useful, such as whether a government-supported loan’s cost should count when a bank calculated its cost of funds. Ongoing, particularized advice was considered to be more fruitful than extensive upfront rules.

This evaluation was not just based on institutional competence. The BBA’s consultation with its constituents led it to think that greater ex ante specificity in processes was not to be desired. For example, the settlements provide extensive guidance on the content of the submission, requiring the submitting bank to define “reasonable” market size clearly. By contrast, the BBA’s report found that seventy-seven percent of the thirty-one formal responses opposed requiring a fixed and clear account of market size, while only one thought that formalizing the question would be helpful.152 The Wheatley Review came to the same conclusion, declining to stipulate what question LIBOR is set to answer, or how precisely firms must do so.153 While the settlements are intended to improve LIBOR, they require policies that were rejected by the Wheatley Review and the BBA. A measured approach is therefore appropriate, especially when the method of applying these requirements is an ad hoc process of unilateral settlements.154

C. Other Reform Proposals

Transaction-Based Index. Many experts have argued that LIBOR should be replaced by an index that is based only on genuine transaction data, which would be public or publishable if necessary. The Wheatley Review declined to make this recommendation in part because most market participants responding to Wheatley said this was not feasible.155 The BBA came to the same conclusion.156

Eliminate LIBOR. Professor Michael Barr, former Assistant Secretary of the Treasury for Financial Institutions, has said that LIBOR is unnecessary in good markets and untrustworthy in bad markets.157 He has urged regulators to push for the transition to a new index. Yet, the Wheatley

152. See, e.g., BRITISH BANKERS’ ASS’N, BBA LIBOR CONSULTATION, supra note 47.
155. See, e.g., THE WHEATLEY REVIEW, supra note 44, ¶ B.19. Those few participants who supported it did so with designs for a regulatory subsidy addressing the dearth of transactions. Id. app. ¶ B.20 (“for example, by creating special considerations for the inter-bank market, similar to market-maker exemptions (e.g. capital relief, more relaxed liquidity rules, etc.”)).
156. See, e.g., BRITISH BANKERS’ ASS’N, BBA LIBOR CONSULTATION, supra note 47, at 4 (stating that an element of judgment will always be required).
Review concluded that transition to a new index “would pose an unacceptably high risk of significant financial instability, and risk large-scale litigation . . .”158 Similar concerns have been expressed by Ben Bernanke159 and industry representatives.160

Any change to LIBOR’s fundamental operations could create uncertainty and litigation costs, as some parties may seek to invalidate their contracts. These risks are especially high if the new LIBOR generally disadvantages some constituency. While appropriate chain and transition rules could prevent an abrupt change in the rate, a clumsy transition to a new methodology would result in systematically higher or lower rates, with greater or lesser volatility.161 With so many contracts linked to LIBOR — subprime mortgages in Alabama, bond issues by the city of Baltimore, Eurodollar futures contracts traded in Chicago, syndicated loans for infrastructure projects in Pakistan, and interest rate swaps between multinational conglomerates — it is impossible to predict how a new LIBOR could affect all of its users.

Abrupt or not, some participants want relatively little change to LIBOR. They like it for its correlation to bank borrowing costs, and prefer it to other rates.162 Market participants have not voted with their feet, even though there are other rates available. Despite all of the negative publicity, there is no indication of a decline in LIBOR use.163

Government-run LIBOR. Some experts have urged government provision of the LIBOR benchmark or its replacement index.164 It is thought that “a

158. THE WHEATLEY REVIEW, supra note 44, ¶ 1.12. See also id. ¶ B.34 (“Most responses recommended caution with regards to making significant changes to LIBOR, in case it puts existing transactions at risk . . . There was also a concern that step changes in the rate as a consequence of changes to LIBOR may pose legal difficulties.”).


161. See Sarah Lewis, 150 Shades of Libor, FOCUS (Nov. 26, 2012), http://www.trinityllp.com/150-shades-of-libor/ (arguing that reformed LIBOR could lead to higher, more volatile, rates).

162. See, e.g., Rosa M. Abrantes-Metz & David S. Evans, Will the Wheatley Recommendations Fix LI-BOR?, CPI ANTITRUST CHRONICLE, Nov. 2012, at 3 (noting that “market participants . . . presumably have believed that LIBOR was conceptually the best rate to rely on and that it was superior to other readily available benchmarks”); see also BAINBRIDGE, supra note 115, at 40–41 (noting problems with other indices); Rauterberg & Verstein, supra note 40, at 49.

163. See, e.g., The WHEATLEY REVIEW, supra note 44, ¶ 1.13.

164. Id. app. ¶ B.31. Some of the responses to the Wheatley Review’s initial discussion paper argued “that the authorities should take ownership of the rate, including rate-setting . . ..” Id.
government benchmark would not be vulnerable to the sort of manipulation to which LIBOR has been subjected.”165 Yet government manipulation of indices is also possible.166 Indeed, some of the LIBOR manipulation that occurred is alleged to have been at the behest of government officials concerned about policy objectives.167 The basis risk would be higher for a government-run index unless it was based on the same borrowing rates of the current LIBOR,168 in which case it would face the same problems of insufficient data in thin markets as does LIBOR. In any case, parties already have the option to use a government rate if they wish, so it seems unlikely that eliminating a prominent non-governmental option would assist parties. At the same time, the Wheatley Review worries that a publicly-run LIBOR would not adapt to user needs as quickly as does a privately-provided benchmark.169 Wheatley therefore recommended against government control of the index.170

D. Regulatory Pathologies

Closer scrutiny of the record of LIBOR and the BBA during its period of putative “deregulation” provides other important lessons for future reform. One lesson involves the ways in which public regulators can be captured or otherwise rendered powerless. Unsettling evidence has suggested that regulators may have known, tacitly approved, or even recommended manipulation of LIBOR to panel banks.

Some amount of LIBOR manipulation may have been with the blessing of state regulators. Bob Diamond testified that senior British officials had raised concerns that Barclays’ rates were too high and that it would be better to lower them.171 In other correspondence, it was suggested that Paul Tucker, Deputy Governor of the Bank of England, may have been among the regulators blessing the depressed rate. Diamond carried the message to his subordinates. Jerry Del Missier gave the instruction, believing that he was following indirect orders from the Bank of England. As The Economist put it, there is “evidence that can be interpreted as an implicit nod from the Bank of England (and Whitehall mandarins)” to engage in manipulation “to bolster confidence in banks and keep credit

165. BAINBRIDGE, supra note 115, at 39.
166. See, e.g., Rauterberg & Verstein, supra note 40, at 135–40.
167. See discussion infra Part II.D.
168. See, e.g., BAINBRIDGE, supra note 115, at 38.
169. See, e.g., THE WHEATLEY REVIEW, supra note 44, ¶ 3.7.
170. Id. ¶ 1.16.
flowing.” The manipulating banks thus may have had “tacit permission from their regulators.” The impulse behind potential regulatory cooperation in rate manipulation might be understandable as the health of domestic financial institutions during the financial crisis became intertwined with the survival of the real economy.

The Federal Reserve Bank of New York was informed — perhaps in April 2008, perhaps in August of 2007 — that Barclays was underestimating its rates. This resulted in a June 2008 email to Mervyn King, Governor of the Bank of England, from U.S. Secretary of the Treasury Tim Geithner. The ten-point recommendations included in the email were essentially copied from the BBA's own proposal, meaning that the government's only regulatory response was to adopt a regulation from industry. Those proposals ended up being forwarded back to the BBA. That proposal went nowhere, with U.K. officials denying that they had even received such notice.

These disturbing possibilities of regulatory involvement in the provision of inaccurate borrowing quotes for LIBOR suggest that in order to be effective, future public regulation of LIBOR may need to be cordoned off from political interests. This underscores the importance of recognizing the risks of public index provision. Viewing the BBA as a regulator also allows one to see it as a captured regulator, entirely too tolerant of the banks it supervised. This, again, reminds us of the importance and difficulty of protecting public regulators from industry capture.

Regulators of all stripes make mistakes, and our attention must be focused on how to help them make better decisions. Jon Macey opined that “regulators foolishly looked to [LIBOR] to determine the market's perception of the health of big banks.” Will they make the same mistake...

173. Id.
178. See Rauterberg & Verstein, supra note 40.
if given greater control over this space? Will more frequent meetings and more formalistic procedures increase unjustified confidence? Abrantes-Metz and Sokol argue that the LIBOR manipulation was easy to detect: “Had any member bank that set [LIBOR] or any antitrust authority undertaken an econometric screen, they likely would have detected these anomalies . . .”

What causes regulators to decline to use these screens, just as the BBA and its members did, if they can be so effective?

E. The Limits of Private Regulation

Private regulation failed in the OTC space because of steps private regulators chose not to take. However, among those omissions were actions that the private regulators could not have effectuated. While a private regulator can create advantageous circumstances for those who conform to best practices or standardized ways of doing business, such a regulator may have difficulty preventing free-riders from taking advantage of the system to which others contribute. For instance, a transnational private regulator will have little ability to create and enforce intellectual property regimes.

For example, the LIBOR banks incur significant costs to contribute to the rate. Other banks and entities enjoy the use of a widely-known rate, but they may not end up paying for it. A private regulator has only limited powers of exclusion over information. ISDA, for example, provides that its agreements are valid only when printed on paper purchased from ISDA. Whether this self-destruction language actually proves effective, ISDA has found a cumbersome way at least to imply that unauthorized users do not enjoy full benefits.

The BBA can delay access to LIBOR data, but cannot effectively exclude non-paying users given the state of intellectual property in many nations. Without the ability to internalize much of its users’ gains, incentives are skewed for actors subject primarily to transnational private regulators. Sometimes the solution may be to allow the transnational private regulators some limited power over the provision of intellectual property. More often, state actors must focus on those regulatory powers that they are unwilling to delegate to the private regulator.

Further, the LIBOR incident may be “too big to litigate,” because even the panel banks — many of the world’s largest and most important financial institutions — may not have pockets deep enough to actually


181. See Rauterberg & Verstein, supra note 40.
compensate victims for the sums of money that inappropriately changed hands if misleading submissions dramatically altered the LIBOR rates. The structure of “too big to litigate” exists within the OTC derivatives market, at least in part because the central private regulators — ISDA and the BBA — produce valuable intellectual property that structures market transactions (through documentation and reference rates, respectively) as something like public goods. As a result, neither of these organizations, nor the major commercial entities that inform their output, fully internalize anything like the profit stream that their intellectual property could make available. A difficulty results: the production of intellectual property as a public service means that there may not be sufficient funds available to hold culprits accountable if misuse occurs.182

Besides the odd problem of the world’s biggest banks potentially being judgment-proof because LIBOR was largely provided for free, this combination of private regulatory production of public goods has its own particular hazards.

All of the products offered by ISDA — its ubiquitous documentation, legislative efforts, or Credit Derivatives Committees — are produced through a particular kind of information production, which we have called byproduction elsewhere.183 Information is byproduced when it is produced as an incident to some other profit-generating activity.184 For instance, the New York Mercantile Exchange creates the NYMEX financial index and the financial participants on ISDA’s influential committees draft ISDA’s documentation, but neither corporate entity’s principal motivation is the production of that information.185 Rather, derivatives markets participants

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182. These structural features of ISDA documentation and LIBOR are discussed in far greater detail elsewhere. See Rauterberg & Verstein, supra note 40. Stephen Bainbridge has addressed the analysis of intellectual property and incentives therein with some subtlety, but also with several errors. See BAINBRIDGE, supra note 115, at 45–50. For instance, Bainbridge misses that producers of financial intellectual property will need property protection from wherever their fees principally accrue. Bainbridge also fails to recognize that the value of the intellectual property of LIBOR and ISDA documentation could quickly grow stale and useless in the absence of adequate incentives. Unlike a static piece of intellectual property, such as a book or patent, most financial intellectual property is iteratively produced and dynamic, and outdated information can be worse than useless. That intellectual property reform should be supplemented by other reforms — in the LIBOR context or elsewhere — is something that we never deny.

183. See, e.g., Rauterberg & Verstein, supra note 40, at 135–40.


185. See, e.g., N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 497 F.3d 109, 118 (2d Cir. 2007) (discussing incidental production of information by NYMEX).
serve on ISDA’s committees in order to assist in creating the financial infrastructure that enables efficient transacting.

Byproduction has two features that promote the likelihood of byproducts serving as public goods. The first is conceptual: a byproduct is not designed by its creators as a principal profit-making instrument. The second is its corollary: because a byproduct is an incident to some other-directed commercial activity, it is typically low-cost to its producers. For both of these reasons, byproducts will often be provided to third parties as a public good.

Related to these benefits, however, are several structural features of byproduction that make it especially prone to certain regulatory failures. Byproducts often employ private internal firm data (hence, their status as byproducts), making misuse or manipulation of that data more difficult to detect. Byproducts are, by definition, not a primary firm income generator, and sometimes will not be significant income producers at all. If so, then the incentive to maintain the byproduct’s quality and reputation — an incentive that can dilute manipulative impulses — will be absent. Finally, and most importantly, like any form of joint production, byproducts are generated alongside some other product, and creators may have a conflict of interest if the byproduct can impact the primary product’s success.

Byproduction of harmonized regulation can often be an efficient way for markets to be governed, and private regulators can often produce it efficiently. However, this mode suffers from structural limitations, both in terms of incentives and powers. While awareness of private regulation can often relieve the state of regulatory burdens, the state’s interventions may be doubly important where private regulation is unlikely to work well.

F. Assessing the Desirability of Regulatory Abdication

LIBOR manipulation may have created an inefficient distribution of wealth during the period of improper quote provision. Beyond simply wreaking havoc in the absence of regulation, an unregulated LIBOR may have also frustrated government regulation intended to improve the economy in the early days of the Great Recession. In December 2007, the Bank of England cut the base rate fifty basis points to 5.5%. LIBOR fell by only four basis points. As the senior technical manager of one of England’s largest mortgage brokers put it, “The rate cut has not had the usual reaction in the market.” One possible explanation for the unresponsiveness could be that monetary policy efforts — intended to

lower rates to borrowers, improve liquidity, and stimulate the economy — were undermined by false submissions.

Yet, willful unresponsiveness to policy levers implies that the BBA or LIBOR banks had the power to use LIBOR to affect monetary policy by contributing to perceptions of the direction of short-term interest rates, the target of the Bank of England’s policy move. This is consistent with the prior discussion that the state may have delegated some amount of control over interest rates to the BBA. It may be that LIBOR, in taking on a monetary policy function from the state, has done more than allow for interest rate protection.

Consider one problem during the financial crisis and how LIBOR might have been involved: the inability to reduce principal or interest payments to mortgage borrowers. Many borrowers owned homes that were “under water,” and hence worth less than their indebtedness. For such borrowers, it could be rational to default on the loan. For others, the home equity exceeded liability, but they found monthly payments to be untenable. This may have been due to illness or unemployment. Alternatively, they may have been in the practice of obtaining loans with a teaser rate and then refinancing, but when such refinancing had become unavailable, their monthly payments increased to an unaffordable level.

Many experts have argued that borrower and lender alike would benefit from a modification under these circumstances, but modifications were surprisingly rare. Explanations for this scarcity are many. Securitization of loans meant that the initial lender, the loan servicer, and the entity entitled to payment from the borrower were unlikely to be the same entity, raising the complexity of modification. The loan servicers, those best positioned to effect modifications, may have been afraid of liability to owners of the loan for modifications adverse to their interests. It would have been difficult and costly to obtain broad agreement amongst the owners of various tranches of mortgage-backed securities (MBS), whose interests were often adverse. Even where agreement or waiver could be cheaply obtained, loan servicers sometimes had little incentive to propose a workout since they also received payments for their work in addressing defaulted mortgages. Likewise, it would be difficult for a consortium of owners of the reference loan to actively monitor its servicer, allowing the agent a great deal of discretion. Those coordination problems concern the intra-security conflicts attendant to a single mortgage-backed security, but the entire pool of mortgage-backed security owners may have had their own coordination problem. With each defaulted mortgage, home values nearby plummet and other mortgage-backed securities are endangered. MBS investors, as a class, might have benefited if each had taken steps to

189. See supra text accompanying notes 108–09.
modify loans in consideration of the benefit to other MBS investors. But absent some mutual commitment, few investors would take account of this positive externality.

Finally, many owners of mortgage-backed securities would dislike a modification or writedown even if it resulted in fewer costly defaults. Such modifications could designate the security as delinquent in payment, and thus subject to credit downgrading. For regulated entities, such credit downgrades can have severe impacts, such as triggering a need to raise additional capital at a time when capital may not be forthcoming. Such entities would prefer a “non-modification modification,” which is precisely what LIBOR might have allowed.

LIBOR manipulation may have helped solve all of these problems. Under one possible account of LIBOR manipulation, the contributor banks lowered their submissions in order to protect their reputations. If this were true, it would have had the effect of lowering the LIBOR rate. This in turn would have lowered the monthly payments and interest obligations of all borrowers linked to LIBOR, which would have included the vast majority of subprime borrowers, those most at risk of default. Thus, successful downward manipulation of LIBOR could have arguably achieved an efficient result from one perspective—overcoming transactions costs and agency problems, as well as easing the stress on borrowers precisely when they needed relief.

To be sure, not every account of the macro-effect of downward LIBOR manipulation is so glowing. Bainbridge points out that low LIBOR rates would fail to compensate lenders for the risks they assumed in lending and would cause losses to many mutual funds and hedge funds. This is surely right, at least unless and until margins on the rate adjusted to the new norm. But wondering whether this type of transfer helped or harmed the crisis in the long-term is precisely the kind of question we would ask if the Federal Reserve or a regulator had engaged in similar easing or cramdowns.

These considerations are part of a broader normative question as to whether political institutions should sometimes pressure financial entities to engage in behavior that is inefficient or misleading, if it is perceived to have some critical consequence for the economy. The “too big to fail” debate may have an intriguing and analogous phenomenon in the world of financial infrastructure: LIBOR may be “too big to end” and “too big to regulate” simply because its essential importance as a sign of health for a

190. See, e.g., BAINBRIDGE, supra note 115, at 9 (stating that “the misreporting of the LIBOR data may actually have made the banking crisis worse in the long term”). See also Rosa M. Abrantes-Metz et al., Tracking the Libor Rate, 18 APPLIED ECON. LETTERS 893, 897–99 (2011); Rauterberg & Verstein, supra note 40, at 104 (discussing harms of LIBOR manipulation).

191. See, e.g., BAINBRIDGE, supra note 115, at 9.
nation’s banks compromises the capacity of public regulators to govern it objectively and demand accuracy at all times.

G. Market Spaces Without Public or Private Regulation

In light of private regulation, the OTC derivatives market cannot be accurately described as unregulated. Indeed, even in terms of state regulation, the market has long been subject to important forms of oversight and accountability at the entity level. In fact, the vast majority of swaps dealers are regulated at the entity level as either banks or financial firms.\(^{(192)}\)

There are financial markets that come close to being genuinely unregulated — subject to no robust rules of conduct in certain respects — and they look very different from the OTC derivatives markets. Appreciating the real, if limited, role of private regulation highlights the unique character of those markets that have no public, private, or mixed regulation. One interesting example is insider trading in the commodities markets. In the commodities markets, insider trading is, for most purposes, legal. “In contrast to the broad prohibition against insider trading found in the securities laws, insider trading is considered an accepted and integral practice in the commodity futures and derivatives markets.”\(^{(193)}\) While there are perfunctory gestures at adopting different private norms,\(^{(194)}\) the commodities markets simply do not have a domestic or transnational

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192. See Jerry W. Markham, “Confederate Bonds,” “General Custer,” and the Regulation of Derivative Financial Instruments, 25 SETON HALL L. REV. 1 (1994) (indicating, at that time, more than ninety percent of the top fifty entities dealing in interest rate swaps were banks, financial firms, or affiliates already subject to regulation); Testimony Before the Subcomm. on Sec., Ins. and Inv. of the S. Comm. on Banking, Housing, and Urban Affairs, 110th Cong. 11 (July 9, 2008) (statement of Katherine E. Dick, Deputy Comptroller for Credit & Market Risk, Office of the Comptroller of the Currency), available at http://www.occ.treas.gov/ftp/release/2008-79a.pdf (noting that “the vast majority of significant participants in these markets are regulated”). Additionally, OTC swap transactions remained subject to antifraud provisions. See, e.g., EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS § 14.05 (10th ed. 2013); see also Governance, supra note 104 (“As all contributor banks are regulated, they are responsible to their regulators, rather than BBA LIBOR Ltd. or the LPBAUG, for maintaining appropriate procedures for contributing.”).

193. Bradley J. Bondi & Steven D. Lofchie, The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance, 8 N.Y.U. J.L. & BUS. 151, 167 (2011) (“Not only does the Commodity Exchange Act (the ‘CEA’) lack a prohibition against insider trading in commodities (except with respect to certain individuals connected with the regulation, self-regulation, or exchange governance of those markets), but the CEA actually accepts insider trading as a means to facilitate efficient pricing of commodities.”). Front running certainly is illegal, but importantly, it does not encompass anything like the full range of activities prohibited by insider trading laws in the equities markets.

private body that effectively enforces an additional set of rules. This unregulated aspect of the commodities markets highlights their basic economic functions:

[T]he purpose of the commodity futures and derivatives markets is to provide a forum for price discovery and risk management... [and] as a joint report by the SEC and CFTC acknowledges, 'permit hedgers to use their non-public material information to protect themselves against risks to their commodity positions.'... 'it would defeat the market's basic economic function — the hedging of risk — to question whether trading on knowledge of one's own position were permissible.'

Different trading markets can serve dramatically different functions and be served by different rules. While domestic equity markets with broad societal participation may benefit from a regulatory prohibition against the use of insider information, other markets, like the commodity futures markets, exist in part to enable insiders to express their knowledge in trading strategies. Recognizing the significant differences between a market without governmental regulation and one bereft of any regulation whatsoever may well have a valuable lesson to teach as to the function of the unregulated activity for that market.

H. The Domestcity of Transnational Private Regulators

Transnational private regulation can only outrun the state so far. Ultimately, even a transnational private regulator must be subject to at least one (and potentially many) public regulatory regimes. This “home” or domiciliary of the private regulator will often have its status solely as the result of historical contingency, rather than as the result of conscious choice by the regulated, third parties, or coordination by international governments. Nonetheless, the law of this home state will have a tremendously outsized power over what is now a truly transnational regulatory regime. LIBOR provides a compelling example of this concept. The Wheatley Review may be a largely reasonable set of recommendations, but the power of the report and subsequent action by the British government illustrate our structural observation. LIBOR is the

195. Bondi & Lofchie, supra note 193, at 168; see also Elizabeth L. Ritter, The Securitization of Commodities: Crossing a Gold (or Silver) Line in the Sand, 2 BUS. L. BRIEF 7, 8 (2005) (“‘insider trading’ means something very different in the securities world than it means in the commodities world (where it’s actually desirable to have people with inside industry knowledge actively trading the marketplace — that’s how prices are discovered). Consequently, application of securities insider trading laws to commodities trading is entirely inappropriate.”).

196. See, e.g., Bondi & Lofchie, supra note 193, at 168 (explaining that “commodity futures and derivatives markets exist to facilitate trading based on information generated by participants’ inside knowledge”).
world’s short-term interest rate benchmark, and the LIBOR contributor banks include over half of the world’s systemically important financial institutions, less than one-quarter of which are based in the United Kingdom. The United Kingdom also accounts for less than half of the overall market value of global OTC derivatives. Yet, it is the British government that retains the right to reformulate LIBOR, eliminate the BBA’s control over it, and potentially (and disastrously) end LIBOR itself. By accident of history, the U.K. government could have abolished the world’s most prominent interest rate and thrown millions of contracts into disarray.

However, exercising this leverage over international financial markets is risky. OTC derivatives markets are localized in London and New York, and Bainbridge has claimed that aggressive control over LIBOR by the U.K. Treasury or Bank of England would meet with “political hostility” in the United States.

From the perspective of the state under whose jurisdiction a transnational private regulator is headquartered, unique possibilities emerge. This jurisdictional reach provides a state with legal and regulatory power over a transnational private regulator. Control over the home of a transnational private regulator is thus a largely unacknowledged source of international regulatory power. A nation that seeks a certain character of regulation for the world’s derivatives markets may well find that its best chance of achieving harmonized international regulation of that market is through leveraging control over a transnational private regulator.

Professor Robert Wai has characterized the broader reality of which this is just one instance — the necessity of even transnational private entities being subject to some measure of public jurisdiction — as the “touchdown” of transnational business, which seems to have partially “lifted off” from the plane of easy state law governance. Wai cogently outlines several points of touchdown for private entities, including utilization of domestic law regimes to enforce contracts and property rights effectively, such as intellectual property or e-commerce. The necessity of some “touchdown” entails that a public regulator will always

199. See Baker, supra note 9, at 1321.
200. See, e.g., BAINBRIDGE, supra note 115, at 40. Indeed, Bainbridge explicitly worries about “the thorny question of which government would take the lead.” Id.
be able to assert power over financial markets principally regulated by a transnational private regulator. Likewise, Wai makes the point that these “touchdown” points are public regulators’ opportunity to ensure that transnational private entities (and private regulators) are fully responsive to third-party concerns.203

John Biggins has drawn on Wai in the context of ISDA, noting “despite the best efforts of ISDA and the industry to minimize ‘interpretative interference’ through what I term ‘targeted touchdown’ . . . in what are perceived to be ‘derivatives friendly’ jurisdictions, particularly England and New York, such interference has been unavoidable.”204 Biggins emphasizes the potential hazards of public interference in transnational private regulation.

To our suggestion that LIBOR might be bolstered by U.S. property law, Bainbridge says

[i]n the case of LIBOR, however, this suggestion makes no sense . . . . While the U.S. government obviously has an interest in such a globally and systemically important benchmark . . . it nevertheless makes more sense for any new intellectual property protections to come from LIBOR’s home base rather than the U.S.205

Chris Brummer has expressed a similar view:

ultimately the LIBOR scandal is an instance where the UK appears to be the most responsible authority since the British Bankers’ Association, a local organization, provided the unique product in question . . . . London’s Financial Services Authority was not a host, but was instead, for all practical purposes, the home regulator.206

This domestic power allows states to influence, shirk, and avoid responsibility for either. Brummer is right that: “[t]he home regulator won’t get off scot-free [if there is a problem for the host country], but it will escape a lot of the scrutiny.”207

The regulator with the greatest power to affect the transnational private regulation regime may sometimes have the least incentive to do so. If the home state is the beneficiary of the current transnational private regulator, then there is an incentive to allow its misbehavior at the expense of others. Thus, the Federal Reserve of New York may fail to curtail LIBOR

203. Id.
204. Biggins, supra note 54, at 1298.
205. BAINBRIDGE, supra note 115, at 47.
207. Id.
manipulation insofar as the beneficiaries are New York banks and the losers are global swap participants.

The global reach of regulation is exemplified by aspects of UBS’s LIBOR settlement with the CFTC and the U.K. Financial Services Authority. In that case, a U.S. regulator dictated to a Swiss Bank how its Japanese affiliate would communicate with a U.K. trade organization in connection with a benchmark used around the world. Thus, the substantive oversight of the benchmark-setting process is often achieved on a firm-by-firm basis, rather than at a national or industry level, where regulators have traditionally had power over the relevant firms.

I. Noticing Harmony

ISDA and the BBA have achieved massive harmonization of global derivatives norms. Realizing that there is non-state harmonization reveals the possibility that increased harmonization of state regulation may come at the expense of extant private regulatory harmony. It is an open question in any given instance whether that increased harmonization will result in a net increase in regulatory harmonization. For example, Dodd–Frank’s efforts to create regulatory order has diverted transactions from better-harmonized spaces to less-harmonized ones. Under Dodd–Frank, many more OTC swaps must be cleared at registered clearinghouses, and entities that clear swaps through a Derivatives Clearing Organization must be registered Futures Commission Merchants. Cleared swaps rely on futures account agreements rather than ISDA documentation, a fact that has resulted in some surprise and confusion to firms familiar with global swaps practice. These changes resulted in a fragmentation of the practical order. This disharmony has since been managed by private regulators. But policymakers must be aware that efforts to increase state regulatory harmony, even when they succeed on their own terms, may decrease harmonization simpliciter.


211. Id. at 5. FIA and ISDA published a standard form addendum to futures clearing agreements to address cleared swaps. Id.
CONCLUSION

The ambition of this Article was to explore the implications of a change in perspective on global derivatives regulation. The stage was set by reviewing the scholarly literature that recognizes authoritative governance of market activity, which is produced by private actors, as a genuine form of regulation. We then analyzed the BBA and ISDA as transnational private regulators that have produced coordinated, pervasive, and harmonizing norms for OTC derivatives. We suggested that this picture is more accurate than the history of OTC derivatives that has often been promoted in the media and scholarly literature, in which OTC derivatives were seen as subject to virtually no regulation at all. From this perspective, we articulated the many implications for future regulatory reform, including recognizing preexisting regulatory harmony, appreciating the extent to which trade-offs involved in regulatory proposals have already been considered, and muting the urge to willy-nilly regulate in times of crisis. With these tools, there can be modest hope for superior future governance of OTC derivatives.