We're All Capitalist Now: The Importance, Nature, Provision and Regulation of Investor Education

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The Article studies investor education so as to evaluate and
guide increasing educational efforts. It first discusses the conditions
that have made investor education important in the United States.
The Article then presents a theoretical framework that identifies three
kinds of investor education—education about saving, investing and
financial fraud. In considering the parties best competent to provide
them, the Article suggests that families might accomplish each kind of
investor education, with schools also offering, as many now do, gen-
eral financial education. Consumer financial services and nonprofit
firms, moreover, should conduct—and do, in fact, provide—saving
and investing education as initial or "continuing" investor training.
Federal and state regulators of financial services should, therefore,
focus their tasks on educating consumers about financial fraud and
abuse, persuading them to save, invest and use available educational
products and services and on conveying basic saving and investing
norms. As an application of the theoretical perspective, the Article
analyzes the major investor educational initiatives of the Securities
and Exchange Commission ("SEC"). The SEC should improve its

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of Michigan. I would like to thank Margaret Berger, Lan Cao, Neil Cohen, Beryl Jones, Gary
Minda, Eric Orts, Arthur Pinto, Leo Raskind, Tony Sebok, Larry Solan, Spencer Waller and
Steve Winter for comments on earlier drafts of this Article, particularly (former SEC Commis-
sioner) Roberta Karmel and Norman Poser for helping me, as always, to understand and to
represent fairly the SEC's regulatory purposes and actions, and Daniel Greenwood and Dennis
Patterson for their general insights on investor education. I am also grateful to Dean Joan
Wexler of Brooklyn Law School for two summer research stipends and Vivek Suri (Brooklyn
Law School, 1998) for valuable research assistance.
educational efforts by redirecting them, in accordance with the Article’s guidance, to concentrate on anti-fraud education, to reinforce the basic norms and to promote and facilitate private investor education.

ABSTRACT .................................................................................................................105

I. INTRODUCTION ....................................................................................................106

II. THE NEED FOR, AND CULTURAL INEVITABILITY OF, INVESTOR EDUCATION .................................................................112

A. The Consequences of the Aging “Baby Boom” Generation ..................................112

B. The Culture of Individual Responsibility and Education ........................................118

III. A THEORETICAL FRAMEWORK ........................................................................126

A. What is Investor Education? ..................................................................................127

1. Education About Saving .......................................................................................127

2. Education About Investing ...................................................................................130

3. Education About Financial Fraud ..........................................................................135

B. Who Should Educate? ............................................................................................136

1. Families ................................................................................................................136

2. Schools ..................................................................................................................137

3. The Market ............................................................................................................140

4. The Government ....................................................................................................146

   a. Education About Saving and Investing ...............................................................146

   b. The Government as Anti-Fraud Educator ........................................................153

IV. AN EVALUATION OF SEC INVESTOR EDUCATIONAL INITIATIVES .................................................................156

A. <www.sec.gov/invkhome> .....................................................................................159

B. Plain English ..........................................................................................................164

C. Investment Company Disclosure Formats ............................................................171

D. A Concept Release on Investor Education ............................................................178

V. CONCLUSION .......................................................................................................179

I. INTRODUCTION

Parents with young children may occasionally find themselves watching Mary Poppins.1 At one point in that movie, the father, appropriately named Mr. Banks, takes his two young children, Jane and Michael, on an outing to his place of employment, a well-established British merchant bank in London, intending to counter the imagina-

1 (Walt Disney 1964).
The scene is a good introduction to the subject of this Article, investor education, for it portrays a flawed educational attempt. Without investor education there would likely be no investment in all of the productive ventures enumerated in the partners' song. The education must be properly conducted, however. The partners become so carried away with their love of finance that they scare and bewilder Michael with incomprehensible terms, such as "self-amortizing notes." It is no surprise, then, that Michael refuses to part with his money, especially when, in a beautiful song, Mary Poppins has encouraged him to spend it on bird feed. If, as is the case here, education is poorly done, it not only discourages investing, but, given the "herd" behavior of existing investors, it disastrously undermines capital-raising.

Investor education is important in the United States today mainly because saving and investing activities are as common as finding a job or an apartment. Saving and investing are critical for survival in our society for those who, as children years ago, first watched *Mary Poppins*. Because investing has assumed a significance in their lives that it did not generally have for their parents, they must be educated in how to invest. Their financial future and retirement income mainly depend upon the success of their investments, for they can no longer rely on the Social Security "safety net" that is projected to run out of funds early in the next century. Their employers are less likely to provide guaranteed retirement benefits, but more often offer them contributions to a retirement fund to be invested at the individual employee's direction. To meet their retirement and other future needs, they must also save and invest outside retirement plans. Developments in financial services, which give ordinary consumers numerous saving and investing products that will enable them to assume their new responsibilities, also require education to ensure that an individ-

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2 His partners refer to the elderly Mr. Dawes as a "giant in the world of finance," but all Michael understands is that Dawes is a "giant."

3 See infra Part II(A).
ual will understand and choose knowledgeably among the many products to design an optimal portfolio.

This kind of education means more than merely supplying a consumer with information and is, therefore, radically different from the disclosure about investment products and the companies selling them that securities law has traditionally sought to provide.\(^4\) Rather, it involves an intellectual *formation*, which gives consumers the conceptual framework, intellectual skills and the language: in sum, the “culture” of saving and investing that will allow them to make sense of financial information and to function intelligently in the investment world. Investor education thus raises challenges and difficulties akin to those of other kinds of education, such as identifying the appropriate educational curriculum and instructors.\(^5\)

Economists, consumer organizations, financial firms, government regulators and even Congress and the Executive Branch have all recognized the increasing significance of investor education and are actively designing and contributing to educational programs and materials. Economists have inspired much of the educational activity with their theoretical and empirical work, suggesting that investor education can increase consumers’ savings and improve their investing performance.\(^6\) Consumer groups have worked with state legislatures and state and federal agencies to institute saving and investing training even in grade schools.\(^7\) Consumer financial services firms, whether individually, in trade groups or in self-regulatory organizations (“SROs”),\(^8\) provide consumers with useful educational materials and services at little or no cost.\(^9\) Federal financial regulators, particular...
particularly the Securities and Exchange Commission ("SEC") and banking and pension regulators, have established and sponsored educational programs for investors, often using the new Internet technology, and have proposed and adopted regulations encouraging investor education. Most significantly, recent federal legislation makes investor education the goal of a national campaign by federal and state government officials (including the President) and interested private parties.

Despite these major government and financial industry activities, legal scholars have generally ignored investor education. This Article evaluates and seeks to help guide these important educational efforts. Part II reviews in more detail the conditions that have made investor education important and inevitable in the United States. The inability of an aging "Baby Boom" generation to rely on Social Security programs for its retirement needs, the increasing use by employers of retirement plans that place investment decision-making upon employees and the major changes in consumer financial services are specific conditions evidencing the need for investor education. Part II also argues that the American cultural emphasis on individual responsibility determines that, short of a financial cataclysm, ordinary people expect to make their own saving and investing decisions, which makes any appreciable increase in government paternalism in Social Security or pension policy unlikely. Yet the same culture generates consumers' expectations that they should receive the training and tools to become capable saving and investing decision-makers, and thus ensures that investor education must accompany consumers' increased responsibilities. Part II contends that, given the cultural situation, improving investor education as soon as possible to respond to individuals' critical need for saving and investing training makes the most pragmatic and policy sense. It admits, however, that education is not the solution to the saving and investing crisis, but an important response to be used in conjunction with other solutions.

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10 See infra Parts III(B)(4), IV(A).
11 See infra Part III(B)(4)(a).
12 A major exception is Professor Henry Hu of the University of Texas Law School, who insightfully discusses investor education when evaluating disclosure of investment products. See Henry T.C. Hu, Illiteracy and Intervention: Wholesale Derivatives, Retail Mutual Funds, and the Matter of Asset Class, 84 Geo. L.J. 2319, 2358-79 (1996) (observing that mutual fund disclosure includes a discussion of the attributes of the class of investments to which the fund belongs and thus leads to issues of investor education); see also Jeffrey N. Gordon, Employees, Pensions, and the New Economic Order, 97 Colum. L. Rev. 1519, 1565 n.148 (1997) (mentioning education in passing); cf. Gregory S. Alexander, Pensions and Passivity, LAW & CONTEMP. PROBS., Winter 1993, at 111, 130 (arguing that giving pension beneficiaries more decision-making may enhance individual responsibility); Deborah M. Weiss & Marc A. Sgarglino, Prudent Risks for Anxious Workers, 1996 Wis. L. Rev. 1175, 1212-14 (advocating a "mild sort of paternalism" whereby employees can make investment choices among alternatives that are appropriately diversified to eliminate nonsystematic risk).
A serious inquiry on investor education requires a theoretical framework that establishes the kinds of investor education and the parties “best” suited to accomplish them. Part III identifies and examines three kinds of investor education: education about saving, investing and financial fraud. The first kind essentially involves acquiring an understanding of the need to defer present consumption to meet future goals (in Judge Posner’s terms, to act responsibly towards one’s future “selves”\(^{13}\), of the psychological impediments to saving optimally and of the best available means of achieving deferred consumption. The second kind of investor education basically concerns optimal wealth creation through investing. Because this subject is at the heart of finance, Part III relies upon finance theory to describe this kind of education, which includes training about securities markets, investment products, financial professionals, the language of finance, investing strategy and, again, psychological impediments to optimal investing. Investor education about financial fraud complements the other two kinds of investor education, because it teaches consumers to recognize and resist any fraud and abuse threatening them in the financial world.

Part III identifies the parties, or combination of parties, who should conduct each kind of education. It observes that families would best accomplish all investor education since they can inculcate individuals in the “culture of investing” from an early age. Because there is no assurance that every family can and will adequately perform this task, schools should complement family training by offering general saving and investing education. This education has, in fact, become part of the high school curriculum in many states and uses local and federal government, consumer organization and financial industry resources.\(^{14}\) Since not every state requires, or, in the near future, will likely require, this education and since, in any event, consumers need “continuing” investor education, this Part argues that financial services firms, as well as for-profit and nonprofit organizations in the financial information industry, should also conduct saving and investing education. They are appropriate education providers both because these kinds of education have become a commodity and because, as empirical evidence demonstrates, firms in the highly competitive consumer financial services market will supply educational services and products at low cost to attract and keep customers. Part III concludes that, in light of this market activity, federal and state regulators of financial services should accomplish two important educational tasks for which they are well suited: (i) to educate con-

\(^{13}\) See RICHARD A. POSNER, AGING AND OLD AGE 84 (1995) (“The idea that the individual can be modeled as a locus of competing selves (simultaneous or successive) is not new, but it remains esoteric and is disregarded in most economic analysis.”) (footnote omitted).

\(^{14}\) See infra Part III(B)(2).
sumers on financial fraud and abuse (the third kind of investor education), including any abuse in private market educational efforts, and (ii) to persuade and encourage consumers to save, invest and use the investor education products and services of private firms, as well as to give them some basic tools and guidelines for these activities.\textsuperscript{15}

As an application of this theoretical perspective, Part IV analyzes the major investor education initiatives of the SEC, one of the federal agencies most active in this area. It observes that, while the SEC's educational efforts have been useful, it could greatly improve them by redirecting its activities, in accordance with the Article's guidance, to concentrate on anti-fraud education and to encourage consumers to look to the education supplied by private firms, including nonprofit organizations. The SEC's Office of Investor Education and Assistance now educates consumers to guard against fraudulent and abusive practices in financial services. However, the Office's saving and investing education does not measure up to similar activities of private firms and should thus be redesigned to be part of a government campaign to encourage saving and investing, to provide consumers with a few easily-understandable rules and guidelines about these activities, and to publicize the firms' educational services. Part IV also finds that SEC initiatives to simplify securities disclosure and to design new disclosure formats for mutual funds exhibit a valuable partnership with the financial services industry. This partnership should allow consumers to receive basic information about investment products and companies in formats to which they can easily apply the saving and investing education that they receive from the financial firms. The SEC, however, should explicitly recognize the necessary relationship between the consumer-oriented disclosure and the firms' educational services, and take regulatory action to make firms link their disclosure documents to these services. Finally, the SEC should begin a sustained reflection on its role in investor education and heighten awareness of education's importance by issuing a "concept release" on investor education and inviting comment from all those involved and interested in the subject. Part V concludes by restating the need for a sustained reflection on investor education while circumstances are propitious—that is, while the stock market remains at record high levels.

\textsuperscript{15} The state and federal governments can, and should, do much to address the saving and investing crisis in the U.S., for example, by providing tax incentives to saving. \textit{See generally} BERNHEIM, \textit{THE VANISHING NEST EGG}, supra note 6, at 93-121 (discussing potential government policy options to increase rates of saving). This Article focuses, however, only on the government's role in investor education.
II. THE NEED FOR, AND CULTURAL INEVITABILITY OF, INVESTOR EDUCATION

A. The Consequences of the Aging “Baby Boom” Generation

Investor education has become important because individual wealth creation is critical, primarily on account of demographics. The numerous children born in the two decades following World War II (the “Baby Boom” generation) have increasing financial needs. As they begin to retire in 2010 with a longevity greater than that of their parents, they will require considerable financial resources. Many must now support their children’s important, but expensive, education and may also have to take care of aging parents, who are living longer as well. Since saving and investing performance can contribute to meeting these needs, a fundamental issue is whether individuals are intellectually, and even psychologically, equipped to save and invest optimally.

That Americans can not expect federal government programs to help them fully meet their retirement and other needs makes optimal individual saving and investing particularly acute. The primary gov-

16 See Peter F. Drucker, The Future That Has Already Happened, HARV. BUS. REV., Sept.-Oct. 1997, at 20 (“The dominant factor for business in the next two decades—absent war, pestilence, or collision with a comet—is not going to be economics or technology. It will be demographics.”).


18 See id. at 161 (citing statistics related to the increase in life-spans); see also GENERAL ACCOUNTING OFFICE, GAO/HEHS-97-81, RETIREMENT INCOME: IMPLICATIONS OF DEMOGRAPHIC TRENDS FOR SOCIAL SECURITY AND PENSION REFORM 17 (1997) [hereinafter GAO, RETIREMENT INCOME] (showing steady longevity increase since 1940 and projected increase in the future).


20 Cf. Marilyn Moon, Are Social Security Benefits too High or too Low?, in SOCIAL SECURITY, supra note 17, at 62, 71-72 (observing that the elderly’s perceived improved well-being in relation to other age groups has generated a backlash).

21 Saving and investing also benefit investors indirectly by providing companies with sources of inexpensive capital. This capital helps firms successfully compete in global product and capital markets, and they can thus provide more jobs for investors and their children. See Michael C. Jensen, The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems, 48 J. FIN. 831, 850-52 (1993). An active investment market also requires a successful financial services industry. See, e.g., The Americans Are Coming, ECONOMIST, Apr. 15, 1995, at 23, 23-25.

22 Cf. Gordon, supra note 12, at 1534-36 (explaining that low growth in wages has placed additional importance on other forms of wealth creation, such as investing).
ernment social insurance program, Social Security (officially, the Old-Age, Survivors, and Disability Insurance ("OASDI") programs), was never intended to be the major source of retirement income for most people, but only a safety net for the lower-income elderly. Yet the impending retirement of the "Baby Boomers" will create a deficit in funds available for OASDI payments and could even cast doubt on the continued viability of this minimum retirement amount. Whatever solution to the projected funding deficit is adopted, the publi-

See Robert M. Ball & Thomas N. Bethell, Bridging the Centuries: The Case for Traditional Social Security, in SOCIAL SECURITY, supra note 17, at 259, 259-60 (describing the program as part of a three-pronged approach to retirement that also includes private pensions and personal savings); cf. Edward D. Berkowitz, The Historical Development of Social Security in the United States, in SOCIAL SECURITY, supra note 17, at 22, 24-25 (discussing early history of the Social Security program). In reality, Social Security payments provide most, and in some cases nearly all, of the income for the lower-income elderly. See GAO, RETIREMENT INCOME, supra note 18, at 24-26 (presenting statistics); Moon, supra note 20, at 66-67 (presenting percentages of income received from Social Security, which in the lowest-income families is more than 75%). This result is due to the redistributive nature of the program: individuals with low average earnings over their eligible working lives receive a greater percentage of these earnings as Social Security benefits than do individuals with higher average earnings. See EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 20 (5th ed. 1997) [hereinafter FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS]. Individuals can obtain estimates about future benefits from the Social Security Administration, as well as from commercial and noncommercial services. See id. at 27; see, e.g., American Savings Education Council, Ballpark Estimate (visited Sept. 15, 1998) <http://www.asec.org/ballpark.htm> (providing rough estimates for different income levels).

See Robert J. Myers, Will Social Security Be There for Me?, in SOCIAL SECURITY, supra note 17, at 208, 209-11 (summarizing various actuarial reports on date of future deficit in Social Security funds). OASDI is a pay-as-you-go program: present workers are taxed to pay for the benefits of current retirees. Social Security now collects more than it pays out and has generated a surplus that is invested in, and receives interest payments as, U.S. Treasury securities. Under current estimates, the Social Security surplus will rapidly fall in 2009 and disappear in 2012. The federal government will then have to begin repaying its loan from Social Security to make up the shortfall. Proceeds from this loan (also known as the Social Security trust funds) will be used up in 2029. See GAO, RETIREMENT INCOME, supra note 18, at 40-41.

There is an ongoing national debate on the future design of Social Security. See generally Christopher Georges, Social-Security 'Privatization' Effort Makes Headway, WALL ST. J., June 22, 1998, at A24 (summarizing various actuarial reports on date of future deficit in Social Security funds); Bosworth, supra note 17, at 24-25 (discussing possible solutions to the deficit problem, including increasing payroll taxes); see also RICHARD DISNEY, CAN WE AFFORD TO GROW OLDER? A PERSPECTIVE ON THE ECONOMICS OF AGING 8-9, 104 (1996) (pointing out that "pay-as-you-go" social insurance systems are premised on the unrealistic promises and assumptions that "current and future generations could maintain positive real rates of return on contributions so long as both the growth of real earnings and the growth of the population remained positive," and that there has not been the necessary population growth in America). Propositions that would change the pay-as-
cized funding problems of Social Security have caused ordinary Americans and policy-makers alike to realize that an individual must rely primarily on two other means of generating income for retirement and other future needs that primarily depend upon individual effort: pensions and individual savings.26

Investor education is also required to inform the decision-maker how to participate in a retirement plan. Since the late nineteenth century, many employees have traditionally looked to their employers for retirement income,27 and favorable tax treatment of pensions has encouraged employer-sponsored plans.28 Yet the kinds of retirement


26 See, e.g., Virginia P. Reno & Robert B. Friedland, Strong Support But Low Confidence, in SOCIAL SECURITY, supra note 17, at 178, 186-87 (discussing Americans' recent loss of confidence in Social Security and increasing dependence upon personal investments); Dallas L. Salisbury, Public Attitudes on Social Security: The UFO Fallacy, EMPLOYEE BENEFIT RES. INST. NOTES, March 1998, at 1, 1-3 (reviewing survey data suggesting Americans' concerns about the viability of Social Security and confusion about the program's funding problems); cf. Alan Murray, Boomers May Not Like Social Security 'Return,' WALL ST. J., Jan. 12, 1998, at A1 (referring to Heritage Foundation study showing declining rates of return for Social Security for younger, affluent taxpayers). Popular and scholarly doubts have also increased about the ability of federal and state governments to provide such an important service as education. See generally MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 141 (1981) (discussing lack of confidence in public education); Jonathan B. Cleveland, School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace, 29 CLEV. MARSHALL L. REV. 77, 82-85 (1995) (summarizing studies that evidence the poor academic performance of American students);

27 See SASS, supra note 19, at 227-28 (summarizing early history of pensions designed by large businesses to attract and keep employees trained for specialized positions); see also GAO, RETIREMENT INCOME, supra note 18, at 43 (noting that 45-47% of employees in the private sector are covered by pensions, a number that remained constant from 1970 through 1993, the last date for which data is available). The economic literature explains how employee retirement benefits fit into labor management: employers use these benefits to attract and retain employees (e.g., by requiring lengths of service for the "vesting" of benefits and increasing benefits with seniority). See generally E. PHILIP DAVIS, PENSION FUNDS: RETIREMENT-INCOME SECURITY, AND CAPITAL MARKETS: AN INTERNATIONAL PERSPECTIVE 57 (1995) (discussing the attraction of pension funds to employees); JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 5-16 (2d ed. 1995) (discussing history of U.S. pension plans with reference to WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY 27-47 (1976)).

28 While taxation regarding private pension plans is complex, the tax advantages can be generally summarized as follows: "(1) within limits, employer contributions are deductible as a business expense, (2) contributions are not counted as income to participants (and therefore not subject to federal income tax) until paid in the form of benefits, and (3) investment earnings, including capital gains, are not taxed until distribution." Kelly Olsen & Jack VanDerhei, Defined Contribution Plan Dominance Grows Across Sectors and Employer Sizes, While Mega Defined Benefit Plans Remain Strong: Where We Are and Where We Are Going, EMPLOYEE BENEFIT RES. INST. SPECIAL REP. SR-33/ISSUE BRIEF NO. 190, Oct. 1997, at 5 n.12; see also LANGBEIN & WOLK, supra note 27, at 149-51; Deborah M. Weiss, Paternalistic Pension Policy: Psychological Evidence and Economic Theory, 58 U. CHI. L. REV. 1275, 1280-85 (1991) (noting that the tax exemption for employer-sponsored plans is the largest tax preference in the Internal Revenue Code).
plans employers are more frequently offering to their employees actually place responsibility on an individual employee to save and invest funds for retirement and other future financial needs. In recent years, employers have perceptively shifted to offering employees "defined contribution," rather than "defined benefit," pension plans. In a defined contribution plan, an employer establishes individual accounts for employees and, depending upon the kind of the plan, the employers, the employees or both make contributions to the accounts within statutorily prescribed limits. For many plans, an employee specifies the investment of account funds in a number of investment options permitted under the plan. Upon retirement, the employee

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29 See SASS, supra note 19, at 243 (describing these plans as essentially thrift savings plans, not pension plans); Weiss & Sgaraglino, supra note 12, at 1177 ("The average American worker is increasingly asked to bear the risks of his own financial decisions.").

30 See Olsen & VanDerhei, supra note 28, at 3 (pointing out that "[d]uring 1975-1993, the number of workers participating in a private [defined contribution] plan increased from 12 million to 44 million, while [defined benefit] plan participants remained roughly steady at 33-40 million"); id. at 22, 31 (observing that the greatest decrease in defined benefits plans occurred in small plans (with 10-24 active participants) and was partly attributable to the loss of favorable tax treatment for these plans acting as tax shelters for highly-paid persons and that the number of large defined pension plans has remained stable); see also GENERAL ACCOUNTING OFFICE, GAO/GGD-97-1, PRIVATE PENSIONS: MOST EMPLOYERS THAT OFFER PENSIONS USE DEFINED CONTRIBUTION PLANS 4-9 (1996) (presenting statistics of growth in defined contribution plans); Olivia S. Mitchell et al., Introduction: Assessing the Challenges to the Pension System, in POSITIONING PENSIONS FOR THE TWENTY-FIRST CENTURY 1, 2-5 (Michael S. Gordon et al. eds., 1997) [hereinafter POSITIONING PENSIONS] (explaining shift to defined contribution plans).

31 Under a defined benefit plan, an employer provides an employee with a pension calculated in accordance with some set formula (e.g., based upon years of service and a percentage of pay). See generally FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, supra note 23, at 69-70. Defined benefit plans use different formulas: some pay a flat-dollar amount for each eligible year of service, others use a percentage of pay for each eligible year or a percentage of career-average pay and still others calculate benefits as a percentage of average pay in the final employment years. See LANGBEIN & WOLK, supra note 27, at 44.

32 See FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, supra note 23, at 57-59, 70-72; LANGBEIN & WOLK, supra note 27, at 46-52 (describing kinds of defined contribution plans); see also GENERAL ACCOUNTING OFFICE, GAO/GGD-98-23, PRIVATE PENSIONS: PLAN FEATURES PROVIDED BY EMPLOYERS THAT SPONSOR ONLY DEFINED CONTRIBUTION PLANS 11-18 (1997) [hereinafter GAO, PLAN FEATURES] (describing contribution features of a subset of defined contribution plans). A well-known defined contribution plan is that pursuant to Section 401(k) of the Internal Revenue Code, in which an employee can defer, on a pre-tax basis, a portion of her compensation as a contribution to an individual retirement account and receive a matching contribution from an employer (generally, a percentage of an employee’s earnings), at the employer’s option. See FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, supra note 23, at 96-97 (summarizing “nondiscrimination” rules under which plans lose their favorable tax treatment if they do not have adequate participation of “nonhighly compensated” employees vs. “highly compensated” employees).

33 See LANGBEIN & WOLK, supra note 27, at 741-42; GAO, PLAN FEATURES, supra note 32, at 21-23 (presenting data on employer-directed, as opposed to participant-directed, plans). Section 404(c) of the Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104(c) (1974), authorizes an employer to provide a defined contribution individual account plan. The Department of Labor’s regulations, see 29 C.F.R. § 2550.404c-1(b)(1)(ii), (b)(3) (1997), provide that, in such plans, an employer must offer an employee a minimum of three diversified investment alternatives with different risk and return characteristics. See generally Vickie L. Bajtelmit & Jack L. VanDerhei, Risk Aversion and Pension Investment Choices, in POSITIONING PENSIONS, supra note 30, at 45, 50-56 (discussing investment decision-making by
receives the proceeds of the account's investment performance. Although defined benefit plans protect employees better against some retirement risks, employers prefer the defined contribution plans for numerous reasons, particularly because they are less costly to administer.

Americans can satisfy their retirement and other needs through the classic third method—saving outside of Social Security and employer-sponsored pensions. In this method, saving and investing responsibility falls almost exclusively upon an individual, which again raises the issue of education. Since government incentives to encourage saving have been, at best, mixed, individuals should not

employees in defined contribution plans). But see Weiss & Sgaraglino, supra note 12, at 1196-97 (explaining that the Section 404(c) regulations do not require complete diversification in the finance sense of diversification within and across asset types).

35 See generally FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, supra note 23, at 70-71 (explaining that the benefit payable at retirement reflects employer and employee contributions and investment gains or losses).

36 See Olsen & VanDerhei, supra note 28, at 7-8 (referring to discussion of risks in Zvi Bodie, Pensions As Retirement Income Insurance, J. Econ. Lit., March 1990, at 28-49). But see Gordon, supra note 12, at 1539-40 (observing that employers providing defined benefit plans captured most of the growth in invested plan assets from 1980 to 1995, since their pension obligations to employees were fixed). Other risks facing retirees include the risk that a retiree will have insufficient assets to maintain a pre-retirement standard of living and that an employer/plan sponsor will become bankrupt.

37 See Olsen & VanDerhei, supra note 28, at 13-14 (discussing costs); see also Ball & Bethell, supra note 23, at 259, 289 n.1 (attributing the decline of defined benefit plans to employer cost savings); Haim A. Mozes, The Role of Taxes in the Shift in Emphasis from Defined Benefit Plans to Defined Contribution Plans 1 (Dec. 1997) (unpublished manuscript, on file with author) (associating declining use of defined contribution plans with decreased corporate tax rates after 1986). But see RICHARD A. IPPOLITO, PENSION PLANS AND EMPLOYEE PERFORMANCE: EVIDENCE, ANALYSIS, AND POLICY 85-89 (1997) (arguing that the decline of defined benefit plans owes much to the popularity of Section 401(k) plans). Yet the cost issue does not uniformly support defined contribution plans (e.g., new workers may not accrue any benefits under defined benefit plans, which is a cost advantage for these plans from an employer's perspective). Defined benefit plans, like Social Security, are "pay-as-you-go" in nature and thus favor older workers at the expense of younger workers and may thus lead employers in industries where new or younger employees are more productive to abandon such plans. See DISNEY, supra note 25, at 110-21 (explaining how, in defined benefit plans, older workers benefit at the expense of others, as they are given early retirement, which typically requires more contributions from younger workers). Defined contribution plans might simply be more suitable in a labor environment where highly-educated employees "rent" their services to many companies over their working lives, which means that they could not take full advantage of defined benefit plans that require several years for vesting. See SASS, supra note 19, at 240-41.

38 See Ball & Bethel, supra note 23.
shoulder all of the blame for the low national saving rate. Yet because individuals must rely at least partly upon income from their savings for their future needs, their present saving rate and their decisions about how to invest the saved funds are critical for their future.

Finally, as a result of the enormous changes in consumer financial services during the past several decades, financial firms offer ordinary people numerous investment products and options, which may enable people to better assume the new burdens of saving and investing and may even help cause an increased use of defined contribution plans. However, these products require financial literacy so that an individual will understand and choose knowledgeably among the many kinds of securities when designing an optimal portfolio. Individuals' investment options are not, as once was the case, merely savings deposits or a few insurance products with a saving component; brokerage services and most financial products are no longer limited to the wealthy. Because of technological developments and competition in financial services, individuals with modest financial resources can now purchase sophisticated investment products and services. Most importantly, the investment company or asset management industry, which provides consumers with professional

See generally Paul Yakoboski & Bill Pierron, IRAs: It's a Whole New Ballgame, EMPLOYEE BENEFIT RES. INST. NOTES, Sept. 1997, at 1, 1-4. The new law facilitates (i.e., assesses no tax penalty on) withdrawals from all IRAs for special consumption purposes, such as education and first-time home purchase, which could undermine the saving incentive aspect. See, e.g., R. Glenn Hubbard & Jonathan S. Skinner, Assessing the Effectiveness of Saving Incentives, J. ECON. PERSP., Fall 1996, at 73, 73-90 (reviewing debate over the value and costs of saving incentives). But see James M. Poterba et al., How Retirement Saving Programs Increase Saving, J. ECON. PERSP., Fall 1996, at 91, 111 (concluding, on the basis of empirical data, that tax-favored accounts (IRAs and 401(k)s) do, in fact, increase saving, and do not involve a shift of savings from other investment vehicles); Eric M. Engen & William G. Gale, Debt, Taxes, and the Effects of 401(k) Plans on Household Wealth Accumulation 28-29 (May 1997) (unpublished manuscript, on file with author) (questioning whether eligibility for 401(k) plans has in fact increased participants' wealth).

See generally BERNHEIM, THE VANISHING NEST EGG, supra note 6, at 5-35 (describing the decline in the U.S. saving rate since 1973, the poor saving rate in comparison to those in other developed countries, and refuting arguments that such decline is illusory). See also CHRISTOPHER CONTE, THE NATIONAL SUMMIT ON RETIREMENT SAVINGS: AGENDA BACKGROUND MATERIALS 10-11 (1998) (presenting data on contemporary saving rates); Arthur B. Kennickell et al., Family Finances in the U.S.: Recent Evidence from the Survey of Consumer Finances, 83 FED. RESERVE BULL 1, 1 (Jan. 1997) (same).

money management, has grown tremendously in the past two decades, and gives consumers a bewildering array of investment choices.

B. The Culture of Individual Responsibility and Education

Therefore, developments in Social Security, pensions, saving and consumer financial services all emphasize individual saving and investing responsibility and decision-making, and could support the need for investor education. However, different, more paternalistic, solutions to the saving and investing crisis are imaginable and may even be preferable, particularly if one is doubtful that most people could be trained to bear this responsibility. A government agency, for example, could mandate the amount an individual should save and the appropriate investment of the savings. In fact, government paternalism is manifest in Social Security and pension law, for Social Security forces individuals to put aside money for retirement (and dictates the investment of these “trust funds”), and pension and tax law generally favor pension plans that remove decision-making from employees. Although economists debate the advantages and purposes of paternalism in retirement programs, common sense suggests that it beneficially addresses the failure of individuals, for a number of understandable psychological reasons, to plan adequately for their future consumption.

A powerful argument for paternalistic pension policies is that, according to the psychological and behavioral literature, and data, people often do not act rationally in their saving and investing activities.  


42 See generally Weiss, supra note 28, at 1279-85 (explaining that the largest tax subsidy goes to employer-sponsored pension plans where employee participation is mandatory).

43 See id. at 1285-97 (surveying the debate among economists over paternalism); id. at 1297-1311 (discussing human behavior that justifies paternalism in pension policy); see also Alexander, supra note 12, at 134-39 (reviewing arguments justifying paternalism).

44 See B. Douglas Bernheim et al., What Accounts for the Variation in Retirement Wealth Among U.S. Households? 34-35 (Sept. 1997) (unpublished draft, on file with author) (concluding that the life-cycle model of consumption can not explain data about individuals’ consumption pre- and post-retirement, because individuals are often surprised by their decline in income following retirement); Gordon, supra note 12, at 1357-59 (discussing loss aversion and salience as psychological barriers to making high levels of equity investments); Richard H. Thaler, Psychology and Savings Policies, 84 AM. ECON. REV. 186, 186 (May 1994) (arguing that psychological factors cause investors to fall to perform optimal life-cycle investing). See
Constraints in American culture, however, significantly limit paternalism because the culture favors, promotes and thus determines a preference for individual responsibility and decision-making. Short of a financial cataclysm, these constraints make unlikely any appreciable increase in government paternalism in Social Security and pension policy that would significantly limit this preference. (This does not mean that there will, and should, not be significant government intervention in the saving and investing crisis that is paternalistic in nature.) The same culture that foregrounds individual responsibility also assumes that individuals should be educated to accept this burden. It thus ensures that investor education will inevitably accompany the new saving and investing tasks placed on Americans, particularly since these activities have become a part of ordinary life. Because investor education is, therefore, a cultural “given,” scholars should consider ways of improving it, instead of focusing most of their attention on more paternalistic saving and investing policies.

It is assumed here that culture instills in each individual methods of motivating and understanding their own behavior and also that of others, while not placing them in a mental straightjacket. What may be drawn from this assumption is that in American culture, individuals look to, and expect to rely upon, their own efforts for many achievements, including saving and investing success. Individuals expect that much of their financial well-being should flow from these savings and investment efforts. Because it is cultural, the “ideology” of self-help animates both the wealthy and those with limited financial resources. The social- and self-understandings that the ideology generates are powerful, and thus constraining, because they have been


See, e.g., Weiss & Sgaraglino, supra note 12, at 1207-09 (proposing safe harbor rules for small pension plans to encourage proper diversification of pension assets).

“Culture” does not explain all behavior, attitudes or viewpoints in a country, for within any given culture there are innumerable subcultures, often at odds with the dominant culture. Yet, just as nearly every human practice is to a degree conventional and made up of shared goals, routines, and procedures, so also do citizens share certain common viewpoints. See generally STANLEY FISH, PROFESSIONAL CORRECTNESS: LITERARY STUDIES AND POLITICAL CHANGE 82 (1995) (“Each effort only makes sense in relation to the traditions, goals, obligatory routines, and normative procedures that comprise its history and are the content of its distinctiveness . . . .”); CLIFFORD GEEKTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 89 (1973) (“[culture] denotes an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life.”).

See, e.g., FRIEDMAN & FRIEDMAN, supra note 26, at xv (expressing this ideology). But see ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 66-82 (1996) (arguing that current societal pressures undermine the traditional cultural emphasis upon individual responsibility).
formed in history and by earlier common experiences. Yet the past alone does not determine the American cultural preference for individual responsibility, for the present reinforces it in countless ways.

The shared perspectives of this culture that emphasize individual responsibility do not leave individuals unaided. Rather, within the culture, individuals accept a burden as an appropriate individual task only if they receive a minimum of collective support and training to develop their respective talents, and to recognize and make use of opportunities, in the human activity in question. The culture thus ensures that education inevitably accompanies individual growth and responsibility. Under its central and traditional justifications, education "forms" or "empowers" men and women so that they can function responsibly in our society. However, the "constraining" side of education should not be ignored. In instructing individuals how best to accomplish a given activity, education creates and reinforces the collective understanding that the activity is an individual, as opposed to social, undertaking and helps to limit the ways in which individuals engage in the activity.

A culture that places responsibility on individuals and educates them to bear it should similarly affect Americans' understanding of saving and investing. Yet something more is needed for these activities to fall into the familiar cultural pattern. Saving and investing must become everyday activities, similar to learning how to find a job


49 See, e.g., Donald C. Langevoort, Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers, 84 Cal. L. Rev. 627, 681-84 (1996) (discussing cases that impose a duty upon individuals to read information on investments that has been given to them).

50 Cf. Chubb & Moe, supra note 19, at 3-4 (discussing "scientific" progressive justification for bureaucratic control of schools); Friedman & Friedman, supra note 26, at 144 ("Mostly, [the establishment of the school system in the United States] simply reflected the importance that was attached by the community to the ideal of equality of opportunity."); Cleveland, supra note 26, at 85-88 (noting that universal elementary and secondary education in the U.S. was the product of the Progressive Era); Lee E. Teitelbaum, Family History and Family Law, 1985 Wis. L. Rev. 1135, 1152 (discussing influence of the Enlightenment theory upon provision and methods of education in the U.S.).

51 On the constraining side of education see, e.g., Michel Foucault, Discipline and Punish: The Birth of the Prison 184-92 (1979) which criticizes traditional Enlightenment justifications of education. Like all educators, those engaged in investor education must be sensitive to, and constantly question, the limitations placed upon students through education. See James A. Fanto, Investor Education, Securities Disclosure and the Creation and Enforcement of Corporate Governance and Firm Norms, 48 Cath. U. L. Rev. (Forthcoming 1998) (manuscript at 18-20, on file with author) (discussing limiting or "reifying" aspect of education).
or housing, that nearly all members of society must undertake, and that are thus critical to one’s individual and social development, survival and advancement. For all the reasons discussed earlier, particularly the transformations in retirement plans and consumer financial services, personal saving and investing have achieved this commonplace status. Individuals thus expect to depend upon their own efforts and saving and investing decisions and also feel entitled to investor education.

In fact, the very nature of American capitalism has made individual investing an ordinary activity, which inevitably leads to investor education. Unlike capitalism in other countries, American capitalism has always been characterized by capital market financing in which companies primarily raise funds on securities markets from dispersed investors, not privately from large financial intermediaries. In recent times, these capital markets have experienced tremendous growth because an increased number of ordinary individuals are participating in them, again often through defined contribution retirement plans. This capitalism simply cannot grow, or exist at its present level, unless the consumer capital providers know how to participate in these markets, whether as direct investors or through collective investment vehicles, such as mutual funds.

Indeed, another aspect of American culture—a longstanding “Main Street” hostility to, suspicion of, and yet irresistible attraction to the dominant market capitalism typified by Wall Street—reinforces individuals’ expectations of receiving investor education so that they can participate in a “game” where the deck has often been stacked against them. Historically, many ordinary citizens, politicians and intellectuals disliked Wall Street because, in their view, Wall Street

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52 See, e.g., ROE, supra note 48, at 3-8; see also Andrei Shleifer & Robert W. Vishny, A Survey of Corporate Governance, 52 J. Fin. 737, 748-73 (1997) (surveying corporate financing and governance systems).

53 See NEW YORK STOCK EXCHANGE, FACT BOOK FOR THE YEAR 1997 57-59 (1998) [hereinafter FACT BOOK] (discussing growth of individual stock ownership in America and observing that one in three adults owns stock directly or indirectly); Edward Wyatt, Share of Wealth in Stock Holdings Hits 50-Year High, N.Y. TIMES, Feb. 11, 1998, at A1 (observing that Americans have more of their funds invested in the stock market than in other assets); cf. Bartholomew & Murphy, supra note 40, at 177-78 (noting growth in the amount that individuals invest through the Internet).

54 Indeed, investor education is becoming important in other countries that are moving from bank-centered capitalism to market capitalism because consumers need to be taught to save and invest if capital markets in these countries are to grow. See, e.g., AUSTRALIAN SECURITIES COMM’N & FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA LTD., DON’T KISS YOUR MONEY GOODBYE: HOW TO CHOOSE A FINANCIAL ADVISOR (1997); SEC, First-Ever Hemisphere-Wide Investor Education Campaign Planned (visited Sept. 15, 1998) <http://www.sec.gov/news/press/97-111> (on file with author) (discussing investor education campaign to be coordinated by financial regulators throughout the Americas). This Article is part of a larger research agenda that also examines investor education outside the United States.
professionals took advantage of investors and misused their money.\(^5\) The financial power of the investment community also potentially undermined individual initiative since financial institutions dominated many economic activities and thus eliminated areas for individual economic expression and activity.\(^6\) Yet this suspicion of Wall Street was always coupled with an attraction to investing, the possible investment gains and to the successful investors in ways often akin to the love and hatred of gambling and gamblers.\(^7\) From these additional cultural perspectives, investor education should correct the “educational” asymmetry between ordinary investors and Wall Street professionals to ensure that these investors could at least play the potentially valuable investing “game” better.

While it is not easy to gather empirical evidence about a concept as elusive as culture and while such evidence is not critical to establish the above argument, available data support the conclusions drawn from this general overview of American culture. For example, data suggests that Americans desire personal responsibility in investing and value investor education to improve their investing performance. Empirical studies have examined (and continue to examine) individual investing attitudes and behavior, particularly in retirement plans, with the goal of developing policies that increase personal saving activity and produce optimal investing behavior. The studies uniformly show that individuals want to control, or at least to be significantly involved in, investment decisions. Furthermore, investors want to feel that their efforts matter in their financial future.\(^8\) More impor-

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\(^6\) See BRANDEIS, supra note 48, at 1-27 (positing a classic statement of hostility towards Wall Street).

\(^7\) See ROBERT J. SHILLER, MARKET VOLATILITY 59 (1989) ("Investing in speculative assets clearly shares with gambling the element of play .... The satisfaction afforded by gambling is related to the individual's ego involvement in the activity; and thus individual investors must themselves play to achieve satisfaction, and most do not rely on others for decisions."). Even business law scholars show much respect for “great” investors. See, e.g., The Essays of Warren Buffett: Lessons for Corporate America, 19 CARDOZO L. REV. 1 (1997) (symposium on this famous investor with a collection of his essays and contributions by over 20 well-known scholars).

\(^8\) See, e.g., CONTE, supra note 39, at 8-9 (citing results of U.S. Department of Labor's survey of focus groups); Arthur B. Kennickell et al., Saving and Financial Planning: Some Findings from a Focus Group, 8 FIN. COUNSELING & PLAN. EDUC. 4 (1997) (emphasizing "self-control" in saving and financial planning); Olsen & VanDerheel, supra note 28, at 32 (reviewing literature which suggests that employees favor defined contribution plans because they like the control and the choice to use retirement savings for other uses, if the need arises; "While
tantly, the studies also strongly suggest that people want and use investor education, which appears both to increase their saving rate and to make their investing decisions accord better with the financial principles.\(^{59}\)

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\(^{59}\) See, e.g., PATRICK J. BAYER ET AL., THE EFFECTS OF FINANCIAL EDUCATION IN THE WORKPLACE: EVIDENCE FROM A SURVEY OF EMPLOYERS 19 (National Bureau of Econ. Research Working Paper No. 5655, 1996) ("Retirement education—and frequent seminars in particular—positively affect the size of contributions to self-directed plans."); BERNHEIM, ET AL., EDUCATION AND SAVING, supra note 6, at 3 (presenting statistical research, based on survey, suggesting "strong indications that mandates [requiring financial education] not only increased exposure to financial education, but also systematically altered adult behavior by stimulating greater saving"); BERNHEIM & GARRETT, supra note 6, at 19 (using a database on household interviews, the authors find that employees rely heavily on financial education in the workplace and that it affects financial choice); CONTE, supra note 39, at 23 (citing studies which show "employees regard financial education as an important and attractive benefit"); EMPLOYEE BENEFIT RESEARCH INSTITUTE, THE 1997 RETIREMENT CONFIDENCE SURVEY (RCS) SUMMARY OF FINDINGS 9 (1998) ("Worker education programs do appear to influence individual behavior. First, 45 percent of those using the educational material report that it led them to begin contributing to the plan. In addition, the RCS found that among users of educational material, 49 percent report that it led them to change the allocation of their money among the investment options offered, and 38 percent said that it led them to change the amount they contributed to the plan."); Deborah Milne et al., Can We Save Enough to Retire? Participant Education in Defined Contribution Plans, EMPLOYEE BENEFIT RES. INST. ISSUE BRIEF No. 160, April 1995, at 1 (discussing positive results of investor education programs); Deborah Milne et al., Participant Education: Actions and Outcomes, EMPLOYEE BENEFIT RES. INST. ISSUE BRIEF No. 169, Jan. 1996, at 22 (concluding that pension plan education produces positive saving and investing results and that investors like to be involved in investing decision-making); Paul Yakoboski & Jack VanDerhei, Worker Investment Decisions: An Analysis of Large 401(k) Plan Data, EMPLOYEE BENEFIT RES. INST. ISSUE BRIEF No. 176, Aug. 1996, at 3 (noting a survey of employees in three major companies, AT&T, IBM and New York Life, shows that 46% of individuals reallocated money on the basis of educational materials explaining asset allocation and diversification); Zvi Bodie & Dwight B. Crane, Personal Investing: Advice, Theory, and Evidence from a Survey of TIAA-CREF Participants 15 (May 28, 1997) (unpublished manuscript, on file with author) ("While TIAA-CREF participants are on average better informed and more experienced at making their own investment choices than the general population, our findings suggest that, given enough education, information, and experience, people will tend to manage their self-directed investment accounts in an appropriate manner."); see also YANKELOVICH PARTNERS INC., supra note 55, at 7 (reporting that surveyed investors desire more investor education from financial firms). But see CONTE, supra note 39, at 9 (discussing investors' confusion over educational materials).
Since American culture thus gives investor education an important and inevitable, but not an exclusive, role in saving and investing, scholars interested in financial markets, pension policy or related fields should analyze this education from various theoretical perspectives, compare current educational efforts with their theoretical conclusions, and propose improvements to the education. Legal scholars have particularly neglected this agenda as they have seldom examined investor education and, when they have, they have generally downplayed it, preferring to focus their attention on paternalistic saving and investing policies that, at times, remove, or substantially restrict, individual decision-making. Although occasionally appearing to reveal an academic hostility to market-oriented solutions, these scholars believe—with considerable justification—that most consumers, with little time, few assets and well-documented psychological inhibitions to saving and investing optimally, do not belong in the bewildering and often difficult investment world. Yet economists

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60 Professor Hu, for example, gives equivocal support to investor education. See Hu, supra note 12, at 2372 ("The road ahead is less clear. Investor education, through modified disclosure requirements or otherwise, will help. But there are limits to the efficacy of education. A rethinking of the locus of investment decisionmaking is appropriate. Devising alternatives to the need for universal literacy and universal decisionmaking is essential."); id. at 2377 ("Despite all of these limitations, I think that efforts at investor education and more comprehensible forms of mandated disclosure are worthwhile.").

61 See, e.g., LANGBEIN & WOLK, supra note 27, at 742 (supporting paternalism); Gordon, supra note 12, at 1566 (recommending that financial instruments allowing investors to capture the upside of market with some downside protection be added to investment options in pension plans); Hu, supra note 12, at 2378 ("regulatory steps that would have the effect of causing the less financially sophisticated to more seriously consider asset allocation funds do make sense to me."); Weiss, supra note 28, at 1311-19 (recommending a number of paternalistic policies, including mandatory savings plans, that counter individuals' abilities to hurt themselves in saving). But see Weiss & Sgaraglino, supra note 12, at 1212-13 (advocating a "mild sort of paternalism" whereby "pension funds should be permitted to allow workers to choose the level of rational risk they wish to bear.").

62 Cf. RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 1-13 (1995) (observing that legal academics in the United States have been historically hostile to market solutions and private economic activity, including private law practice, and favorable to government solutions to social problems).

63 See supra note 44.

64 See, e.g., Hu, supra note 12, at 2326 ("End runs around universal literacy and universal probabilistic decisionmaking are thus essential. Because of certain structural biases inherent to existing investment arrangements, such end-runs are especially likely to benefit those who are poorly educated and, educated or not, those who are simply unable to assume significant investment risks."); Weiss, supra note 28, at 1300-11 (exploring the psychological difficulties facing investors). They may also simply express the despair of professors, who appreciate the difficulties of their subject matter and wonder how ordinary people can comprehend it. See, e.g., Hu, supra note 12, at 2367-71 (discussing difficulties even the sophisticated investors face in understanding the complexities of finance); see also DAVIS, supra note 27, at 29 (observing that consumers' inability to understand financial information is an economic justification for social security); KRIPKE, supra note 4, at 14 (discussing the SEC staff's traditional view that the ordinary investor is incapable of making investment decisions by herself); Lawrence J. White, Competition Versus Harmonization—An Overview of International Regulation of Financial Services, in INTERNATIONAL FINANCIAL MARKETS, supra note 41, at 17-18 (explaining that paternalism in financial policy has traditionally been based on the belief that, even if ordinary individuals
and financial economists—that is, the actual finance and investment specialists—both hypothesize and find that financial education can help a typical consumer in her saving and investing decisions. By ignoring investor education, legal scholars are simply neglecting an important policy tool in the mix of possible solutions to the emerging saving and investing crisis.

Finally, the growing emphasis on investor education in America, while historically contingent, demands scholarly attention not because it is necessarily the preferred solution as a normative matter, although a normative argument could be made for it. Rather, since it is a major cultural solution, investor education’s neglect or absence can produce troubling, and potentially catastrophic, social consequences. If nearly all Americans have saving and investing responsibility and decision-making, particularly in defined contribution retirement plans, their well-being in retirement and even the assets that they pass on to their heirs will depend, if there is no organized investor education, upon such circumstances as an individual’s inherent financial ability and/or the quality of her financial advisors. The significant wealth disparities in the United States, between those with and without such retirement plans, therefore, will be joined by further distinc-

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receive information on investing, many of them either will not understand it, or can not invest well despite it).

The argument would be that optimal saving and investing from an overall societal perspective will occur when, with an accompanying general social protection as a minimal Social Security program, individuals have a major role in making decisions regarding their own saving and investing behavior and are educated, as early as possible, as to the consequences of their choices, before circumstances inevitably “educate” them. This normative statement generally relies on the common sense observations that there exists a great range of individual preferences, attitudes, motivations and behavior and that any plan or policy to harness or modify them will inevitably fail. An eloquent statement of this normative position is the following:

Not only do we not possess such an all-inclusive scale of values: it would be impossible for any mind to comprehend the infinite variety of different needs of different people which compete for the available resources and to attach a definite weight to each. For our problem it is of minor importance whether the ends for which any person cares comprehend only his own individual needs, or whether they include the needs of his close or even those of his more distant fellows—that is, whether he is egoistic or altruistic in the ordinary senses of these words. The point which is so important is the basic fact that it is impossible for any man to survey more than a limited field, to be aware of the urgency of more than a limited number of needs. Whether his interests center [a]round his own physical needs, or whether he takes a warm interest in the welfare of every human being he knows, the ends about which he can be concerned will always be only an infinitesimal fraction of the needs of all men.

FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 58-59 (1944); see also Alexander, supra note 12, at 130 (“A sense of responsibility develops only when a person has the opportunity to act responsibly.”); Michael C. Jensen & William H. Meckling, The Nature of Man, J. APPLIED CORP. FIN., Summer 1994, at 5 (“Human beings are not only capable of learning about new opportunities, they also engage in resourceful, creative activities that expand their opportunities in various ways.”).
tions between people who, for whatever reason, save and invest well in the plans and those who do not.\textsuperscript{66} Providing an adequate investor education will help prevent this potential source of disparity of economic well-being. It is admittedly, however, only one solution and should not be used to foreclose others.\textsuperscript{67} Whatever its justification or consequences, individual responsibility is with us, as is education. The difficult, but necessary questions are what kinds of investor education individuals need and who should deliver it to them.

\textbf{III. A THEORETICAL FRAMEWORK}

As a preliminary matter, investor education, like any education, means much more than supplying information to individuals.\textsuperscript{68} Investor education suggests that individuals receive the cognitive and conceptual means to make sense of information and to guide their behavior.\textsuperscript{69} Without this conceptual framework, they will not understand any information given as relevant to their activity, and their behavior will be incomprehensible to those who already possess the framework and operate within the activity. As they are educated regarding the activity, investors come to understand the relevance and importance of information and the motivations and behavior of those participating in it (e.g., what is important and what is not, how significant is some, as opposed to other, information, and what behavior

\textsuperscript{66} I owe this observation to Professor Daniel Greenwood.

\textsuperscript{67} Such other solutions include forcing investors to place a certain percentage of their retirement assets in particular kinds of investments. See Zvi Bodie & Dwight Crane, The Design and Production of New Retirement Savings Products (Harvard Business School Working Paper 98-070, 1998) (proposing retirement investment products placing a "floor" on investment risk); Gordon, supra note 12, at 1566 (recommending that defined contribution plans include an equity portfolio with a collar); Weiss & Sgaraglino, supra note 12, at 1213 (requiring investment options in defined contribution plans to be adequately diversified). Moreover, education can hardly address disparities arising from levels of compensation, which allow some to save more than others, and from differences in employers' retirement plans. And it can not by itself address the wealth disparity between those who can and can not save. Investor education could at least give low-income individuals some basic saving and investing skills so that, when they have funds available for saving, they know what to do with them.

\textsuperscript{68} Education is thus not captured well by the general economic concepts of "absence of information" and "information asymmetry" between a consumer and financial professional. Absence of information simply describes the situation in which an individual must make choices and decisions without complete information, while information asymmetry refers to transactions in which one contracting party has information that is not available to the other. See, e.g., White, supra note 64, at 16.

\textsuperscript{69} See, e.g., Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities 365 (1980) (discussing literary interpretation and observing that when "we try to persuade others to our beliefs because if they believe what we believe, they will, as a consequence of those beliefs, see what we see; and the facts to which we point in order to support our interpretations will be as obvious to them as they are to us. Indeed, this is the whole of critical activity, an attempt on the part of one party to alter the beliefs of another so that the evidence cited by the first will be seen as evidence by the second") (emphasis in original).
follows from specific understandings). For example, individuals need more than a definition to make sense of a “stock” or “bond,” for they must learn why an enterprise raises funds in different ways and what risks different investments pose for them. Again, it is important to remember that, however designed, investor education must concentrate on imparting certain skills, at the expense of others, if it is to be successful (i.e., to help individuals to save and invest well in this society).

It is also useful, for analytic purposes, to divide investor education into different categories based upon the goals or purposes—basically economic and financial—that the education should fulfill. A curricular order makes sense in learning since education about savings logically precedes education about investing. Finally, in considering who can best accomplish the different kinds of investor education, it is important to consider which party, whether a private firm or a government agency, has the incentives to, and can in fact, offer the education most effectively and in a cost efficient way. Any identification of appropriate parties must depend upon certain assumptions—which will be stated—about the motivations and functioning of private market actors and of government agencies.

A. What is Investor Education?

1. Education About Saving

Individuals must first learn to save, which means deferring present consumption of income or assets to meet later financial goals or, in economic parlance, adjusting consumption rationally over the life cycle so that savings and income from savings can replace income no longer available (or not available in sufficient amounts) from employment. They must be taught to set, and see the usefulness in setting...
ting, such goals, which could include maintaining a certain lifestyle after retirement or having funds available for some specific future consumption (theirs or their children’s). Education about saving should convey the understanding that saving is an important way to achieve these goals because other sources of income may contribute less to future consumption, may not provide as large a return as invested savings or, for whatever reason, may simply disappear.

Education about saving thus changes one’s conceptual framework and behavior regarding money and finances. To see saving as a way of achieving goals, a person must first understand her financial situation (income, expenses, assets and debts) and make a reasonable assessment of its likely future outlook. The consumer must then consider how to adjust this financial situation to meet these goals, which could require setting aside a certain amount of funds each month and/or limiting present consumption. Saving as a method of attaining long-term goals should make a consumer think of herself (and family) as an economic unit, and regard each activity in financial or economic terms. As a complementary way of viewing saving, each person should realize that she will have differing needs and resources at different times in the life cycle. An investor must anticipate these different needs and provide for these later life stages or “selves.”

An ambitious educational program on saving would also teach that saving benefits the entire economy (and thus individuals and their children) by making funds available to a country’s firms, which improves the competitive position of these firms by increasing external resources for new projects. See BERNHEIM, THE VANISHING NEST EGG, supra note 6, at 39; id. at 40-43, 54-61 (describing the general dependency of domestic firms on domestic financing and risks associated with foreign financing, such as higher interest rates, under-investment in projects, and currency appreciation); see also White, supra note 64, at 32-33 (discussing how insufficient saving causes the demise of domestic industries in world markets and a general lack of confidence in a country’s financial markets, resulting in unemployment).

It would also involve planning for unexpected emergencies by means of insurance and emergency funds. See, e.g., AMERICAN COUNCIL OF LIFE INSURANCE, RETIREMENT SECURITY INFORMATION (1997) (describing various forms of insurance protection).

Cf. CONTE, supra note 39, at 23-24 (suggesting that financial education about personal goals and budgeting enables employees to better understand business financial decisions).

See POSNER, supra note 13, at 95 (“The concept [of multiple selves] can also be used—though here great caution is necessary—to justify, nonpaternallyistically, the conferral of certain rights on the future self against the selfishness of the current self.”); Sunstein, supra note 44, at 1184-86 (discussing the differences between one’s prediction about a future event and one’s actual experience of it); Richard H. Thaler & H.M. Shefrin, AN ECONOMIC THEORY OF SELF-
Education about saving should also include an explanation of the many psychological pressures that undermine willpower regarding saving, such as excessive focus on the present ("myopia") and impulsiveness. Appreciation of such pressures and of one's own particular psychological profile regarding saving and future planning in general is critical since behavioral studies demonstrate that successful saving involves issues of will as much as intelligence. The education should thus generate substantial self- and social knowledge, not only about the goals one sets but also regarding the consumption temptations to which a typical American consumer is subject. A person must also learn attitudes and behavior (even behavioral "tricks") that help one resist such psychological pressures, such as placing funds to be saved in separate accounts, and thus removing them from the temptation of current consumption. Indeed, like other behavior enabling people to function on a day-to-day basis, successful saving involves following simplified, informal rules or "norms" that can be easily applied, are reinforced by others and become almost habitual.

More specifically, this kind of education would also convey a basic understanding about Social Security and the program's func-

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Control, in QUASI-RATIONAL ECONOMICS 77, 79 (1991) (assuming a "two-self" person; a "planner" who is concerned with the future and a "doer" who experiences the present). People must simply learn to imagine or anticipate their future views and needs.

79 See Sunstein, supra note 44, at 1179-84 (describing pressures such as aversion to loss and to extremes of any kind, unrealistic optimism, overconfidence, etc.); Weiss, supra note 28, at 1297-1311 (describing pressures).

80 See, e.g., EMPLOYEE BENEFIT RESEARCH INSTITUTE, 1998 RETIREMENT CONFIDENCE SURVEY, RETIREMENT PLANNING PERSONALITIES: FROM DENIERS TO PLANNERS 1-3 (1998) (categorizing kinds of personalities—deniers, strugglers, impulsives, cautious savers, planners, retiring savers, and their saving strategies); Thaler, supra note 44, at 187 ("Saving requires willpower, which humans (or at least men) have sometimes had trouble summoning since the time of Adam and Eve.").

81 See BERNHEIM, THE VANISHING NEST EGG, supra note 6, at 66-92 (discussing how popular culture encourages present consumption).

82 See Hersh M. Shefrin & Richard H. Thaler, The Behavioral Life-Cycle Hypothesis, in QUASI-RATIONAL ECONOMICS, supra note 78, at 97 (describing usefulness of "habitual rules" in enabling individuals to resist impulses, and explaining prominence of "mental accounts," whereby individuals divide their income and assets into various accounts, some of which they consider unavailable for current consumption); Thaler & Shefrin, supra note 78, at 81 (observing that people often use learned "self-imposed rules of thumb" in saving because they reduce decision-making discretion). Indeed, as part of education about saving, people should be taught to establish, at least mentally, accounts for current vs. long-term expenditures. In a sense, these rules are the informal norms that guide much human behavior. See generally Assar Lindbeck, Incentives and Social Norms in Household Behavior, 87 AM. ECON. REV. 370, 375-76 (1997) (discussing saving and consumption norms); Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 MICH. L. REV. 338, 351 (1997) (defining "norms" as obligations that are not imposed by law, but can be imposed either by decentralized groups or even throughout society); Richard A. Posner, Social Norms and the Law: An Economic Approach, 87 AM. ECON. REV. 365, 365 (1997) ("By 'social norm' ('norm' for short) I shall mean a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with (otherwise it wouldn't be a rule.").) (footnote omitted).
tioning and terms of eligibility. The education would also help a consumer achieve an elementary understanding of tax-favored retirement saving plans, such as employer pensions, IRAs and others, as well as their availability. In addition, it might train a consumer about methods available from financial institutions for non-retirement saving, such as automatic paycheck deposits or debits to accounts.

2. Education About Investing

Since a major goal of investor education is to have a consumer achieve an optimal investment portfolio, the consumer must understand how to invest well. Finance theory, which studies investment strategy, should establish this basic understanding. Like any intellectual discipline, finance presupposes a familiarity with a conceptual framework and methodology, as well as with related sciences (e.g., economics, statistics and psychology). As in any rigorous intellectual pursuit, moreover, its practitioners constantly re-examine and test, empirically and conceptually, its theories and results. Yet a person need not understand the nuances of the scientific debates to be conversant with or, in Professor Hu's terms, "literate" as to the basic teachings of finance. Rather, the goal of education about investing is to produce consumers who are educated about the fundamentals of investment theory, and who can knowledgeably converse with finance professionals. In sum, consumers must become part of finance's "culture" by assuming its basic conceptual framework, which establishes certain goals and methods of achieving them and thus sets simple, easily applied guidelines or "norms" for appropriate investing behavior.

The basics of investing—in effect, the distilled wisdom of finance—are not beyond the grasp of an investor with a high school or

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83 This is the kind of basic information available from the Social Security Administration. See, e.g., Social Security Administration, Understanding Social Security (visited Sept. 15, 1998) <http://www.ssa.gov>.


85 See, e.g., RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE xxiii (5th ed. 1996) (pointing out that it is useful, in studying finance, to understand accounting, statistics and micro-economics).

86 See, e.g., id. at 992-98 (identifying "10 unsolved problems in finance").

87 See supra note 82.
comparable education.88 They are found, not only in the most advanced finance treatises, but also in numerous popular books, pamphlets and electronic media presentations prepared for the average consumer.89 A consumer should understand elementary information about available investment products, financial markets and the role of investment professionals. The consumer, for example, should comprehend the basic differences between stocks and bonds as well as the defining features of collective investing through a mutual fund (e.g., that numerous individuals pool their funds for investing in underlying securities to take advantage of economies of scale, professional money management and diversification of investments).90 The consumer should also become familiar with the background information about these investments, which involves instruction about public securities markets, the professionals, particularly brokers, with whom investors may deal,91 and the regulation of markets and market participants.92

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88 See, e.g., Langevoort, supra note 49, at 650 ("Economists have frequently pointed out that structuring an efficient portfolio is not all that difficult, involving primarily a buy-and-hold (i.e., inactive) strategy with investments diversified among a set of individual securities or mutual funds."); Bodie & Crane, supra note 59, at 4-5 (summarizing basic investing principles). But see Hu, supra note 12, at 2367 (suggesting that only professionals can successfully invest); Terrance Odean, Are Investors Reluctant to Realize Their Losses, 53 J. Fin. 1775 (1998) (discussing data indicating that investors hold losing investments too long and sell winning investments too soon); Lynn A. Stout, Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation, 81 Va. L. Rev. 611, 666 (1995) [hereinafter Stout, Costly Casinos] (suggesting that investors are irrational optimists); Lynn A. Stout, Technology, Transaction Costs, and Investor Welfare: Is A Motley Fool Born Every Minute?, 75 Wash. U. L.Q. 791, 812 (1997) [hereinafter Motley Fool] (suggesting that investors, confused about differing sources of securities information, will engage in excessive speculation); cf. Lynn A. Stout, How Efficient Markets Undervalue Stocks: CAPM and ECMH Under Conditions of Uncertainty and Disagreement, 19 Cardozo L. Rev. 475, 477-84 (1997) (surveying "postmodern finance" that, according to the author, calls into question much of basic finance teaching).

89 See, e.g., Burton G. Malkiel, A Random Walk Down Wall Street 229 (1996); see also Basics of Saving and Investing, supra note 73. Several law books presuppose that a law professor can teach the basics of finance to law students completely unfamiliar with the subject. See, e.g., Robert W. Hamilton, Money Management for Lawyers and Clients: Essential Concepts and Applications xxiii (1993) ("[The book] assumes that the reader has little or no prior experience or knowledge [of finance]."); William A. Klein & John C. Coffee, Jr., Business Organization and Finance: Legal and Economic Principles iii (6th ed. 1996) ("As our audience, we have tried to keep in mind a bright young woman or man from a family of musicians, with a college major in English, now entering a law school or a graduate school of business—on the brink of discovering, with great surprise, that the study of business can be interesting and enjoyable, as well as profitable, and that it need not be intimidating.").

90 See, e.g., Basics of Saving and Investing, supra note 73, at Units 2, 3; Malkiel, supra note 89, at 441-56.

91 See, e.g., Klein & Coffee, supra note 89, at 380-92 (discussing securities markets); Basics of Saving and Investing, supra note 73, at Unit 2; You and the Investment World, supra note 76.

92 See, e.g., Basics of Saving and Investing, supra note 73, at Unit 2; You and the Investment World, supra note 76.
A consumer must comprehend elementary finance to be able to think about investing from a financial perspective. An investor should understand the time value of money, investment return and risks, liquidity, and the relationship of risk to return. Informed by this training, an investor can understand the risks inherent in different investment products and their related returns and can learn to compare investments on these bases. An investor should also be introduced to some elementary investing strategies, such as portfolio diversification, which are designed to reduce or eliminate some risks. This understanding would lead to an awareness of the potential value of investing in market indices, an appreciation of the difficulties faced by financial professionals in outperforming these indices, and the potential harms of excessive speculation, including the tax consequences of securities transactions. Investors, moreover, should learn to identify their personal risk preferences and appropriate investment and asset-allocation strategies for themselves and, generally, for different stages of one’s life cycle. Identification of risks and strategies will ensure that, when investing, consumers design and implement an optimal portfolio for their life stage and risk aversion, and overcome

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Risk is the chance that expected security returns will not materialize and, in particular, that the securities you hold will fall in price.

... A security whose returns are not likely to depart much, if at all, from its average (or expected) return is said to carry little or no risk. A security whose returns from year to year are likely to be quite volatile (and for which sharp losses are typical in some years) is said to be risky.

MALKIEL, supra note 89, at 229.

94 See, e.g., MALKIEL, supra note 89, at 366-99 (discussing basic determinants of stock and bond returns); id. at 321 (observing that “[e]very investor must decide the trade-off he or she is willing to make between eating well and sleeping well”); id. at 324-25 (presenting chart of kinds of investments keyed to ability to sleep, e.g., bank accounts correspond to “semicomatose state”).

95 Compare BREALEY & MYERS, supra note 85, at 154 (“Diversification works because prices of different stocks do not move exactly together. Statisticians make the same point when they say that stock price changes are less than perfectly correlated.”), with Basics of Investing, supra note 73, at Unit 3 (“The process of reducing risk by spreading money among various types of investments is diversification.”); and with MALKIEL, supra note 89, at 239 (“True diversification depends on having stocks in your portfolio that are not all dependent on the same economic variables (consumer spending, business investment, housing construction, etc.).”).

96 See, e.g., BREALEY & MYERS, supra note 85, at 323-46 (discussing diversification through an index investment that helps an investor eliminate risk associated with individual companies and the efficient capital markets hypothesis that emphasizes how difficult it is for portfolio managers consistently to beat market indices); MALKIEL, supra note 89, at 422-32 (discussing advantages of index funds). See generally Stout, Costly Casinos, supra note 88, at 696-97 (discussing the dangers of excessive stock trading). But see Paul G. Mahoney, Is There A Cure For “Excessive” Trading?, 81 VA. L. REV. 713 (1995) (replying to Professor Stout).
unreasonable fears of risk preventing its implementation. Like education about saving, education about investing must make an investor aware of major psychological factors that can adversely affect investing decision-making (e.g., excessive fear of risk or undue optimism and grandiose expectations about investment success) and of “rules of thumb” that can help one counter them (e.g., following asset-allocation strategies, ignoring daily securities movements).

A cultural education on finance and investing would teach a consumer to identify, and to understand the languages of, the basic documents and texts on the activity, as well as those that enable an investor to educate herself further. The investor learns where to look for information, so that she can apply, and refine, the acquired conceptual framework, and how to read the presentation conventions of this information. Investing education thus identifies the media that provide information and training about investments, such as newspapers, magazines and Web sites. It also introduces one to such conventions as the presentation of price quotations in stocks, bonds or mutual funds. As a simple example, a consumer educated about investing should be able to read knowledgeably Section C of the Wall Street Journal (“Money and Investing”).

Education about investing should empower an individual to invest alone and also to select and use financial professionals intelligently. Financial planners, brokers, insurance agents or mutual fund managers are individuals to whom investors may delegate some or all investment responsibility. A consumer educated about investing, for example, could evaluate whether a recommended investment is suit-

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97 See Basics of Saving and Investing, supra note 73, at Unit 3; CONTE, supra note 39, at 25 (“Understanding the impact of pre-retirement withdrawals is key to accumulating adequate savings for retirement.”); MALKIEL, supra note 89, at 400-21 (discussing asset-allocation strategies for different stages of the life cycle). But see Paul A. Samuelson, The Long-Term Case for Equities, And How It Can Be Oversold, 21 J. PORTFOLIO MGMT. 15 (1994) (questioning accepted wisdom about long-term stock investing and asset-allocation strategies).

98 Indeed, consumers must learn not to use their new investing knowledge in such a way as to play upon their excessive fears of risk. See CONTE, supra note 39, at 26. Moreover, just as saving must become habitual, so also investing must involve simple “rules of thumb” that an individual can apply almost mechanically. See, e.g., National Association of Investors Corp., NAIC’s Four Easy Investment Principles (visited Sept. 15, 1998) <http://www.better-investing.org> (offering simple investing principles); cf. Shefrin & Thaler, The Behavioral Life-Cycle Hypothesis, supra note 82, at 107 (“Nearly all retirement saving is done through some routinized program.”).

99 See Basics of Saving and Investing, supra note 73, at Unit 4 (listing common sources of investment information, such as SmartMoney, Money and The Wall Street Journal). No list of sources of such information would be complete without a reference to the World Wide Web, where there has been a literal explosion of such resources. See, e.g., Basics of Saving and Investing, supra note 73, at Appendix (listing written and on-line materials for educating investors); Robertson, supra note 40, at 362-74 (discussing information sources available on the Internet).

100 See Basics of Saving and Investing, supra note 73, at Unit 4 (presenting worksheets on reading stock, bond, and mutual fund quotations); You and the Investment World, supra note 73, at 22-25 (explaining how to follow investment performance).
able for her personal risk preferences and whether a suggested asset-allocation strategy fits her life-cycle stage. Similarly, an investor should be taught to monitor a financial professional so as to receive the best available "deal" for a particular kind of investment. Not only must a consumer be able literally to "speak the language" of a financial professional, but also to know something about the financial industry and its incentives. Knowledge about the kinds of investment professionals and their incentive structure (e.g., full-service vs. discount brokers, fee-only vs. fee-and-commission financial planners) is critical to enable an investor to navigate profitably among them. Finally, an investor should learn to recognize, and to resist, the well-documented social and personal pressures that financial professionals use in recommending investments.

101 A classic example is the decision whether to invest in mutual funds that professional money managers actively manage, or those that adopt a passive investing strategy tracking a given market index. See Malkiel, supra note 89, at 422-32 (describing the benefits of index strategy); id. at 441-46 (discussing the question of why some money managers consistently outperform market indices). But see Judith Chevalier & Glenn Elison, Are Some Mutual Fund Managers Better Than Others? Cross-Sectional Patterns in Behavior and Performance 4 (National Bureau of Econ. Research Working Paper No. 5852, 1996) ("The existence of funds that are expected to beat the market provides a potential justification for the effort which many consumers expend in choosing between funds rather than simply investing in indexes."). Because of their increased investing responsibility, consumers are likely to look with more frequency to financial advisors, particularly as the value of their investment portfolios grows. See Marilyn Harris, Time to Hunt for an Investment Pro?, BUS. WK., May 11, 1998, at 106E2 (advice on finding a financial advisor); Money Managers: Take My Advice, ECONOMIST, Jan. 31, 1998, at 78 (describing the growth in investment advisory business as employees accumulate high value portfolios). Such reliance does not eliminate the need for investing education since, as in dealing with any professional, consumers are likely to receive the best service if they have enough training to monitor the advisor's performance.

102 See, e.g., American Ass'n of Retired Persons, Investors Age 50+ Know Little About Investment Charges, New AARP Survey Shows (visited Sept. 15, 1998) <http://www.aarp.org/press/1998/042398.html> (describing survey results evidencing that a majority of the older population does not understand broker commissions); Basics of Investing, supra note 76, at Unit 4 (describing kinds of professionals and their incentive structure); National Association of Securities Dealers, Inc., Investor Training, Taking Charge of Your Finances: How to Select a Broker (visited Sept. 15, 1998) <http://www.nasd.com>. A consumer must understand that a broker may make an inappropriate investment recommendation because the broker personally benefits more by this recommendation or because the broker is negligent. Cf. Cox, supra note 8, at 1102-10 (explaining legal rules addressing competence of financial professionals and their fiduciary obligation to ensure that recommended investments are suitable to clients); Norman S. Poser, Broker-Dealer Law and Regulation 2-1 to 2-112 (2d ed. 1998) (discussing fiduciary obligations of brokers). A broker may also steer a customer towards appropriate investments that give the broker a slightly higher commission, or a proprietary mutual fund company will push its funds over those of its rivals.

103 See generally Langevoort, supra note 49, at 634-69 (discussing such psychological pressures as a broker's pressuring an investor into feeling she will lose social standing by not making a particular investment and generating a trust that causes a client to accept any investment recommendation to please the broker).
3. Education About Financial Fraud

Education about financial professionals leads to another kind of investor education that teaches individuals to avoid becoming victims of financial fraud and abuse. This kind of fraud, which has a long pedigree,\(^{104}\) arises from dealings between those who have assimilated the investment culture and those who have not,\(^{105}\) the ease with which financial transactions occur, the readily disposable nature of the assets at issue (e.g., cash) and the unfortunate credulity and greed of many victims.\(^{106}\) Court cases involving financial professionals, such as unscrupulous brokers and investment advisers, provide countless examples of this kind of fraud, or even of outright theft.\(^{107}\) Since investments can be complex and financial criminals are profit-oriented, investment fraud and abuse will continue to take new forms.

Anti-fraud education simply teaches a consumer how to recognize and avoid common forms of financial fraud and abuse.\(^{108}\) Here, even more than in the two preceding kinds of investor education, it is important to provide individuals with simple rules or norms, similar in nature to those given to neophytes in any human activity, that they can apply without much thought. Children are warned not to talk to strangers; similarly, consumers are instructed to "hang up" the telephone whenever they hear certain selling pitches.\(^{109}\) As further education, consumers should learn the basic features and rationale of

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105 Even persons sophisticated in investing fall prey to some fairly simple investment fraud. See, e.g., Steve Stocklow, New Era's Bennett Gets 12-Year Sentence, Wall St. J., Sept. 23, 1997, at B15 (discussing New Era "Ponzi scheme" whereby rich individuals and institutions made contributions to a Pennsylvania organization that promised them that "wealthy benefactors" would match their funds and forward the total amount to the donors' favorite charities; needless to say, the matching benefactors did not exist).

106 This is the only explanation of the startling phenomenon of people actually sending their account information to Nigerians who promise, by letter, free cash in return for use of one's bank account. See Central Bank of Nigeria, Press Statement on Advance Fee Fraud Scam, Economist, Sept. 13, 1997, at 25.

107 See, e.g., Thompson v. Smith Barney, Harris Upham & Co., 709 F.2d 1413, 1416 (11th Cir. 1983) (discussing "churning": "Churning occurs when a securities broker buys and sells securities for a customer's account, without regard to the customer's investment interests, for the purpose of generating commissions."). See generally Poser, supra note 102, at 3-1 to 3-126 (describing broker fraud).

108 This Article does not suggest that education alone can deal with financial fraud or that it should be used to lessen the scope of the duties of financial professionals toward consumers. See generally Cox, supra note 8, at 1082-1135 (general survey of broker regulation); Poser, supra note 102, at 4-1 to 4-22 (describing traditional compensatory damages available to consumers as damages against broker-dealers).

109 See, e.g., Basics of Saving and Investing, supra note 73, at Unit 5 (listing abusive sales techniques and recommending consumer action—generally that consumers hang up). Indeed, hanging up the telephone is the only sensible response to many broker calls. See, e.g., Deborah Lohse, Tricks of the Trade: 'Buffett is Buying This' and Other Sayings of the Cold-Call Crew, Wall St. J., June 1, 1998, at A1 (describing abusive broker sales behavior).
They should also be taught how to prevent the kinds of fraud that unscrupulous financial professionals in reputable firms practice. Once again, instruction on the psychological pressures used by financial salespeople is important in improving one's resistance to financial fraud or abuse. Further, continuing education on saving and investing, coupled with anti-fraud training, should enable a consumer to predict the possibilities of fraud in new financial products.

B. Who Should Educate?

I. Families

Since saving is now a critical survival skill and since learning its cognitive and behavioral aspects requires constant reinforcement, the best educator is the family, however defined or constituted. That is, if the goal of all three forms of investor education is to teach easily applied habits, norms or behavioral "rules of thumb," it makes sense to look to the family, which can inculcate them in a durable way. From an early age, a child can be introduced to the culture of deferred consumption through the teaching and example of other family members, and even through compelled saving behavior. The same can be said for investing. Families can teach over the years, by example and through discussion adjusted for a young person's developing abilities, the basics of investing, investment options and materials on investing. Education against financial fraud could also be part of the young person's socialization, no different from other protective guidance given to children.

Although the above discussion may seem merely amusing to the reader, the role of the family in each kind of investor education should not be overlooked, or limited to inculcating basic saving behavior. The available empirical evidence suggests that family training produces educated investors in every sense of the term. While

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110 See Basics of Saving and Investing, supra note 73, at Unit 5 (describing basic fraudulent schemes).
111 See Thaler & Shefrin, supra note 78, at 85 ("The best predictors of which individuals will fall into which groups [of savers] are probably related to family background, since the family is the most likely place for the individual to learn (or not learn) the rules and norms necessary to overcome the self-control problems.") (footnote omitted); cf. Eric A. Posner, The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action, 63 U. Chi. L. Rev. 133, 149-50 (1996) (discussing the results on ethnic groups of the different kinds of rules used by the state to modify behavior).
112 As an amusing example, one thinks of the family saving lesson remembered by Woody Allen's character in ANNIE HALL (United Artists 1977): "Never buy retail."
113 Some of this evidence is anecdotal. Cf. Howard Gleckman, Generation $ Is More Like It, BUS. Wk., Nov. 3, 1997, at 44 (discussing the increased saving rate among young adults).
We're all capitalists now

giving the family an important role in investor education was questionable when few American households included investors, it is less so today when more Americans do and must invest. Moreover, because ordinary individuals have increasing access to financial information and educational materials, the family has sufficient tools to act as the primary financial educator of children. Accordingly, any governmental policy initiatives must include as a goal strengthening the family as educator of investing and provider of saving and investing norms.

At present, however, it is not reasonable to rely completely upon families to provide all the kinds of investor education. Although more people save and invest than in the past, significant numbers of Americans do not, and can not, engage in this activity. Some children will not have the opportunity to receive this family education, just as they lack other family educational advantages. Also one can not be sure whether in consumption-oriented American society, even financially sophisticated parents will take the time to educate their children on saving and investing. The best-trained Wall Street professional may have no time to provide education (or may decide that it would be better simply to make more money so that her children do not ever have to worry about saving and investing). In addition, although families can educate children about common kinds of financial fraud, their informal, shared knowledge will not adequately address its more innovative forms.

2. Schools

Because families can not in all cases provide investor education to children, schools should supplement what education families can furnish. Schools are major participants in the “acculturation” process and can thus bring students into the saving and investing culture. As in other forms of education involving critical skills for social survival,
the knowledge to be imparted by investor education is too important to be left to families, for society has an obvious interest in training individuals to provide for themselves throughout their lives. The requirement of universal schooling ensures that investor education will reach all students so long as it is part of a school curriculum. Like other subjects, the kinds of investor education can be taught in stages and adjusted for student abilities, as well as repeated and tested to reinforce learning. Since American schooling is subject to centralized government control at the state level, the state educational bureaucracy should adopt a standardized investor education model for use in local schools, particularly high schools, and periodically update it to reflect developments in law, finance and the financial markets.

In fact, basic investor education has entered the high school (and, in some cases, the elementary and middle school) curriculum in many states since the mid-1970s. As of 1997, thirty-seven states have some policy on high school consumer education, which generally includes training in consumer decision-making, economics, personal finance and consumer rights. Of these thirty-seven states, twenty-nine mandate, in some fashion, that high school students receive consumer education (with fourteen of the twenty-nine specifically requiring instruction in personal finance). Educators have also developed standardized materials for this investor education curriculum. The best example of this standardization is from the National Institute for Consumer Education, under whose auspices educators, consumer advocates, financial industry representatives and regulators have produced course materials designed to help educate students about basics of saving, investing and avoidance of financial fraud.

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118 See, e.g., AMY GUTMANN, DEMOCRATIC EDUCATION 28-33 (1987) (discussing the dangers of placing all educational authority with parents).
119 See generally CHUBB & MOE, supra note 19, at 4-5 (discussing the structure of control in local schools). This Article does not address the rich literature on whether schools should be subject to centralized government control or open to market competition. See generally Hakim, supra note 19, at 1-15 (highlighting the benefits to be obtained from implementing a competition-based educational system).
120 See generally Constance L. Hays, First Lessons in the Power of Money, N.Y. TIMES, Apr. 12, 1998, § 3, at 1 (describing, among other things, basic economic and finance courses in primary schools).
121 See BERNHEIM ET AL., EDUCATION AND SAVING, supra note 6, at 5-8, Table 1 (noting that educational requirements vary in states, even for those mandating investor education; for example, a state may require that consumer education be integrated into an existing course, that it be developed as a separate course, or simply that consumer education materials be distributed to students).
122 See Basics of Saving and Investing, supra note 73 (describing activity of the National Institute for Consumer Education (“NICE”), its development of investor education materials with the help of the National Association of Securities Dealers and the members of its advisory committee, who include education specialists and financial industry representatives). Funding for development of these educational materials came from private and public sources. This Institute also acts as a clearinghouse for the numerous supplementary materials for this curriculum. See id. at Appendix (listing free and inexpensive sources of investor education, including
The available empirical evidence about the effects of this formal investor education, while limited, is positive. The evidence suggests that the school consumer education has increased Americans’ exposure to investor education and, more importantly, has actually improved saving and investing behavior by those who have taken the school finance courses. It is also not unreasonable to conclude that the education has had other positive effects that are difficult to measure, such as decreasing students’ susceptibility to fraudulent investing schemes and improving their personal budgeting.

Given the social importance of investor education and the preliminary success of school training, the question arises whether the federal government should do more to compel the states to provide, or to expand, investor education in schools. Since the federal government administers Social Security and other welfare programs, oversees the pension system and is well-positioned to have a global perspective on national saving and investing behavior and its relation to the national economy it should be concerned about investor education. At the same time, it has little direct control over the national education curriculum, and it is unlikely that investor education alone would motivate Congress to face the constitutional questions that would arise from an aggressive federal government move into this area. Since, moreover, the number of states mandating some form of investor education is increasing, it is also not unreasonable to conclude that the education has had other positive effects that are difficult to measure, such as decreasing students’ susceptibility to fraudulent investing schemes and improving their personal budgeting.


See *Bernheim ET AL., EDUCATION AND SAVINGS*, supra note 6, at 11-17 (discussing the findings of a study that examined the impact of curriculum requirements on financial education).

See *Bernheim ET AL., EDUCATION AND SAVINGS*, supra note 6, at 22-23 (describing results suggesting an increase in the saving rate as a function of exposure to financial education); id. at 27-28 (describing higher net worth of individuals exposed to the education). The first generation of students subject to this education are those in “Generation X,” and these individuals are reported to be high savers and financially savvy. See, e.g., Tripp Baltz, *Generation X-ers Favor Self-Investing Social Security Payments, Speaker Says*, BNA PENSIONS & BENEFITS DAILY, Dec. 8, 1997, available in LEXIS, pension library (describing saving preferences of younger workers); Gleckman, supra note 113, at 44 (reporting an increased saving by the younger generation).

Indeed, the federal government is mandated by law to develop initiatives on investor education, although these initiatives are not specifically aimed at schools. See infra Part III(B)(4)(a).

The provision of, and questions concerning, education have traditionally been left to the states. A constitutional question relating to education, for example, would be whether education, or a minimum level of education, is a fundamental right, entitling individuals to protection under the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 18 (1973) (holding that the strict scrutiny test should not be used to examine the Texas school financing system because education is not a fundamental right under the Constitution). See generally Susan H. Bitensky, *Theoretical Foun-
of investor education has increased, states may eventually have uniform investor education requirements and a curriculum.\textsuperscript{128}

Yet the federal government could strongly reinforce a role in investor education schooling that it has already employed and for which it is well-suited—that of facilitator and promoter of local educational efforts. Federal financial market regulators should encourage financial market participants to continue to work with educators to develop educational materials and to offer their services in schools,\textsuperscript{129} and the regulators could supply curriculum guidance in their particular areas of expertise. The Department of Education could also support investor education in elementary, middle and secondary schools by its available means (e.g., grants for teaching, sponsorship of conferences and research in this area) without upsetting any state/federal balance. This activity would signal the federal government’s recognition of the importance of this education and encourage the states to develop further investor education requirements and curricula.\textsuperscript{130}

3. The Market

Since families and schools do not yet uniformly educate their children about saving and investing, another education provider is needed. "Continuing" investor education would also provide consumers with an opportunity to "refresh," update and improve their financial knowledge. This kind of education is crucially important. Although saving and investing have become critical activities, the necessary level of investor education has not yet been attained, and therefore many individuals reach adulthood having received no investor education or educational opportunities, which constitutes a social failure that needs to be addressed. The questions, of course, are who should provide this education and how? More specifically, should it be left to private educational providers or should the government ensure its provision?

Before considering the appropriate government role in investor education outside the schools, it is important to review briefly

\textsuperscript{128} See BERNHEIM ET AL., EDUCATION AND SAVING, supra note 6, at 6 (describing gradual adoption of the investor education laws).


\textsuperscript{130} See infra Part IV(A) (describing national saving and investing campaign coordinated by state and local financial regulators).
whether, from a theoretical perspective, private actors have incentives
to provide investor education, and what they are, in fact, doing. In-
vestor education appears to be the kind of service or product that pri-
ivate parties in a market should supply. Since the basics of saving and
investing are straightforward, standardized and thus easy to reproduce
and package, they are a commodity. Economic theory suggests that,
under most circumstances, the market will produce and provide
commodities to consumers at favorable prices (e.g., not significantly
above marginal cost). It is, of course, necessary to keep in mind
potential circumstances that could undermine this “free market” re-
sult. Since investor education is a commodity, private actors may not
supply it in adequate quantities for, or in forms easily accessible to,
consumers, for they could not capture all the profits of their efforts
(i.e., other companies could copy the information or the format). A
few firms might dominate consumer financial services and, if this
market had high entry barriers, they could ignore investor education
altogether or charge anti-competitive prices for it.

No market problems in American consumer financial services
currently hinder the market’s provision of investor education to con-
sumers at a low cost. Financial services are highly competitive be-
cause low start-up costs allow a relative ease of entry for new partici-
pants. Advances in communications technology enable new en-
trants to have access to information about markets, investment prod-
ucts and investors, formerly the main competitive advantage of estab-
lished firms. A financial firm or group of financial firms simply
can not dominate the retail or consumer investing industry so as to be

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131 See generally OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 61-63,
98-100 (1996) (demonstrating how different safeguards in the market produce low prices); Alan
Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect Information: A
market producing commodities for consumers, optimal pricing will occur as long as the market
is competitive, because market participants can not distinguish between, and discriminate in
pricing as to, informed and uninformed consumers).

132 See, e.g., White, supra note 64, at 15 (noting the external effect on the market when
one company adopts a new development idea of another).

133 See, e.g., id. at 12 (discussing the development of market power and its effects on
quantity of a product in the market).

134 See generally SMITH & WALTER, supra note 40, at 14-15 (noting the increase in fi-
nancial businesses and the effects of competition in the financial market). Entering the financial
services industry does involve considerable costs, many of them regulatory in nature, as well as
a significant human capital cost. These human costs, as well as those arising from firms’ efforts
to provide globally all financial services to their customers, have led to industry consolidation.
See Global Investment Banks: Fools’ Gold, ECONOMIST, Dec. 13, 1997, at 61 (discussing the
benefits and problems associated with the merger of two large Swiss banks).

135 See FRANKLIN R. EDWARDS, THE NEW FINANCE: REGULATION AND FINANCIAL
STABILITY 8 (1996) (“The ability to retrieve, store, process, manipulate, and transmit large
masses of data at low cost made it easier for financial institutions to offer new products and
enter new markets to compete for customers.”); SMITH & WALTER, supra note 40, at 394 (not-
ing that consumer financial services involve the provision of interchangeable products and
services).
able to impose restrictions on, or to hinder, the provision of investor education. 136

Indeed, financial firms vigorously compete specifically in consumer “asset management” because ordinary people increasingly invest through the industry, particularly in defined contribution plans and IRAs. 137 This competition ensures that the firms supply consumers with investor education products and services at low cost and in user-friendly formats and also constantly improve them. Asset management firms need to distinguish themselves from their competitors for consumers. While the most attractive characteristic is superior investment advice, strategy and returns, long-term investment performance on an expense-adjusted basis is difficult to achieve. 138 Financial firms must attract and maintain consumers as customers through other means, primarily by providing ancillary investing services. 139

Investor education is one such service. Since it is standardized and communications technology has lowered its cost of reproduction, firms can supply it to consumers at little or no charge. Although a firm cannot generate significant profits directly from a standard educational product or from any innovations to it (which competitors easily and immediately imitate), the firm will supply the education and continue its innovations because the service generates customer goodwill and encourages consumers to invest through the firm. The more consumers know about saving and investing, the more likely they are to save and to invest through financial firms, and specifically through one particular firm (as opposed to leaving their savings in bank deposits or outside the financial services industry). 140 In addition, investor education enables consumers to understand the range of investment products a firm has to offer, and encourages them to use these products in their portfolio. The education may also lead consumers to realize the potential benefits that they can receive from brokers or other financial professionals employed by the firm. In

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136 This situation could, of course, change. Numerous large consolidations and mergers between banks and other financial institutions have recently occurred (e.g., Citibank/Travelers), and these transactions could have an adverse effect on the provision of services, like investor education, to consumers.

137 See, e.g., EDWARDS, supra note 135, at 73 (discussing investment growth in mutual fund shares as opposed to bank deposits); SMITH & WALTER, supra note 40, at 381-82 (noting changes in investment business created by competition); see also Investors, Unite, ECONOMIST, (Supp.) Oct. 25, 1997, at 3, 3-5 (discussing competition in asset management).

138 Cf. supra note 101.

139 See EDWARDS, supra note 135, at 16 (describing how investment banks came to offer customers check-writing and payment services formerly provided only by commercial banks).

140 See, e.g., BERNHEIM & GARRETT, supra note 6, at 19 (noting that educated individuals rely on financial professionals for information and advice, rather than their employers).
There has been, in fact, a remarkable increase in the number of investor education products and services offered by financial firms to consumers at minimal or no cost. See, e.g., Kevin J. Delaney, Mutual Funds Use a New Spin To Sell Wares, WALL ST. J., Aug. 27, 1997, at Cl ("Mutual-fund companies have begun to sell their wares the way consumer-goods companies market cereal and laundry detergent."). Not everyone is pleased with the consumer characterization of investing. See, e.g., Don Phillips, Owner or Consumer? Open Letter to the SEC (last modified May 2, 1997) <http://www.morningstar.net/cgi-bin/Getnews.exe?newstory=ms/OpEd/letterToSEC1/Lettertosec4.html> (president of rating organization of mutual funds argues against regulatory actions accepting the view of ordinary investors as consumers).

The following references cannot pretend to be exhaustive, but are only representative, since new firm educational products and services appear on a daily basis, particularly on the Internet.


See Investment Company Institute, Mutual Fund Connection (visited Sept. 15, 1998) <www.ici.org> (offering, at the Web site of the Investment Company Institute ("ICI"), general educational materials explaining the nature of a mutual fund, its risks and benefits (chiefly diversification), the kinds of mutual funds, the typical fees, expenses and services of a fund, and the pricing and redemption of mutual fund shares).

See FACT BOOK, supra note 53, at 57 (explaining that, since individual investors still generate much of the direct investing in securities, the New York Stock Exchange offers investor education on its Web site); You and the Investment World, supra note 73 (education on personal and macroeconomic reasons for investing, the functioning of stock exchanges, the language of the financial press, kinds of investments and their risks and basic advice on asset-allocation strategies and ways of investing); see also Investor Training, supra note 73 (educating investors as to reasons for investing, investment options, and providing guidance on assessing one's personal financial situation and setting financial goals); NASDAQ, Investment Tips (visited Sept. 15, 1998) <www.nasdaq.com/services/services.stm> (providing links to the NASD's educational materials, including those of NICE, as well as sophisticated tools to track the value of a portfolio).
services and seminars.\textsuperscript{147} The firms and organizations deliver this education in traditional ways (e.g., through written materials),\textsuperscript{148} but developments in information technology, particularly CD-ROMs and the World Wide Web, have greatly enhanced its provision, sophistication and, significantly, its use by consumers.\textsuperscript{149}

The commodity nature of investor education, the sophistication of financial products and industry competition all ensure that the educational products and services of financial firms are more than "window dressing" to attract consumer funds.\textsuperscript{150} Indeed, the education would not be successful unless it offered consumers some understanding about a firm's investment products and strategies. Competition in financial services forces firms to do more than conduct a superficial teaching in order to explain the superiority of their products and services. Although there are superior educational products, it generally does not matter what educational product a consumer uses, since the products have become "standardized" through competition.\textsuperscript{151}

\textsuperscript{147} See James S. Hirsch, Fidelity, CBS Are Considering Finance Show, WALL ST. J., Sept. 17, 1997, at B1 (discussing Fidelity's proposed (but later abandoned) television show on personal finance); Robert McGough, No-Load Fund Investors Still Buying Advice, WALL ST. J., Sept. 11, 1997, at C1 (discussing advisory services provided by mutual funds); Money Managers: Take My Advice, supra note 101, at 78-79 (noting that increased advisory services are packaged as investor education in financial firms).


\textsuperscript{149} See supra text accompanying notes 142-47 (providing examples of use of technology in educational materials); see also YANKELOVICH PARTNERS, INC., supra note 55, at 12 (referring to growing numbers of investors who use personal computers to obtain investment information). But see ARTHUR B. KENNICKELL & MYRON L. KWAST, WHO USES ELECTRONIC BANKING? RESULTS FROM THE 1995 SURVEY OF CONSUMER FINANCES 18 (Federal Reserve Board Finance and Economics Discussion Series No. 1997-35, 1997) (demonstrating that consumer use of electronic means to make saving and investing decisions is very limited).

\textsuperscript{150} See Schwartz & Wilde, supra note 131, at 638 (observing that competition in the educational services market protects consumers who do not regularly research market products).

\textsuperscript{151} Indeed, there might well be a cause for suspicion about firm-provided investor education, for instance, if consumers heard only about the benefits of actively managed mutual funds and nothing about indexed investing. As it is, the Vanguard Group, one of the largest mutual fund companies, provides investors with training about indexing in its voluminous educational materials. See The Vanguard Group, Learning Center (visited Sept. 15, 1998) <http://www.vanguard.com/educ/inveduc.html> (offering consumers a "University" with a course on "The Fundamentals of Mutual Funds"); see also The Vanguard Group, Literature Library (visited Sept. 15, 1998) <http://www.vanguard.com/educ/lib/litlib.html> (offering viewpoints of Vanguard's legendary founder, John Bogle, the champion of index investing, such as "Bogle on Indexing" and "The Riddle of Performance Attribution"); The Vanguard Group, Plain Talk: The Vanguard Investment Planner (visited Sept. 15, 1998) <http://www.vanguard.com/educ/
Competition in educational services from firms and organizations other than financial firms, whether nonprofit or for-profit, also compels financial firms to create “quality” educational products. Almost countless members of the financial press, rating organizations, investor groups and others provide at little or no cost to consumers investor educational materials and tools. Moreover,
since new technology permits consumers to bypass financial services firms\textsuperscript{158} if they are helped by these independent educational services, financial firms need to justify their value. The provision of superior education is one possible justification.

Consumer financial services firms, as well as the financial marketplace in general, provide worthwhile investor education to consumers at little cost and in accessible formats. Consumers can thus easily continue whatever investor education they received at home or in school, or if they never received such education, can acquire the educational tools and services to begin their acculturation into the saving and investing world. In light of all this private educational activity, what investor education efforts, in addition to facilitating familial development of saving and investing norms and encouraging formal education in the schools, can the government usefully undertake?

4. The Government

\textbf{a. Education About Saving and Investing}

State or federal financial regulators should not see as \textit{their} main tasks the establishment of a basic investor education curriculum and the teaching of consumers. Not only do they not have the resources to conduct this education, but there is no general need for their involvement, on account of the activity of the market (broadly defined to include nonprofit organizations). Active intervention by regulators to set minimum standards of investor education (a "quality assurance" role often undertaken by the government in other kinds of education\textsuperscript{159}) is also unnecessary since the standardization of the product and the competitiveness of the financial services industry ensure this quality. The regulators should, however, ensure that these standards are being regularly applied. Because financial firms have strong, profit-oriented incentives, which financial regulators lack, to make their educational products and services as innovative and "user-

\textsuperscript{158} See, e.g., Peter Galuszka, \textit{Guess Who's Courting the Beardstown Ladies?}, BUS. WK., Sept. 22, 1997, at 90 (discussing direct investing movement and National Association of Investor Corporation that encourages this movement and educates investors); Barbara Hetzer, \textit{Direct Stock Buying: A Load of New No-Loads}, BUS. WK., June 16, 1997, at 152 (describing the increasing opportunities of small investors to buy stock directly from companies and thus to bypass brokers). Financial firms are also feeling pressure from on-line brokerage and trading. See Deborah Lohse, \textit{Wit Capital Will Launch On-Line Site}, WALL ST. J., Sept. 15, 1997, at B12 (describing an on-line service proposing to bring initial public offerings directly to individuals without financial firm involvement).

\textsuperscript{159} See HART ET AL., supra note 5, at 2-7 (discussing quality concerns as a justification for government control of education).
friendly” as possible, any models or standards that government officials would devise would likely add little to the “standard” product, would quickly become outdated, and would retard industry experimentation.\(^{160}\) State or federal financial educators should simply encourage the continued market development of consumer educational materials, which they could also review for minimum educational qualification and for the prevention of investor fraud or abuse.

Although the exact contours of the role are not always easy to define, the government has an important role in the delivery of investor education. Rather than being the chief conductor of saving and investing education, the government should act as a “cheerleader” for these activities and should promote and facilitate consumer use of the educational services of for-profit and nonprofit providers. Federal and state agencies could use their resources to conduct an active and continuous publicity campaign to encourage consumer saving and investing. Although incidental to the campaign’s promotional purpose, some elementary investor education should be part of this campaign so as to reinforce basic saving and investing “norms,” as well as to reach members of the population overlooked by private education providers. The federal executive branch should orchestrate a national campaign, and each government agency or Congressional committee should participate in areas within its jurisdiction and competency.

Private financial services firms also have incentives to support a national saving and investing campaign since the industry can only benefit from increased consumer saving and investing. Certainly the industry’s existing educational efforts have a hortatory or promotional side,\(^ {161}\) but industry participants alone are unlikely to be the most effective campaigners. The government is an excellent “bully pulpit” with many effective instruments of persuasion at its disposal. Since citizens expect pronouncements on issues of general concern from the government, financial firm publicity will produce better results if supplemented with active government involvement in promoting saving and investing. In fact, behavioral and economic research suggests that the government’s promotional efforts have a significant positive effect upon saving and investing behavior.\(^ {162}\) Indeed, the literature suggests that the government occupies a critical position in creating and changing the kind of “rule of thumb” norms so important

\(^{160}\) The investor educational materials of government agencies are generally inferior to those offered by private market parties. See infra Part IV(A).


\(^{162}\) See BERNHEIM, THE VANISHING NEST EGG, supra note 6, at 121 (explaining the importance of a national government campaign for consumer saving).
for saving and investing because it can publicize their importance and help generate a "norm community" of savers and investors.\(^\text{163}\)

A good example of a federal agency's performance of the "cheerleading" and market facilitator roles is the recent activity of the Department of Labor's Pension and Welfare Benefits Administration ("PWBA"), which helps administer private pension plans subject to ERISA.\(^\text{164}\) Because of the low rate of consumer saving and the impending retirement of the "Baby Boomers," the PWBA began a Retirement Savings Education Campaign in 1995 to educate Americans about the importance of saving, investing and using pension plans.\(^\text{165}\) Its extensively publicized campaign materials convey this promotional message, provide some basic guidelines on saving and investing and refer consumers to financial and nonprofit firms for full education.\(^\text{166}\) The PWBA also enlisted financial firms in its campaign through the nonprofit American Savings Education Council ("ASEC"),\(^\text{167}\) which conducts research on saving, co-sponsors public

\(^{163}\) See generally McAdams, supra note 82, at 362-64 (discussing the importance of publicity in establishing a norm consensus); id. at 400-07 (discussing how the law can be used to signal, and thus to establish, a consensus around certain norms); Posner, supra note 111, at 149-50, 187 (describing how the government can strengthen pre-existing norms and encourage generalized norm creation); Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903, 929-30 (1996) (discussing the government's ability to create and reinforce social norms). See, e.g., David Charny, Illusions of a Spontaneous Order: 'Norms' in Contractual Relationships, 144 U. Pa. L. Rev. 1841, 1847-48 (1996) (suggesting that norm creation across large populations needs centralized state intervention); cf. Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943, 972-86 (1995) (discussing, among other things, the role of government in the generation of social meaning).

\(^{164}\) The PWBA administers Title I of ERISA, which regulates reporting, disclosure and fiduciary matters pertaining to plans. The Internal Revenue Service administers Title II, which deals with eligibility of pension plans, vesting requirements and funding. The Pension Benefit Guaranty Corporation manages an insurance program covering employees in the event of plan termination. See generally FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, supra note 23, at 35-36.


\(^{166}\) See id., at 1-4 (listing PWBA's educational activities and publications available to investors); see also DOL, Pension and Welfare Benefits Administration, Protect Your Pension: A Quick Reference Guide (visited Sept. 15, 1998) <http://www.dol.gov/pwba/public/pubs/protec/guidetoc.htm> (presenting general facts about pensions); DOL, supra note 76 (explaining the importance of inquiring about an employer's pension plans, using an IRA and recommending that consumers set retirement goals, learn basic investment principles and ask questions of financial advisors). The PWBA also provides references (or, on its Web site, hypertext links) to providers of investor education, such as ICI and AARP. See supra note 165 (where links are listed).

\(^{167}\) Founded in 1995 as part of the Employee Benefit Research Institute and funded by the financial services industry, ASEC has "charter partners" or sponsors that include financial companies like American Express, Bankers Trust, Fidelity, the Variable Annuity Life Insurance Company and Prudential Investments, as well as trade groups of financial firms, such as the American Council of Life Insurance and ICI. See Sponsors: American Savings Education Council (visited Sept. 20, 1998) <http://www.asec.org/sponshtm.htm>; see also ASEC, Strategic Plan: Building Public Awareness and Understanding of Saving and Retirement Planning (visited Sept. 15, 1998) <http://www.asec.org/straplan.htm> (explaining that ASEC's mission is "to
educational events about its importance with government officials and develops tools for saving education that have a consciousness-raising and general educational purpose.\textsuperscript{168} Moreover, in a recent interpretive bulletin on participant investment education, the PWBA specifically facilitated private market educational efforts by adopting a regulation that encouraged more employers to have financial firms provide investor education to employees participating in defined contribution plans.\textsuperscript{169}

Indeed, the PWBA’s educational activities, coupled with a bipartisan national concern about adequate retirement saving and in-

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\item \textit{See DOL, supra note 73 (listing sources of information on saving, investing and selecting a financial professional); ASEC, Ballpark Estimate, Definitions of Saving and Retirement Terms} (visited Sept. 15, 1998) <http://www.asec.org/ballpark.htm> (providing a worksheet so that an individual can get a rough idea of how much he or she will need at retirement and a glossary of saving and retirement terms); ASEC, \textit{What is ASEC?} (visited Sept. 15, 1998) <http://www.asec.org/pamphlet.htm>; ASEC, \textit{The Power to Choose} (visited Sept. 15, 1998) <http://www.asec.org/asecpwr1.htm> (explaining retirement needs, the limitations of Social Security and tax-favorable savings plans, particularly those provided by employers); ASEC, \textit{How Do I Get There From Here?} (visited Sept. 15, 1998) <http://www.asec.org/there2.htm> (listing sources of information on saving and investing and also giving advice on selecting a financial professional). \textit{See generally CONTE, supra note 39, at 28 (describing ASEC’s recent activities).}

\item \textit{See Participant Investment Education, Interpretive Bulletin 96-1, 29 C.F.R. § 2510.2-21(c) (1997). The PWBA and employers were concerned that employees participating in defined contribution plans did not understand enough about investing. Many employers, however, declined to conduct, or to have financial firms conduct, programs to help employees because they feared that they would increase their fiduciary liability—an avoidance of which is one reason for establishing a defined contribution plan. Under ERISA, employers as plan sponsors have fiduciary obligations to plan beneficiaries, which include an obligation to account for plan losses due to a breach of fiduciary duties. See 29 U.S.C. §§ 1103, 1104, 1109 (1996). Pursuant to Section 404(c) of ERISA and to the applicable regulations, an employer can limit, but not eliminate, such fiduciary liability by establishing participant accounts and allowing participants to exercise control over them. See 29 U.S.C. § 1109(e) (1996). This limitation requires that a participant have sufficient information on investment alternatives under the plan to make an informed investment decision, but not that employers provide employees with general investing advice or education. See 29 C.F.R. § 2550.404c-1(c) (1998). The Interpretive Bulletin established a “safe harbor” for four kinds of information and education that employers, and particularly financial firms operating the plans for them, can supply without triggering a fiduciary obligation (i.e., without being deemed to be giving investment advice): (i) a description of the plan and its operation, the benefits of plan participation, the disadvantages in withdrawing funds prior to retirement and basic information about alternatives under the plan, (ii) general information on financial concepts, different rates of return on investments, inflation, future retirement income needs, investment time horizons and risk tolerance assessment, (iii) the presentation of asset-allocation models keyed to individuals with different time horizons and risks (i.e., life-cycle investing), which essentially helps an employee grasp the general finance information through specific examples and (iv) interactive materials and worksheets that allow an employee to compare his or her own circumstances to the asset-allocation models. \textit{See Interpretive Bulletin 96-1, supra.} The PWBA also took the “market friendly” position of suggesting that other kinds of educational information and services that these firms may develop would likely fall within the safe harbor. Cf. Lynn Asinof, \textit{Click & Shift: Workers Control Their Benefits On-Line}, WALL ST. J., Nov. 21, 1997, at C1 (observing that workers increasingly control their benefits on-line).}
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vesting, resulted in the recent enactment of the SAVER Act, which has an explicit educational focus. This Act specifically mandates that the Department of Labor ("DOL") convey to the public information about retirement saving and plans, particularly by means of a permanent Internet site. The Act's definition of such information is essentially that provided by basic saving and investing education. The Act seems to envision that the site will focus on a description of retirement plans and will provide references to other Internet sites that provide the education. Even more importantly, it requires the President to convene three educational summits to bring government officials and private parties (both for-profit and nonprofit firms) together, to "facilitate the development of a broad-based, public education program to encourage and enhance individual commitment to a personal retirement savings strategy . . . ."


1. to advance the public's knowledge and understanding of retirement savings and its critical importance to the future well-being of American workers and their families;
2. to provide for a periodic, bipartisan national retirement savings summit in conjunction with the White House to elevate the issue of savings to national prominence; and
3. to initiate the development of a broad-based, public education program to encourage and enhance individual commitment to a personal retirement savings strategy.


See 29 U.S.C. § 1146(c)(2) (requiring that the Secretary of Labor convey such information as "(A) the forms of retirement income savings; (B) the concept of compound interest; (C) the importance of commencing savings early in life; (D) savings principles; (E) the importance of prudence and diversification in investing; (F) the importance of the timing of investments; and (G) the impact on retirement savings of life's uncertainties, such as living beyond one's life expectancy.").

See 29 U.S.C. §§ 1146(c)(1), (d)(1)-(5) (specifying in (d)(5) that the DOL Web site provide "links to other sites maintained on the Internet by governmental agencies and nonprofit organizations that provide additional detail on retirement income savings arrangements and related topics on savings or investing").

29 U.S.C. § 1147(a)(2). The first of these summits was held on June 4-5, 1998 in Washington. See The National Summit on Retirement Savings, Summit Agenda (visited Sept. 15, 1998) <http://www.saversummit.org/agenda.htm> (providing agenda for the summit); Employee Benefit Research Institute, Current State—Savings and Education Today (visited Sept. 15, 1998) <http://www.ebri.org/rcs/dallas> (providing material for presentation by EBRI president Dallas Salisbury at the summit); see also Conte, supra note 39 (providing the agenda briefing book for the summit). Indeed, since the SAVER Act provides that the summits should involve the participation of public and private parties and be privately and publicly funded, the summits give a good example of government encouraging private market educators. See 29 U.S.C. § 1147(b),(e),(j); see also Alliance for Investor Education, Alliance Mission and Members (visited Sept. 15, 1998) <http://www.investoreducation.org/mismembers.htm> (Web site of Alliance for Investor Education, a nonprofit organization sponsored by trade groups and assisted by governmental agencies, that "is dedicated to facilitating greater understanding of investing, investments and the financial markets among current and prospective investors of all ages").
A difficult issue regarding the government’s role in investor education is how, and how much, government agencies, as part of a national saving and investing campaign, should conduct some substantive education on important issues to which financial firms or nonprofit organizations might not give adequate attention. For example, should the government discourage consumers from excessive stock speculation and risk-taking in investing and advocate a strategy of portfolio diversification adjusted to an individual’s life cycle and risk preferences as an optimal investing strategy for most Americans? Similarly, if brokers and other financial professionals are understood to exert excessive influence upon individual investors, should an agency warn consumers to be on their guard about this influence when seeking advice from professionals?

A government agency, such as the Social Security Administration, the PWBA, the DOL, and federal bank regulators, is certainly
justified in educating and, in some cases, is required to educate consumers about its programs and about its regulatory authority. Further, this activity could also include some kinds of basic saving and investing advice to consumers. Indeed, as part of the saving and investing campaign, government agencies should use their power to go beyond specific messages related to their regulatory authority, and to drive home certain key points about saving and investing, other than that a consumer should save, invest and use available educational materials. Their messages will lend weight to the educational activities of for-profit and nonprofit firms by reinforcing the basic saving and investing rules of thumb, and they can target lower income Americans often ignored by such firms. The line between acceptable and unacceptable messages of government advocacy is not entirely clear, however, which means that any agency must approach this “education reinforcement” activity with care. An agency can beneficially echo saving guidelines and generally accepted financial principles. However, the agency must be careful about lending its support to any particular investing strategy that is not universally accepted in the financial community as being superior to any other. Even if an agency feels that, on the whole, one strategy (e.g., index-

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178 Admittedly, some of the best educational materials come from financial firms that are targeting people with significant disposable income. Yet it is critical that education also reach those who can save only small amounts. See CONTE, supra note 39, at 16-17.
WE'RE ALL CAPITALISTS NOW

As a pragmatic matter, a government agency, such as the SEC, cannot warn consumers generally to be on their guard against brokers and financial professionals. This warning would not only alienate powerful constituencies, but it would also undermine the welfare of the many consumers who benefit from these professionals. The best way to ensure that consumers resist any psychological selling pressures used by financial professionals is to have consumers educated in the basics of saving and investing, which includes the appropriate psychological education.

b. The Government as Anti-Fraud Educator

Consumers also need first-time and continuing education about financial abuse and fraud from a provider other than families and schools. The financial services industry, broadly defined to include trade associations and participating nonprofit groups, could conduct this kind of investor education. Since its members are already involved in general saving and investing education, they could add this task to their educational efforts. Given their position, financial firms could identify and understand new permutations of abusive or fraudulent behavior. They also have incentives to police their industry. Legitimate firms want consumers to distinguish them from fraudulent organizations, and their provision of education to counter abusive practices provides a sign of legitimacy. Firms may educate consumers about fraud typical of financial professionals, since this misbehavior undermines customer confidence in financial services that is so critical to the industry's well-being. In addition, consumer organizations that supply education naturally want to protect their members from abuse and fraud by educating them to be aware of their forms.

Yet even the most reputable financial firms do little to educate consumers about abusive or fraudulent financial practices. Rather, the only detailed private education on this subject comes from the quasi-governmental self-regulatory organizations, such as the National Association of Securities Dealers ("NASD") and the New

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179 See YANKELOVICH PARTNERS, INC., supra note 55, at 6 (noting that the majority of investors surveyed are pleased with their brokers).

180 See, e.g., Langevoort, supra note 49, at 630 n.6 ("There is no doubt that the securities industry has a strong economic incentive to promote the impression that manipulative sales practices are limited to a small subset of brokers, for their entire business is built on customer trust.")

York Stock Exchange ("NYSE"), and from nonprofit consumer organizations. This is not surprising given that conflicting interests make even legitimate financial professionals unsuitable to undertake investor education about consumer abuse or fraud. Despite concerns about legal sanctions and adverse publicity that will affect their market position, firms may be tempted by profit to engage, directly or indirectly, in clearly prohibited practices. The line between illegitimate and legitimate financial practices, moreover, is also not always easy to draw, particularly regarding innovations in financial products, and practices can move from the legitimate to illegitimate category over time. If certain practices or products are profitable and if their legality is uncertain (or not even questionable), it is not reasonable to expect that financial professionals will educate the public about ways of avoiding them, thus reducing their own profit. While competition in financial services helps ensure that financial firms will offer adequate saving and investing education to consumers, the same competition makes it unlikely that these firms will be at the forefront of educating consumers about innovative, potentially fraudulent financial practices, or simply about legitimate, but potentially abusive, sales tactics. Furthermore, although consumer financial organizations can (and do) educate consumers about abuse and fraud, they do not have all of the expertise or resources necessary wholly to take on this educational burden.

The government in one or more forms, through agencies and self-regulatory organizations, as well as in partnership with consumer groups, should therefore be the primary educator about financial abuse and fraud, including fraud and deception in firm investor education materials. Unlike financial firms, it suffers no disabling conflict-of-interest in warning consumers against new fraud or abusive practices, although it may initially lack the knowledge and expertise to identify them. Its educational efforts, moreover, follow from its enforcement of the laws and other regulatory responsibilities. A gov-

182 See You and the Investment World, supra note 73, at 33-37.
184 See Langevoort, supra note 49, at 647-48 (describing the tendency of supervisors in financial firms to focus on the "bottom line" in an effort to be able to deflect legal and moral responsibility for prohibited behavior by their employees); see also Is This Marriage a Mistake?, ECONOMIST, Jan. 31, 1998, at 75-77 (describing the lack of supervision in a Swiss bank that led to enormous losses).
185 See, e.g., SELIGMAN, supra note 55, at 397-416 (describing the abolition of fixed commission rates at the NYSE).
186 See, e.g., In the Matter of NationsSecurities and Nationsbank, N.A., Securities Act 1998 SEC LEXIS 833 (May 4, 1998) (settling charges against these financial institutions alleged to have engaged in fraudulent sales practices to consumers that blurred the distinction between insured bank deposits and non-government insured securities).
187 Part of this education will thus be to inform consumers how to contact the government to bring new abusive or fraudulent schemes to the relevant agency's attention.
ernment agency identifies prohibited behavior regarding saving and investing and counteracts it by prosecuting offenders for violations of their fiduciary or other duties,188 and by licensing and supervising investment professionals.189 Publicizing these activities both deters future violators and educates investors about existing fraudulent or abusive schemes.190 As new schemes appear, whether versions of old ones or genuinely innovative fraud, the government addresses them and, through the media publicity of its action and court decisions, further alerts investors.191 An explanatory list, or summary of past successful prosecutions regarding abuses of investors, would resemble the kind of list of common crimes affecting children that police officers distribute in schools.192 The cost of this education, moreover, is relatively small since communication technology makes it increasingly easier and cheaper for the government to communicate this information.

Americans also expect the government to perform this educational task, which state and federal financial regulators have traditionally fulfilled.193 Consumers respect financial market authorities who have a reputation for integrity in policing financial fraud and abusive practices.194 They look to government agencies for protection from,


191 See, e.g., NASA (visited Sept. 15, 1998) <http://www.nasa.org> (Web site of the North American Securities Administrators Association, Inc. (“NASAA”) warning about recent rise in “ethnic affinity fraud” (financial fraud targeted to particular ethnic groups by members of same group) and providing a list of recent fraudulent schemes, including “Cyberspace Fraud and the Small Investor”).

192 State or federal government financial regulators or members of self-regulatory organizations could also discuss with students the dangers of financial fraud. See infra Part IV(A).

193 See generally STEPHANIE W. KANWIT, 2 FEDERAL TRADE COMMISSION 22-1 to 22-59 (1995) (describing Federal Trade Commission regulation of false and deceptive advertising). The available government materials against securities fraud are voluminous. See, e.g., NASA, supra note 191; Basics of Saving and Investing, supra note 73, at Appendix (listing numerous governmental agencies, together with their materials and Web sites).

and guidance about, such practices and are likely to cooperate with these agencies in helping to identify perpetrators of fraudulent schemes. Just as the government has a critical role in reinforcing optimal saving and investing norms, it plays a significant part in maintaining the bounds of acceptable and prohibited investing behavior. Social expectations thus reinforce the conclusion that the government, generally through financial regulators, should conduct continuing investor education designed to protect ordinary people against abuse and fraud in saving and investing.

IV. AN EVALUATION OF SEC INVESTOR EDUCATIONAL INITIATIVES

This Part of the Article evaluates the SEC’s investor educational initiatives from the above theoretical framework. It focuses on the SEC because the Commission has been the most active federal agency in this area. Most of these initiatives significantly extend the SEC’s traditional mission, which is, simply put, disclosure related to securities transactions. It is one thing for the SEC to ensure that companies offering and selling securities, or engaged in transactions affecting their securities, disclose, among other things, information about their business, management, the features of the securities and any major transactions. It is quite another thing for the SEC to train consumers how to save and to invest, which involves their intelligent use of the disclosed information. Any SEC education about fraud or abusive practices, however, is less of a regulatory stretch, since it is ancillary to the SEC’s law enforcement role.

The current SEC chairman (1993 to present), Arthur Levitt, has been the catalyst for the SEC’s educational initiatives. In 1993 he established an Office of Investor Education and Assistance and has himself reached out to ordinary investors through town meetings (a format popular with the man who appointed him, President Clinton). Under his direction, the Office prepares educational pamphlets for consumers, makes them available on its Web site, has recently been engaged in a national (and even international) investor education campaign and has itself greatly increased the contact between the SEC and ordinary consumers, through electronic and other means. It has also been involved in an important initiative to simplify the language of all disclosure documents filed with the SEC, by

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196 See Permanent Subcomm. on Investigations of the Senate Comm. on Government Affairs, 105th Cong. 18 (1997) (statement of Arthur Levitt, Chairman, SEC) (describing town meetings as “typically well-attended (often over 1,000 investors attended each meeting) and feature a series of seminars for investors on a wide variety of topics”).
197 See infra Part IV(A).
transforming them into "plain English." In addition, the SEC's Division of Investment Management, which oversees the mutual fund industry, has recently sought to make mutual fund disclosure more instructive for consumers by focusing on important fund issues and facilitating the comparison of funds. The SEC staff has even suggested that, given the subject's importance, Congress pass legislation on investor education.

These SEC educational efforts may be little more than a passing political trend and, from a "public choice" perspective, an example of an often-used strategy of regulatory agencies justifying their existence by dramatizing an issue that demands their regulatory intervention. Yet the SEC, as the primary government agency regulating the securities markets, should be involved in investor education and should expand its disclosure mission to include education. The pressures leading to the importance of investor education—the problems with Social Security, the growth of defined contribution plans, and the decline of saving in the United States. amid changing demographics—are not of the SEC's making. The focus on disclosure was appropriate when few Americans were investors and they mainly relied upon full-service brokers; it is inadequate when investing has become an everyday, yet important, activity for over half of the American population, many of whom invest without a financial professional. The SEC would also incur considerable political risk if its lack of attention to education contributed to a market disaster (e.g., small investors left financial markets in a panic in a market downturn or out of concern of market fraud, partly because of their educational deficiencies).
The SEC likely now has the regulatory authority to be involved in investor education, although its staff’s references to the possible need for legislation may reflect their acknowledgment that the pertinent statutes do not clearly address this issue. This authority is arguably incidental, and even unnecessary, to the SEC’s statutory mission in various securities acts to ensure adequate disclosure in the public interest. If many ordinary investors can not even understand how disclosed information relates to investing, disclosure cannot achieve its communicative purpose. Moreover, if the central purpose of the Securities Exchange Act of 1934 is to create “fair and honest [securities] markets,” this purpose cannot be achieved without investors being educated not only about fraud, but also about the functioning of these markets, the securities traded on them, the role of the markets in personal investing and wealth creation—in short, about all of the knowledge that investor education should impart.

While the SEC’s educational efforts have been useful, it could greatly improve them if it redirected its activities, in accordance with the Article’s guidance, to concentrate on anti-fraud education and to do more to promote and facilitate the educational services of financial and nonprofit firms. In the general educational materials and activities of the Office of Investor Education and Assistance, the SEC appropriately educates consumers about illegal and abusive practices in financial services and markets, and usefully provides means for consumers to contact it about these practices. Yet its saving and investing education does not measure up to the educational activities of private firms. Therefore, this education should be redesigned to be part of a federal government campaign to encourage saving and investing, and to publicize and facilitate access to private educational resources and services while still itself providing investors with basic

205 See, e.g., 15 U.S.C. § 77g (1994) (empowering the SEC to determine what information is needed in registration statements as being “necessary or appropriate in the public interest or for the protection of investors”); 15 U.S.C. § 78m (empowering the SEC to require the filing of information “as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security”); 15 U.S.C. § 80a-1(b)(1) (justifying regulation of mutual funds because investors purchase their securities “without adequate, accurate, and explicit information, fairly presented”).

206 That many ordinary investors do not read disclosed information and instead rely on market price and recommendations of financial professionals would not change the analysis, for the securities acts do not authorize the SEC to assume that only professionals participate in securities markets and that all ordinary investors hand their portfolios over to professionals—a situation that, in any case, bears no connection to reality.

207 See 15 U.S.C. § 78b; see also Cox, supra note 8, at 653-55.

208 A general problem with the SEC’s educational efforts is that, unlike market participants, the SEC does not fully feel cost pressures, although Congress reviews its budget and it is required both to review its regulations from a cost/benefit perspective and to consider the burdens they imposes upon businesses. See, e.g., Small Business Regulation Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (encouraging the effective participation of small businesses in the federal regulatory process). But see Kripke, supra note 4, at 59 (contending that the SEC’s cost/benefit analysis is often perfunctory).
saving and investing norms. The SEC's "plain English" initiative and mutual fund disclosure simplification and presentation exhibit a valuable partnership with the financial services industry, which will allow consumers to understand basic information about investing in a format to which they can easily apply the investor education provided by others. The SEC, however, should explicitly recognize the necessary relationship between the consumer-oriented disclosure and the firms' educational services and make the firms link their disclosure documents to these services. Finally, the SEC should begin a sustained reflection on its role in investor education and heighten awareness of education's importance by issuing a "concept release" on investor education, and inviting comment from all those involved and interested in the subject.209

A. <www.sec.gov/invkhome>

The "Investor Assistance & Complaints" section of the SEC's Web site,210 the "virtual home" of the Office of Investor Education and Assistance, exemplifies both the usefulness of the SEC's investor education efforts and its need for redirection. The introduction by the Office's Director suggests its educational ambitions: "We provide a variety of services to address the problems and questions you may face as an investor. We cannot tell you what investments to make, but we can tell you how to invest wisely and protect your hard earned investment dollars from securities fraud or abuse."211 In much of its material, the Office appropriately provides education about fraud and questionable financial practices, particularly by finance professionals, and facilitates communication from consumers to the SEC. The Office, for example, urges investors to contact the SEC if they have "suffered wrongdoing at the hands of a bad broker or investment ad-

209 In a companion piece, I argue that, once it has refocused its saving and investing educational activities, the SEC should do more to teach people about governance and corporate morality. See Fanto, supra note 51.


visor . . . ”

The section also provides links to the SEC’s Division of Enforcement complaint hotline and to Division notices that alert investors about recent questionable financial practices or investments targeted at consumers.

The SEC does not limit its educational efforts, however, to fraud prevention but also offers general saving and investing education; one of the purposes of the Office is, after all, to tell people “how to invest wisely.” It is unquestionably difficult for the agency to conduct anti-fraud education without saying something about investing, investments and securities markets. Yet the SEC’s saving and investing education is uneven when compared to the educational materials of financial and nonprofit firms, because the SEC has not always identified what kind of investor it is addressing (i.e., sophisticated vs. unsophisticated). Furthermore, the SEC sometimes mixes elementary points about investing with issues demanding some sophistication.

The SEC’s most basic educational brochure, What Every Investor Should Know, has a clear, useful discussion of securities markets, basic financial instruments, investment companies and instructions about opening brokerage accounts and stock trading.

Yet in the
Ask Questions brochure, a consumer is given a list of useful questions to ask about financial products, the progress of investments and problems with brokers, but many of them make little sense unless the investor is already familiar with basic finance concepts, such as asset allocation, diversification and risk, that are absent from the brochure (and are not found on the SEC's Web site).\textsuperscript{216} Moreover, in its Invest Wisely brochure on brokers, after disclaiming that it will provide any general investor education,\textsuperscript{217} the SEC offers consumers its own investing advice ranging from simple anti-fraud remarks\textsuperscript{218} to statements requiring some finance knowledge\textsuperscript{219}

Despite their problems, these SEC saving and investing educational efforts involve only the limited activity of organizing and maintaining a Web site and printing documents, which also supply useful anti-fraud education. An obvious answer to the above criticisms is that the SEC spend more time, effort and money on saving and investing education, particularly on finance and investing strategies.\textsuperscript{220} Although Chairman Levitt has admirably tried to make the SEC more responsive to the needs of consumers, the SEC can not produce educational products and services superior to those supplied by private firms in a highly competitive environment. The SEC staff

\textsuperscript{150} SEC supervision of brokers and other financial professionals, which brings it within the SEC's anti-fraud ambit. See id.

\textsuperscript{216} See Ask Questions, supra note 214 ("Does this investment match my investment goals? . . . Why is this investment suitable for me? . . . What are the specific risks associated with this investment? . . . What is the maximum I could lose?") Similarly, while the brochure What Every Investor Should Know provides useful descriptions of basic financial instruments, as well as a glossary of investment terms, it, too, offers little finance explanation. See e.g., What Every Investor Should Know: Section 4. How to Choose an Investment (last modified October 22, 1996) <http://www.sec.gov/consumer/weisk/weisk4.htm> [hereinafter How to Choose an Investment] ("One of the more basic relationships in investing is that between risk and reward. Very often, investments that offer potentially high returns are accompanied by relatively higher risk factors. It is up to you to decide how much risk you can assume.").

\textsuperscript{217} See Advice from Your Securities Industry Regulators, supra note 214 (encouraging readers to get "{[i]nformation regarding the fundamentals of investing and basic financial terminology . . . at your local library."; see also How to Choose an Investment, supra note 216 (referring investors to other sources for information about securities, while downplaying the obvious sources, such as financial services firms).

\textsuperscript{218} See Advice from Your Securities Industry Regulators, supra note 214 ("Investments in securities issued by a company with little or no operating history or published information may involve greater risk.").

\textsuperscript{219} See Advice from Your Securities Industry Regulators, supra note 214 ("The higher the expected rate of return, the greater the risk . . . In some cases, such as partial or two-tier tender offers, failure to act can have detrimental effects on your investment."); see also Invest Wisely: An Introduction to Mutual Funds (last modified Oct. 21, 1996) <http://www.sec.gov/consumer/inwsmf.htm> [hereinafter An Introduction to Mutual Funds] (warning that "[a]lthough past performance is not a reliable indicator of future performance, volatility of past returns is a good indicator of a fund's future volatility," while also stating in a simple maxim, "[a] mutual fund is a company that brings together money from many people and invests it in stocks, bonds, or other securities").

\textsuperscript{220} See Investor Assistance & Complaints, supra note 210 (promising more information, which could include more general education: "More To Come! Watch this space for future developments!").
simply lacks the continuous contact with consumers, the strong profit motive and/or the need to justify its existence that would enable it to design and tailor general educational efforts to consumers' needs.\textsuperscript{221}

More importantly, extensive education efforts, as well as any substantial increase in these efforts, distract the SEC from the tasks for which it is better suited. The SEC should continue to focus the investor assistance section of its Web site and general investor publications on alerting investors about new and regularly occurring kinds of securities fraud and abuse, as it has successfully done. It should also perform the significant "cheerleading" function of encouraging consumers to save and invest, a function that (as the PWBA has demonstrated) is appropriate for government agencies, but that, until recently, the SEC has all but ignored in its educational materials.\textsuperscript{222}

The SEC has several brochures describing itself and its regulatory authority that could contribute to this educational function.\textsuperscript{223} For example, in outlining its authority over new securities issuances and securities trading, the SEC could also describe the importance of private securities markets and personal investing for the economy and the well-being of citizens. The SEC should not underestimate the effect that publicizing its regulatory authority will have on encouraging saving and investing, for evidence suggests that consumers are encouraged to invest if they realize that securities markets are subject to laws and that an active agency is enforcing them.\textsuperscript{224}

The SEC should therefore conduct saving and investing education as ancillary to its fraud prevention education and to its "cheerleading" activities so as to drive home to investors saving and investing norms.\textsuperscript{225} Rather than attempting to design the optimal educational product, the SEC would do better to consult with the financial industry on its members' educational products, encourage continued product and services development and review educational materials

\textsuperscript{221} Even nonprofit organizations, like AAII, owe their very existence to satisfying the needs of individual investors and thus have a strong motive to design services attractive to them.\textsuperscript{222} In his town meetings, however, Chairman Levitt has always admirably performed this "promotional" educational task.\textsuperscript{223} See, e.g., The U. S. Securities and Exchange Commission: What It Is, What It Does (last modified November 18, 1996) <http://www.sec.gov/aseclasecart.htm>; The Work of the SEC (last modified August 5, 1997) <http://www.sec.gov/asec/wot.htm>.\textsuperscript{224} See RAFAEL LA PORTA ET AL., LAW AND FINANCE 40-42 (National Bureau of Econ. Research Working Paper No. 5661, 1996) (describing importance of law in permitting capital markets to function); Rafael La Porta et al., Legal Determinants of External Finance, 52 J. Fin. 1131, 1149-50 (1997) (same).\textsuperscript{225} For example, in summarizing its oversight over mutual funds and investment advisors, the SEC could briefly discuss the nature of a mutual fund, the kinds of funds, and their basic features and advantages. The SEC could also combine some of its current brochures into an "investor's handbook" that explained the SEC's regulation of different investment products and markets and provided an elementary description of them.
for any abuses. In addition, it should limit itself to echoing several basic, but important, saving and investing rules. Indeed, the SEC exemplified the correct balance between promoting saving and investing and conducting basic investor education in its sponsorship of a week-long “Facts on Saving and Investing Campaign” from March 29 to April 4, 1998, with the participation of other government agencies, state securities regulators, consumer organizations and financial industry trade groups. Not only did the SEC and the other participants focus on simple saving and investing norms through high visibility events, but it also produced educational materials designed to convey and reinforce these norms.

Most importantly, the SEC should inform consumers that financial and nonprofit firms are supplying investor education, and repeatedly encourage them to use these educational materials and services. As a regulator, the SEC may not think it appropriate to publicly high-

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226 In fact, the SEC should undertake a general review of educational materials produced by consumer financial services firms for abuses or irregularities in them. Cf. Ellen E. Schultz, Employees Looking for Advice on 401(k)s Often Face Obstacles, WALL ST. J., Feb. 6, 1998, at C1 (discussing potential abuses in investor education relating to mutual fund expenses and fees).

227 See, e.g., Securities Industry Association, Understanding Market Risks: What Every Investor Should Know, at 1 (visited Sept. 15, 1998) <http://www.sia.com/investor_information/html/publications.html> (referring to consultations with the SEC’s Office of Investor Education and Assistance in preparing the brochure). While there is no great need for the SEC to recommend to consumers a particular investment strategy, in its general educational messages the SEC could give warnings to the effect that, despite the many different investing strategies, it is difficult for any one person (including a professional) consistently to beat the market and that diversification should characterize most investors’ portfolios. See Stout, Costly Casinos, supra note 88, at 692 n.271 (“The government might, however, require all stocks to carry the following label: ‘WARNING: Self-Selection Ensures that You Probably Are Not Going To Be as Talented at Trading as You Think You Might Be.’”); Robert B. Thompson, Securities Regulation in an Electronic Age: The Impact of Cognitive Psychology, 75 WASH. U. L.Q. 779, 782 (1997) (discussing possible investor warnings to address cognitive weaknesses and pressures resulting from the use of framing in securities regulations). In fact, the SEC occasionally makes such statements in its materials. See, e.g., How to Choose an Investment, supra note 216 (“Don’t speculate. Speculation can be a useful investment tool for those who can understand and manage the risks involved and those who can afford to lose money. For the average investor, more conservative investment strategies are generally appropriate.”); An Introduction to Mutual Funds, supra note 219 (suggesting that higher expense funds are not necessarily more profitable, which is an indirect reference to the benefits available from no-load, index funds).

228 See Overview: Get the Facts. It’s Your Money. It’s Your Future (last modified Feb. 24, 1998) <http://www.sec.gov/consumer/cosra/about/facts.htm> (describing campaign, campaign partners, events in nearly twenty states). The campaign, in fact, involved activities in twenty-one countries in the Western Hemisphere, which highlights the growing importance of investor education in other countries as market capitalism increases worldwide.


230 See, e.g., SEC, Get the Facts on Saving and Investing: A Roadmap to Start You on a Journey to Financial Security Through Saving and Investing (visited Sept. 15, 1998) <http://www.sec.gov/consumer/cosra/brochure.htm> (providing some basic guidelines on saving and investing, such as a financial plan, the benefits of saving, elementary concepts of investing, fundamentals about mutual funds and brokers and ways to avoid fraud and abuse). Moreover, the SEC’s campaign Web site provides a hyperlink to the site for the Alliance for Investor Education.
light the educational efforts of a particular firm. Yet it now refers
investors, by hypertext links on its Web site, to other Web sites that
might be of interest to them. Some of these “quasi-public” sites, like
those of the NYSE and the NASD, have good educational materi-
als. The SEC could take the additional step of openly referring in-
vestors, with appropriate disclaimers, to these sites and to others, such
as those of trade groups. It should then encourage the SROs and
trade groups to point consumers to excellent sites of their member
firms, which would give an additional spur to the already existing
firm competition to provide consumer educational services.

B. Plain English

The “plain English” movement began in law over a decade ago. Its appearance in securities regulation is again due to the par-
ticular interest of Chairman Levitt and to the fact that, since investing
is now a consumer area, adequate communication to ordinary inves-
tors is critical, just as it was earlier in leases, loans and insurance
contracts. The more specific reason for the SEC’s attention to “plain
English” came from the results of a report of a task force of private
and government lawyers studying simplification of securities disclo-
sure. Recognizing that much disclosure language was opaque, the

231 As noted below, in its “plain English” initiative, the SEC does publicly praise private
firms that have produced plain English disclosure documents. Since many educational materials
now exist, the SEC may fear slighting one or more firms by omitting mention of their educa-
tional materials if it lists those of other firms.

232 The SEC also has a hyperlink with the ASEC. See Other Sites, supra note 211.

233 The SEC’s “Facts on Saving and Investing Campaign” clearly involved the high-
lighting for consumers of the availability of private investor educational resources, if only be-
because of the involvement therein of many financial industry trade groups and consumer organi-
izations specializing in advising consumers on saving and investing. Moreover, Chairman Levitt
has recently publicly praised the educational activities of private firms. See Remarks by Arthur
to suggest that he may have taken some inspiration for this recent focus from a reading of an
earlier draft of this Article? See Letter from Arthur Levitt, Chairman, SEC, to James A. Fanto,

234 SROs or trade groups, like the ICI or the Securities Industry Association, could peri-
odically highlight and praise the educational materials of one or more firms or firms’ educa-
tional innovations.

3154 (Jan. 21, 1997) [hereinafter Proposing Release] (to be codified at 17 C.F.R. pt. 228, 229,
230 and 239). For a general discussion of the legal “plain language” movement, see LAWRENCE

236 See SEC, REPORT OF THE TASK FORCE ON DISCLOSURE SIMPLIFICATION (1996)
[hereinafter DISCLOSURE SIMPLIFICATION]. Appointed by Chairman Levitt, the task force was
carded by a private lawyer, Philip Howard, a named partner in Howard, Darby & Levin and
author of the book, DEATH OF COMMON SENSE, and included staff members from different SEC
divisions.
task force recommended that the SEC “enhance [the] readability [of disclosure documents] by individual investors.”

It is difficult not to regard the SEC’s “plain English” initiative with some cynicism. The “crisis” of opaque disclosure will lead to more work (and continued employment) for the securities bar and SEC staff—that is, for those who are in large part responsible for the obfuscatory legalese in disclosure documents in the first place. The initiative also confirms the late Professor Kripke’s observation that, since lawyers, rather than economists and finance professionals, are most influential in the SEC staff, the agency invariably emphasizes the importance of law and rhetoric, rather than economics and finance, in its regulations. Even if the SEC staff and securities lawyers should shoulder much of the blame for a securities disclosure that generates opaque documents, they are at least trying to remedy the problem.

The SEC’s “plain English” initiative not only helps simplify disclosure, but also highlights the importance of, and contributes to, in-

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237 Id. at 17 (“Develop a ‘plain English’ introduction to the prospectus to enhance its readability by individual investors, by eliminating boilerplate ‘legalese’ and requiring a summary of key information.”) (emphasis in original); see also Proposing Release, supra note 239, at 3152 n.17.


239 See Kripke, supra note 4, at 18. “Plain English” is, in fact, a way for rhetorically-trained lawyers to reassert their usefulness and expertise in an investment world dominated by mathematicians and economists. The SEC’s writing and organizing recommendations at times appear to come from high school English teachers who are not particularly conversant with, and somewhat fearful of, the latest computer technology. See Plain English Handbook, supra note 238, at 55 (recommending that a writer take sections of a disclosure document and “tape or tack to the wall the pages” as an aid in considering the best order of presentation). The drafters seem to be unaware of word processing programs that allow multiple configurations of documents.

240 In the past, the SEC has urged practitioners to write simpler disclosure documents. See, e.g., Clarification of Prospectuses, Securities Act Release No. 4844, 31 Fed. Reg. 10,667, 10,668 (Aug. 11, 1966) (“The chief goal of registration is disclosure for the benefit of investors and that involves, among other things, the use of language that can be understood readily by the persons to whom it is addressed. Failure to use language that is clear and understandable by the investor may operate to defeat the purpose of the prospectus.”) (footnote omitted).
vesting education.\textsuperscript{241} Simplifying information to promote effective
communication in securities disclosure inevitably raises questions as
whether consumers have the necessary background or “culture” to
understand even this information.\textsuperscript{242} Yet the SEC does not always
squarely face, nor clearly think through, the connections between the
initiative and investor education. Thus, the initiative’s educational
implications appear haphazardly, with the result that educational tasks
are inappropriately placed upon parties, such as individual companies,
when others, such as financial services firms, are already performing
them. Unless it is integrated into a well-conceived SEC educational
initiative, “plain English” will simply be “window dressing,” bringing
few ordinary people into the investment world.

In the “plain English” releases,\textsuperscript{243} the SEC appears not to realize
fully the educational implications of its initiative, and thus offers con-
fusing signals to companies preparing disclosure documents. It states
that “plain English” and disclosure simplification involve clarifying
language and improving presentation. Since a disclosure document
addresses investors with different levels of financial sophistication,\textsuperscript{244}
the SEC requires that a company generally adopt language under-
standable to the least sophisticated among them and presentation
techniques that satisfy both sophisticated and unsophisticated inves-
tors. Under the final rule, a company must use “plain English” writing
principles in initial parts of prospectus, where a company often
summarizes important information, and ensure that the language and
presentation of the rest of the document are “clear, concise, and un-
derstandable.”\textsuperscript{245} There is no question that the SEC’s “plain English”

\textsuperscript{241} Others have discussed the advantages and disadvantages of “plain English.” See, e.g., SOLAN, supra note 235, at 129-38 (discussing misguided effort to simplify necessary legal complexities).

\textsuperscript{242} The Task Force on Disclosure Simplification made this connection. See DISCLOSURE SIMPLIFICATION, supra note 236, at 17 (observing that in prospectuses “[t]rivial points sometimes receive as much attention as material information, and in the end may bury points significant to an investment decision” and recommending better writing and presentation to remedy the problem; but also making the general educational recommendation, i.e., “the use of a ‘plain English’ glossary to explain technical terms used in the document”). See, e.g., Isaac C. Hunt, Jr., Plain English—Changing the Corporate Culture, 51 U. MIAMI L. REV. 713, 714 (1997) (quoting a Commission member observing that disclosure does not achieve its purpose if it fails to communicate with the investor).


\textsuperscript{244} See Proposing Release, supra note 235, at 3155 (“The educational background and financial sophistication of your current or prospective investors should dictate the language you use.”). The Final Release omits discussion of kinds of readers, but implies that the new disclosure will reach a wider audience, i.e., consumers. See Final Release, supra note 243, at 6370 (“Prospectuses will be simpler, clearer, more useful, and we hope, more widely read.”).

\textsuperscript{245} Final Release, supra note 243, at 6384. Under the adopted “plain English” rule, a company must use “plain English principles in the organization, language, and design of the front and back cover pages, the summary, and the risk factors section” of a prospectus. \textit{Id}. These principles are six: “(i) Short sentences; (ii) Definite, concrete, everyday words; (iii) Ac-
writing principles and clarification standards, which are the foundations of good writing, will lead to, and have produced clearer, more understandable disclosure.246 Yet the examples of the "plain English" or clarifying redrafting of poor prospectus disclosure, although much better written,247 do not always help an ordinary investor who is unfamiliar with many financial, accounting and business terms in the prospectus or with investing in general.248

The SEC suggests the educational implications of its initiative when, like the Disclosure Task Force, it recommends the inclusion of glossaries in prospectuses for "[t]erms that are not clear from the context [and to] facilitate understanding of the disclosure."249 But its support for these tools is qualified because it fears that reliance on glossaries and the necessary cross-references will interrupt the flow of writing and discourage ordinary investors from reading the documents (since it takes time and effort to move back and forth through them), although these are the very people that a glossary is designed to help. Rather, the SEC recommends that documents provide, at appropriate places, a "concise explanation" of complex provisions or terms.250 Yet the SEC's examples of explanations would not effect complete communication to the financially uneducated. It is not always clear where any particular explanation would stop and this recommendation does not entirely avoid the problem of cross-references. The SEC offers yet another standard, which states that a company

tive voice; (iv) Tabular presentation or bullet lists for complex material, whenever possible; (v) No legal jargon or highly technical business terms; and (vi) No multiple negatives." See id. at 6384. The rule encourages the use of pictures and charts to make this part of the document accessible to ordinary investors. As for the rest of the prospectus, the rule demands that a company present the information in a prospectus "in a clear, concise and understandable manner," following four standards: (1) "Present . . . clear, concise sections, paragraphs, and sentences . . . [with the use of] . . . short, explanatory sentences and bullet lists; (2) Use descriptive headings and subheadings; (3) Avoid frequent reliance on glossaries or defined terms as the primary means of explaining information in the prospectus. . . ; (4) Avoid legal and highly technical business terminology." See id.

246 See DIVISION OF CORPORATION FINANCE ET AL., BEFORE & AFTER EXAMPLES FROM THE PLAIN ENGLISH PILOT PROGRAM AND A PLAIN ENGLISH HANDBOOK (1998) [hereinafter BEFORE & AFTER EXAMPLES] (contrasting disclosure before and after it was rewritten with "plain English" writing principles); see also Proposing Release, supra note 235, at 3156-58 (giving similar examples). Numerous companies participated in a "pilot program" to use "plain English" in their disclosure documents. See Final Release, supra note 243, at 6370.


248 For example, the rewritten sentence "[o]ur losses were caused, in part, by the annual write-off of a portion of the goodwill resulting from the ten acquisitions we made during this period" does not communicate much to an investor who has no knowledge of accounting. See Proposing Release, supra 235, at 3157, 3159 (declining to discuss how to improve disclosure of financial ratios, which clearly raises the question of explanations to unsophisticated investors).

249 See Proposing Release, supra note 235, at 3159.

250 See id; see also Final Release, supra note 243, at 6384 ("[A]void frequent reliance on glossaries or defined terms as the primary means of explaining information in the prospectus. Define terms in a glossary or other section of the document only if the meaning is unclear from the context. Use a glossary only if it facilitates understanding of the disclosure . . . . ")
should "[a]void legal and highly technical business terminology." The elimination, rather than the explanation, of complex information does not enhance effective communication. And the SEC affirms that "plain English does not mean ‘dumbing down’ complex information."

In its Plain English Handbook: How to Create Clear SEC Disclosure Documents, the SEC acknowledges the connection between disclosure simplification and investor education, without giving much guidance on how far the education should extend. The Handbook states that a "plain English" document must satisfy the needs of the audience and thus recommends that a company identify its investors and ask such questions as "How familiar are they [i.e., typical investors] with investments and financial terminology? [and] What investment concepts can you safely assume they understand?"

Recognizing that unsophisticated investors are ubiquitous in the public securities market, the Handbook assumes that disclosure must target and educate them. A company can do this, while still addressing sophisticated investors, by making "basic, educational information visually distinctive from the rest of the text . . . ." The Handbook also recommends that a company take an explicitly educational approach in the organization of its disclosure documents. The Handbook does not merely recommend eliminating "jargon and legalese," but observes that, when there is "no plain English alternative" for a word or term, the company should provide a meaningful explanation of it. Yet the Handbook does not indicate how much background information a company must provide for financially unsophisticated investors.

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251 Final Release, supra note 243, at 6384.
252 Proposing Release, supra note 225, at 3155; see also Final Release, supra note 248, at 6374 ("Using plain English does not mean omitting important information. These rules only require you to disclose information in words investors can understand and in a format that invites them to read the document.").
253 Plain English Handbook, supra note 238.
254 Warren Buffett, who wrote the Handbook's preface, underscores its educational purpose in his explanation that, when writing Berkshire Hathaway's annual report, he imagines that he is addressing his sisters who, "[t]hough highly intelligent . . . are not experts in accounting or finance." Id. at 2.
255 See id. at 5 ("Plain English means analyzing and deciding what information investors need to make informed decisions, before words, sentences, or paragraphs are considered. A plain English document uses words economically and at a level the audience can understand.").
256 Id. at 9. It even tells companies to ask: "What are [investors'] demographics—age, income, level of education, and job experience?" Id.
257 Id. at 10 (emphasis added). The SEC observes that some companies know, through their investor relations department, the exact demographics of their investors. See id. at 9. Few public companies, however, are likely to have only financially sophisticated investors as capital providers.
258 See id. at 16 ("[Y]our audience's degree of investment expertise will also affect how you organize the document. If you are writing for financially unsophisticated investors, your document's overall organization may take an educational approach. You may need to explain industry terms or concepts where they first appear.") (emphasis added).
259 Id. at 30.
investors or how many different kinds of investors it must target in its disclosure.

The SEC’s “plain English” initiative thus potentially places vague educational requirements on all companies selling securities that do not have the justification traditionally offered for mandatory disclosure. Even more importantly, these requirements do not take account of the market reality that financial firms and others are already providing educational services and products. Mandatory disclosure has always provoked considerable debate and disagreement, but scholars and practitioners have generally agreed that it makes sense when it requires companies to provide easily verifiable and comparable information for the sophisticated analysts (and plaintiffs lawyers) who typically read prospectuses. Requiring companies to assess the characteristics of diverse investors and conduct financial education for them cannot rely upon this justification. No doubt, some companies will provide education to attract investors, with or without legal requirements. But others may decide that any educational efforts for consumers are not worth the costs, because they find enough capital from educated investors (including the financial intermediaries through which many ordinary people invest). Companies registering or listing their securities on an exchange may also justifiably ask why they are being compelled to provide investor education in disclosure documents, when financial and nonprofit firms are already supplying this educational service.

Yet the “plain English” initiative usefully directs companies to clarify language and organization throughout disclosure documents, particularly to the investment professionals and financially sophisticated, who would be forced to subsidize this consumer educational effort. Additionally, because investment companies act as intermediaries for many investors, consumers may actually end up paying much of the costs of a “plain English” disclosure that they do not in fact use, but that is supposed to benefit them. In addition, every regulation can affect the competitive ability of firms. That is, if “plain English” imposes net costs on American firms and others raising funds publicly in the capital markets of the United States, it could harm these firms and markets.

See, e.g., Frank H. Easterbrook & Daniel R. Fischel, Mandatory Disclosure and the Protection of Investors, 70 VA. L. REV. 669, 679, 685, 689-90 (1984) (discussing theoretical and actual benefits of mandatory disclosure). The courts have also so read disclosure requirements. See, e.g., Wielgos v. Commonwealth Edison Co., 892 F.2d 509 (7th Cir. 1989). But see MacMahan & Co. v. Wherehouse Entertainment, Inc., 900 F.2d 576, 579 (2d Cir. 1990), cert. denied, 501 U.S. 1249 (1991) (holding that “the disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers”) (citation omitted).

Companies are likely to pass along the costs of the new disclosure to all investors, particularly to the investment professionals and financially sophisticated, who would be forced to subsidize this consumer educational effort. Additionally, because investment companies act as intermediaries for many investors, consumers may actually end up paying much of the costs of a “plain English” disclosure that they do not in fact use, but that is supposed to benefit them. In addition, every regulation can affect the competitive ability of firms. That is, if “plain English” imposes net costs on American firms and others raising funds publicly in the capital markets of the United States, it could harm these firms and markets.

See Galuszka, supra note 158, at 90 (discussing firms that encourage direct consumer investing in their stock).
and essentially requires them to create a valuable, simplified consumer-oriented part of a prospectus.\textsuperscript{264} Despite their mutual fund investments, consumers are investing directly in companies and are likely to increase this activity as technology facilitates this type of investment.\textsuperscript{265} They do not read lengthy disclosure documents, no matter how plainly written, and it makes no sense to encourage them to do so. Yet they benefit from an understandable summary of key company and securities information, and the development of a prospectus outline/summary designed for consumers is a valuable contribution of the initiative. In essence, the SEC requires a company to provide consumers with the equivalent of a "profile" disclosure document.\textsuperscript{266}

The simplified consumer format, however, is only the first step, and the educational issue remains. The SEC should have used the "plain English" initiative to make consumers realize that they need to consult the investor education tools and services provided by financial service firms, so as to understand any particular investment in a broader financial context. In effect, this connection can now occur since many consumers invest through brokers, fund companies or other on-line services that offer educational materials and financial advice. The SEC should revise its "plain English" format to make consumers aware of the importance and availability of investor education. It could require that, in the consumer-oriented prospectus sections, companies provide consumers with some elementary warnings about the generic risks of the particular kind of investment and then encourage them to educate themselves about the potential place of this investment in their portfolio.\textsuperscript{267} A "plain English" prospectus would then have to point—or, in electronic prospectuses, provide a direct hypertext link—to specific educational providers, such as the

\textsuperscript{264} The creation of a simplified consumer section of a disclosure document is a central thrust of the initiative because plain English writing principles apply only to the cover pages, summary and risk factors sections of the prospectus, which introduce, and summarize the material in the entire document. See Final Release, supra note 243, at 6370; Proposing Release, supra note 235, at 3160-63.

\textsuperscript{265} See Lohse supra note 158, at B12; AAl.com, supra note 155 (providing numerous services for consumers).

\textsuperscript{266} See infra Part IV(C); see also Final Release, supra note 248, at 6374 (requiring that an investment company apply plain English principles to its profile). In fact, the SEC should have gone farther in designing a consumer prospectus section by requiring companies to provide a summary section and a discussion of an investment's risk factors; under the new rule, it must draft these sections using "plain English" principles only if it decides to supply them in a disclosure document. See id. at 6373 ("We decided against this [requirement of a summary] because a summary may not be helpful in all prospectuses."). In practice, however, most companies do provide prospectus summaries.

\textsuperscript{267} In effect, the SEC requires such risk discussion when a company provides a risk disclosure summary. See Final Release, supra note 243, at 6373 ("You should place any risk factor in context so investors can understand the specific risk as it applies to your company and its operations."). While the SEC discourages a discussion of risk in purely generic terms, such a general discussion could be useful to consumers.
self-regulatory organization where the company lists its securities, and to the SEC for referrals to other providers and for anti-fraud educational materials. While this mandatory connection would not resolve all uncertainties about "plain English" disclosure, it should at least make clear to companies that their primary obligation is to provide a straightforward consumer prospectus summary, and to consumers that they need investor education to invest safely and wisely.

C. Investment Company Disclosure Formats

Because of the popularity of mutual funds, and their use in retirement plans, consumers need to receive education about them so that they understand the advantages of mutual fund investing and the benefits of particular kinds of funds and fund investment strategies. Investments by Americans in mutual funds have grown exponentially, both in retirement and non-retirement accounts. This growth is not surprising, because mutual funds provide consumers with the professional money management and investment options that were previously available only to the wealthy. More importantly, by their nature, mutual funds raise basic finance issues critical to wealth enhancement (e.g., diversification, specialized investing, strategies ranging from passive indexing to active management and changing asset allocation over life cycles) that consumers need to understand.

Two recent and significant SEC changes to investment company disclosure implicate investor education because they are designed

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268 For example, a prospectus summary dealing with stock might contain the following warning:

This investment makes you an owner of a "share" of the company's assets and subjects you to risks particular to the company, as discussed below, and to stock investing in general. You should decide whether the investment is suitable to your personal circumstances and fits with your other investments. For help in making this decision, you should consult investor educational materials and your financial advisor, if you have one.

To obtain information on investor education and education providers, please contact [specify the NYSE, the NASDAQ, or any other exchange where the company's securities are listed]. The Securities and Exchange Commission will also direct you to educational services, as well as help you protect yourself against investment fraud and abuse (please call [telephone number] or go to its web site, www.sec.gov).

269 See 1998 Mutual Fund Fact Book, supra note 41, at 1 (describing increase in total assets in mutual funds from $1.07 trillion in 1990 to $4.5 trillion in 1997); id. at 16 (noting that the number of mutual funds has more than doubled since 1990). Approximately 16% of the $7.9 trillion of total retirement assets are invested in mutual funds. See id. at 44.

to make the disclosure more useful and understandable to consumers, specifically by enabling them to grasp the basic features of a fund and by enhancing their ability to compare it to similar funds. That is, by focusing consumers' attention on certain fund features and their comparability, the revised disclosure helps them understand that they cannot view any investment in isolation, but must view it in comparison to similar investment products and as part of an optimal portfolio. The amended disclosure format thus has mutual funds provide consumers with some knowledge that comes from investing education—a general understanding about kinds of investments, advantages of combining of investments and the need for their portfolios to change over time and circumstances. At the very least, it requires the funds to put information into a format to which consumers could easily apply the education about saving and investing that the funds already provide. In a third proposed change to investment company names, the SEC justifiably targets an anti-fraud educational issue: preventing an investment company from misleading consumers by its use of an inappropriate name.

The two amendments resulting in the new disclosure format originate from a valuable cooperation between mutual fund companies and the SEC. In designing the new fund disclosure format, the SEC staff took the advice of firms in an area where they are likely to offer the best solutions, since fund companies communicate daily with, and have an interest in satisfying, consumers. As in the “plain


See Final Registration Release, supra note 270, at 13,917 (observing that the two major disclosure initiatives are “intended to: improve fund disclosure by requiring prospectuses to focus on information central to investment decisions; provide new disclosure options for investors; and enhance the comparability of information about funds.”); Final Proposal Release, supra note 270, at 13,969-70 (requiring “[s]tandardized [f]und [s]ummaries . . . [i]mproved [r]isk [d]isclosure . . . [g]raphic [d]isclosure of [v]ariability of [r]eturns . . .” and other fund information in plain English).


English” initiative, however, the SEC’s amendments would have been more valuable if it recognized the relation of the disclosure format to fund educational products and services. The SEC should improve its initiatives by taking the next logical steps of requiring fund companies to link the new disclosure format to their—and SEC anti-fraud—educational materials, and of alerting consumers about the existence and importance of these materials.274

The Registration Final Release, developed from industry experimentation with different disclosure formats,275 requires a fund to provide investors with a standardized, simplified summary of a fund.276 The educational implications of the format are significant since, under the Release, funds would provide information in a way that facilitates a consumer’s use of investor education. A fund prospectus would summarize the fund’s basic investment objectives and the general strategies of its fund advisor for achieving them (e.g., that the equity fund has adopted a “growth” approach and that it achieves this objective through purchases of securities of companies with specific characteristics).277 The risk disclosure requires a fund to identify in general terms the risks to which it is subject because of its portfolio, objectives and strategies.278 The disclosure thus encourages a

274 One problem with the new disclosure format is that, like much of investor education, it encourages investors to concentrate only on their portfolios and to ignore “larger” social issues relating to company activity. See Fanto, supra note 51. Again, it is appropriate that the SEC focus first on ensuring that investors understand the connection between an investment in a particular fund and their overall portfolios before it encourages them to consider such issues.

275 See Registration Proposal, supra note 270, at 10,899 n.16, 10,909 n.101 (discussing experimental approaches and pilot plane); see also Letter from Paul Schott Stevens, Senior Vice President, General Counsel, Investment Company Institute to Jonathan G. Katz, Secretary, Securities and Exchange Commission (June 9, 1997) <http://www.ici.org/nlacomment.html> (commenting on Registration Proposal).

276 The SEC relates the proposal to its “plain English” initiative because the SEC observes that mutual fund prospectuses have grown too complex and legalistic and fund shareholders do not find them useful in making investment decisions. See Registration Proposal, supra note 270, at 10,899 n.6; Final Registration Release, supra note 270, at 13,918.

277 See Registration Proposal, supra note 270, at 10,910 (“The information might describe, for example, whether an equity fund emphasizes value or growth, or blends the two approaches, or whether the fund invests in stocks based on a ‘top-down’ analysis of economic trends or a ‘bottom-up’ analysis that focuses on the financial condition and competitiveness of individual companies.”) (footnote omitted); id. at 10,902 (requiring a fund to disclose whether it intends to concentrate on particular kinds of securities and/or on an industry or group of industries); id. at 10,910 (discussing requirement that a fund disclose whether it expects to have a yearly turnover rate equal to or greater than 100% and the tax consequences of this turnover for investors); see also Final Registration Release, supra note 270, at 13,920 (discussing generally how investors will be able to determine the strategy of a fund).

278 See Registration Proposal, supra note 270, at 10,903; Final Registration Release, supra note 270, at 13,919-20. This risk presentation arose out of the SEC’s consideration of responses to an earlier concept release in which it asked the fund industry for its views on what is the appropriate disclosure of risk. See Investment Company Act Release No. 20,974, 60 Fed. Reg. 17,172 (Apr. 4, 1995) (requesting views and comments); see also supra note 270, at 10,900 (discussing response to this release). The SEC does not propose any quantitative risk disclosure, such as standard deviation, beta and duration, which could help investors numerically evaluate and compare fund risk. See Registration Proposal, supra note 270, at 10,911 &
consumer to think about the relationship between risk and return in a
fund. Indeed, a fund may, but is not required to, identify the kind of
investor for which it is suitable, depending upon an investor’s risk
tolerance and preferences.279 Such disclosure makes sense in the as-
et-asset-allocation and life cycle decision-making that is a fundamental
part of knowledgeable investment decisions.280 A requirement that a
fund also provide a bar chart of risk/return information comparing the
fund’s returns over the last ten years to those of an appropriate market
index,281 pushes consumers to compare a fund’s performance to that
of other funds, particularly to a market index. This comparison in
effect leads consumers to consider whether a particular actively man-
aged fund does better than a passive indexing investing strategy.282

The SEC’s related Final Profile Release particularly underscores
the educational implications of the revised fund disclosure format, as
well as the format’s origin in market experimentation. The Release
permits a fund to provide investors with a short, readable profile of a
fund that facilitates comparison of funds, allows them to judge the
fund’s appropriateness for their investing strategy,283 and on the basis
of which they can make an investment decision.284 The purpose of the
profile is clearly to help the ordinary consumer who invests in funds
for retirement and other savings, who “face[s] an increasingly diffi-

n.136 (explaining that the fund industry’s response to its concept release on risk disclosure
showed that firms disagree about appropriate quantitative risk measurement standards and about
the ability of consumers to understand and to use effectively quantitative risk measurement, but
allowing continued industry experimentation with risk disclosure).

279 See Final Registration Release, supra note 270, at 13,921. The original proposal re-
quired that the disclosure form include an identification of an appropriate investor for a fund.
See Registration Proposal, supra note 270, at 10,903. In response to opposition by commenta-
tors who thought that the requirement would conflict with suitability rules imposed on brokers
and investment professionals (i.e., that brokers determine whether an investment is suitable for a
client), the SEC made such identification optional in the new registration form.

280 See Registration Proposal, supra note 270, at 10,903 (requiring a fund to identify risks
peculiar to it, the most prominent being that funds offered by banks are not FDIC-insured); Final
Registration Release, supra note 270, at 13,921-22 (same).


282 The bar chart comparison would not include returns adjusted for sales loads, but only
a general warning that, if the loads were included, the funds' returns would be lowered. See
Final Registration Release, supra note 270, at 13,923 n.62, 13,924-25 (requiring a table of sales
loads and expenses associated with the fund that would allow fund shareholders to compute
easily the differences between sales fees and fund expenses). There is an increasing SEC con-
cern with fund fees and disclosure regarding them, and it is likely that the SEC may revisit the
subject of fee disclosure. See Levitt Remarks, supra note 233.

283 See Profile Proposal, supra note 270, at 10,945 ("Requiring profiles to present infor-
mation in a standardized format should help investors identify key information about a fund and
make comparisons among different funds."); Final Profile Release, supra note 270, at 13,968
(adopting proposed rule).

284 The profile would alert investors that they could obtain from the company a full pro-
spectus (which, in any event, would be sent to them upon confirmation of purchase). See Final
Profile Release, supra note 270, at 13,969; see also Profile Proposal, supra note 270, at 10,944
("The profile would allow investors to choose the amount and format of information they want
before making an investment decision.").
cult task in choosing among different fund investments,\(^{285}\) and who has limited financial sophistication. Since many of these investors cannot understand the lengthy, financially and legally complex fund prospectuses,\(^ {286}\) they increasingly look to simple comparisons, evaluations and ratings of funds offered by market services,\(^ {287}\) or to the more accessible materials supplementary to a prospectus, such as sales literature and advertisements, supplied by fund companies.\(^ {288}\) Under SEC and ICI supervision, fund companies conducted an experiment with fund profiles and found them to be popular with consumers, which led to the proposal and final rule.\(^ {289}\)

The format and manner of distribution of the profile complements any consumer investor education. A fund can provide in the profile only nine items of information in a set order,\(^ {290}\) with the first four items covering fund goals, strategies, risks and fees. The profile would thus have the same basic educational purposes of simplified disclosure, fund comparability, portfolio suitability and "ease of fit" with education about investing that characterize the Registration Final Release.\(^ {291}\) To enhance access to profiles, a fund company could distribute them to consumers widely through various media, including through mass mailing, newspapers and electronic delivery.\(^ {292}\) In fact, the SEC recognizes the suitability of the profile to the growing Inter-

\(^{285}\) Final Profile Release, supra note 270, at 13,968 ("In the Commission's view, the growth of the fund industry and the diversity of fund investors warrant a new approach to fund disclosure that will offer more choices in the format and amount of information available about fund investments.") (footnote omitted).


\(^{287}\) See Morningstar.Net, supra note 154 (referring to Morningstar's fund service).


\(^{290}\) See Final Profile Release, supra note 270, at 13,972. In the rule proposal, the SEC suggested that a fund present the items in a simplified, popular question-and-answer format. See Profile Proposal, supra note 270, at 10,945. To allow for industry experimentation in the profile, the SEC omitted this requirement from the Final Release. See Final Profile Release, supra note 270, at 13,972. The "plain English" principles would still apply to the profile. See id. at 13,969-70, 13,972.

\(^{291}\) See Final Profile Release, supra note 270, at 13,975-76 (declining to require a fund to identify the "ideal" investor in it (although recommending that a fund make such an identification)). The other items would provide information on the fund's investment advisor and portfolio manager, purchase and sale of fund shares (two items), fund distributions and their taxation, and fund services—all items that the industry has found to be important to consumers. See id. at 13,978-79, 13,986.

\(^{292}\) See Final Profile Release, supra note 270, at 13,981 n.115.
net use by fund companies and fund customers, since a company could electronically provide a profile and a hypertext link to the full prospectus and other fund information.293

While the Names Proposal, which requires that a fund invest at least 80% of its assets in a specific kind or kinds of securities if its name suggests a fund focus on them,294 provides an example of the SEC's traditional mission of ensuring accurate disclosure, it also has an anti-fraud educational purpose related to the SEC's role in protecting and educating consumers against illegal and/or abusive practices of financial professionals. The SEC explains that consumers increasingly use mutual funds to meet their retirement and other investment needs, and base their fund investments, as is proper, on asset-allocation theory—a primary component of investing education.295 Furthermore, in making asset-allocation decisions, they use well-defined kinds of funds, such as stock, bond and money market funds to meet their target portfolio composition. Yet, in the SEC's view, investors rely too much on fund names in arriving at these decisions.296 If a mutual fund implies through its name that it specializes in particular investments, but does not in fact do so, it undermines the

293 See id. at 13,981 n.120. On electronic delivery of disclosure documents, see generally HOWARD M. FRIEDMAN, SECURITIES REGULATION IN CYBERSPACE 2-1 to 3-40 (1997). Fund companies could also tailor profiles used in retirement plans to the plans' needs and participants' investment limitations. See Final Profile Release, supra note 270, at 13,981-82. A controversial issue in the profile project was the potential liability of a fund and fund distribution participants because of the potential use of the profile to sell fund shares. See id. at 13,970-72. Given my focus on the educational import of the profile, I do not examine this issue.

294 See Names Proposal, supra note 272, at 10,956. The SEC promulgated this rule proposal pursuant to the National Securities Markets Improvement Act of 1996, which amended Section 35(d) of the Investment Company Act to empower the SEC to address potentially misleading company names by its rule-making authority. See Pub. L. No. 104-290, § 208, 110 Stat. 3416, 3432 (1996). Section 35(d) now provides as follows:

(d) Deceptive or Misleading Names. It shall be unlawful for any registered investment company to adopt as a part of the name or title of such company, or of any securities of which it is the issuer, any word or words that the Commission finds are materially deceptive or misleading. The Commission is authorized, by rule, regulation, or order, to define such names or titles as are materially deceptive or misleading.

Prior to this amendment, the SEC prohibited, by order, names of specific investment companies pursuant to its power under a prior version of Section 34(d) to bar materially deceptive or misleading names. See 15 U.S.C. § 80a-34(d) (1988). The SEC's proposed new Rule 35d-1 requires a "floor" investment amount for fund companies advertising themselves as specializing in certain kinds of securities (e.g., stock, bond, Treasury, government, tax-exempt) or securities of issuers in a particular industry (e.g., utilities) or countries or geographic regions. See Names Proposal, supra note 272, at 10,957-58. The SEC proposes that the rule not apply to funds for which it has already provided guidance about appropriate portfolio composition, such as index, balanced, and small capitalization. It would also exempt bond funds from the rule since it is studying the proper characterization of these funds, a subject related to quantitative risk disclosure. See id. at 10,959-60.

295 See Names Proposal, supra note 272, at 10,956-957.

296 See id. at 10,956.
beneficial effects of consumers’ asset allocation and thus of investor education generally. The SEC hopes consumers avoid this deception by reading disclosure documents (as simplified by the Registration and Profile Proposals, as well as by the “plain English” initiative), but it feels that consumers’ excessive reliance on fund names justifies its addressing the problem through substantive regulation.297

As in the “plain English” initiative, the SEC should improve the new fund disclosure format by explicitly linking it to investor education provided by financial and nonprofit firms. Although the new format invites a consumer to apply a basic education about investing to the disclosed information, a fund company does not provide that education in a profile. Even the Names Proposal presumes that an investor understands the basic differences between a stock and bond fund. The SEC should thus take the additional regulatory step of requiring a mutual fund to tie the revised fund disclosure to investor education materials supplied by the fund—or by some other financial intermediary—as well as to SEC anti-fraud education and its references to education providers.298 In fact, linkage between information and education should occur throughout a profile: when, for example, a fund discusses its risks and identifies the appropriate kind of investor for the fund, it should point the investor specifically to educational materials on risk, asset allocation and life-cycle investing.299 While the SEC must work out the details of the linkage,300 additional mutual fund disclosure reform could thus be another significant opportunity for the SEC to recognize publicly the developments in investor edu-

297 This Proposal may implicitly conflict with the SEC’s two fund disclosure format amendments. It is one thing to simplify and shorten disclosure to facilitate consumer reading; it is quite another thing to justify substantive regulation because of an assumption that, since investors read only a few words (i.e., the names of funds), the SEC must ensure the accuracy of these words. One could argue, in the SEC’s favor, that investors may read a profile, or a prospectus, but still place too great reliance on a name because they justifiably regard it as an important sign that “trumps” sections of the prospectus contradicting it.

298 See supra note 268 (presenting possible prospectus language). A significant difference between company and fund disclosure is that many, but not all, fund companies, unlike non-financial companies, provide educational services and materials to which they could easily link a profile or prospectus. If, like a non-financial company, a fund company does not provide such services, it could link its disclosure documents to the services of the ICI or of the brokerage firms through which the fund is sold (as well as to the SEC Web site, where further educational references are available).

299 In its disclosure simplification, whether in company or fund prospectuses, the SEC worries about confusing a consumer by providing cross-references, etc. Yet the electronic delivery of disclosure documents and educational materials, with the availability of hypertext links, ensures that the use of glossaries and cross-references does not impede reading and comprehension, since a reader can easily access them.

300 For example, the SEC would have to address any concerns of fund companies that they would increase their liability if they provided links to their educational materials. See, e.g., 15 U.S.C. § 77e (1994) (prospectus liability under the Securities Act of 1933); cf. 15 U.S.C. § 77b(a)(10)(b) (exempting supplementary sales literature from the prospectus definition); 17 C.F.R. § 230.135a (1997) (restricting advertising for mutual funds).
cation by financial firms and nonprofit organizations and to encourage consumers to use these educational services.

**D. A Concept Release on Investor Education**

In light of the SEC’s educational and education-related efforts, it may well be time for the SEC to issue a concept release on investor education. The SEC typically circulates a concept release as a result of a significant development in the securities markets and explains therein its regulatory response, or offers potential responses, to the development and asks interested persons for their views on appropriate SEC action. A release thus serves two important functions: (1) It focuses SEC attention on the development, and its regulatory authority to address it, and (2) it stimulates reflection by all kinds of parties—financial firms, their lawyers, economists, legal scholars, consumer groups and private investors. With the information gathered from the concept release, the SEC can intelligently decide whether to undertake further regulatory initiatives to address the market development.

The SEC now needs to adopt a formal position on investor educational developments in the securities markets (or at least to discuss them in detail), and to take a critical look at its own valuable, but not entirely coordinated, educational activities. If the SEC engages in this public reflection, it should recognize the value of the educational efforts of financial and nonprofit firms, and redirect its own activities in cooperation with them to provide consumers with the best opportunity to receive saving, investing and anti-fraud education. A release will also lead firms, consumer organizations and other regulators to bring to the SEC’s attention additional educational materials, services and research on investor education, as well as possibilities of joint, or separate, government and market educational activity. The concept release will also require the SEC to justify its statutory authority in this field, and thus highlight any need for additional legislation. Finally and most importantly, the release would greatly contribute to the ongoing national campaign to encourage saving and investing, and to make consumers understand the importance of investor education for their financial future.

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301 See, e.g., Investment Company Act Release No. 20,974, supra note 278.
302 The release would thus fit well within the national campaign and activities generated by the SAVER Act and by the SEC’s own “Facts on Saving and Investing Campaign.”
V. CONCLUSION

Numerous pressures and events have made it important that ordinary Americans save more and invest their savings well. The major government safety net, the Social Security program, can not entirely fund the income needs of the elderly, and the aging of the "Baby Boom" generation seriously threatens the solvency of the program. For a number of reasons, companies are increasingly likely to offer their employees retirement plans where, at best, they and the employees contribute funds to retirement accounts, and where employees themselves have the responsibility to direct the investment of the funds. An individual's financial well-being in retirement thus depends much upon her own saving and investing decision-making. In an age where government programs are generally not expanding, individual Americans also need to save and invest outside retirement programs for other goals, such as their children's education and their own aging parents' welfare.

A growth in investment opportunities, which allows ordinary investors to meet their saving and investing goals, has accompanied these pressures for enhanced investment performance. No longer is investing restricted to the wealthy, who alone can benefit from professional money management. Rather, funds offer consumers an extraordinary choice of investment options and professional management, whether inside or outside retirement plans. Technology facilitates an investor's access to these collective vehicles and the services they provide, as well as to direct investing in companies. Yet the range of investment choices and financial services poses a problem for consumers, who must navigate among a bewildering number of selections, now that saving and investing have become everyday, but necessary, activities.

Investor education should assist consumers in meeting their new saving and investing responsibilities. As a cultural matter, this education is an inevitable part of the solution to the financial problems facing ordinary Americans, and to the growing wealth disparity between Americans, which the new responsibility of ordinary people for investment decision-making may exacerbate, although it is neither the only solution, nor the one most likely to help the many lower-income individuals without any real means of savings. The Article thus begins the necessary work of identifying the kinds of investor education and the appropriate party or parties to conduct them. Indeed, since the importance of investor education can only increase, as consumer mutual fund and direct investing grows inside and outside retirement plans and perhaps even within Social Security itself, and as saving
and investing become even more a part of everyday life, additional reflection on this subject is needed, particularly on the proper allocation of educational responsibilities between the government and private parties. It is best that this reflection not occur in a haphazard fashion or as a result of a crisis, such as a major stock market correction, but, if at all possible, through a careful observation, analysis and evaluation of market experimentation and government efforts.\(^{303}\)

\(^{303}\) Securities markets worldwide have recently become more volatile. This market development makes reflection on investor education even more critical because, if investors are not "trained" to understand such volatility, they can panic with potentially adverse consequences to the markets.