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A TALE OF TWO CITIES: REGULATING EQUITY DERIVATIVES IN NEW YORK AND LONDON

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Abstract: This Comment seeks to understand the relative legal risk facing over-the-counter derivative contracts in London and New York by analyzing the approach each city's legal system took in deciding to regulate total return swaps. It argues that regulators on both sides of the Atlantic should devote equal attention to the implementation of financial regulation as the specific regulations themselves when it comes to limiting legal risk in the financial marketplace and maintaining a jurisdiction's competitiveness.

INTRODUCTION

Financial capital of the world: London and New York have competed for this title for the last century. Despite the economic reversals of the last year in both cities, London and New York are still the premier centers of global finance. Given the intertwined language, history, politics, and legal and business traditions of both cities, the competition between them creates interesting parallels.

Among these parallels is the legal and regulatory approach used to police the over-the-counter (OTC) derivatives market, the newest, most controversial and most innovative sector of the financial markets.

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3 OTC Derivative financial contracts have been written about extensively over the last two decades. See generally John T. Lynch, Credit Derivatives: Industry Initiative Supplants Need
Given the infancy of these products, the rules—or lack thereof—by which they are traded are still uncertain. This uncertainty creates legal risk for those entering into OTC derivative contracts, risks that must be evaluated and understood in order to assess the promise of any OTC derivative transaction. Policy makers and market commentators believe that those jurisdictions more willing to provide a stable regulatory environment for OTC derivative products are likely to see the amount of OTC transactions in their jurisdiction increase, along with the lucrative externalities such transactions create. In the war to achieve dominance in the financial services industry, some see the OTC derivatives market as the crucial theater. The industry’s perception of legal risk surrounding OTC derivatives is an important element in deciding the relative merits of the London and New York markets.

This Comment seeks to understand the relative legal risk facing OTC derivative contracts in London and New York by analyzing the approach each city’s legal system took in deciding to regulate total return swaps (TRS), a specific kind of OTC derivative. More specifically, this Comment will compare the narrative and consequences of CSX v. Children’s Investment Fund Management, a New York case examining the uses of TRS, with the United Kingdom’s Financial Services Authority’s (FSA) administrative decision to require the disclosure of some TRS positions. Both decisions, one judicial and one administrative, examined the same question regarding TRS during the first half of 2008.

Part I of this Comment will outline the history of the OTC derivatives market in the context of legal risk. It will also describe the uses of

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5 Id.
7 Id.
8 Id. at 49.
11 See CSX, 562 F. Supp. 2d at 511; FSA Consultation Paper, supra note 10.
total return swaps and briefly discuss the regulatory structure under which these instruments are traded in both London and New York. Part II will discuss the history of the *CSX v. Children’s* decision and compare it with the FSA’s administrative decision to require disclosure of TRS positions. Part III will discuss and analyze the consequences of the different approach used by the regulatory system in each market. Understanding the similarity and differences of the reasoning and process used to reach the conclusions of the respective decisions will provide better understanding of the legal risk OTC derivatives face in these respective markets.

I. Background

The word derivative describes a type of contract that “derives” its value from another referenced security or asset. Some derivatives are standardized and traded on public exchanges. Nevertheless, the vast majority of derivative contracts are traded on the OTC market, where parties to a trade negotiate terms of the contract to suit their individual needs.

A TRS is a particular kind of OTC contract, whereby parties to a trade agree to exchange cash flows based on the fluctuation in value of a share of corporate stock. As U.S. District Judge Larry A. Kaplan explained in the *CSX v. Children’s* opinion, in a TRS:

> With reference to 100,000 shares of stock of General Motors, the short party agrees to pay the long party an amount equal to the sum of (1) any dividends and cash flow, and (2) any increase in the market value that the long party would have realized had it owned 100,000 shares of General Motors. The long party in turn agrees to pay the short party the sum of (1) the amount equal to interest that would have been pay-able had it borrowed the notational amount from the short party, and (2) any depreciation in the market value that it

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13 Id.
15 Flanagan, *supra* note 12, at 220.
would have suffered had it owned 100,000 shares of General Motors.\textsuperscript{16}

In the United Kingdom, a contract outlining the same set of transactions is called a contract for differences.\textsuperscript{17}

Use of these products by the financial services industry is only about thirty years old.\textsuperscript{18} In fact, many types of derivative contracts or uses for them have been developed in the last decade.\textsuperscript{19} Consequently, the legal rules governing OTC derivatives are new and uncertain.\textsuperscript{20} For much of the last fifteen years, the OTC derivatives market has been characterized by its lack of regulation in both the United States and England.\textsuperscript{21} To the extent that regulation or potential regulation existed in either country, the novelty of the OTC derivatives market, coupled with its continuous innovation, made the development of market rules a risky proposition for market participants.\textsuperscript{22}

As one commentator explained, the OTC derivatives market is plagued by statutes that are “all over the financial map,” providing “little clarity or certainty to market participants.”\textsuperscript{23} What’s worse, judicial application of common law principles or statutory interpretations to OTC derivative disputes often fail to describe the underlying transactions accurately or consistently.\textsuperscript{24} Moreover, some market observers believe that the history of derivatives is little more than a history of financial services participants creating tools to circumvent existing regulation.\textsuperscript{25} The possibility that regulators will begin assessing OTC derivatives based on what they do—their function—as opposed to what they are called—their form—is one of the main sources of legal risk for the market.\textsuperscript{26}

\textsuperscript{16} CSX, 562 F. Supp. 2d at 520–21.


\textsuperscript{18} Flanagan, supra note 12, at 234–35.

\textsuperscript{19} Id.

\textsuperscript{20} See Partnoy, supra note 4, at 421–23.

\textsuperscript{21} Schinasi, supra note 14, at 31; see also FSA Consultation Paper, supra note 10; PHILIP M. JOHNSON & THOMAS L. HAZEN, DERIVATIVES REGULATION § 1.02[2][E] (2004).

\textsuperscript{22} See Partnoy, supra note 4, at 421–23.

\textsuperscript{23} Id. at 446.

\textsuperscript{24} Id. at 449–50.


Consequently, legal risk is one of the chief considerations parties must weigh before entering into an OTC derivative transaction.\textsuperscript{27} The relative legal risk posed by a given jurisdiction is a pivotal factor in determining where industry decides to grow the OTC derivatives market.\textsuperscript{28} Analyzing the differences between how jurisdictions—in this case, London and New York—approach OTC derivative regulatory issues is one way to evaluate legal risk.\textsuperscript{29} Assuming that change in regulation is at least as likely to occur as market innovation for a given financial product, it is arguable that the approach used by regulators to implement new rules is as important as the regulations themselves.\textsuperscript{30} To this extent, abrupt changes in the law that allow market participants little time to adjust their practices is indicative of a market with significant legal risk.\textsuperscript{31} Legal changes that are clear and that give market participants ample time to adjust their practice to new rules are indicative of relatively low legal risk.\textsuperscript{32}

\section*{II. Discussion}

In the Spring of 2008, the legal and regulatory authorities in London and New York were considering whether TRS could be used to evade securities disclosure laws and whether such a possibility merited requiring disclosure of TRS contract positions.\textsuperscript{33} The context in which these evaluations were made, however, differed significantly.\textsuperscript{34}

In London, the FSA was in the midst of consulting with derivatives traders and other members of the securities industry to determine how to deal with TRS.\textsuperscript{35} This initiative was the product of an overall move by


\textsuperscript{29} See Partnoy, \textit{supra} note 4, at 421–23.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id.


\textsuperscript{34} See CSX, 562 F. Supp. 2d at 511; FSA Consultation Paper, \textit{supra} note 10.

the FSA to harmonize existing English financial regulation with recent reforms in the European Union. The decision to look at the uses of TRS was made after “investors raised concerns relating to lack of disclosure.” The FSA cited the following three concerns by market participants: (1) that lack of transparency regarding the economic interests of market participants allowed those participants to gain control over voting rights attached to underlying shares referenced by TRS; (2) that corporations are not able to know who has economic exposure to their shares; (3) that investors using TRS may outflank other investors using traditional financial products in influencing companies by voting shares. To determine the extent to which these possibilities were real, the FSA surveyed market participants, conducted a review of the relevant academic literature and ran a cost benefit analysis of various methods of providing disclosure of TRS positions.

Meanwhile, in New York, a very different process took place. In March, U.S. railroad CSX sued two hedge funds, The Children’s Investment Fund Management and 3G Capital Partners, alleging the defendants violated disclosure rules by using TRS to secretly gain an upper hand in a proxy fight. The allegations made by CSX mirrored the precise concerns of English investors surveyed by the FSA. CSX asserted that the funds took large TRS positions referencing CSX stock. The funds knew that given the methods used by TRS dealers to hedge risk, these TRS positions could be easily converted into controlling share positions. In essence, CSX asserted that the funds were using the TRS to take control of the company without triggering detection, since TRS did not have to be disclosed according to securities disclosure rules in the United States. Over the next two months, the dispute saw the U.S. Securities and Exchange Commission and industry participants weigh in on the issue.

36 See FSA Consultation Paper, supra note 10, at 1.1.
37 See id.
38 Id.
39 Id. at 1.14.
40 CSX, 562 F. Supp. 2d at 520–21. Cf. Hazell v. Hammersmith and Fulham Borough Council and Ors, [1992] 2 AC (showing that England has used its court system to regulate derivative products in the past, which has created substantial legal risk).
41 See CSX, 562 F. Supp. 2d at 518.
42 Id.
43 Id.
44 Id.
45 Id.
46 CSX, 562 F. Supp. 2d at 549.
The financial industry watched closely to see how both the administrative process in England and the litigation process in the United States would affect the market for OTC derivatives.\(^47\) During the spring of 2008, in both countries, the law decided whether a derivative product would be judged by its name or by its use.\(^48\)

**A. FSA Analysis and Conclusions**

In deciding to analyze TRS, the FSA concerned itself with “possible market failure” or lack of transparency.\(^49\) The FSA intended to analyze whether the non-disclosure of TRS positions allowed buyers of the contracts to take large equity positions in order to influence corporate governance without notifying corporate managers or other shareholders.\(^50\) Such a possibility could, according to the FSA, potentially lead to inefficient price information, a distorted market for corporate control, diminished market confidence and information asymmetry for equity investors.\(^51\)

The FSA worried that under the current rules TRS traders could wind up knowing more about a company’s ownership than the rest of the market’s participants.\(^52\) The FSA believed this could happen either through banks, typical sellers of TRS contracts, voting on behalf of TRS holders or through the quick acquisition of a bank’s equity hedge (“it would be difficult to find a seller who would for example sell 5% of a company”).\(^53\) In either case, the TRS seller’s hedge transfers knowledge to the buyer regarding the location and potential voting positions of shares to which the market as a whole is not privy.\(^54\) Nevertheless, the FSA realized that “lack of full information itself is not a market failure.”\(^55\) Market failures only arise when, the FSA said, market “imperfec-

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\(^{50}\) *Id.* at 3.20.

\(^{51}\) *Id.* at 3.14–.22.

\(^{52}\) *Id.* at 3.14.

\(^{53}\) *Id.* To understand the FSA’s worries requires an understanding of how a TRS seller hedges its risk. When a buyer purchases a TRS contract it pays an upfront fee to place a bet on what will happen to a give company’s equity shares. The buyer will be paid any amount by which those equity shares increase. To hedge its bet the seller, which is usually a bank, will buy the shares on which the two parties to the trade have bet. *CSX*, 562 F. Supp. 2d at 519–24. TRS sellers are said to exercise voting rights of the shares they acquire in ways that mirror the interests of the counterparty to the TRS trade. *Id.*


\(^{55}\) *Id.* at 3.18.
tions [are] large enough to suggest that regulatory intervention has a realistic prospect of improving market outcomes.”

The FSA reasoned that the potential for market imperfection was deemed to be especially great when it came to the market corporate control. Lack of disclosure rules, the FSA said, allowed those organizing a takeover to use TRS to gain an ownership toehold in terms of controlled shares to which the market would be blind. The FSA worried that toeholds could discourage other potential bidders from contesting the takeover, as they would be at a “competitive disadvantage” relative to a bidder with a toehold. The FSA regarded such a disadvantage as enough to keep other bidders from participating in the market, which could lead to the inefficient pricing of corporate shares.

Moreover, the FSA worried that the influence TRS buyers potentially have over sellers could be a deterrent for smaller players from participating in the market. “Without disclosure,” the FSA wrote, “investors may be deterred from participating in the market if they feel uncertain about who the players are.” This issue might also be problematic for the corporations themselves, according to the FSA, as it might lead to issuers expending resources to align their shareholder roles with the market’s actual make-up. The FSA viewed such expenditures as inefficient because it essentially forced corporations to internalize transparency costs that the majority of FSA regulations assign to shareholders.

Once the FSA had identified possible market failures, it then set out to discover the extent to which the possibility of such failures were believed by market participants to occur. A review of academic and professional literature revealed that the potential market failures the FSA had identified were of great concern to most market observers. Furthermore, regulators in other jurisdictions—Hong Kong, Australia, New Zealand, and Switzerland—were introducing disclosure rules for

56 Id.
57 Id. at 3.19.
58 Id.
59 FSA Consultation Paper, supra note 10, at 3.19.
60 Id. at 3.20.
61 Id.
62 Id.
63 Id. at 3.21.
64 FSA Consultation Paper, supra note 10, at 3.21.
65 Id. at 4.1–.35.
66 Id.
TRS based on similar fears about market failures. The FSA also commissioned an independent study, which found some evidence of the type of market failures the FSA described, as well as a cost benefit analysis of adopting different regulatory responses to TRS. Finally, the FSA consulted market participants as to what kind of TRS regulation would most benefit the market for equities. This consultation took place over several months, after the FSA’s research had been made public.

Among the most vocal groups with whom the FSA consulted was the International Swaps and Derivatives Association (ISDA), a trade group that represents participants in the OTC derivatives market, which are chiefly large banks that make markets for OTC derivatives. The group lobbies on behalf of derivatives market participants and attempts to create industry protocols with which derivative contracts can be standardized. The ISDA argued that there was no valid policy need to change FSA rules concerning TRS. At the same time the ISDA stated that it appreciated the manner in which the FSA approached changing the rules, stressing that industry consultation was an important part of the process.

Despite the ISDA’s advice, the FSA concluded that TRS were sometimes, but not always, used to “influence votes and other corporate governance matters.” As a result, some sort of regulation of the TRS market was necessary. The new rules proposed by the FSA would treat TRS positions like equity positions. They would require disclosure as soon as market participants acquired a three percent equity stake in a company, measured by aggregating TRS with company shares. The FSA decided to begin enforcing the new rules in 2009, giving market participants time to adjust their trading practices.
B. CSX v. Children’s Analysis and Conclusions

In the early spring of 2008, United States District Judge Lewis A. Kaplan, tasked with hearing the CSX v. Children’s case, found himself faced with the same market forces that led the FSA to reconsider its disclosure rules. The Children’s Fund and its fellow defendants had entered into TRS contracts with banks. The banks had hedged their positions by buying CSX equity shares. Children’s Fund had, according to CSX, represented that it controlled or had the ability to control a large portion of CSX shares. CSX claimed that Children’s Fund intended to exercise those shares to appoint directors to the CSX’s board if the railroad did not adhere to the hedge Fund’s proposed management changes. As the proxy fight between management and the hedge fund commenced, CSX filed suit claiming that Children’s had been able to amass its large position in CSX unbeknownst to the market by violating federal securities disclosure law.

“The heart of the dispute presently before the Court,” Judge Kaplan wrote, “concerns whether [Children’s Fund]’s investment in cash-settled TRS referencing CSX shares conferred beneficial ownership of those shares upon [Children’s Fund].” Unlike the FSA, however, Judge Kaplan was not charged with designing the rules, but with interpreting them.

Initially, Judge Kaplan invited the SEC to offer its analysis of how SEC Rule 13d-3, the rule defining beneficial ownership of securities for disclosure purposes, should be interpreted regarding the use of TRS. Judge Kaplan asked the SEC (1) whether Children’s fund had beneficial ownership of CSX’s shares held by the counterparty banks; (2) what mental state is required to establish the existence of a plan or scheme within the meaning of 13-d3.

80 See CSX, 562 F. Supp 2d, 548.
81 See id. at 518.
82 See id.
83 See id.
84 See id.
85 See id.
86 CSX, 562 F. Supp. 2d at 539.
87 See id.
89 Id.
In response to the first query, the SEC opined that entering into a TRS is not sufficient to create beneficial ownership. The fact that the TRS seller has economic incentives to act in the interest of the buyer does not change the analysis, the SEC said. Actual authority to vote or to direct the vote of the shares is not created by the mere presence of economic incentives, according to the SEC.

In response to the second query, the SEC wrote that a “plan or scheme to evade” is only manifested when the person entering the transaction knows that it will create a false appearance. The SEC reasoned that entering into a TRS is legitimate and even if it was done to avoid disclosure requirements it does not mean it was done to create a false appearance.

The SEC closed its response to Judge Kaplan by stating it believed any other interpretation would create “significant uncertainties for investors.” No further policy analysis was provided. The crux of the SEC’s argument was that if the legal rights that were being transferred did not fit precisely into the definitions of ownership, ownership did not exist.

Judge Kaplan disagreed with the SEC’s conclusions. He determined:

[The rule] does not confine itself to “mere interpretation of the legal right to vote or direct the acquisition or disposition of securities,” but looks instead to all of the facts and circumstances to identify situations in which one has even the ability to influence voting, purchase or sale decisions of its counterparties by “legal, economic or other” means.

He went on to write that focusing on Children’s Fund’s legal rights under its swap contracts “exalts form over substance.” “The securities markets,” Judge Kaplan wrote, “operate in the real world and not in a

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90 Id.
91 Id.
92 Id.
93 See Letter, supra note 88.
94 See id. (“The significant consideration is not the person’s motive but rather that the person knew or was reckless in not knowing that the transaction would create a false appearance. In this regard, taking steps with the motive of avoiding reporting and disclosure generally is not a violation of 13(d) unless the steps create a false appearance.”).
95 Id.
96 Id.
97 See Letter, supra note 88.
98 CSX, 562 F. supp. 2d at 548–49.
99 Id.
law school classroom. Any determination of beneficial ownership that failed to take account of the practical realities of that world would be open to the gravest abuse.”

For Judge Kaplan, the facts were clear. “The evidence,” he wrote, “that [Children’s Fund] created and used the TRSs, at least in major part, for the purpose of preventing the vesting of beneficial ownership of CSX shares in [Children’s Fund] and as part of a plan or scheme to evade the reporting requirements of section 13(d) is overwhelming.” Children’s Fund, Judge Kaplan concluded, should not be allowed to use TRS to get around 13(d) reporting requirements.

Judge Kaplan enjoined the defendant hedge funds from using TRS to further circumvent securities disclosure rules. He did not, however, enjoin the funds from using the shares they had acquired from the banks that sold them TRS to place new directors on CSX’s board. The Second Circuit Court of Appeals upheld this decision. Judge Kaplan’s ultimate decision was to do nothing but encourage the Department of Justice and the SEC to take notice of his judicial findings and to act accordingly.

The ISDA’s reaction to Kaplan’s decision was significantly less conciliatory than their reaction to the FSA’s administrative decision. The ISDA claimed, in its amicus brief to The Second Circuit Court of Appeals, that the decision created significant legal uncertainty by creating “a novel ‘influence’ standard for beneficial ownership that cannot be supported by the applicable legal precedent.” The result is that Judge Kaplan created “a potentially unmitigable risk [for market participants] of violating (or subsequently being found to have violated) reporting requirements and thus incurring substantial liabilities.”

The ISDA made specific mention of how Judge Kaplan’s decision differed from the process used by the FSA in England. It argued that Judge Kaplan’s decision differed from the approach taken by the FSA

100 Id.
101 Id. at 548–649.
102 Id. at 572.
103 See CSX, 562 F. supp. 2d at 572.
105 See CSX, 562 F. Supp 2d 511 at 573–74.
107 Id. at 3.
108 Id. at 27.
in its creation of legal risk and uncertainty because it did not provide “full opportunity for notice and comments.”

III. Analysis

In terms of assessing the legal risk presented by the decisions to regulate TRS in both jurisdictions, the FSA’s approach is preferable. Not only did the FSA provide a forum through which a legal issue could be evaluated by all interested parties, it also gave the market a clear timeline along which the decision would be carried out and clear guidance as to when the enforcement of the new rules would begin. From the perspective of a continuously operating market, these aspects of the FSA rule making process make all the difference.

At first glance, the approaches used by the American court and the English regulator look similar. Both Judge Kaplan and the FSA realized that TRS positions would have to be disclosed if the securities disclosure rules were to be consistent and effective.

The difference between the consequences of their respective decisions, however, is severe. Judge Kaplan, a district judge whose decisions could easily be overturned, introduced a novel line of reasoning into American case law examining the uses of derivatives. The Second Circuit Court of Appeal’s decision to affirm Judge Kaplan’s holding left the state of American law regarding TRS in flux, since Judge Kaplan’s decision did not go so far as to change the law, but merely suggest that the SEC and Justice Department do so. At the time of this writing, due to inaction on the part of the SEC, the regulation of TRS in the United States remains uncertain.

In contrast, the FSA decision has left the OTC derivatives market in England with changes to make, but no questions as to what type of behavior is allowed and what isn’t. The rules are clearly laid out in

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110 Id. at 29.
111 See CSX, 562 F. Supp. 2d at 570; FSA Consultation Paper, supra note 10.
112 See FSA Policy Update, supra note 10.
113 See id.; Partnoy, supra note 4, at 421–23.
118 See FSA Policy Update, supra note 10.
the FSA’s regulatory announcements.119 The market reaction was generally welcoming, according to observers.120 Though changes will be made, the London OTC derivatives market knows what those changes will be and can adjust accordingly.121 The same cannot be said about New York.122

This distinction is important for market participants attempting to decide where to base OTC trading operations.123 In New York, on the one hand, OTC derivative traders are faced with a set of legal rules that are unknown.124 While, at the time of this writing, it might seem as if New York offers a less stringent regulatory environment because TRS positions do not necessarily have to be disclosed, it is unclear how long this state of affairs will continue.125 It entirely depends on the SEC’s willingness to follow Judge Kaplan’s lead.126 In London, on the other hand, the law does require more, but it is defined and certain.127 TRS traders in London know what will be required of them and when.128 Therefore, from the standpoint of market participants hoping to plan transactions and trading strategies, London offers a far superior regulatory regime in terms of legal risk.129

Much of the difference between the outcome regarding the different regulatory approach to TRS in England and the United States can be attributed to the fact that the FSA decided to evaluate their use, while the SEC didn’t.130 There has yet to be any significant discussion as to why this regulatory problem ended up in a court in one country and before a financial regulatory administration in another.131 Future comparisons of these two jurisdictions would do well to consider that question.

119 See id.
121 Id.
122 Id.
124 See Duffie, supra note 28, at 5–6.
125 See Hurwitz, supra note 121.
126 Id.
127 See FSA Policy Update, supra note 10.
128 Id.
129 See id.; Partnoy, supra note 4, at 421–23.
130 See FSA Consultation Paper, supra note 10; SEC Letter, supra note 83.
The beginnings of an answer might be found in the culture of the SEC compared to the FSA. The FSA has stated that it attempts to use a “light touch,” when approaching regulatory issues.\(^{132}\) The emphasis is on making the markets work, as opposed to enforcing rules and consequently the regulator attempts to cooperate with industry participants to achieve compromise that work for all involved.\(^{133}\) The emphasis, according to this description of the FSA, is on a substance over form approach and understanding how to help the market function best.\(^{134}\)

The SEC, on the other hand, prosecutes fraud in the securities markets.\(^{135}\) As an institution, it enforces the Securities Exchange Acts, and in doing so it is hoped that market efficiency will be achieved.\(^{136}\) The extent to which its stance as a rule enforcer interferes with its ability to understand the purpose of the rules has been questioned by some observers.\(^{137}\)

**Conclusion**

Though beyond the scope of this Comment, further research regarding why the FSA decided to examine the use of TRS, and why the SEC did not, should prove valuable. Regardless, what is clear is that the regulatory regime in London seems to be doing a superior job of limiting the legal risk associated with OTC derivatives than its counterpart in New York. Such an advantage, if held for long, should help London outpace New York in the competition to be the financial capital of the world.

To a large extent, the events of Fall 2008 make the differing regulatory approaches to TRS outlined in this Comment seem minor.\(^{138}\) The collapse of major financial institutions and the massive government bailout of others are likely to bring significant regulatory changes in their aftermath.\(^{139}\) In a severe bear market, legal risk is a relatively minor investment factor to consider. Given the scope of the upheaval in the global markets, new rules and the legal risk they inherently create

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\(^{133}\) See id.

\(^{134}\) See id.


\(^{136}\) Id. at 257.

\(^{137}\) Id. at 15–20.


\(^{139}\) Id.
are certain. Nevertheless, regulators would do well to consider why the manner in which the decision to regulate TRS in London and New York differed to such a great extent. Going forward, regulators on both sides of the Atlantic should regard the implementation of regulation as of as much importance as the specific regulations themselves.

140 Id.