SECURITIZATION TEN YEARS AFTER THE FINANCIAL CRISIS: AN OVERVIEW

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I. Introduction

This symposium issue[1] examines securitization a decade after the 2008 financial crisis. Prior to the crisis, securitization was one of America's dominant means of financing.[2] Many observers, however, blamed securitization for causing the crisis, sparking regulation that arguably has been overly restrictive and, in some cases, even punitive.[3] Where are we now?

II. What Is Securitization?

Securitization enables a company to raise financing without borrowing from a bank (it therefore "disintermediates," or removes, the

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[1] Symposium, *Securitization: Ten Years after the Financial Crisis*, 37 REV. BANKING & FIN. L. 757–927 (2018). Articles are authored by Tamar Frankel; Jason H.P. Kravitt, Sairah Burki & Stacy S. Lee; Jonathan C. Lipson; and Matthew C. Turk.

[2] Exclusion from the Definition of Investment Company for Structured Financings, 57 Fed. Reg. 56,248 (Nov. 27, 1992) (to be codified at 17 C.F.R. pt. 270).

[3] *See, e.g.*, Ronald S. Borod, *Belling the Cat: Taming the Securitization Beast Without Killing It*, 31 REV. BANKING & FIN. L. 643, 644–47 (2012).

need for banks as financial intermediaries)[4] and without issuing securities whose pricing is dependent on the creditworthiness of the company.[5] In a highly simplified example,[6] a company will sell certain of its rights to payment (financial assets), such as loans or accounts receivable, to a "bankruptcy remote" special purpose entity (SPE, sometimes called a special purpose vehicle or SPV). The SPE will issue securities[7] to investors, repayable from collections of cash on the financial assets. The investors thus look to the financial assets, not to the company itself, for repayment.[8]

In 2007, the volume of securities issued in securitization transactions approximated $6.44 trillion in the United States[9] and €595 billion in Europe.[10] The financial crisis caused these levels to decline precipitously.[11] By 2015, for example, the volume of U.S. securitization

[4] Steven L. Schwarcz, *The Governance Structure of Shadow Banking: Rethinking Assumptions about Limited Liability*, 90 NOTRE DAME L. REV. 1, 2 (2014) (explaining how disintermediation is characteristic of the so-called shadow banking system).
[5] Jonathan C. Lipson, *Re: Defining Securitization*, 85 S. CAL. L. REV. 1229, 1239–45 (2012) (identifying the elements and functions of securitization).
[6] For a more nuanced examination of securitization and its forms, compare *id*. at 1271–80 (arguing for a redefinition of securitization), with Steven L. Schwarcz, *What Is Securitization? And for What Purpose?*, 85 S. CAL. L. REV. 1283, 1288–99 (2012) (addressing issues with Lipson's proposed definition of securitization).
[7] These debt securities are often called asset-backed securities (ABS). When specifically backed by financial assets consisting of mortgage loans, these debt securities are commonly called mortgage-backed securities (MBS). Schwarcz, *supra* note 6, at 1292.
[8] *Id*. at 1293.
[9] SEC. INDUS. & FIN. MKTS. ASS'N, Vol. 111, No. 2, RESEARCH QUARTERLY 2 (2008), www.sifma.org/wp-content/uploads/2017/05/us-research-quarterly-2007-q4.pdf [https://perma.cc/25KD-RHXY].
[10] ASS'N OF FIN. MKTS. IN EUROPE, SECURITIZATION DATA REPORT: EUROPEAN STRUCTURED FINANCE FOR Q1 2016 7 (2016), https://www.afme.eu/globalassets/downloads/data/securitisation/2016/afme-stn-securitisation-data-report-q1-20161-v3.pdf [https://perma.cc/J2TP-BCJW].
[11] *See id.* (detailing the total issuance of securities in Europe and the United States from 2006 until 2016).

issuance had collapsed to $1.9 trillion,[12] and the volume of European securitization issuance had declined to €214 billion.[13]

While securitization is still under suspicion in the United States, it is increasingly used as a financial tool abroad.[14] One of the key goals of the European Commission's proposed Capital Markets Union, for example, is to further facilitate securitization as a source of capital market financing, as a viable alternative to bank-based finance for companies operating in the European Union.[15] Because financial assets can be easier to understand and value, if not safer, than the business and risks associated with operating a company, securitization offers companies an efficient and usually lower-cost funding source.[16] Authors Kravitt, Burki, and Lee add that regulators "generally acknowledge that, when utilized

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[12] Press Release, Sec. Indus. & Fin. Mkts. Ass'n, SIFMA Issues 2015 Securitization Year in Review (Apr. 7, 2016), http://www.sifma.org/newsroom/2016/sifma-issues-2015-securitization-year-in-review/ [https://perma.cc/ 4XNA-BHZA].

[13] ASS'N OF FIN. MKTS. IN EUROPE, *supra* note 10, at 7.

[14] *Securitisation: It's Back*, ECONOMIST, Jan. 11, 2014, at 12 (discussing the benefits of increased securitization for Europe).

[15] The Capital Markets Union initiative includes a range of reforms of various sectors of the European financial system to help build an integrated European capital market. *See Commission Staff Working Document: Economic Analysis*, at 8–20, COM (2015) 468 final (Sept. 30, 2015), http://edz.bib.uni-mannheim.de/edz/pdf/swd/2015/swd-2015-0183-en.pdf [https://perma.cc/982L-A2U4] (discussing the benefits of decreased reliance on bank-based finance). The key objectives of the Capital Markets Union are to improve access to financing for European businesses, to increase and diversify sources of funding from investors in the EU and all over the world, and to make the fragmented European markets more integrated, efficient and effective. *See Commission Green Paper on Building a Capital Markets Union*, at 4, COM (2015) 63 final (Feb. 18, 2015), http://ec.europa.eu/ finance/consultations/2015/capital-markets-union/docs/green-paper_en.pdf [https://perma.cc/WRR9-5KA6].

[16] Securities backed by financial assets are usually more creditworthy, and thus can be sold at a lower interest rate, than securities issued directly by the originators. STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION § 1:3 (3d ed. & Supps. 2010) (explaining that, except for the most highly rated issuers, securities issued in securitization transactions are typically more highly rated than the issuer's own debt securities and, even where the latter are more highly rated, securitization provides additional market flexibility to obtain financing).

properly and wisely, securitization is an important source of funding" for the real economy.[17]

III. Fixing Securitization's Abuses

There is little doubt certain abuses of securitization were causal factors in the financial crisis.[18] The U.S. regulatory responses to securitization are primarily embodied in the Dodd-Frank Act and partially in U.S. implementation of the Basel III capital requirements.[19] I have argued these responses conceptually fall into four categories: (i) increasing disclosure; (ii) requiring risk-retention; (iii) reforming rating agencies; and (iv) imposing capital requirements.[20] The European regulatory responses conceptually fall into five categories: the same four indicated above, as well as requiring certain due diligence.[21]

The symposium papers largely concur that these regulatory responses inadequately address securitization's abuses. Kravitt, Burki, and Lee argue, for example, the "post-crisis securitization industry is subject to an extensive patchwork of rules, many of which . . . don't address the underlying causes of the crisis."[22] I agree, except insofar as I will discuss how the EU's simple, transparent, and standardized (STS) framework addresses the problem of complexity.[23]

Otherwise, these regulatory responses tend to miss the mark.[24] For example, one of the primary criticisms of securitization has been of its originate-to-distribute (OTD) model of making and collecting (pooling) loans to securitize, thereby arguably creating moral hazard because the makers (originators) of the loans do not hold onto, and thus do not

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[17] *See* Jason H.P. Kravitt et al., *Some Thoughts on Financial Regulatory Reform Adopted in Response to the Financial Crisis of 2008/9*, 37 REV. BANKING & FIN. L. 779, 785 (2018).
[18] Mathew C. Turk, *Regulation by Rulemaking or by Settlement?*, 37 REV. BANKING & FIN. L. 861, 870–74 (2018) (discussing the securitization of residential mortgages as a primary cause of the 2008 crisis).
[19] *See id*. at 876 (reviewing the Dodd-Frank reforms); Kravitt et al., *supra* note 17, at 789–99 (describing the Basel III framework).
[20] Steven L. Schwarcz, *A Global Perspective on Securitised Debt*, *in* CAPITAL MARKETS UNION IN EUROPE (Guido Ferrarini et al. eds.) (2018).
[21] *Id*.
[22] Kravitt et al., *supra* note 17, at 781–82.
[23] *See infra* notes 50–55 and accompanying text.
[24] *See, e.g.*, Turk, *supra* note 18, at 901–10.

necessarily bear, risk for the ultimate performance of the loans.[25] To reduce moral hazard, the Dodd-Frank Act requires lenders to retain an unhedged portion—ordinarily at least 5 percent—of the credit risk on the loans they sell into securitization transactions.[26] By compelling lenders to have "skin in the game," Congress believed lenders would act more prudently when originating loans.[27]

Symposium author Turk uses that risk-retention example to argue that although Dodd-Frank-Act and its associated rulemakings appear to impose "a comprehensive new regulatory framework for securitization," the "real-world effect" of the framework is de minimis.[28] Contrary to the premise that lenders retained minimal risk on the loans they sold into securitization transactions, he observes," [i]n reality, it was common practice for the bank sponsoring a securitization to retain a substantial amount of the . . . risk" on those loans.[29] In principle,[30] I agree with Professor Turk's observation to the extent it concerns risk-retention:

> In my experience—which is confirmed by market information—sophisticated purchasers have generally, even before the financial crisis, required sellers of loans to retain skin in the game, or the equivalent. This not only helps to realign incentives between the parties but also provides the fundamental solution to the "lemons" problem of asymmetric information . . . . These observations cast doubt on the need for regulatory intervention to

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[25] Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 256 (2009).

[26] Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78o–11 (2012). Section 941 of the Dodd-Frank Act requires this risk retention for all but the highest quality loans that originators sell. Originators and other sellers of Qualified Residential Mortgage loans—a designation based on a borrower's ability to repay the mortgage loan at origination, verification of the borrower's income, and certain other relevant considerations—are not subject to risk-retention requirements.

[27] Steven L. Schwarcz, *Secured Transactions and Financial Stability: Regulatory Challenges*, 81 L. & CONTEMP. PROBS. 4 (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3033052.

[28] Turk, *supra* note 18, at 880, 901.

[29] *Id*. at 880 (highlighting "the fact that the entire [risk retention] rule rests on a mistaken premise").

[30] I note, technically, that risk retention on originated loans and on loans sold by a sponsor into a securitization transaction can be different if the sponsor is not the loan originator.

> attempt to correct a market failure that the market has already addressed.[31]

Professor Turk further explains "sponsor banks opted to hold onto part of the risk from their securitizations for the specific purpose of signaling the quality of the securities they were issuing to investors."[32] I have argued that this signaling inadvertently created a unique informational market failure, one in which the failure is not asymmetric information, but mutual misinformation caused by complexity such that neither the sponsor of the securitization nor the investors fully understand the risks associated with the underlying financial assets.[33]

Symposium author Lipson makes an interesting and novel argument to further explain the failure of the OTD model.[34] He contends it was caused by social distance—a variance in the levels of trust and reciprocity between, on one hand, borrowers of residential mortgage loans and, on the other hand, investors in the securities backed by those mortgage loans (the residential mortgage-backed securities, or RMBS) and servicers of those loans.[35] He also argues how to close this social distance.[36] We do not have sufficient empirical evidence, however, to know the extent to which social distance explains the failure of the OTD model. It appears likely, however, it could help to explain at least part of that failure: inefficiencies and misunderstandings created by conflicting interests of individual home mortgagors and institutional collection agents hired to enforce defaulted and delinquent mortgage loans for the benefit of large RMBS investors.[37]

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[31] Schwarcz, *supra* note 27, at 4–5.
[32] Turk, *supra* note 18, at 882.
[33] Schwarcz, *supra* note 27, at 6–8; *cf. infra* notes 50–55 and accompanying text.
[34] Jonathan C. Lipson, *Securitization and Social Distance*, 37 REV. BANKING & FIN. L. 827, 829 (2018).
[35] *Id*. at 830–31 (defining the concept of social distance).
[36] *Id*. at 855 ("Closing the social distance created by the legal distance of RMBS securitization requires four things: (i) timely information exchange; (ii) communication; (iii) authority to act; and (iv) a mechanism to formally recognize the resolution.").
[37] *See id*. at 846–55 (arguing RMBS contract terms kept borrowers and loan servicers apart at times when they could have resolved a default through negotiations and avoided inefficient judicial foreclosures). *But see* Jeff Holt, *A Summary of the Primary Causes of the Housing Bubble and the Resulting Credit Crisis: A Non-Technical Paper*, 8 J. BUS. INQUIRY 120, 120–29 (2009) (finding loose lending standards and poor underwriting practices before a social relationship existed between the parties were a primary cause of the housing

Finally, while Professor Turk concurs post-crisis regulation of securitization has accomplished little, he argues administrative enforcement actions against securitization sponsors, which resulted in multi-billion dollar settlements, have actually accomplished some real reform.[38] He maintains that these settlements, considered as a whole, create a "*de facto* legal prohibition against misconduct in securitization markets, roughly equivalent to a negligence standard."[39] Although some scholars see these settlements merely as the cost of doing business,[40] the settlements no doubt have had some impact in making securitization sponsors more careful.[41] My concern with these enforcement actions and resulting settlements, however, is two-fold. First, to the extent securitization sponsors in fact acted illegally, "firms themselves are second-best targets of deterrence. Targeting managers in their personal capacity is thus widely viewed as a greater, if not also a more optimal, deterrent than firm-level liability."[42] Second, as Turk himself acknowledges, many of these settlements were compelled by reputational and politically induced duress on securitization sponsors that in fact acted legally; they therefore create more of a strict liability than a negligence standard.[43] Imposing ex post strict liability for legal actions is inconsistent with "the American legal system's commitment to 'rule of law' values."[44]

IV. Rebuilding Confidence

The revival of securitization will depend on rebuilding confidence.[45] This, in turn, depends on developing a regulatory framework that maximizes securitization's benefits and minimizes potential for harm.[46]

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bubble, thus suggesting social distance appears much less likely to explain origination-related failures of the OTD model).

[38] Turk, *supra* note 18, at 912–16 (referring to this administrative lawmaking as "regulation by settlement").

[39] *Id*. at 925.

[40] *See* Steven L. Schwarcz, *Excessive Corporate Risk-Taking and the Decline of Personal Blame*, 65 EMORY L.J. 533, 537–38 (2015) (discussing these views of Professors Anat Admati and John Coffee).

[41] *Id*. at 537.

[42] *Id*. at 536.

[43] Turk, *supra* note 18, at 918–19 (discussing a strict liability standard).

[44] Turk himself recognizes this conundrum. *See id*. at 912.

[45] *Cf.* Miguel Segoviano et al., *Reviving Securitization*, *in* FINANCIAL STABILITY REVIEW 51, 52 (Banque de Fr. ed., 19th ed. 2015).

[46] *Id*. at 57.

To achieve this, the United States could learn from the European Union.[47] The EU is creating a regulatory framework favouring simple, transparent, and standardized (STS) securitization.[48] The STS framework is specifically designed to increase investor confidence in securitization.[49]

The STS framework addresses the issue of complexity, one of the two fundamental causes of market failures (the other being change) that apply distinctively to securitization.[50] By simplifying securitization structures, it should help to make disclosure more effective, in contrast to disclosure's occasional failure in much more highly complex securitization transactions.[51]

The STS framework also directly discourages complexity.[52] Prior to the financial crisis, securities issued in many securitization transactions

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[47] Christian Noyer, *The Financing of the Economy in the Post-Crisis Period: Challenges and Risks for Financial* Stability, *in* FINANCIAL STABILITY REVIEW 7, 9 (Banque de Fr. ed., 19th ed. 2015) (explaining how the European Union is in the process of implementing initiatives to revive the securitisation market).

[48] *Id*.

[49] *See Commission First Status Report on Capital Markets Union*, at 2–3, 21, SWD (2016) 147 final (Apr. 25, 2016), https://ec.europa.eu/info/system/files/cmu-first-status-report_en.pdf [https://perma.cc/MY8F-J84Z]. The STS framework includes requiring: (i) a true sale or similar transfer of the underlying financial assets; (ii) those financial assets must meet simplicity requirements, including homogeneity, creditworthiness (e.g., not in default, not from insolvent obligors or obligors with adverse credit history), and not constituting already securitized financial assets; (iii) interest-rate and exchange-rate risks must be hedged; (iv) other than to effect such hedging, the financial assets cannot be supported by derivatives, as would occur in a "synthetic" securitization; (v) transaction documents must clearly specify obligations, duties, and responsibilities of the servicer and back-up servicer to ensure efficient and continuing servicing of the financial assets and must also include clear provisions facilitating the timely resolution of conflicts among different classes of investors; (vi) and investors must receive a cash-flow model of anticipated collections on the financial assets, supported by information on historical default, delinquency, and loss performance for substantially similar financial assets to those being securitized. Also, a sample of the financial assets may be subject to external verification by an independent party. *See* Schwarcz, *supra* note 20.

[50] Steven L. Schwarcz, *Securitization and Post-Crisis Financial Regulation*, 102 CORNELL L. REV. ONLINE 115, 131–33 (2016).

[51] Steven L. Schwarcz, *Disclosure's Failure in the Subprime Mortgage Crisis*, 3 UTAH L. REV. 1109, 1113 (2008) ("The complexity of the transactions, however, caused the disclosures to be insufficient, cutting into the very heart of federal securities regulation . . . .").

[52] Schwarcz, *supra* note 50, at 121.

were "re-securitized" in complex and highly leveraged "ABS CDO" transactions.[53] Repayment of the re-securitized securities issued in these transactions was so "extremely sensitive to cash-flow variations" that, when "the cash-flow assumptions turned out to be wrong, many of these [securities] defaulted or were downgraded."[54] That, in turn, sparked a loss of confidence not only in securitization generally but also in the value of credit ratings and of all highly rated debt securities.[55] The STS framework strongly disincentivizes these types of complex transactions.[56]

More may be needed, however, to address the second market failure—change.[57] Although the financial system is constantly changing, financial regulation is normally tethered to the distinctive design and structure of financial firms, markets, and products in existence when the regulation is promulgated.[58] Without continuous monitoring and updating—which rarely occurs because it is costly and subject to political interference—present-day regulation can quickly become outmoded.[59] Prior to the financial crisis, for example, the entrenched legacy of bank regulation obscured the fact that securitization had replaced a significant portion of the need for bank financing.[60] Kravitt, Burki, and Lee concur "[o]nly continuous evaluation will allow all market participants to gain a deeper understanding of the financial system . . . ."[61]

Securitization itself is particularly prone to change.[62] Although the Dodd-Frank Act focuses on regulating mortgage-loan securitization,[63]

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[53] The term ABS CDO refers to a securitization of collateralized debt obligations. Schwarcz, *supra* note 7, at 1285.
[54] *Id*.
[55] *Id*. at 1285–86 (using Enron as an example).
[56] *See* Schwarcz, *supra* note 50, at 134–36.
[57] *Id*. at 137 (arguing that regulators cannot predict the types of assets that will securitized in the future).
[58] *See generally* Steven L. Schwarcz, *Regulating Financial Change: A Functional Approach*, 100 MINN. L. REV. 1441, 1442 (2016) (discussing the need to regulate financial change).
[59] *Id*. at 1443.
[60] *Id*. at 1443–44 ("[T]he pre-crisis financial regulatory framework . . . failed to adequately address a collapsing financial system in which the majority of funding had become non-bank intermediated."); *cf.* Schwarcz, *supra* note 5, at 2.
[61] Kravitt et al., *supra* note 17, at 784.
[62] *See also id*. (explaining how regulation requires "constant reevaluation" due to changes in securitization).
[63] The Dodd-Frank Act focuses on a range of mortgage lending laws, including ability-to-repay rules, high-cost mortgage and homeownership counselling, modifications to mortgage servicing rules, modifications to the Equal Credit

virtually any type of financial asset—of which mortgage loans are but one example—can be securitized.[64] Regulators simply cannot predict and attempt to prevent all future financial problems.[65] To illustrate this, compare how two very different types of financial assets were at the core of both the financial crisis and the Great Depression.

> Prior to the Depression, many banks engaged in margin lending to risky borrowers, securing the loans by shares of stock that the borrowers purchased with the loan proceeds. The value of the stock collateral started out being at least equal to the amount of the loan, and banks assumed that the stock market, which had been continuously rising in value for some years, would continue to rise, or at least not decline, in value. At the time, that assumption was viewed as reasonable. In August 1929, however, there was a (relatively) modest decline in stock prices, causing some of these margin loans to become under-collateralized. Some banks that were heavily engaged in margin lending then lost so much money on the loans that they themselves became unable to pay their debts . . . . These debts consisted not only of amounts due depositors but, more systemically significant, debts due to other banks. As a result, defaults by these margin-lending banks on their obligations to other banks often adversely affected the other banks' ability to meet their obligations to yet other banks, and "so on down the chain of banks and beyond."[66]

This almost perfectly paralleled the problem with "subprime" mortgage loans at the heart of the financial crisis. Banks and other lenders

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Opportunity Act, appraisals under the Truth in Lending Act, and loan originator compensation structures. *See* CONSUMER FIN. PROT. BUREAU, THE CFPB DODD-FRANK MORTGAGE RULES READINESS GUIDE (2015), http://files.consumerfinance.gov/f/201509_cfpb_readiness-guide_mortgage-implementation.pdf [https://perma.cc/G6FT-DQX7]

[64] Schwarcz, *supra* note 6, at 1295–98.

[65] Schwarcz, *supra* note 58, at 1442–45.

[66] Iman Anabtawi & Steven L. Schwarcz, *Regulating Systemic Risk: Towards an Analytical Framework*, 86 NOTRE DAME L. REV. 1349, 1356–57 (2011) (evaluating the types of financial assets at issue during the Great Depression and 2008 financial crisis).

loaned money to risky borrowers to enable them to buy homes.[67] The borrowers secured the loans by mortgaging the homes they purchased with the loan proceeds.[68] The value of the homes started out being at least equal to the amount of the loan, and lenders assumed home prices, which had been continuously rising for some years, would continue to rise, or at least not decline, in value—an assumption that, at the time, was viewed as reasonable.[69] In 2007, however, a decline in the housing market caused some of these mortgage loans to become under-collateralized, triggering the wave of defaults that started the financial crisis.[70]

Although one might argue that lenders should have seen that possibility, two flaws obscured their sight: first, it is human nature for people to assess the present by their experience of the recent past;[71] second, political pressure by Congress on banks and mortgage lenders induced them to make subprime mortgage loans to facilitate home ownership.[72] Another impediment is that financial change can evolve incrementally, preventing recognition of increasing risk.[73]

V. Lessons

Traditional ex ante regulation designed to prevent a financial failure is necessary, but inherently insufficient.[74] Complexity and change

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[67] *Id*.
[68] *Id*.
[69] *Id*. at 1359–60 ("These securities maintained their value so long as home prices appreciated, as they had been doing for decades and as most market observers assumed would continue.").
[70] *Id*. at 1360.
[71] *See, e.g.*, Steven L. Schwarcz, *Regulating Complacency: Human Limitations and Legal Efficacy*, 93 NOTRE DAME L. REV. 1073, 1079 (2018) (explaining availability bias).
[72] *See* Peter J. Wallison, *Dissenting Statement* to FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 441, 452–53 (2011) (discussing how political pressure led Fannie Mae and Freddie Mac to lower mortgage underwriting standards).
[73] Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657, 686–87 (2012) (claiming the "incremental nature of the processes through which financial innovations become highly complex is critical to understanding how that complexity develops and why that complexity itself may not be subjected to close scrutiny").
[74] Schwarcz, *supra* note 58, at 1448 (describing how ex ante regulation often fails since it is difficult to predict the cause of the next financial crisis).

make it difficult if not impossible to predict, and thus avert, failures.[75] Ex ante regulation of securitization thus should be supplemented by ex post regulation to mitigate the consequences of inevitable financial failures.[76]

Symposium author Frankel suggests another lesson about regulating securitization.[77] In the past, she argued the law of cross-border securitization "is developed and established by the lawyers who structure these transactions," referring to this as *lex Juris*.[78] She has also discussed how *lex Juris* helped standardize the laws regarding securitization, such as laws regarding bankruptcy remoteness of asset transfers.[79] In this symposium edition, Professor Frankel provides a contrasting discussion of the EU's STS framework.[80] Asking who should regulate, she argues that the government should regulate "on a higher scale" and lawyers should regulate on the lower scale of "individual cases."[81]

I would answer the question of who should regulate slightly differently. Lawyers, sometimes aided by their clients, normally make transaction-specific rules, which govern how securitization and other financial transactions operate.[82] These rules are intended to maximize transactional efficiency, thereby benefiting the parties to the transaction.[83] Lawyers and their clients are not necessarily motivated, however, to make rules that constrain externalities.[84] Therefore, governments should

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[75] *See* Schwarcz, *supra* note 50, at 134–38.

[76] *See* Iman Anabtawi & Steven L. Schwarcz, *Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure*, 92 TEX. L. REV. 75 (2013). In a broader financial context, I have also analyzed how regulation could better address change by regulating finance functions, which remain more constant over time. *See* Schwarcz, *supra* note 58, at 1441.

[77] Tamar Frankel, *The Law of Cross-Border Securitization: From Lex Juris to Codes of Law*, 37 REV. BANKING & FIN. L. 771 (2018).

[78] Tamar Frankel, *The Law of Cross-Border Securitization: Lex Juris*, 12 DUKE J. COMP. & INT'L L. 475, 480 (2002).

[79] *Id.* at 479–80.

[80] Frankel, *supra* note 77, at 777–78.

[81] *Id*. at 778.

[82] Frankel, *supra* note 78, at 480 ("Lawyers and other professionals, such as investment bankers, create many innovative structures on which the success of the transactions may depend.").

[83] Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 500–02 (2007) (arguing lawyers create unique transaction-specific rules to minimize regulatory costs, which improves overall efficiency).

[84] *See* Steven L. Schwarcz, *Misalignment: Corporate Risk-Taking and Public Duty*, 92 NOTRE DAME L. REV. 1, 35–36 (2016) (distinguishing transactional efficiency and societal efficiency); *cf.* Steven L. Schwarcz, *Too Big to Fool:*

make those rules to protect society,[85] such as the EU's promulgation of the STS framework.

Moral Hazard, Bailouts, and Corporate Responsibility, 102 MINN. L. REV. 761, 770–71 (2017) (showing systemic harm can be externalized onto market participants, the government, and the public).

[85] Schwarcz, *supra* note 84, at 5 (arguing "corporate governance law should, and feasibly could, take into account risk-taking that causes systemic externalities").