THE MYTH OF INVESTOR PROTECTION: THE DODD-FRANK ACT AND THE OFFICE OF THE INVESTOR ADVOCATE

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ABSTRACT

Are security investors protected when investor advocacy is a form of regulation? This article asks that question and answers "no." This article looks at the SEC's Office of the Investor Advocate ("OIA") mandated by the Dodd-Frank Act of 2010. The OIA's prime-objective is the advocacy and protection of investors. The OIA plans to meet its objective by ensuring retail investors' interests are adequately represented, assisting them in

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conflict resolution, and identifying areas where regulatory changes benefit investors. This article posits, however, that the OIA cannot achieve its goals because of the ever-increasing complexity of financial securities; the conflicts of interest inherent in the SEC; and finally, the flawed approach the Dodd-Frank Act takes by regulating through advocacy. This Article suggests proposals to remedy the inconsistencies with the OIA. It concludes that although the OIA was established in response to the increased call for securities reform, its ability to function and operate will actually hamper its ultimate-goal: protecting investors.

INTRODUCTION

In economic soccer, both teams – retail investors and market insiders[1], should know and understand the rules. I regularly watch soccer, and I have never seen a game where Team A and Team B could not agree on the size of the field, or which ball to use, and, generally, the players defer to the referee. It is simple, Team A stops the ball from entering its goal and simultaneously seeks to put the ball in Team B's goal, and vice-versa. The rules on the field are enforced by the referee – in this case, the U.S. Securities and Exchange Commission (SEC) – in a generally straightforward manner. The referee controls the flow of the game. A poorly regulated game will be divisive and dirty, and would not be called a game. Players become upset by the referee's poor calls or lack thereof, and they become frustrated. A bad referee can ruin a potentially great game: fans can tell, commentators can tell, and players can tell.

This brief analogy illustrates the dichotomy of the simple versus the complex of "balancing the playing field" for retail investors. Now, imagine that soccer analogy, but with only one team enjoying an advantage solely by their awareness of new soccer gear to increase speed and performance. Would fans and novices be able to keep up? Or what if the professional soccer leagues decided that each field should be a different size? The professionals would be able to keep up with the changing field of soccer, but could the spectators?

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1. Throughout this Article the use of the term "market insider" means those persons such as CEOs, officers, and directors of a company, who have knowledge of or access to nonpublic confidential information, such as corporate trade secrets. Similarly, "professional market participants," like Warren Buffet, for example, are those persons within the financial industry who possess the requisite knowledge to trade on their own investment portfolios or advise retail investors on investment decisions, such as broker-dealers or investment advisers. *See* Caroline Bradley, *Information Society Challenges to Financial Regulation,* 37 U. TOL. L. REV. 307, 318-25 (2006), to learn more about the distinction between professional and non-professional market participants.

Increased disclosure regulation, and regulation by education of retail investors, has the same effect as a spectator reading a memo on soccer rules: complete confusion, absent the experience of actually playing soccer. Under the current regulatory model and the revision prescribed in the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by President Obama on July 21, 2010 ("Dodd-Frank Act"),[2] balancing the playing field for retail investors is doomed for failure due to an asymmetry of information and time. Corporate disclosure of transactions is a way to provide a playbook to retail investors regarding market transactions and what is going on in a company that the retail investor may be interested in. Similarly, the primary goal of retail investor education is to give the investor the necessary tools to make an informed investment decision.[3] The asymmetry of information comes in because by the time the corporate information is disseminated and understood by the retail investor it is already obsolete.[4] In other words, by the time the spectator has received a copy and read the rules, the referee has already made the call, or the player has already committed the foul. The retail investor may have received a copy of the latest quarterly or annual report, but by that time the company's act or omission may have already resulted in securities fraud. As a result, trading on obsolete information could cause a loss to retail investors and increase individual investor risk. The Dodd-Frank Act does not improve the outmoded regulation structure, nor does it appreciate the workings of the market or stay current with the increased complexity of financial products.[5]

Retail investors' constant cry for regulation is to "balance the playing field." Even the most erudite of investors are not familiar with the changing landscape and changing complexities of either the market or the governing rules and regulations. To aid retail investors in their endeavors, there are three widely used bases of market regulation[6] in order to balance the

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2. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. §5301 (West 2010).

3. *See* Lauren E. Willis, *Against Financial-Literacy Education,* 94 IOWA L. REV. 197, 201 (2008).

4. *See id.* at 212 (arguing that because market insiders have access to more information, by the time information gets to the investor the market has already changed).

5. *See* Steven Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211 (2009) [hereinafter Schwarcz, *Complexity*]; s*ee also* Saule T. Omarova, *The Dodd-Frank Act: A New Deal for a New Act?*, 15 N.C. Banking Inst. 83, 85-86 (2011) [hereinafter Omarova, *Dodd-Frank*] (noting that regulation has not stayed pace with the increasing complexity, innovation and global nature of financial products and markets).

6. Legal scholars have written on various forms of regulation of the securities market but these three forms seem to be the most highly regarded. For a detailed analysis of the fundamental principles of exchange regulation, i.e., competition and self regulation, *see* Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulations and the National Market System*, 39 U. RICH. L. REV. 1069 (2005).

playing field: (1) increase corporate disclosure requirements,[7] (2) regulation by education,[8] and (3) regulation by advocacy.[9] The first two, disclosure and investor education, are self-help schemes that place much of the responsibility on the investors to protect themselves.[10] Regulation by advocacy, or the use of an advocate within a regulatory agency to advise the investor or consumer about their rights and options, is a retail investor assistant approach that disseminates the responsibility of retail investor help between the investor and the investor advocate. Regulation by advocacy may be a new trend in the effort to protect investors, but it resembles its two predecessors because it utilizes the same fragmented crisis-response model of regulation where a crisis, either economic, financial, or market based, must occur prior to and give impetus and a sense of urgency for the regulatory reform to occur. A good example of regulation by advocacy as a response to an economic crisis is the creation of the Office of the Investor

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7. Much has been written about the debate over mandatory disclosure. *Compare* Merrit B. Fox, Retaining *Mandatory Securities Disclosure: Why Issuer Choice is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1337-42 (1999) (arguing against replacing the current regime of mandatory disclosure for securities regulation with an issuer choice-based regime in which companies opt to comply with state rather than federal law), *and* Allen Ferrell, *The Case for Mandatory Disclosure In Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81 (2007), *with* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2403-28 (1998) (arguing that the federal mandatory disclosure regime ought to be abolished and replaced with an "issuer choice," state law regime), *and* Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 Cardozo L. Rev. 909, at 928 (1994). *See generally* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulations*, 71 S. CAL. L. REV. 903 (1998).

8. There are competing arguments in legal scholarship regarding the virtues of investor education. *Compare* Jayne W. Barnard, *Deception, Decisions, and Investor Education*, 17 ELDER L.J. 201, 211-23 (2010) (challenging the efficacy of the SEC's current practice of allocating significant resources towards educating elderly investors about fraudulent schemes), *with* James A. Fanto, *We're All Capitalists Now: The Importance, Nature, Provision, and Regulation of Investor Education*, 49 CASE W. RES L. REV. 105 *passim* (1998) (promoting investor education).

9. *See infra* Part I (addressing the other forms of "prescriptive regulation.") The term prescriptive regulation was coined by Steven L. Schwarcz. *See* Schwarcz, *Complexity*, *supra* note 5, at 215. The premise for prescriptive regulation is medical – (1) here are the symptoms that the stock market is presenting; (2) here is the proposed diagnosis; and (3) here is the prescriptive regulation to attack the specific symptoms. The problem with prescriptive regulation is that it is reactionary instead of proactive to market forces and may not address the underlying cause of the problem, just the symptoms. For example, the Dodd-Frank Act of 2010 is the most recent prescriptive securities regulation to address the symptom of weak market regulation and both consumer and investor protection, resulting from the market downturn of 2007 to 2009.

10. *See, e.g.,* Bradley, *supra* note 1, at 326 (stating that because of financial scandals, even these methods may not be utilized by investors due to lost trust in financial firms).

Advocate ("OIA")[11] by the Dodd-Frank Act. As an advocate for retail investors, the OIA identifies common problems faced by investors in their interactions with financial service providers and complaints lodged with the SEC. Previously, the SEC used disclosure and education as ways to decrease the risk of fraud to investors, but with the OIA, retail investors will have assistance in their plight.[12]

Such reactive approaches to regulation, disclosure, education and advocacy, create a lack of awareness of systemic risk in capital markets and indirectly investor risk. To use our soccer analogy, systemic risk is the breakdown of efficiency and effectiveness of the playing ability of a soccer team due to either the team's own approaches to the game, or external forces. For example, performance enhancing soccer cleats used by many teams could cause market irrationality in prices, which would increase each team's overall expenses. The ripple effect could be teams who cannot afford those cleats would not be able to play at all. A financial example to parallel the soccer example is the near default of Long-Term Capital Management (LTCM) in 1998, not due to its own efforts to reduce risk by diversification of its portfolio, but due to the market irrationality in bond pricing and the Russian government defaulting on its government bonds.[13] If LTCM had defaulted, the chain reaction of events would have had cataclysmic effects on the stock market. Such was the case with the collapse and bankruptcy of Lehman Brothers in 2008. The chain reaction of Lehman's collapse caused the largest monthly decline in the recorded history of global equity of market capitalization.[14] Even with disclosure, education, or advocacy, neither the team manager in the soccer analogy, nor LTCM could have foreseen the irrationality that caused the systemic risk. The trickle-down effect is investor risk. Here, it is the individual spectator, or retail investor, who, despite corporate disclosure and investor education, would be subject to economic losses, in the form of ticket or stock price, due to market irrationalities. The benefit to the SEC of understanding both systemic and investor risk, unlike the examples, is to prevent securities fraud in the future.

This Article examines the establishment of the OIA[15] under the Dodd-Frank Act and the regulation of investor protection through an analysis of achievable goals. Congress designed the OIA with numerous goals in mind.

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11. Securities Exchange Act of 1934, 15 U.S.C. § 78d(1) (2006).

12. *See infra* Part II.

13. *See* Steven L. Schwarcz, *Systemic Risk,* 97 GEO. L. J. 193, 201 (2008) [hereinafter Schwarcz, *Systematic Risk*].

14. *"Blueprint for Banks Needed" to Restore Investor Confidence,* IRISH INDEPENDENT, Dec. 12, 2008, *available at* 2008 WLNR 23822941.

15. Securities Exchange Act of 1934, 15 U.S.C. § 78d(1) (2006).

First, OIA is tasked to combat regulatory capture of the SEC,[16] specifically, the means by which an agency's personnel is so entrenched with those they are regulating that the distinction between the regulated and the regulator is lost. Second, the OIA is to act as an external check, or a system of self evaluation, on the SEC.[17] Additionally, the OIA is to act as the legal protector of the retail investor against fraudulent activity, either by the market or the SEC.[18] This Article asks whether the stated goals of the OIA address the issue of investor protection.

Part I summarizes the historical fragmented regulatory schemes used to protect investors. Part II examines the legislative intent behind the OIA.

Part III asks whether the OIA will achieve its goals given its structure, its position within the SEC and its regulatory posture. In addition, Part III evaluates the current regulatory structures in comparison with the goals of the OIA and securities laws. Furthermore, Part III argues that the OIA does not introduce a new regulatory model, given its regulatory scheme, and falls far short of the goals and Congressional intent behind its creation. Next, Part IV considers the lifespan of the fatally-flawed OIA, and then proposes ways in which the OIA could go beyond just investor self-help, but be a federal office acting on behalf of the investors. Additionally, Part IV contends that OIA's current model will not survive the ever-increasing complexity of the stock market or financial products unless the OIA is remedied. Part IV concludes that a system of preemptive regulation that is both independent and functional will be better able to protect the investor now and in the future.

I. THE REGULATORY PHILOSOPHIES OF INVESTOR PROTECTION

True federal financial regulatory reform is not a bad thing.[19] As financial products become more complex and innovative, financial regulation must be just as innovative, creative, and proactive.[20] Some scholars declare that the natural evolution of regulatory reform is reactionary – crisis, then government intervention, and, finally, reform, and

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16. *See infra* Part III.B.

17. 156 CONG. REC. S5870 (July 15, 2010) (daily ed. July 15, 2010) (statement of Sen. Akaka).

18. *See infra* Part II.

19. *But see* Lawrence A. Cunningham & David Zaring, *The Three or Four Approaches to Financial Regulation: A Cautionary Analysis against Exuberance in Crisis Response*, 78 GEO. WASH. L. REV. 39, 49 (2009) (lauding the benefits of an incremental approach to securities regulation).

20. *See* Saule Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 Brook. J. Int'l L. 665, 667 (2010) [hereinafter Omarova, *Rethinking the Future*] (stating that substantial reform proposals tend to strengthen existing reform models).

repeat *ad infinitum*.[21] Whether it is labeled remedial legislation,[22] prescriptive regulation,[23] ad hoc regulation,[24] or fragmented regulation,[25] the premise is the same – a crisis is the essential triggering event toward regulatory reform.[26] The order should be inverted: regulatory reform, crisis, and then government assessment. In both equations, the variable is economic crisis, whether now or in the future. The principle that would drive a reform-first scheme is the need for retail investor protection. I will later discuss a most radical proposal for financial reform,[27] but, first, I will look at the staid modes – disclosure, education, and a new trend, advocacy, used in the recent decades to address investor protection. During an economic crisis, the perception is that over regulation will suffocate the economy and deepen the crisis.[28] However, that is not the case. It is not over regulation, but poorly designed regulation, which bends to the whims of political pressures[29] and, thus, ignores the need to protect investors.

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21. *See* Cunningham & Zaring, *supra* note 19, at 49-56.

22. *See* 3 HOWARD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL CORPORATE LAW § 1:1 (2d ed. 2008) ("The history of securities regulation has largely conformed to a pattern of flagrant problems made evident by a financial crisis followed by retrospective investigations leading to the enactment of remedial legislation."); *see also* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (referring to securities laws as remedial legislation).

23. *See* Schwarcz, *Complexity*, *supra* note 5, at 215.

24. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 230-31.

25. *See* Cunningham & Zaring, *supra* note 19, at 49.

26. *See* Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Governance Round II*, 95 MINN. L. REV. 1779, 1782 (2011) (calling the pattern boom-bust-regulate). *See generally* Regina F. Burch, *Financial Regulatory Reform Post-Financial Crisis: Unintentional Consequences for Small Businesses*, 115 PENN. ST. L. REV. 409 (2010).

27. *See infra* Part IV.C.; *See also* Omarova, *Dodd-Frank*, *supra* note 5, at 87-90 (noting that some have called for a one financial regulator model, while others have advocated a two agency approach, a consolidated functional regulatory approach or a systemic risk regulator); *See, e.g.,* Elizabeth F. Brown, *E Pluibus Unum – Out of Many, One: Why the United States Needs a Single Financial Services Agency*, 14 U. MIAMI BUS. L. REV. 1 (2005); Michael Taylor, "Twin-Peaks:" A Regulatory Structure for the New Century, Ctr. For the Study of Fin. Innovation (1995); Roberta S. Karmel, *The Controversy over Systemic Risk Regulation*, 35 BROOK. J. INT'L L. 823 (2010) [hereinafter Karmel, *The Controversy*].

28. *See, e.g.,* Frank B. Cross & Robert A. Prentice, *The Economic Value of Securities Regulation*, 28 CARDOZO L. REV. 333, 378-79 (2006) (comparing the post-socialist regulatory approaches to investor protection of Poland and Hungary with that of the Czech Republic).

29. *See* Cunningham & Zaring, *supra* note 19, at 92 (discussing the reason for differing approaches to the economic crisis of 2007-2009 was because of competing political pressures placed on regulators to react).

A. Increased Disclosure Requirements

Disclosure requirements have historically been the means of regulating the market.[30] Securities disclosure regulations were established not as a way to educate security investors,[31] but as a way to standardize and ensure accurate valuation.[32] Legal scholars have written extensively about the feasibility and effectiveness of disclosure regulation.[33] Others have emphasized that mandatory disclosure requirements may negatively affect market forces.[34]

Dodd-Frank continues the tradition of requiring more disclosure by corporations[35] without restricting the riskiness of the corporations' financial products or activities.[36] In addition, the continued use of disclosure as a regulatory scheme negates the fact that it is not an effective method of regulation because it relies too heavily on modification of individual's behavior rather than that of the market insider.[37]

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30. *See* Schwarcz, *Systematic Risk, supra* note 13, at 218; Cass R. Sustein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 673 (1999) (noting the increase use of disclosure as a form of regulation); Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 45-46 (1983). *See generally* Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089 (2007), for a more in-depth discussion of when and how regulation by disclosure works; Sec. & Exch. Comm'n v. Stifel Nicolaus & Co Inc., 11-cv-00755 U.S. District Court, Eastern District of Wisconsin (Milwaukee). *See also* William Selway & Joshua Gallu, *SEC Sues Stifel over Wisconsin Losses Tied to $200 Million of CDOs*, Bloomberg (Aug. 10, 2011, 7:03 PM), http://www.bloomberg.com/news/2011-08-10/sec-sues-stifel-for-fraud-on-losses-after-200-million-wisconsin-cdo-sales.html ("Let this be a teaching moment for sellers of complex financial products. Those who push such investments must meet standards of disclosure and ensure the suitability of the products for the buyer," said Robert Khuzami, director of the SEC's Enforcement Division, commenting on the SEC's action in Litigation Release No. 22064).

31. *See* Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473 (2007).

32. *See* Onnig H. Dombalagian, *Licensing the Word on the Street: The SEC's Role in Regulating Information*, 55 Buff. L. Rev. 1, 7 (2007) [hereinafter Dombalagian, *Licensing*].

33. *See* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation,* 55 Duke L. J. 711 *passim* (2006); *see* Fox, *supra* note 7, at 1345-46.

34. *See, e.g.,* Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 148-49 (2006); Romano, *supra* note 7; George J. Stigler, *Public Regulation of the Securities Markets*, 37 J. Bus. 117 (1964).

35. *See* 15 U.S.C.A §§ 77g(d), 78m, 78n(a)(i), 78n(a)(i)(j), 78o(d), 78o(n), 5532 (West 2011).

36. *See* Omarova, *Dodd-Frank*, *supra* note 5, at 95–96 (noting that Dodd-Frank relies on regulatory methods such as disclosure and data reporting which merely improve but do not change the regulatory landscape).

37. *But see* Dalley, *supra* note 30, at 1131 (positing that disclosure regulation can work if there is an "articulated purpose, an identified mechanism through which it can

The intended purpose of disclosure is investor self-help to prevent or eliminate information asymmetries among market players.[38] Some argue that increased disclosure requirements do little to reduce financial risk to investors, and actually decrease market liquidity.[39] This is because disclosure places a lower burden on the issuer or the market players as compared to the self-education burden on the investor, to inform investors and the whole market.[40] The asymmetry of information persists where the investor is neither informed, nor educated, nor knowledgeable of his or her investments, as the investments become more sophisticated or the individual risk increases.[41]

Mandatory disclosure requirements and its twin regulatory sister, investor education, rely on four uses of market information: (1) access to market information; (2) comprehension of market information; (3) effect of market information to change investor behavior, and (4) availability of market information as a means to increase market efficiency. For example, investors who are knowledgeable about the market understand that risk exists and will protect themselves by asking for additional information.[42] Furthermore, knowledgeable investors actually benefit from securities regulation because they know that broker-dealers must provide investments suitable to their investor.[43] However, less knowledgeable investors do not understand that risk exists, and often bear the brunt of both individual investment and systemic risk.[44] The Dodd-Frank Act attempts to level the

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accomplish that purpose, a design that takes into account the operation of that mechanism, and a careful analysis showing that the benefits of the system outweigh its cost").

38. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 218; Dalley, *supra* note 30, at 1094-96.

39. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 219.

40. *See* Goshen & Parchomovsky, *supra* note 33, at 737-40.

41. The regulatory methods of disclosure and investor education, what Paula J. Dalley calls "regulation-lite," are politically popular because they involve less government intervention in regulatory reform, they allow a theory of investor choice (or blame the investor victim depending on your stance) to prevail by placing the burden of investment decision making on the individual, and it does little to disrupt the operation of the market. *See* Dalley, *supra* note 30, at 1090. *See* Willis, *supra* note 3, at 214 (stating that when Deutsche Bank in August 2007, sold mortgage backed securities derivatives even the most sophisticated and educated investors did not understand what they were).

42. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 218; Dalley, *supra* note 30, at 1093 ("[D]isclosure preserves individual choice while avoiding direct governmental interference.").

43. *See* Bradley, *supra* note 1, at 325.

44. For a definition and detailed discussion of systemic risk, see Schwarz, *Systematic Risk*, *supra* note 13, at 198-202. For a discussion on the regulation of systemic risk, *see* Heidi M. Schooner, *Private Enforcement of Systemic Risk Regulation*, 43 CREIGHTON L. REV. 993, 995-97 (2010). *See generally* Karmel, *The Controversy, supra* note 27; *see generally* Iman Anabtawi & Steven L. Schwarcz, *Regulating Systemic Risk: Towards an Analytical Framework*, 86 NOTRE DAME L. REV. 1349 (2011).

risk-disparity by utilizing "efforts to enhance the regulation of systemic risk."[45] However, increased disclosure requirements do not decrease systemic risk because as overall risk increases, investors become more concerned about their personal risk rather than that of the market.[46] The more knowledgeable investor will not, by default, be more knowledgeable, but he or she will have the means to more promptly and easily acquire market information. Less knowledgeable investors lack such means to easily acquire information that is readily available to the more knowledgeable investor.[47] Therefore, the ability to disseminate and acquire information will be what ultimately decreases the investor risk of the knowledgeable investor, who by virtue of his position, allocates or shifts the investor risk onto less knowledgeable investors. The problem is not that the less knowledgeable investor needs more knowledge, but that he will always have less time to disseminate or comprehend it.[48]

B. Regulation by Education

Since grammar school, educators expound that the best way out of the harshness of any given economic situation is to educate the affected populace.[49] Education is the salve to heal all wounds.[50] The theory goes that if law makers adopt education as the ideal regulatory model, then those affected will be on the road to recovery. The "regulation through education" model has been in existence for a very long time.[51] In terms of financial education, regulation through education is the use of securities

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45. *See* Schooner, *supra* note 44, at 997.

46. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 218. *See also* Roberta Romano, *A Thumbnail Sketch of Derivative Securities and Their Regulation*, 55 MD. L. REV. 1, 79-80 (1998) (positing that increased disclosure by hedge funds do not protect investors).

47. *See* Willis, *supra* note 3, at 203 (stating that it is not just a matter of knowledge but one also of investor confidence. Where both the overly confident and under confident investor will have the same result. The overly confident investor will not ask for assistance and thus will not pre-analyze his or her investment decision. While the under confident investor will not engage the material disclosed, thus making investment decisions without the hindsight of knowledge); *see also* Bradley, *supra* note 1, at 326 (discussing that the overly confident investor may actually mislead a broker into thinking that the investor is more knowledgeable than he or she actually is).

48. *See, e.g.,* Bradley, *supra* note 1, at 326-27 (commenting that regulation is increasingly being used to aid investors in sorting and analyzing market data); Barnard, *supra* note 8, at 227 (stating that some financially literate investors, due to age, may be more susceptible to fraud because they will not recognize the information as fraud).

49. Bradley, *supra* note 1, at 326-29; s*ee* Barbara Black, *Are Retail Investors Better Off Today?*, 2 BROOK. J. CORP. FIN & COM. L. 303, 334-37 (2008).

50. Bradley, *supra* note 1, at 326-29; *see* Black, *supra* note 49 at 334-37.

51. *See* Willis, *supra* note 3, at 201 (coining the phrase "regulation through education").

regulation as a means to increase the financial-literacy of investors.[52] The model of regulation through education has been expounded by both legal scholars[53] and lawmakers as a means towards investor protection.[54] As time has shown, however, increased investor education does not equal investor protection.[55] Some have even argued that the resources being used in the regulation through education model could best be allocated to other means which produce more effective results.[56]

Investor education, or financial-literacy education, is the education of investors with the specific purpose of giving investors the financial knowledge, and confidence to make an informed investment decision.[57] Previous regulatory reforms and investor education programs by the SEC, which stress the importance of providing investors with information, presupposed that investors would understand the information received.[58] Yet, investor education programs are considered successful, not solely because they increase an investor's knowledge, but because they must also increase an investor's "self-efficacy in controlling [his or her] own financial condition."[59] To this end, some have argued that the SEC has not been the best investor educator because it lacks the necessary business incentives (profit, client customer satisfaction, and business survival) to create a program specifically geared towards an investor's needs.[60]

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52. *See, e.g.,* Barnard, *supra* note 8, at 226-27 (calling for investor education to start at the primary school level to well past an investor's retirement).

53. *See, e.g.*, Willis, *supra* note 3, at 225; Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025 *passim* (2009).

54. Jill E. Fisch, *Regulatory Reponses to Investor Irrationality: The Case of the Research Analyst*, 10 LEWIS & CLARK L. REV. 57, 74 (2006); Jeff Schwartz, *Fairness, Utility, and Market Risk*, 89 OR. L. REV. 175, 244-46 (2010); *see also* Lori J. Schock, Director, Office of Investor Educ. and Advocacy, U.S. Sec. & Exch. Comm'n, Remarks at InvestEd Investor Education Conference (May 15, 2011), *available at* http://www.sec.gov/news/digest/2011/spch051511ljs.htm.

55. *See* Jeff Schwartz, *Fairness, Utility, and Market Risk*, 89 OR. L. REV. 175, 244 (2010) ("[A]verage investors do not revisit their portfolios daily. Because they focus on finance only from time to time, the chances are high that any knowledge gained through education would evaporate over a couple of years.").

56. *See* Willis, *supra* note 3, at 259.

57. *See* Willis, *supra* note 3, at 202; Bradley, *supra* note 1, at 328.

58. *See* Black, *supra* note 49, at 313, 319-20, 334 (describing the analysts research and mutual fund reforms of the early 2000s); Lawrence A. Cunningham, *Behavioral Finance and Investor Governance,* 59 Wash. & Lee L. Rev. 767, 791 (2002) (stating that investor education material tended to be an amalgamation of diverting sources and lacked coherence).

59. *See* Willis, *supra* note 3, at 236.

60. *See* Black, *supra* note 49, at 336 (describing the SEC's grand efforts to create a model investor education program using the funds from the Research Analysts' Global Settlement in 2003, taking only eighteen months after inception to give up its efforts and transfer the funds over to the then NASD (now FINRA's Investor Education Foundation)); *See also* Willis, *supra* note 3, at 259 (stating that the economic incentive does not exist at the

For example, there exists a conflict between providing the investor with adequate financial information in order to make an informed decision, and the cost versus profit to the financial firm of having to provide the information. On the one hand, when financial information, either pre- or post-offering, is not forthcoming, security investors are forced to take it upon themselves to become "educated" about a company's offering.[61] The burden is on the investor to help themselves.

On the other hand some corporations have contended that financial information of securities transactions itself is more valuable than providing the information to investors.[62] It is the clash between the securities laws' demand for disclosure and education towards investor protection and that of copyright laws to protect corporate information. In the age of internet, and twenty-four hour access to information, investor education can be viewed as a compilation of data points.[63] Certain corporations, as financial "designers" of increasingly complex financial products,[64] have sought protection of proprietary rights of these products.[65] As a result, these corporations have argued that the dissemination of such information to investors would not be considered education, but trademark infringement, or corporate misappropriation.[66] Where various security investment data is considered copyrighted information,[67] would retail investors need licenses in order to educate themselves regarding security transactions? Does this leave retail investors, as the end users of financial products, in need of a Geek Squad[68] in order to decipher both the financial product and the

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financial firm level because they profit from the poor decisions of investors); Donald C. Langevoort, *Managing the "Expectation Gap" in Investor Protection: The SEC and the Post-Enron Reform Agenda,* 48 VILL. L. REV. 1139, 1165 (2003) (noting the conflict between providing investor education and the financial self-interest of financial firms providing the information). *See generally,* Fanto, *supra* note 8, at 161-62.

61. *See* Dombalagian, *Licensing*, *supra* note 32, at 9 (stating that investors must rely on market based approaches when mandatory disclosure regulations do not apply).

62. *See* Dombalagian, *Licensing*, *supra* note 32, at 7 (discussing the intellectual property value and protection of firm's trade secrets).

63. *See* Dombalagian, *Licensing*, *supra* note 32, at 12.

64. *See generally* Schwarcz, *Complexity*, *supra* note 5 (discussing the complexity of financial securities).

65. *See* Dombalagian, *Licensing*, *supra* note 32, at 22 (discussing exchanges and investment banks seeking statutory and regulatory protection of their financial products).

66. *See* Dombalagian, *Licensing*, *supra* note 32, at 25-27 (discussing the indexed based ETF cases where the court rejected claims by NASDAQ, McGraw Hill, and Dow Jones asserting that the dissemination of index pricing in order to educate investors and the subsequent use by the investors did not constitute misappropriation).

67. *See* Dombalagian, *Licensing*, *supra* note 32, at 12-13 (discussing case law affirming that compilations based on valuations and pricing information is protected under copyright law).

68. BESTBUY, Registration No. 2673874.

investment transaction itself?[69] In this scenario the disclosure of financial information is not considered investor education when laws beyond the securities law state that the dissemination of the information infringes on the company's rights.[70]

C. Regulation by Advocacy

The new trend is a move towards regulation by advocacy. Regulation by advocacy is a modified self-help approach to regulation. As Dodd-Frank establishes, an investor may request assistance from the Investor Advocate, who acts as a catalyst to the investor in solving the investor's problems. There have been successful models within other government agencies with the use of advocates.[71] For example, the Taxpayer Advocate Service of the IRS looks after the interests of taxpayers.[72]

Similarly, Congress charged the Office of Advocacy of the Small Business Administration with the duty to "represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business."[73] Likewise, within the Department of Transportation, specifically the Federal Highway Administration, several offices have advocacy roles. These offices include the Associate Administrator for Safety, the Office of Legislative Affairs, and Government Communications.[74]

The regulatory philosophies of disclosure, education and advocacy are not new concepts; they are simply tweaked versions of the same thing. Countless years have been wasted on these regulatory philosophies. Still, more years continue to be wasted. Until there is passage of actual

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69. *See generally* Schwarz, *Complexity*, *supra* note 5. *But see* Omarova, *Dodd-Frank*, *supra* note 5, at 93 (stating that the problem may be a never-ending cycle where regulation based on unrealistic premises may actually increase the shifting of risk, regulatory arbitrage, and the innovativeness of creating more complex financial instrumentalities which in essence would make the regulation ineffective).

70. *See* Dombalagian, *Licensing*, *supra* note 32, at 11-12 (discussing the premise that some courts have upheld a tort theory of misappropriation to protect a company's trade secrets and some companies have argued the use of copyright law regarding unauthorized dissemination as misappropriation of property).

71. *See* Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC's Stalled Mutual Fund Reform Effort*, 12 STAN. J. L. BUS. & FIN. 1, 56-57 (2006).

72. *See* Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1673-74 (2011); IRS.gov, Evolution of the Office of the Taxpayer Advocate, http://www.irs.gov/advocate/article/0,,id=171463,00.html. *See also* S. Rep. No. 111-176, at 105 (2010).

73. 15 U.S.C. § 634(a) (1998); 15 U.S.C. § 634c(4) (1998).

74. U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, D.O.T. ORDER 1100.63B (Apr. 10, 2011), *available at* http://www.fhwa.dot.gov/legsregs/directives/orders/dot110063b/fhwasectionb.htm.

regulatory reform, instead of regulatory tweaks to old flawed models, investors will remain unprotected.[75]

II. THE GOALS OF THE SEC'S OFFICE OF THE INVESTOR ADVOCATE

The Dodd-Frank Act was intended "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[76]

Congress designed the OIA[77] "to combat the 'regulatory capture'[78] that is perceived to exist in the industry."[79] Congress set out to work with the SEC to better represent retail investors' interests and to help resolve any internal problems the investor had with the SEC and other self-regulatory organizations.[80] The OIA will achieve this by identifying common problems that retail investors have with financial service providers and with investment products and suggests ways in which the SEC's or the SRO's policies can be altered to better serve retail investors.[81] The OIA recommends policy changes to the SEC and Congress on the investors' behalf, prioritizing retail investors throughout the rulemaking process.[82] The OIA, to combat regulatory capture, is an "external check" or a system of self-evaluation that the SEC lacks.[83] Ultimately, the advocates say, the OIA will increase the SEC's transparency and accountability.[84] The Investor Advocate is appointed by the Chairman of the SEC.[85] To completely separate the OIA from the SEC, the appointed Investor Advocate cannot be employed by the SEC's employ for at least two years

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75. *See* Omarova, *Dodd-Frank*, *supra* note 5, at 90 ("[N]one of these measures really amount to a break with the old regulatory philosophy, which in turn rests on certain outdated assumptions about different financial institutions' business and risk profiles and the efficacy of keeping them in separate regulatory silos.").

76. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified at 12 U.S.C. §5301).

77. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C.A. § 78d(1) (West).

78. *See infra* note 121 and corresponding text (discussing and defining regulatory capture); *See also infra* Part III.B.

79. *See International Securities and Capital Markets*, 45 INT'L LAW 253, 266 (Robert Samir Kuster, ed., 2011); *See also* S. Rep. No. 111-75, at 105 (2010).

80. 156 CONG. REC. S5870 (daily ed. July 15, 2010) (statement of Sen. Akaka); Securities Exchange Act of 1934, 15 U.S.C. § 78d(g) (West 2010).

81. 156 CONG. REC. S5870 (daily ed. July 15, 2010) (statement of Sen. Akaka).

82. *Id.*

83. *Id.*

84. *Id.*

85. 15 U.S.C.A. § 78d(g)(2)(A) (West 2010).

preceding the appointment, nor for at least five years following his or her service as Investor Advocate.[86]

The OIA includes an appointed ombudsman for retail investors, with the belief that the OIA can respond more appropriately to investor feedback, avoiding the repetition of past mistakes—e.g. the failure of the SEC to expose Ponzi schemes until it was too late.[87] The presumption goes that if investors were given their own attorney general, *id est* their own protector, then Ponzi-type schemes would be thwarted by the ombudsman's ability to receive and process complaints in an efficient and centralized manner. Ideally, a vast array of investor complaints would show a common-actor threaded throughout. The ombudsman would act aggressively to bring down that malicious actor.

The public seems to express a concern that the parameters of the ombudsman position should be carefully structured to ensure complete independence and guarantee confidentiality.[88] Specifically, many argue that the organizational ombudsman model should be the model utilized to effectively safeguard retail investors' confidentialities. Advocacy groups, such as the Derivative Project and the Public Investors Arbitration Bar Association question the qualifications that will surround the Investor Advocate position, such as the types of experiences the candidate must have, the candidate's relationship with the SEC, and the scope of the Investor Advocate's responsibility.[89]

The present status of the OIA is tenuous. On May 4, 2011, the Senate's subcommittee for Financial Services and General Appropriations of the Senate Appropriations Committee heard testimony from SEC Chairman Mary Schapiro, regarding the SEC's budgetary requests, wherein the Chairman requested funding for the OIA.[90] On June 23, 2011, when the House of Representatives Appropriations Committee approved the FY 2012

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86. 15 U.S.C.A. § 78d(g)(2)(C) (West 2010).

87. 156 CONG. REC. S5870 (daily ed. July 15, 2010) (statement of Sen. Akaka); 15 U.S.C. § 78d(g)(8)(B)(ii) (West 2010).

88. *See* OFFICE OF THE INVESTOR ADVOCATE: TITLE IX PROVISIONS OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, *available at* http://www.sec.gov/comments/df-title-ix/investor-advocate/investor-advocate.shtml#meetings.

89. Memorandum from James R. Burns, Deputy Chief of Staff, Office of the Chairman (Aug. 26, 2011), *available at* http://www.sec.gov/comments/df-title-ix/investor-advocate/investoradvocate-21.pdf; Memorandum from Kayla J. Gillan, Deputy Chief of Staff, Office of the Chairman (Nov. 8, 2010), *available at* http://www.sec.gov/comments/df-title-ix/investor-advocate/investoradvocate-19.pdf.

90. *Hearing on FY 2012 Funding for the CFTC and SEC*, 111th Cong. (2011), http://appropriations.senate.gov/webcasts.cfm?method=webcasts.view&id=6b69ca73-5cb7-41cf-83b7-59f24bcaf922; *See also Hearing on FY 2012 Funding for the CFTC and SEC Before the Subcomm. On Appropriations*, 111th Cong. (2011) (statement of Mary L. Schapiro, SEC Chairman), http://appropriations.senate.gov/ht-financial.cfm?method=hearings.view&id=e9d2dc7c-023d-49a8-adaa-b0d52a41609e.

Financial Services and General Government Appropriations Bill for the year ending September 30, 2012, the bill was silent on the funding of the OIA.[91] The comments contained in the bill mostly critique the SEC for its "inefficiencies" which are rooted in the SEC's non-compliance with a report promulgated by the Boston Consulting Group.[92] The SEC's Chairman Schapiro, in a letter dated June 30, 2011, ("Chairman Schapiro's letter"), wrote that the SEC requests prior pre-programming approval from the Committees on Appropriations of both the House and the Senate to establish the OIA.[93] So far, the Senate Appropriations Committee has not voted on any aspect of the SEC's budgetary requests.[94] Likewise, the House has not responded to Chairman Schapiro's letter. Thus, the present financial status of OIA remains unknown.

The OIA should be briefly distinguished from the Office of Investor Education and Advocacy ("OIEA"). OIA is not the equivalent of the current OIEA. The OIEA has existed for over a decade. The OIEA's two main objectives are to assess the views and needs of retail investors, and to improve investor financial literacy.[95] In Chairman Schapiro's letter, she uses the OIEA as an example of a unit within the SEC that performs functions, which she asserts, are similar to the functions which the Securities Exchange Act of 1934[96] assigns to the Investor Advocate.[97] Chairman Schapiro is silent on whether, in pointing out these similarities, she views the creation of the OIA as duplicative or a reinforcement of an

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91. Financial Services and General Government Appropriations Bill, H.R. No.__, 112th Cong. (2011), http://appropriations.house.gov/UploadedFiles/FY_2012_FS_Full_xml.pdf.

92. Financial Services and General Government Appropriations Bill, H.R. No.__, 112th Cong. (2011), http://appropriations.house.gov/UploadedFiles/FY_2012_FS_Full_xml.pdf.

93. Letter from Mary L. Schapiro, S.E.C. Chairman, to the Committees on Appropriations of the House of Representatives and the Senate (June 30, 2011), http://www.sec.gov/spotlight/dodd-frank/investoradvocateletter063011.pdf. (explaining that in the absence of the OIA the other divisions of the SEC will be employed to accomplish the same goals).

94. The Library of Cong., *Status of Appropriations Legislation for Fiscal Year 2012* (Oct. 5, 2011), http://thomas.loc.gov/home/approp/app12.html.

95. *See* Black, *supra* note 49, at 335.

96. Securities Exchange Act of 1934, 15 U.S.C. et seq. (2006).

97. *See* Letter from Mary L. Schapiro, S.E.C. Chairman, to the Committees on Appropriations of the House of Representatives and the Senate, *supra* note 93. The OIEA website is silent on the policy functions performed by the OIEA. *See* SEC, Investor Education and Advocacy, http://www.sec.gov/investor.shtml *and* http://investor.gov. As a result, it is not clear how the OIEA conducts research and makes recommendations on retail investor interests to the other units within the SEC. The OIEA is headed by Director Lori Schock, who previously held the same position from 2001 to 2007, before leaving to serve as the Associate Director of FINRA's Investor Education Foundation and Office of Investor Education. Director Schock returned to OIEA in 2009. She appears to have a strong background in investor education, which is consistent with the OIEA's presence on the web.

existing regulatory regime.[98] In the letter, Chairman Schapiro discusses the OIEA's complaints resolution function, the investor education function, and the investor research/policy recommendations function.[99] The OIA's ombudsman is a feature distinguishable from the OIEA. The OIA ombudsman[100] is charged with, *inter alia*, liaising between the SEC and retail investors in order to resolve investor complaints. Currently, the OIEA does not perform such a function.

III. WHY THE OFFICE OF THE INVESTOR ADVOCATE WILL NOT ACHIEVE ITS GOALS

As an office of the SEC, the OIA can be a force to achieving comprehensive protection for retail investors. The OIA's mission is to ensure that the interests of retail investors are adequately represented and to identify areas in which the investors can benefit from regulatory change. Its mission will fail. First, the increased complexity of financial securities, and the fragmented approach to regulation by advocacy leads to an office where the form (the structure of the office) is valued more than function (the actual advising, advocating, and protecting investors). Such an approach, although popular, increases both investor and systemic risk by widening the chasm of obstacles that impede OIA's ability to achieve its goals.

Second, the OIA will fall victim to its surrounding environment. Currently, the OIA, housed within the SEC, is in a precarious position, subjecting the office to possible regulatory capture by players from the very industry Congress charged the SEC with regulating.[101] The placement of

98. *See* Letter from Mary L. Schapiro, S.E.C. Chairman, to the Committees on Appropriations of the House of Representatives and the Senate, *supra* note 93.

99. The letter is consistent with the description of the OIEA on the OIEA website, investor.gov. The online presence of the OIEA is almost exclusively dedicated to investor education, but the website does provide information on how to file a complaint with the SEC. The website makes clear, however, that the OIEA does not have financial examiners whose job is dedicated to complaints resolution; the OIEA is not analogous to state regulators, such as the Maryland Office of the Commissioner of Financial Regulation or consumer advocates such as the Federal Consumer Financial Protection Bureau. Rather, the OIEA will transfer a complaint to the appropriate regulatory body. The timeframe for complaints resolution is not discussed on the website. On the other hand, the website links to a webpage containing an extensive list of SEC Frequently Asked Questions, which assists the user in self-help.

100. 15 U.S.C.A. § 78d(g)(6)(B) (2006).

101. Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security,* 10 AM. U. J. GENDER SOC. POL'Y & L. 381, 390-99 (2002) (discussing regulatory capture in the Federal Aviation Administration); Toni Makkai & John Braitwait, *In and Out of Revolving Door: Making Sense of Regulatory Capture*, 12 J. PUB. POL'Y 61, 62 (1992); Adam I. Muchmore, *Private Regulation and Foreign Conduct*, 47 SAN DIEGO L. REV. 371, 401 (2010) ("In any regulatory situation, there is a risk that private interests may capture the relevant government agency."); Eric R. Pogue, *The Catastrophe Model of Risk, Regulation and the Regulatory Legacy of*

the OIA within the SEC structure, although admirable, may actually prevent the OIA from truly protecting investors. In other words, the OIA will suffer from guilt by association. The investors will perceive the OIA in the same corrupt light as the SEC.

The problem is that the SEC itself needs reform. Regulatory capture, at one extreme, and laissez faire approaches to Wall Street's misdeeds, at another, has led to the cops helping the robbers.[102] OIA's goal of strengthening the authority of the SEC to take action seems ironic, given the conflict of interest between the regulators and the regulated. The domino effect from the SEC's lack of enforcement could possibly lead to OIA's failure to strongly advocate on behalf of investors. This lack of advocacy would hinder another one of OIA's goals: assuring the interests of retail investors are adequately represented. This may be premature speculation. It is still too early for anyone to tell.

OIA might not achieve its goals because, similar to the regulatory philosophies already discussed, regulation by advocacy is not a new means to protect investors, but rather a variation on the previous, fragmented modes of regulation. Dodd-Frank may go further than some prior forms of prescriptive legislation; however, regulation by advocacy neither gives teeth to the OIA, nor truly advocates on behalf of the investor.

A. Increased Complexity of Financial Securities

The overall goals of the OIA, in terms of investor protection, may be hampered for several reasons, including the increased complexity of financial securities, which can "obscure the ability of market participants to see and judge consequences."[103] This would lead to a form-versus-function imbalance, where the creation and debate surrounding the OIA is considered more important than the OIA's ability to actually effectuate its goals. The imbalance, coupled with the SEC's myopia to anticipate financial consequences, could increase systemic and investor risk. For example, one aspect of the economic crisis of 2007 to 2009 was the sale of mortgage-

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Three Mile Island and Love Canal, 15 PENN ST ENVTL. L. REV. 463, 480 (2007) (defining agency capture as the co-opting of a government agency's agenda by the business interest they are tasked to regulate); *see* Aguirre v. SEC, 551 F. Supp. 2d 33, 56 (D.D.C. 2008) (discussing the possible regulatory capture of the SEC during its investigation of John Mack, the Chairman of the Board and former CEO of Morgan Stanley). *See generally* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) [hereinafter Stigler, *Economic Regulation*] (providing the primer on regulatory or agency capture).

102. Indeed, SEC Chairman Shapiro has repeatedly characterized the SEC as a law enforcement agency or used the language of law enforcement to characterize the Commission's mission. *See, e.g.*, *supra* note 93.

103. *See* Schwarcz, *Complexity*, *supra* note 5, at 220.

backed securities, such as collateralized debt obligations ("CDOs").[104] At inception, the CDOs seemed to be a valid and a solid investment, where the underlying debt being collateralized was a diversified pool of mortgage obligations[105] and the rating agencies gave the resulting CDOs top grades.[106] Sophisticated investors purchased the CDOs based on the presumed safe nature of the underlying debt and the rating agencies' stellar evaluation of the potential risk of investment.[107] Nevertheless, the increased complexity of CDOs and other such products made evaluation of the investor risk difficult for market participants,[108] thus leading to over-investment of various toxic assets.[109]

OIA aims to ensure that the interests of the retail investors are adequately represented. Does such representation require that the OIA employ individuals who understand complex securities like CDOs? If so, would OIA be better off than those who relied upon the rating agencies to make their investments? Some of the smartest business people and investors in the world praised the surety offered by CDOs, but they could not have been more wrong.[110] OIA, in this sense, would be an arbiter of

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104. *See* Zachary J. Gubler, *The Financial Innovation Process: Theory and Application*, 36 DEL. J. CORP. L. 55, 65-66 (2011); Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039 *passim* (2007); Joe Nocera, *The Give and Take of Liar Loans*, N.Y. TIMES, Nov. 27, 2010, at B1, *available at* Gale, Doc. No. GALE A242932698.

105. *See* Bradley J. Bondi, *Securities Arbitrations Involving Mortgage-Backed Securities and Collateralized Mortgage Obligations: Suitable for Unsuitability Claims?*, 14 FORDHAM J. CORP. & FIN. L. 251, 252-53 (2009); Richard E. Mendales, *Collateralized Explosive Devices: Why Securities Regulation Failed to Prevent the CDO Meltdown, and How to Fix It*, 2009 U. ILL. L. REV. 1359, 1381 (2009); Mark Whitehouse, *Crisis Compels Economists to Reach for New Paradigm*, WALL ST. J., Nov. 4, 2009, at A18, *available at* Factivia, Doc. No. WSJO000020091104e5b4002xl.

106. *See* Claire A. Hill, *Why Did Rating Agencies Do Such a Bad Job Rating Subprime Securities?*, 71 U. PITT. L. REV. 585, 590-600 (2010); Republican Comm'rs on the Fin. Crisis Inquiry Comm'n, *Financial Crisis Primer: Questions and Answers on the Causes of the Financial Crisis*, 5, (Dec. 15, 2010), *available at* http://graphics8.nytimes.com/2010/12/15/business/FinancialCrisisPrimer.pdf?scp=6&sq=CDO%20rating%20agencies%20investors&st=cse.

107. *See id.*

108. *See* Charles W. Murdock, *Why Not Tell the Truth?: Deceptive Practices and the Economic Meltdown*, 41 LOY. U. CHI. L.J. 801, 850-53 (2010); William Poole, *Causes and Consequences of the Financial Crisis of 2007-2009*, 33 HARV. J.L. & PUB. POL'Y 421, 423-27 (2010); Heidi N. Moore, *Political Rashomon on Financial Crisis Panel*, N.Y. TIMES, (Dec. 15, 2010), http://dealbook.nytimes.com/2010/12/15/political-rashomon-on-financial-crisis-panel/?scp=3&sq=%22toxic+assets%22+investment+risk&st=nyt.

109. *See id.*

110. *See, e.g.,* David L. Batty, *Dodd-Frank's Requirements of "Skin in the Game" for Asset-Backed Securities May Scalp Corporate Loan Liquidity,* 15 N.C. Banking Inst. 13, 21 (2011) (stating that often after the creation of the original asset pool for a CDO, the portfolio is left unmanaged); William K. Sjostrom, Jr., *The AIG Bailout*, 66 Wash. & Lee L. Rev. 943, 959-60 (2009) (discussing how a large portion of AIG's portfolio in residential mortgage

investor risk, rather than an advocate of investor protection because OIA will not anticipate the consequences.

The flow of time, the market's evolution, and the increasing complexity of financial securities are economic constants.[111] In previous economic downturns,[112] and during the most recent crisis,[113] many market players did not comprehend the effects of trading in sophisticated securities.[114] Regardless of whether the suitability of complex and exotic securities applies to the investors,[115] the investors' constant and increasing demand for more financial choice has lead to a plethora of nuanced financial products.[116] In response to this demand, the regulatory agencies have not kept pace with market forces.[117] Where traditional regulatory rules

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backed CDOs, coupled with the downturn in the residential housing market in 2007 due to the issuance of mortgages to non-prime and subprime borrowers, was adversely effected by the low quality of the highly rated CDOs).

111. Mark A. Horwitz, Comment, *Swaps Ahoy! Should Regulators Voyage into Unknown Waters?*, 1 IND. J. GLOBAL LEGAL STUD. 515, 545-48 (1994) (arguing about the regulation of swaps); Peter H. Huang, *A Normative Analysis of New Financially Engineered Derivatives*, 73 S. CAL. L. REV. 471, 482-91 (2000) (regarding the regulation of derivatives). *See generally* Thomas Russo & Marlissa Vinciguerra, *Financial Innovation and Uncertain Regulation: Selected Issues Regarding New Product Development*, 69 TEX. L. REV. 1431, 1436 (1991) (discussing the need for regulation twenty years ago because of the innovation of "new" financial securities).

112. Cunningham & Zaring, *infra* text accompanying note 160 (regarding more recent economic crises); *See* Schwarcz, *Complexity*, *supra* note 5, at 223-24 (discussing the collapse of the mobile home market).

113. *See* Schwarcz, *Complexity*, *supra* note 5, at 223 (stating that even the rating agencies who had the responsibility to evaluate the investment risk of the securities failed to see the risk); Steve Lohr, *In Modeling Risk, the Human Factor Was Left Out*, N.Y. TIMES, Nov. 5, 2008, at B1. *See generally* Kia Dennis, *The Rating Game: Explaining Rating Agency Failures in the Build Up to the Financial Crisis*, 63 U. MIAMI L. REV. 1111 (2009).

114. *See* Schwarcz, *Complexity*, *supra* note 5, at 223; Lohr, *supra* note 113, at B1. *See generally* Dennis, *supra* note 113.

115. Willa E. Gibson, *Are Swap Agreements Securities or Futures?: The Inadequacies of Applying the Traditional Regulatory Approach to OTC Derivative Transactions*, 24 J. CORP. L. 379, 410 (1999); Zeke Faux, *Individual Investors Duped by Derivatives*, BUS. WK. (Sep. 30, 2010, 5:00 PM); *See* Willa E. Gibson, *Investors Look Before You Leap: The Suitability Doctrine is not Suitable for OTC Derivatives Dealers*, 29 LOY. U. CHI. L. J. 527, 530-31 (1998) [hereinafter Gibson, *Investors*] http://www.businessweek.com/magazine/content/10_41/b4198043663903.htm.

116. Lee C. Buchheit, *Did We Make Things Too Complicated?*, 27 Int'l Fin. L. Rev. 24, 24 (2008); *See also* Michael Lewis, *The End*, PORTFOLIO (Nov. 11, 2008), http://www.portfolio.com/news-markets/national-news/portfolio/2008/11/11/The-End-of-Wall-Streets-Boom. *See generally* Cally Jordan, *The Dangerous Illusion of International Financial Standards and the Legacy of the Financial Stability Forum*, 12 SAN DIEGO INT'L L.J. 333 (2011).

117. *See* Jordan, *supra* note 116, at 337; Henry T. C. Hu, *Keynote Address: The SEC, Dodd-Frank, and Modern Capital Markets*, 7 N.Y.U. J. L. & BUS. 427, 431-32 (2011).

have placed the burden on the securities providers,[118] they have caused more confusion among investors due to the want of guidance.[119] The OIA was designed to close this asymmetrical gap between investor demand and the regulators' desire to protect the investor.[120] Yet, when financial innovation matches the demand for new products, the regulators have the responsibility to be just as proactive with innovation. OIA will be hampered in its quest to protect investors unless it recognizes that there will always be "new" and unregulated financial products.

B. The Fox in the Henhouse – The Regulatory Capture of the SEC

The second reason why the OIA will not achieve its stated goals is because the SEC suffers from "regulatory capture."[121] Regulatory capture means that the regulatory agency, or the members thereof, has become so entrenched within the industry they regulate that their regulations appear arbitrary, or worse, reek of corruption, causing a blurring of the line between the regulator and the regulated.[122] It's an osmotic environment, where the regulators and the regulatees often switch roles. This regulatory osmosis between the two groups, which is exacerbated during times of crisis, makes it difficult for investors to know whether pleas for assistance will be answered, and if not answered, then why they were not.[123] When the

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118. *See, e.g.*, Daphna Abrams, *A Second Look at Clearing Firm Liability*, 67 BROOK. L. REV. 479, 507 (2001).

119. *See* discussion *supra* Part I.

120. *See* discussion *supra* Part II (regarding the Congressional intent on the creation of the OIA).

121. *See generally* Stigler, *Economic Regulation*, *supra* note 101 (providing the primer on regulatory or agency capture); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J. L. & PUB. POL'Y 639, 664 (2010) (discussing the SEC's capture by the mutual fund industry). *See generally* Eric R. Pogue, *The Catasrophe Model of Risk, Regulation and the Regulatory Legacy of Three Mile Island and Love Canal*, 15 PENN. ST. ENVTL. L. REV. 463, 480 (2007) (defining agency capture as the co-opting of a government agency's agenda by the interest they are tasked to regulate).

122. *See generally* Stigler, *Economic Regulation*, *supra* note 101.

123. *See* William Cohan, *One More Reason to Shut the SEC and Start Over*, BLOOMBERG (Aug. 29, 2011, 8:00 PM), http://www.bloomberg.com/news/2011-08-30/one-more-reason-to-shut-sec-and-start-over-commentary-by-william-d-cohan.html (stating that many Freedom of Information Acts requests sent to the SEC are not answered). *See generally* Pogue, *supra* note 121, at 480 ("In the context of the Catastrophe Model, the capture theory is notable in at least two respects: (1) traditional agency capture may be part of the explanation for why agencies are hesitant to regulate adequately before catastrophes; and (2) an agency's overreaction after a catastrophe may be explained by the agency's agenda being captured by the strong political and public sentiment regarding the catastrophe.").

objectivity of the SEC is questioned, then its decisions are cynically appraised.

The SEC's twisted relationship with those it regulates was brought to light in July 2011 by Darcy Flynn, a thirteen-year veteran attorney of the SEC.[124] Flynn informed Congress, and the National Achieves Records Administration, that the SEC had been systematically destroying records generated from "matters under inquiry" ("MUI").[125] A MUI is the SEC's set of preliminary inquiries into possible criminal activities.[126] Flynn detailed to Congress that around 18,000 MUIs were completely destroyed by the SEC over the course of seventeen years.[127] Notable mentions among the destroyed records were MUIs against Bernie Madoff, Deustche Bank, Lehman Brothers, and SAC Capital.[128]

Erasing the MUI records means that any later complaints against fraudulent entities must undergo a fresh inquiry by the SEC investigator, and she would not be able to refer back to past witnesses and reports contained within the older MUIs to help guide her investigation.[129]

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124. *See* Matt Taibbi, *Is the SEC Covering Up Wall Street Crimes?*, ROLLING STONE, (Sept. 1, 2011, 8:00 AM), http://www.rollingstone.com/politics/news/is-the-sec-covering-up-wall-street-crimes-20110817.

125. Flynn had initially informed his superiors at the SEC in the summer of 2010, but when the matter seemed to go unaddressed, he reached out to Sen. Charles Grassley of Iowa. *See id.*; Edward Wyatt, *S.E.C. Files were Illegally Destroyed, Lawyer Says*, N.Y. TIMES, Aug. 18, 2011, at B1, *available at* http://www.nytimes.com/2011/08/18/business/sec-illegally-destroyed-documents-whistle-blower-alleges.html; David S. Hilzenrath, *A Different Story Emerges on SEC Record Purges*, WASH. POST (Sept. 5, 2011), http://www.washingtonpost.com/business/economy/a-different-story-emerges-on-sec-record-purges/2011/09/02/gIQALBh44J_story.html.

126. *See* Taibbi, *supra* note 124.

127. *See* Taibbi, *supra* note 124.

128. *See* Taibbi, *supra* note 124; *See also* Cohan, *supra* note 123; Wyatt, *supra* note 125; David S. Hilzenrath, *SEC Officials 'Lawyering Up'*, WASH. POST (Sept. 14, 2011), http://www.washingtonpost.com/business/economy/sec-officials-lawyering-up/2011/09/14/gIQAWmYkSK_story.html (discussing the SEC's Inspector General's probe against current former SEC officials regarding the SEC's conflict of interest and its policy toward Madoff investors).

129. *But see* Letter from Robert S. Khuzami, Dir. of Enforcement, Sec. & Exch. Comm'n, to Sen. Charles Grassley (R. Iowa), Ranking Member, U.S. Senate Comm. on the Judiciary, (Sept. 14, 2011), http://grassley.senate.gov/about/upload/Khuzami-to-Sen-Grassley-9-14-2011.pdf; Marcy Gordon, *SEC Admits Documents From Preliminary Investigations on Big Banks, Bernie Madoff Likely Tossed*, HUFFINGTON POST (Sept. 14, 2011, 9:20 PM), http://www.huffingtonpost.com/2011/09/14/sec-investigations-tosses-preliminary_n_963178.html (quoting Robert Khuzami, Director of Enforcement at the SEC, in a reply letter dated Sept. 14, 2011 to Sen. Charles Grassley (R. Iowa) as stating that future investigations will not be compromised as a result of the destructions of the MUIs). *See also* Jessica Holzer, *SEC's Khuzami: Current Probes Not Hurt by Records Destruction*, WALL ST. J. (Sept. 14, 2011, 7:28 PM), http://online.wsj.com/article/SB10001424053111903927204576571163363257404.html (citing Sen. Grassley as being skeptical of SEC's Director of Enforcement, Robert Khuzami's assertions); Press Release,

Therefore, investor complaints about fraudulent activity could not, and cannot, tell the SEC if there was, or is, a pattern surrounding certain actors. It is reasonable to ask whether Bernie Madoff's Ponzi scheme would have been thwarted had the SEC investigators actually had access to past-MUIs.[130]

Even when MUIs were prepared for acceleration to a subpoena action, they were often dismissed or closed by an enforcement director, who was either a former Wall Street insider, or was looking to move into a role at a Wall Street investment bank or law firm.[131] There was no obligation by that director to justify his or her reason for dismissing the subpoena action.[132]

Flynn blew the whistle on the destruction of the MUIs in a letter to Senator Charles Grassley (R. Iowa), a member of the Senate's Judiciary Committee.[133] Grassley, outraged by the SEC's horrendous recordkeeping practices, which bordered on criminal activity, wrote a letter to SEC Chairman Mary Shapiro requesting clarification of Flynn's allegations and a response by August 31, 2011.[134] As a result of Grassley's letter, the SEC reversed its policy,[135] and temporarily froze the destruction of any additional MUIs.[136] The SEC did respond, on September 14, 2011, stating that MUIs have a lower threshold than informal investigations; that despite the destruction of the MUIs, the Division of Enforcement has a searchable database of data points from previous MUIs; and since MUIs were "not

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Sen. Charles Grassley (R. Iowa), Ranking Member, U.S. Senate Judiciary Comm., Grassley: SEC Confidence on Insignificance of Destroyed Documents is Questionable (Sept. 15, 2011), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=36953.

130. *See* Taibbi, *supra* note 124.

131. *See* Taibbi, *supra* note 124; Cohan, *supra* note 123; *The Kojo Nnamdi Show: In the Dark? Probing the SEC's Probes*, American University Radio (Aug. 30, 2011) (transcript *available at* http://thekojonnamdishow.org/shows/2011-08-30/dark-probing-secs-probes/transcript) (describing the ethical dilemma of former Wall Street executives who now are employed by the SEC and vice versa).

132. *See* Taibbi, *supra* note 124.

133. *See* Taibbi, *supra* note 124; *See also* Press Release, Sen. Charles Grassley (R. Iowa), Grassley Asks SEC to Account for Serious Allegations of Case-Related Document Destruction (Aug. 17, 2011), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=36486).

134. *See* Letter from Senator Charles Grassley, Rep. Iowa, to Mary Shapiro, Chairman of the SEC (Aug. 17, 2011), http://grassley.senate.gov/about/upload/2011-08-17-CEG-to-SEC-MUI.pdf.

135. *See* David S. Hilzenrath, *SEC Orders Staff to Stop Destroying Records*, WASH. POST (Sept. 7, 2011), http://www.washingtonpost.com/business/economy/sec-orders-staff-to-stop-destroying-records/2011/09/07/gIQAoTuWAK_story.html.

136. *See* Press Release, Senator Charles Grassley, Rep. Iowa, SEC Freezes Document Destruction After Grassley, Whistleblower Inquiry (Sept. 8, 2011), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=36831.

stored as official files of the Commission," their subsequent disposal was consistent with the long standing SEC guidance.[137]

The employment background of prior and current SEC officials and their failure to enforce or properly investigate valid MUIs [138] throughout the last decade has led to the very reasonable conclusion that the SEC has succumbed to regulatory capture.[139] It has become too cozy with those from whom it must protect – the investors. Some wonder whether the SEC desired the securities fraud schemes run by Bernie Madoff, and whether the SEC wanted the economic crisis to occur.[140] Systemic corruption would mean more jobs and resources would be allocated to the securities police force, i.e. the SEC, so that it might address the very events that the MUIs had documented.[141] If these questions strike the reader as cynical, then please remember the SEC's fundamental purpose, investor protection, and try to answer: why were the MUIs destroyed? What benefit is incurred upon investors by the systematic destruction of the SEC's criminal inquiries? How does the investor benefit when the SEC literally forgets the investors' complaints in less than a year? The investor does not benefit, but the target of the complaint does. That target is given a *tabula rasa* to try again.

The placement of the OIA within the fractured SEC fails to protect investors due to the regulatory capture of the SEC, and the temporarily frozen policy of destroying MUIs.[142] The SEC has indicated that it has changed its document destruction policies;[143] however, with many years' worth of MUIs destroyed, future civil actions may not have the necessary evidence to prosecute the offenders.[144] Congress created the OIA within the

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137. *See* Letter from Robert S. Khuzami, Dir., Division of Enforcement, U.S. Sec. & Exch. Comm'n, to Senator Charles E. Grassley, Rep. Iowa, Ranking Member, Comm. on Judiciary, U. S. Senate (Sept. 14, 2011), http://grassley.senate.gov/about/upload/Khuzami-to-Sen-Grassley-9-14-2011.pdf. *See also* Davild S. Hilzenrath, *File Purging Not Harmful, Says SEC Official*, WASH. POST (Sept. 15, 2011), http://www.washingtonpost.com/business/economy/file-purging-not-harmful-says-sec-official/2011/09/14/gIQAlWs1SK_story.html.

138. *See, e.g.,* Gretchen Morgenson, *Hey S.E.C., That Escape Hatch is Still Open*, N.Y. TIMES, Mar. 5, 2011, at BU1 (discussing how the SEC has refused to enforce its own rules against credit rating agencies).

139. *See* Taibbi, *supra* note 124; Cohan, *supra* note 123; *The Kojo Nnamdi Show, supra* note 131 (describing Yale Law School Professor Jonathan R. Macey's study on why the SEC has failed to find financial irregularity over the last decade).

140. *See* Cohan, *supra* note 123.

141. *See generally The Kojo Nnamdi Show, supra* note 131 (discussing that more jobs at the SEC, coupled with the SEC's personnel's inherent conflicts of interest, would mean that the enforcement division of the SEC has no real incentive to actually resolve financial crisis). *But see* 156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of former U.S. Rep. Paul Kanjorski) (acknowledging the need for additional funding to the SEC in order for the agency to keep pace with the financial innovations in the market).

142. *See* Taibbi, *supra* note 124.

143. *See* Hilzenrath, *supra* note 135.

144. *See* Tiabbi, *supra* note 124.

SEC—via the Dodd-Frank Act—as a means to better equip the SEC to respond to investors' feedback and to more effectively disseminate information that could potentially expose illegal practices by firms in a more prompt manner.[145] Yet, the OIA should be aiding the investors against the impropriety of the SEC, not just the actions of financial firms. The SEC's apparent problem is not its ability to respond to investors' feedback or to disseminate their complaints. The SEC suffers from regulatory capture, which is an entirely different beast than ability: the SEC lacks the impetus to act against bad actors and itself. Chances are, the impetus is lacking because the bad actors are already working for the SEC. OIA should be completely separated from this atmosphere, in order to avoid the taint the SEC has already been exposed to.

C. New Law, Same Old Regulatory Paradigm – Emperor Still Has No Clothes.

Disclosure and leveling – balancing the playing field - for investors by the SEC[146] has not resulted in investor protection.[147] None of the many regulatory philosophies discussed thus far have successfully protected investors.[148] The Dodd-Frank Act's call for the OIA to regulate via an advocacy approach takes the form of "the emperor's new clothes": the call for reform has been given, but no "clothes" have arrived to shield investors from the market's harsh nature. Continuing the metaphor, the emperor is still just as bare. Similar to other philosophies of regulation, regulation by advocacy may be a new approach to the ever-present and growing need for investor protection, but it resembles the same regulatory paradigm of crisis-response regulation that already exists. Just as the emperor paraded his exposed person, praising his garments, so too advocates flaunt the OIA as a new method to the old model, but both are illusions. Fragmented regulation, including regulation by advocacy, leads directly to the lack of awareness of

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145. *See* 156 CONG. REC. S4069 (daily ed. May 20, 2010) (statement of U.S. Sen. Akaka).

146. *See* Marc I. Steinberg & Jason B. Myers, *Lurking in the Shadows: The Hidden Issues of the Securities and Exchange Commission's Regulation FD*, 27 J. CORP. L. 173, 177 (2002) (Regulation FD, a leveling the playing field prescriptive regulation, was enacted to combat the system of selective disclosure of material information from analysts to their clients).

147. Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 308 (2009); *see* Joseph A. Franco, *A Consumer Protection Approach to Mutual Fund Disclosure and the Limits of Simplification*, 15 STAN. J.L. BUS. & FIN. 1, 53-59 (2009).

148. *See supra* Part II; Franco, *supra* note 147, at 53-59; Poser, *supra* note 147, at 308.

systemic risk,[149] and indirectly to investor risk. Yet, the current fragmented model has both proponents touting its benefits,[150] and opponents critical of its usefulness. [151]

Regulation by advocacy is nothing new – it's the same crisis driven model of reform.[152] Thus, similar to the other regulatory philosophies, OIA, as a regulator, will not appreciate the systemic or investor risk because of a failure to adopt new regulatory techniques, which causes information asymmetry.[153]

What is meant by regulation by advocacy? It means a call for regulatory reform, or in the case of the creation of the OIA, actual regulation, where the impetus of the regulation is to advocate on behalf of investors.[154] Regulation by advocacy has been applied before, and with some positive results.[155] Scholars raise the question as to why the SEC has not already adopted advocacy regulation.[156] For regulation by advocacy to work effectively the SEC would not only comment on financial regulation but would also either have to take a cost-benefit-analysis approach to rulemaking,[157] employ or rely on an army of economists to do it for them, or both.[158] Such an approach, if adopted by the SEC through the OIA, would

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149. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 196-97 (providing an in-depth discussion of systemic risk).

150. *See* Cunningham & Zaring, *supra* note 19, at 49 (arguing that the benefits of the fragmented regulatory model allow for financial innovation, regulatory discipline and product alternatives); *see also* Schwarcz, *Systematic Risk*, *supra* note 13, at 230-31 (stating that although it sometimes does not work, the remedial legislation can be used to quantify the cost and benefits of the regulation on the crisis and reduce moral hazard costs, i.e. the costs of predicting when a crisis occurs whether the company will be bailed out or allowed to fail).

151. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 230-31 (arguing that remedial legislation does not always work either because of delay in timing to respond to the crisis triggering event or the harm committed was so severe that the regulatory band-aid had no effect).

152. *See supra* Part II.

153. *See* Steven M. Davidoff, *Paradigm Shift: Federal Securities Regulation in the New Millennium*, 2 BROOK. J. CORP. FIN. & COM. L. 339, 359 n.95 (2008) (SEC's refusal to adopt modern regulatory techniques in terms of regulating the hedge fund industry); Cunningham & Zaring, *supra* note 19, at 99-111. When I use the term information asymmetry here, I mean the market information known by the market participants versus that known by the securities regulators or the retail investors.

154. *See* discussion *supra* Part II.

155. *See* Sherwin, *supra* note 71, at 56-57. *See also supra* Part I.C.

156. *See* Sherwin, *supra* note 71, at 19-46.

157. *See Id.*; SEC Regulatory Accountability Act, H.R. 2308, 112th Cong. (2011); *see also* David S. Hilzenrath, *Former SEC Head Opposes New Restrictions*, WASH. POST (Sept. 15, 2011), http://www.washingtonpost.com/business/economy/former-sec-head-opposes-new-regulations/2011/09/15/gIQACpRkUK_story.html (discussing the proposed SEC Regulatory Accountability Act which would require the SEC to conduct more elaborate cost-benefit analysis than it currently performs prior to promulgating regulation).

158. *See* Sherwin, *supra* note 71, at 19-46.

incrementally decrease the information asymmetry gap. Yet, the gap would still exist.

The numerous moving parts in the financial market decrease the regulators ability to evaluate systemic risk, thus causing information asymmetry.[159] This begs the question: Can a financial system have both government intervention in a financial crisis and regulatory evaluation of systemic risk? Scholars answer no, and cite recent financial history. Historically, when the increased financial complexity of securities was coupled with governmental intervention, the resulting outcome was an inherent ignorance of systemic risk.[160] Thus, the regulatory response to the proliferation of new and complex financial products is not a recent phenomenon.[161] In the fragmented regulatory reform approach, crisis leads to government intervention; such an approach does not create effective regulatory reform.[162]

In other words, the financial regulators, such as the SEC, are always a step behind in regulatory enforcement, and the crooks are a step ahead, thus the crooks are winning.[163] In order to both comprehend the investor risk and decrease the crimes against investors, the SEC must think like a crook.[164] The SEC must hasten its pace to lessen the gap between its lagging regulatory enforcement and the step-ahead-criminal. Government intervention, followed by regulatory reform in a financial crisis means that after the criminal deed occurs and the damage is done, the government steps in and notices the current laws are lax. It then decides to strengthen the legal regimen to catch the criminal, when that criminal idiotically decides to commit the exact same crime, in the exact same manner, in the future and

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159. *See* Cunningham & Zaring, *supra* note 19, at 50-51 (noting that while the system knew what the regulators were doing because of regulation fragmentation, the regulators were blinded to overall systemic risk in the market which led to financial crisis).

160. *See* Cunnigham & Zaring, *supra* note 19, at 51-55 (showing that with the S&L crisis in the 1980s, government responded with federal takeover of the institutions; in 1987, when the Dow Jones Industrial Average fell by more than 20% in a single day, government responded with measured and specifically tailored reform proposals to address the specific exotic securities; in 1997 with the collapse of the hedge fund LTCM and the lack of regulation of such products by the SEC or CFTC, no regulatory reform was initiated despite numerous requests for by proponents such as Elizabeth Warren and Brooksley Borne calling for regulation of hedge funds; the corporate accounting scandals of 2000s lead to the enactment of Sarbanes-Oxley Act of 2002). Similarly, when the economic crisis of 2007-2009 occurred, the government responded with the passage of the Dodd-Frank Act of 2010.

161. *See, e.g.*, Russo & Vinciguerra, *supra,* note 111, at 1497; Thomas Lee Hazen, *The Short-Term/Long-Term Dichotomy and Investment Theory: Implications for Securities Market Regulation and For Corporate Law*, 70 N.C. L. REV. 137, 175-76 (1991); Gibson, *Investors, supra* note 115, at 561.

162. *See* Cunningham & Zaring, *supra* note 19, at 56.

163. *See* Davidoff, *supra* note 153, at 357-63.

164. It could be argued that the SEC's current agency capture is the agency's way of thinking like a crook.

under the exact same circumstances – a very reactive approach. Advocacy in the midst of a reactive approach is not advocacy, but rhetoric. It solidifies only what occurred, and how to prevent its re-occurrence. "Government, rather than the private sector, has the incentive . . . to become informed about systemic risk."[165] Thus, an understanding of both the systemic risk, and the investor risk, is critical for the SEC to ask how the next financial crime might occur, not to be a reporter, or to continue the crooks analogy, a forensics-team.

Given this analysis, ideally the OIA's role in regulatory advocacy for investors would be in the conducting of cost-benefit-analysis of the SEC's rulemaking,[166] or trying to comprehend the nature and potential uses of complex securities and transactions, in order to regulate against abuse and protect investors.[167] Rather, OIA was contemplated to use the current regulations to advocate on behalf of investors.[168] The Dodd-Frank Act did not call for the OIA to use a new formula to anticipate market conditions, but rather asked the OIA to advocate for investors amidst current market conditions.[169] Such a fragmented regulatory approach throws the proverbial regulatory kitchen sink at the problem, where some benefits emerge, but the effectiveness is imperceptible.[170] Thus, regulation by advocacy as proposed with the creation of the OIA will not achieve its stated goals because, like the other regulatory paradigms, the OIA will not comprehend the degree of investor risk to a level to actual meet what is needed for investor protection.

IV. PROPOSED SOLUTIONS AND A STARTING POINT

Title IX of the Dodd-Frank Act defines the actual function of the OIA.[171] The OIA's stated goals are admirable, as discussed in Part II, yet they lack clear direction and function about how the OIA will protect retail investors. While the fragmented regulatory regime of crisis-based regulatory regulation created the OIA, it does not mean that the OIA must succumb to its limitations, and ignore potential advocacy avenues.

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165. *See* Henry T. C. Hu, *Misunderstood Derivatives: The Cause of Informational Failure and the Promise of Regulatory Incrementalism*, 102 YALE L. J. 1457, 1502 (1993).

166. The SEC has done this before in the context of Sarbanes-Oxley. *See generally* Sherwin, *supra* note 71; *see also* Press Release, U.S. Sec. & Exch. Comm'n, SEC Begins Small Business Costs and Benefits Study of Sarbanes-Oxley Act Section 404 (Feb. 1, 2008), http://www.sec.gov/news/press/2008/2008-8.htm.

167. *See generally* Schwarcz, *Complexity*, *supra* note 5.

168. *See supra* Part II.

169. *See* 156 CONG. REC. S5870 (daily ed. July 15, 2010) (statement of U.S. Sen. Akaka).

170. *See* Cunningham & Zaring, *supra* note 19, at 56-71.

171. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, *supra* note 2, at § 901.

The OIA can achieve its goals using the traditional regulatory philosophies and the premises of investor protection by implementing two adjustments. The first proposal, which Part A will expound on, is the call to invert the order of the traditional fragmented approach to regulatory reform. Instead of crisis-driven regulation, the first proposal advocates for an anticipatory preemptive reform model, where regulatory reform occurs prior to a crisis happening. When the anticipated crisis does occur, the government, at that time, can analyze whether or not the established regulation actually aided or harmed retail investors. Some scholars have argued that "comprehensive reform is not something for prosperous financial times;"[172] however, traditional crisis-driven regulation has not protected investors either.[173] An anticipatory preemptive approach would shift the nature of the OIA from strictly advisory to one of a true regulatory advocate.

The second proposal, which Part B explores, considers the current state of the SEC, and whether the OIA benefits by being located within the agency. An independent OIA, which reports directly to Congress, but is not housed at the SEC, would be able to advocate for, and protect retail investors against not only the market but also the abuses of the SEC.[174] What the fragmented regulatory philosophies have shown, is that retail investors are not protected by the agency whose purpose it is to protect investors against bad actors. The OIA could report both to Congress on investor protection, and to the Inspector General of the SEC and Congress on the lack of investor protection by various financial government regulators. To effectively operate, the OIA should not be located within the SEC. As the comic book asks, "Who watches the Watchmen?"[175] The answer could be the OIA.

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172. *See* Cunningham & Zaring, *supra,* note 19, at 73 (citing Larry Ribstein and Stuart Banner). *See generally* Stuart Banner, Anglo-American Securities Regulation (1998); Larry Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77, 79-83 (2003); Erik F. Gerding, *The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation*, 38 CONN. L. REV. 393 (2006).

173. *See* Cunnigham & Zaring, *supra* note 19, at 51-55; *see supra* text accompanying note 160.

174. *See* Taibbi, *supra* note 124; *See also* David S. Hilzenrath, *Former SEC Chairman Criticizes Agency IG*, WASH. POST (Sept. 15, 2011), http://www.washingtonpost.com/business/economy/former-sec-chairman-criticizes-agency-ig/2011/09/15/gIQA3njQVK_story.html (discussing SEC Inspector General David Kotz's probe into the SEC's omission to act regarding the conflict of interest in the securities fraud investigation against Bernie Madoff).

175. *See* Alan Moore & Dave Gibbons, WATCHMEN, 9, (Dan Didio ed., D.C. Comics 1986). The Watchmen initially was a twelve issue limited comic book series published by D.C. Comics. The collective comic series was first compiled into a graphic-novel and later turned into a movie. The Watchmen is a graphic-novel with many different socio-political concepts and philosophical inquiries, which ask who watches the superheroes? It is not just

Lastly, Part C invites the discussion of the OIA advocating for a normative shift in the regulatory framework in order to reduce investor risk. This would require the OIA to propone the limitation of choice in financial products and the explicit prohibition of the phenomenal degree of complexity that certain transactions have. This approach is idealized. The current regulatory philosophies in their post-crisis approach have not decreased the rise in the complexity of financial products.[176] A normative shift would accomplish two things. First, by accepting the existence of the ever increasing number of complex financial products, the normative shift in regulation would look at the degree to which the system can accept such products, and not at the specific products themselves. Second, the normative shift in regulation would analyze the prohibition of certain complex transactions and ask whether this would directly decrease systemic risk, thus indirectly decreasing the risk to investors.

A. Current Structure Proposal – Anticipatory Preemptive Regulation

Anticipatory preemptive regulation is a response to the fragmented crisis-driven model of regulation. Anticipatory preemptive regulation reform in the OIA would entail advocacy and regulation of the financial industry during prosperous economic times, and provide independence, transparency, predictability, legitimacy, and credibility for the regulatory system.[177] Although the concept of anticipatory preemptive reform has been debated previously,[178] the promotion of the concept as an approach to reduce investor risk is novel. Anticipatory preemptive reform contradicts the classic crisis-driven approach to regulatory reform, and propones that regulation can predict that financial calamities will occur, based on past financial history. Thus anticipatory preemptive regulation would place the onus on the regulator to anticipate the consequences of systemic risk and, indirectly, investor risk.

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that the superheroes are mysterious, but that they believe themselves above the law and humanity itself, which they arrogantly police. The story ultimately concludes that superheroes are just as fallible as men, and it is their arrogance, their failure to understand their own beliefs, which leads to the death of countless many, and the loss of humanity's soul. Here the analogy is to the SEC, where it is not that they believe themselves mysterious, but like the superheroes in the Watchmen, they believe themselves to be above the law. When the SEC's actions place the safety of investors' trust in regulatory enforcement in jeopardy, and SEC's failure to understand systemic and investor risk, the SEC's actions will also lead to a death: that of investor protection.

176. *See* Schwarcz, *Complexity*, *supra* note 5, at 216-36.

177. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C.A. §78a (West).

178. *See* Cunningham & Zaring, *supra* note 19, at 71-74 (discussing the concept in relation to former United States Treasury Secretary Henry Paulson's preemptive regulatory blueprint ("Paulson's Blueprint") for the 2008 crisis).

In the age of mega Ponzi schemes,[179] market instability,[180] and pension plan explosions,[181] there is a strong need for investor advocacy. It is needed now more than ever. What exactly does the functional[182] term "investor advocacy" mean? Does it address the age old question of "[h]ow can and should we regulate our economic affairs in light of [economic] ignorance?"[183] Dodd-Frank and the creation of the OIA were meant to answer these questions. One of the stated goals of the OIA is the identification of areas in which retail investors could benefit from regulatory change.[184] What is not specified is whether the regulatory change contemplated to advise retail investors on was a change in the regulation (rules), the creation of a new regulatory philosophy (process), or a change in the regulatory body itself (structure), or all of the above.[185] Dodd-Frank, by creating the OIA, introduces a small shift towards regulatory reform. Although incremental regulatory reform is good,[186] it does not go far enough to protect investors.[187] What is needed is anticipatory preemptive regulatory reform.[188] If the current structure of the OIA must be maintained, then allow it to adopt an anticipatory preemptive reform model where it would advocate a function-over-form approach to regulatory advocacy.[189] This approach rejects the traditional fragmented crisis-response regulatory model.

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179. *See, e.g.*, Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1. *See generally* Miriam A. Cherry & Jarrod Wong, *Clawbacks: Prospective Contract Measures in an Era of Excessive Executive Compensation and Ponzi Schemes*, 94 MINN. L. REV. 368 (2009).

180. *See, e.g.*, Holly M. Sanders, *Bloomberg LP Braces for Terminal Hits*, N.Y. POST (Sept. 16, 2008, 7:06 AM), http://www.nypost.com/p/news/business/item_Qxgwv4Ls47Xt3Kr1B1s86O;jsessionid=C36737E52B7396375431D7373ED475E3; Louise Story, *Wall Street Report Tries to Dissect Financial Meltdown*, N.Y. TIMES (Aug. 6, 2008), http://www.nytimes.com/2008/08/07/business/07report.html?scp=20&sq="market+instability"&st=nyt.

181. *See generally* Jonathan Barry Forman, *Funding Public Pension Plans*, 42 J. MARSHALL L. REV. 837 (2009).

182. *See* Francesco Parisi & Jonathan Klick, *Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking*, 79 CHI.-KENT L. REV. 431 (2004).

183. *See* Brett H. McDonnell, *Of Misses and Min(sky): Libertarian and Liberal Responses to Financial Crises Past and Present*, 34 SEATTLE U. L. REV. 1279, 1281 (2011).

184. *See* 156 CONG. REC. S4069 (daily ed. May 20, 2010) (statement of Sen. Akaka).

185. Congressional intent is silent as to what is meant by this stated goal of the OIA. *See id.; see also supra* Part II.

186. *See* Cunningham & Zaring, *supra* note 19, at 29 (expounding the virtues of incremental regulatory reform).

187. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 212 (stating that the SEC lacks the expressed authority to manage systemic risk by trying to restrain the increasing nature of complex securities or transactions); *see also* Goldstein v. SEC, 451 F. 3d 873 (D.C. Cir. 2006).

188. *See* Cunningham & Zaring, *supra* note 19, at 71-74.

189. *See* Cunningham & Zaring, *supra* note 19, at 71-74 (describing the Secretary of Treasury Henry Paulsen's Blueprint ("Paulsen's Blueprint") which adopts an anticipatory

According to Cunningham and Zaring,[190] the features of an anticipatory preemptive regulatory reform model are: (1) regulation during prosperous and/or calm economic conditions; (2) which is presented before a clear need for reform has been articulated by the market; (3) where regulatory innovation or renovation may or may not be proportionate to an anticipated crisis; (4) is not drafted in response to any manifest urgency; and (5) could suggest a revision or even elimination of regulatory agencies which seem to have redundant authorities and missions.[191] What emerges is a clear, un-fragmented, non-crisis driven regulatory scheme. An anticipatory preemptive reform model is not cobbled together because of the urgent need to react to a pending crisis. Instead, it is given the time to be thoroughly vetted, where objectives are established, options and alternatives are presented, consequences are analyzed to see whether or not the measure decreases systemic and/or investor risk, and decisions are made without the restraint of a rigid crisis response timeframe.

Critics argue that "comprehensive reform is not something for prosperous financial times."[192] Others endorse that an *ex ante* approach, such as an anticipatory preemptive model, can be a means to prevent economic panic which may trigger systemic risk.[193] What makes the anticipatory preemptive model work is, unlike the crisis-driven approaches, a preemptive approach assumes that because of financial innovation, securities will continue to be more and more exotic, markets will increase in complexity, and the need for regulation is a constant response, and not a variable response, of the market. Thus, the function of an anticipatory preemptive regulatory scheme is to take the constants in the market and to formulate regulation accordingly.[194]

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preemptive regulatory approach rather than the traditional crisis response regulatory model). *But see* Schwarcz, *Systematic Risk*, *supra* note 13, at 212 (stating that the SEC lacks the expressed authority to manage systemic risk by trying to restrain the increasing nature of complex securities or transactions).

190. *See* Cunningham & Zaring, *supra* note 19, at 49-56.

191. *See* Cunningham & Zaring, *supra* note 19, at 71-74. The elements were derived from the authors' observations of the preemptive nature of Paulsen's Blueprint.

192. *See id.* at 73 (citing Stuart Banner & Larry Ribstein's conclusion regarding the benefits of crisis-driven regulatory reform); *see, e.g.,* Banner, *supra* note 172; Ribstein, *supra* note 172, at 79-83.

193. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 214-18.

194. *See* Schwarcz, *Systematic Risk*, *supra* note 13, at 217 ("[R]egulation intended to avert panics should attempt to take into account what it is beyond the triggering events that sorts the magnitude of the consequences and should apply only to deter panics that trigger large consequences.").

B. Modified Proposal – An Independent Regulatory Body

The establishment of the OIA could combat the regulatory capture of the SEC and go towards a notion of an independent government regulator.[195] Although housed in the SEC, the OIA reports directly to Congressional committees.[196] Unbiased advocacy for investors requires this independent management. Investors need a voice in securities regulation. The OIA could be that voice. As mentioned above, the conflict which exists in housing a quasi-independent office within a government regulator begs several questions. Will it be effective? Is it really independent? Will investors have a right through the OIA to criticize actions taken by the SEC if the investors feel that the SEC is not doing enough to protect them from reported or known fraudulent activity?[197] And more importantly, will the OIA act on the investors' complaints about the SEC? Alternatively, housing the OIA in the SEC may allow investors the direct access, and an opportunity for their complaints to be heard by the SEC. On the other hand, it may cause the OIA to be less critical of the SEC because of its proximity.[198] Perhaps the OIA, by sharing the SEC's lunchroom and parking garage, will be invited to SEC events and parties, and will therefore become just as guilty as the SEC staff-personnel who attended Bernie Madoff's niece's wedding.[199] The cozy environment at the SEC might be too cozy, and when you're so cozy with the SEC, who cares about the investors?

Pundits will argue that the OIA increases the already bloated bureaucracy of the federal government. Yet, the current structure of the SEC, whose main objective is regulating and enforcement, leaves little

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195. *See* Kuster, *supra* note 79, at 266; *see also* Omarova, *Rethinking the Future*, *supra* note 20, at 705 (asking the very questions necessary to consider in the creation of a new self-regulatory financial body); *see generally*, Cohan, *supra* note 123 (expounding the premise that due to regulatory capture the SEC should be scraped and redesigned over again).

196. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78d(g)(6) (2006).

197. One of the primary purposes of the OIA is to assist investors with resolving problems they may have with the SEC or another self-regulatory organization. *See* 15 U.S.C. § 78d(g)(4) (West 2011). Yet the provision does not create any causes of action for retail investors and it is somewhat vague as to the powers of the OIA ombudsman and how he or she will handle investor complaints. *See generally* Roberta Karmel, *The Future of the Securities and Exchange Commission as a Market Regulator*, 78 U. CIN. L. REV. 501 (2009) [hereinafter Karmel, *SEC*] (advocating a merger of the SEC with the Commodities Futures Trading Commission).

198. *See* Tiabbi, *supra* note 124 (criticizing the laissez-faire nature of the SEC in terms of its securities investigation and record keeping); *see generally* Karmel, *SEC*, *supra* note 27, at 508-10.

199. *See* Steve Fishman, *The Monster Mensch*, N.Y. MAG. (Feb. 22, 2009), http://nymag.com/news/businessfinance/54703/.

room for investor protection.[200] Since more investors have lost more money per capita than in any other time in market's regulatory history, the regulatory focus has been one of caveat emptor, and not of protecting the investor or policing the market. An independent agency whose sole purpose is to advocate the retail investor's interest will accomplish more because it will not be distracted by regulatory or enforcement considerations which pervade the SEC.

C. An Investor-Centered Ideal – A Normative Shift in Regulation[201]

A discussion of the normative shift in regulation invites a conversation of what would be the most radical approach to investor protection, and the increased complexity of financial securities.[202] This is just the starting point of a discussion, the scope of which is outside the focus of this paper, but the basic concept is relevant here because the idealized purpose of securities regulation is protecting investors and decreasing systemic risk.[203] The SEC has utilized various regulatory approaches in an effort to achieve these goals. The creation of the OIA is driven by the idealized regulatory purpose, where investor protection through advocacy would be expounded.[204] Yet, the OIA lacks the necessary impetus, either in conception or potential execution, to stay the course.[205] The creation of the OIA, and that of the Dodd-Frank Act, does not go far enough in regulatory reform to anticipate and adjust for the effects of future market risk on investors.

When first created, the actual purpose of the securities laws was not investor protection, but market efficiency.[206] Ninety years ago, investors faced the same issues of information asymmetry, financial innovation, and systemic and investor risk that are now being discussed by legal scholars.

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200. *See* Goshen & Parchomovsky, *supra* note 33, at 713; *see also* discussion *supra* Sec. III.C.

201. *See* Omarova, *Dodd-Frank*, *supra* note 5, at 97 n.48.

202. *See* Omarova, *Dodd-Frank*, *supra* note 5, at 97 n.48 (stating that "Congress could have imposed explicit limits, or even outright prohibitions, on certain derivative transactions, based on their riskiness from a systemic perspective. Thus one such alternative approach would be mandatory pre-approval of OTC derivative instruments, which would effectively put the regulators in the position to decide what level of risk is socially acceptable, as a matter of public policy. Regardless of their desirability or potential effectiveness, such measures would have signaled a significant normative shift in the regulatory process."); *see also* Omarova, *Rethinking the Future*, *supra* note 20, at 701-05 (calling for a normative shift in the self-regulation of the financial industry).

203. *See* Goshen & Parchomovsky, *supra* note 33, at 713 (stating that the widely accepted assumption that the securities regulation is a consumer protection law is false).

204. *See supra* Part II.

205. *See supra* Part II.

206. *See* Goshen & Parchomovsky, *supra* note 33, at 713. *But see* Black, *supra* note 49, at 336 (stating that one of the purposes is to provide better information to investors).

The original Ponzi scheme, created by Charles Ponzi, was orchestrated in the early 1920s, and the information asymmetries and unaccounted financial innovations were to his benefit, of which he took full advantage. Almost ninety years later, Bernie Madoff took advantage of the information asymmetries and unaccounted financial innovations, much like Charles Ponzi, to achieve his own scheme.

Fraud is always fraud. Securities fraud is always securities fraud. Over a time span of ninety years, Ponzi schemes have occurred, from the 1920s to today, because financial products have become so complex that they are incomprehensible. The complexity of derivatives, swaps, hedge funds, and the like have made it virtually impossible for retail investors to get a grasp of not only what the products are, but also how to invest in them. Financial innovation is a given, a constant. Like string theory in physics, not all scientific and financial innovations need to be accepted. There must come a point when some financial innovations fall off the range of being accepted by the market, and thus not are not presented to retail investors for trading. Just because a trader designed a new financial product, it does not mean investors should be allowed to trade in a product that has no market utility, and actually increases investor risk. CDOs were such a product. The only purpose of CDOs, in the end, was to make a profit for the trader. Their market utility had little to no value, and was one of the causes of the downfall in the economy in 2007-2009.[207] Similarly, the risks to investors, masked by the rating agencies high assessments of CDOs, were astronomical.[208] There should be a limit to the degree by which the system can accept such products from being traded. Yes, financial innovation will continue to exist, but not all financial products are made the same.

Second, ideally securities regulation desires to decrease systemic risk, investor risk, or both. Unlike the original incarnation of the Securities Exchange Act, subsequent amendments have tried to patch the holes of securities fraud. Whether by the use of cost-benefit analyses, empirical studies, or what I advocate in this Article, an anticipatory preemptive based model, and a debate on the normative shift in regulatory reform, financial regulation ought to be a shield against fraudulent activity.

Regulation can be a catalyst to market efficiency. Complex transactions, like complex securities, are a constant in the market. There will always be a desire to structure a transaction in answer of a financial nuance. Systemic risk as a variable can be manipulated, either up or down. Prohibition of certain transactions can act as an advancement in market efficiency because certain complex transactions may disrupt the flow of the market. Complex transactions are like boulders on a riverbank. They can

207. *See* Sjostrom, *supra* note 110, at 959-60.
208. *See generally* Dennis, *supra* note 113.

either stay on the bank or fall into the river. When boulders fall into the river, they can divert the stream of water. When rivers divert, flooding occurs. The increased systemic risk of a diverted river causes flooding on dry land. Here, complex transactions, like boulders diverting a river onto dry land, can be limited or prohibited from causing an increase in systemic risk. Regulation and the prohibition of complex transactions from falling into the stream of financial commerce can be a means of decreasing systemic risk.

The fundamental flaw in current regulatory scheme is its narrow scope, and its lack of a true investor-centered approach.[209] An investor-centered approach to regulation should allow for individual choice of financial products while at the same time limiting the choice of financial products and/or explicitly prohibiting certain securities transactions from occurring.[210] Thus, the normative shift in regulation would refocus the OIA to advocate on behalf of investors by shifting the regulatory center in its execution away from purely market efficiency to one of the idealized concept of investor protection.

CONCLUSION

Given that the Dodd-Frank Act was recently passed, the net benefits of the OIA will not be known or seen for a number of years. There must be further analysis in the future to determine if the OIA has been a benefit or detriment to investor protection.

The fragmented regulatory philosophies of disclosure, investor regulation, and the Dodd-Frank approach to regulatory advocacy place the burden on the investor to protect themselves from ills in the market. Regulation by advocacy, as proposed in the Dodd-Frank Act, does not give the OIA enough authority to truly advocate on the investor's behalf. A revised OIA could shift the burden from the investor and self-help, to the OIA and investor advocacy, where the OIA can regulate from a position of strength.

Furthermore, the OIA's current structure may not survive the ever-increasing complexity of the stock market and financial products, unless it is modified. Increased complexity of financial securities and securities transactions may be factors which widen the chasm of obstacles that impede the OIA's ability to achieve its goals. Another may be the OIA's placement within the SEC, which may cause the OIA to fall victim to its surrounding environment because of the regulatory capture of the SEC. A better designed OIA, one that is both independent, and advocates preemptive

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209. *See* Omarova, *Rethinking the Future*, *supra* note 20, at 701.

210. *But see* Barnard, *supra* note 8, at 229 (stating that certain investors, such as the elderly, should not be making investment decisions).

regulation, could protect investors now and in the future. An anticipatory preemptive approach would shift the nature of the OIA from strictly advisory to one of regulatory advocacy. Furthermore, an independent OIA, which reports directly to Congress and is not housed at the SEC, would be able to advocate for, and protect retail investors against, not only the market, but also the abuses of the SEC.