Beyond Bankruptcy: 
Resolution as a Macroprudential Regulatory Tool

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Abstract: To try to protect the stability of the financial system, regulators have been extending bankruptcy-resolution techniques beyond their normal boundaries. The resulting regulation, which focuses on reorganizing or liquidating troubled systemically important firms, often is flawed because it builds without insight into bankruptcy law, which seeks to protect individual firms rather than to protect financial stability. This Article explains these flaws and analyzes how, and why, resolution-based regulation should be used to help stabilize the financial system. That analysis reveals how resolution-based regulation can valuably be extended not only to resolve troubled systemically important firms but also to protect against the failure of markets and other critical elements of the financial system.
INTRODUCTION

Since the global financial crisis of 2008-09 (the “financial crisis”), regulators and policymakers have been shifting their focus from traditional microprudential regulation, which is intended to protect individual financial firms, to “macroprudential” regulation that protects the stability of the financial system itself. Macroprudential regulation is very much in the process of

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developing. Its specific measures are still viewed as “tools” in a regulatory “toolkit,” evidencing an ad hoc approach that does not yet fully protect financial stability.

In designing macroprudential regulation, regulators originally focused on trying to deter events that might trigger destabilization. It is not always clear, however, what those events are or how they could be deterred. For example, the Dodd-Frank Act seeks to dampen overheated mortgage lending, one of the events that triggered the financial crisis. But mortgage lending is unlikely to be a trigger of the next crisis; each financial crisis is different from the last and raises new issues.

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7 Iman Anabtawi & Steven L. Schwarcz, Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure, 92 TEX. L. REV. 75, 77 (2013) (“Dodd-Frank’s underpinnings reflect a strong ex ante financial regulatory bias”). Systemic risk is the risk that a financial system failure will have a significant adverse impact on the real economy.
8 Anabtawi & Schwarcz, supra note 7, at 93 (observing that we do not yet know all the triggers of systemic risk, nor can we prevent the known triggers, such as panics, from occurring).
10 See, e.g., Why the Next Financial Crisis Will Be Different, KNOWLEDGE@WHARTON (Oct. 28, 2014), http://knowledge.wharton.upenn.edu/article/why-the-next-financial-crisis-will-be-different/.
Likewise, current regulatory efforts to deter excessive risk-taking by systemically important financial firms (“systemically important firms”\(^\text{11}\)) are insufficient. Although that risk-taking was a trigger of the financial crisis\(^\text{12}\) and appears to be a continuing threat to financial stability,\(^\text{13}\) regulators remain uncertain how to control it.\(^\text{14}\) Many of the deterrent efforts arguably focus on the wrong factors: reducing moral hazard, and aligning managerial and investor interests.\(^\text{15}\) Attributing excessive risk-taking to moral hazard is unsupported by evidence and inconsistent with management incentives.\(^\text{16}\) Aligning managerial and investor interests is

\(^{11}\) This Article uses the term “systemically important firm” to reference those firms that have been designated as systemically important by governments. In the United States, for example, the Dodd-Frank Act allows the Financial Stability Oversight Council to designate any firm that “could pose a threat to the financial stability of the United States” as a systemically important financial institution (“SIFI”). Ryan Tracy, *What you need to know about SIFIs*, The WALL STREET JOURNAL SHORT ANSWER BLOG (Mar. 30, 2016, 1:33 PM), http://blogs.wsj.com/briefly/2016/03/30/what-you-need-to-know-about-sifis-the-short-answer/. SIFIs are subject to enhanced supervision by regulators. *Id.*


\(^{14}\) Cf. Timothy F. Geithner, *Are We Safe Yet?: How to Manage Financial Crisis*, FOREIGN AFFAIRS (Dec. 12, 2016) (observing that “[a]lthough regulations [imposing specific requirements] have reined in banks’ risk-taking behavior, they can go only so far”); Hester Peirce, *Clearing, Recovering, and Resolving*, Brookings Center on Regulation and Markets (Feb. 27, 2017), https://www.brookings.edu/research/clearing-recovering-and-resolving/ (discussing the uncertainty over how law should protect critical elements of the financial system).

\(^{15}\) Steven L. Schwarcz, *Too Big to Fool: Moral Hazard, Bailouts, and Corporate Responsibility*, 102 MINN. L. REV. (forthcoming issue no. 2, Dec. 2017), available at http://ssrn.com/abstract=2847026. Moral hazard generally refers to the temptation of persons who are protected from the negative consequences of their risky actions to take more risks. In this Article’s specific context, moral hazard is the idea that a systemically important firm will take risks assuming it will profit from success and, being “too big to fail,” be bailed out to prevent its failure. *Id.* at 15.

\(^{16}\) *Id.* at 6–11.
inadequate because excessive risk-taking appears to be primarily motivated by a different misalignment—between managerial and investor interests, and the interests of the public.\(^{17}\)

Frustrated that they have made “little progress in figuring out how they might actually” prevent another financial crisis,\(^{18}\) regulators are now re-focusing\(^{19}\) on the systemically important firms themselves. They are seeking to increase financial stability by applying bankruptcy-resolution techniques to try to reorganize the capital structure of,\(^{20}\) or else to liquidate, systemically important firms that become financially troubled.\(^{21}\) To date, however, their efforts to achieve that stability through resolution-based macroprudential regulation (hereinafter, “resolution-based regulation”\(^{22}\)) have been seriously flawed.

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\(^{17}\) Id.


\(^{19}\) Their new focus goes beyond trying to deter excessive risk-taking. Cf. supra notes 11-15 and accompanying text (discussing their original focus).

\(^{20}\) The capital structure of a firm refers to the “mix of debt and equity by which a corporation finances its operations.” A HANDBOOK OF BUSINESS LAW TERMS 96 (Bryan A. Garner, ed., 1999). One of the principal goals of a reorganization under Chapter 11 of the Bankruptcy Code is determining what the firm’s new capital structure will be. Mark J. Roe, Bankruptcy and Debt: A New Model for Corporate Reorganization, 83 COLUM. L. REV. 527, 528 (1983).

\(^{21}\) See, e.g., Peter O. Muelbert, Managing Risk in the Financial System, in THE OXFORD HANDBOOK OF FINANCIAL REGULATION 364, 384 (Niamh Moloney, Eilis Ferran, & Jennifer Payne, eds. 2015) (characterizing “improving the resolvability of financial institutions” (or “making them resolvable in the first place”) as a relevant tool “pursuing a macro-prudential objective—even though partly not ‘prudential’ in nature”; and also observing, at that time, that resolution was not a “main” tool identified with macroprudential policy); Speech of Governor Daniel K. Tarullo, Departing Thoughts, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM 25 (Apr. 4, 2017) (calling the “the need for credible resolution mechanisms for large banks” an “important topic[ ]”); E-mail from Paul Tucker, Senior Fellow, Mossovar-Rachmani Center for Business and Government, John F. Kennedy School of Government, Harvard University, to the author (Dec. 2, 2016) (arguing that because “nothing, other than moving to an economy without debt, can crush the probability [of a systemically important firm’s failure] to 0%,” a “robust policy [should] include[] an effective/credible regime for resolution”). Cf. Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions ¶ 3.1 (Oct. 15, 2014), available at http://www.fsb.org/wp-content/uploads/r_141015.pdf (stating that resolution “should be initiated when a firm is no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so”).

\(^{22}\) In accordance with customary bankruptcy usage (see supra notes 20-21 and accompanying text), references in this Article to “resolution” include reorganizing the capital structure or liquidating firms that become financially troubled. More broadly, however, this Article uses that
The problem is that regulators are working without insight into bankruptcy and insolvency law (collectively, “bankruptcy law”), which normally seeks to protect individual firms rather than to protect the financial system as a “system.” As a result, they are conflating microprudential and macroprudential goals. For example, regulators assume without critical inquiry that applying resolution to individual systemically important firms will necessarily protect financial stability. As will be shown, that assumption is false. Regulation based on that false assumption will also be shown to be flawed, ignoring correlations among systemically important firms and missing the opportunity to apply resolution-based regulation to markets and other critical elements of the financial system. Additionally, regulation based on that false assumption will be shown to be dangerous, reducing financial stability and increasing systemic risk.

These flaws do not undermine the potential importance of resolution-based regulation. Rather, they illustrate the need to more carefully and critically analyze and differentiate the term to also include any other ways to restructure or otherwise stabilize a financially troubled firm, market, or other entity—and irrespective of whether that occurs through a court-supervised process (like ordinary bankruptcy) or an administrative process (like FDIC-receivership; see infra note 45 and accompanying text).


24 Traditionally, the goals of bankruptcy law are purely microprudential: to protect individual firms that are financially troubled but otherwise viable by reorganizing their capital structure, and to liquidate financially troubled firms that are not otherwise viable. [cite]

25 Cf. supra notes 3-4 and accompanying text (describing those regulatory goals).

26 See Part I, infra (describing how resolution-based regulation has been used to date).

27 See infra notes 111-126 and accompanying text (explaining why using resolution to protect individual systemically important firms does not necessarily follow the distributive law of mathematics).

28 See infra note 137 and accompanying text.

29 See infra Parts II.B.2 & II.B.3.

30 See infra notes 35-44 and accompanying text (discussing the derivatives safe harbor). See also infra notes 111-126 and accompanying text (explaining why resolution that nets offsetting liabilities superficially appears stability-enhancing but in fact exacerbates financial volatility in times of stress).
microprudential and macroprudential goals of resolution, in order to derive a coherent theory of how and why resolution-based regulation can stabilize the financial system. This Article begins that analysis, laying the groundwork in Part I by examining how resolution-based regulation is currently being used and explaining why that use is generally flawed. Thereafter, Part II identifies the macroprudential goals of resolution-based regulation and analyzes how and why such regulation should be used.

I. TYPOLOGY OF RESOLUTION-BASED REGULATION

As a real-world foundation for this Article’s analysis, first consider how resolution-based regulation is currently being used. This Article identifies three approaches. The first two approaches—“reactive” resolution and “proactive” resolution—represent resolution in the strict sense of reorganizing the capital structure of, or liquidating, a firm.31 The third approach, “counteractive” resolution, is not strictly resolution per se; instead, it represents regulation that is designed to reduce the need for resolution by mitigating the risk of failure.

A. Reactive Resolution

This approach to resolution-based regulation is “reactive” in the sense that it applies if, and only if, a firm becomes financially troubled. Reactive resolution-based regulation (“reactive resolution”) is by far the most common approach in the United States and worldwide, comprising customary bankruptcy resolution techniques (and variations thereon) that are designed to reorganize the capital structure of financially troubled firms to make them viable, or to liquidate such firms that cannot be made viable through reorganization.32 Reactive resolution is currently being applied both directly and indirectly to systemically important firms.

1. Applying reactive resolution directly to systemically important firms.

31 See supra notes 19-21 and accompanying text.
32 See supra note 24. In the United States, for example, bankruptcy is governed by Title 11 of the United States Code. The two most common forms of corporate bankruptcy are reorganization, covered by Chapter 11 of Title 11, and liquidation, covered by Chapter 7 of Title 11. See DAVID G. EPSTEIN, STEVE H. NICKLES & JAMES J. WHITE, BANKRUPTCY 3–4 (1993).
In principle, reactive resolution could apply to any troubled firm, even a troubled systemically important firm. Corporate bankruptcy law, for example, could enable such a firm to restructure an unsustainable debt burden, such as by reducing the principal and interest on that debt and extending its maturities. So long as the firm has an inherently good business model, the debt restructuring could give it a “fresh start.” The bankruptcies of General Motors and Chrysler broadly followed this restructuring approach.

For at least two reasons, though, traditional bankruptcy may be insufficient as a macroprudential tool. First, bankruptcy law’s focus on protecting individual firms (as opposed to also protecting the financial system) is inherently microprudential. Secondly, the controversial bankruptcy of Lehman Brothers has raised concern that existing corporate bankruptcy law may be ill suited to reorganizing the capital structure of large financial firms. That concern has prompted proposals to amend bankruptcy law to better adapt it to those types of firms. In the United States, for example, the Hoover Institution has proposed adding a new Chapter 14 to the Bankruptcy Code and Congress has been considering a proposed Financial Institutions

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33 Cf. 11 U.S.C. § 109 (not limiting debtors under U.S. bankruptcy law to non-systemically important firms).
34 [cite] Commentators sometimes refer to such a firm as “good company, bad balance sheet.” [cite, e.g., to Fitch report] Reorganization cannot make a financially troubled firm viable if it lacks a good business model. See id.
35 Although the term “fresh start” is more commonly used for individuals rather than corporations, it is helpfully illustrative in this Article’s context.
36 Cf. Ralph Brubaker & Charles Jordan Tabb, Bankruptcy Reorganizations and the Troubling Legacies of Chrysler and GM, 2010 U. ILL. L. REV. 1375 (although arguing that these bankruptcy reorganizations “illustrate . . . that there actually is no clean, clear distinction between reorganization by ‘plan’ and reorganization by ‘sale’”).
37 Cf. infra notes 131-133 and accompanying text (discussing the Lehman bankruptcy).
38 See, e.g., Thomas H. Jackson & David A. Skeel, Jr., Dynamic Resolution of Large Financial Institutions, 2 HARV. BUS. L. REV. 435, 458–59 (2012) (critiquing a proposal made by the Hoover Institution for adding a new Chapter 14 to the Bankruptcy Code); Emily C. Kapur & John B. Taylor, A New Tool for Avoiding Big-Bank Failures: ‘Chapter 14’, WALL ST. J. (Mar. 10, 2016, 6:53 P.M. E.T.), https://www.wsj.com/articles/a-new-tool-for-avoiding-big-bank-failures-chapter-14-1457654027 (“The solution is not to break up the banks or turn them into public utilities. Instead, we should do what Dodd-Frank failed to do: Make big-bank failures feasible without tanking the economy by writing a process to do so into the bankruptcy code.”).
Bankruptcy Act, even in each case to try more appropriately to address the reactive resolution of systemically important firms. These proposed changes to bankruptcy law nonetheless remain microprudential, following the traditional approach of negotiating an individual firm’s debt restructuring.

Another approach to reactive resolution is epitomized by the Orderly Liquidation Authority (OLA), which contemplates a regulatory-supervised proceeding. The OLA empowers the Federal Deposit Insurance Corporation (FDIC) to put certain large, troubled financial institutions into FDIC receivership. The articulated justification for the OLA is that FDIC receivership has been used successfully for decades as a scheme for resolving insolvent banks and thus should be extended to troubled non-banks.

The OLA is itself potentially flawed. It has been criticized as being neither transparent nor predictable, with the potential to increase moral hazard:

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40 The Financial Institutions Bankruptcy Act of 2017 (“FIBA”) was proposed in April 2017 under H.R. 1667 to include a new financial-institutions-bankruptcy subchapter V to Chapter 11 of the U.S. Bankruptcy Code.

41 That negotiation is primarily undertaken by the debtor, its creditors, and its shareholders in connection with a court-supervised bankruptcy proceeding.

42 The OLA was created under the Dodd-Frank Act.

43 Although beyond this Article’s scope, some fear that the proposals to amend bankruptcy law discussed supra notes 39-40 and accompanying text could undercut the OLA. For example, the proposed CHOICE Act would repeal the OLA and substitute for it a Financial Institutions Bankruptcy Act. See Jeffrey N. Gordon, Mark J. Roe, et al., “Financial Scholars Oppose Eliminating ‘Orderly Liquidation Authority’ As Crisis-Avoidance Restructuring Backstop” 5 (May 23, 2017 letter to Congress) (hereinafter, “Financial Scholars Letter”).

44 Kwon-Yong Jin, *How To Eat an Elephant: Corporate Group Structure of Systemically Important Financial Institutions, Orderly Liquidation Authority, and Single Point of Entry Resolution*, 124 YALE L. J. 1746, 1754 (2014). The OLA gives the FDIC “extensive latitude in managing the company.” For example, it provides the FDIC with “the power to merge [the firm] with another institution, to transfer the institution’s assets (without any consent or approval), to suspend legal actions pending against the company, to avoid certain transfers, and to disallow claims that are not proven to its satisfaction.” *Id.* at 1754–55.

45 Banks are exempted from corporate bankruptcy law. See 11 U.S.C. § 109(b)(2).

46 At least part of the impetus for creating the OLA may have been that FDIC officials, who were thus familiar and comfortable with FDIC receivership as a means of resolving insolvent banks, were integrally involved in formulating the federal government’s regulatory response to the financial crisis.
Like the proposed changes to bankruptcy law, the OLA is also inherently microprudential because it focuses on protecting individual firms. Additionally, the success of FDIC receivership historically has depended on larger healthy banks acquiring troubled banks. If a large financial firm becomes troubled, there may not always be a larger healthy financial firm willing, much less available and able, to acquire the troubled firm. As a result, the FDIC may have to “heavily subsidize the [troubled firm’s acquisition under the OLA], a point in some tension with the notion that Dodd-Frank has ended bailouts.” This scarcity of eligible acquiring firms would become especially critical if multiple financial firms become troubled around the same time.

47 Stephen E. Hessler, A Better Idea for Bankrupt Big Banks, WALL ST. J., Apr. 25, 2017, at A17 (suggesting the FDIC’s power to treat creditors dissimilarly will cause politically connected creditors to expect higher recoveries, increasing moral hazard by making them less cautious when extending credit).

48 The OLA may not be quite as microprudential as traditional bankruptcy, however, because the FDIC, as an administrative agency, has much more discretion and flexibility than individual bankruptcy judges to coordinate the resolution of multiple troubled firms in light of systemic concerns.

49 Historically, the FDIC has had three options when dealing with a troubled bank. The strongly preferred option is to find a healthier bank to purchase the troubled bank, through what is called a purchase and assumption (P&A) transaction. In the second option, called open bank assistance (OBA), the FDIC lends money to the troubled bank. OBA has rarely been used, the last time being in 1992. Its disfavor might be due to the uncertainty of whether an insolvent bank will be able to repay the FDIC loan. The FDIC’s third option is simply to liquidate the troubled bank.

50 Cf. Stephen J. Lubben, Resolution, Orderly and Otherwise: B of A in OLA, 81 U. CIN. L. REV. 485, 509 (2013) (questioning whether the analogy the Dodd-Frank Act makes between bank receivership and financial institution failure holds up to careful scrutiny). Professor Lubben notes, for example, that “in times of systemic crisis there might well be no buyers large enough or confident enough to perform a similar function [i.e., to engage in a P&A transaction as discussed in note 49, supra] with regard to a large financial institution”).

51 Id.
For these reasons, reactive resolution-based regulation that currently adapts bankruptcy and its variants to systemically important firms is insufficient and potentially flawed.

2. Applying reactive resolution indirectly to systemically important firms.

Reactive resolution-based regulation that currently applies indirectly to systemically important firms is even more problematic. This is exemplified by the so-called “derivatives safe harbor” of the U.S. Bankruptcy Code, which is also widely followed outside the United States. This safe harbor epitomizes how regulatory confusion over cause and effect, in this case influenced by a powerful industry trade group, can actually increase systemic risk.

In contrast to rights of other creditors, the safe harbor allows derivatives counterparties “virtually unlimited enforcement rights against the debtor” on the supposition that such rights

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53 See id. at [cite] (discussing the powerful lobbying influence of the International Swaps and Derivatives Association, or “ISDA”).
54 See supra notes 28-30 and accompanying text.
55 Steven L. Schwarcz, Derivatives and Collateral: Balancing Remedies and Systemic Risk, 2015 U. ILLINOIS L. REV. 699, 700 (hereinafter, “Derivatives and Collateral”). For example, derivatives counterparties “can immediately collect on their debts at the beginning of a bankruptcy while other creditors cannot,” and “they need neither return eve-of-bankruptcy preferential payments on old debts nor give back preferential collateral calls that other creditors must return.” Mark D. Roe, The Derivatives Markets Payment Priorities as Financial Crisis Accelerator, 63 STAN. L. REV. 539, 547 (2011). In 2014, ISDA issued the Resolution Stay Protocol to eliminate these rights for parties that opt into the Protocol regime. See International Swaps and Derivatives Assoc., ISDA 2014 Resolution Stay Protocol, https://www2.isda.org/functional-areas/protocol-management/faq/20. Opting in “prevents derivatives counterparties that have adhered to the Protocol from immediately terminating outstanding derivatives contracts, giving regulators time to resolve the troubled institution in an orderly way.” Id. “The effect of these stays therefore would be to prevent counterparties to a SIFI in resolution from exercising early termination rights so long as the SIFI continues to pay and perform. Cf. David Geen, et al., A Step Closer to Ending Too-Big-To-Fail: The ISDA 2014 Resolution Stay Protocol and Contractual Recognition of Cross-Border Resolution, 35 No. 3 FUTURES & DERIVATIVES L. REP. 1 (Apr. 2015) (arguing that these stays are “a cornerstone of a resolution authority’s ability to preserve a failed SIFI as a going concern”).
are “necessary to protect against systemic risk.”\textsuperscript{56} Ironically, as explained below, those rights can amplify systemic risk.\textsuperscript{57}

Unlimited enforcement rights permit derivatives counterparties to offset net claims against the debtor, thereby allowing them “to concentrate their positions with relatively few [derivatives] dealers.”\textsuperscript{58} That concentration “can spread a chain of defaults among financial institutions.”\textsuperscript{59} The safe harbor can also amplify systemic risk by undermining market discipline; derivatives counterparties “know that they often will be paid even if their [debtor counterparty] fails.”\textsuperscript{60} Professor Roe believes that such lack of market discipline increased systemic harm from the failures of each of AIG, Bear Stearns, and Lehman Brothers during the financial crisis.\textsuperscript{61} Furthermore, the safe harbor applies by its terms to all firms in bankruptcy that are parties to derivatives contracts, not merely to such firms that are systemically important.\textsuperscript{62} That can inadvertently force the liquidation of an otherwise viable systemically important firm.\textsuperscript{63}

B. Proactive Resolution

Some resolution-based regulation is “proactive” in the sense that it consists of pre-planned enhancements that are designed, at a time when a systemically important firm’s default is merely a theoretical possibility, to take effect if the firm becomes troubled—by then strengthening the firm’s ability to pay its debt (and thereby avoid default) or facilitating its resolvability. Proactive resolution is implicitly justified by chaos theory, “which recognizes that failures are almost inevitable in complex [engineering] systems.”\textsuperscript{64} Given the inevitability of failure, the most successful (complex) systems are those in which the consequences of failures are limited.\textsuperscript{65}

\textsuperscript{56} Derivatives and Collateral, supra note 55, at 700.
\textsuperscript{57} Id. at 708.
\textsuperscript{58} Id.
\textsuperscript{59} Id. \& id. at 709.
\textsuperscript{60} Roe, supra note 55, at 541–42.
\textsuperscript{61} See id. at 550–55.
\textsuperscript{62} Derivatives and Collateral, supra note 55, at [cite].
\textsuperscript{63} See id.
\textsuperscript{65} Id.
Engineering design often limits those consequences through “modularity,” which involves “partially closing off some parts of the system . . . enabl[ing] repairs to be made before the entire system shuts down.” This helps to reduce the chance that a failure in one part of the system will systemically trigger a failure in another part. I have separately argued that chaos theory should apply equally to the problem of inevitable systemic shocks in the complex financial system. Similar to “modularity,” proactive resolution involves reparative measures intended to prevent, and therefore to limit the consequences of, a system failure.

Proactive resolution-based regulation is currently being applied to systemically important firms in at least four ways.

1. **Converting debt to equity.**

   This type of approach seeks to pre-engineer a change to a systemically important firm’s capital structure that becomes effective if the firm experiences financial problems. Regulators have been discussing this approach, but they do not always acknowledge that it is effectively resolution-based.

   Different iterations of this approach have been referred to as total loss-absorbing capacity (“TLAC”) and contingent convertible securities (“CoCos”). In each case, a systemically important firm would be required to have a requisite portion of its debt in the form of securities that convert to equity upon pre-set conditions. Such conversion would reduce the firm’s

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66 Id. at 248–49.
67 Id. (focusing on the aspect of chaos theory regarding deterministic chaos in dynamic systems, which recognizes that the more complex the system, the more likely it is that failures will occur).
69 See, e.g., Erica Jeffrey, *TLAC: What You Should Know*, EUROMONEY (Aug. 10, 2016) (reporting that TLAC contemplates that systemically important firms issue minimum levels of debt and similar securities “that can be written down or converted into equity in case of resolution”); Edward Simpson Prescott, *Contingent Capital: The Trigger Problem* 98 ECON. Q. 33 (2012). See also Federal Reserve Board, Press Release on Total Loss Absorbing Capacity
indebtedness, thereby (hopefully) making the firm financially viable again.\textsuperscript{70} The possibility that their debt claims could be converted into equity should also motivate creditors to take on more of a “monitoring” role by imposing stricter covenants,\textsuperscript{71} which could reduce the firm’s risk-taking.\textsuperscript{72}

CoCos have been issued in Europe, where the initial tests of their conversion have had mixed success. In early June 2017, the junior-bond CoCos of Spain’s Banco Popular converted as planned to prevent the bank’s failure.\textsuperscript{73} Later that month, in contrast, the senior-bond CoCos of Italy’s Veneto Banca and Banca Popolare di Vicenza were not converted, resulting in a taxpayer bailout of those banks.\textsuperscript{74} Although there are ways to try to distinguish these cases,\textsuperscript{75} some argue they reflect the inevitable failure of CoCos as a viable resolution option.\textsuperscript{76} Additional

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\item \textsuperscript{70} Jianping Zhu et al., \textit{From Bailout to Bail-in: Mandatory Debt Restructuring of Systemic Financial Institutions} (IMF Staff Discussion Note, SDN/12/03, Apr. 2012), available at http://www.imf.org/external/pubs/ft/sdn/2012/sdn1203.pdf
\item \textsuperscript{71} Emilios Avgouleas & Charles Goodhart, \textit{Critical Reflections on Bank Bail-ins}, 1 J. FIN. REGULATION 1, 4-5 (2015).
\item \textsuperscript{72} This monitoring aspect is counteractive because it designed to reduce the need for resolution. See supra note 31 and accompanying text.
\item \textsuperscript{73} \textit{Senior Moment: Europe’s Framework for Dealing with Troubled Banks is Working, but has One Big Drawback}, ECONOMIST (July 1, 2017), at 12.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} For example, the new European agency in charge of bank resolution, the Single Resolution Board (SRB), apparently determined that the Italian banks “did not pose a threat to financial stability, and handed them to the Italian authorities to deal with under national insolvency procedures”). Id. Although there is no evidence of this, the SRB might also have been more reluctant to convert senior than junior bonds.
\item \textsuperscript{76} See, \textit{e.g.}, Neel Kashkari, \textit{New Bailouts Prove ‘Too Big to Fail’ Is Alive and Well}, WALL ST. J. (July 10, 2017), at A17 (arguing that the Italian bank bailouts prove that “‘bail-in debt’ doesn’t prevent bailouts”). Kashkari contends that CoCos won’t work because governments “fear financial contagion” if they “force losses on bondholders.” Id. Where systemic risk isn’t at issue, he maintains that CoCos won’t work because “governments may worry that bondholders are politically important constituents.” Id. Professor Admati likewise argues that it “is unrealistic to expect that regulators will trigger recovery and resolution processes that are complex, costly and untested so that losses can be imposed on debt-like TLAC securities, and that they would be politically able to follow up with imposing losses on creditors of mandatory conversion to equity. This is particularly true if a potential crisis is looming, since pulling triggers and
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questions also remain regarding the actual implementation of a CoCo conversion policy, including what should trigger the debt to convert and how to ensure that creditors holding convertible debt are compensated without making the debt too costly.

CoCos can also raise their own moral hazard concern—that a “bank that issues contingent capital faces a moral hazard incentive to increase its assets’ jump risks”—i.e., the risk that bank assets can suffer large, sudden losses. In other words, issuers of CoCos may be motivated to invest in risky assets because such issuers will be protected against a fall in asset value by the CoCos’ debt-to-equity conversion. Attempts to reduce this moral hazard, such as by including restrictive contractual covenants, can be overly rigid and “impair[] the managers’ ability to pursue value-maximizing projects.” Yet the failure to reduce this moral hazard is likely to further increase the cost of issuing CoCos. The Financial Stability Board, however, has made this approach a significant part of its plans to end the perceived too-big-to-fail (TBTF) problem—that systemically important financial firms might engage in excessive risk-taking because they would profit by a success and be bailed out by the government to avoid a failure.


See Emilios Avgouleas et al., *Living Wills as a Catalyst for Action*, Duisenberg School of Finance Policy Paper No. 4, 4 (2010)


Simone M. Sepe, *Corporate Agency Problems and ‘Dequity’ Contracts*, 36 J. CORP. L. 113, 145 (2010). Another concern over this moral hazard is that it will increase the cost of CoCos.

*Cf.* Pennacchi, *supra* note 79, at 22 (arguing that investors in CoCos that are subject to “downward jumps in value” will “demand higher new issue yields to compensate for these potential losses”).

Even if CoCos did not raise the concerns discussed above, their use is limited to protecting individual systemically important firms. That limitation makes them inherently inadequate as macroprudential regulatory tools.

2. Resolving the corporate structure.

Effectively, this approach pre-plans wiping out the equity owners of a troubled systemically important firm, making either the government or the firm’s creditors the new equity owners. This approach is similar to a “bail-in.”

As a macroprudential tool, this approach is increasingly exemplified by the “single point of entry” (SPOE) strategy, which represents another way to attempt to control the failure of a systemically important firm. This strategy is artificially dependent on systemically important firms having a parent-subsidiary organizational structure in which the parent holds the stock of the operating-company subsidiary. At the start, therefore, it faces legal challenges for systemically important firms that lack that organizational structure—especially for cross-border firms whose organizational structure may not be subject to regulation by any one country.

A particular milestone was the FSB’s publication in November 2015 of the finalised standard for Total Loss-Absorbing Capacity (TLAC). This policy taken together with the other policy measures to enhance the resolvability of systemic banks will, if implemented at firm level and underpinned by robust legal or regulatory measures, contribute to greater resilience of the financial system.”


84 See, e.g., Daniel K. Tarullo, “Toward Building a More Effective Resolution Regime: Progress and Challenges,” Remarks at the Federal Reserve Board and Federal Reserve Bank of Richmond Conference (Oct. 18, 2013) (“Planning for the Orderly Resolution of a Global Systemically Important Bank,” Washington, D.C. (“The aim of the single-point-of-entry approach is to stabilize the failed firm quickly, in order to mitigate the negative impact on the U.S. financial system, and to do so without supporting the firm’s equity holders and other capital liabilities holders or exposing U.S. taxpayers to losses.”).

Under the SPOE strategy, if the subsidiary begins to fail, a government agency would become the receiver of the parent, wiping out the parent-company’s shareholders (and potentially writing down some of its debt). The receiver then may provide temporary liquidity to the parent to keep the subsidiary operating (thereby avoiding the instability that rocked the financial markets after Lehman Brothers collapsed), while it seeks to sell its receivership interest to equity investors to bring in more permanent capital. Proponents of the SPOE strategy are optimistic it can work once implementation challenges are resolved. Others, however, believe the strategy is unlikely to be practical, characterizing it as “a resolution tool designed for a very stylized, even hypothetical sort of failure,” observing that there is no way to test the strategy’s effectiveness until it is actually in use (and doubting it will be useful in a stressed economic climate), and arguing that “[r]eputational contagion” may cause investor flight within the United States once the holding company is liquidated, regardless of how many subsidiaries are still operating.

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86 In the United States, this agency would be the FDIC pursuant to the OLA. See supra notes 42-44 and accompanying text.
87 Mechanically, the steps described above might take place through a bridge company. The above simplified description nonetheless would still accurately depict the economics of the SPOE strategy.
89 Jin, supra note 44, at 1764.
92 Stephen J. Lubben & Arthur E. Wilmarth, Jr., Too Big and Unable to Fail, Fla. L. Rev. 2 (2016).
Even if the SPOE strategy superseded these legal challenges and were otherwise practical, it operates primarily to protect individual systemically important firms and only secondarily to protect financial stability.\(^95\) That operation might limit its effectiveness as a macroprudential regulatory tool.

3. Pre-planning liquidation.

The Dodd-Frank Act also requires certain systemically important firms to file so-called living wills, which are resolution plans setting forth how they could liquidate with minimal systemic impact if they become financially troubled.\(^96\) Although this requirement is intended to protect financial stability without needing a bailout,\(^97\) it might not completely eliminate that need. In my many years as a workout and bankruptcy lawyer, I rarely saw a firm’s failure that accurately reflected, much less closely resembled, expectations about the firm when it was profitable. Furthermore, living wills do not prevent the concurrent failure of multiple otherwise-systemically important firms from collectively having a systemic impact.\(^98\) The financial crisis demonstrated that a concurrence of failures is likely when the causes of the failures are interconnected, such as widespread investor overreliance on subprime mortgage loans as a source of payment and on the reliability of credit ratings.\(^99\)

\(^{95}\) Cf. supra note 89 and accompanying text (discussing the possible provision of temporary liquidity to help avoid financial instability).

\(^{96}\) See, e.g., Jennifer Meyerowitz et al., A Dodd-Frank Living Wills Primer: What you Need to Know Now, 31 AM. BANKR. INST. J. 34, 34 (Aug. 2012) (“As part of the goal to remove the risks to the financial system posed by ‘too big to fail’ institutions, § 165(d) of the Dodd-Frank Act requires systemically important financial institutions to create living wills to facilitate rapid and orderly resolution, in the event of material financial distress or failure”) (internal quotations omitted).


\(^{98}\) Cf. Victoria McGrane, FDIC Chief Martin Gruenberg: Big Bank Failure Won’t Imperil System, WALL ST. J., May 12, 2015, at C1 (observing that some in Congress “doubt regulators could handle the failure of multiple major firms at the same time”).

4. Last-resort lending.

Illiquidity is the primary factor that can cause firms to fail. Most countries authorize their governmental central bank to act as a lender of last resort, with power to advance funds to solvent systemically important firms that are, nonetheless, unable to pay their debts as they come due. Such lending is proactive because it is pre-planned to strengthen the firm’s ability to pay its debts if it becomes troubled. In the United States, however, the Dodd-Frank Act sharply limited the Federal Reserve’s authority to make emergency loans to individual financial firms. This limitation appears somewhat excessive, if not dangerous.

In sum, proactive resolution-based regulation is also (like reactive resolution-based regulation) currently insufficient and potentially flawed.

C. Counteractive Resolution

This regulatory approach is “counteractive” in the sense that is designed to reduce the need for resolution by preventing firms from becoming financially troubled. As such, it does not strictly represent resolution per se. For example, regulation imposing capital and liquidity-coverage requirements is designed to keep systemically important firms solvent and able to pay

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Cf. supra note 64 and accompanying text (defining proactive resolution). Because of the borrowing firm’s solvency, last-resort lending might also arguably be categorized as counteractive.

Dodd-Frank Act § 1101 (limiting the Federal Reserve Bank’s power under § 13(3) of the Federal Reserve Act).

See, e.g., Jeffrey N. Gordon & Christopher Muller, Confronting Financial Crisis: Dodd-Frank’s Dangers and the Case for a Systemic Emergency Insurance Fund, 28 YALE J. ON REG. 151, 156 (2011).

See supra note 31 and accompanying text.
their debts, thereby reducing the need for resolution.\textsuperscript{106} Capital and liquidity-coverage requirements, however, are typical forms of ordinary microprudential regulation.

Nonetheless, counteractive regulation is sometimes discussed as part of the topic of resolving systemically important firms.\textsuperscript{107} That broader focus goes beyond this Article’s focus on regulation that is truly resolution-based and would unrealistically expand the Article’s scope.\textsuperscript{108} This Article therefore limits its analysis below to reactive and proactive resolution.\textsuperscript{109}

This Part I has shown that the current uses of reactive and proactive resolution as a macroprudential regulatory tool are insufficient and potentially flawed. Part II next analyzes, more normatively, how and why resolution should be used as a macroprudential regulatory tool. To this end, subpart A identifies what the macroprudential regulatory goals of resolution should be. Thereafter, subpart B examines how resolution-based regulation should be designed to better achieve those goals.

\textbf{II. ANALYSIS}

A. Identifying Resolution’s Macroprudential Goals

\textsuperscript{106} Cf. International Insolvency Institute annual meeting, London, June 19, 2017 panel discussion of SIFI resolution (discussing capital and liquidity-coverage requirements as a form of “counteractive” resolution-based regulation).

\textsuperscript{107} See id. (discussing not only regulation imposing capital and liquidity-coverage requirements but also regulating SIFI governance as a way to reduce excessive SIFI risk-taking).

\textsuperscript{108} Including counteractive regulation would expand the Article’s scope to include all forms of regulation that mitigate the risk of failure.

\textsuperscript{109} For an intuitive way to distinguish this Article’s categories of reactive, proactive, and counteractive regulation, consider the colloquial reference to a firm going into bankruptcy as the “sh-t” hitting the fan. Cf. \url{http://www.urbandictionary.com/define.php?term=shit%20hits%20the%20fan} (defining that as “the point at which an already unstable situation devolves into utter chaos”). Reactive resolution-based regulation would try to clean up the mess once the sh-t hits the fan (analogous to reorganization) or, if the fan is irreparably damaged, to throw it out (analogous to liquidation). Proactive resolution-based regulation would try to prevent the sh-t, once thrown, from actually hitting the fan. Counteractive regulation would try to prevent the sh-t from ever being thrown at the fan. The analogy is even more robust: if the sh-t hits the fan and splatters all over, that would cause externalities that are analogous to this Article’s systemic harm.
The goal of macroprudential regulation generally is to protect the stability of the financial system. The macroprudential regulatory goals of resolution should therefore be to help achieve financial stability. To that end, resolution should certainly be used to protect systemically important firms. The analysis below first demonstrates, however, that using resolution to protect each such firm individually is inherently insufficient to protect all such firms. Resolution should also be adapted, if feasible, to protect systemically important firms in the aggregate. Thereafter, the analysis shows why resolution should additionally be used, to the extent feasible, to protect the systemically important markets and infrastructure that, together with firms, comprise the financial system.

1. Protecting individual systemically important firms is inadequate.

Intuitively, regulation that protects individual systemically important firms might appear to protect all systemically important firms. That expectation extrapolates the logic of the distributive law of mathematics, that “the result of first adding several numbers and then multiplying the sum by some number is the same as first multiplying each separately by the number and then adding the products.” Thus, if no systemically important firm fails, no such firm’s failure would trigger a systemic collapse. As next explained, however, the distributive-law analogy between mathematics and systemic risk is misleading. Furthermore, other failures can trigger a systemic collapse.

The distributive-law analogy is misleading for several reasons. Professor Mokal observes, for example, that regulatory theory views “[s]ystemic risk . . . in a bottom-up manner

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110 See supra note 4 and accompanying text.
111 Distributive law, ENCYCLOPAEDIA BRITANNICA (June 1, 2006), https://www.britannica.com/topic/distributive-law. The distributive law is stated symbolically as $a \times (b + c) = a \times b + a \times c$. Id.
112 See infra notes 113-121 and accompanying text.
113 See infra notes 126-133 and accompanying text.
114 Cf. Douglas J. Elliott, et al., The History of Cyclical Macroprudential Policy in the United States 6 (Fed. Reserve Bd., Finance and Economics Discussion Series No. 2013-29, 2013), http://www.federalreserve.gov/pubs/feds/2013/201329/201329pap.pdf (observing that the goal of macroprudential regulation “is to manage factors that could endanger the financial system as a whole, even if they would not be obvious as serious threats when viewed in the context of any single institution”).
as a simple aggregation of the risk of individual institutions, with the implication that ‘the whole financial system is sound if and only if each institution is sound.’” He argues, however, that protecting individual firms can sometimes aggravate financial instability, using the example of “netting” inter-firm liabilities to reduce a firm’s exposure:

[Netting] is based on the simplistic view that systemic risk is pro tanto reduced to the same extent as the reduction in risk to each individual financial institution in the system. [But] netting encourages greater leverage and inter-party concentrations, weakens lending standards by exacerbating financial agency and adverse selection costs, redistributes counterparty risk rather than reducing it, exacerbates market volatility in times of stress, and thus creates an additional channel for risk transmission, propagating the effects of shock through the financial system.

The distributive-law analogy is also misleading because individual systemically important firms are not always resolved in a way that reduces systemic risk. Corporate reorganization law, for example, normally looks to the parties in interest to reach a consensual debt restructuring plan, absent which the firm could attempt to cram down a plan over those parties’ objections or, in a worst case, be liquidated. The parties in interest are limited primarily, however, to the firm and its investors (i.e., its creditors and shareholders). As shown in a separate context, the interests of those parties are fundamentally misaligned with the public’s interest to reduce systemic risk.

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116 Id. at 19.
117 Id. Professor Mokal further argues that regulatory theory focuses too heavily on “procyclical measures of risk” that are inappropriate for systemic stability. Id. at 21. For example, “[c]redit ratings . . . have long been recognized as failing timeously to predict crises, and bank capital and loan loss provisioning regulations premised on [a procyclical focus] have proven potent amplifiers that exacerbate financial sector stress.” Id. at 21–22.
118 See 11 U.S.C. § 1109(b) (listing the parties in interest).
119 [cite]
120 See supra note 118.
Finally, the distributive-law analogy does not address correlated triggers that cause the concurrent failure of multiple systemically important firms. Regulation intended to protect individual systemically important firms may then be overwhelmed. Ironically, regulation designed to protect individual firms can even create correlated triggers. For example, regulators generally require insurance companies to divest corporate bonds that are downgraded below an investment-grade rating, in order to protect individual insurers against a loss in the value of assets available to pay claims. That requirement, however, has the potential to correlate an industry-wide dumping of bonds that lose that rating, in turn causing a systemically risky bond-market collapse.

To overcome these limitations, resolution-based regulation should be designed to try to protect systemically important firms not merely individually but also in the aggregate.

2. Resolution should also protect systemically important markets and infrastructure.

Even if systemically important firms could be protected both individually and in the aggregate, the failure of other critical elements of the financial system could trigger a systemic collapse. Resolution-based regulation should also have the goal of protecting those other elements against failure.

123 Id. Cf. Muelbert, supra note 21, at 395 (observing that financial regulation that “causes banks to act in a (more) uniform way . . . will increase systemic risk”); ERIK F. GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION 13 (2014) (arguing that regulations can create investment preferences for certain asset classes, setting the stage for asset bubbles and disastrous bank runs).
124 Cf. Anabtawi & Schwarcz, supra note 7, at 102 (discussing the “elements and interconnections” of the financial system that permit it to function as a “system”). For something to qualify as a system, (1) it must be composed of elements, (2) its elements must be interconnected, and (3) it must have a function that is distinct from its elements. DONELLA H. MEADOWS, THINKING IN SYSTEMS: A PRIMER 11 (Diana Wright ed., 2008). The financial system therefore clearly qualifies as a “system.”
One such critical element is the financial markets that facilitate the transfer (i.e., the issuance and trading) of securities.\textsuperscript{125} For example, the financial crisis was more fundamentally caused by a collapse in the market for mortgage-backed securities than by the failure of systemically important firms such as Lehman Brothers.\textsuperscript{126} In 2007, when home prices began declining, subprime borrowers could not refinance and, in many cases, defaulted. Even borrowers who could afford to pay their mortgage loans were tempted to walk away as mortgage loans exceeded home values. These mortgage defaults in turn caused substantial amounts of low investment-grade mortgage-backed securities to default and some AAA-rated securities to be downgraded. The defaults were especially large for certain highly leveraged securities,\textsuperscript{127} which were indirectly backed by subprime mortgages; full payment of even the senior classes of these securities was extremely sensitive to cash-flow variations and dependent on the (failed) assumption that housing prices would continue to appreciate.\textsuperscript{128} These defaults and downgradings of rated securities, in turn, unnerved investors who believed that AAA meant ironclad safety and that investment grade meant relative freedom from default.\textsuperscript{129}

Investors started losing confidence in ratings and avoiding debt securities. Reduced demand caused the price of debt securities to fall, requiring firms using those securities as collateral to mark them to market and put up cash; and generating cash required the sale of more securities, causing market prices to plummet further downward in a death spiral.\textsuperscript{130} The market prices of mortgage-backed securities, for example, collapsed substantially below the intrinsic value of the mortgage-loan assets underlying those securities. This collapse in market prices required banks and other financial institutions holding mortgage-backed (and other asset-backed) securities to write down the securities’ value. That in turn made institutions with significant

\textsuperscript{125} Cf. Steven L. Schwarcz, \textit{Systemic Risk}, 97 GEO. L.J. 193, 202 (2008) (discussing the systemic importance of financial markets and observing that the extraordinary growth of disintermediation is making markets increasingly important to the financial system).

\textsuperscript{126} This financial crisis discussion is adapted from the author’s \textit{Keynote Address: Understanding the Subprime Financial Crisis}, 60 S. C. L. REV. 549 (2009).

\textsuperscript{127} These were called “ABS CDO” securities.

\textsuperscript{128} \textit{Understanding the Subprime Financial Crisis}, supra note 126, at 550.

\textsuperscript{129} \textit{Id.} at 552.

\textsuperscript{130} The high leverage of many firms appears to have made this death spiral worse. Encouraged by the earlier liquidity glut, many firms had borrowed excessively because the cost of funds was so cheap.
holdings of these securities, such as Lehman Brothers, appear (if not be) more financially risky, raising concern over counterparty risk. Afraid these institutions might default on their contractual obligations, many parties stopped dealing with them. The refusal of the U.S. government to save Lehman Brothers in mid-September 2008, and its resulting bankruptcy, added to the panic. Debt markets became so spooked that even the short-term commercial paper markets virtually shut down. Without debt-market financing, which constitutes approximately 58% of all corporate credit availability, companies lacked money to expand and sometimes even to pay current expenses. The economy collapsed.

Another critical element of the financial system whose failure could trigger a systemic collapse is its infrastructure, which (among other functions) provides the clearing and settlement services needed to consummate the transfer of securities and other financial assets and the payment therefor. The clearinghouses and other firms currently providing the bulk of

132 Silvio Contessi, Li Li, & Katheryn Russ, Bank vs. Bond Financing Over the Business Cycle, 31 ECONOMIC SYNOPTES 1, 1 (2013), available at https://research.stlouisfed.org/publications/es/13/ES_31_2013-11-15.pdf. By comparison, bank loans make up only about 10% of corporate credit availability. Id. These estimates are based on 2003-2013 data. Id.
133 See, e.g., Fiorella De Fiore & Harald Uhlig, Corporate Debt Structure and the Financial Crisis, at 2, https://economicdynamics.org/meetpapers/2012/paper_429.pdf (“the implication of the turmoil for economic activity [during the financial crisis] was a drop in investment and output that was unprecedented”).
135 Clearing is “the process of transmitting, reconciling and, in some cases, confirming transfer orders prior to settlement . . . .” European Central Bank, Glossary of Terms Related to Payment, Clearing and Settlement Systems, available at https://www.ecb.europa.eu/pub/pdf/other/glossaryrelatedtopaymentclearingandsettlementsystems_en.pdf.
136 Settlement is “the completion of a transaction or of processing with the aim of discharging participants’ obligations through the transfer of funds and/or securities.” Id.
137 For a broader discussion of the financial infrastructure, see https://www.federalreserve.gov/paymentsystems/designated_fmu_about.htm.
these services are sometimes called financial market utilities (FMUs). For example, The Depository Trust Company (DTC) is an FMU that clears and settles the transfer of securities and the Chicago Mercantile Exchange is an FMU that clears and settles commodities transactions. Some FMUs, known as central counterparties (CCPs), also help to reduce counterparty risk that can result from those procedural steps.

To understand how an FMU’s failure could trigger a systemic collapse, consider the failures, first, of an FMU that clears and settles securities transactions and, thereafter, of an FMU acting as a CCP to help reduce counterparty risk that can result from the settlement of derivatives transactions. Although the clearing and settlement services performed by the first FMU are unlikely to cause it to fail, some FMUs are part of a holding company structure that exposes them to other risks. If, say, an FMU’s corporate parent files for bankruptcy, the FMU could easily become part of the bankruptcy estate. Any resulting suspension of clearing and

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138 Cf. Dodd-Frank Act Article VIII (referring to FMUs as “multilateral systems that provide the infrastructure for transferring, clearing, and settling payments, securities, and other financial transactions among financial institutions or between financial institutions and the system”). A simple example of an FMU’s function is to provide the basic mechanism by which financial assets are conveyed from seller to buyer and reciprocal compensation is conveyed from buyer to seller. Richard Heckinger et al., The Federal Reserve Bank of Chicago, Financial market utilities and the challenge of just-in-time liquidity, Chicago Fed Letter No. 268a, Nov. 2009, at [cite], available at https://www.chicagofed.org/publications/chicago-fed-letter/2009/november-268a. The FSOC has the power to designate select an FMU as a SIFI “if the failure of or a disruption to the functioning of the FMU could create or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system.” FIN. STABILITY OVERSIGHT COUNCIL, 2012 ANNUAL REPORT 110 (2012).
140 [cite]
141 Baker, supra note 131, at 74.
142 This counterparty risk being the risk that a party involved in the transfer, clearance, or settlement defaults on its contractual obligation to another such party. See id.
143 The Dodd-Frank Act requires all standardized derivatives transactions to be settled through such a CCP. [cite]
144 This assumes the FMU provides those services without negligence.
145 See infra notes 234-243 and accompanying text.
146 This could occur in various ways in the United States, including the parent causing its FMU subsidiary to file for bankruptcy under 11 U.S.C. § 301 or the FMU being substantively consolidated with the parent under 11 U.S.C. § 105.
settlement, even if temporary, could disrupt the transfer of securities and cause a financial panic.\footnote{147}{The question of whether the FMU’s bankruptcy would suspend clearing or settlement would be an issue of first impression under 11 U.S.C. § 362(a) (imposing a stay automatically suspending various interactions between a debtor and third parties).}

The systemic risks are even greater for an FMU acting as a CCP to help reduce counterparty risk. Such a CCP reduces counterparty risk by assuming the potential obligation of each counterparty to pay the other counterparty on the settlement date.\footnote{148}{Heckinger et al., supra note 138, at [cite] (observing that CCPs legally interpose themselves between counterparties, becoming “the legal buyer to every seller and the legal seller to every buyer”). See, e.g., FIN. STABILITY OVERSIGHT COUNCIL, supra note 138, at 172 (discussing ICE Clear Credit, a CCP that clears credit-default swap (CDS) derivatives, thereby “lower[ing] the likelihood of default leading to a financial contagion of defaults across major CDS counterparties”).} Thus, if the settlement requires counterparty A to pay counterparty B, the CCP will make that payment to counterparty B and then seek reimbursement from counterparty A.\footnote{149}{Iman Anabtawi & Steven L. Schwarcz, Regulating Systemic Risk: Towards an Analytical Framework, 86 NOTRE DAME L. REV. 1349, 1394–95 (2011).}{\cite} Although this reduces individual counterparty risk, it concentrates aggregate counterparty risk in the CCP.\footnote{150}{Id. I am not claiming that default is inevitable. CCPs typically rely on a variety of risk-management strategies, including margin requirements and the maintenance of a loss-sharing pool funded by members to cover losses arising from any clearing member defaults. See supra note 150, at 1394–95. Cf. See also Dan Ryan, Financial Market Utilities: Is the System Safer?, Harvard Law School Forum on Corporate Governance and Financial Regulation (February 21, 2015), https://corpgov.law.harvard.edu/2015/02/21/financial-market-utilities-is-the-system-safer/ (observing that some of these risk-management strategies are required by law).} If the CCP is unable to obtain sufficient aggregate reimbursement, for example, it may itself default.\footnote{151}{See, e.g., Duffie, supra note 134 (arguing that a CCP’s “fail[ure] to meet its obligations to other systemically [important] clearing members” could cause systemic contagion, including “firesales of collateral or derivatives contracts, exacerbating broad market volatility”).} That in turn could suspend all or a portion of the market for derivatives transactions, creating widespread financial panic.\footnote{152}{}}

For these reasons, the goals of resolution-based regulation should include protecting not only systemically important firms (both individually and in the aggregate) but also the
systemically important markets and infrastructure that, together with such firms, comprise the financial system. Next consider how resolution-based regulation could be designed to achieve those goals.

B. Designing Resolution-based Regulation to Achieve those Goals

This Part begins by examining how resolution-based regulation could protect systemically important firms in the aggregate,\textsuperscript{153} considering both reactive and proactive resolution.\textsuperscript{154} Thereafter, it examines how resolution-based regulation could protect systemically important markets and infrastructure,\textsuperscript{155} again considering both reactive and proactive resolution.

1. Resolution-based regulation of systemically important firms.

As discussed, resolution-based regulation of systemically important firms should have the goal of protecting such firms not only individually but also in the aggregate. Consider how that could be done.

(a) Reactive resolution:

Reactive resolution-based regulation is inherently limited in its ability to protect systemically important firms in the aggregate; by the time multiple firms become troubled, it may be too late to effectively reorganize their capital structure to make them viable. Even the recent proposals to amend bankruptcy law to better adapt it to systemically important firms are limited in this way.\textsuperscript{156} The author is part of a group of bankruptcy and financial regulation scholars considering this problem, among others.\textsuperscript{157}

\textsuperscript{153} See Part II.B.1, infra.
\textsuperscript{154} This Part II does not focus on counteractive regulation because, as discussed, that broader focus would be conceptually inconsistent with resolution-based regulation and also would unrealistically expand the Article’s scope. See supra note 107 and accompanying text.
\textsuperscript{155} See respectively Parts II.B.2 & II.B.3, infra.
\textsuperscript{156} See supra note 41 and accompanying text.
\textsuperscript{157} Cf. Financial Scholars Letter, supra note 43, at 4 (discussing the possibility of “multiple institutions failing or tottering simultaneously”). The main purpose of this letter was to oppose proposed legislation that would replace the FDIC’s Orderly Liquidation Authority with a new bankruptcy procedure for resolving systemically important firms. Financial Scholars Letter, supra note 43, at 4. Cf. supra note 98 and accompanying text (observing that living wills do not prevent the concurrent failure of multiple firms, and that protection designed for individual firms
There are at least two limiting constraints. First, even if some of these systemically important firms could be reorganized, the “economy will need a coordinated response, particularly if the entire financial system suffers a panic or lack of liquidity.”158 In the United States, “[b]ankruptcy judges cannot provide that coordinated response.”159 Regulatory-supervised resolution, however, could provide a more coordinated response.160 Regulatory reassurance might also help to reduce the risk of a financial panic.161

This Article has already discussed regulatory-supervised reactive resolution by the FDIC, pursuant to its receivership powers under the OLA.162 As an administrative agency, the FDIC certainly has more discretion and flexibility than individual bankruptcy judges to coordinate the resolution of multiple troubled firms.163 However, the OLA’s own limitations, such as its overdependence on healthy large firms to acquire troubled firms and its lack of transparency and predictability,164 may well impair the FDIC’s ability to provide a fully coordinated response or even to provide regulatory reassurance. A regulatory-supervised resolution procedure that more closely parallels judge-supervised bankruptcy might help to supersede those limitations while providing a coordinated response.

159 Id. (arguing that bankruptcy judges “cannot caucus and decide how to handle multiple bankruptcies in a way that best stabilizes the economy” because they “have neither a mandate, nor the proper experience, nor the staff needed to design a plan to protect the financial system as a whole”).
160 Id.
161 Id. Cf. Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 436-437 (2011) (arguing that investor fear leading to the financial crisis was compounded by the failure of regulatory agencies to quickly address the problem or reassure investors that the problem was isolated).
162 See supra notes 42-50 and accompanying text (discussing those receivership powers).
163 Cf. supra note 48 (observing that the FDIC, as an administrative agency, has much more discretion and flexibility than individual bankruptcy judges to coordinate the resolution of multiple troubled firms in light of systemic concerns).
164 See supra notes 49-47 and accompanying text.
The other constraint is the difficulty of raising sufficient financing—typically referred to as “debtor in possession” or “DIP” financing—to enable multiple troubled systemically important firms to continue operating for the length of time needed to reorganize their capital structure. Absent DIP financing, a firm may have little choice but to liquidate. The “private sources” that ordinarily provide DIP financing in traditional bankruptcy cases “would be either unavailable or at least inadequate” to resolve large systemically important firms. That lack of private DIP financing would be exacerbated, of course, if a multitude of such firms need financing at the same time.

If private sources are inadequate, the government itself might consider providing the DIP financing. The U.S. and Canadian governments provided DIP financing, for example, in the General Motors bankruptcy. As the receiver of troubled deposit-taking banks, the FDIC also has authority to take “action or provide assistance [that] is necessary to avoid or mitigate serious adverse effects on economic conditions or financial stability,” which arguably includes providing DIP financing if sufficient private financing is unavailable. The ability and willingness of governments to extend DIP financing more broadly are beyond this Article’s scope.

(b) Proactive resolution:

Although proactive resolution-based regulation is currently being applied to systemically important firms, this Article has shown that existing regulation may be inadequate as a macroprudential tool. Requiring systemically important firms to have a requisite portion of their debt in the form of securities that convert to equity if the firm experiences financial problems

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165 [cite]
168 Jackson & Stephanie Massman, supra note 166 (internal quotation marks omitted) (citing 12 U.S.C. §1823(c)(4)(G)).
169 In the United States, the Federal Reserve might also have authority to “engage in lender-of-last resort functions for appropriate collateralized credit under a program or facility with broad-based eligibility.” Jackson & Massman, supra note 166, at 67 (referencing § 13(3) of the Federal Reserve Act).
(such as TLAC and CoCos) may be inadequate because the initial tests of such conversion have had mixed success and, more importantly, the use of conversion is limited to protecting individual firms.\textsuperscript{170} Trying to control the failure of systemically important firms by having a government agency become the receiver of the parent, wiping out the parent-company’s shareholders (and potentially writing down some debt) (such as SPOE), may be inadequate for several reasons: it is artificially dependent on systemically important firms having a parent-subsidiary organizational structure, even then it may be ineffective in a stressed economic climate, and it operates primarily to protect individual systemically important firms and only secondarily to protect financial stability.\textsuperscript{171} Requiring systemically important firms to pre-plan their liquidation with minimal systemic impact if they become troubled (such as living wills) may be inadequate because a firm’s expectations while profitable rarely accurately reflect the reality when the firm becomes troubled and also because liquidation pre-planning will not prevent the concurrent failure of multiple otherwise-systemically important firms from collectively having a systemic impact.\textsuperscript{172} And central bank last-resort lending may be inadequate because, at least in the United States, the Dodd-Frank Act sharply limited the Federal Reserve’s authority to make these types of loans.\textsuperscript{173}

To be a more effective macroprudential tool, proactive resolution-based regulation should be designed by using insight into the nature of a “system” in order to prevent, and therefore limit the consequences of, a systemic failure.\textsuperscript{174} Systems in general—and the financial system in particular—that are both interactively complex\textsuperscript{175} and tightly coupled\textsuperscript{176} are “prone to catastrophic failures” because that combination “obfuscate[s] risk and present[s] little

\textsuperscript{170} See Part I.B.1, supra.
\textsuperscript{171} See Part I.B.2, supra.
\textsuperscript{172} See Part I.B.3, supra.
\textsuperscript{173} See Part I.B.4, supra.
\textsuperscript{174} See supra notes 64-66 and accompanying text.
\textsuperscript{175} An “interactively complex system is one whose components can interact in unexpected or varied ways . . .” As a result, a shock to one component can lead to “. . . failures that seem to come out of nowhere or that appear unfathomably improbable.” RICHARD BOOKSTABER, DEMON OF OUR OWN DESIGN 154-55 (2007).
\textsuperscript{176} A “tightly coupled system is one that is highly interdependent, so that a disturbance to one part of the system can spread almost instantaneously to other parts of the system.” Anbtawi & Schwarcz, supra note 7, at 94.
opportunity for intervention following a local shock.”177 By contrast, systems that are interactively complex but not tightly coupled, and systems that are tightly coupled but not interactively complex, are less systemically risky.178 This suggests that proactive resolution-based regulation should be designed to reduce tight coupling and/or interactive complexity among systemically important firms.

Consider how proactive resolution-based regulation could be designed to reduce interactive complexity.179 From the standpoint of systemically important firms, there are at least two sources—both caused by information failures—of interactive complexity in the financial system. The first source of interactive complexity is that market participants do not know what securities other firms hold.180 As a form of risk aversion, they therefore assume that distressed securities owned by a given firm are also held by similarly situated firms.181 If any of those firms fails, they may become reluctant to extend credit to similar firms—even those that, in fact, are financially healthy.182 The loss of credit can then trigger unpredictable failures of those healthy firms, hastening a financial crisis.183 Proactive resolution-based regulation could reduce this source of interactive complexity by requiring systemically important firms to disclose—either on a periodic basis or at least on a case-by-case basis—the amount and identity of their securities holdings.184

177 Id. at 112.
178 Anabtawi & Schwarcz, supra note 7, at 112. For example, a “system that is interactively complex but only loosely coupled . . . is likely to produce unpredictable interactions among its elements because of the system’s interactive complexity. However, the ultimate damage to such a system from a failure at the level of its elements is likely to be manageable because loose coupling presents opportunities for early intervention.” Id.
179 [I am still examining how, if at all, proactive resolution-based regulation could be designed to reduce tight coupling. cite] Regulation probably cannot eliminate interactive complexity because information failures, which underlie the complexity, are inherent in human arrangements. Complexity itself can also sometimes be beneficial; for example, derivatives can be used to better allocate risk among market participants.
180 Anabtawi & Schwarcz, supra note 7, at 94.
181 Id. at 95.
182 Id. at [cite].
183 [Id. at [cite]] (discussing that interactive complexity causes that unpredictability).
184 I categorize this form of resolution-based regulation as proactive because it provides for a pre-planned enhancement (enhanced disclosure) that takes effect if the firm becomes troubled by potentially losing access to credit. That disclosure then strengthens the firm’s ability to pay its
The other source of interactive complexity is that market participants do not know the contractual obligations of other firms.\textsuperscript{185} Yet if a firm defaults on its obligations, its counterparties may be forced to default on their own obligations.\textsuperscript{186} Again, therefore, risk-averse market participants may refuse to extend credit to firms that appear similar to a defaulting firm but in fact are financially healthy, thereby triggering unpredictable failures of those healthy firms and hastening a financial crisis.\textsuperscript{187} The risk aversion is likely to be especially high if market participants fear a firm is contingently obligated on derivatives contracts that expose it to indeterminate liability.\textsuperscript{188} Proactive resolution-based regulation\textsuperscript{189} could reduce this source of interactive complexity by requiring systemically important firms, as before,\textsuperscript{190} to disclose the precise amount and nature of their contractual obligations.\textsuperscript{191}

Next consider how resolution-based regulation could be designed to protect systemically important markets and infrastructure. Little regulation currently protects those critical elements of the financial system.\textsuperscript{192}

2. Resolution-based regulation of systemically important markets.

(a) Reactive resolution:

A reactive approach to resolution-based regulation does not clearly apply to troubled systemically important markets. It is unclear what it would mean to reorganize a troubled debt (and thereby avoid default) by providing continued access to credit. See text accompanying notes 63-64, supra (defining proactive resolution-based regulation).\textsuperscript{185} Anabtawi & Schwarcz, supra note 7, at 114.\textsuperscript{186} Id. at 88.\textsuperscript{187} Id. at [cite].\textsuperscript{188} Regulating Complexity, supra note 64, at 243-45.\textsuperscript{189} This form of resolution-based regulation is proactive for the reasons discussed supra note 184.\textsuperscript{190} See supra notes 183-185 and accompanying text.\textsuperscript{191} Cf. Regulating Complexity, supra note 64, at 203-207 & 246 (discussing disclosure as an option to help avoid a “crisis of confidence”). Generally accepted accounting principles (GAAP) do not require sufficient disclosure of contractual obligations, especially contingent obligations, to reduce interactive complexity. [cite & explain]\textsuperscript{192} Peirce, supra note 14.
financial market, and the consequences of liquidating a financial market could be catastrophic. Proactive resolution, in contrast, is more clearly applicable.

(b) Proactive resolution:
As adapted to financial markets, proactive resolution-based regulation would consist of pre-planned enhancements that are designed, at a time when a market’s failure is merely a theoretical possibility, to strengthen the market or facilitate its resolvability if it becomes troubled. Conceptually, there are at least two possible approaches: to pre-plan enhancements that can make a troubled market become more internally robust,193 and to commit parties in advance to provide liquidity to support a market that becomes troubled.194

Pre-planning can make a troubled financial market become more internally robust by reducing its tight coupling.195 Financial markets today are tightly coupled in at least two ways. Computerized trading makes them especially susceptible to so-called “flash crashes,” in which high-speed automated trading inadvertently can cause extremely rapid (and in retrospect, irrational) price declines.196 Also, “mark-to-market” accounting, which requires that a securities account be adjusted in response to a change in the market value of the securities (ordinarily reducing risk), can inadvertently cause fire sales197 that “distort value” during times of extreme market volatility.198

193 Steven L. Schwarcz, Perspectives on Regulating Systemic Risk, in Systemic Risk, Institutional Design, and the Regulation of Financial Markets 39, 45 (Anita Anand, ed., 2016) (describing the question of how regulation should require systemically important markets to become more internally robust as “important but only partly answered”).
194 Id.
195 Recall that tight coupling is the tendency of a failure in one part of a system to quickly lead to other failures. See supra note 176.
196 [cite]
197 For example, a temporary fall in the price of certain securities can force the sale of those securities to generate cash; that forced sale in turn further drives down the price, which in turn requires more forced sales—and this reiterative process rapidly continues, resulting in a total collapse of the price of those securities. Anabtawi & Schwarcz, supra note 7, at 118–19.
198 Id.
Regulatory pre-planning can reduce the tight coupling of systemically important financial markets that become troubled. For example, it can reduce the tight coupling of a flash crash by requiring systemically important markets to have so-called circuit breakers, which automatically suspend market trading if prices decline too rapidly—e.g., by more than a pre-set amount in less than a pre-set time span.\textsuperscript{199} It can reduce the tight coupling of mark-to-market accounting by suspending that accounting requirement in times of extreme market volatility.\textsuperscript{200}

That pre-planning would require regulators to decide in advance—in many cases, on a market-by-market basis—what price declines are too rapid,\textsuperscript{201} thereby justifying the suspension of trading, and what constitutes extreme market volatility,\textsuperscript{202} thereby justifying the suspension of mark-to-market accounting. In making these decisions, regulators would have to try to distinguish between short-term pricing fluctuations, potentially motivated by panic, automated trades, or other shocks, and pricing fluctuations that represent real changes in the value of the securities. The process by which regulators should make those decisions is beyond this Article’s scope.

Proactive resolution-based regulation can also strengthen and facilitate the resolvability of financial markets that become troubled by committing parties in advance to provide liquidity to stabilize market prices. For example, the internal regulations of some member-sponsored equity markets, such as the New York Stock Exchange,\textsuperscript{203} impose liquidity requirements on their members.\textsuperscript{204} Scholars are also discussing the creation of partly privatized government liquidity facilities to support systemically important markets, by “purchasing market securities at prices that are below their intrinsic value but above then-current prices”\textsuperscript{205} in order to “stabiliz[e] the price of distressed financial assets.”\textsuperscript{206}

\textsuperscript{199} Cf. id. at 117 (“In the case of tight coupling . . . the focus would be on time – slowing or suspending a buildup of consequences.”).
\textsuperscript{200} Id. at 119.
\textsuperscript{201} See supra note 199 and accompanying text.
\textsuperscript{202} See supra note 200 and accompanying text.
\textsuperscript{204} Perspectives on Regulating Systemic Risk, supra note 193, at 45.
\textsuperscript{205} Anabtawi & Schwarcz, supra note 7, at 108–09.
\textsuperscript{206} Id. at 107.
3. Resolution-based regulation of systemically important infrastructure.

(a) Reactive resolution:

Because the systemically important infrastructure is, by definition, critical to the ongoing operation of the financial system,\(^{207}\) any reactive resolution would need to occur immediately to prevent troubled infrastructure from failing. Negotiated resolution, as occurs in a bankruptcy case,\(^{208}\) would therefore likely be much too slow. More quickly acting regulatory interventions, perhaps similar to the OLA’s reactive resolution of systemically important firms, would be more relevant.

The OLA itself, however, is ill-fitted to resolving clearinghouses, which comprise a significant part of the systemically important infrastructure.\(^{209}\) Among other limitations, the FDIC, which administers the OLA, “does not have experience regulating clearinghouses or the derivatives markets.”\(^{210}\) Also, it is unclear whether the FDIC could find a large healthy clearinghouse to acquire a troubled clearinghouse. The limitations may be even worse for clearinghouses that constitute CCPs,\(^{211}\) which have balance sheets that are “quite different from those of other major types of systemically important financial institutions such as banks, broker-dealers, and insurance companies.”\(^{212}\)

Professor Lubben has proposed a regulatory intervention to nationalize clearinghouses on the brink of failure, wiping out “equity, memberships, and investor debt.”\(^{213}\)

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\(^{207}\) See supra notes 135-137 and accompanying text.

\(^{208}\) See supra note 41 and accompanying text.

\(^{209}\) See supra note 138 and accompanying text.

\(^{210}\) Peirce, supra note 14, at [cite]. One scholar argues that the prominent role of the FDIC and the absence of the Commodity Futures Trading Commission (CFTC) in the OLA show that “Congress never intended OLA to apply to clearinghouses regulated under Dodd-Frank.”


\(^{211}\) Cf. supra notes 141-142 and accompanying text (defining CCPs).

\(^{212}\) Duffie, supra note 134.

clearinghouse members could continue clearing through the nationalized clearinghouse on a “fee for services basis.” Once the financial system stabilizes, the nationalized clearinghouse would issue “new memberships . . . in exchange for new contributions to the default fund and new capital commitments.” Nationalization, however, seems to be an overly draconian remedy that might even be unconstitutional.

(b) Proactive resolution:

Proactive resolution, in contrast, is especially applicable and important for infrastructure to ensure the uninterrupted and ongoing operation of the financial system. Just as pre-planned liquidity can enable troubled systemically important firms to pay their debts and can stabilize prices in troubled financial markets, it can also be used to stabilize troubled infrastructure—such as by enabling a financially troubled clearinghouse to pay its expenses. To this end, the Federal Reserve has the power to provide discount-window lending, a form of liquidity, to clearinghouses and other FMUs “in unusual or exigent circumstances.”

For FMUs that are CCPs, the International Swaps and Derivatives Association has proposed another form of proactive resolution, which it calls variation margin gains haircutting

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214 Id. at 31.
215 Id.
216 Cf. Duffie, supra note 134, at 104 (arguing that “An objective or requirement of some bankruptcy and failure resolution processes is that no creditor should be allocated greater losses than would have occurred in a counterfactual scenario in which the failing entity is simply liquidated. . . . Resolution processes that cause some creditors to lose more than they would have in a liquidation scenario, in order to reduce total social losses, would in this sense involve some sort of violation of property rights.”). My Article does not analyze whether that nationalization might violate the Fifth Amendment.
217 See supra note 207 and accompanying text. Cf. Hester Peirce, Clearing the Way for Failure, 64 CLEV. ST. L. REV. 589, 647 (2016) (arguing that the specter of CCP failure and the inability of firms to trade financial instruments covered by Dodd-Frank’s clearing mandate gives clearing members and regulators a strong interest in sustaining CCP services).
218 See supra notes 100-102 and accompanying text.
219 See supra notes 203-206 and accompanying text.
220 Peirce, supra note 217, at [cite].
221 Cf. supra note 53 (discussing ISDA).
VMGH is designed to prevent a CCP from defaulting after its other financial resources have been exhausted. The contract with its members would allow the CCP, at that time, to “conserve or accumulate cash” by cancelling or reducing the margin payments that it would otherwise be required to make to its clearing members while collecting all of the margin payments that its members owe the CCP. Some argue, however, that the VMGH approach could inadvertently amplify systemic risk. For example, by imposing “additional losses on [CCP] members, and likely their customers” during what would likely be a period of financial distress, it could cause some of those firms to fail. Furthermore, by forcing customers “who expected cash payments . . . to liquidate assets in order to raise funds” to post their required margin payments, it “would depress the value of these assets and weaken the market, creating a pro-cyclical scenario that could further destabilize a collapsing market.”

As an alternative to VMGH, investment bank JP Morgan Chase has proposed a form of privatized insurance that would be payable to help recapitalize a troubled CCP. Institutional investors could earn rents (in the form of insurance premiums) by providing such insurance. This would also incentivize the institutions providing the insurance to take on an outside monitoring role.

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223 Id. at 9.

224 Duffie, supra note 134, at 5.

225 CCP Loss Allocation, supra note 222, at 9. Variation margin represents periodic (usually daily) payments or collateral transfers that offset risk of loss due to daily changes in the market value of the CCP members’ portfolios. Peirce, supra note 217, at 607.

226 Lubben, supra note 210, at 153.


228 See id.

229 Duffie, supra note 134, at 99.

230 Peirce, supra note 217, at 655.
The European Union is implementing another approach to proactive resolution of CCP infrastructure. Its European Market Infrastructure Regulation requires “at least two CCPs clearing a particular asset class for the clearing obligation to be imposed.”\textsuperscript{231} Therefore, if one CCP fails, at least another CCP should be available to perform the clearing function. Although that regulation does not solve the problem of correlated CCP failures, it arguably increases the robustness of the clearing process.\textsuperscript{232} For example, assume that same regulation applied in the United States to the Dodd-Frank Act requirement that certain standardized derivative instruments be cleared through a CCP.\textsuperscript{233} In the event the CCP fails, derivatives could still be cleared—either through another CCP or even without using a CCP.\textsuperscript{234}

Finally, ring-fencing can be used to protect an FMU that is part of a holding company structure from its affiliates’ financial and operating risks.\textsuperscript{235} Because it is costly, ring-fencing is

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\bibitem{232} I say “arguably” because the European Market Infrastructure Regulation does not actually require the creation of multiple CCPs; it merely suspends the obligation that clearing occur through a CCP if only one CCP remains. \cite{231}

\bibitem{233} This clearing mandate is meant to reduce systemic risk. \textit{See, e.g.}, Ernst & Young, \textit{Dodd-Frank’s Title VII – OTC derivatives reform}, at 1, available at http://www.ey.com/Publication/vwLUAssets/Key_questions_board_members_should_ask_about_Title_VII/SFILE/Americas_FAAS_Dodd_Frank_derivatives_reform.pdf.

\bibitem{234} \textit{Cf.} Peirce, \textit{supra} note 217, at 627 (in the case of a CCP failure, “there might not be a substitute CCP, so the market for any OTC derivatives cleared at the failing CCP and subject to the clearing mandate would lock up”). \textit{But cf.} World Federation of Exchanges, \textit{supra} note 231, at 7 (“Given the significant effect of such an event, if it were to occur it is quite possible also that the market itself would no longer be viable because of the likely drain on liquidity from those players exiting . . . . As such, it is not obvious to us that suspension of the clearing mandate is a necessary – or even helpful – step during a CCP’s resolution.”).

\bibitem{235} Steven L. Schwarcz, \textit{Ring-Fencing}, 87 S. CAL. L. REv. 69, 82 (2013). Ring-fencing includes regulation that reallocates and reduces risk, such as by protecting the assets and operations of the FMU and minimizing its internal and affiliate risks. Some aspects of ring-fencing are proactive and other aspects are counteractive. Ring-fencing could be proactive when used to protect systemically important infrastructure that is part of a larger corporate structure. Such pre-planned protections could include bankruptcy remoteness, ability to operate on a standalone basis, and protection against affiliates (\textit{see id.} at [cite]), each of which would help to strengthen the systemically important infrastructure even if its affiliates fail. \textit{Cf. id.} at [cite] (explaining how

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most commonly used to protect monopoly or semi-monopoly entities (which thus have few if any substitutes) that provide essential public services, such as public utilities that produce and disseminate electric energy.236 This is especially valuable where the utility is part of a holding company structure that exposes it to non-utility risk; insulation of the utility from that risk helps to assure unimpaired continuation of the public services.237

FMUs fit that pattern if they are part of a holding company structure that exposes them to non-FMU risk.238 Like public utilities, FMUs provide essential public services (by ensuring the ongoing operation of the financial system). Also like public utilities, FMUs have few if any substitutes; indeed, they are often the only entity able to perform clearing and settlement services.239

For example, ICE Clear Credit, an FMU that provides central counterparty clearing services for CDS derivatives, is an indirect subsidiary of Intercontinental Exchange, Inc.240 Intercontinental Exchange, Inc. engages in an aggressive acquisition strategy241 that has caused it to incur significant debt,242 and “[m]any aspects of [its] business [also] involve substantial risks of liability.”243 Ring-fencing ICE Clear Credit would help to protect it from its parent company’s

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236 Id. at [cite].
237 Id. at 74.
238 See supra notes 144-147 and accompanying text.
240 Id. at 172.
242 See id. at 31 (“Following our acquisition of NYSE and Interactive Data, we have a significant amount of indebtedness outstanding on a consolidated basis.”).
243 See id. at 33 (“Many aspects of our business . . . involve substantial risks of liability . . . . For example, dissatisfied market participants that have traded on our electronic platform . . . may make claims regarding the quality of trade execution, or allege improperly confirmed or settled trades, abusive trading practices, security and confidentiality breaches, mismanagement or even fraud against us or our participants . . . . An adverse resolution of any lawsuit or claim against us may require us to pay substantial damages . . . .”)
financial and operating risks, thereby assuring the continuing performance of the FMU’s clearing services even if the parent fails.\textsuperscript{244}

**Conclusion**

In response to the global financial crisis, regulators and policymakers have been shifting their focus from traditional financial regulation, which is intended to protect individual firms, to macroprudential regulation which protects the stability of the financial system itself. Frustrated that they have made little progress in figuring out how to prevent another crisis, regulators are now trying to apply bankruptcy-resolution techniques to stabilize the financial system. To date, however, their efforts have been flawed because bankruptcy law normally protects individual firms, not the financial system per se.

This Article seeks to derive a coherent theory of how and why resolution-based regulation can stabilize the financial system. It argues such regulation should be designed not merely to resolve troubled systemically important firms but also to protect against the failure of other critical elements of the financial system—notably the markets in which securities and other financial assets are traded and the infrastructure that serves to facilitate that trading. Furthermore, for each of the critical elements of the financial system, resolution-based regulation should be conceptualized in three categories: reactive resolution, which comprises variations on traditional bankruptcy; proactive resolution, which consists of pre-planned enhancements that are designed to strengthen or facilitate the resolvability of financial system elements that become troubled; and counteractive regulation, which seeks to reduce the need for resolution (and thus is not resolution-based regulation per se). Finally, the Article attempts to design reactive and proactive resolution-based regulation that can help to stabilize the financial system.

\textsuperscript{244} Cf. supra note 235 (explaining how that ring-fencing could occur). As another example, CME Clearing, an FMU that clears the vast majority of the market for U.S. futures, options on futures, and commodity options, is an unincorporated division of the Chicago Mercantile Exchange. Fin. Stability Oversight Council, supra note 239, at 157. Ring-fencing CME Clearing could help to insulate it from the exchange-related risks, thereby assuring unimpaired continuation of its clearing services even if the exchange fails.
This Article’s analysis of macroprudential resolution-based regulation should be applicable to national regulation both domestically and abroad. The Article does not examine, however, the cross-border recognition or integration of national resolution approaches. The Lehman Brothers bankruptcy illustrated that the efficient cross-border resolution of a large globally integrated systemically important firm requires significant international coordination, making that an important subject for further study.\textsuperscript{245}

\textsuperscript{245} The author has separately examined cross-border recognition of resolution approaches. See Steven L. Schwarcz et al., Comments on behalf of the Centre for International Governance Innovation, on the [Financial Stability Board]’s September 29, 2014 Consultative Document, “Cross-Border Recognition of Resolution Action,” available at http://www.cigionline.org/sites/default/files/no.51.pdf. A group of U.S. and international bankruptcy and financial regulation scholars, including the author, has also been analyzing the cross-border integration of resolution approaches. See Financial Scholars Letter, supra note 43, at 3. Among other things, that letter argues that courts are likely to “lack deep prior relationships or the authority to reach understandings with foreign regulators in advance of a bankruptcy filing,” thereby “increas[ing] the likelihood that foreign regulators or foreign courts, at the behest of local interests, will seize assets [of the global systemically important firm] within their jurisdiction.” Id. Just as that type of “grab race” is thought to undermine the effectiveness of a domestic firm’s resolution, it is “likely to be the death-knell of a successful” resolution of a global systemically important firm. Id.