2014

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Shadowy Banking: Theft By Safety Net

Edward J. Kane†

Shadowy Banking is financial activity that is engineered to extract implicit subsidies from government safety nets. It substitutes innovative corporate entities and products for activities that could be performed more straightforwardly within a traditional banking firm. The shadows obscure organizational forms and transaction strategies that circumvent regulatory restraints and extract subsidies by regulation-induced innovation. Because government support kicks in when private equity is exhausted, safety nets are implicit contracts that offer loss-absorbing equity capital from taxpayers. Unlike lenders and insurers who assess and absorb risk, taxpayers accept Knightian (i.e., unquantifiable) uncertainty. As coerced equity investors whose liability is unlimited, taxpayers would be better served if information systems and corporate law were revised to give them at least the same safeguards and rights of disclosure that minority shareholders enjoy.

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Economists typically define shadow banking as "financial activities occurring outside the regulated banking sector." This paper introduces a broader term, "shadowy banking," to focus on the ways in which even regulated banking organizations operate outside the boundaries of existing rules and control procedures.

The paper uses the framework provided by the Regulatory Dialectic to argue that shadowy banking is the inevitable yin to regulation’s and taxation’s intended yang. This is because lobbying pressure, privacy protections, and differences in private and governmental compensation schemes make it easier and more rewarding for managers of financial institutions to circumvent the rules than for regulators and tax authorities to come to grips with innovative forms of circumvention.

How we characterize an explicit or implicit financial contract has important legal and ethical consequences for its counterparties. A corporation is a contracting mechanism for sharing risks and returns. Safety-net guarantees create an unsustainable disequilibrium between taxpayer and corporate property rights in lightly capitalized firms that are economically, politically or administratively difficult to fail and unwind (DFU). To rebalance these rights requires introducing civil and criminal sanctions that would incentivize managers of DFU firms to give taxpayer-guarantors a fairer deal.

3. See Edward J. Kane, Accelerating Inflation, Technological Innovation, and the Decreasing Effectiveness of Banking Regulation, 36 J. OF FIN. 355, 355 (May 1981) (The concept of "regulatory dialectic... treats [the] political processes of regulation and economic processes of regulatee avoidance as opposing forces that ... adapt continually to each other. This alternating adaptation evolves as a series of lagged responses, with regulators and regulatees seeking to maximize their own objectives, conditional on how they perceive the opposing party to behave. Market institutions and politically imposed restraints reshape themselves in a Hegelian manner, simultaneously resolving and renewing an endless series of conflicts between economic and political power ... Our dialectical approach emphasizes the tensions, paradoxes, and ambiguities inherent in efforts for regulators either to impose restraints on persons and institutions that function in what is otherwise a free society or to let markets impose extraordinary hardships on groups that are politically strong."). See generally Edward J. Kane, Policy Implications of Structural Changes in Financial Markets, 73 AM. ECON. REV. 96-100 (May 1983).
Finding a way to reduce managerial incentives to exploit government guarantees is the problem. To do this, the supervisory process needs to be re-engineered to surface and price material information and actions by private counterparties.

The Dodd-Frank Act and Basel III presume that it is sufficient to place new balance-sheet and reporting constraints on financial firms, without altering DFU firms' legal right to pursue ways of shifting risk to taxpayers through country safety nets. But over time opportunities for industry disinformation, regulatory lags, and supervisory incentive conflict are bound to reduce the effectiveness of capital constraints and scenario-driven stress tests. The paper warns that safety-net subsidies generated by swaps that substitute for traditional financial contracts are especially difficult to monitor in timely and effective fashion. A round of failures in swaps transactions could expand safety nets by threatening the ability of the pension and insurance industries to keep the promises on which their customers rely.

To protect their citizenry from these dangers, governments need to develop ways to identify shadowy arrangements promptly and to limit access to country safety nets more effectively. To generate the information flows and incentives to do this, my analysis indicates that society must impose and enforce explicit fiduciary duties of loyalty, competence, and care to taxpayers on financiers, politicians, regulators, and credit-rating firms. I believe that the best way to do this is to acknowledge and service the synthetic equity stake that safety nets create for taxpayers in protected firms. The paper explains that this loss-absorbing equity stake may be understood as an implicit compound option: a contract that obligates taxpayers to accept a call that reduces returns on their position in firms when the firms' insolvency is cured and a put that uses taxpayers' resources to keep distressed and even zombie firms in business. The exercise of both options is adversely constrained today by lobbying pressure that makes the managerial norm of maximizing shareholder value inappropriate for difficult-to-fail shadowy institutions.

The paper has eight sections. Sections 1 and 2 explain the term shadowy banking and root its existence in the dialectics of safety-net arbitrage. Section 3 explains swap contracts. The next section reviews the role of safety-net arbitrage in the crisis of 2008. Sections 5 and 6 classify shadowy activities and explain how they relate to financial engineering, swaps, and the pace of technological change. Section 7 discusses the implicit put and call positions that create taxpayers' synthetic equity stake in whatever firms a country's safety net protects and explains that post-crisis reforms perpetuate the incentive

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4. A zombie institution is a firm that has an economic net worth of less than zero, but continues to operate because its ability to repay and service its debts is shored up by implicit or explicit government credit support. See Edward J. Kane, Incentive Roots of the Securitization Crisis and Its Early Mismanagement, 26 YALE J. ON REG. 405, 406 (2009).
conflict that tempts financiers to steal taxpayer resources via the safety net. Section 8 lays out some policy implications of the paper.

I. What is Shadowy Banking?

Paul McCulley and Gary Gorton have used the idea of banking in dark places as a clever way to clarify and extend the meaning of the even more puzzling term "nonbank bank."\(^5\) A shadow bank is an institution or bank-sponsored special-purpose vehicle that has persuaded its customers that its liabilities can be redeemed *de facto* at par without delay (or can be traded *as if* they will be executed at par without fail at maturity) even though they are not *formally* protected by government guarantees. My title adds a "y" and an "ing" to their term to stretch the shadows to include not just firms like money-market funds and government-sponsored enterprises, but *instruments* such as swaps, repurchase agreements, futures contracts and AAA securitizations that may trade for substantial periods of time as if they carried zero performance risk.

Of course, any instrument can trade this way if it is believed that well-funded national or supranational authorities will be afraid *not* to extend the safety net to absorb all or most of the losses its holders might suffer. The perception of a governmental "rescue propensity" is a key element of shadowy banking. It permits aggressive managements to back risky positions (e.g., in money-market funds) with the *ex ante* value of their firm's contingent safety-net support (i.e., equity capital extracted from hapless national or foreign taxpayers) rather than stockholder equity.

"Shadowy" is meant to encompass any effort to play upon this propensity to extract implicit (i.e., confidently conjectured) guarantees from a nation's financial safety net without informing taxpayers about their exposure to loss and without adequately compensating them for the value of the contingent equity support that authorities' rescue propensity imbeds in the shadowy entity's liability structure. Although most macroeconomists stubbornly portray the taxpayer side of such claims as an externality, it is more accurately a central part of the industry's implicit contract for regulatory services: a market-completing "taxpayer put" which the industry understands as a government-

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5. Paul A. McCulley, *PIMCO Global Central Bank Focus: Teton Reflections*, PIMCO (Sept. 5, 2007), [http://www.pimco.com/EN/Insights/Pages/GCBF%20August-%20September%202007.aspx](http://www.pimco.com/EN/Insights/Pages/GCBF%20August-%20September%202007.aspx); see also Gary Gorton, *Slapped by the Invisible Hand: The Panic of 2007* 157 (2010) (discussing new banking systems in chapter 5, "Bank Regulation When 'Banks' and 'Banking' Are Not the Same"). Both McCulley and Gorton, while not using the term explicitly, expand on the idea of "nonbank banks," which Investopedia.com defines as "Financial institutions that are not considered full-scale banks because they do not offer both lending and depositing services. Nonbank banks can engage in credit card operations or other lending services, provided they do not also accept deposits." [Nonbank Banks, INVESTOPEDIA.COM](http://www.investopedia.com/terms/n/nonbank-banks.asp) (last visited Jan. 26, 2014) My definition is that a nonbank bank is an organization that is not chartered as a depository institution, but which does lending, fund-raising, or other business that would traditionally have been done in more straightforward ways on the books of a bank, thrift, or credit union.
enforced obligation for taxpayers to rescue large and politically powerful firms when they are in difficult straits.

Shadowy banking may also be called Safety-Net Arbitrage. It covers any financial organization, product, or transaction strategy that – now or in the future – can opaquely (i.e., nontransparently) extract subsidized guarantees from national and cross-country safety nets by means of “regulation-induced innovation.” This way of thinking about the safety net clarifies that loss-absorbing equity supplied by taxpayers serves as the net’s buttresses. It also implies that the shadowy sector is a moving target. It consists of whatever entities can issue a worrisomely large volume of financial instruments that, given the boundaries of current laws or control procedures, are either actually or potentially outside the statutory grip of the several agencies currently charged with monitoring and managing the financial safety net.

Lobbyists for protected firms work hard to convince politicians and regulators that maintaining a regulatory environment that offers blanket support to important financial enterprises is in officials’ best interests, if not necessarily those of society as a whole.6 In the words of the late James Q. Wilson, safety-net managers operate “not in an arena of competing interests to which all affected parties have reasonable access, but in a shadowy world of powerful lobbyists, high-priced attorneys, and manipulative ‘experts.’”7

II. Shadowy Banking is Shaped by a Regulatory Dialectic

“Dialectics” is the art of arriving at the truth by becoming aware of contradictions and missing elements in opposing beliefs and overcoming or lessening the contradictions by confronting them with logical analysis or empirical evidence. A Hegelian process has three stages: Thesis, Antithesis, and Synthesis. In analyzing financial and regulatory competition, the predictive power of this evolutionary model comes from positing that each synthesis establishes an environment that serves as a thesis to be challenged afresh by new ideas and experience. When used to explain economic competition between differently regulated firms, the Hegelian Dialectical Model seeks to explain institutional change as a process of Incentive Conflict Generation, Conflict Resolution, and Conflict Renewal.

Regulation generates incentive conflict because it seeks to impose outside rules on another party’s behavior. To the extent that they undesirably limit one’s freedom of action, outside rules impose an unwelcome burden on each intended “regulatee.” This is why changes in regulation beget avoidance behavior (i.e., inventive ways of getting around the new rules) and, by

reframing the conflict, avoidance behavior begets regulatory change (re-regulation). As in any dialectical process, the interaction of the conflicting forces supports a process of endless action and reaction. Viewed as an economic game, the alternating sequences of moves impose, escape, and adjust regulatory burdens. As it unfolds, the process reshapes financial institutions, contracting protocols, and markets around the world.

A. An Instructive Analogy

Most of us have our first encounter with regulation within our immediate family where we emerge as an inexperienced child regulatee. Our parents set rules and proffer rewards and punishments in hopes of conditioning us to behave according to these rules. Short-term rewards usually take the form of tangible and intangible expressions of approval, while short-term punishments run a gamut of physical and psychological sanctions.

Troublesome kids may be seen in the best of families. Parents’ long-run goal is to develop a well-behaved child who takes pride in living up to the set of parental rules, which is to say a child who has developed a keen sense of shame. When conformance with parental rules becomes a child’s own preferred course of behavior (and ideally a source of self-esteem), enforcement problems melt away. But most parents show a rescue propensity of their own, so that conditioning efforts at least partially backfire. Children who recognize this propensity and refuse to be bound by parental rules may pursue either of two paths: defiant disobedience or creative avoidance. For a given rule, the mixture of compliance, avoidance, and evasion that is chosen depends on the strength of the child’s aversion to the mandated behavior (compliance costs) and on the relative opportunity costs of evasion and avoidance.

Autonomous children that psychologists would label as well-adjusted generate most of their long-run regulatory environment on their own. They fashion their particular ideas of right and wrong and pursue strategies of prudent circumvention that are designed to reconcile their wants and needs with the outer limits of parental rules. Like banks, securities, and insurance firms, they learn to comply with the letter of unwelcome rules while shamelessly abusing their spirit. By learning to find and exploit loopholes, a child relieves himself or herself simultaneously of guilt and unpleasant restraints. Moreover, the sense of having overcome adversity in an inventive way tends to instill and sustain a positive view of one’s own cleverness.

Avoidance differs from outright evasion by respecting the words of a command, even as the intent of the command is at least partially frustrated. The avoider has a lawyerlike or playful perspective on rules that differs from the criminal mindset of the nonupright, undisciplinable child. An evader is unruly. An avoider is a resourceful escape artist who welcomes the challenge of shaking free from externally imposed restraints.
B. Loopholes as Entitlements

It is costly for regulators to come to grips with avoidance behavior. Parents and government officials are reluctant to search for and eliminate loopholes in advance or to close loopholes until they have taken time to appreciate their effects. However, unlike government regulators in representative democracies, parents are free to discourage circumvention by punishing avoidance ex post as if it were the same as evasion. Children can lobby, but they cannot vote into office a more desirable set of parents. Moreover, because children’s regulatory rights are not closely protected by an administrative system of appellate law, the opportunity cost of avoidance behavior is high for children whose parents refuse to acknowledge and honor the legitimacy of searching out loopholes in their rules.

Some readers may find it instructive to view the Regulatory Dialectic as an evolving game that has no stationary equilibrium. It is played repeatedly by differently informed, differently incentivized, and differently skilled players: financiers, regulators, lobbyists, politicians, customers, credit-rating firms, and taxpayers. The timing and space of potential moves cannot be fully known in advance, but individual moves parallel the stages featured in the Hegelian model: (1) Adjustments in Regulation; (2) Burden-Softening Lobbying, Disinformation, and Avoidance (which occur rapidly and creatively); and (3) Re-regulation (which usually takes considerable time to develop). Some of the players (taxpayers and some regulators) are perennial “suckers,” who only occasionally and temporarily realize that the game is rigged against them.

Processes of financial regulation and financial-institution avoidance produce shadows and light at the same time. Loopholes are seen as entitlements that were woven into the rules by skilled and knowledgeable lobbyists who frame problems and potential solutions in a self-interested way. The Dodd-Frank Act of 2010 tasked regulators with writing hundreds of rules for the avowed purpose of lessening subsidies to aggressive risk-taking. To appreciate the flaws in this process, one must understand that Congress and industry lobbyists are aware that it is not unusual for regulatory personnel to prefer rules that lessen the enforcement and political problems that stringent restraints place on them.

III. Regulation of Swaps

Swaps and other contracts whose net worth “derive” from referenced instruments are financial derivatives. I believe that precedents established by the AIG and other 2008 rescues suggest that the next round of safety-net arbitrage is likely to be rooted in the difficulty of regulating swaps that, like credit default swaps (CDS), substitute for traditional insurance and pension

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8. See supra note 3 and accompanying text.
protections. Swaps are another in a long line of financially engineered substitutes for direct funding from savers to investors. Constructively, a swap agreement is a multi-period forward contract between two counterparties. In a swap, the parties agree to exchange cash flows from one hypothetical or "notional" instrument at specified settlement dates for the cash flows from a second designated instrument. Either or both of the instruments may—but need not—have a precise cash-market counterpart. The two sides of each swap may be regarded as establishing a synthetic incremental balance sheet that renders each counterparty long a series of claims (known as the "receive half") and short a series of obligations (the "pay half"). As a balance sheet, the value difference between the two halves is the contract's net worth.

But the statutory definition of the term "swap" embraces a much wider range of deals than this constructive description accommodates. In particular, it authorizes insurance and reinsurance contracts to be written as swaps. The statutory concept of a swap includes, in part, any agreement, contract or transaction "that provides for any purchase, sale, payment or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." 9

With respect to taxpayers' equity position in the safety net, swaps raise two issues. First, the staffs of the federal agencies charged with regulating swap markets—the SEC and CFTC—have developed expertise and tools appropriate for supervising individual and enterprise market conduct rather than systemic risk. Second, industry influence on both agencies has been institutionalized. Neither agency can be consistently counted upon to elevate taxpayers' interests over those of the industries they simultaneously regulate and represent. In the past, the revolving door between the SEC and the securities industry seems to have been pushed much harder than any of the levers agency personnel have used to fight against corporate fraud and misrepresentation. The revolving door has also helped the derivatives industry to lobby successfully for preferential treatment of swaps and repos in bankruptcy with outright disdain for the way their statutory priority might disadvantage the taxpayer's equity position in the safety net.

It has been left to state insurance regulators, exchanges, dealers, and brokers to assess contract risk and to use bonding tools (e.g., screening traders' net worth; establishing margin requirements; and enforcing minimum standards for collateral quality) to assure counterparty performance. The industry's principal risk-assessment tool is value-at-risk analysis, which specifically excludes the scale of the damage likely to be done by the low-probability events most apt to trigger systemic problems. Moreover, the ease with which MF Global delayed its meltdown in October 2011 by posting almost $900

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million of customer funds to cover losses in a UK broker-dealer account suggests that in some jurisdictions the rules governing the re-hypothecation of customer collateral and how margins may be netted across different positions may make posted margins less than fully collectable when a swap participant defaults.  

Historically, most swaps have been arranged with a third-party dealer or market maker. This trader collects a fee for lessening the due-diligence and search costs that its customers might otherwise face. The fee may be expressed as a spread between the terms offered for taking up one side or the other of a particular swap. As compared with a brokered market, the customer receives immediate execution and the dealer becomes the counterparty for both sides of the deal.

Efficient deal-making generates two types of transactions costs: pre-contract shopping, negotiating, and due-diligence expense and post-contract enforcement and unwinding expense. Whether an individual is a saver or an investor, the opportunity costs encountered in undertaking a swap parallel those met in comparing the benefits and costs of contracting directly with a household or nonfinancial firm against using, for example, a bank to intermediate the deal. Prudent savers and investors have to assess the differences in the benefits of contracting indirectly and weigh these benefits against the differences in transaction costs. Most households lack the expertise needed to make direct lending or borrowing the better alternative.

When the two halves are equally valuable, the swap is said to be "at" or "on" the market. Usually, however, the incremental balance sheet of one counterparty will show positive net worth. That party faces a risk that the party with negative net worth will renege on some or all of its obligation. If it were not for this nonperformance risk, one could construct combinations of swap contracts that would reproduce synthetically the exact cash flows generated by any cash-market portfolio or government-chartered financial intermediary. This means that differences in the dangers of nonperformance (known in the trade as "counterparty risk") lie at the heart of the regulatory problems that swaps and other derivatives pose for society.

A. Swaps Regulation Under the Dodd-Frank Act

Because banking, securities and insurance products have existed for hundreds of years, the dimensions of their regulatory environments have been nailed down in important ways. But because swap contracts are less than a half-century old, their regulatory environment is much more fluid. Cross-country issues and the volume of interagency rule-making to be completed under the

Dodd-Frank Act of 2010 makes the toolkits and architecture of future swaps regulation particularly swampy today. Data on the size of potential imbalances in dealer positions are not readily available. But the major dealers are giant banking institutions that benefit from the perception that they would not be allowed to fail. In hopes of pushing swaps trading out of the shadows and beyond the protections of the safety net, the Dodd-Frank Act asks the Securities and Exchange Commission (SEC) and the Commodities Futures Trading Commission (CFTC) to set rules whose intent is threefold.

First, the Act calls for real-time reporting of swaps transactions to be installed as soon as this becomes technologically practicable. Unlike many Dodd-Frank Act assignments, CFTC real-time reporting rules have been finalized and SEC real-time reporting rules have been proposed. US swaps dealers and clearing organizations are required to report their trades to a swaps data repository (SDR). As the word “repository” suggests, SDRs merely store data. So far, three SDRs are operating in the US: the Depository Trust & Clearing Corporation (which is owned by a consortium of financial services firms); the CME Group; and the Intercontinental Exchange (ICE).

The second and third goals are to force high-volume swap instruments to be standardized as far as possible and to move trading in such instruments onto futures exchanges and swaps execution facilities where it is hoped that positions might be monitored and supervised more effectively. On an exchange, the search function is undertaken jointly by brokers who transmit customer bids and offers to the exchange and by the exchange which clears (i.e., novates) the trades and guarantees that execution will occur on the trading date.

Performance guarantees on an exchange are backed up formally by broker and exchange due-diligence, collateral assessment, and margining procedures. At both the exchange and broker levels, margin and net-worth requirements are set relative to the perceived volume and character of a counterparty’s trading. Brokers protect themselves by screening customers and margining the value of short sales and pending trades. Exchanges support contract performance further.

14. Depository Registration in the U.S., CFTC WEBSITE, http://sirt.cftc.gov/sirt/sirt.aspx?Topic=DataRepositories (Only DTCC, CME and ICE have provisional registration. All other organizations are either pending registration or have withdrawn.) Dec. 8, 2013.
15. See generally, Dodd-Frank Act, Title VII,
16. Id.
by screening brokers for reputation, competence, and net worth and by holding margin accounts posted by brokers. If a customer or broker fails to deliver its half of the trade on the execution date, the exchange’s clearing corporation or partnership is obliged to complete the trade.17

But dictating exchange trading for standardized swaps is different from eliminating the possibility of safety-net arbitrage in swaps markets. First, forcing unwilling dealers to shift the bulk of their market-making activity onto an exchange is much easier said than done. Because standardized swaps carry more basis risk than customized ones, many customers will continue to prefer customized terms, all the more so since giant dealer banks will be smart enough to protect their dominant positions by stressing the value of customization and adopting pricing policies that shift a portion of their safety-net subsidy forward. Second, the more important swaps trading on a particular exchange might become, the better its clearing members will see that adopting a holding-company form (as many have already done) will limit their individual and joint liability in crises and would help them if the exchange itself should ever become insolvent to whip up the financial, political and administrative fear necessary to trigger officials’ bailout propensity.

B. Early Form of Regulation-Induced Innovation.

The Dodd-Frank Act expressly exempted futures contracts from the swap definition.18 This opens the door for any futures exchange that wants to trade an innovative swap-like product to self-certify the proposed instrument as a futures contract and to request that the new contract be placed under the CFTC’s jurisdiction. In fact, emerging regulatory arbitrage is taking the form of exchange-traded swaps futures contracts that substitute for traditional swap contracts. The new contracts may either settle in cash or settle into swaps contracts with the futures exchange at the expiration date. The convenience and favorable margin treatment of these contracts threatens to shrink the OTC deal flow available to swaps dealers and other clearing organizations. Information on these trades is likely to be routed to the exchange’s affiliated data repository from which genuinely informative trade data might be packaged with analysis and sold at a profit to private parties.

C. Cross-Country Issues

The costs and benefits of expanding a financial firm’s geographic footprint have regulatory dimensions. International expansion creates opportunities for competition and regulatory arbitrage between domestic and foreign regulators. Regulators must think deeply about competition between

17. Dodd-Frank Act, §721
18. Id.
established central clearing parties (CCPs) and other swaps platforms located in Europe, Canada, and Asia. The Chicago Mercantile Exchange has already made it possible for its clients to book a few of its foreign-exchange and interest-rate contracts with a London affiliate and London-based exchanges could return the favor by registering a swaps CCP as a Swaps Execution Facility with the CFTC and let it book a selection of high-volume contracts in the US.19

Evolving US derivatives rules are further along and arguably more onerous than those of other countries and impose reporting obligations on trades that cannot easily be reconciled with other countries’ privacy laws. British, EU, and other foreign regulators have expressed concern that applying CFTC and SEC registration, capital, and collateral requirements to foreign branches, affiliates, or subsidiaries of US institutions may affect other regulators’ freedom to tailor rules for foreign and domestic firms operating in their own jurisdictions.

Without acknowledging the extent to which their actions can shift tail risk onto the US safety net, foreign regulators are working to persuade the SEC and CFTC—in a spirit of cooperation—to write into their final rules a generous framework of “substituted compliance.”20 Substituted compliance means that foreign affiliates would be regulated by the country in which they are domiciled as long as the country enforces rules sufficiently comparable (i.e. similar) to those of the U.S. In its Proposed Guidance the CFTC used the phrase “rules comparable and comprehensive” to relevant Dodd-Frank requirements, 21 but enforcement was delayed.22

In July 2013, the CFTC issued guidance interpreting the Dodd-Frank Act as classifying for regulatory purposes the overseas arms of US banking organizations as “US persons.”23 Although the CFTC authorized some exceptions, interpreting the Dodd-Frank Act in this way threatened to expand the territorial reach of CFTC scrutiny so that swaps that US persons execute abroad would not be regulated any differently from those they execute in the US.

The CFTC's interpretation was challenged by foreign regulators and their challenge found a sympathetic SEC. In an April 18, 2013 letter, officials from Germany, France, the UK, Japan, and the European Commission recommended that substituted compliance be made available to all market participants for all transactions-level and entity-level rules. Less than two weeks later, the SEC formally proposed to permit overseas-based firms in securities-based swaps to adhere to their foreign jurisdiction's rules in deals with US firms so long as the foreign rules are "broadly comparable" to US requirements. The SEC's proposal emphasized that it would be focused on examining "regulatory outcomes" instead of comparing rules.

The CFTC's lag in observing outcomes opens a broad back-door path for circumventing the burdens of U.S. rules. The two crucial remaining issues are who in the US will determine when one set of rules is apt to produce outcomes or rules comparable to those of the US and how to verify the adequacy of the enforcement of acceptability on a continuing basis.

At least for the time being, the CFTC has acceded to undocumented industry claims that multiple record-keeping requirements would create more compliance costs than safety-net benefits. On August 13, 2013, the CFTC adopted a rule that granted substituted compliance to the SEC for registered investment companies. Then, on December 13, 2013, it granted substituted compliance to regulatory authorities in Australia, the E.U., Hong Kong, Japan, and Switzerland. One can only hope that accountability for substituted compliance decisions can be established before the next crisis.

D. Why Do the Definitions and Tests Entailed in Substituted Compliance Raise Issues of Shadowy Banking?

Given the worldwide threat of regulatory capture, the result that is both to be feared and to be expected is that sooner or later some major foreign regulators will be encouraged by politicians and financial-sector lobbyists to substitute for US standards inadequate rules or enforcement procedures.
will attract trading volume to these jurisdictions and generate systemic risk that, in crisis circumstances, these foreign governments are likely to shift onto the US safety net by demanding subsidized emergency market-stabilizing loans from the Federal Reserve.

IV. Reinterpreting the Role of Swaps in the Panic of 2008

It has become customary to characterize the bankruptcy of Lehman Brothers as triggering the panic of September 2008. However, I believe that public confidence in the competence and fairness of the government’s regulatory leadership and the reliability of private performance guarantees was destroyed by the combination of a yet-to-be-fully-explained double U-turn in bailout policy (of which Lehman was only the smallest part) and unwise presidential fear-mongering in support of a panic-y blank-check program, TARP. 29 Within the space of a few weeks, federal officials moved from contributing over $100 billion to creditors of Fannie and Freddie, to making undercollateralized creditors of Lehman take their lumps in bankruptcy, then to committing roughly $180 billion to bailing out the creditors and swap counterparties of the American International Group (AIG) and demanding that Congress appropriate $700 billion to buy up distressed assets from other troubled firms at inflated prices. 30 The AIG rescue broke new ground because it represented the first time that federal support was extended to an insolvent US insurance firm whose unfulfilled obligations had exceeded the value of state guaranty schemes and because it dispensed with opportunities to haircut the firm’s creditors.

Two things made AIG different from other insurance insolvencies. First, at the time of its implosion AIG had $1.06 trillion in assets and operated 246 separate insurance and other financial-services companies. 31 This made it by far the largest “insurance firm” in the country. Second, although AIG's traditional life, casualty, and retirement business was supervised by state officials in traditional ways, various “insurance-related activities” had morphed out of the jurisdiction of state regulatory regimes via swap contracts and into the purview of the relatively clueless Office of Thrift Supervision.

AIG offered its counterparties two forms of security: AIG’s “reputation” and the right to call for collateral if its credit rating fell below AAA. These transactions were booked in opaque subsidiary corporations that transacted in convenient foreign jurisdictions (especially London) with a large number of foreign counterparties. To understand the regulatory arbitrage this entails, 29. Edward J. Kane, Incentive Roots of the Securitization Crisis and Its Early Mismanagement, 26 YALE J. ON REG., 405 (2009).

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consider the advantages of using a swap to guarantee payments due on a bond. In the US, a bond insurance contract would have had to be written by a state-regulated entity. This underwriter would explicitly have to estimate and reserve for the loss exposures generated by its guarantee and to establish the existence of an insurable interest on the part of the counterparty (i.e., a long position in the bond); counterparty claims would be settled over time by assuming the string of future payments specified by the bond contract. Although Dodd-Frank rulemaking might change this in the future, credit default swaps (CDS) dispensed with these restrictions. Over-the-counter CDS market makers like AIG could write contracts with counterparties that had no insurable interest, did not have to document how they reserved for losses, and at settlement would usually be required to make a single lump-sum payment.

The highly concentrated risks that AIG took in swap and securities-lending activities in London were inconsistent with state commissioners’ traditional concern for protecting policyholder interests and the New York commission would have stopped them if they had had authority for overseeing foreign subsidiaries. Some state officials took what turned out to be cold comfort from the fact that AIG subsidiaries and the firm as a whole were supervised at a consolidated level as a thrift-institution holding company by the Office of Thrift Supervision (OTS).\(^{32}\) Unfortunately, AIG management knew all too well that this regulator lacked the expertise, the windows into foreign jurisdictions, and the incentives to monitor and control the leverage and volatility inherent in AIG’s burgeoning derivatives and securities-lending businesses. A useful way to understand the AIG debacle is to think of one of its divisions as a “booking bureau” whose task was to place derivatives business in shadowy subsidiaries and foreign markets, which rendered its potential regulators severely overmatched.

AIG illustrates the maxim that firms—like people—are born simple, but die of complications. Corporate complications are both structural and contractual. Table 1, which is taken from Sjostrum,\(^{33}\) shows how AIG partitioned its activities and that the profitability of AIG’s financial-services subsidiaries declined steeply in 2007 and 2008. These losses triggered cash flows and collateral calls in credit default swaps and securities lending that AIG proved unable to sustain.

One alleged benefit of segregating different product lines within a holding-company structure is that it allows a firm to use contractual firewalls to stop losses in one unit from spreading in bankruptcy proceedings to other units. Another is that this arrangement can facilitate a voluntary restructuring of the


firm if and when it falls into distress. However, neither of these benefits was realized in the AIG debacle. Because top management decisions were not being closely monitored, AIG officials had to be tempted to offer implicit cross-guarantees from its insurance units to persuade counterparties to lessen the collateral requirements they might impose or to increase the fees collected on deals with swap and securities-lending counterparties. In the absence of explicit inter-affiliate guarantees and in states where such guarantees might prove unenforceable, the profits of the insurance units would have stayed positive because counterparties could not have used the threat of bankruptcy to force the parent to use these units to honor claims written against loss-making affiliates. At least arguably, the doctrine of corporate separateness would have allowed the claims of derivatives counterparties to be separated from the insurance units in a prepackaged bankruptcy and given appropriate haircuts.

Both at the Treasury and the Fed, the initial justification for rescuing AIG and keeping its many counterparties whole was not protecting the firm’s policyholder and pension-plan reserves, but “unusual and exigent circumstances” in banking, commercial-paper, and derivatives markets. It was the fear that “a disorderly failure of AIG could add to already significant levels of financial market fragility and lead to substantially higher borrowing costs, reduced household wealth, and materially weaker economic performance.”

The irony is that dire events along the lines of those described happened anyway. Forcing AIG’s counterparties to take some lumps in a hastily negotiated bankruptcy settlement would at least have shown an explicit concern for taxpayer costs. Because blanket guarantees typically finance negative-value gambles for resurrection, Kane argues that keeping zombie institutions like AIG in play without subjecting their asset and funding structures to triage prolongs and intensifies—rather than mitigates—the adverse effects that gambles by these firms exert on the real economy.

Figure 1 shows that AIG’s stock price fell sharply during the panic, but remained well above zero through the end of 2008. The continued decline in this price and in indices of consumer and business confidence in October and November 2008 (e.g., the Indexes shown in Figures 3 and 4) support my belief that the $700 Billion TARP rescue and the lack of checks and balances envisaged in the Emergency Economic Stabilization Act combined with poorly explained differences in the extravagance of government assistance across the chain of 2008 bailouts to lead much of the citizenry to lose faith in the competence and economic priorities of the nation’s top economic officials. Unlike Santa Claus, the Fed and Treasury seemed determined to give gifts only to people and firms that had behaved badly.

34. Id. at 976.
35. Id. at 977.
An authoritative account has yet to emerge of which officials knew what and when they knew it. But as a minimum, state and federal regulators must have noticed that profitability of AIG’s financial-services units had been declining for several years at a rate that, thanks to implicit and explicit cross-guarantees, threatened AIG’s ability to pay policyholder and pension claims in its traditional and retirement insurance businesses. The breakdown in supervision was not just that state and OTS personnel failed to curb AIG’s growing losses and loss exposures, but that the Fed, the SEC, and foreign counterpart agencies failed either to see or to do anything about the nonperformance risk that was building up in banking and securities firms that held the other side of AIG’s deals. The depth and breadth of the cross-country regulatory failure suggest to me that an unspoken reason for completely bailing out AIG’s creditors and counterparties was bureaucratic blame avoidance. In the US in particular, Figure 3 and numerous other political polls show that the Bush Administration became increasingly unpopular over the final years of its span in office. Top officials could not reasonably expect to hold office beyond January 20, 2009. The rescue’s generous treatment of AIG creditors and counterparties converted what would have been immediate industry criticism for being asleep at the wheel into applause for the Treasury’s fast action and political bravery and shifted the unpopular task of explicitly funding the rescue forward onto the Fed and succeeding administrations.

V. Classification of Shadowy Firms and Practices

The safety-net arbitrage seen in the AIG case may be characterized as theft by safety net. Such theft seeks to identify and exploit gaps in a nation’s or region’s framework of financial regulation and supervision, gaps that allow the arbitrageur to extract safety-net benefits from conjectural guarantees without compensating taxpayers for their full cost of production. It is a dynamic and creative form of purposively self-interested behavior. Inevitable differences in the information and contracting opportunities available to institutions, regulators, and taxpayers mean that, whatever changes in the fabric of regulation financial authorities make, they will soon find themselves outcoached, outgunned, and playing from behind. This is why shadowy banking can never be completely eliminated. Still, the damage that crises create might be lessened if voters could be made to understand the extent of regulatory arbitrage.

Four distinct kinds of regulatory and tax avoidance take place within the shadowy sector. The first and most obvious is that of regulatory capture, in which regulated parties rig rules or enforcement in their favor. But shadowy banking also includes strategies for developing financial products or chartering firms in which regulators may or may not be complicit. These involve three additional financial-engineering strategies that:

Do not fall under the rubric of existing laws (i.e., exploit statutory gaps);
Are deliberately designed to fall outside the span of control defined by existing regulatory practices (i.e., exploit procedural gaps);

Can be redesigned to exploit either or both types of gaps once the benefits of escaping burdensome regulations or oversight become great enough to overcome implementation costs (i.e., will take advantage of gaps that have not yet been exploited).

Managers of large financial institutions have made intensive use of all four strategies. At year-end 2011, Table 2 contrasts the number of domestic bank, domestic nonbank, and foreign subsidiaries at the largest US bank holding companies (BHCs) with a selection of smaller BHCs. Figure 4 shows that the extraordinary structural complexity of the largest and most politically powerful US bank holding companies (three of which were investment banks and insurance companies that were only conjecturally connected to the formal safety net prior to 2008) developed only after 1989 when the Savings and Loan crisis clarified the extent to which the largest firms in the industry might count on taxpayer support to help them survive emergency circumstances. Crisscrossing lines of authority within such organizations makes them difficult to control from the top down. For this reason, it seems very likely (as in the AIG case) that one attraction of a complicated network of subsidiaries is to place activities in jurisdictions in which it is hard for government officials to supervise them.

As I have indicated, large US institutions can derive benefits from exploiting statutory or procedural gaps in local and global statutory and control frameworks. Subsidiary corporations can book selected business in less heavily regulated parts of the US financial sector or perform activities in foreign countries that are outlawed or more closely regulated in their home country. Table 3 quantitatively shows that U.S. BHCs’ nonbank subsidiaries more or less split their organizations’ high-value structured securitization business with their more closely monitored banking subsidiaries.

It is also true that any bank can circumvent the FDIC’s statutory limits on account coverage by writing bilateral swap contracts through the Promontory Interfinancial Network. Although it operates as a swaps broker, Promontory is not itself federally regulated, even though (and perhaps because) its founders include a former Comptroller of the Currency and a former Governor of the Federal Reserve System. This firm offers an OTC swap product that allows a single depositor to push its FDIC coverage from $250,000 per depositor envisioned in the FDIC Act to as much as $50 million. Promontory named this product the “Certificate of Deposit Account Registry Service” (CDARS).

37. CDAR FAQs, PROMONTORY GROUP (Jan 26, 2014), http://www.promnetwork.com/home/services/certificate-of-deposit-account-registry-service/cdars-overview/.
CDARS acts as a clearinghouse. It re-books balances in excess of FDIC limits (i.e., statutorily uninsured deposits) from one institution as below-the-limit increments in deposits that are swapped into other institutions. The injustice of the arbitrage is that Promontory collects fees for re-booking these deposits, while the FDIC incurs the costs of providing the over-line coverage. It seems likely that during crisis years deposits supplied through CDARS helped to sustain the life of more than a few zombie banks.

The lessons inherent in the CDARS program generalize to the broader swaps market. Almost anything that carries an explicit or implicit government guarantee can be swapped in great volume and achieving high volume establishes the equivalent of a squatter’s right. This is because authorities are reluctant to roll back innovations once they have achieved widespread use. CDARS shows that swaps designed to arbitrage the safety net can easily go viral if authorities do not intervene. At this writing, approximately 3,000 financial institutions belonged to the CDARS deposit-swapping network. Like sponsors of the first retail money-market funds, the sponsors of CDARS extended the effective reach of the US safety net and dared authorities to do something about it.

VI. Why Shadowy Banking Generates Disadvantaged Taxpayer Equity

The more policy debates I examine, the better I understand Friedrich Nietzsche’s claim that “[t]here are no facts, only interpretations.” Almost all forms of financial engineering and shadowy banking offer some benefits to society. This is because at the same time that financiers use emerging technologies to extract safety-net subsidies, they create new, better, or cheaper services for their customers. This favorable dimension of innovation is apt to be overstressed, especially in the narratives that sponsors of shadowy instruments offer regulators and the public to justify their existence. As an example, consider the half-true content of the pleas to spare money-market funds (MMFs) from further restrictions that former Comptroller Hawke published on the American Banker’s Bank Think website. Hawke disputes the contention that MMFs deserve to be called shadow banks. He denies that they are exploiting any statutory or procedural gaps because they are in fact supervised by the SEC. He denies that MMFs face an “appreciable threat of future runs” (assuming away the danger of asset-concentration risk) and frames his


40. Id.
presentation to indicate that the temporary liquidity facilities put in place to save the industry in September 2008 did not cost taxpayers more than a "penny on the dollar."\(^{41}\)

Regulatory arbitrage can generate safety-net benefits for particular firms, politicians, regulators, and categories of customers. Statutory and procedural gaps offer legal, but inherently unethical opportunities for different parties to exploit and corrupt one another. Corruption deepens as the stakes rise and when incentive conflict tempts other players to join in a coalition to exploit taxpayers. As Francis Bacon explains, opportunity makes the thief.\(^{42}\)

Central bankers' rescue propensity leaves taxpayers holding the short side of an implicit regulatory contract. This contract allows elite financial firms: (1) to put ruinous losses onto government safety nets if and when creditors refuse to roll over their debts and derivatives at "reasonable" (i.e., low) cost and (2) to exercise a call on the government's position if and when the debt overhang has been eliminated. That exploiting taxpayers through the safety net is touted as evidence of managerial proficiency without also being worn as a badge of shame signals the extent of the moral vacuum that has overtaken the debate over bailout policies.

Safety-net arbitrage is at heart a form of theft. One way to see this is to think of difficult-to-fail institutions as using a gun to force Uncle Sam or John Bull to extract money from the wallets of hapless taxpayers. We can think of the bullets in the gun as disinformation, fear, campaign contributions, and post-government jobs.

Genuine reform has to embrace and enforce the common-sense notion that managers of DFU firms owe fiduciary duties to taxpayers. This is because authorities' demonstrated propensity to rescue them turns taxpayers into disadvantaged equity investors in such firms. The current system of shareholder lawsuits compounds rather than limits taxpayer loss exposure. The simplest approach would be to amend corporate law to assign taxpayers an actionable equitable interest in all firms that accept protection from the safety net. Pushing the idea one step further, Kane argues for establishing single-purpose trusteeships at systemically important financial firms (SIFIs) and requiring each trusteeship to make sure that each SIFI's managers do three things: measure regularly, report honestly, and pay a fair return on the evolving value of taxpayers' equity stake in their enterprise.\(^{43}\)

Kane offers two justifications for taking this responsibility away from unaccountable government regulators and supervisors and establishing an

\(^{41}\) \textit{Id.} \\
\(^{42}\) \textit{FRANCIS BACON, Sir Francis Bacon to the Earl of Essex Concerning the Earl of Tyrone, in 3 THE WORKS OF FRANCIS BACON, LORD CHANCELLOR OF ENGLAND 6 (Basil Montagu ed., 1850).} \\
Shadowy Banking

enforceable system of fiduciary duties at the firm level instead. The first is a legal argument: the idea that, because taxpayers are *de facto* equity investors, corporate law should be broadened to accord taxpayers the same informational and fiduciary rights to prudent stewardship that the law gives to a SIFI's explicit shareholders. This would make explicit duties that conscientious managers should have recognized at least implicitly all along. The second is a moral argument based on Kant's Second Imperative. Kant's second imperative maintains that exploitation of others is intrinsically wrong. Kant argues that one may not rightfully use other parties—as financiers operating in and out of the shadows have used federal taxpayers—only as means to benefit oneself.

In the US, each trusteeship might be governed by three trustees recruited for character and financial expertise by the Office of Financial Research (OFR). The OFR could use the same techniques for soliciting and screening candidates that it employed in 2011-12 to staff its own advisory board. Terms of service might be fixed for 3-to-5 years and permanently staggered to assure the presence at all times of experienced hands on the teller.

A critical feature is that trustees could be sued personally if they fail to enforce taxpayer interests. This would not make trustees capture-proof. But it would make them less incentive-conflicted than government policymakers are now and subject them to outside discipline from underwriters of director and officer liability insurance. The trustees at different SIFIs could be expected to organize a standard-setting association, consult with one another on emerging problems, and to hire sufficient staff to double-check and be ready to challenge publically bank and regulator estimates of the dividends taxpayers are due each quarter.

Trustees would be independent of the boards of the firms they oversee. Their primary responsibility would be to set a fair quarterly dividend and to see that dividends are collected and transmitted to the Treasury in a timely manner. To assure payment in difficult circumstances, they might be granted a limited right to sell out-of-the-money puts on the firm's shares and to cover losses on these puts from treasury stock (i.e., to dilute shareholder positions immediately) if one of several specified adverse events were to occur. The essence of the plan is not only to privatize, but also to extend the monitoring functions that in-house government examiners have fulfilled at very large US banks for years.

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44. Immanuel Kant, *Grounding for the Metaphysics of Morals* 37 (James W. Ellington, trans., 3d edition, 1993) ("Third, with regard to contingent (meritorious) duty to oneself, it is not enough that the action does not conflict with humanity in our own person as an end in itself; the action must also harmonize with this end.").
Suppose the government allowed your banker to send you monthly statements in a format that was so complicated that he could be sure that you would not be able to figure out whether your account balanced or not. Then, taking advantage of your ignorance, he goes on to transfer money out of your account each month and dares incentive-conflicted bank examiners to uncover and publicize his thefts.

While abusive financial engineering is subtler than this, the crime of expropriating taxpayer resources through the safety net proceeds in more or less the same way. To disincentivize this behavior, reformers must improve the accounting framework to make the crooked funds transfers easier to see and strengthen examiner incentives to publicize and punish expropriation when they see it. That is what my proposal to re-engineer the supervision of systematically important financial institutions (SIFIs) aims to do.

Financial engineering becomes abusive when—as the Regulatory Dialectic predicts it will—managers use technological innovations to exploit a country’s taxpayers in hard-to-observe ways and personal culpability for safety-net abuse is eliminated by regulatory lags and regulatory capture. The resulting risk-taking destructively sows the seeds of future insolvencies and financial crisis.

As noted earlier, taxpayers hold a disadvantaged compound option on protected firms’ profits and losses. The put assigns them without limitation the deep downside of firm losses, while the call cuts off taxpayer claims on future profits if and when the firm returns to robust health. Contingent-claims analysis can estimate the value of a protected firm’s side of the put and call. It also tells us that this value increases both with the volatility of a firm’s asset holdings and with the fragility of its funding structure. Empirical research I have conducted with various colleagues shows that periodic dividends due on taxpayers’ equity stake in politically or administratively difficult-to-fail firms can be defined and measured as the value of the warranted return on an individual firm’s contribution to the financial sector’s aggregate portfolio of taxpayer puts and calls. By reinforcing authorities’ rescue propensity, a firm can further disadvantage taxpayers by building up its political clout, size, and complexity. Each of these attributes enhances management’s ability to delay or

avoid regulatory punishments and to use the resulting period of grace to neutralize regulatory restraints and to gamble for resurrection.

A. Operational Weaknesses of Capital Requirements

Before, after, and during the crisis, capital requirements have served as the major instrument for containing shadowy banking practices. Capital requirements seek to limit safety-net subsidies not by improving banking ethics, but by setting boundaries on the extent to which regulated institutions can leverage their accounting balance sheets. The plan is to keep losses from spilling beyond a firm’s internal capacity to bear losses by aligning its ownership capital with its exposure to economic loss.

The linchpin of the Basel system of capital requirements is to measure loss exposure by the sum of risk-weighted assets (RWA). The weights employed in the first two accords were fixed at arbitrary levels and gave a bank virtually no credit for the extent to which it might have diversified or hedged the risks in its loan portfolio. Weighting formulas took inadequate account of operational or interest-rate risks. Finally, although Basel II authorized tying some weights to credit ratings, none of the accords has linked the system of risk weights it applies to a benchmark set of assets or to movements in the average or marginal risk premiums that one could observe in loan or swap markets.

These disconnects artificially distort bank risk-transfer activity by creating opportunities for clever banks to capture safety-net subsidies by arbitraging the weighting system. The first principal loophole came from large institutions’ success in persuading Credit Rating Organizations (CROs) to help them to game the Basel system by overrating shadowy packages of securitized loans. A second avenue of avoidance was that, when regulatory demands for capital first began to generate a compliance burden at a particular bank, its managers found it temptingly easy to book counterfeit increments in regulatory capital by manipulating its loan-loss reserves and by selling or securitizing a sufficient amount of its least-risky assets.

Prior to the crisis, regulators did not seem very worried about the size and perversity of various accounting, securitization, swap, and loan-sales loopholes. Even after the crisis ensued, practical people more or less turned a blind eye toward the accounting loopholes in the Basel system. The fact that during the crisis even obviously distressed banks continued to post a capital position far in excess of Basel standards suggests that Basel’s minimum standards were easy

47. The Basel Committee on Banking Supervision (BCBS) is beginning to question the risk-weighting methods. See BASEL COMM. ON BANKING SUPERVISION, REPORT TO G20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS ON MONITORING IMPLEMENTATION OF BASEL III REGULATORY REFORM 2 (2013).
48. Id.
49. This and ISDA’s reluctance to keep credit default swaps on Greece from paying off as the price of Greek debt declined exemplify how shadowy institutions tend to corrupt one another.
to game. Despite efforts by U.S. and foreign regulators to increase the granularity of the risk categories by which capital standards were set in previous years, risk-weighted capital proved of no help in predicting what banks would and would not need to be rescued.50

In the forum in which Basel III and its successors are being crafted today (the Basel Committee on Banking Supervision, BCBS), reform plans continue to mischaracterize capital as an accounting-generated number and to misweight risk in response to political concerns: Although one would hope they know better, negotiators act as if it is acceptable to temper the fiduciary duties that this paper associates with monitoring the size of, and collecting a fair return on, taxpayer contributions to bank equity. They content themselves with aligning a banking organization's accounting leverage with politically distorted conceptions of its exposure to risk. In Basel III, regulators have decided to downplay Basel II's emphasis on risk-weighting and to force protected institutions to accept a marked increase in their equilibrium ratio of accounting net worth to total assets. But leeway inherent in reporting loan-loss reserves and other discretionary items makes accounting net worth a shadowy concept whose value need not reliably reflect an institution's ability to absorb losses generated by its appetite for risk. In practice, a firm whose books make a show of high capital is often more risky than a firm whose books show less.51

Hence, the preventive leg of the Basel policy prognosis relies on overly hopeful assumptions that are not supported by empirical research. Financial crises are a fact of life. Where data exist, they show that every country's financial sector passes through a succession of three-stage sequences: a pre-crisis bubble in credit, an actual crisis, and a post-crisis period of creative destruction and healthy recovery.52 Of course, the durations of the different stages vary across countries and across time, and transitions from one stage to another become clear only in retrospect. But bubbles and crises can be amplified by weaknesses in insolvency detection and by subsidies to risk that zombie firms generate as they battle for bailouts. The Regulatory Dialectic portrays crises and subsidies as generated in large part by path-dependent collisions between (1) efforts by regulators and supervisors to control leverage and other forms of risk-taking and (2) disruptive efforts by regulated and "shadowy" financial institutions to expand risks in nontransparent ways and to shift responsibility for ruinous outcomes onto creditors and national safety nets.


In the presence of a safety net, bank managers face a threefold avoidance incentive: to lobby for lenient standards, to hide and understate risk exposures, and to overstate accounting net worth. This set of incentives makes risk and stockholder-contributed net worth hard to measure accurately and reliable standards by which to judge improvements in incentive alignment difficult to set and enforce.

B. Undone by the Regulatory Dialectic

Because regulators have relatively short terms in office, they are attracted to temporary, rather than lasting fixes. The costs and benefits of capital requirements extend far into the future and are by no means fixed or exogenous. Regulatees search tirelessly for ways to reduce the burdens of regulation. Value maximization leads bankers to devise progressively lower-cost ways to exercise political clout, to adjust and misreport asset values and funding structures, and to choose favorable jurisdictions in which to book particular pieces of business.

This kind of financial engineering resembles what happens on a “makeover” television show. Top managers deploy the equivalents of fashionistas, cosmeticians, and hairdressers to revamp their firm’s external appearance without changing the underlying character of the risk exposures that they expect taxpayers to support.

C. Can Basel Save Us?

The endogeneity of regulatory burdens should lead one to view: (1) ongoing negotiations in the Basel Committee on Banking Supervision that seek to establish global risk-based capital rules and (2) disruptive bank objections to—and circumvention of—emerging rules as conflicting forces in a dialectical evolutionary process that I model as a rigged game.53

Weaknesses in the way U.S. and E.U. regulators chose to implement Basel II standards created differences in the costs of loophole mining that help to explain why the crisis hit their financial systems harder than those of Canada, Asia, Latin America, and Oceania.54 Although Basel II tied risk weights for sovereign debt to credit ratings, it permitted national authorities to go below those weights for central-government debt (or debt guaranteed by a central government) as long as it was issued and funded in the currency of the country in question. For political reasons, U.S. regulators assigned unrealistically low weights to mortgage-backed securities and E.U. officials set zero risk weights for member-state debt. Until well into 2012, the European Central Bank (ECB) contributed to the process by accepting the sovereign debt

53. Although this model can be formalized, only a narrative form is presented here.
of all Eurozone countries at par value when posted as collateral for ECB loans. The E.U. and ECB fueled speculators’ demand for the debt of the “GIPSI” nations of Greece, Ireland, Portugal, Spain and Italy by not imposing “haircuts” on these countries’ increasingly risky securities as soon as the interest rates on their debt began to soar above those paid by other Eurozone countries.

These delays were part of a larger strategy of cross-country denial and concealment of financial-sector risk exposure. E.U. stress tests and Basel’s risk-weighted capital ratios failed demonstrably to distinguish between failing and viable banks. The fundamental weakness in Basel I, II, and III is their lack of enforcement procedures. Basel accords fail to make credit-rating organizations and individual-country regulators accountable either to the Basel Committee as a whole or to banking regulators in other member countries.

In the absence of an enforceable duty to disclose and service taxpayers’ equity stake, accounting loopholes make the idea of balance-sheet transparency a sham. Politicians’ and lobbyists’ disinformational claim that tougher capital requirements will make banks pass up profitable, but socially risky financial opportunities seems distressingly dishonest. Accounting ratios are not difficult to overstate and financial firms do not accept proposed regulatory burdens passively. Other things equal, higher capital requirements lead difficult-to-fail banks to choose riskier strategies and, both individually and collectively, to conceal the resulting loss exposures from regulators and other outsiders so as to minimize adverse effects on bank profits and stock prices. In the U.S., the Occupy Wall Street movement very briefly energized a few ordinary citizens into expressing rage about the game that regulators and regulatees were playing on them. But these few rebellious sheep have had little lasting influence.

VIII. Policy Implications: The Need for Profound Changes in Both the Nature of Information Flows and the Contractual Relationships Linking Taxpayers to Protected Firms

It is factually and legally misleading to characterize credit support for zombie institutions as a lending program, and financial safety nets as a source of casualty insurance. Loans to zombie institutions and safety-net support are, in fact, sources of loss-absorbing equity funding to protected firms. Neither Basel nor the Dodd-Frank Act imposes the fiduciary duties of loyalty, competence, and care on regulators and managers of difficult-to-fail institutions that the taxpayer’s equity position deserves.

Two related weaknesses continue to plague the U.S. and global regulatory systems: (1) accounting ratios remain easy to manipulate, and even ruinous risks are easy to hide and/or misrepresent legally and (2) authorities are willing

55. Demirgüç-Kunt et al., supra note 50 at 1162.
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to exaggerate the “comfort” taxpayers should take from loan-loss reserves, credit-rating firms, liquidity swaps, and sympathetically graded stress tests. The root problem is that corporate law allows financial-institution managers to aim at the mere appearance of regulatory compliance. Managers and regulators act as if they are playing an amusing game of hide and seek. Managers feel legally justified in hiding risks from regulators and repeatedly denying the existence and extent of safety-net subsidies.

The root problem is an incentive conflict that is intensified by disinformation, industry lobbying pressure, and post-government job opportunities. Both in the U.S. and in Europe, ongoing negotiations between different regulators show a willingness to paper over incentive distortions in the web of safety-net supervision and to postpone the resolution of important issues in ways that intensify rather than dispel the uncertainty and lack of trust that have bedeviled wholesale financial markets since the crisis began. The Dodd-Frank Act doled out the task of implementing its most controversial features as a homework assignment for various regulatory agencies. Three years after the passage of Dodd-Frank, many important issues remain unsettled, including: risk retention in securitization; how to establish accountability for credit rating organizations; variation in cross-country derivatives trading rules; limitations on proprietary trading; and restrictions on compensation, dividends, and stock buybacks. Delay in resolving these issues prolongs rulemakers’ exposure to further rounds of shadowy lobbying pressures and accommodates potentially toxic safety-net abuse in the interim.

Governments develop regulatory institutions to compensate for imperfections in counterparty transparency and in the enforceability of contractual rights by private counterparties. To be efficient, the design and operation of a country’s safety net must not solely respond to country-specific weaknesses in the transparency and disciplinary rights offered by financial contracts between private parties. It must also, and more importantly, recognize and repair longstanding weaknesses in the social contracts that taxpayers are forced to write with managers of firms that the safety net protects. Regulators and the financial sector have foisted defects in the transparency of—and lines of responsibility for—safety net benefits and costs on the rest of society. Whether and how proposed changes in rules improve a government’s contracting environment ought to be the benchmark by which we judge financial reforms. The more shadowy the regulatory environment remains, the more likely it is that governments’ rescue propensities and the conjectural governmental guarantees these propensities generate will undermine financial stability and misdirect a portion of a country’s scarce savings into wasteful investments.

To reduce destructive incentive conflict, society must go beyond tightening capital restraints. It must explore ways to make financiers help
regulators to identify shadowy arrangements promptly and to narrow shadowy bankers’ access to the safety net more effectively.\textsuperscript{56} To my mind, this requires society to find ways to impose and enforce fiduciary duties to taxpayers on unwilling financiers, politicians, regulators, and credit-rating firms.\textsuperscript{57} The paper stresses that safety-net subsidies generated by swap contracts have not been adequately addressed. Swap transactions need to be monitored in a more timely and effective fashion if only because failures to perform in swaps markets could create great social unrest by globalizing the guarantees embodied in the U.S. safety net and undermining promises made in the pension and insurance industries.

To begin to reclaim an effective role in the politics of financial regulation, taxpayers need a way to oversee and bypass the system of client-centered regulation that has developed at the banking agencies, the SEC, and the CFTC. As equity investors, taxpayers deserve to receive regular and unbiased estimates of the value of their equity position in government-protected firms, and to be assured that protected institutions will pay a fair dividend on the equity that political forces make taxpayers take on. I believe societies around the world would be better off if each country were to establish a well-funded Office of Financial Research (OFR) and give the OFR the budgetary independence that central banks have long enjoyed. To be free to measure and report on systemic risk, an OFR desperately needs the freedom to resist short-term budgetary interference.

Precisely because the benefits of shadowy arrangements are deliberately overpraised by their proponents, taxpayers need to force individual SIFIs—backed up by an OFR—to identify tail risk and safety-net consequences hidden in instruments and structural arrangements that substitute for standard financial contracts. One approach would be to require that trusteeships and individual-country OFRs be notified by SIFIs and other major market participants to undertake tail-risk analyses whenever the volume of trading being booked in a particular derivative contract surpasses a specified size threshold. To enlist alerts from trade associations for institutions losing business to new firms and instruments, OFRs ought have the right to examine the business of unusually fast-growing financial firms, especially firms that pioneer an unconventional asset or funding structure.

To guard its political independence, I would recommend that the OFR engage in informational and analytical activities, but be denied the authority to sanction private firms directly. In the U.S., authority to disallow contracts or institutions or to adjust deal-making parameters that the OFR finds to be dangerous could be routed through the Systemic Risk Oversight Council or


\textsuperscript{57} Edward J. Kane, \textit{Importance of Monitoring and Mitigating the Safety-Net Consequences of Regulation-Induced Innovation}, REV. OF SOC. ECON. 145, 151-56 (2010).
assigned directly to various federal agencies. But the OFR must have authority—and even the duty—to demand information from and to criticize other supervisory agencies. In particular, the OFR should be empowered to insist that agencies responsible for monitoring and reserving for loss exposures that the OFR determines to be worrisome have established reliable systems of oversight and control.
Appendix: Tables and Figures

TABLE 1
OPERATING PERFORMANCE BY UNIT, 2005 THROUGH SEPTEMBER 30, 2008

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<td>$35,854</td>
<td>$51,708</td>
<td>$49,206</td>
<td>$45,174</td>
</tr>
<tr>
<td>Life Insurance &amp; Retirement</td>
<td>14,271</td>
<td>53,570</td>
<td>50,878</td>
<td>48,020</td>
</tr>
<tr>
<td>Financial Services</td>
<td>(16,016)</td>
<td>(1,309)</td>
<td>7,777</td>
<td>10,677</td>
</tr>
<tr>
<td>Asset Management</td>
<td>658</td>
<td>5,625</td>
<td>4,543</td>
<td>4,582</td>
</tr>
<tr>
<td>Other</td>
<td>531</td>
<td>457</td>
<td>483</td>
<td>344</td>
</tr>
<tr>
<td>Consolidation &amp; Eliminations</td>
<td>(436)</td>
<td>13</td>
<td>500</td>
<td>(16)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$34,862</td>
<td>$110,064</td>
<td>$113,387</td>
<td>$108,781</td>
</tr>
<tr>
<td><strong>Operating Income (Loss)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>General Insurance</td>
<td>$(393)</td>
<td>$10,562</td>
<td>$10,412</td>
<td>$2,315</td>
</tr>
<tr>
<td>Life Insurance &amp; Retirement</td>
<td>(19,561)</td>
<td>8,186</td>
<td>10,121</td>
<td>8,965</td>
</tr>
<tr>
<td>Financial Services</td>
<td>(22,880)</td>
<td>(9,515)</td>
<td>383</td>
<td>4,424</td>
</tr>
<tr>
<td>Asset Management</td>
<td>(2,709)</td>
<td>1,164</td>
<td>1,538</td>
<td>1,963</td>
</tr>
<tr>
<td>Other</td>
<td>(2,899)</td>
<td>(2,140)</td>
<td>(1,435)</td>
<td>(2,765)</td>
</tr>
<tr>
<td>Consolidation &amp; Eliminations</td>
<td>237</td>
<td>722</td>
<td>668</td>
<td>311</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$(48,205)</td>
<td>$8,943</td>
<td>$21,687</td>
<td>$15,213</td>
</tr>
</tbody>
</table>

Figures for 2005-2007 cover the full year.

TABLE 2
NUMBER AND DISTRIBUTION OF SUBSIDIARIES: SELECTED TOP FIFTY BANK HOLDING COMPANIES

<table>
<thead>
<tr>
<th>BHC Rank</th>
<th>Name</th>
<th>Number Asset Value</th>
<th>Number</th>
<th>%*</th>
<th>$**</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Domestic</td>
<td>Commercial Bank</td>
<td>Consolidated Total Assets</td>
</tr>
<tr>
<td>1</td>
<td>JPMorgan Chase &amp; Co.</td>
<td>4,265.8</td>
<td>4</td>
<td>2,936</td>
<td>451</td>
</tr>
<tr>
<td>2</td>
<td>Bank of America Co.</td>
<td>2,019</td>
<td>5</td>
<td>1,541</td>
<td>473</td>
</tr>
<tr>
<td>3</td>
<td>Citigroup Inc.</td>
<td>1,645</td>
<td>2</td>
<td>935</td>
<td>708</td>
</tr>
<tr>
<td>4</td>
<td>Wells Fargo &amp; Co.</td>
<td>1,366</td>
<td>5</td>
<td>1,270</td>
<td>91</td>
</tr>
<tr>
<td>5</td>
<td>Goldman Sachs Group, Inc.</td>
<td>3,115</td>
<td>1</td>
<td>1,444</td>
<td>1,670</td>
</tr>
<tr>
<td>6</td>
<td>MetLife, Inc.</td>
<td>163</td>
<td>1</td>
<td>39</td>
<td>123</td>
</tr>
<tr>
<td>7</td>
<td>Morgan Stanley</td>
<td>2,884</td>
<td>2</td>
<td>1,593</td>
<td>1,289</td>
</tr>
<tr>
<td>10</td>
<td>Bank of N.Y. Mellon Co.</td>
<td>360</td>
<td>3</td>
<td>211</td>
<td>146</td>
</tr>
<tr>
<td>20</td>
<td>Regions Financial Co.</td>
<td>40</td>
<td>1</td>
<td>35</td>
<td>4</td>
</tr>
<tr>
<td>30</td>
<td>Comerica Incorporated</td>
<td>76</td>
<td>2</td>
<td>72</td>
<td>2</td>
</tr>
<tr>
<td>40</td>
<td>First Horizon National Co.</td>
<td>37</td>
<td>1</td>
<td>35</td>
<td>1</td>
</tr>
<tr>
<td>50</td>
<td>Webster Financial Co.</td>
<td>22</td>
<td>1</td>
<td>21</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>19,603</td>
<td>86</td>
<td>13,670</td>
<td>5,847</td>
</tr>
</tbody>
</table>

*% of Y-9C Assets ** Y-9C Billions of USD


Notes: Structure data are as of February 20, 2012. Financial data are as of fourth-quarter 2011. The number of subsidiaries of each bank holding company (BHC) is determined based on the Regulation Y definition of control. Asset data include approximately 3,700 of the more than 19,000 subsidiaries belonging to the top fifty BHCs that meet particular reporting threshold criteria. Authors have an online appendix that provides more detail.
# TABLE 3
EVIDENCE ON THE EXTENT OF BANKS’ NONCREDIT ACTIVITY ALONG THE CHAIN OF STRUCTURED FINANCE

<table>
<thead>
<tr>
<th></th>
<th>Top Fifty ABS Deals</th>
<th>Top Fifty ABCP Conduits</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td># of Deals</td>
<td>Amount*</td>
</tr>
<tr>
<td>Banks</td>
<td>40</td>
<td>250.60</td>
</tr>
<tr>
<td>Nonbank affiliates</td>
<td>44</td>
<td>261.95</td>
</tr>
<tr>
<td>Other</td>
<td>42</td>
<td>78.61</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>272.09</td>
</tr>
</tbody>
</table>

*USD Billions

Source: Nicola, Cetorelli, Benjamin H. Mandel, and Lindsay Mollineaux, *The Evolution of Banks and Financial Intermediation: Framing the Analysis*, 18 FRBNY Econ. Pol’y Rev. 1, 8 (2012). Constructed from data on fee income published by Moody’s covering securities services other than credit enhancement (as issuers, underwriters, servicers, and trustees).

Note: ABS stands for asset-backed securities; ABCP represents asset-backed commercial paper.

# FIGURE 1
AIG Stock: March 07, 2012

FIGURE 2

NFIB Small Business Optimism Index
Based on 10 Survey Indicators, Seasonally Adjusted 1986 = 100
January 1986 - October 2013, Quarterly

FIGURE 3

*Americans’ Confidence in Federal Government’s Handling of Domestic Problems*

How much trust and confidence do you have in our federal government in Washington when it comes to handling domestic problems -- a great deal, a fair amount, not very much, or none at all?

1. A great deal/A fair amount

Source: Frank Newport and Joy Wilke, *Fewer Americans Than Ever Trust Gov’t to Handle Problems*, Gallup Politics, Sept. 13, 2013, http://www.gallup.com/poll/164393/fewer-americans-ever-trust-gov-handle-problems.aspx. This chart comes from Gallup’s annual Governance survey, conducted Sept. 5-8, 2013, while Congress was debating the use of military force in Syria, but prior to President Barack Obama’s nationally televised address on Syria, and Russia’s proposal to avert U.S. military action.
FIGURE 4
ORGANIZATIONAL COMPLEXITY AND INTERNATIONAL REACH
OF LARGE U.S. BANK HOLDING COMPANIES


Note: Data are as of February 20, 2012, and December 31, 1990, and include the top fifty bank holding companies (BHCs) at each of these dates. Authors have an online appendix that provides more detail.