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RETHINKING U.S. INVESTMENT ADVISER REGULATION

ANITA K. KRUG[†]

INTRODUCTION

Although the U.S. Investment Advisers Act of 1940[1] (the "Advisers Act") was not at the center of the post-financial crisis regulatory reform that culminated in the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] ("Dodd-Frank" or "Dodd-Frank Act"), it was certainly part of the reform effort. In particular, Dodd-Frank amended the Advisers Act—the federal statute that regulates investment advisers and their activities—in a manner intended to address the ways in which privately-offered funds, particularly hedge funds, may have exacerbated the financial crisis. The primary regulatory concern, whether valid or not, was that, given the magnitude of assets invested in hedge funds and hedge funds' penchant for pursuing certain types of risky investment activities, such as taking positions in credit default swaps, those funds potentially helped create systemic risk.[3] Arguably, Dodd-Frank was about nothing if not mitigating systemic risk.

And so lawmakers set about to bolster "hedge fund regulation." They did so, ultimately, by effectively stapling various hedge fund-related provisions to the Advisers Act, notwithstanding that that statute theretofore contained nary a mention of hedge funds. In broad strokes, as a result of Dodd-Frank's amendments and the Securities and Exchange Commission's (the "SEC") rulemaking under Dodd-Frank, investment advisers who manage hedge funds are required to

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1 15 U.S.C. §§ 80b-1 to -21 (2012).

2 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

3 *See* Edmund L. Andrews & Louise Story, *Geithner To Outline Major Overhaul of Finance Rules,* N.Y. TIMES, Mar. 25, 2009, http://www.nytimes.com/2009/03/26/business/economy/26regulate.html?dbk.

become registered with, and regulated by, either the SEC or the relevant state regulatory authorities.[4] That result is, in large part, a product of Dodd-Frank's elimination of an exemption from SEC registration on which, prior to Dodd-Frank, many advisers to hedge funds had relied.[5] In addition, most advisers managing enough assets to be required to register with the SEC are now required to submit to the SEC periodic reports containing a wide range of information about the funds they manage, including those funds' investment activities and portfolio holdings.[6] The SEC, furthermore, is authorized to share that information with the newly-created Financial Services Oversight Council.[7]

Now, in the aftermath of Dodd-Frank's enactment and the SEC's associated bout of rulemaking, one might think that the Advisers Act's regulatory regime is a workable and effective one, equipped to address—and address efficiently—the investor-protection risks that the twenty-first-century investment adviser industry produces. In fact, however, Dodd-Frank did not touch—and, indeed, Dodd-Frank's crafters indicated no awareness of—many of the Advisers Act's longstanding troubles. Additionally, the changes Dodd-Frank brought about have their own considerable deficiencies. As this Article contends, the U.S. investment adviser regulatory regime, now seventy-four years old, is in need of more than a few statutory amendments and new SEC rules. For the sake of the investor-protection goals of securities regulation, the promotion of market integrity, and regulatory efficiency, U.S. investment adviser regulation needs to be rethought and reformed. Focusing both on longstanding and new regulatory weaknesses, this Article highlights five grounds for that conclusion.

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[4] *See* 15 U.S.C. §§ 80b-2(a)(29), -3(b), -3a(a); 17 C.F.R. §§ 275.203A-1, -5 (2013).

[5] *See* 15 U.S.C. § 80b-3(b)(3).

[6] *See id.* § 80b-4; 17 C.F.R. § 275.204(b)-1(a).

[7] *See* 15 U.S.C. § 80b-4(b). In addition, those larger advisers, by AUM, who manage only hedge funds and therefore may rely on an exemption from SEC registration—until those funds' collective assets reach $150 million—must nonetheless report certain types of information with the SEC and comply with certain other requirements under the Advisers Act. *See id.* § 80b-3(m); 17 C.F.R. § 275.204-4.

I. REGULATION EXEMPTIONS

The shortcomings of the U.S. investment adviser regulatory regime begin with the rules dictating who must become registered as an investment adviser and who may avail themselves of an exemption from registration—and, therefore, regulation by the SEC. Prior to the regulatory changes that the Dodd-Frank Act effected, things were rather simple in that regard. In particular, an investment adviser that had in excess of twenty-five million dollars under management and at least fifteen "clients" had to become registered.[8] Those advisers that managed the threshold amount of assets but that had fewer than fifteen clients were generally exempt from SEC registration.[9] Advisers who had assets under management ("AUM") below twenty-five million dollars were generally prohibited from becoming registered with the SEC, based on Congress's judgment that such smaller advisers reasonably fell within state, rather than federal, regulatory jurisdiction.[10]

The rationale for the client-based exemption was that an adviser that provides its investment advice only to a very small number of clients creates no particular threat to the regulatory goal of ensuring the integrity of the securities markets and arguably creates only a de minimis concern for the goal of protecting investors. As many readers might recall—and as Part II elaborates further—the fewer-than-fifteen-client exemption came to create fairly substantial regulatory concerns once hedge funds and other private funds came to dominate investment advisory services.[11] That complication aside, and as discussed below, an exemption based on client count generally seemed to be a reasonable one. However, the long and rocky reform process that led to the Dodd-Frank Act would not countenance the client-

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8 *See* 17 C.F.R. § 275.203(b)(3)-1(a)(2)(i) (removed 2011). Even if an adviser met those requirements, it was nonetheless required to become SEC-registered if it satisfied certain other conditions, such as if it managed a mutual fund or other registered investment company. *See* 15 U.S.C. § 80b-3a(a)(1)(B).

9 *See* 15 U.S.C. § 80b-3a(a)(1)(B).

10 *See id.* § 80b-3a(a). Any such smaller adviser may or may not have had to register with the relevant states, depending on the particular states' regulatory regimes.

11 That concern is evidenced by the so-called "hedge fund registration rule" that the SEC adopted in 2004, *see* Registration Under the Advisers Act of Certain Hedge Fund Advisers, 69 Fed. Reg. 72,054, 72,057–58, 72,070 (Dec. 10, 2004) (codified at 17 C.F.R. pts. 275, 279), which the District of Columbia Circuit Court of Appeals vacated in 2006, *see* Goldstein v. SEC, 451 F.3d 873, 880–81 (D.C. Cir. 2006).

based exemption's survival.[12] Eliminating the exemption, of course, was only one of the myriad changes that Dodd-Frank and the associated SEC rules made to the Advisers Act's regulatory scope.[13]

The Dodd-Frank amendments, at their core, were designed to more effectively regulate investment advisers to private funds—hedge funds, in particular—and the particular risks to systemic stability that hedge funds were seen to be creating. Toward that end, the amendments expressly acknowledge that some advisers may manage hedge funds, while others do not, and tailor the Advisers Act's newly reformulated registration exemption accordingly. Post-Dodd-Frank, an adviser managing between $25 million and $100 million in assets may not register with the SEC unless the adviser would not otherwise be subject to regulation by a state authority.[14] Investment advisers with less than $25 million in AUM generally may not register with the SEC, regardless of what the relevant state requirements might be.

One hundred million dollars, then, is the new asset-based threshold for SEC registration. However, pursuant to a rule that the SEC adopted under Dodd-Frank, an adviser that manages only private funds need not become registered with the SEC if its AUM is below $150 million—again, as long as the adviser is otherwise subject to regulation by the relevant state or states.[15] So, for example, an adviser that manages one hedge fund with three investors and, separately, the assets held by three individuals in three separate brokerage accounts is subject to the $100 million threshold. However, if those individuals instead placed their account assets in the hedge fund, the $150 million threshold would apply. The amendments and new rules contain

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[12] *See, e.g.*, Gillian Tett, *Dodd Frank's Long-Distance Paper Chase*, FIN. TIMES (Oct. 28, 2011, 5:27 PM), http://www.ft.com/intl/cms/s/0/1d6d6808-009a-11e1-ba33-00144feabdc0.html#axzz2QSwtPBey (discussing the "sheer complexity and opacity of the reform process").

[13] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 401–419, 124 Stat. 1376, 1570–80 (2010).

[14] *See* 15 U.S.C. §§ 80b-2(a)(29), -3(b), -3a(a); 17 C.F.R. §§ 275.203A-1, -5 (2013).

[15] *See* 15 U.S.C. § 80b-3(m)(1); 17 C.F.R. §§ 275.203(m)-1. However, as noted, these advisers are still required to report information to the SEC regarding the funds they manage. *See supra* note 7.

substantially greater complexity than this brief description suggests, but these are the important components for present purposes.

If the objectives of investment adviser regulation remain primarily to protect investors and promote market integrity, while encouraging innovation and a robust securities market, then the new exemption regime seems ill-suited to further regulatory objectives. Arguably, there continues to be a de minimis level of investment advisory activity, regardless of the amount of assets involved, that does not call for regulatory oversight in the form of investment adviser registration and regulation. However, as the description above suggests, the Dodd-Frank amendments fail to make such a distinction—nor do they even try—save to specify that advisers managing only private funds may remain unregistered until they reach the $150 million AUM threshold. Rather, all investment advisers with greater than $100 million—or $150 million, as the case may be—under management must become registered and be substantively regulated, even if they have only a very small number of clients. That approach may constitute excessive regulation, causing inefficient and poor use of regulatory resources, and, moreover, is inconsistent with the approach the SEC has pursued under the Securities Act of 1933 (the "Securities Act")[16] and its exemption from registration for securities offerings that are "non-public."[17] Under one of the safe harbors set forth in Regulation D under the Securities Act, for example, a securities offering remains exempt from SEC registration if all but thirty-five of the offerees meet certain financial qualification thresholds, provided the issuer complies with a few other requirements.[18]

A better approach for amending the Advisers Act would have been to continue with a client-based exemption, perhaps one that aligns with the securities laws' private placement exemption. That is, if, prior to the financial crisis, an exemption from registration based on the number of clients an adviser advises was reasonable, there is no apparent basis—whether arising from the financial crisis or otherwise—for concluding that such an exemption has become unreasonable. Indeed, there are good arguments not only for continuing that exemption but for

[16] *See* 15 U.S.C. §§ 77a-77aa.
[17] *See id.* § 77d(a)(2).
[18] *See* 17 C.F.R. §§ 230.501–.508.

expanding it such that an adviser with considerably more than fourteen clients may remain exempt from registration so long as those clients meet specified wealth or sophistication tests.

To be sure, as noted, Dodd-Frank allows a limited exemption for those advisers that manage only private funds.[19] That exemption, however, is wrong-headed because it disregards the nature of private funds. Private funds may be thought of as an aggregation of clients—a pooling of those who might otherwise have engaged an adviser directly but instead invested in a fund that the adviser manages. A simple example illustrates the concern: Our adviser noted above who manages a small private fund with very few investors and, separately, three individuals' brokerage accounts cannot avail itself of the limited exemption, whereas an adviser managing only private funds but with thousands of investors—would-be clients—in those funds could avail itself of the exemption. Viewed in that light, for purposes of exemptions under the Advisers Act based on the number of clients an adviser has, separate account clients and private fund investors should have the same status. Each of them, in other words, should count. In ignoring both this circumstance and the pointlessness of requiring those advisers with only a small number of clients and/or fund investors to become registered, Congress and the SEC squandered an opportunity to make the Advisers Act more coherent and regulation more efficient.

II. HEDGE FUNDS AND OTHER PRIVATE FUNDS

A second weakness of the current U.S. investment adviser regulatory regime is—perhaps surprisingly—its failure to adequately address the growth and continued prevalence of private funds.[20] These are pooled investment vehicles, such as hedge funds, venture capital funds, and private equity funds, to name a few, that are exempt from registration with the SEC under the U.S. Investment Company Act of 1940[21] (the "ICA"). That exemption distinguishes these funds from mutual funds and

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[19] *See supra* note 15 and accompanying text.

[20] To be sure, notwithstanding the growth of private funds, many investment advisers do not manage any, focusing instead on, for example, managing "separate accounts" on behalf of individual or institutional clients or advising clients on a non-discretionary basis.

[21] The exemption is a product of the ICA's exclusion of those funds from the statute's definition of "investment company." *See* 15 U.S.C. § 80a-3(c).

other publicly-held funds, which are so registered and, therefore, must comply with the ICA's substantive provisions.[22] The problems with investment adviser regulation, insofar as private funds are concerned, are a product of the fact that the Advisers Act did not expressly contemplate private funds at the time of its enactment, and regulators' later attempts to address them have created piecemeal, patchwork legislation and rules that render the Advisers Act, taken as a whole, less than effective in addressing the regulatory concerns that private funds create.[23]

This author has articulated several of these problems elsewhere.[24] For example, once private funds came onto the scene, over time lawmakers and regulators formulated a doctrine under which the private funds that an adviser manages—rather than the private funds' myriad investors—are deemed to be the adviser's "clients" and, therefore, the subject of the Advisers Act's protections.[25] That doctrine makes little sense when one considers that private funds' origins lie in their role as a mechanism of convenience, to facilitate an adviser's management of the assets of smaller would-be clients.[26] It also, and more problematically, creates anomalies that militate against the Advisers Act's investor protection objectives.[27]

Specifically, the doctrine's implications for those objectives is a product of the sorts of protections the Advisers Act provides. Consistent with the U.S. securities laws generally, the Advisers Act seeks to protect advisory clients through, among other things, requiring that advisers make certain types of disclosures to their clients.[28] Moreover, given that an adviser is a fiduciary to its clients, the Advisers Act's anti-fraud provisions are to be given a broad, remedial construction, rather than a narrow,

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[22] *See id.* §§ 80a-1 to -64 (identifying the numerous provisions of the ICA).

[23] *See* Anita K. Krug, *Institutionalization, Investment Adviser Regulation, and the Hedge Fund Problem*, 63 HASTINGS L.J. 1, 15–17 (2011) [hereinafter Krug, *The Hedge Fund Problem*].

[24] *See id.* at 28–31; Anita K. Krug, *Moving Beyond the Clamor for "Hedge Fund Regulation": A Reconsideration of "Client" Under the Investment Advisers Act of 1940*, 55 VILL. L. REV. 661, 672–79 (2010) [hereinafter Krug, *Moving Beyond the Clamor*].

[25] *See* Krug, *The Hedge Fund Problem*, *supra* note 23, at 28–31.

[26] *See* Krug, *Moving Beyond the Clamor*, *supra* note 24, at 690–91.

[27] *See id.* at 672–79.

[28] *See* 15 U.S.C. § 80b-6(3) (2012); 17 C.F.R. § 275.206(4)-3(b) (2013); Krug, *The Hedge Fund Problem*, *supra* note 23, at 27 n.120.

technical one.[29] That, in turn, means that, for an adviser to be in compliance with those provisions—in other words, for it to avoid being deemed to have deceived or misled clients—the adviser's disclosures to its clients regarding its activities and services must be similarly broad and encompassing.[30] A second regulatory tool of the Advisers Act is to require advisers to obtain client consent before engaging in certain types of activities, such as those as to which the adviser's interests may be seen as adverse to its clients' interests.[31]

When the private fund that an adviser manages, rather than the fund's investors, is the "client," then it is the fund—and not its investors—that is formally entitled to receive the adviser's disclosures and to provide or not provide consent to the adviser's proposed conflict-of-interest transactions. That might not be problematic if the fund's representatives or spokespersons were trustees of or fiduciaries as to the investors' interests. In fact, however, it is very often the case that the adviser itself controls and speaks for—and consents on behalf of—the fund, whether as a formal matter or as a de facto one.[32] The fund, after all, is typically the adviser's creation—again, a mechanism of efficiency in the adviser's management of numerous investors' assets. This doctrine remains intact in our post-Dodd-Frank world.[33]

That the SEC and Congress, combined with the courts, adopted the doctrine evinces a regulatory focus on the "thing" whose assets the adviser actually deploys for investment in securities and other instruments. In this case, as in many, the thing is an entity, one whose boundaries regulation does not look beyond to discern the substance of the relationship between a private fund's investors and the fund's adviser. It is a manifestation of entity-centrism in securities regulation—or, in other words, the tendency of laws and regulations to give undue weight to discrete entities based on an apparent assumption that each entity is an isolated whole, independent of relationships that further define it and that are constitutive of it.

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[29] *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

[30] *See id.* at 196–97.

[31] *See* 15 U.S.C. §§ 80b-5(a), -6(3) (2012).

[32] *See* Krug, *Moving Beyond the Clamor*, *supra* note 24, at 673.

[33] *See id.*

Indeed, we might see that tendency in a second substantive problem with the Advisers Act's approach to regulation of advisers to private funds. That problem centers on the fact that many advisory firms are not themselves stand-alone entities but, instead, are part of a group—be it large or small—of affiliated entities. That may be because a financial enterprise provides various types of financial services—for example, investment advice, broker-dealer services, and insurance. In those cases, it is at least reasonable for each type of service provided to be housed in a separate entity, if only for liability limitation and risk management purposes. However, in the investment advisory arena, it is also not at all unusual for advisers who manage private funds to create multiple entities devoted to the advisers' private-fund advisory activities. In those situations, the investment advisory firm itself comprises multiple entities.

Most commonly in such circumstances, the entity that formally serves as the investment adviser to the private funds—and that is subject to regulation as such—has a merely contractual relationship with the fund, while a second entity, typically with the same ownership as the investment adviser entity, is formed to be the funds' general partner or managing member.[34] The entities' owners may opt for this sort of "split structure" for any of a number of reasons, but a common one is to achieve more favorable tax treatment where, for example, the funds' compensation to the adviser takes the form of a profit allocation or the adviser plans to engage marketers to recruit fund investors.[35] Although this structure is more complex than one in which the investment adviser entity also serves as the general partner, the tax savings to the firm or achievement of other objectives is considered worth the complexity—at least until one considers the regulatory complications the structure has tended to create.

The investment adviser regulatory regime does not, in many respects, contemplate that an investment advisory firm may comprise multiple entities. As a result, although the investment adviser entity is the registered and regulated entity, there

[34] *See, e.g.*, Am. Bar Ass'n Section of Bus. Law, SEC No-Action Letter, 2005 WL 3334980, at *9, *28 (Dec. 8, 2005) (discussing requirements for investment advisers to hedge funds in establishing another entity to serve as a hedge fund's general partner).

[35] *See id.*

necessarily remains the lingering question—one that has caused considerable regulatory handwringing—of whether the general partner entities must also become registered or whether, to the contrary, they need not do so. The rationale for requiring registration is that a general partner entity *does* things that the investment adviser entity would otherwise do, namely receive compensation from the fund that, but for the split structure, the adviser entity would receive. Accordingly, so the argument goes, the general partner entity is subject to the same conflicts of interest as the adviser entity in connection with its operation of the fund—in its capacity as the fund's general partner—notwithstanding that the general partner is not the entity that formally manages the fund's investments. The rationale for the general partner entity's *not* having to become registered is, of course, exactly that: The entity does not provide investment advice, so why should it have to be regulated as an investment adviser, especially since that regulation would be duplicative of the regulation of the investment adviser entity?[36]

Over time, the SEC developed a solution, which, in a nut shell, was to allow the special purpose entity to forego registration as an investment adviser, so long as it both maintained the sorts of books and records that it would be required to maintain if it were registered as an adviser and made those books and records available for examination by the SEC staff to the same extent as the registered entity.[37] State regulators, which are responsible for regulating ever-more investment advisers as a result of the Dodd-Frank Act's amendments to the Advisers Act,[38] have remained considerably more flummoxed, in some cases evincing little understanding of the rationale for split structures and extreme skepticism about the SEC's compromise approach. The result has doubtless been to cause split-structure investment advisory firms to bear substantially greater regulation-related expenses and to confront substantially greater regulatory obstacles than what need be the case. That, in turn, highlights once again how investment adviser regulation is unduly focused on entities and entity-separation, at the expense of addressing firms' substantive

[36] *See id.*
[37] *See id.*
[38] *See supra* notes 13–14 and accompanying text.

activities and the risks those activities create. Accordingly, it also highlights another way in which investment adviser regulation could be improved.

III. ADVISERS TO PUBLICLY-OFFERED FUNDS

As the previous Part discusses, U.S. investment adviser regulation remains poorly suited for the regulation of investment advisers managing private funds. That is, in part, a product of the fact that private-fund-specific regulation is essentially tacked on to the original regulatory structure. Unlike private funds, publicly-held funds, such as mutual funds, were well within Congress's view at the time it enacted the securities statutes and, also unlike private funds, are subject to their own separate and complex regulatory regime, namely that established by the ICA.[39] Nonetheless, investment adviser regulation is likewise problematic in its coverage of investment advisers to public funds.

The ICA was enacted at the same time as the Advisers Act, its companion statute. Whereas the Advisers Act regulates investment advisers, and, therefore, "private fund regulation" is achieved through regulation of *investment advisers* to private funds, the ICA regulates *public funds themselves*.[40] And extensive regulation it is. Among other things, the ICA specifies that each public fund—an "investment company" under the ICA—is to be managed and governed by a mostly-"independent" board of directors,[41] which oversees the investment company's activities, including the investment company's relationships with its investment adviser and its other service providers, such as its administrator, its transfer agent, and its distributors.[42]

The board, moreover, oversees the investment company's compliance with the many substantive requirements set forth in the ICA.[43] Among those requirements are ones governing leverage and investment portfolio composition, which are intended to limit the riskiness of the investment company's investment strategy;[44] transactions between the investment

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[39] *See* 15 U.S.C. §§ 80a-1 to -64 (2012).
[40] *See id.*
[41] *See id.* § 80a-10(b).
[42] *See id*. §§ 80a-1 to -64.
[43] *See id.*
[44] *See id.* § 80a-12.

company and certain of its affiliated persons;[45] and the procedures that must be followed before the investment company may bear distribution expenses.[46] Moreover, the investment company must hold occasional shareholder (investor) meetings for purposes of electing or removing members of the board and approving the investment advisory agreement between the investment company and its investment adviser, as well as weighing in on any other matters that the board may determine to put before the shareholders.[47]

The rationale for such extensive regulation is not difficult to discern. ICA-registered investment companies are public companies,[48] meaning that anyone, including so-called retail—or "unsophisticated"—investors, is eligible to invest in them. The policy judgment behind regulation is that such investors are in greater need of regulatory protection, as compared with private fund investors, who, under Rule 506 of Regulation D, must meet certain financial sophistication thresholds.[49] Certainly that rationale would seem to present little with which to quibble and, indeed, is consonant with the approach to an exemption from investment adviser regulation proposed in Part I. Whether the regulation itself is coherent and effective is a separate question.

Although there are reasons to answer that question in the negative, the analysis is beyond the scope of this Article, focused as it is on the regulation of investment advisers. That very dichotomy, however, reveals the difficulty with investment adviser regulation, insofar as it encompasses investment advisers to investment companies. To put it succinctly—and, perhaps, a bit too colloquially—the ICA and the Advisers Act step all over one another and, together, arguably constitute inefficient and redundant regulation. To see how this is so, we need to think about what, exactly, an investment company is and, more specifically, how it operates.

Many business enterprises are managed by persons that do not actually own an appreciable part of the firm's equity. That state of affairs leads to the classic problem of corporate governance—namely, how to keep managers accountable to

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45 *See* 17 C.F.R. §§ 270.17a-6 to -7 (2013).

46 *See id.* § 270.12b-1.

47 *See* 15 U.S.C. § 80a-15.

48 *See id.* § 80a-1(a)(1).

49 *See* 17 C.F.R. § 230.506.

shareholders or other relevant stakeholders and reduce agency costs.[50] Although investment companies formally have corporate structures, they lack the core relationships—among officers, directors, and shareholders—present within "operating" companies—General Electric, Facebook, Costco, or Starbucks, for example. Rather than governance by a management group internal to the entity, an investment company is effectively governed by a separate firm altogether.[51] In particular, the investment company's operations and investment activities often are largely under the control of its investment adviser, and, similar to a private fund, the investment company typically exists solely by virtue of the investment adviser's decision to create it.[52]

Among other things, the investment adviser typically employs the portfolio managers that manage the investment company's portfolio, selects and negotiates arrangements with the company's service providers, and is primarily in charge of the investment company's compliance with many of its regulatory obligations.[53] To be sure, investment companies are required to have boards of directors who, as noted, are formally responsible for the investment company's governance and regulatory compliance.[54] In practice, however, investment company boards have tended to defer to the wishes of the investment adviser, particularly to the extent that board members lack expertise regarding investment company operations and regulation.[55] In essence, investment companies may be considered less as companies and more as true investment "vehicles," doing really nothing other than facilitating the investment adviser's aggregated management of the assets of numerous discrete investors.

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[50] *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); *see* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 634, 636 (2004).

[51] *See* Jones v. Harris Assocs. L.P., 559 U.S. 335, 338 (2010); Lyman Johnson, *A Fresh Look at Director "Independence": Mutual Fund Fee Litigation and* Gartenberg *at Twenty-Five*, 61 VAND. L. REV. 497, 503 (2008).

[52] *See Jones*, 559 U.S. at 338; Johnson, *supra* note 51, at 503–04.

[53] *See Jones*, 559 U.S. at 338; Johnson, *supra* note 51, at 503–04.

[54] *See supra* notes 41–43 and accompanying text.

[55] *See* A. Joseph Warburton, *Should Mutual Funds Be Corporations? A Legal and Econometric Analysis*, 33 J. CORP. L. 745, 752–53 (2008).

Neither the ICA nor the Advisers Act reflects that circumstance, however. That is evidenced by the statutes' imposition of dual, yet similar, regulatory obligations on both an investment company and its investment adviser. For example, the ICA contains a requirement that the investment company and the investment adviser adopt and maintain a "code of ethics" that is reasonably designed to ensure their respective compliance with applicable laws and to mitigate conflicts of interest that might exist between shareholders, on one hand, and the investment company or its investment adviser or any of their respective "access persons," on the other.[56] For these purposes, the investment adviser's directors and officers may be deemed to be access persons of the investment company.[57] Accordingly, at least some of the investment adviser's personnel may be subject to restrictions set forth in the investment company's code of ethics, including those governing trading and investing in the same securities or types of securities as those in which the investment company invests.

Certainly the regulatory objectives behind the code-of-ethics requirement are sound. As the ICA itself suggests, conflicts of interest in connection with proprietary trades were among the primary problems afflicting the investment company industry at the time the ICA was enacted.[58] Incoherence derives from the fact that, under Advisers Act—as a result of relatively recent changes to the rules under that Act—the investment adviser is *also* directly subject to a code-of-ethics requirement.[59] Yet neither Congress nor the SEC has clearly specified how these separate code-of-ethics requirements relate to one another, why investment advisers to investment companies must comply with duplicative regulatory provisions, or what is the rationale behind requiring certain investment advisory personnel to comply with two separate codes of ethics. A similar question arises as to the ICA's requirement that an investment company have a "chief compliance officer,"[60] given that the rules under the Advisers Act require the same of investment advisers.[61] Moreover, investment

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[56] *See* 17 C.F.R. § 270.17j-1(c) (2013).
[57] *See id.* § 270.17j-1(a)(1)(i).
[58] *See* 15 U.S.C. § 80a-1 (2012).
[59] *See* 17 C.F.R. § 275.204A-1.
[60] *See id.* § 270.38a-1(a)(4).
[61] *See id.* § 275.206(4)-7(c).

companies are required to adopt policies and procedures reasonably designed to prevent, detect, and address possible risks associated with most aspects of their operations,[62] a requirement that is similar to one applicable to investment advisers under the Advisers Act.[63]

This duplication, of course, presumably does not redound to the detriment of investors, nor does it likely have any discernible impact on the market for investment advisers or, for that matter, on the investment company industry. However, the duplication highlights the uneasy fit between the ICA and the Advisers Act, statutes that may be "companions" and that may regulate intertwined fields of activity but that, in many ways, seem distinct and independent from one another. Part of the problem is that investment company regulation may not adequately reflect that an investment adviser is an essential part of what an investment company does. Perhaps, to address the matter, investment adviser regulation should encompass investment company regulation or vice versa. What is clear is that the apparent lack of coordination between the two statutes at least raises the prospect that consolidating the regulatory regimes could lead to greater regulatory efficiency, not to mention greater regulatory coherence.

IV. SPECIFIC RULES VERSUS BROAD STANDARDS

At the risk of painting with too large a brush, one might say that the U.S. securities laws are generally standards-based, rather than rules-based. They are premised, in the name of efficiency, on the goal of informing securities markets participants and, toward that end, require that those who aim to sell securities to, or buy securities from, less-informed counterparties disclose all material information so that, in the transaction, those counterparties will not be unfairly disadvantaged.[64] In other words, eschewing specific rules and procedures for securities markets transactions, the U.S.

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[62] *See id.* § 270.38a-1.

[63] *See id.* § 275.206(4)-7.

[64] *See* Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 330 (1988).

securities regulatory regime pursues its objectives primarily through broad disclosure standards, leaving it to the regulatory subjects to determine how best to meet those standards.

The ICA's approach to investment company regulation arguably constitutes an exception to that basic regulatory approach. As suggested in the previous section, the ICA contains specific requirements,[65] which cover matters ranging from the composition of an investment company's board of directors[66] to the amount of leverage the investment company may use in its investment activities.[67] The list could continue, but the point should be apparent: The ICA, in many respects, does not rely only on generally-phrased disclosure requirements, and, to the extent it mandates disclosure, it does not, for the most part, leave it entirely up to investment companies and their boards to determine what that disclosure should be.[68] Accordingly, the ICA might be said to embrace a rules-based approach, at least in comparison to U.S. securities laws and regulations generally. Perhaps not surprisingly, then, so might the Advisers Act, albeit to a lesser extent.

Whether the securities laws' standards-based disclosure regime is able to achieve its objectives is, at best, open for debate. Certainly there are reasons to be skeptical. Nonetheless, whatever may be the costs or benefits of deploying standards in most securities regulatory contexts, the rules that pervade investment adviser regulation are, for the most part, counterproductive. One difficulty with the sorts of substantive requirements that are reflected in the Advisers Act and the SEC's rules under that statute is that those requirements and rules are so readily overtaken by changes in the subject matter to which they apply. Put another way, the rules' specific, granular requirements are susceptible to becoming incoherent in their application and/or obsolete and, therefore, irrelevant—if not actually harmful—on a net basis. A second difficulty is, perhaps, more singular: Many of the Advisers Act's substantive rules seem not to serve any worthy regulatory purpose. Two examples are illustrative.

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[65] *See supra* notes 41–47 and accompanying text.

[66] *See supra* note 41 and accompanying text.

[67] *See supra* note 44 and accompanying text.

[68] *See* 15 U.S.C. §§ 80a-8, -30 (2012).

Beginning with the Advisers Act itself, as opposed to the SEC's rules, section 205 of that statute requires that certain types of provisions be included in investment advisory agreements entered into by SEC-regulated investment advisers.[69] To begin with, if the adviser is organized as a partnership, the agreement must contain a provision obligating the adviser to inform the client of any change in the adviser's "membership."[70] The SEC, in a "no-action letter," has taken the position that, if the partnership in question is a limited partnership, then the advisory agreement need only contain a provision to the effect that the adviser will notify the client of a change in the adviser's general partner.[71] Apart from presenting the curiosity of requiring certain client notifications through regulating the contents of advisory agreements rather than through directly imposing the obligation, there are a number of difficulties with this provision.

First, one can imagine that a change of a partnership's membership, particularly one involving the general partner of a limited partnership, would be tantamount to an assignment of the agreement, in which case the adviser's fiduciary duties should serve to protect the client. Second, there are myriad circumstances in which a change of a partnership's membership—even one that involves a general partner—might cause no change in the substantive control of the partnership, in which case the notification requirement serves no purpose and is merely one more regulatory item on an adviser's compliance checklist. Third, the requirement, even if it serves a plausible regulatory function, is under-inclusive in its failure to encompass newer types of business associations, such as limited liability companies, and over-inclusive in its failure to acknowledge that, even in *general* partnerships, not every partner is an active participant in the business or significant owner whose departure should trigger the requirement. Yet, year after year, lawyers, in drafting or reviewing the investment advisory agreements of their clients who are investment advisers organized as

69 *See id.* § 80b-5.

70 *See id.* § 80b-5(a)(3).

71 *See* The Ayco Co., L.P., SEC No-Action Letter, 1995 WL 861516, at *1–3 (Dec. 14, 1995).

partnerships, are careful to ensure the provision's presence, as do the SEC examiners in their periodic reviews of those advisers' businesses.

Also under section 205, an investment advisory agreement must provide, in substance, that the adviser will not assign the agreement without the client's consent,[72] a requirement that seems similarly inefficient. Specifically, as most any competent lawyer is aware, agreements often expressly contemplate the possibility that one party may, in the future, wish to assign its contractual rights and obligations and, accordingly, specify whether the counterparty's consent is required for such an assignment. Assignment provisions, in other words, are routine, almost rote, components of agreements. They are, moreover, provisions of which parties to an investment advisory agreement presumably are aware, and those parties should have ample incentives, apart from those imposed by the Advisers Act, to include an assignment provision in their contractual arrangement. More importantly, to the extent the adviser and the client have not meaningfully negotiated assignment terms, then regardless of the agreement's specific language, the adviser presumably would be deemed to be in breach of its fiduciary duties to the client by assigning the agreement without having obtained the client's consent or otherwise in a manner that may be deemed detrimental to the client.[73]

Turning to the SEC's rules under the Advisers Act, there is the advertising rule—rule 206(4)-1.[74] That rule sets forth specific requirements for investment advisers' "advertisements"—

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[72] *See* 15 U.S.C. § 80b-5(a)(2).

[73] Finally, section 205 specifies that no investment contract may provide for performance-based compensation—compensation based on the profit the adviser earns for the client—unless the compensation arrangements meet certain requirements, including whatever requirements the SEC may specify through its rulemaking. *See* 15 U.S.C. § 80b-5(a)(1), (e). Pursuant to that authorization, the SEC, in rule 205-3, requires that the adviser ensure that any client from whom it is to receive performance-based compensation meet the "qualified client" test, meaning that he or she must have a net worth of at least two million dollars or have placed at least one million dollars under the adviser's management. *See* 17 C.F.R. § 275.205-3 (2013). The Dodd-Frank Act requires the SEC to revise these financial thresholds, based on inflation, every few years. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 418, 124 Stat. 1376, 1579 (2010) (providing that, by July 21, 2011 and every five years thereafter, the SEC must adjust for inflation the dollar amount thresholds in rules issued under Advisers Act § 205(e)).

[74] *See* 17 C.F.R. § 275.206(4)–1.

basically any communication regarding an adviser's services or performance sent to more than one person—including, for example, that advertisements may not contain testimonials, that they may not state that an advisory service will be provided free of charge unless it actually is provided free of charge, and that they may not "represent[], directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them."[75] The rule also specifies that no advertisement may contain any "past specific recommendations" that "were or would have been profitable to any person," unless, essentially, the advertisement or a separately-provided list sets forth all of the "recommendations" made by the adviser in the past year.[76]

It is difficult to know where to begin with this rule, as it raises a number of questions that the SEC staff have not definitively answered.[77] The spirit behind the rule is clear: Advisers should not "cherry pick"—that is, they should not mention only profitable trades in their advertisements without also mentioning trades that were unprofitable. However, one substantial challenge for advisers and their counsel has been to understand what is a "past" recommendation, as opposed to a current recommendation or a future recommendation. If an adviser bought IBM stock three months ago, and that stock has appreciated in value, but the adviser has not yet sold it, is IBM a past or a present recommendation? If the adviser bought Google stock on behalf of it clients and expects that the investment will be profitable, is that a past, a present, or a future recommendation? Moreover, and turning to a second thorny component of the rule, was or would that recommendation have been profitable to any person? What if the IBM investment described above was profitable in the first month but then

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[75] *Id.*

[76] *Id.*

[77] The first hurdle is to understand what "recommendation" as used in this rule might mean. One might be inclined to think "recommending" is what happens when an investment adviser suggests that a client make a particular investment or endorses a particular securities transaction. One would be correct in so thinking, but, in this context—and, perversely a few other, but not all, contexts under the Advisers Act—it also encompasses an adviser's discretionary securities transactions on behalf of a client, even where the client has no inkling that the transaction is occurring.

decreased in value to a point below the original purchase price? Can we say the investment was or *would have been* profitable to any person?

These questions are more than academic, as their answers determine whether an adviser is in violation of the SEC's rules. Unfortunately, the SEC staff have been slow and incomplete in their elaboration of the meaning of the rule, and any elaboration that occurs outside of the SEC's sporadic interpretive releases tends to be conservative and restrictive. The fact remains, however, that a core component of an adviser's interactions with its clients is its periodic descriptions of what, exactly, the adviser has done with its clients' assets, what investment opportunities seem ripe for the taking, and what the adviser plans to do going forward. The SEC's too-specific, too-detailed advertising rule, arguably veering from the anti-cherry-picking policy behind it, has often prevented advisers from providing those sorts of disclosures. A prospect worth considering is whether the simple anti-fraud catch-all provision that is also part of the advertising rule could further the rule's policy objectives without hindering investment advisers' performance of their services in their clients' best interests.

V. EXAMINATION AND ENFORCEMENT

Regulations and statutory provisions are only two of the critical components of any regulatory system. Enforcement of those regulations and provisions is another fundamental component. As described below, when it comes to U.S. regulation of investment advisers, a number of factors serve to undermine effective enforcement. Of course, that enforcement measures may be wanting does not necessarily have any implications for the nature and content of the regulation itself. However, there are ways in which better formulated regulation might better serve the goals of punishment, deterrence, and detecting wrongdoing, thereby promoting market integrity and protecting investors.

As is the case for U.S. securities regulation generally, the primary federal enforcement authority for U.S. investment adviser regulation is the SEC.[78] The SEC performs this function

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[78] State regulators may also play a role in enforcement. In particular, pursuant to section 203A(b)(2) of the Advisers Act, state regulatory authorities may bring

in a variety of ways. Investors or others may submit a complaint to the SEC staff regarding a particular investment adviser, and, should the SEC investigate the subject of the complaint, that investigation may ultimately lead to an enforcement action.[79] Alternatively, the SEC may review or monitor securities transactions by market participants, including investment advisers, to detect wrongdoing.[80] For example, it may observe suspiciously-timed trades that indicate that an investment adviser or one of its employees has traded on inside information.[81] If further investigation produces support for that possibility, the SEC may pursue an enforcement action.[82] Finally, the SEC staff, in the course of their periodic examination of an investment adviser's books and records, may find that the adviser or its personnel has materially violated requirements under the Advisers Act or the SEC's regulations thereunder and launch an enforcement action on that basis.[83] Of course, it is also possible for an investment adviser simply to admit to having violated applicable laws and regulations, as was the case with Bernie Madoff.

Enforcement in the investment advisory context has multiple roles. That is, the SEC may bring enforcement actions against an investment adviser for such transgressions as failing to maintain its books and records in the manner required by the recordkeeping rule,[84] charging performance fees to clients that do not meet the SEC's prescribed financial sophistication test,[85] and neglecting to follow procedures the SEC has mandated in connection with paying cash compensation to marketers engaged to solicit new clients.[86] The SEC may also look to punish an investment adviser for arguably more severe activities, such as inappropriately using "soft dollars," which are payments by

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fraud actions against SEC-registered investment advisers. *See* 15 U.S.C. § 80b-3a(b)(2).

[79] *See id.* § 80b-9.

[80] *See id.* § 80b-4.

[81] *See id.*

[82] *See id.* § 80b-9.

[83] *See* John H. Walsh, *Regulatory Supervision by the Securities and Exchange Commission: Examinations in a Disclosure-Enforcement Agency*, 51 ADMIN L. REV. 1229, 1231–32, 1239–40 (1999).

[84] *See* 17 C.F.R. § 275.204-2 (2013).

[85] *See id.* § 275.205-3(a), (d)(1); *supra* note 70 (describing this sophistication test).

[86] *See id*. § 275.206(4)-3(a)–(b).

securities brokerage firms in recognition of brokerage commissions earned from transactions effected by the adviser on behalf of its clients;[87] failing to provide disclosure to clients regarding particular conflicts of interest; or engaging in "style drift"—that is, straying from the investment strategy set forth in the disclosure provided to clients.[88] Finally, the SEC may pursue the most harmful conduct—namely, more blatantly fraudulent activity, in which, for example, an adviser systematically overcharges clients for services rendered or misappropriates client assets for its own uses.[89]

Intuitively, the most important role of enforcement is finding and punishing fraudulent activity that directly harms clients through depleting their assets in a manner that has nothing to do with the adviser's investment advisory function.[90] Most famously, and apart from Charles Ponzi himself, that is Madoff. That is also Arthur Nadel,[91] Samuel Israel III,[92] Nicholas Cosmo,[93] Darren Berg,[94] and many, many others. The conduct of investment advisers who defraud their clients and investors of funds placed in their trust produces harm that is substantially greater than the harm arising from an adviser's sloppy bookkeeping or failure to implement a privacy policy. Quite

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[87] *See* 15 U.S.C. § 78bb(e).

[88] These activities typically constitute breaches of the fiduciary duty an adviser owes to clients, as described by the Supreme Court in Securities & Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191–92, 196–97 (1963).

[89] The Advisers Act contains anti-fraud provisions, *see* 15 U.S.C. § 80b-6, as do the SEC's rules under the Advisers Act, *see* 17 C.F.R. §§ 275.206(3)-1–.206(4)-8.

[90] Generally, that type of fraudulent conduct is a greater possibility where the adviser or one of its affiliates has "custody" of client assets. *See* 17 C.F.R. § 275.206(4)-2(a), (d)(2).

[91] *See* Patricia Hurtado & Bob Van Voris, *Ex-Florida Money Manager Nadel Sentenced to 168 Months in Prison for Fraud*, BLOOMBERG (Oct. 21, 2010), http://www.bloomberg.com/news/2010-10-21/ex-florida-money-manager-nadel-sentenced-to-168-months-in-prison-for-fraud.html.

[92] Reuters, *Hedge Fund Founder Given 20 Years for Investor Fraud*, N.Y. TIMES (Apr. 15, 2008), http://www.nytimes.com/2008/04/15/business/15bayou.html?_r=2&ref=samuelisraeliii&.

[93] *See* Thom Weidlich, *Nicholas Cosmo Receives 25 Years in Prison for $413 Million Ponzi Scheme*, BLOOMBERG (Oct. 14, 2011), http://www.bloomberg.com/news/2011-10-14/cosmo-gets-25-year-sentence-for-scheme.html.

[94] *See* Rami Grunbaum, *Darren Berg Gets 18-Year Sentence for Ponzi Scheme*, SEATTLE TIMES (Feb. 9, 2012, 6:35 PM), http://seattletimes.com/html/businesstechnology/2017465361_meridian10.html.

obviously, such conduct can, and often does, dramatically and permanently adversely impact the clients' livelihoods and, indeed, their lives.

Yet that sort of fraudulent activity is precisely the conduct that, so it appears, the SEC is least equipped to detect and punish. Part of the reason may be that fraud of the worst sorts is nothing if not intentional and, therefore, difficult—very difficult—to detect.[95] Because of that, one might surmise that the SEC would expend extra effort in the service of fraud detection efforts. Perversely, however, although the SEC is very diligent, and largely effective, in detecting whether an adviser has complied with the more technical rules under the Advisers Act, anecdotal observations suggest that, by and large, it has not devoted significant attention to detecting intentionally fraudulent activity. This conclusion arises from the manner in which SEC staff have often used their opportunities to examine what, exactly, an investment adviser—that is, one that is SEC-registered—is doing vis-à-vis its clients and the assets they have placed under the adviser's management.

An SEC-registered investment adviser is subject to the SEC staff's periodic—every three or four years or so—examination of the adviser's books and records.[96] These examinations encompass not only the staff's reviewing the adviser's records but also their interviewing firm personnel.[97] The problem is that the focus of these examinations, which, in some cases, have been conducted by relatively inexperienced personnel, often center on the more technical, compliance-related aspects of the Advisers Act and its rules. The product of an examination, moreover, is usually a deficiency letter that one might characterize as a "fix-it ticket," requiring the adviser to correct its regulatory deficiencies and declare to the SEC that it has done so.[98] Until recently, at least, the staff have made insufficient effort to verify client assets and securities held on their behalf. Once again, Madoff is exhibit one in this regard.

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[95] *See* Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, *Combating Securities Fraud at Home and Abroad* (May 28, 2009), http://www.sec.gov/news/speech/2009/spch052809laa.htm.

[96] *See* Walsh, *supra* note 83, at 1231.

[97] SEC. & EXCH. COMM'N, EXAMINATIONS BY THE SECURITIES AND EXCHANGE COMMISSION'S OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS 24 (2012), *available at* http://www.sec.gov/about/offices/ocie/ocieoverview.pdf.

[98] *See* Walsh, *supra* note 83, at 1238, 1240.

Whatever the Advisers Act's provisions might say and whatever rules the SEC may adopt, investment adviser regulation will not achieve its goals without effective enforcement capabilities and, in particular, the ability to detect advisers' intentionally fraudulent conduct. Nonetheless, it is worth considering whether the nature of the current regulations and, in particular, their favoring technical requirements over broad disclosure standards, might be a distraction in the SEC's enforcement efforts. If SEC staff, in their examinations, are primarily concerned with whether an adviser dotted its "i's" and crossed its "t's" and otherwise complied with the detailed rules to which it is subject—and, arguably, so long as the rules exist, that is, indeed, a legitimate concern—then perhaps we should be neither surprised nor chagrined that detecting truly harmful behavior has apparently been given short shrift.

CONCLUSION: CONSIDERATIONS FOR A BETTER APPROACH

If the U.S. investment adviser regulatory regime is flawed, as this Article suggests, then it is a further question of what might be a better approach. One implication of the concerns this Article has identified is that the U.S. laws and regulations governing investment advisers—and the public and private funds they manage—should be reconceptualized and reformulated from the ground up. After all, those concerns encompass far-ranging problems, including ones associated with the Advisers Act's structure and regulatory scope, regulatory and judicial doctrine based on the statute, and oversight and enforcement under it. Commensurately comprehensive reform, then, is likely in order, and one approach to pursuing it might be to look to other, non-U.S. jurisdictions whose investment adviser regulatory regimes are relatively more modern than their U.S. counterpart.

Success in such reform efforts may not seem particularly unreasonable, considering both the vintage of the U.S. securities laws and regulations and the evolution of the investment adviser industry since their inception. However—and as might be obvious—prospects for reform must be considered in the context of political realities, which counsel that even incremental regulatory changes are likely targets of fierce resistance, depending on whose interests those changes are deemed to adversely affect. As noted in the Introduction, the Dodd-Frank

Act included a number of amendments to the Advisers Act.[99] At least some participants in the reform process that culminated in Dodd-Frank presumably acknowledged the possible need for thoroughgoing changes to the statute. Yet, as noted, the reforms that ultimately came to be were far from comprehensive.[100]

It is worth mentioning one component of some recent reform proposals—namely, the creation of a self-regulatory organization ("SRO") for investment advisers, along the lines of the Financial Industry Regulatory Authority, which regulates broker-dealers, and the National Futures Association and "designated" SROs, such as the Commodity Mercantile Exchange, which govern regulated participants in the commodity futures industry.[101] It may be that an SRO would be a useful complement to investment adviser regulation. Among other things, such a regulator, privately funded and with its own personnel and oversight resources, could improve overall regulatory monitoring and enforcement. Nonetheless, to be effective in that regard, the SRO arguably would need to have developed and implemented investigation and fraud-detection procedures that surpass those that the SEC has heretofore demonstrated.[102] It is by no means a certainty that the organization could or would do so. The National Futures Association's and the CME Group's recent, and dismal, regulatory failures provide ample reason for skepticism.[103]

More to the point, in light of the arguments presented in this Article, it is difficult to conceive of an SRO improving the regulatory situation without policymakers first—or simultaneously—achieving the comprehensive legal and regulatory changes contemplated above. Indeed, without that reform, the presence of an SRO presumably could make matters

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[99] *See supra* notes 2–7 and accompanying text.

[100] *See supra* notes 2–7 and accompanying text.

[101] More recently, in April 2012, Representative Spencer Bachus (R-AL) introduced a bill in the House of Representatives that would establish an SRO for investment advisers. *See* Investment Adviser Oversight Act of 2012, H.R. 4624, 112th Cong. § 203B(a) (2012).

[102] *See supra* Part V.

[103] *See* Azam Ahmed & Ben Protess, *Clients Question CME Oversight of MF Global*, N.Y. TIMES DEALBOOK (Nov. 9, 2011, 10:32 PM), http://dealbook.nytimes.com/2011/11/09/clients-question-oversight-by-mf-globals-regulator/; Silla Brush & Matthew Leising, *Peregrine Has U.S. Futures Regulators on Defense in Congress*, BLOOMBERG (July 25, 2012, 1:42 PM), http://www.bloomberg.com/news/2012-07-25/peregrine-has-u-s-futures-regulators-on-defense-at-house-panel.html.

worse, by imposing an additional regulatory layer onto one that is already too complex and too incoherent. Put another way, creating a new regulatory authority could be yet another piecemeal regulatory fix that could further obscure, if not exacerbate, more extensive and entrenched regulatory shortcomings. Better investment adviser regulation—that is, more effective and efficient investor protection and promotion of market integrity—requires, in some sense, returning to square one and thinking critically about what that regulation should be and what it should accomplish.