

Regulation of Cross-Border Capital Markets

Presentation to The European Financial Markets Law Group

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Introduction

“Grasp the subject, the words
will follow” (Aristophanes,
Frogs, 405 BC)



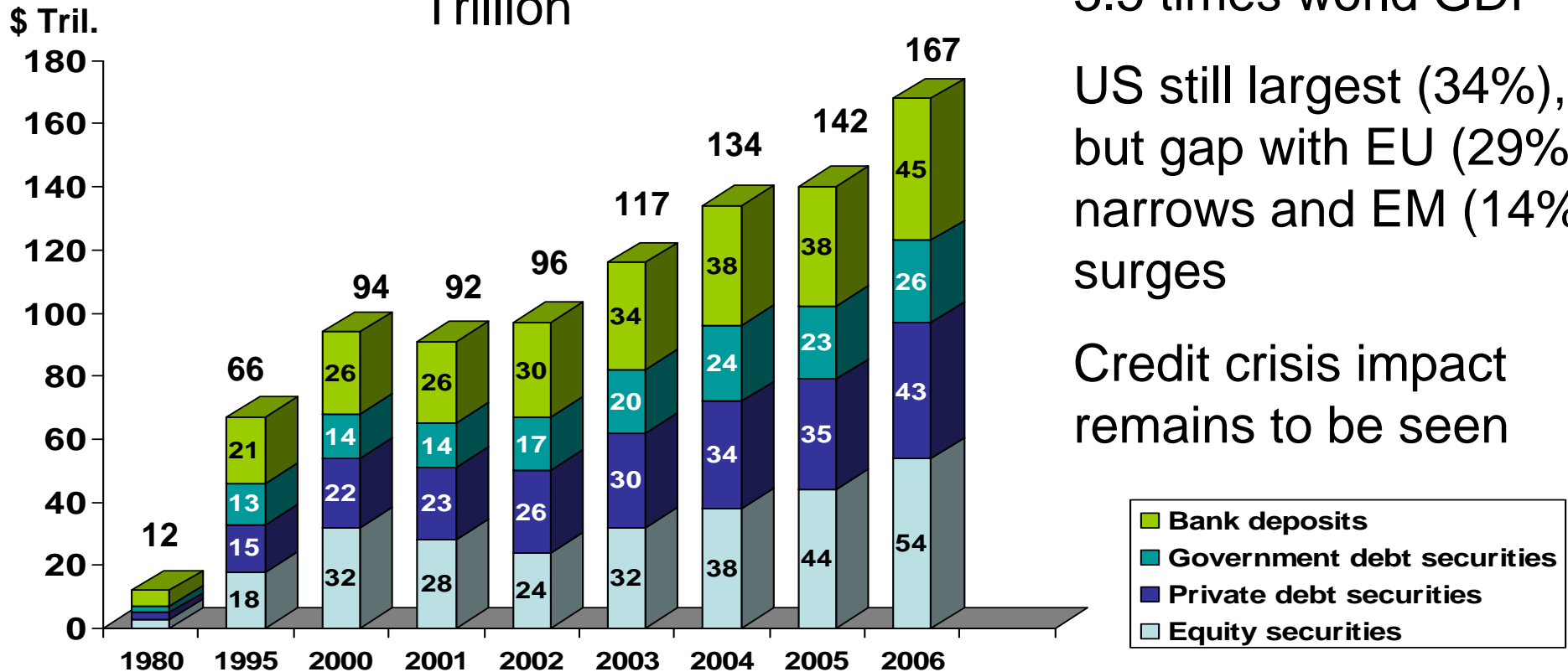
- ▶ The Business Environment
- ▶ The Regulatory Environment
- ▶ Benefits of More Coherently Regulated Global Capital Markets
- ▶ The Political Context
- ▶ The Regulators' Work to Date
- ▶ The Industry Work to Date
- ▶ Main Tension Points and Challenges Ahead
- ▶ What Next?

The Business Environment

“This is not bad, but the pace of globalisation has surpassed the capacity of the system to adjust to new realities of a more interdependent and integrated world” (Anna Lindh)

Global Financial Assets Continue to Soar

Global Financial Assets Reach \$167 Trillion



World financial assets
3.5 times world GDP

US still largest (34%),
but gap with EU (29%)
narrows and EM (14%)
surges

Credit crisis impact
remains to be seen

Source: McKinsey & Company, February 2008

Growing Cross-Border Investments Link Global Financial Markets

Crossing borders: 2006

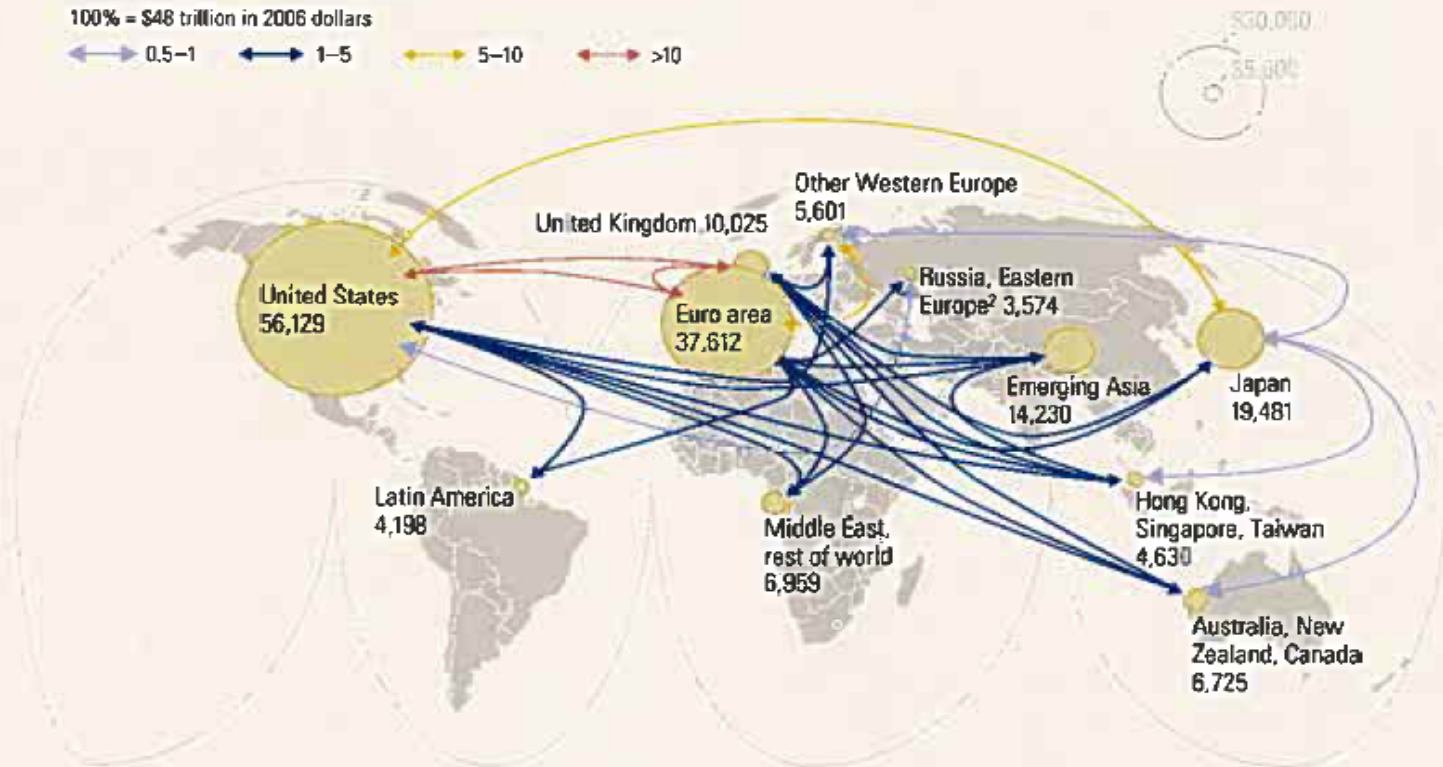
Part 2: Global web of cross-border investments, 2006

Lines show total value of cross-border investments between regions¹
Figures show size of total domestic financial assets, \$ billion

% of world GDP

100% = \$48 trillion in 2006 dollars

↔ 0.5-1 ↔ 1-5 ↔ 5-10 ↔ >10



¹Includes total value of cross-border investments in equity and debt securities, lending and deposits, and foreign direct investment.

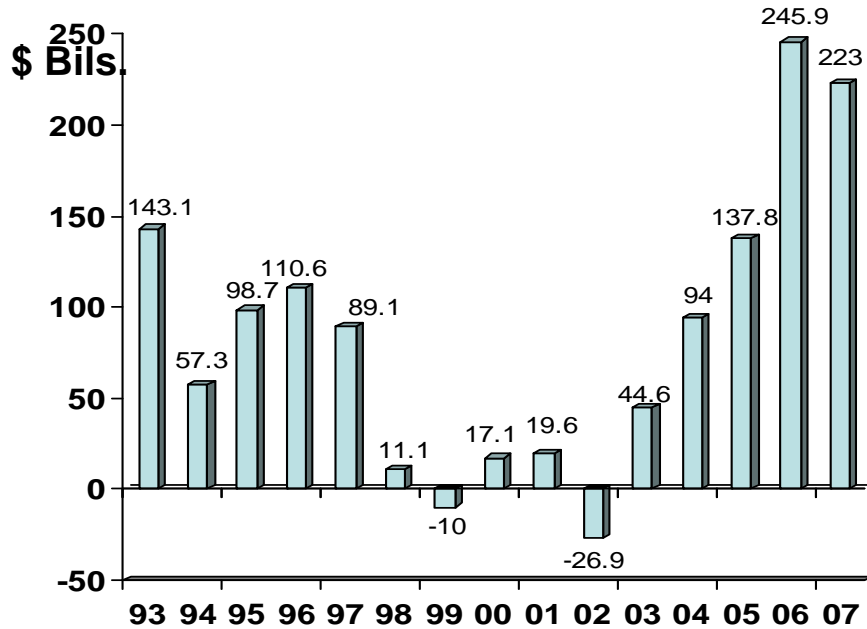
²Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, and Ukraine.

Source: McKinsey Global Institute analysis

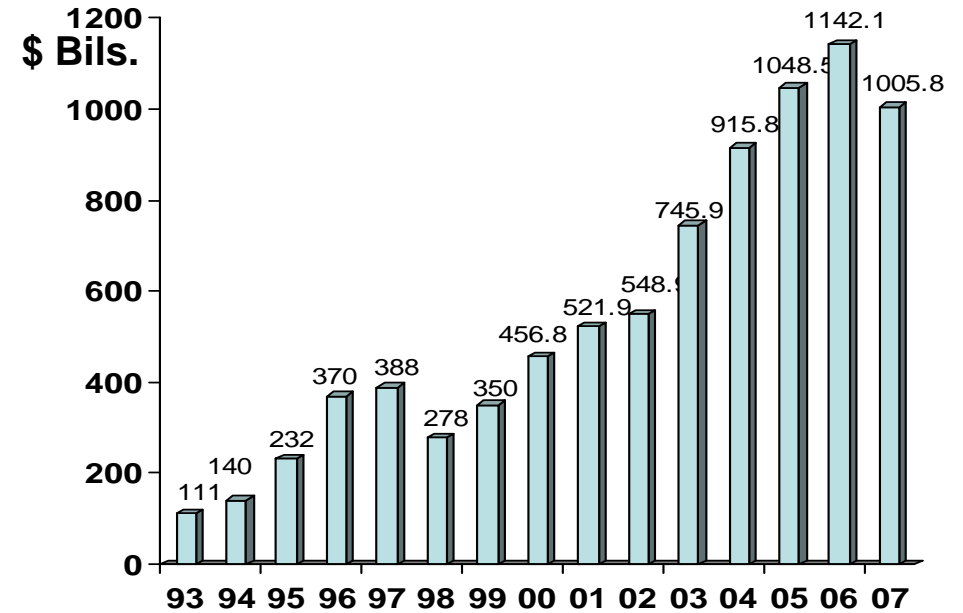
Source: McKinsey & Company, 2008

A Fast Growing Class of Global Investors

Net Acquisitions of Foreign Securities by U.S. Investors

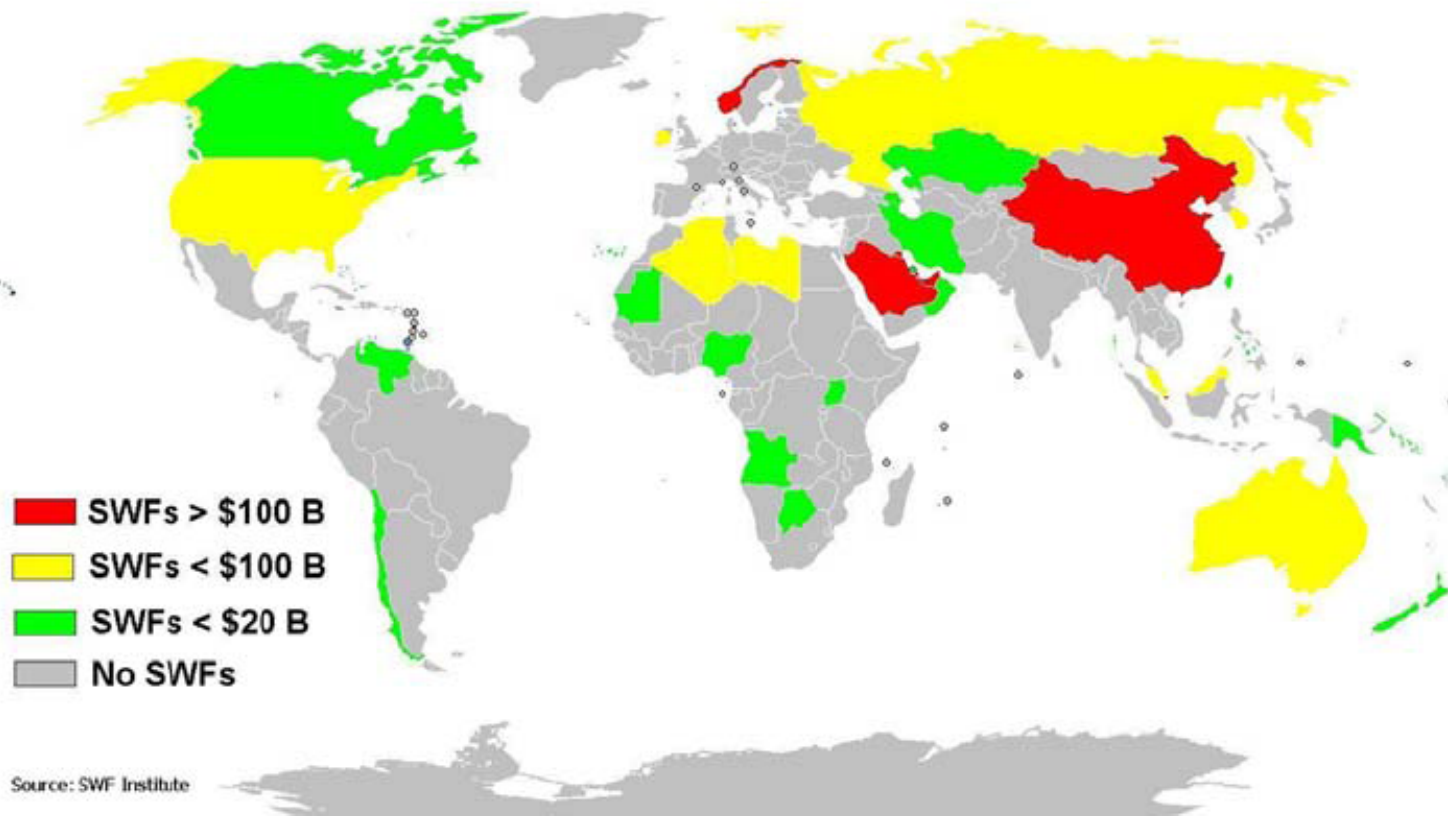


Net Acquisitions of U.S. Securities by Foreign Investors



Source: U.S. Treasury, 2008

SWF Size & Concentration by Country



Source: SWF Institute

Table 1: The 15 Largest EU Banks' Assets Holdings

EU's 15 Largest listed banks (by decreasing order of market value)	Home Country	Assets in home country (1997)	Assets in the rest of Europe (1997)	Assets in home country (2006)	Assets in the rest of Europe (2006)
HSBC	UK	35%	4%	27%	12%
RBS	UK	81%	1%	68%	7%
Santander	ES	55%	8%	26%	58%
BNP Paribas	FR	53%	19%	58%	20%
ING	NL	55%	11%	23%	16%
UniCredit	IT	77%	17%	26%	70%
Barclays	UK	71%	8%	41%	20%
ABN Amro	NL	38%	15%	29%	43%
Intesa Sanpaolo	IT	70%	15%	84%	8%
BBVA	ES	85%	3%	61%	9%
Société Générale	FR	80%	7%	54%	27%
Deutsche Bank	DE	32%	35%	18%	47%
HBOS	UK	83%	8%	85%	9%
Crédit Agricole	FR	88%	3%	77%	13%
Lloyds TSB	UK	86%	5%	95%	2%
Average (unweighted)		66%	11%	51%	24%
Average (asset-weighted)		60%	13%	48%	24%

Source: Bruegel / EBF Report on Integration of European Financial Services Markets, Dec 07

Interconnected Capital Markets The Sub-Prime Evidence

Quand
l'Amérique
fait trébucher
l'épargnant
français



Des banques allemandes touchées par la crise du « subprime »

“The European Central Bank injected more than Eur155bn of liquidity into markets because unemployed workers in Detroit are defaulting on home loans ...”
(FT 14/8/07)

"The recent turmoil has clearly demonstrated the interconnectivity and globalisation of financial markets." (C McCreevy, 5/9/07)

THE EU-US CONNECTION



Trade

- ▶ EU-US trade relationship represents more than \$2 billion a day
- ▶ Together, EU and US represent 45% of world trade and 63% of global financial assets

Investment

- ▶ EU companies had 71% (\$1270 billion) of the total invested in the US by all foreign nations ('06)
- ▶ US direct investment in the EU totaled \$1250 billion ('06).

Jobs

- ▶ US companies employed more than 4.3 million people in Europe ('05)
- ▶ EU companies based in the US employed 3.7 million people ('05)

Profits

- ▶ US companies derive more than half of their foreign profits from the EU

“For all the clashes of culture, the mutuality of interests between America and Europe far outweighs the differences”

Financial Times, 27th April 2007

The Regulatory Environment

“You must be the change you wish to see in the world”
(Mahatma Gandhi)



- ▶ Fragmented regulatory structure with overlapping jurisdiction
 - Federal level: 6 banking regulators (Fed, OCC, FDIC, OTS, FHFB, NCUA); 3 securities regulators (SEC, CFTC, MSRB)
 - Also banking, securities and insurance regulators at state level
 - SROs
- ▶ Rules-based approach created system with outdated, overly broad, and/or unduly burdensome rules, which does not reflect global markets
 - Numerous obstacles to efficient execution of cross-border securities transactions (eg restrictions on qualified investors, chaperoning)
 - Different approaches to cross-border dealings with US investors between SEC and CFTC
 - Fail to recognize distinctions between different types of investors and products
- ▶ Reform is on the way...

- ▶ Good progress in more integrated approach to pan-EU wholesale securities market regulation
 - Introduction of the Euro played key role
 - So did FSAP Passport and harmonisation directives and the coordinating role of the Level 3 Committees as part of the Lamfalussy process

- ▶ But inconsistent and lack of timely implementation maintain fragmentation
 - Only 3 out of 30 EEA member states implemented MiFID on time
 - 44 instances in MiFID where Member States can chose to vary requirements
 - Despite EU's discouragement of "gold-plating", "the cumulative effect of any significant divergence between the 30 EEA member states who are obliged to transpose MiFID could be quite pronounced" (EBF Dec 07 report on Integration of EU Financial Markets)

- ▶ Cross-border dealings between 3rd country firms and local EU investors not harmonised under EU securities laws
- ▶ Member States' approaches vary: e.g. some provide exemptions to local licensing rules, others don't
- ▶ Test for triggering local licensing rules can be unclear or out of sync with interactive wholesale markets
- ▶ Even where a foreign firm has an EU presence that benefits from the single passport, licensing rules still impose significant restrictions on wholesale cross-border business
- ▶ As a result
 - Structuring business with EU institutional investors so that it flows through the passported EU company inefficient and increases control, legal and compliance risks
 - Need to capitalise EU subsidiary fragments the group's capital and restricts ability to risk manage its positions centrally
 - Multiplying intra-group transactions increases operational risks and complexity for supervisors

- ▶ Firms that operate in different countries are subjected to different rules developed independently for local markets, resulting in
 - disproportionate costs
 - regulatory conflict or duplication – legal & compliance uncertainty
 - customer confusion
 - less efficient cross-border transactions
 - barriers to market access

- ▶ Although the current crisis has highlighted some deficient practices among market participants, it has also highlighted that
 - The US regulatory regime and structure is outdated
 - Europe is not pulling in one direction
 - There is a lack of global regulatory and supervisory coordination

- ▶ Global financial markets need a global regulatory framework

Benefits of More Coherently Regulated Global Capital Markets

“Everything is for the best in this
best of possible worlds” (Voltaire)

Benefits of More Coherently Regulated Global Capital Markets

▶ **For consumers of financial services**

- Broader access to global investment opportunities (wider range of services, products, sources of capital and financial services providers)
- Improved understanding of regulatory protections, financial products and transactional risks

▶ **For providers of financial services**

- Facilitating common internal processes and customer-facing procedures and documentation will bring greater business and cost efficiencies

▶ **For market infrastructure providers/exchanges**

- More efficient investment and capital raising services and deeper pools of liquidity through enhanced and more cost-efficient cross-border dealings

▶ **For regulatory authorities**

- Deeper common understandings and working relationships and greater trust, so enhancing ability to better cooperate in supervisory and enforcement functions, and reducing regulatory differences

▶ **Broader, deeper, more integrated and more efficient global capital markets**

The Political Context

“In politics, strangely enough,
the best way to play your
cards is to lay them face
upwards on the table”
(H.G. Wells)

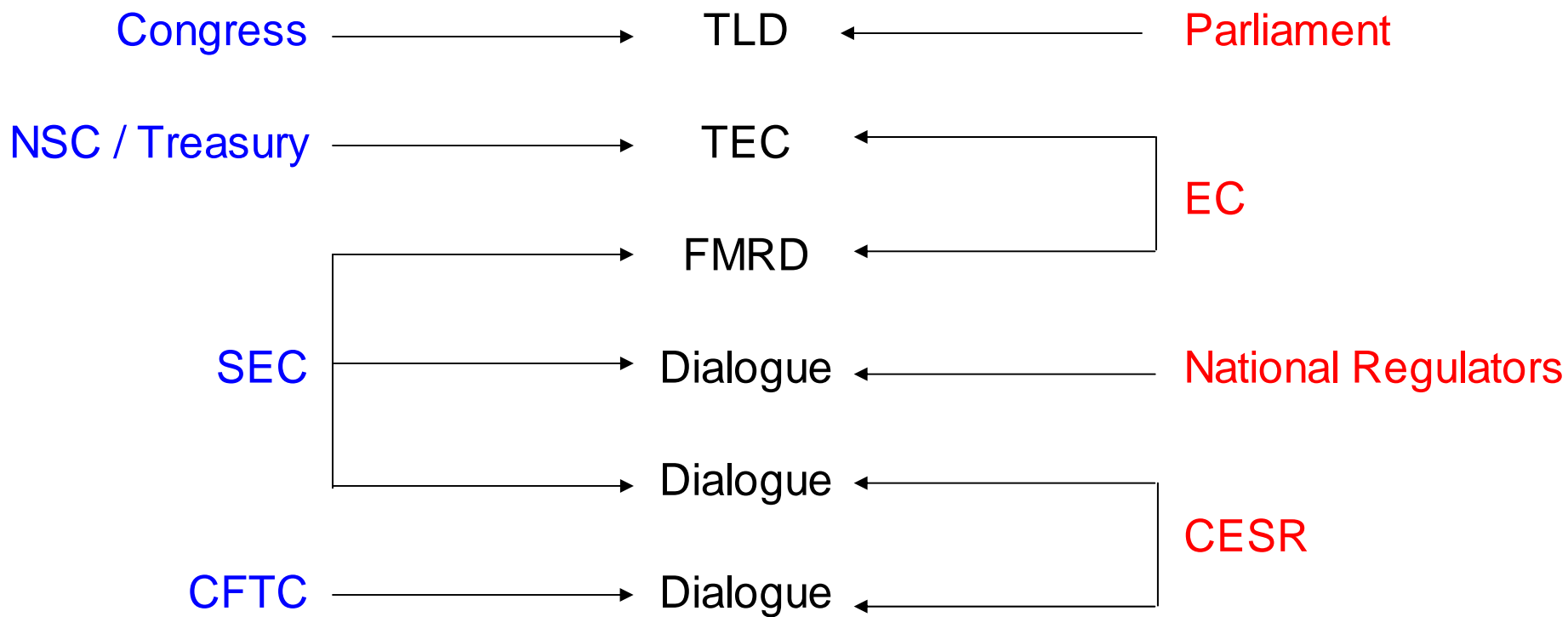


- ▶ Regulators and industry consensus that improvements in cross-border regulation and supervision required
 - One of the key policy responses to the current crisis
- ▶ Growing interest and support from political community: TEC/EU-US Summit, G7
- ▶ 2008 a pivotal year for EU-US agreement on mutual recognition
 - EU is ready: improved EU “quality label” post-FSAP → more integrated EU capital markets now in a position to look outwards with confidence
 - US has to deliver: competitiveness issue; Chairman Cox legacy
 - Like minded regulators: FMRD experience (trust, cooperation)
- ▶ Growing emerging market force with EM countries developing their regulatory regimes: opportunity for EU-US leadership to minimise inconsistent/protectionist approaches to regulation

Main Regulatory and Political Forums that are Driving the Agenda

U.S.A.

EUROPE



IOSCO / G7-G8

Financial Markets Crisis: The New Political Driver

- ▶ A new context: control post credit crunch
- ▶ All monetary authorities and regulators are struggling with new scenarios
 - “Even the recent past is a foreign country“ (Martin Wolf FT 26/03/08)
 - Barney Frank's call for creation of systemic risk regulation to safeguard the financial services sector (20/03/08)
 - Lender of last resort activities: FED in US, ECB in Euroland, Bank of England
- ▶ International work in four main areas
 - Transparency - public and investor disclosure
 - Valuation standards and methodology - risk models
 - Prudential capital risk management and supervision – liquidity
 - Market functioning, including rating agencies, accounting and “originate to distribute” model
- ▶ Both global and public & private sector cooperation and coordination required
 - EU and G7 Finance Ministers, FSF, IOSCO, BIS Committees, US President's WG, EU Commission, EU Parliament Own Initiative
 - ESF/SIFMA/LIBA/EBF/IIF etc

Crisis in the Financial Markets: Threat or Opportunity?

- ▶ Protectionist risk, compounded by upcoming key elections in US and EU
- ▶ Inertia risk, compounded by drain on public and private sector resources
- ▶ Yet, “the interconnectivity of markets shows how important it is to have a globally convergent approach to regulation” (McCreevy 5 Sept – 1st Speech on Subprime)
- ▶ The French and UK press seem to agree
 - “Le caractère critique de la crise financière exige des mesures d’urgence...Primo, réduire le fossé qui s’est créé entre l’universalité du capitalisme et le caractère national de sa regulation...” (Le Monde 12 mars 2008, Nicolas Bavarez – économiste et historien)
 - “In recent years regulators worldwide have grappled with the fact that the regulatory system has been evolving far slower than the financial sector – meaning that when a crisis strikes, regulators and central banks are forced to create policy on the hoof...For as the crisis spreads, it is exposing institutional shortcomings in the regulatory pillars that underpin the financial system” (FT 17 March 2008, Tett, Guha and Giles)

The Regulators' Work to Date

“We shall not fail or falter; we shall not weaken or tire. Give us the tools and we will finish the job” (Winston Churchill)



In Europe: EU Commission Guiding Principles For Mutual recognition

- ▶ A gradual approach – professional markets 1st
- ▶ Regulators should drive, not trade negotiators
- ▶ A multilateral, not a unilateral process
- ▶ Co-operative assessment of relevant rulebooks, supervisory and enforcement arrangements
- ▶ Equality of criteria for assessment process
- ▶ Consistent application – no cherry picking of EU jurisdictions
- ▶ Equal treatment and processing of applications of EU brokers and exchanges and of EU jurisdictions
- ▶ Access to company books must respect EU personal data protection systems
- ▶ No extraterritoriality
 - Business conducted within the EU subject to EU and Member States' laws
 - No extra on-site inspections by foreign regulators
 - No importing of investors class action lawsuits via mutual recognition arrangements

Possible Mutual Recognition Process

▶ Scoping and specification

- Joint EU-US political declaration on the broad framework for mutual recognition of securities regimes
- Steering Committee (EC, CESR, SEC) to drive the process. Initial scoping and determination of substantial comparability requirements based on IOSCO's Objectives and Principles of Securities Regulation

▶ Assessment

- Each party conducts a self-assessment in line with the IOSCO-based framework. On the EU side, both EC and CESR would be involved
- Validation by the Steering Committee

▶ Application and monitoring

- EU and US regulators agree to apply the mutual recognition model
- Both sides commit publicly to grant recognition to the other at the same time, once the conditions for mutual recognition have been satisfied
- Periodic review mechanism is established (involving IMF?)

- ▶ Very positive developments in the accounting area with SEC accepting IFRS for not just foreign issuers, but also potentially US issuers
- ▶ Slow progress in the securities area - SEC 24/3/08 statement adds little but maintains momentum. Upcoming SEC release(s) (April?) should address
 - Mutual recognition for broker-dealers and exchanges: little detail known - expected “top-down” approach
 - Expansion of exemptive regime (rule 15a-6) to allow foreign broker-dealers to access a greater category of sophisticated US investors (but may still require US broker-dealer intermediation) - No reciprocity expected!
- ▶ In depth review by CFTC of its Part 30 rules approved and continues largely unchanged. Part 30 offers unilateral rights of access to US investors by non-US futures brokers/exchanges provided
 - They are subject to a comparable regulatory regime in their country of incorporation
 - Appropriate information sharing arrangements exist with CFTC
 - Consent to submit to jurisdiction in the US

- ▶ “Structured dialogue” with industry since March 2007
- ▶ Improves industry input into IOSCO Work Programme, including on convergence of securities regulations
- ▶ 20 March 2008 IOSCO/Industry meeting agreed convergence topics to be carried forward
 - Standardisation of disclosures of significant shareholdings
 - Convergence/standardisation in definition of investors, especially wholesale sophisticated investors
 - Facilitating direct access to global financial markets by international financial firms

The Securities Industry's Work to Date

“There is no substitute for hard work” (Thomas A. Edison)



- ▶ A response to the 1st “structured dialogue” meeting between industry and IOSCO in March 2007
- ▶ Combining high-level papers on approach to regulatory convergence
 - Effective and efficient regulation of cross-border capital markets transactions: a conceptual framework for identifying areas for international standards, exemption and recognition
 - Achieving direct cross-border institutional access for capital market intermediaries
- ▶ And detailed papers on standardisation needs
 - Standardising investor classification definitions
 - Standardising rules on the disclosure of shareholdings
 - Standardising rules on stabilisation practices

SIFMA Discussion Paper on Cross-Border Regulatory Reform (Oct. 07)

- ▶ Analyses US regulatory obstacles to efficient execution of cross-border securities transactions
- ▶ Stresses the need for practical reforms that will address such obstacles
- ▶ Recommends and describes the key features of a phased and tiered approach to achieving those reforms, with initial focus on the most significant markets, transactions and investors
- ▶ Highlights the importance of
 - expanding wholesale cross-border access below the current \$100 million investor threshold
 - adopting an expeditious and transparent implementation mechanism
 - avoiding impractical regulatory distinctions (e.g. limits on trading mixed portfolios of US and non-US securities)
 - basing regulatory deference to non-US jurisdictions on strengthened agreements for supervisory cooperation rather than abstract “comparability” determinations

Illustrative Example of a Phased and Tiered Approach

	Phase I		Phase II
	<i>Investors with \$100 millions or more under management</i>	<i>Investors with \$25 millions or more under management</i>	<i>Retail and Other Investors</i>
Disclosure Requirements	Disclosure of firm's regulatory status	Ditto	Disclosure of firm's regulatory status, more detail if appropriate for particular jurisdictions
Undertakings of Non-US Securities Firm	Consent to SEC jurisdiction Persons subject to statutory disqualification cannot engage in US activities	Ditto	Consent to SEC jurisdiction Persons subject to statutory disqualification cannot engage in US activities Clearing arrangement with US registered broker-dealer, except where inconsistent with non-US law or where local regulator provides protection of assets comparable to US
Home Country Regulation	Enforcement MOU required	Ditto – In addition: Oversight of non-US securities firm is consistent with US investor protection principles, taking into account: (i) supervision by home country regulator, (ii) capitalization and controls of the firm and its holding company; (iii) regulatory oversight of firm's holding company and any US broker-dealer that the non-US firm retains to provide clearing or similar services	Enforcement MOU required Supervisory cooperation MOU required Recognition of home country regulatory and enforcement framework including with respect to (i) anti-fraud and market manipulation, (ii) sales practices; (iii) safekeeping of customer assets and related books and records requirements
Securities Type	Non-US securities and US securities (so long as non-US firm's customer business predominantly consists of non-US securities activities)	Ditto	Non-US securities only
Permitted Activities	Direct communications with US investors (without chaperones), including provision of research Entering into transactions (without intermediation), including maintenance of accounts and related confirmation, clearance, settlement, financing and safekeeping	Ditto	Direct communications with US investors, including provision of research, re non-US securities Execution of non-US securities transactions Direct communications and transaction execution subject to chaperoning and intermediation

EU-US Coalition 2nd Report on the 3 Gateways to Regulatory Modernisation (March 08)

- ▶ Supports “fast track” *exemptive relief* for foreign intermediaries for defined levels of wholesale business as a more readily deliverable and a foundation for establishing regulatory recognition
- ▶ Encourages wider acceptance of *regulatory recognition* (unilateral, mutual or multilateral) as accepted international regulatory policy based on common regulatory values and shared outputs
- ▶ Identifies need for “*targeted*” *rules’ standardisation* where either (i) there is insufficient approximation in rules’ outputs to facilitate recognition; or (ii) standardisation would deliver tangible benefits for providers and consumers of financial services
- ▶ Encourages creation of a framework for (i) taking forward the regulatory dialogue on a regulator-to-regulator basis; and (ii) accommodating regular industry input
- ▶ Updates priorities for regulatory action to reflect the needs and priorities of today’s transatlantic financial services industry (see slide 40)

Regulators and industry should consider **all the options** - A successful outcome depends on choosing the most appropriate and effective approach to addressing the diverse obstacles to efficient cross-border business – they are not mutually exclusive!



- ▶ Prevailing regulatory model requiring local licensing/registration of foreign firms out of sync with global wholesale markets: creates significant unnecessary barriers to efficient cross-border securities business (even in EU for non-EU branches/subs) and deprives local institutional investors of the benefits of global market integration
- ▶ Removing barriers could be done via recognition (mutual or unilateral). But most effective way to obtain near-term tangible results is to exempt foreign firms which enter into cross-border transactions with sophisticated local investors
- ▶ The model of direct cross-border institutional access is a better fit with a more globalised marketplace as it allows institutional investors to deal directly with the firms that provide the services and products they wish to obtain
- ▶ In its purest form, wholesale exemption requires no comparative assessment of foreign regulatory regimes, and the local regulator imposes no requirements on foreign firms other than to limit activities with institutional investors – e.g. Ireland
- ▶ But often local regulators will impose additional requirements for granting exemptions from local licensing/registration: can range from basic (e.g. UK, Belgium) to extensive (e.g. US Rule 15a-6) – but still no comparative assessment involved (when regulators introduce comparability requirements, we begin to enter recognition)
- ▶ In any case, exemption does NOT mean no regulation: adjusting regulatory regimes to meet the needs of firms and investors in a more efficient way does not undermine the ability of regulators to fulfill their mandates
- ▶ Competitiveness tool/market opening device – e.g. in the US, upcoming SEC 15a-6 reform driven in part by pressure to attract foreign investments back into the US
- ▶ May require legislative changes but progress not dictated by slowest mover

- ▶ Recognition can be mutual (reciprocal) or unilateral (non-reciprocal) – e.g. CFTC, Australia
- ▶ Has benefit of not requiring regulatory changes and may be effective when regimes are sufficiently comparable (e.g. rules on capital raising, distribution of securities, conduct of business)
- ▶ Effectiveness more likely if the assessment of comparability is “top-down” (focused on regulatory outcomes) rather than a “bottom-up” / line-by-line detailed evaluation of rules
- ▶ EU-US Coalition Report proposes a basis and process consistent with EU Commission approach (i.e. a multilateral mutual recognition basis)
 - IOSCO Principles a sound basis for measuring rules’ outputs and establishing a common set of regulatory values
 - With “top-up” (“IOSCO+”) to reflect certain aspects of specific regulation (e.g. MiFID on the EU side)
- ▶ Enforcement aspects could also be based on IOSCO’s existing MMOU on Consultation, Cooperation and the Exchange of Information
- ▶ Upcoming SEC Release on mutual recognition of broker-dealers and exchanges is next critical step
- ▶ Real risk that the process will move at the pace of the slowest country involved (especially where mutual recognition is chosen approach)

- ▶ Developing common approaches, international standards and/or converged rules
- ▶ When regulations are so out of line that only standardisation can eliminate disparate elements of national regulations; eg
 - Disclosure of significant shareholdings: differences world-wide on scope of obligation, threshold triggers, notification procedures, exemptions and exceptions, reporting
 - Investor classifications: vary greatly between countries, and even when they don't, consequences of classification may differ, in particular in 3 areas: offering restrictions, conduct of business, licensing
- ▶ Like exemption, has important practical advantage of avoiding the need to make politically sensitive assessments of foreign regulatory regimes
- ▶ Will help achieve exemption, recognition, convergence
- ▶ But will likely require changes to primary legislations
- ▶ Should be carried out as part of IOSCO and Industry “structured dialogue”
 - Long-term initiative - critical that appropriate bodies are mandated to carry forward this work within IOSCO

Industry Priorities & Possible Approaches



Non-exhaustive examples and still under review

PRIORITIES	POSSIBLE APPROACH
1. Foreign broker-dealers' access to sophisticated clients	Exemption
2. Classification of counterparties	Standardisation
3. Disclosure of large shareholdings	Standardisation
4. Investment fund marketing restrictions	Standardisation/Recognition
5. Transaction Reporting standards	Standardisation
6. Registration/examination of individuals' competence	Standardisation/recognition
7. KYC and AML requirements	Recognition/standardisation

Main Tension Points and Challenges Ahead

“Obstacles are those frightful things you see when you take your eyes off your goal” (Henry Ford)

Focusing on the Means – Forgetting the Purpose

- ▶ Much tension arises out of the confusion over the meaning of the variety of often loaded terms used as possible ways to achieve more efficient and effective regulation of cross-border capital markets: exemption, recognition (unilateral, mutual, multilateral), standardisation, convergence etc.

- ▶ Whilst different securities regulators and different market participants may have legitimate reasons to prefer one avenue over another, it is critical that they do not forget the objective that is common to all stakeholders, i.e.
 - To simplify, or eliminate, duplicative, inconsistent and / or overlapping regulations between domestic markets

 - In order to reconnect regulation with the reality of today's increasingly integrated global capital markets

 - So as to deliver the benefits identified on slide 20

- ▶ Extraterritoriality
 - Importing class actions
 - Foreign inspections
- ▶ Cherry-picking
- ▶ Impact on single market integrity
 - Distorting competition
 - Changes to MiFID
- ▶ Sub-prime contagion makes opening up a harder political sell

- ▶ Who speaks for Europe?
- ▶ Dealing with 27 member states
- ▶ Uneven regulatory powers and enforcement philosophies
- ▶ Not all “like-minded” regulators
- ▶ Opportunities for faster outcomes with other jurisdictions

What Next?

“The trouble with our times is that the future is not what it used to be” (Paul Valery)



▶ Regulators and Policy Makers

- SEC Release(s) on mutual recognition and exemptive relief (15a-6) reform. How will Europe react?
- Negotiating the recognition framework
- Engagement with IOSCO's Standing Committees on convergence agenda
- Credit crisis regulatory response (see slide 24)

▶ Industry

- Round Robin of EU and US meetings on the Coalition Report
- Developing an EU position - EU Cross-Border Securities WG
- Possible UNIDROIT involvement on investor definitions project
- SIFMA workshop