The Internal Governance Structure of Financial Regulatory Authorities: Main models and current trends

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Executive Summary

The current financial crisis raises several concerns about appropriate internal designs for regulatory institutions.[1] In adopting an internal governance framework, a financial regulatory authority must create a regulatory architecture which is adaptable and able to respond in different ways to varied sources of potential future risk in financial markets.[2] Efficiency, flexibility, and effectiveness are the core regulatory goals in financial regulatory governance structures.[3] The complexity and pace of the international financial market necessitates regulatory flexibility. There is a present »need for regulatory structures in which the shape, needs, and integrity of the market are key determinants of regulatory approaches, rather than preexisting regulatory structures that may not be consistent with financial market developments.«[4]

This article analyzes the core elements of internal governance that aid the function of a financial regulatory authority. The following analysis includes a discussion of the primary governance mechanisms and their implementation within various governance structures. The elements which form the regulatory governance structure include: the mechanisms for the election of board members, accountability and transparency tools, and the devises utilized for the execution of disciplinary functions. The analysis below examines these governance elements for the purpose of providing a basis for molding a regulatory framework which provides a strong structure promoting the optimal performance of a financial regulatory authority based on the specific characteristics of the regulatory entity.

1 *See* Arewa, Olufunmilayo, B., *Risky Business: The Credit Crisis and Failure (Part II)*, 104 Nw. U. L. Rev. Colloquy 421, 422 (2010). In general, see also Davies, H., & Green, D., *Global Financial Regulation: The Essential Guide*, Polity Press, Cambridge, UK, (2008), 187-214.
2 *See* Arewa, Olufunmilayo, B., *Risky Business: The Credit Crisis and Failure (Part II)*, at 424.
3 *See id.* at 429.
4 *See id* at 431.

The method for the election of board members is of primary importance in establishing an environment aiding the regulatory function.[5] Board members are the prominent guides of a financial regulatory authority. The structure for the election of board members is significant in establishing a varied board which is not prone to external or internal influence. Some of the main models discussed in the following article outline the current trend of staggering the terms of the board members. This ensures a systematic variance providing a framework aiding in the prevention of internal and external influences within the governance of a financial regulatory authority. The responsibility for oversight rests with the regulatory board, and thus prevention of self-serving or politically influenced regulatory guidance is imperative to maintaining the integrity of the regulatory body.

Another component in the functioning of a financial regulatory authority is the different internal and external mechanisms which ensure the accountability of the regulatory entity.[6] The models of accountability discussed in detail in this article include both external and internal mechanisms. The importance of a discussion concerning accountability mechanisms stems from the danger of unchecked power within the governance structure. The following analysis will outline the various models of accountability, and furthermore emphasize the necessity of building the fundamental mechanisms of accountability into the internal structure of the financial regulatory authority.

The element of transparency discussed below has two facets.[7] Transparency in the regulatory realm can be either mandated or voluntary. The mechanisms aiding transparency are similar to those used in promoting accountability, in that, they can be both internal and external. Both mandated and voluntary transparency are essential factors in establishing a solid corporate governance culture within a regulatory authority; and thus are an invaluable tool for promoting and maintaining the integrity of a regulatory authority.

A primary aspect of the internal governance structure of a financial regulatory authority is in the composition of the internal board.[8] This is an important element in the governance structure, and is furthermore a central component in promoting the previously outlined elements of accountability and transparency. The following article outlines the various structures for the terms of board members and evaluates the importance of implementing measures aiding the development of a strong internal structure. The board of a financial regulatory body is the core element in all regulatory activities; therefore, it is essential to establish a board structure aiding agency accountability and promoting agency integrity.

5 *See supra* discussion beginning on page 6.
6 *See supra* discussion beginning on page 11.
7 *See supra* discussion beginning on page 19.
8 See *supra* discussion beginning on page 25.

The final governance element discussed in this article is the structure for determining sanctions.[9] There is an internal and external structure for the enforcement of sanctions. A regulatory authority can have a unified structure for the enforcement of sanctions, or the power for enforcement of disciplinary actions can come from an outside entity. The major concern with both of these frameworks is in ensuring that the regulatory authority maintains a high level of accountability and transparency in the performance of its disciplinary functions. This article analyzes the risks and benefits of these two structures.

1. *Introduction*

Promoting good regulatory governance is a key component in crisis prevention.[10] The central tenant of governance is the establishment of agency integrity. A financial regulatory authority requires a governance structure that aids the efficiency of its regulatory activities, and furthermore gives its functions democratic legitimacy. There are several central governance tools, discussed in the following article, that contribute to the democratic legitimacy and effectiveness of the financial regulatory authority. Strong governance tools are necessary in the fulfillment of regulatory responsibilities. There are advantages and disadvantages in implementing different types of governance tools, and the varying modes of that implementation. Each element in the governance framework must be adapted to the specific regulatory entity. In adopting a governance framework, attention must be given to the nature, dimension, complexity, and longevity of the entity. Appropriate governance measures and a precise regulatory framework must be formatted to each organizational form. A specifically tailored governance structure prevents artificial transplants which would harm core agency functions. Scholars have noted that shortcomings in the regulatory framework are a source of risk that could be inadequate in preventing crisis or managing the effects of crisis.[11] Thus, only an explicitly defined governance structure, formatted according to a regulatory entity's specific characteristics will promote optimal performance in the fulfillment of the entity's regulatory activities.

There are four primary elements that form the architecture of national financial regulatory structures.[12] However, the facets of internal governance do

9 See *supra* discussion beginning on page 27.

10 *See* Das, Udaibir, S., Quintyn, Marc, and Chenard, Kina, 2004, *Does Regulatory Governance Matter for Financial System Stability? An Empirical Analysis*, IMF Working Paper available at: http://www.imf.org/external/pubs/ft/wp/2004/wp0489.pdf; Ferran, Eilis and Alexander, Kern K., *Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board* (November 4, 2010), available at SSRN: http://ssrn.com/abstract=1676140.

11 *See id.* at 14.

not adhere to overarching structural boundaries; rather, the elements of internal governance are applicable within each regulatory framework. Consequently, an analysis of governance trends is important in determining the best practice for ensuring the efficiency and effectiveness of a financial regulatory entity.

The following article presents an analysis of the main models and current trends found in the structure of financial regulatory authorities. In defining these various models, this article emphasizes the importance of establishing the fundamental elements necessary in preserving and maintaining the structural integrity of a financial regulatory authority. These elements include: 1) election or appointment of the board members, 2) mechanisms of accountability within the financial regulatory authority, 3) means furthering the transparency of the authority, 4) internal structural of the authority, and 5) methods utilized in the imposition of sanctions or disciplinary measures. Additionally, in discussing the previous elements, this analysis will outline the importance of both the financial regulatory authority and the internal governance structure within the authority, and will furthermore demonstrate the rationale for the implementation of the different structural models and the risks and benefits posed by each.

There are numerous current statistics which demonstrate the efficiency of a financial regulatory authority. Articles exhibiting the output from financial regulatory authorities such as litigation action and disciplinary administrative proceedings are one means of showing the utility and necessity of the authority. For example, in the U.S., the Securities and Exchange Commission (SEC), a government affiliated financial regulatory authority responsible for the oversight of the securities market, has, in the first half of 2010, a total of 208 litigation actions currently in federal court. Additionally, in the first half of 2010, the SEC issued 359 disciplinary administrative proceedings which include measures such as the leveling of fines and the imposition of sanctions. The number of trading suspensions imposed by the SEC thus far in 2010 is 32.[13] These numbers demonstrate one facet of the function of the financial regulatory authority. Clearly, these statistics show the current oversight activity of the agency, and are furthermore an indication of a functioning regulatory structure.

12 *See* The G30 Report: *The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace*, 2008, available at: http://www.economicpopulist.org/files/us_fsi_banking_G30%20Final%20Report%2010-3-08.pdf (defining and discussing the four approaches – institutional, functional, integrated, and twin peaks – of financial regulatory frameworks).

13 *See e.g.* the litigation releases on the SEC website available at: http://www.sec.gov/litigation/litreleases.shtml; *see also* the disciplinary administrative proceedings available at: http://www.sec.gov/litigation/admin.shtml.

In the UK, the Financial Services Authority (FSA),[14] the primary financial services authority, presents another example of the functioning of a financial regulatory entity. During 2008 there were 268 enforcement cases opened by the FSA, and, during the same year there were 240 cases were closed. At the beginning of 2009 there were 262 disciplinary cases which were opened that carried over from previous years.[15] Another example, the Financial Industry Regulatory Authority (FINRA), the largest private securities regulator in the U.S., imposed, during June 2010, disciplinary actions including: 28 firms fined, 3 individuals sanctioned, 54 individuals barred or suspended, 1 decision issued by the Office of Hearing Officers, and 5 complaints filed against individuals and firms. The sheer number of disciplinary actions imposed by financial regulatory authorities in the U.S. and the UK demonstrate the need for a regulatory entity in overseeing national financial markets to prevent abuse of within the market. Moreover, the quantity of past and present sanctions and other disciplinary measures by these financial regulatory authorities show the self-serving potential for abuse that would occur in an unchecked and unguided financial market.

As underscored by the quantity of enforcement actions, a financial regulatory authority has a crucial role in the maintenance of market integrity and in maintaining financial soundness. Previous studies have shown the importance of financial regulatory authorities, and noted that, if left unsupervised, financial systems are prone to stints of instability and contagion.[16] Thus, the presence of a supervisory authority is necessary in providing a balance between the risks necessary in the function of a healthy financial market and the safety mechanisms crucial to the soundness of that market.[17]

Scholars note that financial crises are twice as prevalent as they were prior to the beginning of the twentieth century.[18] This fact merely affirms the need for a strong mechanism capable of guidance in times of national and global economic crises. A strong framework supporting both the external structure and internal governance mechanisms of a financial regulatory authority is a necessary measure in maintaining the integrity of a national financial market and in advancing financial competitiveness on an international scale.

14 Note that as of June 2010, broad enforcement powers were granted to the Bank of England and the FSA is scheduled to be disbanded in 2012, *see e.g.* Treanor, Jill, *City Minister to set out plans to disband FSA*, Guardian, July 25, 2010 available at: http://www.guardian.co.uk/business/2010/jul/25/city-minister-plans-disband-fsa.; Ferran, Eilis, *The Break-Up of the Financial Services Authority* (October 11, 2010). University of Cambridge Faculty of Law Research Paper Series No. 10/04, available at: http://ssrn.com/abstract=1690523.

15 *See e.g.* the 2008/09 Enforcement Annual Performance Account available at: http://www.fsa.gov.uk/pubs/annual/ar08_09/Enforcement_article.pdf.

16 *See* Davies, H., & Green, D., *Global Financial Regulation: The Essential Guide*, Polity Press, Cambridge, UK, at 15.

17 *See id.* at 14.

18 *See id* at 205.

The internal governance mechanisms within a financial regulatory authority are essential in providing a source of oversight, accountability, and transparency within the financial market, and in establishing the democratic legitimacy of the regulatory entity. Some researchers have found statistical evidence validating the importance of good regulatory governance for the soundness of the financial system.[19] Furthermore, in confirming the importance of regulatory governance, the aforementioned study sampled many countries and constructed indices of financial stability which correlated with the sound internal governance structure of the agency.[20] Therefore, the role of sound governance principles is critical in building a financial framework aiding economic growth and stability.

Another leading study used empirical analysis directly linking a high quality of internal governance mechanisms within a financial regulatory authority with the stability of the financial market.[21] Additionally, this study emphasized the impact of internal governance at each layer of the financial regulatory authority in maintaining the soundness within the financial market.[22] Scholars also note that the failure to apply good governance practices leads to the loss of agency credibility.[23] This loss of credibility and moral authority could potentially contribute to unsound market practices and heighten financial crises within the financial market.[24]

In summary, the purpose of the following article is to present an analysis of the different elements central to the internal governance structure of a financial regulatory authority. Here, the discussion of the main models and trends within the regulatory sphere is intended to provide a foundation for decision-making and discussion in determining the best current practices for the formation of a strong internal governance structure. Therefore, this article concludes that the establishment of a financial regulatory framework equipped to be competitive on an international scale requires the adoption of internal governance mechanisms promoting accountability and transparency within the agency structure. The governance tools discussed below are essential to increasing the efficiency and democratic legitimacy of a financial regulatory authority.

19 *See id.*

20 *See id.*

21 *See e.g. supra* note 10 at 48.

22 *See supra* note 10 at 11.

23 *See* Das, Udabair, & Quintyn, Marc, *Crisis Prevention and Crisis Management: The Role of Regulatory Governance*, 2002, IMF Working Paper No. 02/163 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880183.

24 *See id.* at 5.

2. *Election*

2.1. *Current Trends*

Election of board members is a core topic in the discussion of financial regulatory governance. This element of the governance framework is crucial in establishing a structure of accountability and in maintaining a unified oversight body. The framework for electing board members varies according to the agency, and factors such as the degree or latitude of governmental control influence this structure. For example, in Portugal, board members of regulatory agencies are appointed by the government and cannot be removed from office without relevant cause.[25] Similarly, one of the major trends in the sector of U.S. government controlled regulatory frameworks is the appointment of board members by the President with the approval of the Senate.[26] Although the responsibility of the appointments rests with the President, the requisite »advice and consent« (US Constitution, Article II, Section 2, paragraph 2) by the Senate forms a legislative balance of power intended to secure the autonomy and independence of the regulatory agency.[27] All election trends within the governmental structure were legislatively designed to mirror a universally comparable form. In essence, there is political designation in the appointment to the regulatory office; however, despite the political ties within this process, the agency is autonomous in the carrying out of its regulatory function. As stated by the U.S. Supreme Court in *Humphrey's Executor,* all officials of governmentally affiliated financial regulatory agencies »shall be independent of executive authority *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.«[28] Therefore, the legislative oversight of this process creates stability in the structure of the appointments process.

Within the private sector of U.S. regulatory frameworks, the current trend in the election structure includes both internal and external elements. However, the common theme within this construction is the use of both internal and external nominations in the election process. For example, the election process of the largest private securities regulator in the U.S., the Financial Industry Regulatory Authority (FINRA), uses an internal and external election process.[29] This procedure allows for candidate nomination both by the current FINRA board and by the current firm-members. Board member elections under this framework are segregated into small, medium, and large firm nominees. A nominating committee, made up of current board members or »governors,« first nominate potential members to fill the open positions for the representation of the different size firms. Then, all member firms receive a personal description of the candidates which includes biographical information and his or her *curriculum vitae*.[30] The size of the member firm then dictates the voting category. Furthermore, there is constant interaction between firm members and the current board regarding nominations and opinions relating to current and potential candidates.[31] Additionally, member firms can add to the nominations of the committee by petitioning for additional candidates. The structure of the election system within this category includes internal and external mechanisms for the election of candidates with the purpose of providing an open and democratic election process. Thus, the substantive difference in the appointments process between the public and private sectors in the U.S. is that board members are not appointed any governmental agency or entity.[32]

Another relevant regulatory model blends both public and private regulatory sectors. The Public Company Accounting and Oversight Board (PCAOB), responsible for overseeing the regulation and enforcement of financial and accounting standards, was created by legislation, yet is entirely separate from the U.S. government. Conversely, appointment to this private agency is done solely by the SEC Board of Governors without executive or legislative oversight. Legislation established the PCAOB as an entirely independent regulatory body, and thus uniquely exempt from the traditional requirement of Presidential appointment. Interestingly, the future of this model is uncertain due in part to the disallowance of executive appointment or removal, coupled with the lack of legislative oversight.[33] The central argument concerns the constitutionality of a legislatively created body that does not allow some form of executive or legislative oversight in its appointment process. On June 28, 2010, the U.S. Supreme Court held that the dual for-cause limitation on the

25 Concerning capital markets, see Câmara, Paulo, *Manual de Direito dos Valores Mobiliários*, Coimbra (2009), 273-282. Regarding the diversity of models of designation of members in Portuguese administrative independent authorities, in general, see Morais, Carlos Blanco de, 2001, *As Autoridades Administrativas Independentes na Ordem Jurídica Portuguesa, ROA* 137-141.

26 15 U.S.C. § 78(d); 12 U.S.C. § 241; 7 U.S.C. § 2(a)(2).

27 *See e.g.*, Title 17, § 10; 12 U.S.C. 241. As Amended by acts of June 3, 1922 (42 Stat. 620); Aug. 23, 1935 (49 Stat. 704); 7 U.S.C.A. § 4a.

28 *Humphrey's Executor* v. *United States*, 295 U.S. 602, 625-26 (1935). (Italic emphasis in the original).

29 *See* an example of one of the FINRA's election processes at: http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118314.pdf.

30 *See id.*

31 An example of FINRA's 2010 election process is available at: http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p121378.pdf.

32 *See* Karmel, Roberta S., *Should Securities Industry Agencies Be Considered Self-Regulatory Agencies*? 64, (2008) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1128329.

33 Innes, Whitney, *The Unaccountability of the Accounting Regulators: Analyzing the Constitutionality of the Public Company Accounting Oversight Board*, 42 J. Marshall L. Rev. 1019, 1021 (2010).

president's ability to remove PCAOB board members from office was an unconstitutional contravention of the U.S. Constitution's separation of powers.[34]

One major trend within the area of governmentally controlled regulatory framework in the UK is the conscious creation of a »light touch« approach to regulatory structures, which is essentially designed to minimize burdens made by intrusive, heavy-handed structures.[35] This fairly recent structure was legislatively designed with the specific purpose of centralizing and separating the regulatory structure from government involvement. The FSA[36] is the sole financial regulatory agency within the UK governmental sector,[37] yet, outside of the appointments process, its regulatory functions are autonomous. FSA board members are appointed by Treasury.[38] Therefore, although the agency is autonomous, the election process is entirely dependent upon political mechanisms. However, the political oversight is fairly light, in that, the Treasury appoints the board of governors, but does so without communication between other branches of government.

Another noteworthy trend in UK regulatory appointments is the private oversight in the appointment process for all ministerial positions. The UK uses a Commissioner of Public Appointments (OCPA)[39] as an intermediary overseeing the process of ministerial appointments. This use of a private agency in overseeing ministerial appointments creates a connection between public and private sectors of regulatory oversight. Although attenuated, the use of an independent intermediary in the appointment process affects the regulatory arena in that appointed Treasury ministers are then responsible for all FSA appointments. This system is simply a private agency providing non-governmental oversight to public office, which then affects the regulatory entity.

The interconnection between both the public sector regulators and the private sphere guiding the ministerial appointments is relevant in an analysis of the

34 *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3151 (2010).

35 *See* the Financial Services and Markets Act of 2000 available at: http://www.opsi.gov.uk/acts/acts2000/ukpga_20000008_en_1.

36 *See George Osborne Unveils Sweeping City Reforms*, available at: http://www.guardian.co.uk/business/2010/jun/16/george-osborne-city-fsa-banking [noting that the current structure and role of the FSA is in a state of flux -- supervisory powers were taken from the FSA and returned to the Bank of England; moreover, an analysis involving this reversion of structure was not available at the time this article went to press.

37 Some regulatory duties are, moreover, delegated to the Treasury and to the Bank of England, the 2006 Memorandum of Understanding outlines the allocation of this authority and is available at: http://www.bankofengland.co.uk/about/legislation/mou.pdf.

38 *See* Karmel *supra* note 28 at 64.

39 *See e.g.* the website of the Commissioner for Public Appointments at: http://www.publicappointmentscommissioner.org (emphasizing the purpose of this commission is to ensure that ministers are appointed on merit and to furthermore ensure transparency in the appointment process.

appointment processes. Here, the intermediary OCPA assesses the ministerial appointment for HM Treasury, and after appointment, the minister subsequently participates in the appointment process for the FSA.[40] An understanding of the relationship between the public and private spheres is important in obtaining a clear picture of the appointments structure. Consequently, this structure is built upon the interdependence between the public and private sphere. Therefore, CPA oversight of ministerial appointments creates interdependence between public and private sectors, further providing a systematic check upon the appointment process.

2.2. *Advantages and Disadvantages*

There are several advantages to governmentally controlled regulatory frameworks, which establish »independent« regulatory agencies. First, government based appointment in the election process is a reliable mechanism for the conducting the appointments process. The requirement of strict oversight by both executive and legislative entities leads to solidity within the appointment process. The great advantage of this design is that the election or appointment process centers upon legislative mechanisms, which lead to structural stability.[41] Furthermore, the communication and agreement upon appointments between two branches of the government allow for a greater resistance to political control or manipulation of the process by one political group. Both executive and legislative involvement in the appointments process allows for supervision and a balance within this procedure.

Another advantage in this model is the governmental involvement within the regulatory process ends after it fulfills the elections appointments. This is seen in both U.S. and UK frameworks. The structure of the agency is thus stable through a politically organized process, yet it retains its autonomy in the fulfillment of its regulatory function. The absence of direct political supervision in the regulatory agency after the election process is an insulating factor designed to shield the agency from political influence in the execution of its function. Moreover, the protection from political involvement after the appointment process gives structural freedom to the agency. Both the political involvement in the structure of the appointments process and the ending of that involvement serve the function of creating consistency in the regulatory structure.

40 *See* the CPA codebook and rules at: https://www.publicappointmentscommissioner.org/web-app/plugins/spaw2/uploads/files/Code%20of%20Practice%20August%202009.

41 Enriques, Luca, *Regulators' Response to the Current Crisis and the Upcoming Regulation of Financial Markets: One Reluctant Regulator's View*, 30 U. Pa. J. Int'l L. 1147, 1150-51 (2009).

Conversely, the system of appointments must have specific checks and balances which regulate the distribution of power to prevent political interference within the agency outside of the appointments process. Some critics argue that the disadvantage of such a system is apparent in the multitude of dollars spent on legislative lobbying for the appointment.[42] This form of interaction with the legislature arguably tarnishes the appointment process.[43] However, even under the further privatization of governmentally tied regulatory systems, as in the UK, it is impossible to sever all governmental ties to the appointment process, even where those ties are significantly reduced.

Currently, there are two intertwined debates within the U.S. concerning board election which arise from this model. The first debate centers upon the connection and interaction between the legislature and the regulating body.[44] The second debate revolves around the amount of presidential leverage in nominating board members.[45] The central issue which links these arguments is whether a politically independent or politically linked structure is most efficient in fulfilling the purpose of the regulatory agency. These debates concern the need for political insulation for regulatory entities.[46] Historically, the separation of bureaucratic organizations from direct political oversight was the result of political compromise between differing political groups. Scholars note concerns with inefficiency arising from organizations independent from direct political oversight. The need for protection against political whims in an evolving political climate is imperative. Conversely, absence of legislative interaction within this model appears unavoidable, and furthermore complete separation or legislative altering of the electoral structure could lead to the precipitation of dangers – such as political manipulation and the susceptibility of political whims – previously held in check.[47]

Another argument posits that regulatory agencies established through the mechanism of political appointments are not truly independent because of the level of Congressional oversight. Additionally, other scholars argue that insulation of regulatory oversight by the executive branch (president) merely strengthens the Congressional control. Thus, central to all debates in this area is the prevention of one political faction gaining control of the regulatory entity. However, mechanisms of board structure, primarily put in place for accountability purposes, are instrumental in countering the previous argument.

42 A.C. Pritchard, *The Sec At 70: Time For Retirement?* 80 Notre Dame L. Rev. 1073, 1076 (2005).
43 *See id.* at 1075.
44 *See id.*
45 *See id.*
46 *See id.*
47 *See id.* at 1076.

Also, there are two concerns rising from a governmentally controlled election structure. First, the issue within this realm is whether the influence of the government in the election process is excessively intrusive. Conversely, the second concern is whether the interaction between governmental offices in the appointments results in the lack of legislative compatibility.[48] The core of this debate is centered upon accountability and will be discussed in the following section.[49]

One advantage in the UK system of regulatory appointments is the interconnection between a political body and an independent agency overseeing the ministerial process. This connection does, in a sense, purify the appointment process by assuring government candidates who have the authority to designate the governing regulatory board are of sufficient integrity to merit the appointment.[50] Other safeguards which provide strength to the appointment process will be discussed in the section on accountability.

In conclusion, in adopting a system for election within a regulatory model, it is imperative to implement those elements that provide structural stability and further insulate the process from being subject to the whims of either governmental or private manipulation.

3. *Accountability*

3.1. *Current Trends*

The element of accountability is interconnected with each factor comprising the governance structure.[51] Accountability is essential in maintaining the integrity of the governance structure, and is therefore requisite in establishing the legitimacy of a financial regulatory authority. Scholars have noted that a »complex ad specialized activity like regulation can be monitored and kept politically accountable only by a combination of control instruments: legislative and executive oversight, strict procedural requirements, [and] public participation...«[52] Additionally, the importance of strong accountability framework stems from the consensus among U.S. academics, that administrative agencies tend to fall under the influence of the firms they oversee.[53] Thus, the

48 *See id.*
49 *See supra* discussion beginning on page 10.
50 *See e.g. supra* note 33.
51 Câmara, Paulo, *Manual de Direito dos Valores Mobiliários*, Coimbra, (2009), p. 278-279.
52 *See supra* note 1 at 10 (quoting Majone, Giandomenicao, 1993, »Controlling Regulatory Bureaucracies: Lessons from the American Experience, EUI Working Paper SPS 93/3).
53 *See* Jackson, Howell, E., *Learning From Eddy: a meditation upon organizational reform of financial supervision in Europe, Perspectives in Company Law and Financial Regulation*, ed. by Tison, M., et al., Cambridge University Press (2009) 536 (quoting J.R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty'*, Cardozo L. Rev. 15, (1994), 909-49).

implementation of accountability mechanisms is crucial in the function of a financial regulatory entity.

Within the realm of U.S. governmentally affiliated regulatory systems, there are several mechanisms currently used to ensure accountability and transparency. These mechanisms include both internal and external devices which aid in accountability. The principle trend under the U.S. public model is the accountability both to the legislature and to the public. The main trends under this model are political accountability and internally created audit mechanisms. Under this framework, external accountability to the legislature, even though governmentally affiliated agencies are denoted as »independent,« is an important accountability mechanism.[54] Annual articles are made to the legislature disclosing the current function of the agency, its prior activities in the year, and presenting the future direction of the financial regulatory authority.[55] An additional source of accountability to the legislature is the requirement of legislative approval for budget proposals.[56] This allows the legislature to view the monetary workings of the regulatory body, and therefore adds a further element of transparency and accountability.

Another trend under this model is the establishment of a separate, internal auditing agency.[57] The separate agency articles to the legislature on a regular basis on the activities of the regulatory body. These external private auditors act as a public sector gatekeeper. Additionally, the auditing agency performs formal assessments analyzing the agency operations and programs. The purpose of this separate agency is to establish safeguards against fraud or abuse, and to further promote the efficiency and accountability of the regulatory body.[58] This agency is then accountable to the legislature, and makes periodic articles on its findings. This is merely a separate gate-keeping function that adds an additional layer of accountability.

One current trend in accountability in the U.S. under the governmentally controlled »independent« model is the establishment of an outside auditing agency, which acts as an external accountability mechanism. The establishment of this structure was to create an added layer of accountability within the realm of governmental control. However, the future of this model is uncertain due to a constitutional question concerning the lack of executive power to remove PCAOB members.[59] This stems from the central constitutional concern that a lack of power destroys the U.S. system of checks and balances.[60] The recent Supreme Court decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.* held that the PCAOB structure restricting the power of the executive to remove the principal officer contravened the Constitution's separation of powers.[61] Thus, the future of this accountability mechanism in its current form is uncertain.

Current legislation in the U.S., the Restoring American Financial Stability Act of 2010, implements changes affecting accountability mechanisms in the governmental sector of financial regulatory entities.[62] This Act includes policy changes with broad implications for accountability in regulatory governance, and also includes potential expansion of accountability in the creation of additional oversight and risk assessment offices.[63] The Act establishes a governmental agency, the Financial Stability Oversight Council, which, unlike the PCAOB, is directly linked to the government, and the purpose of which is to provide data assessing risks of bank and non-bank financial institutions; and furthermore, facilitate in the reporting requirements, rulemaking, examinations, and enforcement actions within for financial regulatory entities.[64] Thus, the current legislation provides an added accountability mechanism aiding the U.S. governmentally affiliated financial regulatory authorities.

The structure of accountability in the UK was put in place through legislation.[65] The framework both for the governmentally centered external accountability and the internal accountability mechanisms was established through Parliamentary action. However, the legislation which created this system of accountability specified that the sole external accountability would be to the Treasury. Under this framework, the FSA contains fewer ties to the government than its U.S. counterparts, and the accountability mechanisms thus function similar to a public company. The FSA is not subject to Parliamentary accountability; it articles solely to the Treasury. Consequently, this reflects the historic practice that incorporated bodies are not expressly answerable to Parliament, rather ministers are held responsible for the exercise or non-exercise of any powers they possess. The FSA must article annually to the Treasury on its activities and the discharge of its functions. Both executive and

54 For the semi-annual article presented to Congress by the Office of the Inspector General of the SEC see: http://www.sec-oig.gov/Articles/Semiannual/2010/semiapr10.pdf.
55 *See id.*
56 *See id.*
57 *See e.g.*
58 *See id.*
59 Nagy, Donna M., *Is the PCAOB a »Heavily Controlled Component« of the SEC?: An Essential Question to the Constitutional Controversy*, 71 U. Pitt. L. Rev. 361, 400 (2010) (arguing that the creation of the PCAOB is an unconstitutional constraint of executive power, and further promotes imbalance in the legislative scheme).
60 *See id.* at 400.
61 *See Free Enterprise Fund*, 130 S. Ct. 3138, 3151 (2010).
62 *See* the Restoring American Financial Stability Act of 2010 available at: http://banking.senate.gov/public/_files/ChairmansMark31510AYO10306_xmlFinancialReformLegislationBill.pdfhttp://banking.senate.gov/public/_files/ChairmansMark31510AYO10306_xmlFinancialReformLegislationBill.pdf.
63 *See id.* at Subtitle A §§ 111, 112.
64 *See id.*
65 *See* the Financial Services and Markets Act of 2000 available at: http://www.opsi.gov.uk/acts/acts2000/ukpga_20000008_en_1.

non-executive board members file separate articles with the Treasury.[66] This adds another dimension to the structure for enforcing accountability.

Another aspect of accountability under the UK model which is similar in nature to a public company is the requirement of public meetings held annually. This meeting must be held within the three months following the annual article made to the Treasury.[67] The purpose of the public meetings is to provide a public forum for the discussion of FSA actions, and to further provide an opportunity for the public to question FSA officials about any agency action or inaction occurring during the prior year. Moreover, this annual forum is a demonstration of both internal and external accountability mechanisms. The preparation of the articles requires agency accountability through the preparation of internal articles on regulatory actions and the discharge of regulatory functions. The public presentation of the annual article to the Treasury ministers as well as the public forum is a form of external accountability previously established by legislation.[68]

Additionally, under the UK public model, the regulatory body is accountable to both consumers and to the regulated industries.[69] For example, the FSA has two internal statutory bodies – the Consumer Protection Panel[70] and the Practioners Panel[71] – which act as an intermediary of accountability in reporting to both consumers and industries. Membership on these internal bodies is determined by the FSA, but Treasury consent is required for the appointment or removal of the chairman. The Consumer Protection Panel acts a control mechanism to inform the FSA as to the interests of consumers. Likewise, the Practioners Panel, composed of members of the businesses regulated by the FSA, promotes the interests of those member firms and acts as an intermediary further aiding accountability. Additionally, if either of these agencies proposes policy which the FSA then rejects, then the FSA must state the reasons for the disagreement in writing, and this statement must be made available to the public.[72]

The primary internal accountability mechanism is an internal audit agency. In carrying out its function, this agency must provide an annual assessment article analyzing the effectiveness of FSA processes in managing its risks and controlling its activities. Additionally, this agency must provide regular articles on significant issues relating to the FSA's activities, and any improvements the agency suggests in increasing the efficiency of those processes. The internal audit agency must also provide twice a year articles on its investigations and the results of its audit plan. Also, the internal agency is responsible for working in conjunction with any external auditing agency.[73] Under current UK legislation, any complaint made internally by the FSA is accessible to the public. This adds to the internal core of accountability and to external transparency.

Other internal mechanisms aiding in the transparency and thus accountability under this model is the publication of the minutes online.[74] The increasing trend is the use of the internet as an aid in agency accountability and transparency. Open access to company activities is imperative in ensuring both external and internal accountability.

One central mechanism of accountability found within the private sector of U.S. regulatory frameworks is the attenuated oversight by a governmentally affiliated agency.[75] Similar to the framework found under the U.S. governmental model, the largest private regulatory agency articles to the legislature on its activities, but is not subject to the same oversight seen in governmentally controlled agencies. Also, under this model, every member firm is subject to an internal audit which is then transmitted to a governmentally controlled agency. Within this structure the regulatory body has an internal auditing department that coordinates with outside auditing entities, which either directly or indirectly communicates with government controlled entities.

Another trend under this model, similar to both the U.S and UK governmentally affiliated sectors, is the continual website updates concerning regulatory changes, internal articles, compliance activities, and structural information which lend transparency to the agency. Also, updates to agency rules, rule filings, regulations, comments, notices, and any legislation affecting the agency is easily accessible through the website. Clearly, the internet is one of the foremost trends aiding accountability and transparency.

3.2. *Advantages and Disadvantages of the Current Trends*

Currently, one debate is that governmentally created regulatory entities lack the mechanisms necessary for ensuring accountability to the legislature and to

66 Norton, Joseph J., *Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience – A Critical Reevaluation*, 39 Int'l Law 15, 27 (2005).
67 Financial Services and Markets Act, sch. 1 para 11(1).
68 *See* Norton *supra* note 64 at 27-28.
69 *See id.* at 28.
70 FSMA § 10.
71 FSMA § 9.
72 An example of an annual article conducted by the Consumer Protection Panel is available at: http://www.fs-cp.org.uk/publications/pdf/annual_article10.pdf.
73 FSA Article: Quality Assurance and Internal Audit at the Financial Services Authority, available at: http://www.fsa.gov.uk/pubs/other/qa_ia.pdf.
74 An example of FSA minutes published online at: http://www.fsa.gov.uk/pubs/board-minutes/dec_board.pdf.
75 FINRA files its proposed regulatory rule changes with the SEC and must wait for approval, an example of this is process is available at: http://apps.finra.org/Rules_and_Regulations/rulefilings/1/default.aspx.

the public. For example, there is growing concern that regulatory agencies such as the Federal Reserve System (Fed) in determining the future of U.S. monetary policy and in performing its regulatory function, is too isolated in its decision making, and thus does not have the requisite mechanisms to ensure accountability. Although the purpose is creating an independent regulatory entity was to isolate it from political influence and thus create stability for the nation's economy, the drawback is now that this isolation from political influence also limits the requirements of transparency and accountability.[76] The method for ensuring accountability is the reporting to congressional committees at different times throughout the year. However, the central issue with this method is that the regulatory body was historically given the autonomy to shield some of its actions from public view. The issue is now whether the mere reporting to the legislature is enough of an accountability mechanism to ensure the preservation of regulatory integrity.

Various scholars argue that despite the isolation from political control found within this model, there should be more accountability to Congress and the public.[77] They state that there is imminent danger in the isolation from complete public and Congressional accountability. Furthermore, they argue that in fulfilling the object of greater accountability more power should be given to the legislature in overseeing the monetary policy and regulatory actions of the agency.[78] This would create agency transparency by giving legislative oversight and thus further accountability to the general public.

Alternatively, this argument requires an alternation to the regulatory structure. This would necessitate a change in central legislation which established the function of the agency. In essence, the role of the agency would change and agency oversight would be given to the executive and the legislature. Conversely, this presents the danger of completely politicizing all monetary policy decisions, and could lead to harmful economic consequences.[79]

One of the main arguments concerning the disadvantage of the U.S. governmentally controlled structure is the concern that the level of accountability to the legislative body makes the regulatory agency susceptible to the political whims of the legislature. One scholar proposes a regulatory change decreasing the amount of regulatory accountability to the legislature, but increasing the oversight by the executive branch.[80] The main point of this argument emphasizes the function of accountability. The scholar notes that politicians are quick to find patterns where there exists mere random events, thus promoting

76 Andrew P. Atkins, *The AIG Bailout: Constraining the FED's Discretion*, 14 N.C. Banking Inst. 335, 352 (2010).
77 *See id.* at 355-56.
78 *See id.*
79 *See id.*
80 *See* Pritchard *supra* note 41 at 1076-77.

the passing of legislation useless altering an unbroken structure. The argument continues by suggesting an alteration of the regulatory structure which removes control and accountability from the legislature and transfers the authority to the executive branch. Conversely, this proposal presents dangers of delegating too much authority over national regulatory agencies to one individual – the executive. Therefore, it is unlikely that such an alteration is possible within a system based on the balance of power and a system of checks and balances between the branches of government.

Another central advantage found in the U.S. governmentally controlled model is the strength found in the utilization of both governmental and private methods of accountability. The availability of these internal and external measures ensures that politicians, firms, and the general public have access to agency information. For example, the regulatory entity uses independent internal audit agencies aiding accountability, and has the additional responsibility of disclosing the results of these audits and all its activities to the legislature. Also, the utilization of the internet as a tool for accountability is an internal method aiding transparency. Under this model, the public can access both the minutes from the regulatory agency's Congressional meetings as well as the internal auditor's accountability session before the legislature.[81]

On the contrary, the central advantage to the UK's independent structure allows it to utilize the mechanisms of accountability and transparency which mimics those of a public company. Additionally, the agency procedures involve yearly articles to the Treasury, which then presents this information to Parliament.[82] This process involves a »light touch« approach that does not allow for complete legislative oversight. The advantage here is that the regulatory body retains freedom from legislative control. Also, the establishment of two panels whose primary function is the promotion of accountability and transparency of the regulatory agency curtails possible dangers arising from the lack of political oversight. Additionally, accountability to these panels ensures interaction between stakeholders, and industry practitioners. This further guarantees accountability by the agency in meeting its objectives to the public, and aids in the fulfillment of its function as a public institution.[83]

On the other hand, even this limited interaction with the Treasury has been denounced as detrimental.[84] Past studies evaluating UK regulatory performance have criticized the level of accountability that the centralized agency

81 *See* the Office of the Inspector General's Semi-Annual Article to Congress see: http://www.sec-oig.gov/Articles/Semiannual/2010/semiapr10.pdf.
82 *See e.g.* the FSA's annual report to the Treasury for 2009/10 available at: http://www.fsa.gov.uk/pubs/annual/ar09_10/Section%206.pdf.
83 *See* Norton *supra* note 61 at 36-37.
84 *See e.g.* Norton *supra* note 64.

owes to the Treasury in contrast with the accountability owed to the industries it serves. One such critique stated that the regulatory structure is too dependent upon the Treasury, and furthermore this link takes away from appropriate regulatory accountability to the individual firms within the financial industry.[85] However, this argument is countered by noting that the statutory framework intends to privatize the regulatory body with freedom from legislative oversight, but with the retention of legislative accountability.

One frequent argument against a unified supervisory structure makes the regulatory entity too unwieldy in the management of power.[86] This argument suggests that a unified supervisory structure diminishes the quality of agency supervision and effectively stifles an efficient system of accountability.

Another advantage in this context is that legislation establishing the independence of the regulator also provides a platform for the dissemination of information through the publication of an annual article. Additionally, the structural similarity to a public company ensures transparency through an annual public meeting and the constant availability of consultations. The website provides a public forum for the dissemination of information which aids in promoting agency transparency. This forum provides the means to publish the minutes from each meeting online and also provides easy access to agency articles, and thus is central to ongoing accountability.

Additionally, under the UK framework, an internal audit agency ensures accountability through continual assessment of agency functions. The function of the audit agency includes analysis of regulatory control mechanisms as well as risk assessment of agency policies.[87] The strength of this system is that the constant, vigilant surveillance by an independent agency provides an unbiased assessment of the regulatory function.

Conversely, there are also several areas of weakness in the UK structure in the area of accountability. The requirement for public accountability through consultations has led to an abundance of information and continual updates of the FSA handbook.[88] This makes it difficult to track the constant changes. Inability to understand the regulatory framework and to remain up to date on changes or additions to the handbook is an obstacle in promoting accountability. Furthermore, this over-abundance of information in the regulatory body potentially leads to the shielding of its functions, and thus a hindrance to accountability and transparency.

85 *See id.* at 38-39.

86 *See Wymeersch*, E.,*The Structure of Financial Supervision in Europe About single, twin peaks, and multiple financial supervisors, 2006, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946695.*

87 An example of an internal audit assessment of the FSA is available at: http://www.fsa.gov.uk/pubs/other/nr_article.pdf.

88 The FSA Handbook is available at: http://fsahandbook.info/FSA/html/handbook/.

The advantage in the private sector of U.S. regulatory models is the lack of legislative oversight gives the regulatory entity more freedom to implement internal mechanisms of accountability. For instance, the lack of legislative oversight allows a regulatory structure to quickly adapt in changing or developing internal policies aiding accountability without the cumbersome burden of legislation. However, this advantage is slightly diminished in that independent regulatory agencies such as FINRA are subject to government oversight through the SEC, albeit at a reduced level.[89]

Some scholars argue that the disadvantage under the U.S. private model is that the regulatory body is less accountable to the legislature than governmentally affiliated regulatory bodies such as the SEC, which are subject to yearly governmental audits.[90] They argue that this lack of vigilant oversight by a legislative body is an impediment to the transparency of the agency and diminishes the standard of accountability.[91] Further criticism for the private sector continually points to the lack of legislative oversight. Critics argue that industry standards are not stringent enough within the private sector. Moreover, they state that this reduces the duties owed to clients and increases the burden to these clients through the diminished standard of accountability.[92]

However, the previous argument is countered by emphasizing that the internal control mechanisms available under this model, in conjunction with the increased regulatory flexibility do not diminish regulatory accountability. Moreover, the primary strength of regulatory independence under this model is the flexibility afforded to the agency in communicating with its members, and developing further policies which facilitate accountability.

In conclusion, the tools necessary to develop efficient mechanisms of accountability and transparency must first be implemented as a part of a regulatory entity's internal structure; and furthermore established with external safeguards ensuring agency transparency.

4. *Transparency*

4.1 *Current Trends*

Transparency »refers to an environment in which objectives, frameworks, decisions and their rationale, data, and other information, as well as the terms

89 Karmel, Roberta S., 2008, *Should Securities Industry Agencies Be Considered Self-Regulatory Agencies?* Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1128329.

90 Jordan, Norma M., *Global Capital Markets & the U.S. Securities Laws 2010: Strategies for the Changing Regulatory Environment*, 1807/Corp 629, (2010).

91 *See e.g.*, »*Commissioner Addresses SEC Funding,*« 2010, 16 No. 12 Money Manager's Compliance Guide Newsl. 7.

92 *See e.g*, FINRA's Proposed Discovery Guide – SEC Comment Letters, 1754 PLI/Corp 157 at 253.

of accountability, are provided to the public in a comprehensive, accessible, and timely manner.«[93] Although transparency is not a traditional legal or business term, but in its evolution, now has a close relationship with the governance and regulatory principle of accountability.[94] There is a distinct nexus between accountability and transparency within the realm of financial regulatory governance. In this context, transparency helps to promote accountability by impelling decision-makers to reveal both their decisions and the reasoning behind those decisions. Transparency is a necessary communication tool providing both internal and external accountability. Therefore, this element is essential in maintaining the integrity of the internal governance structure.

Regulatory authorities utilize both mandated and voluntary transparency. Mandated transparency is part of the function of both governmentally controlled financial regulatory authorities and, to a lesser degree, private financial regulatory authorities. In the U.S., governmentally controlled financial regulatory authorities report to the legislature on a regular basis, and are subject to an annual audit from an external agency. Mandated transparency is simply external regulation used to promote development of internal risk management in the financial industry.[95] All regulatory authorities under this model make use of voluntary transparency; however, the differentiation between the frameworks is in the quantity and quality of its use.[96]

Transparency requires the public dissemination of relevant regulatory information, which aids in bolstering the accountability and credibility of regulators.[97] The primary test of the level of voluntary transparency used by a financial regulatory authority is the public accessibility to its internal functions.[98] Currently, websites are the main source of disseminating this information to the public. Thus, separate scrutiny of financial regulatory sites is essential in determining the level of agency transparency.

Within the sector of U.S. government controlled regulatory frameworks, there is some form of mandated transparency; however, depending upon the authority, there is a differentiation in the extent of required transparency. The SEC is one example where the function of mandated transparency is apparent. This governmentally controlled financial regulatory authority discloses its yearly budget as well as its regulatory activities to the legislature. The requirement of budgetary approval from the legislature, also known as »staged financing,« is useful in monitoring agency activities, and thus aids transparency.[99] Additionally, under this model an independent audit agency conducts audits of the regulatory authority and presents these findings biannually to the legislature. Moreover, past legislation requires all SEC meetings to be open to the public unless secrecy is necessary to protect a general interest.[100]

The SEC uses its website[101] as a forum for providing the public with regulatory information. Some of the available website links include news, public statements and press releases, regulatory actions, filings, and investor information. Additionally, the SEC website provides numerous links providing information on litigation, court administrative decisions, enforcement actions, and the annual performance and accountability articles. Additionally, the website provides an avenue for the public to request copies of public documents.

Another model in the sector of governmentally controlled financial regulatory authorities has fewer mandated mechanisms for transparency. The Fed,[102] because of its position in determining the future direction of U.S. monetary policy and its oversight of the federal banks, is allowed less transparency in the interest of preserving both the autonomy of the institution and the stability of the financial market. Interestingly, although the Fed increased its voluntary transparency through the disclosure of its decision concerning open market operations, recent legislation proposes expanding the transparency through annual auditing.[103] Currently, the only »audit« for this financial regulatory authority is testimony in the form of an annual article to the legislature, and there remains a prohibition against full audits of this agency.[104]

Although the Fed is subject to a lesser standard of mandated transparency, it voluntarily posts speeches, testimony, and even videos pertaining to current policy and regulatory actions on its website. Additionally, the Fed website posts the current minutes of the Federal Open Market Committee. The website also provides an avenue for the general public to request records and information regarding Fed activities made available through previous legislation.[105]

93 *See supra* note 1 at 10.
94 *See* Kelly, James E., *Transparency and Bank Supervision*, 73 Alb. L. Rev. 421, 422-23 (2010) (stating the origins of the development of transparency principles in the U.S. and the issues surrounding its use in the context of governance and regulation).
95 *See supra* note 1 at 422.
96 *See* the Chart in Appendix A at the end of this article for a comparison between U.S. and Portuguese financial regulatory authorities regarding website information indicating organizational transparency.
97 *See supra* note 1 at 431.
98 *See id.*
99 *See supra* note 25 at 1150.
100 *See id.*
101 http://www.sec.gov.
102 *See supra* page 12.
103 *See e.g.* Federal Reserve Transparency Act of 2009, H.R. 1207, 11th Cong. (2009).
104 Ruby, Joshua, *Sound and Fury, Confused Alarms and Oversight: Congress, Delegation, and Effective Responses to Financial Crises*, 47 Harv. J. on Legis., 209, 247 (2010).
105 5 U.S.C. 552 *et seq.*

Under the model of the PCAOB,[106] which melds both public and private regulatory frameworks, there is a high level of transparency. This is due to the fact that although the financial regulatory authority was created as independent from the government, the reason for its formation was to enhance transparency and accountability within the financial industry. Thus, this private regulatory authority is subject to SEC oversight. This promotes transparency in the communication of the regulatory activities of the agency with a governmental authority, and is furthermore a type of mandated transparency. Additionally under this model, because of the impetus for its creation, the PCAOB maintains a high level of voluntary transparency. This is evident from the content of the PCAOB website[107] which provides information concerning board members, agency rules, enforcement, disciplinary action, and inspection articles. Furthermore, the website provides a forum for public comment on certain rulemaking dockets, further aiding in the transparency of the authority.

Recently, the Restoring American Financial Stability Act of 2010 mandated mechanisms providing for increased transparency within the regulation of the financial market.[108] These increased transparency measures include the establishment of a governmental organization – the Financial Stability Oversight Counsel (FSOC) – which facilitates and promotes transparency for non-bank financial institutions.[109] This FSOC's purpose is to assist transparency by monitoring the financial services marketplace, and by facilitating the information sharing within that marketplace.[110] Additionally, this agency has the authority to recommend supervisory priorities to regulatory entities based upon the information derived from its data gathering and information sharing capacity.[111] This impacts the governance structure of governmentally connected financial regulatory entities through the implementation of additional measures mandating transparency and information sharing within its supervisory capacity. The FSOC is an additional entity aiding regulatory transparency.[112]

Within the U.S. private sector of financial regulatory authorities, mandated transparency exists, although to a lesser degree than the previous governmentally affiliated model. For example, FINRA, the largest private financial regulatory authority in the U.S., articles to the SEC, yet retains its autonomy as an

106 *See supra* page 6.
107 http://pcaobus.org.
108 *See supra* note 66.
109 *See id.* at Title I, Subtitle A, §§ 111. 112.
110 *See id.*
111 *See id.* at § 112.
112 *See also* the Explanatory Notes on the Restoring American Financial Stability Act available at: https://www.davispolk.com/files/Publication/fc30f0b3-3db4-4181-a44e-3b3e54853b6f/Preview/PublicationAttachment/19c8367f-0467-4f3d-8492-010c9692578c/052210_Davis_Polk_Senate_Bill_as_Passed_Summary.pdf.

independent agency. Thus, the main tool of transparency for the SEC is the disclosure of its regulatory actions on its website.[113] This website includes access to rules, rule filings, sanction guidelines, and disciplinary actions. Also, there is access to compliance mechanisms such as regulatory filings as well as annual financial articles and a »Year in Review« outlining the achievements and program objectives of the previous year, and including the current mechanisms for expanding agency transparency. For example, the 2009 article includes the steps undertaken during that year to bring greater transparency to the financial market. These steps include the expansion of the compliance mechanisms as well as the broadening of the information available to current and potential investors regarding the integrity of different brokers and firms.[114]

The mechanisms ensuring the transparency of the FSA, the main financial regulatory authority in the UK, is the annual article to the Treasury, annual public meeting, consultation and website.[115] The annual article to the Treasury provides a link to a governmental body, and creates a degree of oversight. Additionally, the annual public meeting offers the opportunity for public discourse in discussing the current activities of the regulatory authority. Thus, although the structure of the regulatory authority is private and not governmentally controlled, there is still an element of governmental oversight which ensures the continued transparency of the agency.

The FSA website[116] is the primary means of ensuring agency transparency. The website includes documents such as board meeting minutes and minutes from the annual public meeting, the annual article, press releases, speeches, statements, newsletters, consultation papers, and policy documents. Additionally, the website is constantly being updated with amendments to the Handbook as well as information regarding consultations. This aids the public by providing a basis for both knowledge concerning financial regulatory policy and agency structure as well as a forum for communicating with the regulatory authority. Therefore, the website is a means of voluntary transparency central to the preservation and provision of transparency within this financial regulatory structure.

4.2. *Advantages and Disadvantages*

There are two overarching discussions concerning transparency within the realm of financial regulatory authorities. First, the discussion centers upon the

113 http://www.finra.org.
114 *See* the 2009 Year in Article available at: http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p121646.pdf.
115 *See* Pritchard *supra* note 41 at 37.
116 http://www.fsa.gov.uk.

quantity of transparency necessary to the function of the regulatory entity. The next discussion revolves around the implementation of mechanisms aiding the transparency of the authority. Both conversations stem from the present need of strengthening financial regulatory authority structures, and thus increasing the integrity of the global financial marketplace.

Currently, there is a major trend toward increasing the transparency of financial regulatory authorities. The recent financial crisis fueled the discussion concerning the need for the public scrutiny of financial regulatory authorities, and the value of increasing the transparency of these authorities. For example, in the U.S., there has been widespread criticism concerning the lack of transparency within the Fed.[117] During the recent financial downturn, the Fed made numerous loans to financial institutions without disclosing the names of the institutions. Many legislators argue that limited disclosure in this area would not harm the institutions receiving the loans. They continue by arguing that there is grave danger in not requiring a financial regulatory authority to disclose at least minimal lending information to the legislature.[118]

Conversely, the counter argument is that the lack of transparency in lending to troubled institutions is necessary to market stability. Additionally, it could be argued that even minimal disclosure in this area could create a public political battle if the legislature is unhappy with a particular decision. Thus, this possibility could create the very instability in financial institutions which regulatory transparency seeks to avoid. Despite the discussion of decreasing transparency for regulatory authorities, there are numerous pending items of legislation in the U.S. which seek to further the transparency of financial regulatory authorities, indicating a trend toward the likely adoption of further measures increasing transparency.[119]

Currently, new U.S. legislation seeks to improve the transparency measures within the governance structure of financial regulatory authorities by the addition of other oversight bodies.[120] Scholars have noted one of the difficulties in promoting transparency within the U.S. governmentally affiliated financial regulatory framework is that the architecture of several, and at times, overlapping, regulators makes the assessment of the internal functions of the regulators difficult.[121] Other scholars note that the multitude of financial regulatory authorities in the U.S. governmental context presents a fragmented regulatory structure. Current U.S. legislation seeks to ameliorate this through the establishment of further regulatory bodies which would aid in promoting accountability and market transparency.[122] However, some scholars contend that the legislature, in implementing changes to existing financial regulatory structures by increasing transparency measures and by creating other regulatory bodies, did not adequately consider the efficiency of these measures in light of the existing regulatory structure. Critics argue that the attempt to ameliorate the transparency of the regulatory structure is impossible by merely placing more regulatory frameworks over the current structure.[123] These critics state that a simplified structure for financial regulatory authorities is more conducive to transparency and the efficiency of the financial regulatory authority. Arguably, the current trend of increasing transparency through the addition of more regulatory entities is less likely to create increased transparency within the separate regulatory frameworks.

Perhaps the most relevant current trend in increasing the transparency of financial regulatory authorities is the abundant dissemination of information through its website. This trend is applicable both in the sector of government controlled financial regulatory authorities and in the sector of independent authorities. The internet allows the prompt distribution agency documents such as: minutes from meetings, annual accounts, records, annual programs objectives, information on the governance structure, and some websites even allow the online filing of complaints. The availability of these documents to the general public as well as the legislature aids in maintaining and increasing transparency. Alternately, the quantity of information available on the website, if excessive, is a potential hazard to transparency.[124] For example, the FSA handbook is a large[125] document which is constantly being revised to reflect new procedures. Some scholars note that the magnitude of available information could shield agency functions from external analysis, and thus hinder transparency.[126] However, the counter argument is that diminishing the quantity of the information would lead to selective disclosure, and therefore decrease transparency far more than the current abundance of information.

One advantage to increasing transparency under a governmentally controlled financial regulatory authority model is the ability of regulatory monitoring both by the public and by legislative authority. The advantage under this model is that the dual structure of accountability which increases the mechanisms for transparency, in that, there is continual scrutiny of the financial regulatory authority by the lay public and by governmental entities. For example,

117 *See supra* note 41 at 352-53.
118 *See id.*
119 *See id.*
120 *See generally*, The Senate version of the American Financial Stability Act of 2010 is available at: http://banking.senate.gov/public/_files/ChairmansMark31510AYO10306_xml FinancialReformLegislationBill.pdf.
121 *See supra* note 1 at 431.
122 *See supra* note 75.
123 *See supra* note 1 at 435.
124 *See* Pritchard *supra* note 41 at 37.
125 *See supra* at note 51. The FSA Handbook contains over 6000 pages and is updated daily.
126 See *id.*; see also Yokoi-Arai, Mamiko, *The Regulatory Efficiency of a Single Regulator in Financial Services: Analysis of UK and Japan*, 22, 27 B.F.L.R. 23 (2006).

under a U.S. model such as the SEC, there is the dissemination of information such as annual accounts, annual articles, records, and minutes from meetings directly to governmental authorities through articles to the legislature, and also to the general public through the SEC website. Some scholars argue that the legislated requirement of transparency in all the regulatory authority's functions is too cumbersome and inflexible in the current market. However, this structure has the advantage of dual communication with both the government and the public. Therefore, this framework provides, arguably, the most safeguards in ensuring transparency; furthermore safeguarding the integrity of the regulatory structure.

The discussion concerning the need of greater transparency within financial regulatory governance is apparent in the structure of independent financial regulatory authorities. One argument suggesting the disadvantage of this model states that there is significantly less transparency because the legislation mandating mechanisms for transparency apply only to governmentally controlled authorities.[127] Recently, financial industry professionals complained that this governmentally independent model creates a lack of transparency within the organizational structure.[128] Therefore, scholars emphasize that the lack of a strong mechanism aiding in the internal and external communication of agency functions, could make this model susceptible to dangers stemming from reduced transparency such as self-motivated governance and power imbalance within the authority.

However, scholars counter this argument by emphasizing that the lack of governmentally imposed constraints in the area of transparency can increase the efficiency and utility of the private regulatory authority. Scholars argue that although a private regulatory authority is not bound by the same accountability mechanisms imposed upon governmentally controlled financial regulators, nor required the same level of transparency, this allows for increased efficiency within the organization. Furthermore, scholars note the mechanisms promoting the open and democratic structure seen within the governmental model are likely to make the authority a slow-moving bureaucracy.[129] Nevertheless, this argument runs counter to the current trend visible within all financial regulatory models, that is, in increasing agency transparency for purpose of maintaining agency integrity.

In conclusion, transparency requirements for a financial regulatory authority must include both mandated and voluntary mechanisms, and furthermore promote the dissemination of information leading to an open and democratic process within the financial market.

127 See *supra* note 41 at 363.
128 *See, e.g.*, Commissioner Addresses SEC Funding SROS, June, 2010, 16 No. 12 Money Manager's Compliance Guide Newsl. 7.
129 *See supra* note 66 at 2.

5. *Internal Structure of the Regulatory Body*

5.1. *Current Trends*

The internal structure of a financial regulatory authority is fundamental in aiding the maintenance of a sound regulatory structure. There are various characteristics which define regulatory agency structure. The composition of the agency boards is central in the characterization of this framework. In the U.S., the terms of the board members for all the governmentally controlled agencies are staggered so that each expires within a specified time-frame, preventing political control of the board composition or politically stagnant decision-making.[130] The appointment framework prevents the complete renewal of a governmentally affiliated regulatory board during any one presidential term.[131] Additionally, there are limitations for the number of board members allowed from each political party; this prevents any single political party from controlling the regulatory board.

The average term length for board members under the U.S. model is approximately five years; however, for the governmental agency which controls both the federal bank and the central monetary policy, the terms are fourteen year. Likewise, under this framework, the terms are staggered to end every even-numbered year. Although the appointment to regulatory boards with ties to the government is centrally political in nature, the internal structure of the board – the length of the terms, as well as the staggered design of the terms – allows for a level of political insulation within the regulatory body. Also, the term for board members for a directly controlled governmental regulatory agency[132] is lengthier; however, the purpose of this design is compatible with the overriding legislative purpose – to shield the regulating entity from political whims and thus preserve the strength and integrity of the regulatory body. Similarly, in the UK, the terms for FSA board members are comparable to those under the U.S. model. Term lengths are approximately six years, and are furthermore staggered to end alternately with each member.

Additionally, in the U.S., regulatory authority board members are executive directors. Under this model, all board members are executives who leave previous employment during agency tenure. The requirement of being the sole employee of the regulatory agency is an internal safeguard against divided loyalty and ensuring the member act in the interest of the agency without the

130 *See id.* at 64.
131 *See* Bismuth, Régis, *The Independence of Domestic Financial Regulators: An Underestimated Structural Issue in International Finance Governance*, Goettingen Journal of Int. L. 2, 93, 97 (2010) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1591933.
132 *See* § 10 of the Federal Reserve Act describing the structure of the Board of Governors of the Federal Reserve Board.

temptation of personal gain. In contrast, in the UK, the FSA contains a mix of executive and non-executive directors.

5.2. *Advantages and Disadvantages*

The central advantages and disadvantages of the internal structure centers on whether a staggered or continuous framework for the terms of board members adds to the stability and unity of the board. The advantage of a staggered structure provides a stable structure for the functioning of the board in that the governing body of the board remains unified because only one board member can exit the authority within a specific amount of time. This aids the regulatory authority in maintaining a unified decision making body. Arguably, the exit of one board member does not alter the governing framework in a way which would drastically change the regulatory process, thus providing stability and continuity within the governing body. Conversely, the counter argument is that this could lead to the »petrification« of the internal structure. The staggered terms could lead to the stagnation within the regulatory process because this model could inhibit obtaining new guidance and fresh perspectives within the oversight function. The possible resulting harm might be a structure which is slow to respond to the needs of the current financial market.

Alternately, another strength found in a staggered model is the unification provided to the internal governance structure. Under this model, the inability to implement a change in appointing or electing more than one board member during a specific time aids the unification of the regulatory structure. Arguably, this produces cohesion in the structure of the board and is desirable in maintaining stability in the regulatory framework, and furthermore aids the stability of the authority's oversight functions.

Another argument present in the UK private sector is unconnected to the precise structure of regulatory authorities, yet is relevant in analyzing the varying term structures for board members. In the private sector recent revamping of the corporate structure requires that the board director be elected on an annual basis. Currently, the argument against this practice emphasizes that this hinders the unity of the board, and thus causes instability in the functioning of the board.[133] The argument centers upon the need for a core of consistency and continuity within the structure of a board.[134] This is applicable in viewing the structure of regulatory boards. The need for unity and continuity is a prevalent concern both public and private sector. Thus, the previous argument states

133 *See e.g., Chairmen Slate Parts of Governance Code as 'Crazy'* Financial Times Monday June 28, 2010.
134 *See id.*

that the annual change in board director undermines the unity necessary in the structure of the board.

In conclusion, the determination of an appropriate internal structure for a financial regulatory authority should include a balance between unity and stability, and furthermore encourage cohesion in the oversight activities of the regulatory entity.

6. *Sanctions and Supervision: Unity or Separation*

6.1. *Current Trends*

The implementation of sanctions and other disciplinary measures is central to the oversight function of a financial regulatory authority. The primary role of a financial regulatory authority is to protect consumers and investors against abuse by financial institutions.[135] The act of regulatory enforcement is separate from the regulatory function of oversight and implementing discipline.[136] These differing functions require the regulatory entity to invoke different strategies for these differing roles, and furthermore justify the separation of these different roles.[137]

The central concern in the disciplinary function is in maintaining agency efficiency and effectiveness in the performance of these separate roles. The leveling of disciplinary actions is one measure of agency efficiency. In the area of sanctions, the main question is whether the leveling of sanctions should be performed by an entity which is separate from the financial regulatory authority, or whether the enforcement of disciplinary actions should be a unified process controlled by the regulatory body. The overarching concern with both these models is in maintaining the efficient functioning of the regulatory authority as well as its accountability in carrying out investigatory and disciplinary functions.

Under a unified model for the imposition of sanctions, the financial regulatory authority is responsible both for regulatory oversight and for the enforcement of sanctions and disciplinary actions.[138] This structure is significant because there is no line of separation between the functions of discipline and the regu-

135 *See* Pan, Eric, J. *The Four Challenges of Financial Regulatory Reform,* 2009, Working Paper No. 280 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521504.
136 *See id.* at 18.
137 *See id.*
138 *See generally* Beazley, Thomas, A.G., (2001), *Holding the Balance – Effective Enforcement, Procedural Fairness and Human Rights,* Regulating Financial Services and Markets in the 21st Century, ed. by Eilis Ferran & Charles A. E. Goodhart, Hart Publishing Ltd. Oxford, England [describing the classification of FSA disciplinary proceedings and the various disciplinary measures available under the FSMA].

latory authority's oversight function. For example, under a unified structure such as the FSA, any enforcement of disciplinary actions issues directly from the authority.[139] This trend gives the financial regulatory authority a broad range of power for enforcement. Currently, in the UK the FSA has extensive enforcement power, which even extends to the ability to make arrests of uncooperative regulatees.[140] Additionally, scholars have notes that a consolidated regulatory structure such as the UK enables a higher level of predictability in the enforcement of sanctions or other disciplinary actions.[141]

Similarly, in the U.S., the PCAOB[142] retains a unified authority to impose disciplinary actions including sanctions.[143] This framework does not differentiate between internal structures which are responsible for discipline. Under this structure the authority oversees all investigations and the enforcement of disciplinary actions. However, the lack of even internal separation under the structure of the PCAOB is likely due to the fact that the underlying legislative purpose in establishing this authority was centrally for investigative and disciplinary purposes, not for the broad oversight typically delegated to a financial regulatory authority.

Conversely, under a segregated disciplinary framework, a separate entity is responsible for the implementing sanctions and disciplinary action. For example, the U.S. SEC has an office responsible both for the investigation and enforcement of sanctions which is separate from its oversight function. The enforcement division has the power to investigate and impose sanctions, and although the judiciary has the authority to review appeals from disciplinary action, it can alter the sanctions only to the extent that it lowers the amount of the fine. Under this structure, the judiciary does not have the power to extinguish the regulatory authority's disciplinary action.[144] This is merely one example of the broad powers allotted to the separate entity in performing its disciplinary function.

Another example under a segregated disciplinary framework uses two outside panels for both the initial determination of disciplinary action and in the appeals process. For example, under the framework of FINRA,[145] the adjudication process in the leveling of sanctions consists of a »Hearing Panel« which includes a professional hearings officer and two industry professionals.

139 *See supra* note 36 at 31.
140 *See id.* at 57.
141 *See* Brown, Elizabeth, F. *The Tyranny of the Multitude is a Multiplied Tyranny: Is the United States Regulatory Undermining U.S. Competitiveness?* 369, 420 Brook J. Corp. Fin. & Com. L. (2007) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008969.
142 *See supra* page 7.
143 *See generally* the PCAOB disciplinary sanctions rules available at: http://pcaobus.org/Rules/PCAOBRules/Documents/Section_5.pdf.
144 *See* 69A Am. Jur. 2d Securities Regulation—Federal § 1630
145 *See supra* page 7.

Additionally, under this model an outside »National Adjudicatory Counsel« consisting of both securities industry professionals and nonindustry representatives reviews the decisions made by the Hearings Panel.[146] Thus, FINRA utilizes two external mechanisms for the leveling and enforcement of sanctions.

6.2. *Advantages and Disadvantages*

The major concern with both an internal and external structure for the enforcement of sanctions and disciplinary actions is the assurance of the requisite transparency and accountability in both the investigation and enforcement of any disciplinary measures. One argument against the establishment of a unified structure for sanctions hinges upon the concern that the regulatory authority will have too much power in acting as prosecutor, judge, and jury.[147] The crux of this argument is whether the dual functions of the authority compromise the integrity of the authority in the fulfillment of its regulatory duties. The broad concern here revolves around implementing measures further ensuring accountability and transparency in regulating sanctions and disciplinary action. For example, the primary concern with the current enforcement power of the FSA is in the possible self-serving actions in the imposition of sanctions deriving from a unified structure.[148] Additionally, the FSA has enforcement powers which extend into police powers to arrest any uncooperative regulatees. The danger of extensive enforcement powers that meld into the police powers is apparent. The hazard under this framework is that within the centralization of the disciplinary function there is the possibility for abuse in the wielding of those powers. In other words, a unified structure could potentially act as a shield to regulatory accountability in the use of enforcement powers, and thus act as a self-serving mechanism catering to the whims of the regulatory authority's leadership. However, this argument is countered by the demonstration of proper structural control mechanisms ensuring accountability in the enforcement of disciplinary measures.

Another important concern centering on the unified model focuses upon the efficiency of the financial regulatory authority. Proponents of this model argue that the unification of the authority's ability to provide both oversight in the financial market and discipline within that market ensures a more efficient medium of regulatory control. Conversely, other scholars dismiss this structure as inefficient in carrying out its disciplinary function. There is concern that the greater enforcement culture of a unified model merely drags down

146 *See e.g.*, links to the FINRA adjudications process available at: http://www.finra.org/Industry/Enforcement/Adjudication/.
147 *See supra* note 36 at 57.
148 *See id.*

ability of the agency to handle complaints, and thus hampers the agency's ability to enforce sanctions in a timely and effective manner.[149] On the contrary, it can be argued that a unified structure for the enforcement of sanctions is more efficient because review and enforcement of discipline occur with the same entity, and thus there is more timely communication within the authority of investigations and enforcement actions. However, some authors prefer the increased flexibility derived from a separate agency which controls the disciplinary actions.

There are several benefits derived from a segregated framework for the implementation of sanctions and disciplinary actions. Under this model, a major benefit is that the structure for establishing accountability is clearly visible.[150] The use of a separate entity unconnected with the general oversight functions of the regulatory agency to enforce disciplinary measures prevents any group or person within the regulatory authority from utilizing this power for self-serving purposes. Additionally, this model of separation provides for greater transparency in the disciplinary processes because the separate entity is responsible only for the disciplinary activities of the regulatory body.

Another benefit derived from separating the regulatory and disciplinary functions is in the maintenance of agency efficiency. Under this model, an outside entity controls the review and enforcement of disciplinary actions, thereby freeing the financial regulatory authority to exercise its oversight duties uninhibited by the necessity of investigation, review, and appeal.[151] Moreover, the furtherance of efficiency under this model arguably extends equally to the function of regulatory oversight as well as to the separate agency responsible for enforcement processes.

Finally, the segregation between regulatory and disciplinary functions also favors the highest standards in terms of due process, impartiality of judgment and respect for the presumption of innocence in disciplinary proceedings. Under this light, it is an institutional model that clearly fully satisfies the requirement contained in article 6 of the European Human Rights Convention[152].

149 *See id.* at 54.

150 *See generally* the Officer of the Inspector General's Semi-Annual Article available at: http://www.sec-oig.gov/Articles/Semiannual/2010/semiapr10.pdf (relaying its agency functions further demonstrating a high level of accountability and transparency within the agency's regulatory oversight activities).

151 *See e.g. supra* note 85.

152 See generally WATERS, DANIEL/MARTYN HOPER, *Regulatory Discipline and the European Convention on Human Rights – A Reality Check*, in EILÍS FERRAN/CHARLES GOODHART (ed.), *Regulating Financial Services and Markets in the 21st Century*, Oxford (2001), 95-114; BEAZLEY, THOMAS, *Holding the Balance – Effective Enforcement, Procedural Fairness and Human Rights*, ibid., 115-126; REID, KAREN, *A Practitioner's Guide to the European Convention on Human Rights*3, London (2008), 114-136; BRISSON, JEAN-FRANÇOIS, *Les pouvoirs de sanction des autorités de régulation et l'article 6 § 1 de la Convention européenne des droits de l'Homme. A propos d'une divergence entre le Conseil d'Etat et la Cour de Cassation«*, in *Actualité juridique. Droit administratif*, n° 11, novembre 1999, 847-859. Regarding competition regulation, see also Mendes, Paulo Sousa, 2010, *As garantias de defesa no processo sancionatório especial por práticas restritivas da concorrência, Revista de Concorrência e Regulação* n.° 1, 121-143.

In conclusion, in the adoption of a unified or separate framework for the implementation of sanctions and disciplinary actions, a financial regulatory authority must consider a model which aids in regulatory efficiency, and furthermore imposes mechanisms aiding accountability and transparency.

7. *Conclusion*

Scholars have noted that »[a] financial system is only as strong as its governing practices.«[153] The recent financial crisis has further emphasized the importance of good governance practices within financial regulatory bodies.[154] The current global economic crisis has prompted policy responses both in the U.S. and the UK, which are largely centered on regulatory reform.[155] Further regulatory reforms in the financial system might also be underway in other European countries[156], including Portugal. Consequently, it is important to evaluate how and why the »gatekeeping« function of financial regulatory agencies failed, and furthermore determine solutions to repair effective and efficient monitoring of the financial market.[157] Although there are many regulatory structures within the financial market, the essence of these respective governance mechanisms in each framework is to increase both the efficiency and effectiveness of financial supervision.[158] The central conclusion in analyzing these different regulatory models and trends is the determination that the development of a governance framework for a financial regulatory authority must center upon effective supervisory elements aiding accountability and transparency, furthermore promoting the integrity of both a national, and, in turn, global financial marketplace.

153 *See supra* note 10 at 5.

154 *See id.* at 5 (explaining the importance of good governance practices in light of the financial crises prior to the 2002, which remains applicable in relation to the U.S. financial crisis of 2008).

155 *See e.g. supra* note 68 at 210-11 (outlining the current U.S. policies in the context of financial regulatory reform).

156 See Ferran, Eilis, *Understanding the new institutional architecture of EU Financial Market Supervision*, (2010), 7-12

157 *See supra* note 1 at 422 (stating that in the aftermath of the worldwide economic crisis, significant attention should be given to determining how and why regulatory frameworks failed, and past regulatory failures should be assessed in formulating better regulation that is »flexible« and »effective«).

158 *See id.*

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1. Que modelo de integração económica e política consideraria adequado à União Europeia?

Inerentes a qualquer análise do tipo aqui pedido são os riscos do *subjectivismo*, do *whishful thinking* institucional ou do *ideologismo*. Para uns a Europa excedeu o seu modelo-tipo, para outros ainda não o cumpriu. A verdade é que a evolução dos tratados aponta num sentido que não é, provavelmente, o sentido original ou originário, conquanto a própria declaração *Schuman*, documento a reler e de permanente actualidade, também nada dissesse de definitivo quanto ao fim último da integração europeia, sobre o qual se têm escrito tantas linhas.

O modelo original foi profundamente alterado com a evolução dos tratados, apesar de os próprios modelos originais, designadamente no confronto entre os tratados de Paris, Roma e, porque não dizê-lo, Maastricht, revelarem profundas diferenças. No entanto, é um facto que o modelo assente nas propostas de Popper e na declaração de Schuman, baseado num único pilar estadual mas acompanhado pela transferência e exercício de poderes efectivos por dois órgãos fundamentais de índole trans- ou supranacional foi profundamente revolucionado, pela essência gradualista e pragmática da integração europeia, que impede um qualquer *finalismo ontológico* no sentido da integração final.

É um facto que, a partir dos anos 70, com a eleição directa do Parlamento Europeu e a alteração do modelo de legitimidade da construção europeia, que passou a ser dupla (Estados e cidadãos), e dos anos 90, com o avanço para a união política assente na cidadania e na moeda única e, mais tarde, também no espaço de liberdade, segurança e justiça, se entrou numa vertigem de integração que sofre de um défice de integração cul-

tural, um défice que, para alguns, será um verdadeiro défice democrático, mas que por outro acomoda os crescentes apelos à globalização política (Bento XVI) e a uma pretensa irracionalidade puramente estatal da concepção das soberanias, num mundo em que a informação circula de Timor a Lisboa sem diferença sensível face à própria transmissão de informação dentro de um mesmo edifício...

Dito isto, direi que o modelo adequado é ou deverá ser o modelo que responda aos valores e princípios subjacentes à construção europeia, que respeite integralmente os dois pilares da sua legitimidade e que permita a melhor realização dos objectivos que tiveram na origem da integração europeia: a manutenção da paz, *a outrance*, e o progresso económico comum num quadro dos valores da civilização europeia.

2. Existirá uma identidade europeia e em que se traduz?

Na minha opinião, a identidade europeia traduz-se na comunhão dos valores que, em grande medida, são os valores em que assenta a União Europeia, tal como expressos no Tratado da União Europeia: Estado de Direito, democracia representativa, liberdade política e económica, incluindo a economia de mercado aberto e livre concorrência, respeito pelos direitos fundamentais, no pressuposto de uma sociedade justa subordinada aos valores e princípios estruturantes da chamada civilização europeia, que todos os Estados membros da actual União Europeia partilham. Os valores não podem excluir nem postergar a axiologia cristã de todas as sociedades dos Estados membros, apesar de, nesses limites, que são os da dignidade da pessoa humana e do respeito pelos seus mais elementares direitos, deverem respeitar os princípios do secularismo e laicismo que com a mesma se conformem.

3. Como avalia os efeitos da adesão às Comunidades sobre a economia portuguesa?

Outros dirão certamente muito melhor que eu, que tinha 17 anos à data da adesão às Comunidades Europeias. Embora Portugal tenha progressivamente abdicado de um conjunto importante de mecanismos de política económica, monetária, etc., começando na participação no sistema de recursos próprios, com a abdicação de receitas aduaneiras e fiscais, mas também beneficiando de importantíssimas ajudas à reestruturação e desenvolvimento económico, julgo indiscutível que a participação

nas Comunidades e, depois, também na União Europeia, foi um caso de grande sucesso.

4. Que efeitos teve a adesão sobre a sociedade portuguesa, no seu conjunto?

Julgo que teve um efeito extremamente positivo, designadamente no veicular de uma pertença a um espaço mais global, na superação da perda do Império, na afirmação da própria cultura portuguesa num contexto cultural multiforme e concorrencial (inclusivamente, de concorrência entre culturas) e na afirmação de Portugal e dos portugueses no caminho de uma modernidade em muitos e muitos aspectos positiva. Portugal já era uma sociedade aberta e pluralista, e a adesão às Comunidades acentuou esse aspecto, e implicou a modernização da economia e de toda a sociedade.

5. A União Económica e Monetária foi um passo lógico ou necessário na integração europeia?

É preciso notar que a UEM não era, na prática, um objectivo, antes da queda do Muro de Berlim. Aliás, é elucidativa desta conclusão a consulta de várias obras sobre o ponto anteriores a este importante momento. Um exemplo que costumo dar é o de uma obra que, sob a chancela da Comissão Europeia, analisava em 1980 os 30 anos da integração europeia, e a forma como na mesma se tratava a questão da UEM. No entanto, é preciso também ver que, por um lado, os modelos de integração económica que se dizem seguidos na integração europeia, postulavam há muito, desde os anos 50 do século passado, a UEM como o passo lógico e final da integração económica regional; e, por outro lado, que a queda do Muro de Berlim levou a um insuspeitado voluntarismo político que culminou na quase imediata convocação das duas CIG que estiveram na origem do Tratado da UE, dito de Maastricht. É por isso verdade que, para os líderes políticos da UE, à época, era não só um passo lógico como, na verdade, também um passo necessário, uma vez terminada a "divisão artificial da Europa".

6. A forma como a UEM foi concebida era adequada aos objectivos pretendidos?

Avaliações póstumas são sempre fáceis. Para mais, como é sabido, além de nem todos os Estados membros terem sido transparentes e verdadeiros

no cumprimento dos critérios de convergência previstos no Tratado e nos critérios definidos no chamado pacto de estabilidade e crescimento, também é certo que a UEM retirou aos Estados um conjunto importante e decisivo de políticas, sem que tenha sido transferidos para ou delegados na Comunidade (hoje, UE) as competências e meios necessários para dar cumprimento e assegurar a realização dos objectivos. Também a forma como o SEBC e o BCE foram geridos suscita algumas reservas, designadamente quanto à obsessão pela estabilidade dos preços – conhecida que era a posição alemã sobre o tema, aliás também por razões históricas – e quanto à política da moeda forte, insusceptível de permitir, a médio e longo prazo, assegurar o crescimento das exportações a partir da zona euro, confrontada com as políticas monetárias dos EUA e a abertura ao comércio mundial, exemplarmente expresso nos BRICs, sem que a UE tivesse salvaguardado verdadeiras condições de igualdade material (em muitos domínios, excepto porventura no agrícola). Finalmente, parece-me inequívoca que, apesar das denúncias que do modelo capitalista foram feitas pelo Santo Padre João Paulo II, sempre ele, não houve qualquer preocupação, por parte de todos nós e dos responsáveis, muito em particular, em aperceber-se verdadeiramente da vertigem económica e financeira do nosso modelo económico, num modelo quase de economia piramidal, por analogia com as "vendas em pirâmide", e a consciência ou a vontade em impedir que a livre contratação e a autonomia dos mecanismos criados pelos mercados financeiros conduzisse aos resultados hoje vistos. As políticas de universalização financeira transclassista, inauguradas por Clinton – digamos assim – e desprovidas de qualquer fundamento na economia real e na ausência de mecanismos de controlo regulatório minimamente capazes, deu o toque final do modelo e explica a origem da crise.

7. O euro irá sobreviver à crise actual?

Espero que sim. Mas é preciso agora muita disciplina e uma inflexão rigorosa de algumas políticas. A recuperação económica da Europa implica que, do centro, sejam iniciadas outras políticas para além do resgate económico-financeiro de urgência em curso. É necessário que se torne a economia europeia mais competitiva, porventura também com desvalorização da sua moeda, e se deixe o duplo standard que leva a que as empresas saiam do espaço europeu, com uma normação castradora do investimento e altamente exigente do ponto de vista regulamentar, para

irem produzir, dar emprego e financiar países terceiros que não cumprem todas ou algumas das regras e exigências que impomos internamente.

8. Portugal deve permanecer na zona euro?

Julgo que sim. Em todo o caso, só poderemos sair se quisermos e não por qualquer imposição externa, que seria contrária aos tratados e dramática. A saída do euro deveria ser acompanhada de normas de excepção que permitissem compensar os seus efeitos, nomeadamente através de regimes mais favoráveis face a uma aplicação cega das normas do mercado interno, única forma de permitir a recuperação económica. Na verdade, sem medidas de compensação, a saída do euro seria, a curto e médio prazo, dramática, e, em qualquer caso, não se poderia considerar que a situação de um Estado membro que sai do euro é semelhante à situação de um Estado membro que nunca esteve no euro.

25 ANOS SOB INFLUÊNCIA DA REGULAÇÃO FINANCEIRA EUROPEIA

PAULO CÂMARA

1. Introdução

A adesão à Europa tem constituído um motor decisivo na evolução do direito do sistema financeiro nacional.

Foi sob a forte influência do Direito europeu que se estruturaram os mais relevantes marcos normativos do sector financeiro: designadamente, o Regime Geral das Instituições de Crédito e Sociedades Financeiras (1992), a Lei da Actividade Seguradora (1998) e o Código dos Valores Mobiliários (1999). Todos estes diplomas mereceram sucessivas actualizações, e a maioria destas foram determinadas pela necessidade de transpor Directivas europeias para o ordenamento jurídico interno. As modificações que sofreram, por seu turno, encontram-se de tal modo umbilicalmente filiados em temas europeus que se mostra tarefa árdua a de avaliar estes de modo autónomo ou distinto.

Neste contexto, o presente contributo dedica-se a uma análise – *brevitatis causa*, fragmentária – das principais tendências emergentes da matriz regulatória europeia projectada no sistema financeiro, e procurar apontar pistas para o seu desenvolvimento futuro.

2. A primeira fase (1986-1998): desgovernamentalização e passaportes comunitários

Nos primeiros anos, o legado europeu teve como importante contributo a desgovernamentalização da supervisão financeira, e a sua afirmação como actividade administrativa independente, nomeadamente perante o poder político[1].

Esta orientação foi concretizada através da criação da Comissão do Mercado de Valores Mobiliários, em 1991, e com a reformulação dos poderes do Banco de Portugal e do Instituto de Seguros de Portugal, respectivamente nos diplomas – acima mencionados – de 1992 e 1998.

Merece ainda assinalar, como emblemático pilar normativo deste período, o importante Decreto-Lei nº 23/86, de 18 de Fevereiro, que regulou a constituição e condições de funcionamento de instituições de crédito com sede em Portugal, bem como a abertura e condições de funcionamento de filiais ou sucursais de instituições de crédito com sede no estrangeiro e que transpôs para a ordem interna a Directiva nº 77/780/CEE, de 12 de Dezembro. Este diploma operou a reversão do ciclo iniciado com a nacionalização da banca, ocorrida em 1975, ao permitir a constituição de bancos privados. Um importante complemento viria do DL nº 24/86, de 18 de Fevereiro, respectivo ao regime comunitário de autorização de instituições de crédito.

Pouco mais tarde, outro passo simbólico seria o estabelecimento de uma regra de liberdade administrativa nas emissões, através do Código do Mercado de Valores Mobiliários (1991).

Uma adicional feição relevante deste período seria a eficácia intra-comunitária da autorização de prestação de serviços financeiros com base numa autorização única e reconhecimento mútuo (na gíria designados "passaportes comunitários"). Tal foi consagrado pela primeira vez no âmbito dos serviços bancários desde 1986, como já indicado. Refira-se também, a propósito, a harmonização do regime de prestação de serviços de investimento, facultada pela Directiva dos Serviços de Investimento (Directiva nº 93/227/CEE, de 10 de Maio de 1993, transposta entre nós

[1] PAULO CÂMARA/GRETCHEN LOWERY, *The Internal Governance Structure of Financial Regulatory Authorities: Main Models and Current Trends*, em MARTA TAVARES DE ALMEIDA/LUZIUS MADER (ed.), *Quality of Legislation – Principles and Instruments. Proceedings of the Ninth Congress of the International Association of Legislation (IAL)*, Nomos Verlag, Baden Baden (2011), 148-183.

pelo DL nº 232/96, de 5 de Dezembro) e, no sector segurador, o Decreto-Lei nº 102/94, de 20 de Abril, que procedeu à transposição para o ordenamento jurídico português das directivas de terceira geração, relativas à criação do «mercado único» no sector segurador – a Directiva nº 92/49/CEE, de 18 de Junho, para os seguros «Não vida», e a Directiva nº 92/96/CEE, de 10 de Novembro, para o ramo «Vida».

3. A segunda fase (1998-2007): o progresso da harmonização

A década seguinte viria a conhecer um incremento significativo na harmonização europeia financeira.

Tal viria a merecer tradução sobretudo na harmonização mais intensa da prestação de serviços financeiros. Retêm-se, como principais, as áreas e os textos normativos adiante referidos: prestação de serviços financeiros à distância (Decreto-Lei nº 95/2006, de 29 de Maio, a transpor a Directiva nº 2002/65/CE, do Parlamento Europeu e do Conselho, de 23 de Setembro), serviços de intermediação financeira (Decreto-Lei nº 357-A/2007, de 31 de Outubro, que transpôs a Directiva 2004/39/CE, do Parlamento Europeu e do Conselho, de 21 de Abril, relativa aos mercados de instrumentos financeiros (DMIF)), serviços de pagamento (Decreto-Lei nº 317/2009, de 30 de Outubro, a transpor a Directiva nº 2007/64/CE, do Parlamento Europeu e do Conselho, de 13 de Novembro), crédito ao consumo (Decreto-Lei nº 133/2009, de 2 de Junho, que transpôs a Directiva nº 2008/48/CE, do Parlamento e do Conselho, de 23 de Abril, relativa a contratos de crédito aos consumidores), a actividade das instituições de moeda electrónica (DL n.º 201/2002, de 26 de Setembro, que transpôs a Directiva n.º 2000/28/CE, do Parlamento Europeu e do Conselho, de 18 de Setembro), os acordos de garantia financeira (Decreto-Lei nº 105/2004, de 8 de Maio, que transpôs a Directiva nº 2002/47/CE, do Parlamento Europeu e do Conselho, de 6 de Junho), o resseguro (Decreto-Lei nº 2/2009, de 5 de Janeiro, que transpôs a Directiva nº 2005/68/CE, do Parlamento Europeu e do Conselho, de 16 de Novembro de 2005) e a mediação de seguros (Decreto-Lei nº 144/2006, de 31 de Julho, que transpôs a Directiva nº 2002/92/CE, do Parlamento Europeu e do Conselho, de 9 de Dezembro).

No seu todo, com este acervo normativo, por influência do Direito europeu, passou a haver uma maior interferência no conteúdo dos contratos referentes à actividade financeira (nomeadamente deveres de infor-

mação, deveres de adequação, deveres de lealdade na gestão de conflito de interesses e outros deveres fiduciários)[2].

Detecta-se ainda, neste período, uma maior exigência com a protecção dos investidores. Através do Decreto-Lei nº 222/99, de 22 de Junho, é transposta a Directiva nº 97/9/CE, do Parlamento Europeu e do Conselho, de 3 de Março, sobre o funcionamento do Sistema de Indemnização aos Investidores.

O sistema europeu começou a ser seriamente testado quanto à sua coerência. Ao lado do desconforto causado pela circunstância de os fundos de investimento harmonizados serem tratados fora da Directiva de Mercados e Investimentos Financeiros aliou-se, de modo mais geral, o sentimento de assimetria regulatória entre os produtos financeiros bancários, seguradores e mobiliários de retalho com características equivalentes[3].

4. A fase actual (2007-2013): o ciclo de resposta à crise financeira

Os últimos anos de experiência regulatória financeira foram concentrados em encontrar respostas legislativas para a crise financeira europeia e internacional – o que seguramente irá preencher a agenda dos próximos anos.

A um tempo, a própria arquitectura financeira europeia foi alterada, de modo a poder dar resposta com maior eficácia, e com inteira cobertura institucional, aos problemas regulatórios detectados. O sistema institucional deste modo estabelecido – designado Sistema Europeu de Supervisão Financeira (*European System of Financial Supervisors (ESFS)*) – assenta numa tripla fundação:

- De um lado, o sistema contempla, como novidade, um Conselho Europeu de Risco Sistémico (*European Systemic Risk Board*);
- No centro, estão as novas três autoridades europeias de regulação (colectivamente designadas European Supervisory Authorities). Na área mobiliária, opera a *European Securities and Markets Authority* (ESMA), a par da *European Banking Authority* (EBA), para a área bancária, e da *EIOPA*, para os seguros e fundos de pensões[4];

[2] STEFAN GRUDMANN/YESIM M. ATAMER, *Financial Services, Financial Crisis and General European Contract Law*, (2011) 5-18; PAULO CÂMARA (ed.), *Conflito de Interesses no Direito Societário e Financeiro: um Balanço a partir da Crise Financeira*, (2009).

[3] EUROPEAN COMMISSION, *Need for a Coherent Approach to Product Transparency and Distribution Requirements for "Substitute" Retail Investment Products? Call for Evidence*, (2007); PAULO CÂMARA, *Manual de Direito dos Valores Mobiliários*[2], (2011), 18-22.

[4] Regulamento (UE) no 1095/2010 do Parlamento Europeu e do Conselho, de 24 de Novembro de 2010, que cria a Autoridade Europeia dos Valores Mobiliários e dos Mercados (European Securities and Markets Authority – ESMA), Regulamento (UE) no 1093/2010 do Parlamento Europeu e do Conselho, de 24 de Novembro de 2010, que cria a Autoridade Bancária Europeia (European Banking Authority) e Regulamento (UE) no 1094/2010 do Parlamento Europeu e do Conselho, de 24 de Novembro de 2010, que cria a Autoridade Europeia dos Seguros e Pensões Complementares de Reforma (European Insurance and Occupational Pensions Authority).

- Por fim, são mantidas as autoridades nacionais de supervisão, interligadas num Sistema Europeu de Supervisores Financeiros (*European System of Financial Supervisors*).

Trata-se de um sistema institucional que assegura uma maior coordenação, cooperação e convergência entre as autoridades de supervisão de cada Estado-membro. Implica, em contraste, uma compressão, embora mínima, de poderes das autoridades de supervisão internas. De outro lado, existe agora a base institucional para nova vaga de harmonização europeia, nomeadamente em direcção à concretização do projecto de um *Rule-book* europeu comum.

O processo regulatório europeu revela também maior atenção a outros *standard-setters*, com primazia para o diálogo transatlântico: destaca-se o caso da área bancária, na qual foi confirmada a importância do Comité de Basileia, acompanhada do relevo actual do *Financial Stability Board*; na área mobiliária, o Dodd-Frank Act norte-americano (2010) suscitou a maior atenção. Tal é patente nos processos de revisão da Directiva de adequação de fundos próprios e da DMIF, ainda em curso.

A partir de 2011, a regulação bancária portuguesa passou a ser também determinada pelas obrigações decorrentes do Memorando de Entendimento celebrado entre Portugal, de um lado, e o BCE, o FMI e a Comissão Europeia, de outro lado. Daqui decorre um acervo exigente de medidas legislativas impostas pelo programa de assistência financeira, algumas das quais a serem adoptadas antes do calendário europeu comum – é o que ocorre, a título de ilustração, com a nova disciplina sobre prevenção e gestão de crises bancárias.

Em balanço final, entende-se que o progresso da harmonização europeia se apresenta como inevitável na área da regulação financeira. Esta trajectória tem implicações políticas, que gradualmente serão assimiladas. Atenta a sua posição no sistema financeiro europeu, Portugal tem a ganhar com esta evolução, que reduz os custos de transacção em mercados periféricos e, paralelamente, permite que o nosso país seja atractivo

como porta de entrada para investidores lusófonos, provindos de mercados com afinidades objectivas em termos económico-culturais. O sistema financeiro nacional é substancialmente valorizado, em termos económicos, enquanto integrado em geografias mais amplas. Assim, por muito incerto que seja actualmente o futuro da Europa, o espaço para uma reflexão regulatória nacional é de tal modo exíguo que se torna difícil pensar no futuro da regulação financeira doméstica desligada do percurso próximo do Velho Continente.

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