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The Myth of Protecting the Public Interest: The Case of the Missing Mandate in Federal Securities Law

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THE MYTH OF PROTECTING THE PUBLIC
INTEREST:
THE CASE OF THE MISSING MANDATE IN
FEDERAL SECURITIES LAW

*Wm. Dennis Huber**

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ABSTRACT

Protecting the public interest is at the core of federal securities laws. To protect the public interest is the mission of the Securities and Exchange Commission and its raison d'être. At least, that is what the public is encouraged to believe.

Protecting the public interest in Federal securities laws has been blindly accepted without questioning the basic assumption that the purpose of securities laws is to protect the public interest. However, a recent analysis of the Securities and Exchange Act of 1934 (" '34 Act") has shown that protecting the public interest in the '34 Act is a myth and that it is not the public interest, or even investors' interests, that the '34 Act was primarily intended to protect, but the market interest.¹

Contrary to popular belief, protecting investors' interests is not the primary purpose of the securities laws, and protecting investors' interests is merely derivative of the primary purpose—protecting the market interest—and protecting the public interest is non-existent.² As

¹ Wm. Dennis Huber. *Public Accounting and the Myth of the Public Interest*. 16 J. OF ACCT., ETHICS & PUB. POL'Y 251, 255-59 (2015).

² *Id.*

the Supreme Court has recently commented, “The magnitude of the federal interest in protecting the integrity and efficiency of the national securities market cannot be overstated.”³

Recognizing the true purpose of federal securities laws and the reasons for creating the Securities and Exchange Commission (“Commission” or “SEC”) provides a greater understanding of the policy underlying the decisions (including rule-making and enforcement actions) of the SEC. It changes the nature of discourse concerning the best type of regulatory regime.

Key words: securities laws, public interest, market interest, investors’ interest, myth

I. INTRODUCTION

Protecting the public interest is at the core of federal securities laws. To protect the public interest is the mission of the Securities and Exchange Commission and its *raison d’être*. At least, that is what the public is encouraged to believe.

Protecting the public interest in Federal securities laws has been blindly accepted without questioning the basic assumption that the purpose of securities laws is to protect the public interest. However, by dissecting and parsing the language of the statute, Wm. Dennis Huber concluded that protecting the public interest in the ’34 Act is a myth⁴ and that the reason for enacting the ’34 Act and creating the SEC was not to protect the public interest, and not primarily to protect investors’ interest, but to protect the “market interest.”⁵ Protecting investors’ interests were merely derivative of protecting the market interest, and protecting the public interest is non-existent.⁶ As the Supreme Court has recently commented, “[t]he magnitude of the federal interest in protecting the integrity and efficiency of the national securities market cannot be overstated.”⁷

This paper continues that analysis to determine whether protecting the public interest is the purpose of, or exists in, federal

³ Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006).

securities laws. Recognizing the true purpose of federal securities laws and the reasons for creating the Securities and Exchange Commission (“Commission” or “SEC”) provides a greater understanding of the policy underlying the decisions (including rule-making and enforcement actions) of the SEC. It changes the nature of discourse concerning the best type of regulatory regime.

The following section examines the public interest in federal securities laws. A discussion and conclusions follow.

II. THE PUBLIC INTEREST IN FEDERAL SECURITIES LAWS

The securities laws examined here are the Securities Act of 1933 (“’33 Act”)⁸ and the Securities Exchange Act of 1934 (“’34 Act”).⁹ The federal securities laws have been amended many times since they were first enacted in 1933 and 1934, and Congress has incorporated into these laws other acts such as the Sarbanes-Oxley Act of 2002.¹⁰ The securities laws examined here are based on amendments to date.

A. Securities Act of 1933

The starting point of every case requiring the construction of a statute is the language of the statute itself.¹¹ Therefore, an analysis of the missing mandate in federal securities laws begins with the language of the Securities Act of 1933.

The Securities Act of 1933 refers to the “public interest” not less than 29 times. “Protect” is used at least 31 times but none in relationship to protecting the public interest; only in relation to protecting investors’ interests. Unlike the Securities and Exchange Act of 1934, discussed in section B, *infra*, the ’33 Act does not invoke the public interest as justification for enacting the Act.

The ’33 Act requires issuers of securities to register and obtain approval from the Securities and Exchange Commission (SEC) prior to issuing securities to the public.¹² Registration requires companies that

⁸ 15 U.S.C. 77a–77bbbb.

⁹ 15 U.S.C. 78a–78pp.

¹⁰ 15 U.S.C. 7201.

¹¹ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, (1975) (Powell, J., concurring).

¹² 15 U.S.C. § 77f (2015).

issue securities to the public to make financial disclosures under the federal securities laws and regulations,¹³ subject to certain exemptions.¹⁴

However, the requirement to register and obtain approval from the SEC is not intended to protect the public interest. According to the Supreme Court in *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*,¹⁵ “the essential purpose of the [1933 Act] is to protect investors...”¹⁶ Yet, as explained *infra*, the Supreme Court does not actually believe that the essential purpose of the ‘33 Act is to protect investors.

The first time the “public interest” is mentioned is in reference to the definition of “prospectus” where it is stated that a communication is not prospectus if the communication contains, *inter alia*, “such other information as the Commission [Securities and Exchange Commission, “SEC”] by rules or regulations deemed necessary or appropriate *in the public interest and for the protection of investors.*”¹⁷

The next time the “public interest” is mentioned in the ‘33 Act is in the mandate Congress issued to the SEC concerning its rulemaking process.¹⁸

Whenever the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the *public interest*, the Commission *shall also* consider, *in addition to the protection of investors*, whether the action will *promote efficiency, competition, and capital formation.*¹⁹

¹³ 15 U.S.C. § 77g (2012).

¹⁴ 15 U.S.C. § 77c (2012).

¹⁵ *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38 (1941).

¹⁶ *Id.* at 40.

¹⁷ 15 U.S.C.A. 77b(a)(10) (West 2015) (emphasis added).

¹⁸ Courts consider securities laws to consist of mandates to the Commission. For example, the Second Circuit has stated that the SEC has “a mandate to consider competition with the protection of investors, efficiency, and capital formation.” *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005) *rev'd sub nom*; *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286 (2d Cir. 2006) (stating, “The question in the present case [is] whether the Commission complied with its statutory mandate in promulgating Rule 3a12–3.”).

¹⁹ 15 U.S.C.A. 77b(b) (emphasis added).

Accordingly, “the SEC’s mandate [is] to consider competition with the protection of investors, efficiency, and capital formation;”²⁰ i.e., the market and “market system.”²¹ As the Supreme Court has stated, “[t]he magnitude of the federal interest in protecting the integrity and efficiency of the national securities market cannot be overstated.”²²

Note first that in this mandate the Commission is not always required to consider or determine whether an action is necessary or appropriate in the public interest, but whenever it is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission must also consider whether, in addition to the protection of investors, the action will promote efficiency, competition, and capital formation.

Efficiency, competition, and capital formation is, of course, “the market system.”²³ Not only is the Commission not required to engage in a cost/benefit analysis or weigh the costs and benefits if a particular action,²⁴ regardless of what the costs may be or who may benefit, but it is not even required to balance the costs and benefits of the public interest with investors’ interest, and neither to be balanced with the market interest.

In *Credit Suisse First Boston Corp. v. Grunwald*,²⁵ the Ninth Circuit considered the context of “market efficiency” and Congressional intent. “Whatever the relationship of [NYSE Rule 347] to the objective of investor protection, it is germane to the goal of market efficiency.”²⁶ The court went on to explain that the addition of the “national market system” language to section 2 by the 1975 Amendments to the ’33 Act supports the conclusion that “the 1975 Amendments [were] meant to clarify the scope of the Act, not to broaden it.”²⁷

Second, although Congress had here an opportunity to address and incorporate, had it so desired, a mandate of protecting the public interest Congress explicitly ignored issuing a mandate to the

²⁰ *Billing*, 426 F.3d at 130.

²¹ 15 U.S.C.A. 78b (West 2015).

²² *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

²³ 15 U.S.C.A. 78b.

²⁴ Donna M. Nagy. *The costs of mandatory cost--benefit analysis in sec rulemaking*. 57 ARIZONA LAW REVIEW 129, 2015.

²⁵ *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (9th Cir. 2005).

²⁶ *Id.* at 1145 (Berzon, J., concurring) (*citing* *Drayer v. Krasner*, 572 F.2d 348, 358).

²⁷ *Id.* at 1147.

Commission to protect the public interest. Rather, the mandate here is only that whenever the Commission “is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of *investors...*,” not that “the Commission shall also consider, in addition to protecting *the public interest.*” By purposely ignoring any reference to protecting the public interest, Congress narrowed the scope of the public interest from what would otherwise be understood to be the protection of the public to be the “protection of investors.”²⁸

Third, Congress did not issue a mandate to the Commission that says

Whenever the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate for the protection of investors, the Commission shall also consider whether the action will, in addition, protect the public interest.

Nor did Congress issue a mandate to the Commission that says

Whenever the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate for the protection of investors, and whether the action will promote efficiency, competition, and capital formation, the Commission shall also consider whether the action will, in addition, protect the public interest.

Had Congress chosen language similar to either of the examples, the emphasis would not have been primarily on protecting the market interest and secondarily on protecting investors’ interest, but on

²⁸ When Congress chooses certain wording it reveals Congressional intent. Word choice is critical to an understanding of the rule. *Securities and Exchange Commission v. Tambone*, 550 F.3d 106, (2007), (Selya, Circuit Judge concurring in part and dissenting in part).

protecting the public interest. As it is, protecting investors' interest is only referenced insofar as protecting investors' interest is germane to the goal of market efficiency and protecting the market, with no regard to protecting the public.²⁹

Fourth, the Commission cannot, by law, consider whether an action is either necessary or appropriate in the public interest unless the action *also* protects investors and unless it *also* considers whether the action will “promote efficiency, competition, and capital formation.” Thus, if an action by the SEC could protect investors, the action could not be taken unless the SEC considers whether the action will promote efficiency, competition, and capital formation.

The language Congress chose vacillates between “necessary or appropriate in the public interest and consistent with the protection of investors,”³⁰ “the Commission may, by rule, prescribe for the protection of investors and in the public interest,”³¹ “the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors,”³² and “necessary or appropriate in the public interest, and is consistent with the protection of investors.”³³

The plain language of a mandate such as “*for* the protection of investors *and* in the public interest” can only be interpreted as an action must be *both* “for the protection of investors” *and* “in the public interest.” An action cannot be one without the other.³⁴ That is, an action by the Commission cannot be *in* the public interest unless it is also *consistent with* or *for* the protection of investors.³⁵

The ordinary meaning of a mandate such as “*shall* by rules or regulations deemed necessary or appropriate *in* the public interest *or* for the protection of investors” necessarily means that an action by the Commission is *either* “in the public interest” *or* “for the protection of investors.” It is not required, or logically possible, that it be both “in the public interest” *and* “for the protection of investors,” let alone “for the

²⁹ Credit Suisse, 400 F.3d at 1145 (Berzon, J., concurring).

³⁰ 15 U.S.C. § 77(c)(a)(2)(d)(iii) (2000).

³¹ 15 U.S.C. § 77(d-1)(a)(12) (2000).

³² 15 U.S.C. § 77(g)(a)(1) (2000).

³³ 15 U.S.C. § 77(z-3) (2000).

³⁴ In set theory, this represents an intersection, $A \cap B$, where only the elements common to both A and B are considered a set C and the rest are ignored.

³⁵ Note, however, that “*in* the public interest” cannot be equated with “*protecting* the public interest.”

protection of the public interest” and “for the protection of investors.” That is, unlike an intersection, there are no elements common to both “in the public interest” or “for the protection of investors”³⁶ so that, e.g., an action may protect investors’ interest but not be in the public interest. At the same time, the converse is not permitted. That is, it is not permitted that an action by the SEC protect the public interest if it does not protect investors’ interest.

It can be seen that the language throughout the ’33 Act (and also in the ’34 Act as discussed in section B, *infra*) admits to the presence of two factors—the public interest and the protection of investors’ interests. The public interest and the protection of investors’ interests are distinguished, and are often juxtaposed (i.e., necessary or appropriate in the public interest or for the protection of investors), but both are subjugated to protecting the market interest—i.e., the efficiency of the market system, competition within the market, and capital formation in the market.

There are competing views of the public interest,³⁷ the resolution of which is political, not judicial.³⁸ However, neither the statutes (the political resolution), nor the courts (the judicial resolution) recognize any public interest, no matter how defined or by whom, other than the “investing public” thereby rendering other definitions or competing views of the public interest superfluous.

The SEC is charged with the duty of enforcing the ‘33 Act “in the public interest.”³⁹ One such authorization to enforce its rules is that whenever the Commission determines that a violation specified in a notice instituting proceedings has occurred, may occur, or may continue to occur and is

likely to result in...significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation...the Commission may enter a temporary order requiring the respondent to cease and desist...and to take such action to

³⁶ In set theory, this is called the empty set.

³⁷ SEC v. Citigroup Global Markets Inc., 673 F.3d 158 (2d Cir. 2012).

³⁸ *Id.*

³⁹ United States v. Berger, 473 F.3d 1080 (9th Cir. 2007).

prevent...significant harm to investors, or substantial harm to the public interest.⁴⁰

At first glance this appears to indicate an intent to protect the public interest. However, on closer examination that is shown not to be the case. While “significant harm” and “substantial harm” may be considered a matter of degree, there is nothing in the language to suggest that any past, present or future violation of any securities statute or Commission rule could harm anyone other than investors. Protecting the public interest and preventing harm to the public interest might be the case if the Securities Investor Protection Corporation [SIPC] were funded by taxpayers, but it is funded by broker dealers. Thus, once again, the *public interest* is not the *public*, but the *investing* public.

When the Commission initiates an action to enforce the securities laws, “it vindicates public rights and furthers the public interest.”⁴¹ The purpose of an enforcement action by the Commission “is to expeditiously safeguard the public interest by enjoining securities violations.”⁴² But, did the court really mean “safeguard the public interest?”

No. It is clear that by “safeguard the public interest” the court did not mean safeguard the “public interest” as the court went on to clarify and narrow the meaning of “safeguard the public interest”—enforcement actions further the Commission’s mission of “protecting investors and *safeguarding the integrity of the markets*.”⁴³ Thus, vindicating public rights and furthering the public interest is for the primary purpose of safeguarding the integrity of the markets and the secondary purpose of protecting investors, not the public interest. Protecting investors is only for the greater purpose of safeguarding the

⁴⁰ 15 U.S.C. § 78u-3(c) (2002).

⁴¹ S.E.C. v. Rind, 991 F.2d 1486 (9th Cir. 1993). See also SEC v. Calvo, 378 F.3d 1211, 1218 (11th Cir.2004), S.E.C. v. City of Miami, 581 F. App'x 757 (11th Cir. 2014), and SEC v. Diversified Corporate Consulting Group, 378 F.3d 1219, 1224 (11th Cir.2004). “Public rights” is peculiar and undefined. If the public had rights under the securities laws then the public would have standing to sue for violation of those rights.

⁴² *Id.*

⁴³ S.E.C. v. Rind, *supra* n. 41; In re Sherman, 441 F.3d 794 (9th Cir. 2006) opinion amended and superseded, 491 F.3d 948 (9th Cir. 2007). Emphasis added.

integrity of the market—efficiency, competition, and capital formation,⁴⁴ and only if the protection of investors is germane to the goal of market efficiency.⁴⁵

Steve Thel has commented,

The theme that ties the Act together is a concern with security prices. The Act provides for extensive control over several critical factors affecting prices, including production and dissemination of information that might affect prices, the flow of money into and out of the market, and the basic structure of the securities market...the fundamental purpose of the Act [is] to protect the public's interest in the integrity of security prices.⁴⁶

Yet, only the investing public has an interest in the integrity of security prices.

A more troubling aspect of the absence of protecting public interest found in the '33 Act, and one which confirms the non-existence of protecting the public interest as the mission and mandate of the SEC, concerns the development of generally accepted accounting principles (“GAAP”) for financial statement reporting. Congress has vested the SEC with the sole authority to

prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be

⁴⁴ Jeana Bisnar, *100% capitalist, 90% of the time: the 20 day short-sale ban*, 66 N.Y.U. ANN. SURV. AM. L. 299; *What We Do*, U.S. SEC. & EXCH. COMM’N, <https://perma.cc/UD6B-CKFY> (last updated June 10, 2013) (“The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation”).

⁴⁵ *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (9th Cir. 2005) (Berzon, J., concurring) (*citing* *Drayer v. Krasner*, 572 F.2d 348, 358).

⁴⁶ Steve Thel. *The Original Conception of Section 10(b) of the Securities Exchange Act*. 42 STANFORD LAW REVIEW 385, 391. “The magnitude of the federal interest in protecting the integrity and efficiency of the national securities market cannot be overstated.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006).

followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and non-recurring in-come, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.⁴⁷

Since its creation in 1934 the SEC has “‘outsourced’ its statutory authority to promulgate financial accounting rules applicable to companies that must make financial disclosures under the federal securities laws.”⁴⁸ From 1933 to 1973 the SEC, by default, delegated to the American Institute of Certified Public Accountants (“AICPA”) through its various committees⁴⁹ the responsibility for developing and adopting GAAP,⁵⁰ a move that was heavily criticized by Robert Chatov⁵¹ among others, as an abandonment by the SEC of its statutory directive to proscribe accounting standards. Financial reporting standard-setting was first institutionalized with the enactment of the ’33 Act and ’34 Act that directed the SEC to determine the form and content of financial statements required by companies issuing securities to the public.⁵² Soon thereafter the SEC delegated the responsibility of developing accounting

⁴⁷ 15 U.S.C. § 77s(a) (2002).

⁴⁸ Jacob L. Barney, *Beyond Economics: The U.S. Recognition of International Financial Reporting Standards as an International Subdelegation of the SEC's Rulemaking Authority*, 42 VAND. J. TRANSNAT'L L. 579 (2009). “Congress first granted explicit statutory authorization of the SEC's sub-delegation of accounting rulemaking authority in 2002, despite the fact that the SEC had sub-delegated this authority since 1938.”

⁴⁹ Omar Ochoa, *Accounting for FASB: Why Administrative Law Should Apply to the Financial Accounting Standards Board*. 15 TEXAS REVIEW OF LAW & POLITICS 489, 2011.

⁵⁰ *Id.*

⁵¹ Robert Chatov, *The Collapse of Corporate Financial standards Regulation: A Study of SEC-Accountant Interaction (1973)* (dissertation) (on file with University of California, Berkeley); Jacob L. Barney, *supra* n. 48.

⁵² 15 U.S.C. § 77s(a) (2010).

reporting standards to the AICPA, then known as American Institute of Accountants (AIA).⁵³

As the implied agent of the SEC,⁵⁴ one would think that the AICPA would be concerned with the public interest, at least with the same public interest, i.e., the investing public, as the SEC is concerned with. But that is far from the truth.

According to the AICPA's *Code of Professional Conduct* members of the AICPA are required to "serve the public interest when providing financial services."⁵⁵ The *Code* strongly encourages members to "accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate a commitment to professionalism."⁵⁶ But, as observed by Wm. Dennis Huber, the public interest of the AICPA, the delegatee of the SEC from 1934 to 1973, consists of every interest *but* the public's.⁵⁷

The accounting profession's public consists of *clients*, credit grantors, governments, employers, investors, the business and financial community, and others who rely on the objectivity and integrity of *members* to maintain the orderly functioning of commerce.⁵⁸

While it is doubtful that anyone relies on the AICPA to maintain the orderly functioning of commerce,⁵⁹ to underscore its narrow conception of the public interest the AICPA subsequently defines the public interest as "*the collective well-being* of the community of people and *institutions that the*

⁵³ Omar Ochoa, *supra* n. 49

⁵⁴ Lawrence A. Cunningham. *The SEC's Global Accounting Vision: A Realistic Appraisal of a Quixotic Quest*, 87 N.C. L. REV. 1 (2008). "U.S. securities laws vest the SEC with authority to define GAAP. The SEC traditionally discharges this responsibility by delegation. Pursuant to this authority, in 1973, the SEC formally recognized FASB pronouncements as authoritative. This ordained a delegation model that raised agency-principal issues."

⁵⁵ *Code of Professional Conduct*. New York: American Institute of Certified Public Accountants. 1992. The Code applies only to members. Membership is voluntary. (N/C).

⁵⁶ *Id.*

⁵⁷ Huber, *supra* note 1, at 262.

⁵⁸ *Code of Professional Conduct*, *supra* n. 61.

⁵⁹ Huber, *supra* note 1, at 263.

profession serves”⁶⁰ (which not only puts clients, i.e. the corporations it audits, at the top of the list but also emphasizes the place of clients as first), financial institutions and other credit grantors second, investors fourth, and not even an acknowledgement of the public interest. The AICPA thus not only excludes from the public interest persons outside those whom the profession serves and who do not rely on the objectivity and integrity of its members to maintain the orderly functioning of commerce, but includes the collective well-being of the corporations it audits, along with financial and credit granting institutions.

With the enactment of the Sarbanes-Oxley Act of 2002 (“SOX”), however, Congress explicitly authorized the SEC to delegate its authority to develop GAAP to private entities.⁶¹

RECOGNITION OF ACCOUNTING STANDARDS.—

(1) IN GENERAL.—In carrying out its authority under sub-section (a) and under section 13(b) of the Securities Exchange Act of 1934, the Commission may recognize, as “generally accepted” for purposes of the securities laws, any accounting principles established by a standard setting body—

(A) that—

- (i) is organized as a private entity;
- (ii) has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest...⁶²

⁶⁰ *Id.* The International Federation of Accountants (“IFAC”) defines the public interest more broadly. According to IFAC, the public interest is “The net benefits derived for, and procedural rigor employed on behalf of, all society in relation to any action, decision or policy” Int’l Fed’n Acct., *A Definition of the Public Interest*, IFAC POLICY POSITION 5 (June 2015), <https://perma.cc/SYT5-67P9>.

⁶¹ 15 U.S.C.A. 77s(b)(1) (West 2015).

⁶² *Id.*

There is only one private entity that the SEC currently recognizes—the Financial Accounting Standards Board (“FASB”).⁶³ The FASB was formed in 1973 as an independent, private sector organization to replace the AICPA as the agent of the SEC for establishing standards of financial reporting that govern the preparation of financial statements issued by non-governmental entities.⁶⁴ Although the SEC retains its standard-setting authority and can overrule the FASB it has rarely done so.⁶⁵

Prior to SOX, the FASB’s role as financial reporting standard-setter was similar to that of the AICPA in being unofficially recognized by the SEC.⁶⁶ However, SOX explicitly authorized the SEC to formalize the recognition of a private financial reporting standard-setting body if the body met certain conditions, one of which is that the organization “has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest.”⁶⁷

While the private entity that the SEC presently recognizes is the FASB, there has been much debate recently by both lawyers and legal researchers,⁶⁸ and public accountants and accounting researchers,⁶⁹ as

⁶³ Jacob L. Barney, *supra* n. 53; Lawrence A. Cunningham, *supra* n. 60; FASB. 2015, <https://perma.cc/7M6M-73BE>.

⁶⁴ *Facts about FASB*, FIN. ACCT. STANDARDS BD, <https://perma.cc/CY4A-8NJF> (last visited Mar. 3, 2016).

⁶⁵ William W. Bratton, *Private Standards, Public Governance: A New Look at the Financial Accounting Standards Board*, 47 B.C. L. REV. 5 (2007).

⁶⁶ Omar Ochoa, *Accounting for FASB: Why Administrative Law Should Apply to the Financial Accounting Standards Board*, 15 TEXAS REVIEW OF LAW & POLITICS 489, 2011.

⁶⁷ *Id.*

⁶⁸ Jacob L. Barney, *supra* n. 53. The SEC currently recognizes the Financial Accounting Standards Board (FASB) as the organization empowered to promulgate such accounting rules. Recently, however, the SEC has considered allowing companies, both foreign and U.S.-based, to disclose financial information in accordance with the International Financial Reporting Standards (IFRS) promulgated by the International Accounting Standards Board (IASB). Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation and Accounting*, 60 Vand. L. Rev. 1411, 1473-74 (2007). See David Alexander and Eva Jermakowicz, *A True and Fair View of the Principles/Rules Debate*, 42 ABACUS 132, 161 (2006).

⁶⁹ See, e.g., Philip P. M. Joos & Edith Leung, *Investor Perceptions of Potential IFRS Adoption in the United States*, 88 ACCT. REV. 2, 577-609, 2013.

well as within the SEC itself,⁷⁰ concerning the possibility of adoption by the SEC of International Financial Accounting Standards (“IFRS”) which are set by the International Accounting Standards Board (“IASB”),⁷¹ an international financial accounting standard-setting body established in 2001.⁷²

IFRS proclaims its mission is “to develop International Financial Reporting Standards (IFRS) that bring transparency, accountability and efficiency to financial markets around the world. Our work *serves the public interest* by fostering trust, growth and long-term financial stability in the global economy.”⁷³ The IASB further claims that it is “committed to developing, *in the public interest*, a single set of high quality, global accounting standards that provide high quality, transparent and comparable information in general purpose financial statements.”⁷⁴ But assuming the IASB actually achieves that goal the IASB makes no claim that the global accounting standards it develops would in fact protect either the public interest or even investors’ interest.

The IASB contends that it serves (which is not the same as “protects”) the public interest by “fostering trust, growth and long-term financial stability in the global economy” by bringing transparency to *financial markets*; by bringing accountability to *financial markets*; and by bringing efficiency to *financial markets*. Thus, like the federal securities laws, the market interest is given pre-eminence over the public interest such that any “action, decision or policy” made by IASB will, consistent with the SEC’s mission, “promote efficiency, competition, and capital formation”⁷⁵ in the “transactions in securities,”⁷⁶ i.e., the market.

⁷⁰ Jacob L. Barney, *supra* n. 53. In October 2002, FASB and IASB jointly released a memorandum of understanding known as the “Norwalk Agreement,” which “marked a significant step toward formalizing their commitment to the convergence of U.S. and international accounting standards.”

⁷¹ Lawrence A. Cunningham. *supra* note 68, at 1486-87.

⁷² IFRS FOUNDATIONS, <https://perma.cc/TG7Y-P9Z8>. (The IASB was created in 1973 and originally called the International Accounting Standards Committee).

⁷³ IFRS FOUNDATIONS, <https://perma.cc/4L7M-S6RS>, (2015) (About the IFRS Foundation and the IASB), emphasis added.

⁷⁴ *IFRS Foundation, supra*, n. 72 emphasis added.

⁷⁵ 15 U.S.C. § 77(b).

⁷⁶ 15 U.S.C. § 78(b).

B. Securities and Exchange Act of 1934⁷⁷

The public interest is referred to at least 189 times in the Securities and Exchange Act of 1934 ('34 Act),⁷⁸ the most important of which is found in the purpose for creating the Securities and Exchange Commission. "Protect" is used only 23 times, but none in the context of protecting the public interest. It is always used in the context of protecting investors. However, contrary to several court rulings,⁷⁹ even protecting investor was not the primary reason for enacting the '34 Act and creating the SEC.

Protecting investors is merely derivative to the primary purpose for which Congress created the SEC, and protecting the public interest is not even acknowledged. "The magnitude of the federal interest in protecting the integrity and efficiency of the national securities market cannot be overstated."⁸⁰

§78b. Necessity for regulation

For the reasons hereinafter enumerated, *transactions in securities* as commonly conducted upon securities *exchanges* and over-the-counter *markets* are effected with a national *public interest* which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, to remove impediments to and perfect the mechanisms of a national *market system* for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to

⁷⁷ Much of this section is adapted from Huber, *supra* note 1, with permission.

⁷⁸ 15 U.S.C. § 78(b).

⁷⁹ For example, "The purpose of the 1934 Act was to benefit and protect investors...." *United States v. Berger*, 473 F.3d 1080 (9th Cir. 2007); *A.C. Frost & Co*, 312 U.S. at 38., "Nevertheless, as with the 1934 Act, Congress was primarily concerned with protecting the investing public when it passed the 1933 Act."

⁸⁰ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

impose requirements necessary to make such regulation and control reasonably complete and effective, *in order to protect* interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions...⁸¹

Transactions in securities conducted on securities exchanges and over-the-counter markets are affected with a national public interest which is explicitly declared to be the market: the “national *market system* for securities” and “fair and honest *markets*.” It is the *transactions* in securities (i.e., the purchase and sale of securities) conducted upon securities exchanges and over-the-counter markets that are effected with a national public interest. It is the national *public interest in the transactions* that makes it necessary to provide for regulation of the market in order to (1) remove impediments to and perfect the mechanisms of a national market system for securities; and (2) perfect the mechanisms of a national market system for securities. The national public interest in the *transactions* makes it necessary to provide for regulation of the market to “impose requirements necessary to make such regulation and control reasonably complete and effective.”

Why does the national public interest in transactions in securities make it necessary to impose requirements to make regulation and control of transactions in securities as conducted upon securities exchanges and over-the-counter markets reasonably complete and effective? Three reasons are given, two directly related to protection and one indirectly related to protection. The first is in order to protect not the public interest, or even investors, but to protect interstate commerce, to protect the national credit, and to protect the Federal taxing power. The second is, again, not to protect the public interest or investors, but to protect and make more effective the national banking system and to protect the Federal Reserve System. The third is indirectly related to protecting the market—“to insure the maintenance of fair and honest markets in transactions in securities conducted upon securities exchanges and over-the-counter markets.”

⁸¹ 15 U.S.C. § 78(b).

That Congress omitted protection of the public interest or investors' interest in providing for regulation of the market by the SEC is glaringly obvious and it must be concluded that excluding protection of the public interest was intentional.⁸²

Clearly the regulation and control of transactions in securities protects the interest of the participants in the market, i.e., investors, the buyers and sellers of securities. But the protection of the interest of buyers and sellers of securities is derivative of the reasons given by Congress for regulating and controlling the market in transactions in securities: to protect interstate commerce, to protect the national credit, to protect the Federal taxing power, and to protect and make more effective the national banking system and the Federal Reserve System. As the Ninth Circuit explain in *SEC v. Rind*,⁸³ actions to deter violations of the securities laws furthers the SEC's mission of "protecting investors and safeguarding the integrity of the markets."⁸⁴

As with the '33 Act, the language of the '34 Act alternates between "the public interest and the protection of investors,"⁸⁵ "the public interest or the protection of investors,"⁸⁶ "consistent with the public interest and the protection of investors,"⁸⁷ "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under this title to facilitate the establishment of a national market system for securities,"⁸⁸ and "consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets."⁸⁹

But in case the ultimate purpose of enacting the securities laws and creating the SEC was not understood to be the protection of the

⁸² When Congress chooses certain wording it reveals Congressional intent. Word choice is critical to an understanding of the rule. *Securities and Exchange Commission v. Tambone*, 550 F.3d 106, 573 F.3d 54 (1st Cir. 2010), (Selya, Circuit Judge concurring in part and dissenting in part).

⁸³ *SEC v. Rind*, 991 F.2d 1486 (9th Cir.1993).

⁸⁴ *Id.* See also *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006). "The magnitude of the federal interest in protecting the integrity and efficiency of the national securities market cannot be overstated."

⁸⁵ 15 U.S.C. § 78o.

⁸⁶ 15 U.S.C. § 78q-1.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 15 U.S.C. § 78k-1.

market, Congress subsequently repeated how the public interest is to be considered by the SEC. The language mirrors that of the '33 Act.⁹⁰

CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the *public interest*, the Commission *shall also consider*, in addition to the protection of investors, whether the action will promote efficiency, competition, and *capital formation*.⁹¹

The public interest cannot, by law, be considered without considering the market interest. The unavoidable implication is that if a rule would protect the public interest, but such rule would not promote efficiency, competition, and capital formation, i.e., the market and market system, then the rule could not be adopted.

Still not satisfied, Congress once more repeated the mandate for how and when the public interest is to be considered:

CONSIDERATIONS. — In developing *any* rules under paragraph (1), the Commission *shall consider* whether the rules will promote investor protection, efficiency, competition, and *capital formation*.⁹²

Here, although the protecting the public interest is again ignored, investor protection is recognized, but only insofar as investor protection promotes efficient and competitive capital formation. Capital formation is, of course, the transactions in securities in a national market system.

⁹⁰ 15 U.S.C. § 77(b).

⁹¹ 15 U.S.C. § 78f, emphasis added.

⁹² 15 U.S.C. § 78o, emphasis added.

That is, in developing rules, the rules must be “germane to the goal of market efficiency.”⁹³

How is the Commission to implement the policies and purposes of the Securities laws? One way is by holding annual conferences.

In order to carry out these policies and purposes, the Commission *shall* conduct an annual conference as well as such other meetings as are deemed necessary, to which representatives from such securities associations, securities self-regulatory organizations, agencies, and private organizations involved in capital formation *shall* be invited to participate.⁹⁴

The public is not invited as a representative. Only those involved in capital formation, involved in the market system, shall be invited to participate. The public, as in “public interest,” is not among those who shall be invited to participate.

What is called the “public interest” is actually the “market interest.” It is not that the public interest is synonymous with the market interest but that the use of the term public interest deflects the public’s attention away from understanding that the purpose of the securities laws and the purpose of creating the SEC is to protect the market interest rather than the public interest. “The *dominant congressional purposes* underlying the Securities Exchange Act of 1934 were *to promote free and open public securities markets* and to protect the *investing public*...”⁹⁵

Even in those instance where courts have acknowledged a protection of the “public interest,” the public in public interest is not the public, but the *investing public*—“The SEC’s statutory task is to protect the *investing public* by policing the securities markets and preventing fraud.”⁹⁶ “Congress passed the anti-falsity provisions of the 1933 and

⁹³ Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119 (9th Cir. 2005) (Berzon, J., concurring) (*citing* Drayer v. Krasner, 572 F.2d 348, 358).

⁹⁴ 15 U.S.C. § 77s(d)(4), emphasis added.

⁹⁵ Sec. & Exch. Comm’n v. Tex. Gulf Sulphur Co., 401 F.2d 833, 858 (2d Cir. 1968).

⁹⁶ Sec. & Exch. Comm’n v. Tambone, 550 F.3d 106 (2007).

1934 Acts to protect the United States securities markets and the *investing public* against securities frauds and deceptions.”⁹⁷

For the almost 200 references to the public interest in the ’34 Act, none are accompanied with an explanation of how any rule or action taken by the SEC protects the public interest with one exception. But that one exception applies to government securities brokers and dealers and is based on the type of security, not the mission and mandate of the Commission. Furthermore, that one narrow exception to the missing mandate to protect the public interest in the securities laws demonstrates that had Congress wanted to issue a mandate to the SEC to protect the public interest it knew how to do so. The exception is the market for government securities.

Rules promulgated and orders issued under this section shall—(A) be designed to prevent fraudulent and manipulative acts and practices and to *protect* the integrity, liquidity, and efficiency of the market for government securities, investors, *and the public interest*.⁹⁸

That Congress carved out an exception for protecting the public interest for the market for government securities, even if it is after the market interest and investors’ interest, is easily understood due to the nature of government securities. Unlike non-government (corporate) securities, government securities are inherently related to and inseparable from the public, not just investors. That is, in addition to investors (the buyers and sellers of government securities), governments issuing securities involve those who are not investors, who are not part of the market, the market system, or transactions in securities—citizens, taxpayers, and voters, i.e., the public.

The Sarbanes-Oxley Act of 2002 (“SOX”) amended the Securities Laws to, among other things, create the Public Company Accounting Oversight Board (“PCAOB”). The PCAOB is a private corporation, but its oversight lies with the SEC.⁹⁹

(a) ESTABLISHMENT OF BOARD.—There is established the Public Company Accounting Oversight Board, to oversee the audit of

⁹⁷ In re Kingate Mgmt. Ltd. Litig., 784 F.3d 128 (2d Cir. 2015).

⁹⁸ 15 U.S.C. § 78o-5.

⁹⁹ 15 U.S.C. § 7211.

public companies that are subject to the securities laws, and related matters, *in order to protect the interests of investors and further the public interest* in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, *public investors*. The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.¹⁰⁰

The “public interest” is referred to in SOX not less than 28 times, but none in connection with protecting the public interest.

As noted by Huber, “To protect investors” is explicit and easily understood. Investors are (assumed to be) protected by informative, accurate and independent audit reports. However, “And the public interest” is less easily understood since the public does not use audit reports no matter how informative, accurate, or independent they may be.¹⁰¹ But by synthesizing the Congressional findings for creating the SEC, with the purpose of creating the PCAOB it can safely be concluded that the role of the PCAOB in overseeing audits of public companies is to produce informative, accurate and independent audit reports in order to protect the market by (1) removing impediments to the mechanisms; (2) perfecting the mechanisms of the market; (3) insuring the maintenance of fair and honest markets; and (4) maintaining the orderly functioning of the market.¹⁰²

III. DISCUSSION AND CONCLUSION

The purpose of this paper was to expose as a myth the assumption that protecting the public interest exists within the federal securities laws by conducting an exegetical analysis of the statutes. By parsing and dissecting the language of the federal securities laws, the assumption that protecting the public interest exists in federal securities laws is shown to be a myth. The missing mandate in the federal securities

¹⁰⁰ *Id.*

¹⁰¹ Huber. *supra* note 1, at 262.

¹⁰² *Id.*

laws is a mandate to protect the public interest. That omission must be considered to be deliberate, as well as the intent to mislabel the protection of the market interest and investors' interest as the public interest.

While both the market and investors' interests are important and need to be protected, it should not be done under the guise of protecting the public interest when protecting the public interest is clearly not the purpose or intent of the federal securities laws or the mission of the SEC. By disguising the market interest with the cloak of the public interest language, an illusion has been created that has transformed the discourse from protecting the market interest into protecting (a non-existent) public interest. The cloak of public interest confers upon the market interest a legitimacy to which it is not entitled.¹⁰³

Recognizing that there is no protection of the public interest in federal securities laws will allow a more meaningful discourse on the best type regulatory regime. Recognizing that there is no mandate to protect the public interest can refocus the debate as to the extent of rules and enforcement actions by the SEC, and perhaps amendments to the securities laws.

¹⁰³ *Id.* at 271.

