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GAAP Did Their Job During the Economic Meltdown

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In the recent credit crisis and subsequent economic meltdown, the United States' Generally Accepted Accounting Principles (GAAP) did their job by helping investors and markets recognize how bad things were sooner rather than later. This prevented even greater problems, such as those Europe is now experiencing[2] in part as a consequence of its inferior accounting rules: International Financial Reporting Standards (IFRS). Many in the financial industry criticize GAAP because United States accounting keeps the industry somewhat honest. This "shoot-the-messenger" or "blame-the-arresting-officer" tactic is a standard move.[3] In fact, in the current meltdown, GAAP told the truth better than almost any other economic reporter. The truth sometimes hurts. This article discusses and defends the role played by GAAP during the meltdown and describes how GAAP's success is pushing financial accounting in a sound direction.

The key feature of GAAP that enabled them to do their job[4]—and which has generated such vituperous and unfounded criticism—is their requirement for mark-to-market accounting for certain investments owned

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1 Professor of Law, University of Miami School of Law. Research completed Feb. 19, 2009.

2 Jan Strupczewski, *Eurozone Shrinks Sharply*, REUTERS, Feb. 13, 2009; Keiichiro Kobayashi, *Financial Crisis Management: Lessons from Japan's Failure*, VOXEU.ORG, Oct. 27, 2008, *available at* http://www.voxeu.org/index.php?q=node/2483.

3 For example, in our last economic meltdown (which seems so tiny and innocent today), Jeffrey Skilling, the architect of the house of mirrors that was Enron in its later days, blamed his downfall on the media getting out the truth about his firm. Bethany McLean & Peter Elkind, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON 416-19 (Paperback ed. 2004); Alexei Barrionuevo, *Enron's Skilling Is Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006.

4 GAAP—and IFRS—failed in numerous other important ways, of course. For example, improper accounting by loan originators for guarantees with respect to loans sold and counter-factual accounting for special purpose entities formed by investment banks to hold loans contributed to the meltdown. *See* FIN. ACCT. STDS BD., PROPOSED STATEMENT OF FINANCIAL ACCOUNTING STANDARDS: ACCOUNTING FOR TRANSFERS OF FINANCIAL ASSETS— AN AMENDMENT TO FASB STATEMENT NO. 140, EXPOSURE DRAFT (REVISED), Sept. 15, 2008, 59-73; *FASB Staff Position,* FAS 140-4 and FIN 46(R)-8, Dec. 11, 2008. That said, GAAP still did their job because of all the good done by mark-to-market accounting, as discussed below. Moreover, mark-to-market accounting has been prominent in the policy debates regarding the current meltdown, while these other aspects of GAAP have not received much public scrutiny.

by a reporting business.[5] Since a 1993 pronouncement[6] by the United States' Financial Accounting Standards Board (FASB),[7] reporting businesses have been required to carry most of the securities and loans that they own on their financial books at fair market value rather than at historic cost, the traditional accounting method. A 2006 FASB pronouncement provided more detail on how to determine, disclose and discuss these values.[8] The 2006 statement telegraphed that the value used in mark-to-market accounting is objective market value, and not subjective worth.[9] For most businesses, the 2006 standard took effect for reporting 2007 activities.[10] All of which sounds harmless enough.

Problems arose, however, in the recent economic climate: investors, such as banks and hedge funds that owned loans and loan-backed securi-

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5 The hue and cry got so loud that Congress, in the Emergency Economic Stabilization Act of 2008, felt the need to give the SEC the power to suspend mark-to-market accounting—power which the SEC has had since its birth—and required the SEC to report on mark-to-market accounting. 12 U.S.C. § 5237 (2008). The SEC promptly issued an extensive report that defends mark-to-market, the key conclusion of which is quoted below. *See infra* note 14.

6 FIN. ACCT. STDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 115, ACCOUNTING FOR CERTAIN INVESTMENTS IN DEBT AND EQUITY SECURITIES, May 1993 [hereinafter SFAS 115]. Debt and readily evaluated equity securities are marked to market on the balance sheet. For investments not held to sell, any mark-to-market gain or loss is not reflected on the income statement until the investments are sold. Loans expected to be held to maturity are not marked to market. *Id.* However, they must be written down when their value is impaired. FIN. ACCT. STDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 144 (AS AMENDED), ACCOUNTING FOR THE IMPAIRMENT OR DISPOSAL OF LONG-LIVED ASSETS, Aug. 2001 [hereinafter SFAS 144]; FIN. ACCT. STDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 114 (AS AMENDED), ACCOUNTING BY CREDITORS FOR IMPAIRMENT OF A LOAN, AN AMENDMENT OF FASB STATEMENTS NO. 5 AND 15, May 1993 [hereinafter SFAS 114].

While there is an important difference between market losses immediately reducing reported profits and those losses just reducing equity without going through the income statement, in the current debate both features of mark-to-market are being attacked together, so this article merges them in the interest of simplicity.

7 The SEC delegated some of its authority to set accounting principles to the private FASB upon FASB's formation in 1973. *See generally* George Mundstock, *The Trouble with FASB*, 28 N.C. J. INT'L L. & COM. REG. 813, 829-30 (2003).

8 FIN. ACCT. STDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 157, FAIR VALUE MEASUREMENTS, Sept. 2006 [hereinafter SFAS 157]. *See* Stephen Taub, *FAS 157 Could Cause Huge Write-offs*, CFO.COM, Nov. 7, 2007, *available at* http://www.cfo.com/article.cfm/10097878.

9 SFAS 157, *supra* note 8, at ¶ 5. Subjective valuation sometimes is referred to as "mark-to-model" accounting, and was made famous by Enron. *See* Kurt Eichenwald, CONSPIRACY OF FOOLS 54-68 (2005); McLean & Elkind, *supra* note 3, at 318-20. This article supports true mark-to-market accounting, not Enron-like fraudulent abuses thereof. Many in the financial sector today want to use mark-to-model accounting. Enron demonstrated what happens when such bad reporting is allowed. After all, the credit crisis was made possible by insanely optimistic modeling. Michael Lewis, *Inside Wall Street's Black Hole*, PORTFOLIO.COM, March 2008, *available at* http://www.portfolio.com/news-markets/national-news/portfolio/2008/02/19/Black-Scholes-Pricing-Model.

10 SFAS 157, *supra* note 8, at ¶ 36.

ties,[11] realized that these investments were much, much riskier than previously acknowledged. The market price of these investments plummeted. Businesses that owned such investments were required to write down the value of these assets on their books to reflect the new, more realistic, market conditions.

Reporting businesses make a variety of arguments against having to report the loss in value of their investments: that the current market conditions are transitory, so that mark-to-market does not reflect the true, long-term economics;[12] that it is unfair to punish the owning businesses and their managers for market conditions beyond their control (of course, these businesses and their managers were being rewarded for their supposed expertise in understanding the market and received big returns on mark-to-market gains); that reporting the market value hurts business and thereby compounds problems in the economy; and so on.[13]

In fact, GAAP have it right, and that has been a good thing.[14] That a business owns investments that have lost a considerable portion of their

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11 Examples of loan-backed securities include interests in pools of home-mortgage loans (mortgage-backed securities), interests in pools of corporate loans (collateralized debt obligations), and interests in pools of credit-card obligations.

12 *See* Jesse Westbrook, *SEC, FASB Resist Calls to Suspend Fair-Value Rules*, BLOOMBERG.COM, Sept. 30, 2008, *available at* http://www.bloomberg.com/apps/news?pid=20601087&sid=adXpiEdV8qa 4&refer=home; Ian Katz, *Behind Schwarzman Spat With Wasserstein Lies Rule 115*, BLOOMBERG.COM, Dec. 8, 2008, *available at* http://www.bloomberg.com/apps/news?pid=20601109&sid=aGLHt9Kw7JNo&refer=home#.

13 *See* Urooj Khan, *Does Fair Value Accounting Contribute to Systemic Risk in the Banking Industry?*, *available at* http://ssrn.com/abstract=1327596 (forthcoming Feb. 15, 2009); Susan Lee, *Mark-to-Market in Wonderland: The SEC and the Queen of Hearts*, FORBES.COM, Jan. 9, 2009, *available at* http://www.forbes.com/2009/01/08/mark-to-market-oped-cx_sl_0109lee.html.

14 This discussion assumes that the purpose of GAAP is to inform investors in a business on how that business is doing. Of course, GAAP numbers are used for other purposes, such as bank regulation, for which mark-to-market accounting might not be appropriate, but that really has no bearing on the correct GAAP treatment. *See generally* Letter to U.S. Secretary of Treasury Timothy Geithner & Chairman of the Board of Governors of the U.S. Federal Reserve Ben Bernanke & Chairwoman of the U.S. Securities and Exchange Commission, Mary Schapiro (February 13, 2009) *available at* http://www.thecaq.org / newsroom/release_02132009.htm; John Patrick Hunt, *One Cheer For Credit Rating Agencies: How the Mark-to-Market Accounting Debate Highlights the Case for Rating-Dependent Capital regulation*, (forthcoming 2009), *available at* http://ssrn.com/abstract=1331633. A recent report by the SEC's Office of the Chief Accountant concluded:

> It is important to note that the role of accounting standards is to provide transparent information to investors as they make decisions. Accordingly, the primary factor to consider when evaluating the role of fair value accounting is the impact of such accounting on the information provided to investors. Based upon the analysis performed in Section IV (including the views obtained from investors during multiple roundtables, through comment letters and the consideration of existing academic research), investors generally have found existing fair value accounting standards, particularly as they relate to fair value accounting for financial instruments, to have increased the quality of information available to them. While certainly the views of investors are not monolithic, in general, investors have indicated that fair value provides more relevant information, reflecting current economic reality that should not be replaced by other alternative accounting measures. Many investors indicated that investor confidence is reinforced by providing transparency relating

market value is something that the investors in those businesses should know sooner rather than later. As a JP Morgan Chase analyst observed in the context of the debate over GAAP, that when a reporting firm objects to mark-to-market accounting it is "a lot like going to a doctor for a diagnosis and then blaming him for telling you that you are sick."[15] Hiding the market value simply defers dealing with the real, current problems (no matter how much corporate management wants to deny the problems or hopes they will go away). Even if the financial markets are in the sway of an irrational pessimism, the market has spoken and the investors in a reporting business should know that. The management of a business that owns assets that have lost market value can make its case to its investors that the market undervalues these assets. Management should not be allowed to deny reality on the business' financial statements.

Mark-to-market accounting's accuracy has had particular benefits during the current meltdown: under mark-to-market, a reporting business' books look the same regardless of whether a bad investment is sold or not.[16] Under traditional historical-cost accounting, because an asset is kept on the books at cost, rather than selling it, a reporting business can avoid showing a loss in value of an asset by holding on to it.[17] Similarly, mark-to-market accounting does not require a big write-down with regard to a loan when the loan is renegotiated as the loan was already written down as the value of the loan declined. Businesses are free to renegotiate when that makes business sense, free of accounting concerns. For these reasons, mark-to-market accounting has the least impact on business decisions among all of the alternative regimes, and thus is best for the economy.

A piece of economic history demonstrates the superiority of mark-to-market accounting: the Savings and Loan (S&L) mess of the 1980s.[18] The

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> to the underlying asset value of their investments, and a removal of that information would, in fact, lead to additional financial instability.

S.E.C., OFFICE OF THE CHIEF ACCOUNTANT, DIVISION OF CORPORATE FINANCE, REPORT AND RECOMMENDATIONS PURSUANT TO SECTION 133 OF THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008: STUDY ON MARK-TO-MARKET ACCOUNTING (2008). The U.S. Chamber of Commerce agrees. *See* Malini Manickavasagam, *Chamber of Commerce Recommends Implementation of SEC Fair Value Findings*, 27 DAILY TAX REPORT G-1 (Feb. 12, 2009).

15 Katz, *supra* note 12.

16 Under SFAS 115, if a business decides to sell a loan owned that has lost value which was previously expected to be held to maturity, that decision immediately subjects the loan to full mark-to-market accounting. These accounting consequences should not impact the decision to sell, however, because the loan should have been written down under the general rules for impairment even while being held to maturity. *See* discussion *supra* note 6.

17 FIN. ACCT. STDS BD., STATEMENT OF FINANCIAL ACCOUNTING CONCEPTS NO. 5 (AS AMENDED), RECOGNITION AND MEASUREMENT IN FINANCIAL STATEMENTS OF BUSINESS ENTERPRISES, 1984, ¶¶ 66-70.

18 Then-judge Stanley Sporkin, one of the most distinguished business lawyers of all time, noted in an opinion regarding the most famous broke S&L with meta-aggressive accounting, Charles Keating's Lincoln Savings, that:

S&L mess bore remarkable similarity to the recent credit crisis as both arose out of financing the huge market for home loans.[19] An S&L is similar to a bank, but historically specialized in making home loans to individuals. S&Ls got the money to loan by accepting deposits from customers. S&Ls profited by paying no or a low, regulated, fixed rate of interest on deposits (which are borrowings by the S&Ls), and then charging homeowners a higher rate of interest on the home loans (which are lendings by the S&Ls). Depositors accepted a low return on their investment in part because their deposits were insured by the old Federal Savings and Loan Insurance Corporation (FSLIC). This worked for over 40 years. Then, interest rates started going up in the late 1970s. Depositors in S&Ls started looking elsewhere for higher yields on their funds. (Deposits in S&Ls were demand deposits or other short-term investments, like certificates of deposit, so it was relatively easy for investors to take their money out of the S&Ls.) Worse, the home loans owned by the S&Ls were long term and fixed rate, so that the loans had lost considerable value as interest rates had gone up. The S&Ls went broke.[20]

Rather than deal with the problem, Congress and regulators (particularly, the old Federal Home Loan Bank Board (FHLBB)) tried to deregulate out of the mess. Accounting gimmicks were used:[21] phony "goodwill" was allowed as an asset on an S&L's books to make it not look broke.[22] Loans were allowed to be kept on the books at their historic cost, even when renegotiated.[23] And, most relevant here, to address the accounting penalty on disposing of now-undesirable loans, regulators allowed losses on sold loans to be spread over the remaining term of the sold loans, even though the loss was fully realized.[24] The hope was that the proceeds from the sold loans would be invested in more productive—riskier—assets so that the S&Ls could earn out of their problems. In fact, hiding reality just made matters worse.[25]

One of the great attributes of this nation is that it learns from its mistakes. It is clear that this case should provide us all with a very valuable learning experience. If the lessons are learned well, we will have gone a long way in preventing these abusive practices from recurring in the future.

Lincoln Sav. & Loan Ass'n. v. Wall, 743 F. Supp. 901, 921 (D.D.C. 1990). While we apparently did not learn the regulatory lessons of the S&L mess, this article suggests that we learned the accounting lessons, and that they should not be forgotten.

19 For a good overview of the S&L mess, *see* Robert Sherril, *S&Ls, Big Banks and other Triumphs of Capitalism*, THE NATION, Nov. 19, 1990, at 589.

20 For a good review of this history, *see* The Federal Deposit Insurance Corporation's (FDIC) official history: FDIC: THE S&L CRISIS: A CHRONO-BIBLIOGRAPHY, *available at* http://www.fdic.gov/bank/historical/s&l/ (last visited Mar. 12, 2009).

21 Julie Lockhart, Michael Long & Stephan Sefcik, *Regulatory Accounting, Principles, Forbearance, and the Perpetuation of the Savings and Loan Industry*, 6 HOUS. FIN. REV. 79 (1987).

22 *See* U.S. v. Winstar Corp., 518 U.S. 839 (1996).

23 Lockhart, Long & Sefcik, *supra* note 21.

24 *Id.*

25 See *Winstar Corp.*, 518 U.S. at 839; *see also Lincoln Sav. & Loan Ass'n.*, 743 F. Supp. at 906.

Congress finally was forced to respond in 1989 with the Financial Institutions Reform, Recovery, and Enforcement Act.[26] It got rid of the FHLBB (replacing it with the Office of Thrift Supervision) and the FSLIC (folding it into the insurer of commercial banks, the Federal Deposit Insurance Corporation).[27] All of the accounting gimmicks were stopped.[28] The Resolution Trust Company was formed to take over the broke S&Ls at taxpayer expense.[29] The final cost to the taxpayers is still in litigation,[30] but, as of 2000, it had come to at least $125 billion.[31] As a consequence of the S&L mess, mark-to-market accounting got a big push because FASB and others realized that this improved accounting would have prevented much of the harm.[32] Not coincidently, the current mark-to-market rules were adopted soon (in FASB time) after the S&L mess, in 1993.[33]

During the current meltdown, international accounting rules took a different tack from U.S. GAAP. In October, the International Accounting Standards Board (IASB),[34] which sets the accounting rules for much of the world other than the U.S., retroactively allowed businesses to avoid reporting true fair market values without following its established process for promulgating sound principles.[35] Rather, reporting businesses were allowed to ignore current market conditions.[36] The IASB gave into political pressure from the European Union to hide matters.[37] As a consequence, other economies put off the day of reckoning, but likely at a much greater social cost.[38]

Also in October, the Securities and Exchange Commission (SEC) and FASB issued a joint press release that clarified that; if there really is no market for an investment (or investments that are sufficiently economically

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26 Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.).

27 *Id.* at tits. III and IV.

28 *Id.* at § 1215.

29 *Id.* at tit. V.

30 *See, e.g.*, Glendale Fed. Bank v. U.S., 378 F.3d 1308 (D.C. Cir. 2004).

31 Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, 13 F.D.I.C. BANK. REV. 26 (2000).

32 SFAS 115, *supra* note 6, at ¶ 33.

33 SFAS 115, *supra* note 6.

34 The institutional structure of the IASB is discussed below in the text accompanying notes 48 to 50. This discussion suggests why one must analyze accounting rules and their setter together in order to get a complete picture.

35 A Washington Post article at the time called the results "dramatic," noting, as an example, that the change enabled Deutsch Bank to turn a $970 million pretax quarterly loss into a $120 million profit. Glenn Kessler, *Accounting Standards Wilt Under Pressure*, WASH. POST, Dec. 27, 2009, at A01.

36 INT'L ACCOUNTING STDS BD., RECLASSIFICATION OF FINANCIAL ASSETS: AMENDMENTS TO IAS 39 FINANCIAL INSTRUMENTS: RECOGNITION AND MEASUREMENT AND IFRS 7 FINANCIAL INSTRUMENTS: DISCLOSURE, Oct. 2008.

37 *Id.*

38 Anthony Faiola, *Downturn Accelerates as It Circles the Globe*, WASH. POST, Jan. 24, 2009, at A01.

similar to the investment that their value can be used as a proxy), a reporting business is permitted to use valuation methodologies (such as a valuation model based on the risk-adjusted present value of the expected future cash flow from the investment) to mark the investment to market.[39] The press release in no way caves like the IASB 2008 amendments. (The IASB also issued a press release that parallels the U.S. press release.[40]) In particular, the U.S. press release does not allow reporting businesses to avoid booking a loss in market value.[41] The United States rules require: (i) in order for a reporting business to be allowed to pull a security out from under mark-to-market, any previously unrecorded loss must be booked at the time, and (ii) any subsequent loss must be booked under the tough United States rules that apply to recording the impairment of an asset.[42]

The failure of IFRS has had an important salutatory consequence: prior to the current meltdown, the SEC was pushing toward adopting IFRS in the United States:[43] this would have been a bad thing. While one worldwide set of accounting rules may be a sound goal, the current international rules, IFRS, are so inferior to the United States GAAP that any benefits from the United States using the same rules as most of the rest of the world would be more than offset by the harm of using inferior rules.

IFRS are set by the private IASB.[44] The IASB is not subject to review by a government agency, like the SEC, which overlooks the FASB.[45] The

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39 Press Release, S.E.C., Office of the Chief Accountant and FASB Staff, Clarification on Fair Value Accounting (2008), *available at* http://sec.gov/news/press/2008/2008-234.htm.

40 Press Release, International Accounting Standards Board, IASB Provides Update on Applying Fair Value in Inactive Markets (Oct. 14, 2008), *available at* http://www.iasb.org (follow "News" hyperlink; then follow "Press Releases" hyperlink; then search for Oct. 14, 2008).

41 Martha Kessler, *FASB Member Says Fair Value Guidance Does Not Represent Softening of Rules*, 209 DAILY TAX REPORT G-9 (Oct. 29, 2008).

42 *See* SFAS 144, *supra* note 6, at ¶¶ 7-24; *see also* SFAS 115, *supra* note 6, at ¶¶ 15-16; SFAS 114, *supra* note 6, at ¶¶ 7-24; FIN. ACCT. STDS BD., STATEMENT OF FIN. ACCOUNTING STANDARDS NO. 65 (AS AMENDED), ACCOUNTING FOR CERTAIN MORTGAGE BANKING ACTIVITIES, 1982, §§ 4-10; and Kessler, *supra* note 41. A January FASB staff change in a proposed amendment to the disclosure rules is less burdensome on reporting businesses, because it moves toward exclusively market-to-market disclosures. *See Proposed FASB Staff Position Nos. FAS 107-b and APB 28-a: Interim Disclosures about Fair Value of Financial Instruments* (Jan. 30, 2009).

43 *See* Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers, 73 Fed. Reg. 70,815 (Nov. 21, 2008), *amended by* 74 Fed. Reg. 6,359 (Feb. 9, 2009) [hereinafter Roadmap]. The proposal would apply only to companies required to file financial statements with the SEC—to companies that have outstanding securities that are publicly traded. *See id.* The American Institute of Certified Public Accountants, the accounting industry's trade association, regulates the financial statements of private companies, but presumably would follow the SEC's lead. *See* Lawrence Cunningham, *The SEC's Global Accounting Vision: A Realistic Appraisal of a Quixotic Quest*, 87 N.C. L. REV. 1, 33-34 (2008).

44 *See id.* at 24; Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards with Reconciliation to U.S. GAAP, 73 Fed. Reg. 986, 988-89 (Jan. 4, 2008) [hereinafter Reconciliation].

45 *See* Roadmap, *supra* note 43, at 70,821-22, 27.

IASB depends on donations from industry.[46] The FASB is supported entirely by a fee that the SEC imposes on businesses.[47] As a consequence, rather than being independent and objective, the IASB tries to please its multiple constituencies.[48] Moreover, investors have limited input into IASB pronouncements.[49]

Given the nature of the IASB, it is not surprising that there are problems with its pronouncements: IFRS. In order for the IASB to gain support from all of its constituencies, it regulates by "principles," general statements of accounting, rather than by detailed "rules," as does FASB.[50] The idea behind the "principles" is that general pronouncements result in better financial statements because, without mechanical rules, "principles" force the auditor to exercise more judgment and take more responsibility. "Principles" are in line with the deregulatory spirit of the last 28 years—up until the meltdown.[51] Unfortunately, "principles" allow reporting businesses considerably more flexibility in reporting, with an associated reduction in comparability, transparency, and accuracy.[52] Hence, the industry's attraction to the IFRS.

The recent failure of IFRS (presumably along with the change in United States presidents and an increasing distrust of the mythos of deregulation) has made the SEC and FASB rethink moving to IFRS.[53] This article

46 *See id.* at 70,821.

47 *See* 15 U.S.C. § 7219 (2006).

48 *See* Roadmap, *supra* note 43, at 70,821-22. Of course, FASB has independence problems, particularly since its members are accounting insiders. However, the FASB does not have the particularly troublesome multiple masters problem of the IASB. *See* Andreas Fleckner, *FASB and IASB: Dependence Despite Independence*, 3 VA. L. & BUS. REV. 275, 309 (2008).

49 *See* Reconciliation, *supra* note 44, at 988. *Compare* INT'L ACCT. STANDARDS COMM. FOUND., DUE PROCESS HANDBOOK FOR THE IASB (2006), and FIN. ACCT. STDS BD., FASB DUE PROCESS STEPS REQUIRED BY THE RULES OF PROCEDURE (2005), *available at* http://fasb.org/facts/due_process.shtml.

50 GAAP and IFRS are more alike than they are different. But when choosing between them, it is necessary to focus on their differences. *See* News Release, Fin. Acct. Stds Bd., FASB and IASB Agree to Work Together toward Convergence of Global Accounting Standards (Oct. 29, 2002), *available at* http://72.3.243.42/news/nr102902.shtml.

51 Stanley Sporkin put it best, as follows: "It must be remembered that the purpose of deregulation is to foster the ability of private enterprises to compete and not to provide a license to steal." *Lincoln Sav. & Loan Ass'n.*, 743 F. Supp. at 906.

52 *See generally* Cunningham, *supra* note 43; *see also* Jack Ciesielski, *It's Time to Put the Brakes on Convergence*, FIN. TIMES, Oct. 30, 2008; Mundstock, *supra* note 7, at 841-44.

53 *See* Mary Schapiro, *Answers to Questions from Senator Levin,* January 8, 2009, Answer 12, Tax Core (BNA) (Jan. 26, 2009); Carolyn Wright LaFon & Thomas Jaworski, *Change at Helm of SEC Could Affect US Companies' Transition to IFRS*, 2009 TAX NOTES TODAY 31-33 (Feb. 19, 2009); Yin Wilczek, *IFRS Accounting Roadmap to Be Revisited, SEC Officials Say During Panel Discussion*, 28 DAILY TAX REPORT G-4 (Feb. 13, 2009); Thomas Jaworski, *Direction Uncertain for SEC's International Accounting Standards Convergence Plan*, 2009 TAX NOTES TODAY 24-5 (Feb. 9, 2009); Steven Marcy, *Accounting Commenters Question U.S. Switch to IFRS, Request Extension of time to File Opinions*, 20 DAILY TAX REPORT G-3 (February 3, 2009); Denise Lugo, *FASB Reconsidering U.S.-IFRS Convergence in Light of Year's Events*, 240 DAILY TAX REPORT G-7 (Dec. 15, 2008). *See* Kessler, *supra* note 35.

has discussed how GAAP have done well. They are the best accounting standards in the world today.[54] GAAP should continue in effect for United States businesses.

POSTSCRIPT: FASB'S SAD U-TURN

After this article was finalized, on April 2, 2009, FASB reversed direction completely and allowed businesses to avoid using mark-to-market.[55] The rulemaking was proposed a few days after a U.S. Senate hearing and adopted two weeks later over vigorous objections from investors, investor organizations, and accounting experts.[56] The banking industry celebrated.[57] Bizarrely, the stock market reacted favorably.[58] This changes everything. FASB now looks as unprincipled as the IASB. Once again, it is clear that an "independent," private, accounting standard setter is everything but independent.[59] Governments should bite the bullet and regulate accounting principles.[60]

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54 GAAP could be improved in myriad ways. Most obviously, the SEC should use its authority and set accounting standards rather than leave them to the industry insiders at FASB. *See* Mundstock, *supra* note 7, at 824-41. Substantively, GAAP have numerous problems, such as doing a bad job in accounting (i) for self-developed intangible assets and (ii) for contingent risks (like guarantees and lawsuits). *See id.* Nevertheless, overall, GAAP are considerably better than IFRS. *See id.* at 841-44.

55 Fin. Acct. Stds. Bd., Summary of Board Decisions for April 2, 2009, *available at* http://fasb.org/action /sbd040209.shtml. FASB also relaxed the rules for showing asset impairment in ways reminiscent of the old FHLBB. *Id.*

56 Binyamin Appelbaum & Zachary Goldfarb, *Under New Accounting Rule, Toxic Assets May Be Revalued,* WASH. POST, Apr. 3, 2009, at A15; Floyd Norris, *Banks Get New Leeway in Valuing Their Assets,* N.Y. TIMES, Apr. 2, 2009; Rachel Younglai, *U.S. Financial Firms Want More on Mark-to-Market,* WASH. POST, Mar. 24, 2009; Kara Scannell, *Investor Groups Hit FASB Plan on Asset Values,* WALL STREET J., Mar. 23, 2009.

57 Kara Scannell, *FASB Eases Mark-to-Market Rules,* WALL STREET J., Apr. 2, 2009.

58 *Id.*

59 Mundstock, *supra* note 7, at 816-24.

60 *Id.*