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Financial Regulatory Reform: Dodd-Frank and Beyond

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Primum Non Nocere: The Impact of Dodd-Frank on Silicon Valley

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Western medicine has, thankfully, in the past several centuries advanced beyond drilling holes in the head to release evil spirits and bleeding patients to drain them of foul humors. Advances in medical knowledge, coupled with a maxim of the profession, *primum non nocere*, “first of all, do no harm,” deserve substantial credit. That same prophylactic maxim should likewise apply, mutatis mutandis, in the legislative and regulatory arena.

With near inevitability, remedial legislation often follows in the wake of crises and significant scandals. Just as Enron, Worldcom and other cases of corporate misconduct flushed to the surface by the tech sector crash at the turn of the millennium triggered passage of the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”), the systemic credit crisis of 2008 which rocked the financial world led to enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Critical inquiries, of course, in connection with any such regulatory endeavor are whether the causes of the late crisis have been properly identified, whether existing laws are adequate (and the crisis was merely on of those catastrophes which one must stoically expect to recur from time to time in human affairs) or whether fresh legislation might help better address those causes, and whether the cure does more harm than the disease itself.

Whoever and whatever the causative parties, acts and circumstances leading to the credit crisis were, and here theories abound, often aligned along axes of political sympathy and ideological conviction, one point stands clear and uncontested: Silicon Valley was not at fault. High tech startups and the venture capital (“VC”) funds which help to finance them were not noticeable participants in the mortgage-backed securities industry, nor in the market for credit default swaps or other derivative instruments. They were far more insulated than the financial sector generally from the use of leverage and the creation of counterparty relationships which can lead to daisy chain transmission of financial distress from one entity to another.

As Congress and the Securities and Exchange Commission (“SEC”) have moved and going forward proceed to address what they perceive to be sources of systemic risk to the U.S. financial system, it is important that the legislative and regulatory effort endeavors to avoid adverse collateral consequences to portions of the economy not implicated by the recent crisis. Do the Dodd-Frank Act and the SEC’s proposed implementing regulations to date cohere with that guiding principle, as least as regards the high-tech startup financing process?

In one important respect the Dodd-Frank Act sought to avoid unintended deleterious impact on the VC industry by providing a specific exemption for VC funds from registration requirements under the Investment Advisers Act of 1940 (the “Advisers Act”) which the act otherwise mandated for much of the rest of the private fund management industry. In a few respects, however, the act and the SEC’s proposed implementing regulations thereunder impose requirements and restrictions which at the margin add to the collection of regulatory speed bumps with which the startup financing process must contend. It is open to question whether attainment of the regulatory objectives anticipated from those additional speed bumps merits the incremental burden they impose.