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Why Register Hedge Fund Advisers—A Comment

Lyman Johnson*

I. Introduction

Luke Ashworth has weighed in as a young legal scholar on a subject of exceeding complexity and importance.[1] His work does what a good Note should do in being well-organized, clearly written, providing useful background, engaging existent literature, and advancing (and supporting) a thesis grounded in policy considerations. And Luke's point of view is as unmistakable as it is provocative: the much-ballyhooed regulation of hedge fund advisers adopted in the landmark 2010 Dodd–Frank legislation[2] is wasteful, unnecessary, and should be modified.

Let me welcome Luke to the scholarly world, and extend to him the customary return for thoughtful work: a response. My remarks are designed less to offer critical comments than to place his subject and his views into a larger context, and to offer my perspective on why in 2010 we got the fund adviser law we did, and how that law illuminates larger and longstanding concerns about the sometimes incongruent investor protection, capital formation, and public interest goals of U.S. financial regulation.

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1. Luther R. Ashworth II, *Is Hedge Fund Adviser Registration Necessary to Accomplish the Goals of the Dodd–Frank Act's Title IV?*, 70 WASH. & LEE L. REV. 651 (2013).

2. Dodd–Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

II. Investor Protection

Luke faults the investor protection rationale underlying the hedge fund adviser registration and disclosure requirements of Dodd–Frank. He points out that there was already a Securities and Exchange Commission (SEC) anti-fraud rule, adopted in 2007,[3] and that hedge funds supposedly draw sophisticated investors who can fend for themselves.[4] I think the investor protection case for the registration requirement is a bit stronger than Luke believes, although that in turn serves to highlight in the fund area a question that long has loomed over federal securities regulation more generally: does mandated information disclosure always protect investors, is that its real goal,[5] and is advancing that objective always consistent with other worthy policies? But before briefly making a few points about investor protection, let me address the seeming incongruity of the traditional investor protection aim of federal securities law generally with the specific concerns of Dodd–Frank and the acute financial crisis that preceded it.

The reason for joining longstanding SEC concerns about investor protection with the sprawling systemic-financial-risk regulation of Dodd–Frank is hidden in plain view early in Luke's paper. Prior to Dodd–Frank, the SEC had failed for some time in its efforts to regulate investment pools and their advisers, as it consistently espoused investor protection in its quest to do so.[6]

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3. 17 C.F.R. § 275.206(4)-8 (2011).

4. *See* Ashworth, *supra* note 1, at 654 ("In sum, hedge fund adviser registration is unnecessary because (i) there is already an adequate anti-fraud rule in place; (ii) hedge funds have increased transparency to their investors; and (iii) hedge funds have a sophisticated investor class that does not need the same protections provided to ordinary investors.").

5. *See, e.g.*, John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System,* 70 VA. L. REV. 717, 721–23 (1984) (providing a theory in support of a mandatory disclosure system in the securities law realm); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors,* 70 VA. L. REV. 669, 671–73 (1984) (analyzing "the functions of legal rules and rules compelling disclosure promulgated by the national government").

6. A 2003 SEC Report on hedge funds noted that although the agency had studied systemic risks associated with hedge funds, the report focused on investor protection concerns raised by hedge funds. *See generally* SEC. & EXCH. COMM'N, IMPLICATIONS OF THE GROWTH OF HEDGE FUNDS (2003) [hereinafter 2003 SEC REPORT], http://www.sec.gov/news/ studies/hedgefunds0903.pdf.

The horrific 2008 crisis, viewed on this issue alone, was an unexpected and serendipitous regulatory opening, a crisis not to be wasted by a frustrated administrative agency. After all, more stringent securities market regulation typically is not adopted in booming and flush times; it follows on the heels of financial distress and can be overbroad and too far sweeping.[7] In the aftermath of the historic financial meltdown of 2008–09, with victims and villains aplenty, and regulatory nuance in short supply—in contrast to the abundant regulatory shame—who could be opposed to better investor protection, whether or not faulty protection of hedge fund investors had really contributed to the crisis or, by being improved, would prevent another? For the SEC, the regulatory iron in Congress was hot and so the agency opportunistically struck, but for a cause it had sought long before our recent calamity.[8] Luke rightly seeks in vain for the connection between the 2008 crisis and the need for fund adviser registration on investor protection grounds because there likely is none. If protection for investors was needed, it was in spite of, not because of, the crisis. But calculated timing and implausible policy connection to crisis aside, maybe there still is something to be said for better protecting fund investors.

Hedge funds and their advisers almost invariably are organized as limited partnerships or limited liability companies.[9] Whether organized in a state in the United States or under the law of the Cayman Islands, hedge fund vehicles are not stringently regulated under any of these laws. Under U.S. law, moreover, notably Delaware, states have adopted a highly

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7. For example, Professor Roberta Romano has argued that provisions of the Sarbanes–Oxley Act were not a focus of "careful deliberation by Congress" and were "enacted under conditions of limited legislative debate, during a media frenzy involving several high-profile fraud and insolvency cases" combined with "what appeared to be a free-falling stock market, and a looming election campaign in which corporate scandals would be an issue." Roberta Romano, *The Sarbanes–Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1527 (2005).

8. *See* 2003 SEC REPORT, *supra* note 6, at 88–89 (recommending regulation of hedge funds by amending the Advisers Act of 1940 as a result of the SEC's Hedge Fund Roundtable).

9. *See* Franklin Edwards, *Hedge Funds and the Collapse of Long-Term Capital Management,* 13 J. ECON. PERSPECTIVES 189, 190 (1999) ("[A] hedge fund can be organized as a limited liability company, [and] most are organized as limited liability partnerships . . . .").

flexible, contractarian approach,[10] allowing the fund sponsor to craft a deal document that contractually specifies investor rights. If it is not set forth in the partnership or operating agreement, investors do not have it, including ongoing access to full information.[11] Moreover, the sponsors themselves can reduce or even eliminate their fiduciary duties, thereby removing even traditional state law safeguards for egregious adviser conduct.[12]

It is possible that, as a result of Dodd–Frank, information in Form ADV,[13] filed with the SEC, coupled with on-site agency examinations, will afford greater transparency to regulators and investors, deter adviser wrongdoing, and facilitate earlier discovery of past misconduct.[14] This may extend, for example, to determining: the amount and type of a fund's leverage, that a fund's portfolio assets are of the kind and amount (appropriately valued) as reported and are safe, whether funds performed as stated, whether insider trading or other wrongful activity is engaged in, whether conflicts of interest exist and are handled appropriately, and so on. Investors may be able to, and perhaps they should, take better measures to fend for themselves and

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10. *See, e.g.*, Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 290 (Del. 1999) (noting that "the policy of freedom of contract underlies" both Delaware limited liability companies as well as limited partnerships).

11. For example, section 18-1101 of the Delaware Limited Liability Company Act reiterates that Delaware gives "maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." DEL. CODE ANN. tit. 6, § 18-1101(b) (2012).

12. *See generally* Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701 (2011).

13. *See Form ADV*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/form adv.htm (last visited Jan. 17, 2013) ("Form ADV is the uniform form used by investment advisers to register with both the SEC and state securities authorities.") (on file with the Washington and Lee Law Review).

14. This is a professed SEC objective for the regulation. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Release No. IA 3221, at 125–30 (June 22, 2011) [hereinafter SEC Implementing Release], http://www.sec.gov/rules/final/2011/ia-3221.pdf. On October 9, 2012, the SEC, Office of Compliance Inspections and Examinations, sent a letter to newly registered investment advisers explaining that certain high-risk areas will be focused on during agency examinations. *See* Letter from Drew Bowden, Deputy Dir., Office of Compliance Inspections & Examinations, Sec. & Exch. Comm'n (Oct. 9, 2012), http://www.sec.gov/about/offices/ocie/letter-presence-exams.pdf. These areas are marketing, portfolio management, conflicts of interest, safety of client assets, and valuation. *Id.*

elicit stronger protections (including monitoring mechanisms), but a tough financial cop on the beat can also be on the lookout to head off trouble and to publicly punish (and deter) troublemakers and thereby can also help to upgrade industry norms.

The preexisting anti-fraud rule noted by Luke likely curbs some wrongdoing, but it does not mandate the fuller disclosure of information required by Form ADV, either to investors or the SEC. And its proscription of misconduct is limited to its quite general phrasing.[15] By analogy, the venerable Rule 10b-5[16] is not thought, in its role as an "anti-fraud" rule, to make other mandated disclosures unnecessary under the Securities and Exchange Act of 1934.[17] That rule supplements but does not supplant more detailed disclosure obligations.[18] Of course, any disclosure regime—particularly one aimed at an industry that historically has been opaque and loathes to divulge much information—runs the risk that information will be "sanitized" to screen out (or artfully describe) negative information or, due to lags in reporting, simply be unhelpfully "stale." Hedge fund advisers are likely to be cautious in their initial disclosures and are sure to pay great attention to evolving practices of other registrants.

And it may be open to serious doubt whether so-called "sophisticated" or "accredited" investors truly are financially sophisticated and able to self-help as they are assumed to be. No doubt fund investors are not as financially illiterate as retail investors, as was so alarmingly noted in a 182-page study released by the SEC on August 30, 2012.[19] But given the wealth and income definitions for accredited investors—largely unaltered over the last thirty years, anyway[20]—the behavioral

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15. For the exact language of the preexisting anti-fraud rule for hedge funds, see 17 C.F.R. § 275.206(4)-8 (2011).

16. 17 C.F.R. § 240.10b-5.

17. 15 U.S.C. §§ 78a–78mm (2010).

18. *See, e.g.*, *id.* § 78m (stating various disclosure obligations that certain issuers of securities, such as publicly-traded companies, must file with the SEC).

19. *See generally* SEC. & EXCH. COMM'N, STUDY REGARDING FINANCIAL LITERACY AMONG INVESTORS (Aug. 20,2012), http://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf.

20. The original definition of "accredited investor" found in Regulation D was adopted in 1982. 17 C.F.R. § 230.506. It was altered modestly by § 413(a) of Dodd–Frank to exclude the value of an investor's primary residence in

and regulatory premise is that relatively well-off investors must be considerably more financially astute than the ordinary investor.[21] Yet, although some funds, and certain sectors in particular, can and do provide mouth-watering gains when measured over selected periods, on average hedge funds, as an aggregate investment class, have underperformed risk-free Treasury bills due to an upsurge in the sheer number of funds since 2000.[22] And many fund investors seem to follow the typical retail investor strategy of chasing "yesterday's returns" and preferring large, well-known funds.[23] More information alone, of course, may do nothing to stop this dynamic, but consistently low returns over a long enough period may lead to a market solution, with investors eventually migrating to other asset classes. But it does suggest that if numerous accredited investors are not particularly savvy on this front, they may be more susceptible to wrongdoing than is commonly supposed. And they certainly make attractive candidates for a good fleecing.[24]

Even if investor protection is a worthy goal, however, and one the SEC shrewdly advanced on the coattails of the financial crisis, Congress has a disturbingly familiar habit of flip-flopping on the subject. Just two years after investor protection was injected into the larger systemic risk concerns of Dodd–Frank, Congress enacted the Jumpstart Our Business Startup Act

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calculating net worth. *See* Dodd–Frank Act, Pub. L. No. 111-203, § 413(a), 124 Stat. 1376, 1577–79 (2010) (codified as amended at 15 U.S.C. § 77b).

21. Just as in 1973, Professor Harold Marsh noted the "myth of the 'expert' expert," Harold Marsh, *New Approaches to Disclosure in Registered Securities Offerings—A Panel Discussion*, 28 BUS. LAW. 505, 527 (1973), so too may we have a "myth of the 'sophisticated' sophisticated" investor.

22. *See* Fiammetta Rocco, *The Success of Hedge Funds: Masterclass*, ECONOMIST, July 7, 2012, at 77–78 (noting that although some hedge fund investors do very well, "on average hedge funds have underperformed even risk-free Treasury bills . . . . [b]ecause the bulk of investors' capital has flooded in over the past ten years") (reviewing SIMON LACK, THE HEDGE FUND MIRAGE: THE ILLUSION OF BIG MONEY AND WHY IT'S TOO GOOD TO BE TRUE (2012)).

23. *Id.*

24. The North American Securities Administrators Association reported in August 2012 that, for the second year in a row, Regulation D Rule 506 private offerings were, along with real estate investment schemes, the most reported products at the center of state securities enforcement actions. *See* Richard Hill, *JOBS Act Opens New Path for Scammers, NASAA Says in Annual List of Top Schemes*, 44 SEC. REG. & L. REP. 1618, 1618 (2012).

(JOBS Act)[25] in an effort to bolster another policy goal, capital formation among smaller issuers[26]—who likely will target less savvy investors than those in hedge funds. In effect, this was a legislative effort to "jumpstart" economic activity. Although investor protection and capital formation are both key policy goals of federal securities laws,[27] they can be in conflict. Efforts to "ease" the burden on capital formation frequently translate into less disclosure, reduced regulatory scrutiny, heightened fraud, diminished investor protection, and resulting public cynicism.[28] The recent SEC proposal under the JOBS Act to permit general solicitation in connection with exempt offerings if, among other requirements, the securities are only sold to accredited investors[29]—even if, apparently, they are "publicly" offered—will apply to hedge funds relying on exemptions under the Investment Company Act of 1940.[30] Although the advertising rules of the Advisers Act of 1940[31] remain applicable to fund advisers,[32] they

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25. JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified as amended in scattered sections of the U.S.C.) (aiming to increase job creation and economic growth by improving access to the public capital markets for emerging growth companies).

26. *Id.*

27. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2010) (detailing the first major federal legislation to regulate the offer and sale of securities by requiring certain disclosures to investors).

28. *Cf.* Luis Aguilar, Comm'r, Sec. & Exch. Comm'n, Capital Formation from the Investor's Perspective (Dec. 3, 2012), *available at* http://www.sec.gov/news/speech/2012/spch120312laa.htm (explaining that investor fraud is the "black hole[] of capital formation," so investor protection is necessary for true capital formation through "rules to promote full and fair disclosure, reliable financial information, and accountability for market participants").

29. *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Release No. 33-9354, 77 Fed. Reg. 54,464, 54,464 (proposed Aug. 29, 2012) ("The proposed amendment to Rule 506 would provide that the prohibition against general solicitation and general advertising contained in Rule 502(c) of Regulation D would not apply to offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors."). As of February 6, 2013, no amendment to Rule 506 had been made in this regard.

30. 15 U.S.C. §§ 80a-1 to 80a-64.

31. *Id.* §§ 80b-1 to 80b-21.

32. *See* Richard A. Goldman et al., *Amending Rule 506—Opportunities For Private Funds*, LAW360 (Sep. 07, 2012, 2:11 PM), http://www.law360.com/securities/articles/376400?nl_pk=f77a7383_d68a-4922-bf24-bed5 (last visited

protect existing clients not prospective ones. It is hard to believe, moreover, that widespread advertising will not lead to greater interest in hedge funds among those who, although "accredited," do not, in their pursuit of juiced returns and the status of being "in" a hedge fund, fully understand what they are doing and the true nature of the risks they are taking, including the way in which their exposure to leverage risk is elevated through the funds' use of debt and the great difficulty of exiting the investment. Also, particularly challenging for investors is understanding exactly how a fund is valuing its assets, an area in which practices vary widely.

Whether sponsor investor-verification techniques and enhanced industry "best practices" will successfully filter unqualified investors lured by enticing advertising remains to be seen. This is of great concern to state securities regulators. Sponsors themselves are concerned about this issue. The Hedge Fund Association has sought greater clarification from the SEC as to how funds should verify investor accreditation, inasmuch as the SEC's proposed rule failed to offer a safe harbor.[33] Such a rule also would position funds to defend against charges of wrongdoing in bringing in nonaccredited investors, by permitting them to argue that they followed SEC guidance. Such guidance, moreover, if given, might become a de facto industry standard, thereby impeding development of more rigorous practices.

The hedge fund anti-fraud rule of 2007, even coupled with the 2010 adviser registration requirement criticized by Luke, may do little to curb likely damage to investors in an overly zealous policy pursuit of "capital formation." In this way, Luke's pointed investor protection concern on the fund-adviser front joins a larger and longer debate over whether and how the federal

Jan. 19, 2013) ("[A]dvisers that are registered with the SEC must continue to comply with rules relating to advertising under the Investment Advisers Act of 1940 . . . .") (on file with the Washington and Lee Law Review).

33. *See* Brian Mahoney, *Hedge Fund Group Wants Safe Harbor Under Advertising Rule*, LAW360 (Sept. 13, 2012, 2:56 PM), http://www.law360.com/articles/378011/print?/section=securities (last visited Jan. 19, 2013) ("A nationwide hedge fund lobbying group on Thursday asked U.S. regulators to create a safe harbor provision clearly stating how funds should verify the credentials of investor-clients to whom they can now advertise, saying new proposed rules left their obligations unclear.") (on file with the Washington and Lee Law Review).

securities laws' philosophy of full disclosure can achieve that goal while also balancing it with other policy goals with which it sometimes clashes.

III. Systemic Risk

If Luke is tough on investor protection, he is more generous on systemic risk. However, although he credits the systemic risk concerns of Dodd–Frank as worthwhile, Luke thinks adviser registration is not necessary to advance this goal. Instead, he argues, the Financial Stability Oversight Council (FSOC) can collect pertinent data directly from fund advisers through Form PF,[34] without the intervention of the SEC. Even this more direct approach, however, invites certain concerns.

Given the ninety-day or longer lags in receiving data, information provided to the SEC and FSOC can be far more unhelpfully stale than fresher "real time" data. A lot of undetected systemic risk can develop in the meantime. This is somewhat meliorated by an obligation to "promptly" update specified information that becomes "materially inaccurate."[35] The key premise, of course, is that if adverse developments occur, managers will report them immediately, rather than later. A key risk, however, is that managers may tend not to regard adverse developments as material, perhaps out of simple hope and belief that conditions will change or from a simple desire not to alert the SEC. Moreover, one wonders whether staff at the SEC and the FSOC can efficiently handle a large influx of data and, upon distilling it, accurately identify disturbing aggregate trends. It is easier in hindsight to see potentially destabilizing patterns than it is while awash in data and searching for, but not wishing to overreact to, possible indicators of trouble. Only time will tell on this front.

But concerns about hedge funds' role in systemic risk may mask a deeper clash of interests, i.e., that between the interests

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34. *See Form PF Frequently Asked Questions*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/divisions/investment/pfrd/pfrdfaq.shtml (last visited Jan. 31, 2013) (providing a basic overview of Form PF) (on file with the Washington and Lee Law Review).

35. SEC Implementing Release, *supra* note 14, at 114.

of fund investors and the larger public interest as reflected in systemic (social) risk concerns. Hedge funds command large pools of capital, deploy significant leverage, engage in rapid trading activity, and may profit from and magnify volatility.[36] Whether this creates or exacerbates unacceptable systemic (social) risk is unclear but should be ascertained. What is clear is that funds need investors. Thus, if funds are the sort of financial vehicle that contributes to systemic instability, it is because the very financial wherewithal to do so is supplied by investors. The public policy problem, ironically, may not be to protect investors from fund advisers but, in effect, may be to protect the financial system from risks caused by inappropriate use of the very concentrated capital supplied by investors. Viewed this way, hedge funds may present less of an "adviser vs. investor" regulatory issue than a "fund vs. society" concern.[37]

Here, it might be better to acknowledge outright that mandated disclosure for systemic risk concerns is just that and not cloak it in investor protection rhetoric. As has been noted about the federal Bureau of Corporations, established in 1903, its purpose similarly was aimed at "collecting industrial data and investigating corporate trade practices as a deterrent against illicit corporate activities."[38] The information was aimed at consumption outside the firm, not at those investing in it.[39] And disclosure was required to deter activity that might enrich investors, not damage them.[40] As with hedge fund regulation, then, that early 20th century disclosure law was designed to

36. *See* Edwards, *supra* note 9, at 189–91 (describing general characteristics of hedge funds).

37. For a similar argument about early 20th century Progressive demands for greater financial information under federal law, see Thomas W. Joo, *Comment: Corporate Governance & The "D-Word,"* 63 WASH. & LEE L. REV. 1579, 1582–83 (2006).

38. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1219 (1986).

39. *See* Joo, *supra* note 37, at 1582 ("Progressives wanted disclosure because they believed it would create accountability, not to shareholders, but to 'the public.'").

40. *See id.* at 1583 ("[T]he Bureau required a corporation's 'disclosure' not to empower or protect that corporation's shareholders, but to discourage the corporation from anticompetitive activity—activity that could have enriched its shareholders.").

protect the public interest, not investors. This suggests a potentially deeper clash of policy goals in adviser regulation. What is good about hedge funds—for at least some, perhaps many, investors—may not be good for larger social interests.

Fortunately, we can sidestep this issue for now because what Dodd–Frank really does on the adviser regulation front is simply mandate data collection. The requirements, although law, are really in the nature of an extended study. The aim, paradoxically, is to learn more about the historically opaque hedge funds and their activities precisely to ascertain whether and how to regulate them. It may well be concluded that no further regulatory action is needed or even that a rollback is in order. Or, perhaps particular areas of concern will be targeted for action. But first we need to know how fund advisers themselves are responding, an area in which Professor Wulf Kaal is gathering and assessing useful data.[41] Kaal's early findings in a survey of about ninety hedge fund managers is that the industry appears to be only "modestly affected" by the new requirements.[42] Approximately seventy-two percent of managers reported no expected strategic response to Dodd–Frank, with smaller funds more likely to be affected.[43] Although earnings and profits were expected to decline due to higher compliance costs—with almost half of responding advisers outsourcing compliance work[44]—seventy-five percent of managers did not expect investor returns to suffer.[45] Over forty percent have changed their marketing materials,[46] a figure that may rise yet again if existing restrictions on advertising are dropped, as recently proposed.[47]

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41. *See generally* Wulf A. Kaal, *The Effects of Hedge Fund Manager Registration Under the Dodd–Frank Act—An Empirical Study*, 50 SAN DIEGO L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2150377.

42. *Id*. (manuscript at 59).

43. *Id*. (manuscript at 56); *see also* Wulf A. Kaal, The Effect of the Dodd–Frank Act on the Hedge Fund Industry 41 (Feb. 2, 2013) (unpublished manuscript) (asserting that certain data suggest that the compliance and administrative costs created by the Dodd–Frank Act may disproportionally affect smaller hedge funds) (on file with author).

44. Kaal, *supra* note 41 (manuscript at 42).

45. *Id*. (manuscript at 53).

46. *Id*. (manuscript at 42).

47. *See supra* note 29 and accompanying text.

And from there, we can see what the SEC and FSOC—or Congress—does with the new trove of data, either on the investor protection or systemic risk fronts. Luke's skepticism on the former may be borne out, thereby further spotlighting the latter. And this would then open an even more potentially disquieting debate about the social responsibilities and legal rights of those who facilitate rapid, large capital movements in a way that may destabilize modern markets. Dodd–Frank certainly takes no position on, but may set up, that far more difficult conversation.