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**The Financial Crisis – A Message from Japan (Waseda University GCOE Declaration)**  
**《The Financial Crisis - Proposing a Japanese Perspective to the West》**

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The present declaration is the slightly revised text of a declaration prepared on the responsibility of Professor Tatsuo Uemura, Director of the Waseda University Global COE, Waseda Institute for Corporation Law and Society<sup>i</sup>, and circulated at the urgent symposium: “Examining President Obama’s Financial Regulatory Reform – What Message Should Japan Send to the World? –.” The symposium, organized by the Waseda University Global COE, was held at Waseda University on August 8, 2009. The declaration has been translated into English and several other languages in order to enable its message to be presented outside Japan.

**1 -1 In view of the scale of the impact of financial and capital markets on the world, the Western nations should recognize the profound responsibility that they bear for the establishment of systems to maintain financial and capital market discipline in a global economy. Reckless and undisciplined behavior in these areas has an enormous negative impact on economies and the lives of citizens throughout the world, in particular in developing countries, which are in the majority of cases passive victims of this financial**

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i Global COE (or GCOE) is an acronym for Global Center of Excellence. The Global Center of Excellence Project is a project in which universities compete for extensive funding offered by the Japanese government for the establishment of research centers. Very few of the universities selected thus far have proposed research in the field of law. Waseda University was selected in 2008 following the completion of the previous program, the 21st Century COE Program (for which Waseda was selected in 2003). The research accomplishments of the GCOE to the present have been extremely highly evaluated. Our purpose in establishing the GCOE was to study fundamental aspects of Western societies, and to attain a logical and scholarly understanding of factors stemming from the specific experiences of Western nations. By this means we seek to overcome a lack of experience through the application of logical methodologies, enabling us to create ideal systems of corporate and financial/capital market law suitable to and able to support a civil society which is mature in every respect. Our goal is to establish theoretical models that can serve as signposts to Japan and other Asian nations and, further, to engage in academic dialogue with the Western nations by bringing attention to problems which those nations may have overlooked.

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## **mismanagement**

Financial and capital markets conducive to the formation of economic bubbles, in addition to widespread trading in inappropriate financial products, improper trading and unfair trading in a global economy, have an enormous negative impact throughout the world. This negative impact causes serious damage to economies and to the lives of citizens, in particular in developing countries, which are in the majority of cases passive victims of this financial mismanagement.

In view of the scale of the impact of financial and capital markets on the world, the Western nations which have traditionally exercised leadership in this area must recognize the profound responsibility that they bear for the establishment of systems to maintain financial and capital market discipline. The United States, which is an enthusiastic proponent of the extraterritorial application of its domestic laws, should in particular give rigorous attention to the negative impacts on other countries of economic activities based on the U.S. system (negative extraterritorial impacts caused by application of U.S. rules).

**1 -2 Japan has a responsibility to bring attention to problematic areas in Western systems, being a third party able to analyze and evaluate those systems as a representative of the perspectives of non-Western nations**

Japan has consistently studied the systems of financial and capital market law in effect in the United States and Europe, and the Japanese also have a strong focus on the study of comparative law and foreign law, which is a rare attribute. I believe that Japan has a responsibility to bring attention to problematic areas in Western systems, being an impartial third party able to analyze and evaluate those systems as a representative of the perspectives of non-Western nations.



**2** When we review discussion in the U.S. and Europe regarding the financial crisis, there seems to be a paucity of discussion of the necessary future direction for systems of corporate and capital/financial market law which have provided the conditions for a tendency towards constant excesses. If reformed supervisory systems do not function effectively, harmful effects will be diffused and once again cause damage on a global scale

When we review discussion in the U.S. and Europe regarding the financial crisis, we find that the strengthening of supervisory and regulatory systems has been discussed in a variety of forms. Discussion should be further extended in this direction. However, there seems to be a paucity of voices discussing, in a self-reflective and critical manner, the necessary future direction for systems of corporate and capital/financial market law which have to date provided the conditions for constant excesses. Fundamental laws have tended to promote loose transactions. If this is treated as simply a domestic issue and the situation remains unchanged, merely enhancing supervisory systems will undoubtedly be of limited effectiveness. If the reformed supervisory systems do not function effectively, harmful effects will be diffused and once again cause damage on a global scale.

**3-1** The fact that the present financial crisis originated in the United States indicates that the U.S. system could not control the U.S. mode of procedure, which combines the maximum attractions with the maximum risks

The capacity for considering the systems of corporation and financial/capital market law from a normative, purpose-oriented, historical or ideological perspective seems poorly developed in the U.S. Might it not be the case that the world of economic thinking predicated on the concept of an efficient market has also affected the judicial world, and that systems



predicated on an excessive belief in the market have encouraged the intemperance in the financial world which is directly related to today's financial crisis? The diverse and rigorous systems for seeking out and prosecuting fraud that are unique to the U.S.<sup>ii</sup> appear to have functioned as the basis for a degree of faith in freedom and market mechanisms which could not have been achieved in the absence of those systems. However, we may also say from another perspective that the system thus engendered was such a risky one that it would also tend to encompass financial collapses triggered by an excessive freedom which could not be controlled even by those unique systems for the prosecution of fraud. (A system, we may in fact say, that other countries cannot and must not seek to copy). The fact that the present financial crisis originated in the United States indicates that the U.S. system could not control the U.S. mode of procedure, which combines the maximum attractions with the maximum risks. The U.S. must become more keenly aware of this issue and give it extensive consideration.

**§-2 While the U.S. seems to have little interest in adopting a humble attitude and studying the legal systems of other countries from a comparative perspective, the U.S. system is very difficult for other countries to understand as a whole. Unfortunately, the impact of the complexity of U.S. systems of law are not limited to the U.S. For this reason, the rest of the world must maintain a deep interest in the nature of U.S. systems**

As a nation, the U.S. has emphasized the transparency of rules, with a particular focus on the disclosure of information. However, the nation's

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ii The SEC acting as a sheriff; bounties placed on the heads of wanted individuals; entrapment, wire tapping, and undercover as used frequently by the FBI; plea bargaining; discretionary civil sanctions; discovery; class actions which claim all profits obtained by a company caught in dishonest practices; the comprehensive SEC Rule 10b-5 prohibiting any person from any act resulting in fraud (with heavy penalties); mail and wire fraud statutes under US federal law; conspiracy charges, which are frequently applied in a wide range of fields; the application of RICO, which is used to arrest low-level members in order to prosecute the Mafia as a whole, to financial institutions (viewing securities companies as racketeering organizations),etc.



systems of corporate and financial/capital market law are as complex as a mosaic, making it difficult to grasp them as a whole. With a touch of self-derision, U.S. citizens themselves recognize that U.S. systems are byzantine. The U.S. is a rare case even on a global scale, advocating the convergence of accounting rules, while being unable to achieve the convergence of domestic company laws. Systematic thinking has clearly not been applied in this field. For example, the Federal Securities Regulations and the Securities Exchange Act include provisions which function as federal company law. In the case of the present financial crisis, it is highly possible that the domestic situation in the U.S. - a lack of continuity between state regulations and federal regulations - was a factor in the subsequent disasters overseas. The U.S. seems to have little interest in adopting a humble attitude and studying the legal systems of other countries from a comparative perspective. In addition, the U.S. system is very difficult for other countries to understand as a whole. There are probably few U.S. citizens who would be able to provide an answer when asked to describe U.S. company law. Professor Melvin Eisenberg, one of America's leading scholars, has indicated that state case laws, state corporate laws, the Federal Securities Regulations, the Securities Exchange Act, and other soft laws are all U.S. corporate law. However, very many Japanese, including specialists in the field, believe that only Delaware corporate law is U.S. corporate law. If the impact of the complexity of these systems of law were limited to the U.S., we could see it simply as a result of the nation's culture; however, to the extent that events in the nation have a global impact, the rest of the world must maintain a deep interest in the nature of U.S. systems.

**§-3** In response to a financial crisis originating in the U.S., the nation should not merely focus on the supervisory system, but should be prepared to engage in an extensive reexamination of the existing concepts on which it has depended, in order to create a framework for a new system able to be shared globally. At the same time, the U.S. should make efforts to ensure that its systems are logically consistent and able to be understood by other



## **countries**

In section 2 of the U.S. Securities Exchange Act of 1934, enacted following the experience of securities panics, there is a detailed provision concerning the necessity for the regulations. Recognizing the fact that the system could not deal with interstate commerce or the real status of the securities markets spanning the entire country, the provision emphasized the possibility that the problems in this area might generate panic not only in the United States but also elsewhere in the world, and established a new framework for federal securities regulations. The final paragraph of the provision states “*National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit*”<sup>iii</sup>.

Today, in response to a financial crisis originating in the U.S., the nation should not merely focus on the supervisory system, but should be prepared to engage in an extensive reexamination of the concepts on which it has depended in order to create a framework for a new system able to be shared globally. At the same time, the U.S. should make efforts to ensure that its systems are logically consistent and able to be understood by other countries. To do so, it will be necessary for the U.S. to adopt an attitude of humility in listening to the opinions of other nations. There should, in addition, be no taboo against putting a European-style system of inhibitory corporate law into effect at the federal level.

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<sup>iii</sup> New Foreign Securities Laws: America(Ⅲ), p.76 (2008, Japan Securities Research Institute)



#### **4 Europe must clearly specify a code of conduct for European market actors to base their actions on, enabling countries outside Europe to hold to European discipline**

There is much that we can learn from Europe. For example, Europe has relatively restrained systems of corporate law, in addition to prudent systems of law relating to capital markets. In particular, we should be aware of the significance of the self-regulation which developed in Britain. However, despite the fact that it is essential within Europe, outside Europe there is little inclination for European market actors to base their actions on principles, gentlemen's rules, or best practice. In Asian nations, which are inexperienced in these areas, there is a tendency to simply ignore the situation when these market actors violate principles and other rules. But in Asia also, the feeling still exists that engaging without qualms and without shame in disgraceful actions overseas, actions that one would not consider in one's home country, is a legacy of the colonial era. (For example, the prohibition on smoking opium for British citizens, but the positive encouragement of the activity for the Chinese. Britain must make it plain to the financial world that this type of attitude has been completely abandoned). Europe must clearly specify a code of conduct enabling countries outside Europe to hold to European discipline. If Europe fails to do so, there will be no grounds for complaint if nations which do not share the awareness of norms developed historically in Europe, for example Asian nations, put into place systems which institutionalize a cautious stance in relation to Europe (for example, separation of banks and securities institutions).

**5-1 From the Western nations, Japan has learned democracy and the form of a society which values humanity and the individual. The spirit of democracy and respect for humanity was nurtured historically in Europe and the United States, a fact of which they are justly proud. But disdain these achievements to allow anonymous privately-placed funds formed by**



**small groups of individuals to become major shareholders or controlling shareholders in publicly traded companies is not a model upon which we, Japan and other Asian nations, should base our actions**

From the Western nations, Japan has learned democracy and the form of a society which values humanity and the individual. However, is it not the case that allowing anonymous privately-placed funds formed by small groups of individuals to become major shareholders or controlling shareholders in publicly traded companies is equivalent to abandoning the philosophy of the individual-oriented stock market, stock corporation, and corporate society of which Europe and especially the U.S. is so proud? Becoming enchanted by the allure of financial techniques to the extent that we disdain the spirit of democracy and respect for humanity, which was nurtured historically in Europe and the United States and of which they are justly proud – this is not a model upon which we should base our actions. I believe that Japan also has the responsibility to make this position clear.

**5-2 Given Japan's unique position as a non-Western nation which has achieved a high level of advancement in the areas of systems of corporate and financial/capital market law, the Japanese government has a responsibility to emphasize to the international community the fact that it is time for non-Western actors to participate in discussions**

Systems of corporate and financial/capital market law have largely been developed by the Western nations. As indicated above, however, in today's global era trends in these laws affect the lives of people throughout the world. From this perspective, countries other than the Western nations are fully qualified to participate in discussion concerning the rules in these areas. The Japanese government has a responsibility to emphasize this fact to the international community, given Japan's unique position as a non-Western nation which has achieved a high level of advancement in these areas.





**5-3 We must become aware as quickly as possible of the contradiction implicit in the fact that a nation which ultimately prioritizes its own interests in the event of a financial crisis provides the foundation for the global system, and actively enter into discussions concerning a shared world-level system**

Corporations and financial/capital markets in themselves represent the globalized world, but the rules in effect in these areas have basically been domestic rules – U.S. rules. And despite this, we do not question the fact that the U.S. nakedly prioritizes national interests in the event of a financial crisis. We must become aware as quickly as possible of the contradiction implicit in the fact that a nation which ultimately prioritizes its own interests provides the foundation for the global system, and actively enter into discussions concerning a shared world-level system.

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