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SEC Financial Literacy Study: Wallop for Mutual Funds

By Gary O. Cohen

Ironies abound with the Securities and Exchange Commission's (SEC) financial literacy study:

- Congress titled the study “financial literacy,” but the mandate actually goes much further—requiring that the SEC identify ways to improve the *timing, content* and *format* of disclosure, including that of fund expenses and fund sellers’ conflicts of interest.
 - Congress mandated a related study of fund *advertising*—not by the SEC, but by the Comptroller General of the United States.
 - The SEC study may overlap more than 50 financial literacy programs of 20 federal agencies—so many that Congress
- has created a commission to oversee them.
 - Congress’s mandate that the SEC identify the most effective means of educating investors may be doomed, if the Comptroller General of the United States is correct that there’s little evidence that *any* program is effective.

SEC Study

The SEC is currently studying financial literacy, investor education and disclosure methodology and preparing to submit a report of the study to Congress by July 21 of next year.

The report is mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)¹ in a section entitled “Study Regarding Financial Literacy Among Investors.” The section requires the SEC to conduct a study of “the existing level of financial literacy among investors” and to “identify” “a strategy . . . to increase the financial literacy of investors” and “the most effective existing private and public efforts to educate investors.”

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But the section, despite its innocuous title, actually mandates a much broader and potentially significant study for the mutual fund industry. The Act mandates the SEC to “identify” such things as:

- “[M]ethods to improve the timing, content, and format of disclosures to investors [which, the SEC says, includes fund investors]”;
- The “most useful and understandable relevant information that retail investors [expressly including fund investors] need to make informed financial decisions”; and
- “[M]ethods to increase the transparency of expenses and conflicts of interests in transactions involving investment services and products [expressly including fund shares].”

The SEC invited² public comment on the investor education part of the study. But a few commenters took the opportunity to comment on other parts of the study as well. They suggested steps that the SEC could take to improve the content and format of fund disclosure documents.

The Dodd-Frank Act also requires³ the Comptroller General of the United States⁴ (Comptroller General) to conduct a study of fund advertising and submit a report to Congress⁵ by January 21 of next year. The Comptroller General submitted his report⁶ the end of July.

What the SEC Says

The SEC has not said much about the specifics of its study.

An SEC Web site states⁷ that the study will “focus on the current level of financial literacy among individual investors” and the “more effective private and public efforts to educate investors.” The SEC has also said that it will “look at how to make the cost of investing in mutual funds and other products more transparent to investors” and “how to highlight any conflicts of interest on the part of those recommending or selling investment

products.” However, these statements more or less paraphrase the provisions of the Dodd-Frank Act.

Last April, the Director of the SEC’s Office of Investor Education and Advocacy (OIEA) testified⁸ before a US Senate subcommittee. The testimony described the general approach that the SEC would take in its study, but gave only a few specifics. The Director said that, because of the language of the Dodd-Frank Act, the SEC would focus on the financial literacy of investors, “as opposed to on financial education more generally.”⁹

Regarding fund disclosure, the Director said that OIEA was “working with the SEC’s Division of Investment Management to evaluate investors’ responses to current mutual fund shareholder reports.” The Director explained that “these evaluations are designed to prioritize the importance and usefulness of each of the disclosure items within the . . . mutual fund shareholder report, including information that is less useful and information that might be included in a revised document.”

Also last April, the SEC issued a release¹⁰ requesting public comment on the effectiveness of existing private and public efforts to educate investors. The release stated that OIEA is “currently reviewing existing private and public investor education efforts of which it is aware” and “soliciting public comment to help ensure that the study includes all relevant programs, as well as to better understand the details and effectiveness of these programs.” The solicitation targeted persons “organizing or operating investor education programs and program attendees and participants.”

The Release asked for such information as: descriptions of programs and “any measurable goals and objectives aimed at changing investor behavior”; the “most important characteristics of an effective investor education program”; the “most effective” programs; any “independent third party” evaluation of a program; and whether a program was “national in scope” or could “be replicated or expanded to reach a national audience”; and the “types of investor behaviors on which investor education programs should focus.”

During the 60-day comment period, the SEC received approximately 75 comments.¹¹

A few major fund groups commented, including Fidelity Investments,¹² the Vanguard Group, Inc.,¹³ and Wells Fargo Advisors, LLC.¹⁴ Some key industry groups commented, including the Financial Industry Regulatory Authority (FINRA),¹⁵ the Investment Company Institute Education Foundation,¹⁶ and the Insured Retirement Institute.¹⁷ A number of state regulatory bodies commented, including the North American Securities Administrators Association (NASAA),¹⁸ DC,¹⁹ Hawaii,²⁰ Kentucky,²¹ Virginia²² and West Virginia.²³ And other prominent players commented, including AARP²⁴ and Morningstar, Inc.²⁵ These comments provide some indication of at least certain matters that the SEC is considering.

Last January, the SEC issued a Staff study²⁶ of investment advisers and broker-dealers that the Dodd-Frank Act mandated. This study refers throughout to financial literacy of retail investors and the SEC's efforts to promote financial literacy. The study states, for example, that the SEC will "continue its ongoing program to improve the financial literacy of retail investors."²⁷ However, the study does not refer to the financial literacy study that the SEC is currently conducting. So, the SEC's study of investment advisers and broker-dealers throws no light on the extent to which the SEC will study fund disclosure.

What Is Financial Literacy?

The Dodd-Frank Act does not define "financial literacy."

The Comptroller General has said²⁸ that "there is no single definition," and that the term has "previously been described as the ability to make informed judgments and to take effective actions regarding current and future use and management of money."

The Comptroller General has also said that financial literacy involves both "education" and "judgments." As to education, the term "refers to the processes whereby individuals improve their knowledge and understanding of financial products, services, and concepts." As to behavior, the term means "utilizing that knowledge to make informed decisions, avoid pitfalls, and take other actions to improve one's present and long-term financial well-

being."

The SEC seems to be a late-comer to the study of financial literacy. The Comptroller General recently testified before a US Senate subcommittee that "[f]ederal financial literacy efforts are spread among more than 20 different agencies and more than 50 different programs and initiatives."

The Dodd-Frank Act requires the SEC to consult with the Financial Literacy and Education Commission. Congress created this Commission in 2003 to coordinate federal efforts to promote financial literacy. The Comptroller General has testified that multiple federal financial literacy efforts are "raising concerns about fragmentation and potential duplication of effort" and certain "entities will need to coordinate their roles and activities closely to avoid unnecessary overlap and make the most productive use of resources."²⁹

The Dodd-Frank Act requires that the SEC "identify" "the most effective existing private and public efforts to educate investors." However, the Comptroller General has testified, with emphasis added, that "[a]lthough numerous financial literacy initiatives are conducted by federal, state, local, nonprofit, and private entities throughout the country, there is *little definitive evidence* available on what specific programs and approaches are most effective." Indeed, the SEC's own Staff study of investment advisers and broker-dealers cites letters that the SEC received stating that academic evidence suggests the ineffectiveness of financial literacy education and that investors' lack of understanding cannot be dispelled through disclosures or investor education.³⁰

Scope of SEC Study

The scope of the SEC's study is broad and covers fund investors.

The Dodd-Frank Act mandates that the SEC "identify" "the existing level of financial literacy among retail investors, including subgroups of investors identified by the [SEC]" and "the most useful and understandable relevant information that retail investors need to make informed financial decisions before engaging a financial intermediary or purchasing an investment product or service that is typically sold to retail investors."

The Dodd-Frank Act, with one exception, does not identify “retail investors” and “investment product or service.” The one exception is that the Act expressly refers to fund shares as “an investment product . . . that is typically sold to retail investors.” The Act also refers to fund shares when mandating the SEC to “identify” “methods to increase the transparency or expenses and conflicts of interests.” It follows that the SEC’s study can be expected to focus on fund investors as a “subgroup” of investors.

At the same time, a question is raised whether the SEC’s study will also focus on the subgroup of buyers of variable annuities and variable life insurance. The statutory reference is to “open-end companies as that term is defined in section 5 of the Investment Company Act of 1940” (1940 Act). Most life insurance companies currently offer variable insurance products through separate accounts registered with the SEC as unit investment trusts, which are not “open-end companies.”³¹ Nevertheless, the Dodd-Frank Act applies, without reference to “open-end companies,” to “subgroups of investors identified by the [SEC].” Consequently, it is likely that the SEC’s study will address the subgroup of buyers of variable annuities and variable life insurance.

Another question raised is whether the study will involve “investment products” that are not registered as securities under the Securities Act of 1933 (1933 Act). The Dodd-Frank Act does not expressly limit the SEC’s study to registered products. So, the SEC conceivably could focus on subgroups of investors in products exempt from registration under the 1933 Act and issued by companies exempt from registration under the 1940 Act. One subgroup could be investors in companies exempted from registration as investment companies under Section 3(c)(1) or Section 3(c)(7) of the 1940 Act. On the other hand, the Dodd-Frank Act has language, such as reference to “disclosures” and “open-end companies,” that can arguably be read, in the context of investment companies, to mean disclosure documents for only registered products.

Improving Disclosure

The SEC’s study goes beyond financial literacy and extends to fund disclosure.

The Dodd-Frank Act requires the SEC to “identify” “methods to improve the timing, content, and format of disclosures to investors with respect to financial intermediaries, investment products, and investment services.” More specifically, the Act requires the SEC to “identify” “methods to increase the transparency of expenses and conflicts of interests in transactions involving investment services and products.” The latter provision expressly applies to funds.

As for fund prospectuses, it might seem questionable whether the SEC will identify any “content” or “format” that the SEC hasn’t already identified. During the recent past, the SEC has spent a great deal of time and effort considering the content and format of fund prospectuses. These efforts have resulted in provisions for summary prospectuses³² and electronic tagging of disclosure³³ enabling investors to compare certain aspects of funds.

On the other hand, a few commenters, in response to the SEC’s request for comments on investor financial literacy and education, urged the SEC to take specific actions to improve the content and format of fund disclosure documents.

One commenter,³⁴ for example, called for a “summary shareholder report” to parallel the SEC’s summary prospectus. The commenter outlined the contents of such a report, described as a “streamlined presentation of user-friendly information and data.” The commenter recommended that the summary shareholder report refer shareholders to a full list of portfolio holdings, as well as the independent auditors’ report, that would be available on the fund’s Web site.

The same commenter also called for “two minor modifications to the prospectus fee table to further aid investor understanding and provide a clearer picture of the fund’s operating expenses.” One modification would permit a supplemental footnote to explain that a redemption fee was for only a limited initial period.³⁵ Another modification would permit funds investing in business development companies to exclude such companies for purposes of disclosing the fees and expenses of “acquired funds.”³⁶

Another commenter referred to the need for a summary prospectus for variable annuities to parallel the summary prospectus for funds. The commenter said that “research shows that

94 [percent] of consumers would prefer to receive a shorter, printed summary prospectus instead of a full prospectus if details were available online or upon request.”³⁷

Still another commenter recommended an “updated SEC Plain English Handbook” and disbursement of knowledge about the “benefits of information design principles.”³⁸

Recommending Legislation

The Dodd-Frank Act doesn’t mandate the SEC to recommend amendments to the federal securities laws, and there’s no indication that the SEC intends to do so. However, it’s conceivable that the SEC could identify, among other things, “methods to improve the timing, content, and format of disclosures to investors” that require Congressional action.

For example, as to the “timing” of the delivery of fund prospectuses, it’s conceivable that the SEC could recommend amendment of the 1933 Act to require delivery at the time of offer rather than as late as the delivery of a security.³⁹

However, it seems more likely that the SEC will “identify” steps that the SEC could take regarding the “timing, content, and format” of disclosure to fund investors at the point of sale. Indeed, the Dodd-Frank Act clarifies⁴⁰ that the SEC has authority to “issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service.” The Act specifically authorizes the SEC to adopt rules regarding the form and content of these documents and information.

It’s also conceivable that the SEC could recommend amendment of the federal securities laws to authorize fund shareholder lawsuits against fund sponsors to recover damages from loss of share value caused by alleged defective fund disclosure.

The US Supreme Court recently handed down a decision⁴¹ that, in effect, prevents fund shareholders from bringing such lawsuits under Rule 10b-5 under the Securities Exchange Act of 1934. The rationale was that fund boards—not fund sponsors—ultimately control fund disclosure.

Furthermore, a federal district court recently granted a motion to dismiss⁴² a fund shareholder lawsuit under Sections 11 and

12(a)(2) of the 1933 Act. The rationale was that fund shareholders cannot show loss causation where fund shares are not sold in a market and share value is computed in accordance with a statutory formula.

The SEC could conclude that barring such lawsuits removes an incentive to help assure accurate and full fund disclosure. Three circumstances suggest that the SEC’s study report could recommend that Congress enact legislation to facilitate shareholder lawsuits.

First, this study is not one that the SEC initiated, but rather one that Congress itself mandated. So, the SEC could conclude that it has more of a “green light” to recommend legislation.

Second, in the US Supreme Court case, the SEC believed strongly enough about supporting shareholder lawsuits under Rule 10b-5 to work with the US Department of Justice to file an amicus brief⁴³ setting out the SEC’s views. The SEC could conclude that the importance of shareholder lawsuits justifies further effort to enable them.

And third, the US Supreme Court states, in its opinion, that “[a]ny reapportionment of liability in the securities industry in light of the close relationship between investment advisers and mutual funds is properly the responsibility of Congress and not the courts.”⁴⁴ The SEC could conclude that this statement would add weight to a legislative recommendation to enable shareholder lawsuits.

Study of Fund Advertising

The Dodd-Frank Act mandates, separately from the study of financial literacy, a study of fund advertising—not by the SEC—but by the Comptroller General.⁴⁵ The Act requires the Comptroller General to submit a report on the study to Congress by the end of the third week in January next year, but the Comptroller General has already submitted his study.⁴⁶

The mandate is for the Comptroller General to “identify” “current and proposed regulatory requirements,” current marketing practices,” the “impact of [fund] advertising on consumers,” and “recommendations to improve investor protections.” More specifically, the mandate calls for study of “the use of past performance data, funds that have merged, and incubator funds.” FINRA representatives have

announced informally that the Comptroller General contacted FINRA for information regarding fund advertising.

The mandate also requires the Comptroller General to “identify” “additional information necessary to ensure that investors can make informed financial decisions when purchasing shares.” This part of the Comptroller General’s study seems to overlap the mandate for the SEC to “identify” “the most useful and understandable relevant information that retail investors need to make informed financial decisions.”

Perhaps there’s a distinction between “additional information” that investors need to see in fund advertising and “relevant information” that investors need to see in fund disclosure documents. In any event, it would appear prudent for the Comptroller General and the SEC to coordinate their studies at least in this respect. As noted above, the Comptroller General has testified, with regard to the 50 current financial literacy programs, that coordination is necessary “to avoid unnecessary overlap and make the most productive use of resources.”

The Comptroller General’s recommendations could lead the SEC to revise its regulation of fund advertising.

Conclusion

The SEC’s forthcoming study report mandated by the Dodd-Frank Act and due in 2012 could impact the fund industry. The SEC’s study of financial literacy and disclosure improvement—due next July—could identify methods to improve the timing, content, and format of fund disclosure, including disclosure of expenses and conflicts of interests.

The fund industry no doubt supports the SEC’s study of investor financial literacy and education, if for no other reason than to expand the public market for funds. At the same time, the fund industry may be more wary of the methods that the SEC could identify to improve the timing, content, and format of fund disclosure.

The approach that the SEC will take in its study of fund disclosure is uncertain.

On the one hand, the SEC could conclude that its recent initiatives resulting in fund summary prospectuses and XBRL tagging have brought fund statutory disclosure documents

to a high state of art. Under this approach, the SEC could then focus on developing fund disclosure at the point of sale, particularly disclosure of expenses and conflicts of interests.

On the other hand, the SEC could take this opportunity to step back and review all aspects of fund disclosure. Under this approach, the SEC could identify further ways of tweaking the Form N-1A registration statement form and creating a summary shareholder report. The SEC conceivably could also recommend that Congress adopt legislation regarding prospectus delivery and shareholder lawsuits.

NOTES

1. Pub. Law 111-203 (July 21, 2010). All references to the Dodd-Frank Act are to Title IX and to Section 917 and its subsections unless otherwise specified.

2. *Comment Request on Existing Private and Public Efforts to Educate Investors*, Securities Exchange Act Release No. 64306 (April 19, 2011), 76 Fed. Reg. 22,740 (Apr. 22, 2011) [hereinafter SEC Release No. 64306]. All quotations in this and the next paragraph of the text are from the cited SEC release. See Press Release 2011-93, SEC, “SEC Seeks Public Comment on Effective Investor Education Programs” (April 19, 2011), available at www.SEC.gov.

3. Section 918 of the Dodd-Frank Act provides that the Comptroller General “shall conduct a study on mutual fund advertising to identify “existing and proposed regulatory requirements”; “current marketing practices . . . including the use of past performance data, funds that have merged, and incubator funds”; “the impact of such advertising on consumers”; and “recommendations to improve investor protections . . . and additional information necessary to ensure that investors can make informed financial decisions when purchasing shares.”

4. The Comptroller General of the United States heads the United States Government Accountability Office.

5. Sections 917(b) and 918(b) of the Dodd-Frank Act provide, respectively, that the SEC and the Comptroller General shall each submit its report of the required study to the Senate Committee on Banking, Housing, and Urban Affairs and the House of Representatives Committee on Financial Services.

6. US Gov’t Accountability Office, GAO-11-467, *Mutual Fund Advertising: Improving How Regulators Communicate New Rule Interpretations to Industry Would Further Protect Investors* (2011).

7. See www.Investor.gov. All quotations in this section are from the cited website.

8. Financial Literacy: Empowering Americans to Make Informed Investor Decisions: Before the Subcomm. on Oversight of Government Management, the Federal

- Workforce, and the District of Columbia of the Sen. Comm. on Homeland Security and Governmental Affairs, 112th Cong., 6 (2011) (statement of Lori J. Schock, Director, Office of Investor Education and Advocacy, US Securities and Exchange Commission). All of the quotations in this and the following paragraphs are from the cited testimony.
9. One of the SEC Commissioners made a speech announcing that he had “urged the [S]taff to pay particular attention to the needs of minority communities” in the course of conducting the SEC’s study. Luis A. Aguilar, Commissioner, US Securities and Exchange Commission, “An Update on Diversity and Financial Literacy,” Keynote Speech Before the 2011 Hispanic Association of Corporate Responsibility—Corporate Directors Summit (April 30, 2011), available at www.sec.gov/news/speech/2011/spch043011laa.htm.
 10. SEC Release No. 64306, *supra* n.2.
 11. *Comments on Comment Request on Existing Private and Public Efforts to Educate Investors*, Release No. 34-64306; File No. 4-626, available at www.sec.gov/comments/4-626/4-626.shtml. The comments include, among others, those cited *infra* n.12-25, 34 and 37-38, which are all addressed to the SEC.
 12. Letter of Scott C. Goebel, Senior Vice President and General Counsel, Fidelity Investments (Jun. 21, 2011).
 13. Letter of Heidi Stam, Managing Director, The Vanguard Group, Inc. (June 21, 2011) [hereinafter Vanguard Letter]. Ms. Stam is a former Associate Director of the SEC’s Division of Investment Management.
 14. Letter of Ronald C. Long, Director, Regulatory Affairs, Wells Fargo Advisors, LLC (June 21, 2011).
 15. Letter of Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority (June 21, 2011).
 16. Letter of Sue Duncan, Vice President, Investment Company Institute Education Foundation (June 20, 2011).
 17. Letter of Catherine Weatherford, President & CEO, Insured Retirement Institute (June 21, 2011).
 18. Letter of David Massey, President, North American Securities Administrators Association (June 21, 2011).
 19. Letter of William P. White, Commissioner, District of Columbia Government Department of Insurance, Securities and Banking (June 28, 2011).
 20. Letter of State of Hawaii Department of Commerce and Consumer Affairs (June 17, 2011).
 21. Letter of Kelly May, Public Information Officer and Anetria K. Connell, Attorney, Kentucky Department of Financial Institutions (June 21, 2011).
 22. Letter of Amanda O. Blanks, Investor Education Coordinator, Virginia Division of Securities (June 21, 2011).
 23. Letter of Justin Southern, Communications Director, West Virginia State Auditor’s Office (June 17, 2011).
 24. Letter of David Certner, Legislative Counsel and Legislative Policy Director, Government Affairs, AARP (June 23, 2011).
 25. Letter of Joe Mansueto, Chairman and Chief Executive Officer, Morningstar, Inc. (June 17, 2011).
 26. SEC, “Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act” (Jan. 2011) (“This is a Study of the Staff of the U.S. Securities and Exchange Commission. The [SEC] has expressed no view regarding the analysis, findings, or conclusions contained herein.”) [hereinafter SEC Staff Study on Investment Advisers and Broker-Dealers].
 27. *Id.* at 128.
 28. Financial Literacy—The Federal Government’s Role in Empowering Americans to Make Sound Financial Choices: Before the Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the Sen. Comm. on Homeland Security and Governmental Affairs, 112th Cong., unnumbered introduction page (2011) (statement of Gene L. Dodaro, Comptroller General of the United States, United States Government Accountability Office) [hereinafter Comptroller General Testimony]. All of the quotations in this section of this article are from Mr. Dodaro’s testimony. All references to statements by the Comptroller General are to the cited testimony. The Comptroller General’s testimony may be more significant to the industry than one initially might think. This is because, as discussed in *supra* n.3 and *infra* n.45, and accompanying text, the Dodd-Frank Act mandates the Comptroller General to conduct a study of, and submit to Congress a report on, fund advertising.
 29. The Comptroller General testified that the Dodd-Frank Act requires the establishment of an Office of Financial Education within the new Bureau of Consumer Financial Protection, which the Dodd-Frank Act charges with “developing and implementing a strategy on improving the financial literacy of consumers.” The Comptroller General observed that “the duties this office is charged with fulfilling are in some ways similar to those of the separate Office of Financial Education and Financial Access within the Department of the Treasury.” The Comptroller General did not refer to the SEC financial literacy study and how it relates to, and whether it overlaps, the work of these two offices. Comptroller General Testimony, *supra* n.28.
 30. SEC Staff Study on Investment Advisers and Broker-Dealers, *supra* n.26 at 128, n.586.
 31. Section 5(a) of the 1940 Act provides that “open-end” companies are a subclassification of “management companies,” and Section 4(2) of the 1940 Act provides, in effect, that a “unit investment trust” is not in the same “class” of investment companies as a “management company.”
 32. See Rule 498 under the 1933 Act; *Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies*, Investment Company Act Release No. 28584 (Jan. 13, 2009).

33. See SEC Form N-1A Registration Statement, General Instruction 3(g) “Interactive Data File.”

34. Vanguard Letter, *supra* n.13. All of the quotations in this and the following paragraphs are from the cited letter. The matter of revising fund shareholder reports was addressed by the Director of the SEC’s Office of Investor Education and Advocacy in her testimony before a US Senate subcommittee quoted *supra* n.8 and accompanying text.

35. See SEC Form N-1A, Item 3, Instruction 2(b) regarding fee table disclosure of redemption fees.

36. See SEC Form N-1A, Item 3, Instruction 3(f) regarding fee table disclosure of fees and expenses of “acquired funds.”

37. Catherine Weatherford, President & CEO, Insured Retirement Institute (June 21, 2011).

38. Martin Bischoff, CEO, Labrador Regulated Information Transparency (June 16, 2011).

39. Section 5(b)(2) of the 1933 Act provides, with emphasis added, that unless a registration statement is in effect as to a security, it shall be unlawful for any person to “carry or to cause to be carried through the mails or in interstate commerce any such *security* for the purpose or sale or for *delivery after sale*, unless *accompanied* or preceded by a prospectus that meets the requirements of subsection (a) of Section 10.”

40. Section 919 of the Dodd-Frank Act provides for a “clarification of [SEC] authority” in authorizing the SEC to “issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service by the retail investor.”

41. Janus Capital Group, Inc. v. First Derivative Traders, No. 09-525 (June 13, 2011), 564 U.S. ____ (2011) [hereinafter *Janus*].

42. Yu v. State Street Corp., Memorandum Opin. and Order at 6, 08 Civ. 8235, 2011 WL 1206070 (S.D.N.Y. March 31, 2011). *But see* Rafton v. Rydex Series Funds, No. 10-CV-01171-LHK, 2011 WL 31114 (N.D. Cal. Jan. 5, 2011) (denying motion to dismiss).

43. Brief for the United States as Amicus Curiae Supporting Respondent, Janus Capital Group, Inc. v. First Derivative Traders, No. 09-525 (June 13, 2011), 564 U.S. ____ (2011). The names of SEC General Counsel, Deputy General Counsel, Solicitor, and Senior Litigation Counsel appear on the brief.

44. *Janus*, *supra* n.41 at 10.

45. Section 918 of the Dodd-Frank Act, summarized *supra* n.3. All references to the Dodd-Frank Act in this section are to subsections of Section 918.

46. See *supra* n.6.

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