The Fiduciary Reference

Selected Articles on Fiduciary Duties
Applicable to Personalized Investment Advice

Compiled by The Committee for the Fiduciary Standard
August, 2010

The Committee for the Fiduciary Standard, in response to the U.S. Securities and Exchange Commission's request for public comments on the study of the obligations of brokers and investment advisers, offers this compilation and list of academic white papers.

About The Committee for the Fiduciary Standard.

The Committee for the Fiduciary Standard seeks to help inform and nurture a public discussion on the fiduciary standard. Its objective is to ensure that any financial reform regarding the fiduciary standard meets the requirements of the authentic fiduciary standard, as presently established in the Investment Advisers Act of 1940, and covers all professionals who provide investment and financial advice or who hold themselves out as providing financial or investment advice, without exceptions and without exemptions. The Committee for the Fiduciary Standard urges investors, professionals and all interested market participants to support the five core fiduciary principles.

- Put the client's best interest first
- Act with prudence; that is, with the skill, care, diligence and good judgment of a professional
- Do not mislead clients; provide conspicuous, full and fair disclosure of all important facts
- Avoid conflicts of interest; and
- Fully disclose and fairly manage, in the client's favor, unavoidable conflicts
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Additional information about The Committee for the Fiduciary Standard can be found at www.thefiduciarystandard.org.

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Contents:

A. List of Selected White Papers Deemed Most Relevant to Current Issues

These white papers were selected for their focus on fiduciary duties as applied to investment advisers and/or broker-dealers, or for the key insights provided into fiduciary law, generally.

B. List of Additional White Papers and Other Resources

These additional white papers largely focus on fiduciary duties, generally, or as applied to financial services intermediaries or the professions. Some papers also explore investor protection, such as the behavioral biases of investors and the implications of such for purposes of public policy.

C. List of Additional Papers: Perspectives of Other Jurisdictions

Fiduciary law finds in roots in English common law. These white papers address Anglo-American fiduciary law generally, or the development of fiduciary law, with respect to certain financial intermediaries, in Australia, Canada, UK and/or New Zealand. Given the increased international cooperation in securities law regulation and enforcement, developments regarding market conduct regulation in other countries should not be overlooked.

Please note that The Committee for the Fiduciary Standard does not necessarily agree with the concepts propounded by all of these articles. The Committee advocates for a full, fair and reasoned examination of the issues regarding the application of the fiduciary standard of conduct to financial services intermediaries.

A. Selected White Papers (Printed and Bound)

1. **Akerlof, George A., The Market for "Lemons": Quality Uncertainty and the Market Mechanism, The Quarterly Journal of Economics, Vol. 84, No. 3. (Aug., 1970), pp. 488-500. Available at: http://links.jstor.org/sici?sici=0033-5533%28197008%2984%3A3%3C488%3ATMF%22QU%3E2.0.CO%3B2-6** Want to understand why the same functions should not be undertaken under different standards of conduct? This classic article provides the intellectual underpinning for examining the effects of asymmetric information, as is common in financial advisor – investment consumer relationships. The effects are not limited to those upon the consumer. As Professor Akerlof, who won the Nobel Prize for his research in this area, explains in this paper: "Consider a market in which goods are sold honestly or dishonestly; quality may be represented, or it may be misrepresented. The purchaser's problem, of course, is to identify quality. The presence of people in the market who are willing to offer inferior goods tends to drive the market out of existence – as in the case of our automobile 'lemons.'" As explained by Professor Macey in a later paper, addressing financial advisors in general: "Each financial planner has incentive to develop and maintain a reputation for honesty and competence in order to increase the demand for his services. All financial planners suffer when the reputation of the profession suffers because consumers are unable to distinguish between high-quality services of ethical or competent financial planners and low-quality services of unethical or incompetent financial planners. This, in turn, reduces the market's demand and willingness to pay for financial planners. The practical implications of this basic problem, described by economists as 'information asymmetry' because of the fact that consumers have less information than producers (and therefore the distribution of information between the sellers of services and the buyers of services is asymmetric) are important for the future of any industry or profession … The general problem was first described in a famous article by George Akerloff, in which he showed what would happen to an industry if consumers were unable to distinguish between high quality producers and low quality producers [citing George A. Akerlof, The Market for 'Lemons': Quality Uncertainty and the Market Mechanism, 84 Q. J. ECON.488 (1970)]. The consequences of this problem are far more severe than may appear at first blush. The structure of the problem can be described with reference to the financial planning profession as follows: suppose, for the sake of clarity and simplicity, there are only three types of financial planners, excellent quality planners, whose work is worth $900 per hour, medium quality financial planners, whose work is worth $300 per hour, and low quality financial planners, whose work is worth minus $300 per hour because of the costs that such planners impose on their clients through incompetence and fraud. Imagine further that consumers are unable to differentiate among these various types of financial planners until after they have received their services. They don't know whether the advice they are getting is of high, medium or low quality until they have purchased the advice. Where this is true, economists have shown that the products all will sell for the same price, because consumers who pay more than the standard market price still will be unable to increase the probability that they are receiving high quality advice."

2. **Bailey, Warren B., Kumar, Alok and Ng, David, Behavioral Biases of Mutual Fund Investors (July 16, 2010). Journal of Financial Economics, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1108163.** Another of many papers contributing to the view that, even with disclosures, consumers need guidance in making investment decisions and often make sub-optimal decisions. The paper summarizes the work of other researchers in this area, and the paper examines a number of behavioral factors affecting individual investor decision-making. Abstract: "We examine the effect of behavioral biases on the mutual fund choices of a large sample of U.S. discount brokerage investors using new measures of attention to news, tax awareness, and fund-level familiarity bias, in addition to behavioral and demographic characteristics of earlier studies. Behaviorally-biased investors typically make poor decisions about fund style and expenses, trading frequency, and timing, resulting in poor performance. Furthermore, trend-chasing appears related to behavioral biases, rather than to rationally inferring managerial skill from past performance. Factor analysis suggests that biased investors often conform to stereotypes that can be characterized as "gambler", "smart", "overconfident", "narrow-framer", and "mature".

3. **Black, Barbara, How to Improve Retail Investor Protection (draft, 7/15/10, enclosed).** Abstract: "The Dodd-Frank Wall Street Reform and Consumer Protection Act gives the Securities and Exchange Commission the authority to deal with two issues especially important to retail investors. First, section 913 requires the SEC to conduct a six-month study on the effectiveness of existing standards of care for broker-dealers and investment advisers and specifically authorizes the SEC to establish a fiduciary duty for brokers and dealers. Second, section 921 grants the SEC the authority to prohibit the use of predispute arbitration agreements that would require investors to arbitrate future disputes arising under the federal securities laws and regulations or the rules of a self-regulatory organization. What has been overlooked in the debate over retail investor protection is the interconnectedness of these two provisions. Debate over retail investor protection after Dodd-Frank must consider these two issues together in order to achieve the goal of better retail investor protection. I make three principal arguments: First, I

argue that broker-dealers and investment advisers should be held to standards of care and competence based on professionalism, rather than fiduciary duty. Second, I propose, for adoption by the SEC, federal professional standards of competence and care for broker-dealers and investment advisers. Third, I argue that SEC adoption of standards of care will not create any additional federal remedies for investors because it is unlikely that the U.S. Supreme Court will create a private damages remedy for their breach. If the SEC prohibits mandatory securities arbitration of claims based on federal securities law and SEC and SRO rules, the ability of retail investors, particularly those with small claims, to recover damages for careless and incompetent investment advice may be substantially reduced."

4. **Cain, Daylian M., Loewenstein, George F. and Moore, Don A., The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest (December 1, 2003). Available at SSRN: http://ssrn.com/abstract=480121.** The Abstract provides: "Conflicts of interest can lead experts to give biased and corrupt advice. Although disclosure is often proposed as a potential solution to these problems, we show that it can have perverse effects. First, people generally do not discount advice from biased advisors as much as they should, even when advisors' conflicts of interest are honestly disclosed. Second, disclosure can increase the bias in advice because it leads advisors to feel morally licensed and strategically encouraged to exaggerate their advice even further. This means that while disclosure may [insufficiently] warn an audience to discount an expert-opinion, disclosure might also lead the expert to alter the opinion offered and alter it in such a way as to overcompensate for any discounting that might occur. As a result, disclosure may fail to solve the problems created by conflicts of interest and it may sometimes even make matters worse. This paper is part of a larger body of research which examines how trying to regulate ethical behavior (and/or trying to protect consumers) can potentially backfire."

5. **Choi, James J., Laibson, David I. and Madrian, Brigitte C., Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds (March 6, 2008). Yale ICF Working Paper No. 08-14. Available at SSRN: http://ssrn.com/abstract=1125023.** Professor Choi and his colleagues have co-authored a number of articles on investor behavior which pertain to 401(k) default options, investor understanding of fees and costs, etc. This paper illustrates the limits of disclosure as a means of enabling investor decisions. Abstract: "We evaluate why individuals invest in high-fee index funds. In our experiments, subjects each allocate $10,000 across four S&P 500 index funds and are rewarded for their portfolio's subsequent return. Subjects overwhelmingly fail to minimize fees. We reject the hypothesis that subjects buy high-fee index funds because of bundled nonportfolio services. Search costs for fees matter, but even when we eliminate these costs, fees are not minimized. Instead, subjects place high weight on annualized returns since inception. Fees paid decrease with financial literacy. Interestingly, subjects who choose high-fee funds sense they are making a mistake."

6. **Choi, Stephen J. and Pritchard, Adam C., Behavioral Economics and the SEC (February 23, 2003). Michigan Law Econ. Paper No. 03-002; Georgetown Law Econ. Paper No. 389560;UC Berkeley Public Law Paper No. 115;CLEO Research Paper No. C03-6. Available at SSRN: http://ssrn.com/abstract=500203**. This white paper is included as it demonstrates how behavioral biases, so central to the understanding of the ineffectiveness of disclosures in leading investors to make good decisions, might also affect policy makers. Abstract: "Investors face myriad investment alternatives and seemingly limitless information concerning those alternatives. Not surprisingly, many commentators contend that investors frequently fall short of the ideal investor posited by the rational actor model. Investors are plagued with a variety of behavioral biases (such as, among others, the hindsight bias, the availability bias, loss aversion, and overconfidence). Even securities market institutions and intermediaries may suffer from biases, led astray by groupthink and overconfidence. The question remains whether regulators should focus on such biases in formulating policy. An omnipotent regulatory decisionmaker would certainly improve on flawed investor decisionmaking. The alternative we face, however, is a behaviorally-flawed regulator, the Securities and Exchange Commission (SEC). Several behavioral biases may plague SEC regulators including overconfidence, the confirmation bias, framing effects, and groupthink. While structural solutions are possible to reduce biases within the agency, we argue that such solutions are only partially effective in correcting these biases. Instead of attempting to determine when the behavioral biases of regulators outweigh those within the market, we take a different tactic. Because behaviorally flawed (and possibly self-interested) regulators themselves will decide whether market-based biases outweigh regulatory biases, we propose a framework for assessing such regulatory intervention. Our framework varies along two dimensions. The more monopolistic the regulator (such as the SEC), the greater is the presumption against intervention to correct for biases in the market. Monopolistic regulatory agencies provide a fertile environment for behavioral biases to flourish. Second, the more regulations supplant market decisionmaking, the greater is the presumption against such regulations. Market supplanting regulations are

particularly prone to entrenchment, making reversal difficult once such regulations have become part of the status quo."

7. **Conaway, Ann E., Why No Respect? The Contractual Duties of Good Faith and Fair Dealing in Delaware (June 17, 2007). Widener Law School Legal Studies Research Paper No. 08-05. Available at SSRN: http://ssrn.com/abstract=994624.** This paper aids in understanding why the concept of "good faith" in commercial contracts is distinct from the concept of "good faith" found in fiduciary relationships, and observes that commercial contract actors are largely free to alter their duties with respect to each other, while in fiduciary relationships any terms of an agreement that compromises a fiduciary duty might be rendered unenforceable as against public policy. Abstract: "The thesis of this paper focuses on the statutory policy of 'freedom of contract' in Delaware unincorporated entity law and the confusion of some courts in applying these contractarian principles in the face of, what would have been, traditional fiduciary duties. What has resulted is a muddle in the case law caused by the similarity in the terms good faith, in the context of the duty of good faith in contract law, and the term good faith as it is used in the law of business organizations to describe a fiduciary duty of care or the standard of conduct for a director in a corporation. Similarly, puzzlement results when litigators or courts mistakenly interchange the contract term fair dealing with the judicial standard of entire fairness traditionally reserved for the review of conduct by disloyal fiduciaries. In Delaware, it is time for corporate principles to remain in the realm of corporate law and the corpfuscation of unincorporated law to end."

8. **Fanto, James A., We're All Capitalists Now: The Importance, Provision and Regulation of Investor Education (February 1998). (Enclosed).** Professor Fanto's paper presents a different view on the importance and effectiveness of investor education, in contrast to the views presented in a later paper by Professor Willis (see citation below). Abstract: "The paper studies investor education so as to evaluate and guide increasing educational efforts. It first discusses the conditions that have made investor education important and inevitable in the U.S. The paper 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, it observes that families might accomplish each kind, with high schools also offering, as many now do, general financial education. Consumer financial services 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, limit their tasks to educating consumers about financial fraud and abuse and to persuading them to save, invest and use the educational products and services of private firms. As an application of the theoretical perspective, the paper analyzes the major investor educational initiatives of the Securities and Exchange Commission (SEC). The SEC should improve its educational efforts by redirecting its own activities in accordance with the paper's guidance to concentrate on anti-fraud education and to promote and facilitate private investor education."

9. **Frankel, Tamar, Fiduciary Law (Calif.L.Rev. 1983). Available at http://www.tamarfrankel.com/support-files/fiduciary-law.pdf.** Professor Frankel has long been a leading writer regarding fiduciary law, as applied to securities regulations, and has greatly aided the recent discussion on the application of fiduciary standards to the advisory activities of broker-dealers. This paper explores the key fundamental concepts of fiduciary law.

10. **Frankel, Tamar, Trusting And Non-Trusting: Comparing Benefits, Cost And Risk (1999). Boston University School of Law Working Paper 99-12. Available at SSRN: http://ssrn.com/abstract=214588**. Abstract: "The Article expresses great concern at recent legal literature that preaches contract as the overall legal model subsuming fiduciary law, interoperate relationships, and relationship to investors in business trusts and clients of other money managers. The Article compares the contract model (individualism, self-protection, minimal government interference and "on your guard" attitude of non-trusting) to fiduciary and statutory regulation models (dependence, reliance and greater trusting). The article suggests that in the current environment, where trusting in the financial system and emerging electronic commerce is crucial, the time has come to put contract where it should belong and balance it well against a trusting legal models. ."

11. **Frankel, Tamar, Fiduciary Duties of Brokers-Advisers-Financial Planners and Money Managers (August 10, 2009). Boston Univ. School of Law Working Paper No. 09-36. Available at SSRN: http://ssrn.com/abstract=1446750**. Abstract: "Broker dealers and investment advisers form the lifeline of the financial markets. While in the past their functions were separate, and their regulation differed, throughout the years their functions were allowed to merge but their regulation remained separate. Advisers are their clients' fiduciaries. Brokers are not, with some exceptions. It is recognized that the law has to change, and the question is how. In this Article I argue for imposing the fiduciary duty of loyalty and limiting conflict of interest all financial intermediaries, including broker dealers, and suggest a

process for establishing the details of the law that should apply to them. Section One of the Article outlines the principles on which fiduciary law is based. Section Two offers a short overview of the past and current practice of broker dealers. Section Three highlights the fiduciary aspects of broker dealers and the risks posed to their clients from their conflicts of interest Section Four proposes changes in the current law and a process to achieve future changes. The law should impose principles; the financial intermediaries should seek the specificity."

12. **Huang, Peter H., Legal Implications of Guilt and Pride for Securities Regulation. University of Pennsylvania Law Review, 2003. Available at SSRN: http://ssrn.com/abstract=313840.** Abstract: "This Article considers how guilt and pride about investing has implications for securities regulation. Both U.S. federal securities laws and the regulations of the National Association of Securities Dealers impose very high standards of professional conduct upon securities professionals. But, exactly what are and should be the legal responsibilities of securities professionals remains the subject of much debate. In particular, disagreement exists over whether broker-dealers are fiduciaries of their clients. A legal consequence of a fiduciary relationship is a duty of fair dealing. This Article is the first to consider the emotional, moral, and psychological consequences of broker-dealers being fiduciaries. This Article explains how finding that securities professionals are fiduciaries can alter expectations about securities professionals' behavior, guilt from breaching their clients' trust or pride from honoring such trust, and securities professionals' behavior itself. This Article demonstrates how fiduciary law can affect behavior even without much enforcement or severe legal penalties."

13. **Huang, Peter H., Regulating Securities Professionals: Emotional and Moral Aspects of Fiduciary Investing (2001). USC CLEO Research Paper No. C01-6; and U of Penn, Institute for Law & Econ Research Paper 01-19. Available at SSRN: http://ssrn.com/abstract=276119**. Abstract: "Individuals invest in securities markets via such financial intermediaries as brokers and dealers. Federal securities laws regulate the behavior of securities professionals towards their customers. The relationship between investors and securities professionals is an example of a principal-agent relationship. Such relationships suffer from well-known incentive and informational problems. This Article focuses on some novel emotional and psychological consequences of such relationships for investment decisions. This Article considers how expectations about securities investment behavior can interact with guilt on the part of securities professionals from breaching their clients' trust. This Article explains how imposing a fiduciary duty of loyalty can alter expectations about investment behavior, emotions that depend on those investment expectations, and investment behavior itself. This Article also discusses the applicability of such models to other fiduciary relationships."

14. **Koffler, Michael, Six Degrees of Separation: Principles to Guide the Regulation of Broker-Dealers and Investment Advisers. Available at http://www.sutherland.com/files/Publication/36c725e7-a52b-4229-9131-c846db3d000f/Presentation/PublicationAttachment/df545d6d-0487-4a9d-821a-c97188bcab9f/PDFArtic42709.pdf .** This article explores specific issues arising from the imposition of fiduciary standards upon BDs, as to challenges posed to certain business practices. Abstract: "This article analyzes important differences between the activities of broker-dealers and investment advisers and underscores the public policy implications of these differences on any future attempt to harmonize the regulation of these two industries."

15. **Laby, Arthur B., Fiduciary Obligations of Broker-Dealers and Investment Advisers, 55 Villanova Law Review (2010) (forthcoming) (Enclosed).** Professor Laby has long been a leader in writing on securities regulation, and his more recent works have greatly contributed to the understanding of BD/RIA regulatory issues. This article, forthcoming in the Villanova Law Review, specifically tackles the differences that exist today between the duties owed by brokers and advisers and explores their fiduciary obligations. The Introduction includes: "This Article addresses … unanswered questions as an important step in determining whether reform is warranted. Ascertaining whether broker-dealers owe a fiduciary obligation to their customers has vexed courts and commentators for decades. This sliver of securities law doctrine comprises a bewildering inconsistency of judicial decisions. The Article, in Part II, explains why this question is so formidable and provides five reasons for the ambiguity in the law. Part III reviews the fiduciary duties imposed on brokers and advisers in their historical context and provides concrete examples where the duties can be differentiated. Part IV explains why a fiduciary obligation should be imposed, albeit cautiously, on brokers that provide advice. The explanation turns on the changed role brokers play in modern securities markets where advice is the coin of the realm and trade execution has receded in importance and become a service obtained at relatively low cost."

16. **Laby, Arthur B., Reforming the Regulation of Broker-Dealers and Investment Advisers (October 19, 2009). The Business Lawyer, Vol. 65, No. 2, February 2010. Available at SSRN: http://ssrn.com/abstract=1491268.** Abstract: "A key component of financial regulatory reform is harmonizing the law governing broker-dealers and investment

advisers. Historically brokers charged commissions and were regulated under the Securities Exchange Act of 1934. Advisers charged asset-based fees and were subject to the Investment Advisers Act of 1940, which contains a special exclusion for brokers. In recent years, brokers have changed their compensation structure and many now market themselves as advisers, raising questions about whether they should be treated as such. The Obama Administration's 2009 White Paper on regulatory reform and draft legislation call for a fiduciary duty to be imposed on brokers that provide advice. In this article, I explore the debate over regulating brokers and advisers and suggest how to resolve it. I make four key claims. First, changes in brokers' compensation and marketing methods vitiate application of the broker-dealer exclusion and should subject brokers to the Advisers Act. Second, changes in the nature of brokerage, spurred by changes in technology, make the broker-dealer exclusion unsustainable and Congress should repeal it. I then turn to the consequences of regulating brokers as advisers. The third claim is that imposing fiduciary duties on brokers is incompatible with their historical roles as dealers and underwriters. To resolve this tension, the article suggests a compromise that enhances brokers' duties but does not hobble their ability to perform their traditional functions. Finally, regulating brokers as advisers would overburden the SEC and the article offers alternatives to alleviate the strain."

17. **Laby, Arthur B., The Fiduciary Obligation as the Adoption of Ends. Buffalo Law Review, Vol. 56, No. 1, 2008. Available at SSRN: http://ssrn.com/abstract=1124722**. Abstract: "Contractualist scholars advance a theory of fiduciary duties as implied contract. Fiduciary duties are viewed as terms to which the parties would have agreed if they had the time and inclination to bargain. Contractualists maintain that when costs of bargaining specification and monitoring are high, courts imply particular terms and call them fiduciary duties, but actual terms trump implied terms. While it is true that many fiduciary duties can be waived or modified, this Article claims that the contractual approach is incomplete. The contractual approach can neither predict when fiduciary duties arise nor account for the mandatory rules that characterize fiduciary law, dismissing them, instead, as trivial. After critiquing the contractual model, this Article proposes a positive account of fiduciary duties based on Kant's description of duties of ethics and imperfect duties. Imperfect duties do not entail specific conduct that can be externally enforced; they require instead that the agent adopt goals, objectives, or ends. The fiduciary duty can best be described as an obligation by the fiduciary to adopt the principal's objectives. The Article demonstrates that leading fiduciary cases, as well as questions regarding when certain fiduciary duties arise, can best be understood within the framework of the fiduciary obligation as a duty to adopt the principal's ends as opposed to the framework of contract."

18. **Laby, Arthur B., Resolving Conflicts of Duty in Fiduciary Relationships. American University Law Review, Vol. 54, p. 75, 2004. Available at SSRN: http://ssrn.com/abstract=904212.** Abstract: "Fiduciaries who represent multiple principals often encounter conflicts of duty, torn between promoting the interests of one principal and those of another. Courts have not done a good job of articulating principles for resolving these conflicts. They resort to inconsistent approaches and seek to elide underlying tensions in the cases. Scholars have addressed sources of fiduciary duties, and whether they constitute default contractual terms, but they have paid little attention to resolving conflicts when they arise. This Article seeks to fill the gap, presenting an account to explain and justify the cases. Fiduciaries are subject to common law duties of loyalty and care, and many difficult cases present a conflict between enforcing the duty of loyalty owed to one principal and the duty of care owed to another. The key to understanding how courts resolve such conflicts lies in the different nature of these duties. The duty of loyalty is a negative duty to avoid harm; it is a duty of omission. The duty of care is a positive duty to promote the interests of the principal, a duty to act. To explore the nature of the duties, the Article draws on Kant's discussion of perfect and imperfect duties. It explains that duties of care, like Kant's imperfect duties, can never be fully satisfied, but by enforcing the prohibitions imposed by the duty of loyalty, courts ensure that when the fiduciary acts, she acts consistently with the duty of care as well. The Article applies these principles to three types of fiduciaries: attorneys, financial firms, and company directors, explaining why courts treat a breach of the duty of care more leniently than a breach of the duty of loyalty, much like the common law has treated omissions more leniently than acts. The Article concludes that the theory presented not only justifies how courts resolve difficult cases, it also explains the behavior of individual fiduciaries, financial firms, and regulators."

19. **Langevoort, Donald C., Brokers as Fiduciaries, 71 U. Pitt. L. Rev. 439 (2010). (Enclosed.)** This paper discusses the effort to have the SEC treat brokers and investment advisers comparably, mainly by imposing fiduciary responsibilities on brokers who offer advice to their customers. Because the brokerage business, today, is still largely sales oriented, any imposition of a general fiduciary duty will be awkward. The author suggests directions the effort might take to avoid the awkwardness while improving the regulatory regime dealing with broker conduct so as to make it "more fiduciary-like."

20. **Paredes, Troy A., Blinded by the Light: Information Overload and its Consequences for Securities Regulation (June 1, 2003). Washington University Law Quarterly, Forthcoming. Available at SSRN: http://ssrn.com/abstract=413180.** Abstract: "A demanding system of mandatory disclosure, which has become more demanding in the wake of the Sarbanes-Oxley Act of 2002, makes up the core of the federal securities laws. Securities regulation is motivated, in large part, by the assumption that more information is better than less. After all, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." But sunlight can also be blinding. Two things are needed for a regulatory regime based on disclosure, such as the federal securities laws, to be effective. First, information has to be disclosed. Second, and often overlooked, is that the users of the information - for example, investors, securities analysts, brokers, and portfolio managers - need to use the disclosed information effectively. Securities regulation focuses primarily on disclosing information, and pays relatively little attention to how the information is used - namely, how do investors and securities market professionals search and process information and make decisions based on the information the securities laws make available? Studies making up the field of behavioral finance show that investing decisions can be influenced by various cognitive biases on the part of investors, analysts, and others. This Article focuses on a related concern: information overload. An extensive psychology literature shows that people can become overloaded with information and make worse decisions with more information. In particular, studies show that when faced with complicated tasks, such as those involving lots of information, people tend to adopt simplifying decision strategies that require less cognitive effort but that are less accurate than more complex decision strategies. The basic intuition of information overload is that people might make better decisions by bringing a more complex decision strategy to bear on less information than by bringing a simpler decision strategy to bear on more information. To the extent that investors, analysts, and other capital market participants are subject to information overload, the model of mandatory disclosure that says more is better than less may be counterproductive. This Article considers the phenomenon of information overload and its implications for securities regulation, including the possibility of scaling back the mandatory disclosure system."

21. **Prentice, Robert, Whither Securities Regulation? Some Behavioral Observations Regarding Proposals For Its Future. 51 Duke L.J. 1397 (2002). Available at http://www.law.duke.edu/shell/cite.pl?51+Duke+L.+J.+1397**. One of the leading articles for the proposition that disclosure does not work as a means of protecting consumers, in all instances. Abstract: "Respected commentators have floated several proposals for startling reforms of America's seventy-year-old securities regulation scheme. Many involve substantial deregulation with a view toward allowing issuers and investors to contract privately for desired levels of disclosure and fraud protection. The behavioral literature explored in this Article cautions that in a deregulated securities world it is exceedingly optimistic to expect issuers voluntarily to disclose optimal levels of information, securities intermediaries such as stock exchanges and stockbrokers to appropriately consider the interests of investors, or investors to be able to bargain efficiently for fraud protection."

22. **Walsh, John H., A Simple Code Of Ethics: A History Of The Moral Purpose Inspiring Federal Regulation Of The Securities Industry, 29 Hofstra L. Rev. 1015 (2001). Available at http://www.hofstra.edu/PDF/law_walsh.pdf.** SEC OCIE Asst. Director Walsh's seminal paper discerns a vibrant history underlying the '40 Act, and other 1930's legislation. The article's introduction provides in part: "This Article concludes by positing that FDR's moral vision was more than a political posture—it was a serious policy initiative whose effects can still be seen in the regulatory regime. Moreover, in recent years, moral trustworthiness has received renewed attention as a significant force in the creation of prosperity. In light of this new thinking, one must wonder whether the orthodox Progressives who shaped FDR's vision were onto something. Perhaps moral purpose has a place in securities regulation after all.

23. **Willis, Lauren E., Against Financial Literacy Education. Iowa Law Review, Vol. 94, 2008; U of Penn Law School, Public Law Research Paper No. 08-10; Loyola-LA Legal Studies Paper No. 2008-13. Available at SSRN: http://ssrn.com/abstract=1105384.** Professor Willis' views on the ineffectiveness of financial literacy as a consumer protection mechanism are well-known in the academic community, although not universally accepted. Abstract: "The dominant model of regulation in the United States for consumer credit, insurance, and investment products is disclosure and unfettered choice. As these products have become increasingly complex, consumers' inability to understand them has become increasingly apparent, and the consequences of this inability more dire. In response, policymakers have embraced financial literacy education as a necessary corollary to the disclosure model of regulation. This education is widely believed to turn consumers into "responsible" and "empowered" market players, motivated and competent to make financial decisions that increase their own welfare. The vision is of educated consumers handling their own credit, insurance, and retirement planning matters by confidently navigating the bountiful unrestricted marketplace. Although the vision is seductive, promising both a free market

and increased consumer welfare, the predicate belief in the effectiveness of financial literacy education lacks empirical support. Moreover, the belief is implausible, given the velocity of change in the financial marketplace, the gulf between current consumer skills and those needed to understand today's complex non-standardized financial products, the persistence of biases in financial decisionmaking, and the disparity between educators and financial services firms in resources with which to reach consumers. Harboring this belief may be innocent, but it is not harmless; the pursuit of financial literacy poses costs that almost certainly swamp any benefits. For some consumers, financial education appears to increase confidence without improving ability, leading to worse decisions. When consumers find themselves in dire financial straits, the regulation through education model blames them for their plight, shaming them and deflecting calls for effective market regulation. Consumers generally do not serve as their own doctors and lawyers and for reasons of efficient division of labor alone, generally should not serve as their own financial experts. The search for effective financial literacy education should be replaced by a search for policies more conducive to good consumer financial outcomes."

B. Additional White Papers and Other Resources (Available Online)

1. **Alexander, Gregory S., A Cognitive Theory of Fiduciary Relationships (Undated). Available at SSRN: http://ssrn.com/abstract=205032.** Abstract: "Law-and-economics scholars have argued that there is nothing unique about fiduciary relationships. These scholars make two claims. First, they argue that, analytically, fiduciary relationships are simply contractual arrangements with unusually high transaction costs. Second, they contend that courts in fact apply the same analysis to fiduciary relationships as they do to non-fiduciary contractual relationships. This paper addresses the second, behavioral claims. Accepting for the sake of argument the analytical claim, the paper contends that cognitive biases lead courts to apply a different mode of analysis to fiduciary relationships than they do to contractual relationships. In cases involving alleged breaches of fiduciary duties, courts apply a "top-down" mode of cognitive analysis, in contrast with the "bottom-up," data-driven cognitive mode that characterizes judicial analysis of breach of contract claims. The essay's hypothesis is that fiduciaries are more apt to be found liable of breach of fiduciary duties than are contract parties who are alleged to have violated some contractual duty."

2. **Barry P. Barbash & Jai Massari, The Investment Advisers Act Of 1940: Regulation By Accretion (2008). Available at http://org.law.rutgers.edu/publications/lawjournal/issues/39_3/03BarbashVol.39.3.r_1.pdf**. From the introduction: "This article reviews the use of SEC enforcement actions as a tool for rulemaking in the context of the Advisers Act, taking an in-depth look at how the Commission has effectively set standards for investment advisers through enforcement in a number of different areas. The article then discusses the anti-fraud rule recently adopted by the Commission under the Advisers Act, asserting that the rule is the latest means through which the Commission can be expected to impose, through enforcement actions, other substantive requirements on advisers. Following this discussion is a critique of the rules of conduct for investment advisers developed through enforcement and suggests that the time may be right for a comprehensive review of those rules with an eye toward improving or replacing them with ones that are the product of the Commission's formal rulemaking procedures."

3. **Barnstable-Brown, Christopher D., Investment Advisers Act Rule 206(4)-8: Antifraud for the Masses. The Investment Lawyer, Vol. 15, No. 4, April 2008. Available at SSRN: http://ssrn.com/abstract=1137728.** Abstract: "Investment Advisers Act Rule 206(4)-8 prohibits advisers to pooled investment vehicles (such as hedge funds, private equity funds, or venture capital funds) from making false or misleading statements to current or prospective investors in such funds. The Rule, though superficially similar to other anti-fraud rules such as 10b-5, is actually much broader in that it (1) is not limited to transactions, so it applies continuously to adviser activity, (2) it prohibits other fraudulent or misleading conduct, apart from misleading statements, and (3) according to the adopting release, it only requires a negligence showing. Putting these together, the Rule thus covers activity like negligently misleading performance statements sent to prospective investors, and the Rule invites the question of what kind of negligently fraudulent adviser conduct the Rule actually prohibits. This brief article closely examines the Rule's background and text, articulates standards that the SEC and courts might use to approach the questions the Rule raises, provides some basic guidelines for counsel in advising clients to avoid tripping the Rule, and finally argues that the Rule, despite its breadth, is nevertheless an appropriate SEC enforcement tool."

4. **Beshears, John, Choi, James J., Laibson, David I. and Madrian, Brigitte C., How Does Simplified Disclosure Affect Individuals' Mutual Fund Choices? (March 27, 2009). HKS Working Paper No. RWP09_16; Yale ICF Working Paper No. 09-05. Available at SSRN: http://ssrn.com/abstract=1400943.** Another paper co-authored by Professor James

Choi illustrates the limits of disclosure, this time by analyzing the effect of the new Summary Propspectus. Abstract: "We use an experiment to estimate the effect of the SEC's Summary Prospectus, which simplifies mutual fund disclosure. Our subjects chose an equity portfolio and a bond portfolio. Subjects received either statutory prospectuses or Summary Prospectuses. We find no evidence that the Summary Prospectus affects portfolio choices. Our experiment sheds new light on the scope of investor confusion about sales loads. Even with a one-month investment horizon, subjects do not avoid loads. Subjects are either confused about loads, overlook them, or believe their chosen portfolio has an annualized log return that is 24 percentage points higher than the load-minimizing portfolio."

5. **Black, Barbara, Working Toward Fair Treatment for Retail Investors (February 1, 2010). University of Cincinnati Law Review, Vol. 76, p. 375, 2008; U of Cincinnati Public Law Research Paper No. 09-41. Available at SSRN: http://ssrn.com/abstract=1543269.** Abstract: "Twenty years ago, in Shearson/American Express, Inc. v. McMahon, the Supreme Court held that brokerage firms could require their customers to arbitrate all their disputes in industry-sponsored fora - a decision that had great significance for the law of arbitration as well as securities regulation. In 1996, a blue-ribbon task force released its report, assessing the securities arbitration process at National Association of Securities Dealers, Inc. (NASD), the principal securities arbitration forum, and the report led to several symposia on the topic coinciding with the tenth anniversary of McMahon. Since then, arbitration scholars and practitioners have intensified the debate over the fairness of arbitration, both generally and specifically in the context of brokerage customers' disputes. In addition, in the last ten years, the stock market has undergone a boom and bust cycle that generated a record number of customers' claims filed at NASD; the securities industry has continued to market new investment products, strategies, and services for retail investors; and the aging population has increasingly become aware of the importance of investing for retirement, but has also become susceptible to deceptive promises offering freedom from financial worries. As a result of these developments, now is an opportune time for a re-examination of arbitration and investors' remedies."

6. **Black, Barbara, Are Retail Investors Better Off Today? (January 15, 2008). Brooklyn Journal of Corporate, Financial, & Commercial Law, Vol. 2, p. 303, 2008; U of Cincinnati Public Law Research Paper No. 07-34. Available at SSRN: http://ssrn.com/abstract=1085744.** Abstract: "In recent years, investors' attitudes towards the securities industry plummeted, in reaction to both the conflicted research and the mutual fund scandals. In both instances, Congress and the regulators responded by asserting the need for reforms to restore the confidence of the retail investor. This paper first reconsiders the importance of investor confidence and argues that, in an era where adults are required to invest in the markets, the government has a moral obligation to assure that investor confidence in the markets is warranted. This paper examines the SEC's reforms, as well as its investor education initiatives, through the lens of morality and assesses whether they have improved the environment for retail investors. It concludes that the most optimistic assessment is that the SEC has plenty of unfinished business to attend to."

7. **Black, Barbara, Fiduciary Duty, Professionalism and Investment Advice (March 28, 2010). University of Cincinnati Public Law Research Paper No. 10-24. Available at SSRN: http://ssrn.com/abstract=1579719.** The author makes four main points, as the Abstract notes: "Despite their consensus on the general concept of harmonized regulation, the broker-dealer and investment adviser industry groups are bitterly divided over how to accomplish this. In addition, the broker-dealer industry supports mandatory securities arbitration, while other groups call for its abolition. This paper seeks both to shed some light and remove some heat from these contentious debates. I make four arguments: 1. The fiduciary duty standard is not a useful standard for regulating the conduct of broker-dealers or investment advisers; the standard should be based on professionalism. 2. There are established standards of care and competence that should be applicable to both broker-dealers and investment advisers. 3. Without an explicit federal remedy for negligence, investors do not have adequate protection. 4. If Congress directs or encourages the SEC to invalidate predispute arbitration agreements, small investors are likely to be worse off."

8. **Black, Barbara, Brokers and Advisers - What's in a Name? (October 15, 2009). U of Cincinnati Public Law Research Paper No. 09-29. Available at SSRN: http://ssrn.com/abstract=1487706.** Abstract: "The article addresses two recent developments - the adoption by the SEC of a rule that allows brokerage firms to market fee-based accounts without registering as investment advisers and the increase in brokerage advertising that promotes the image of the broker as a trusted family friend and financial adviser. Professor Black argues that as a result of these developments investors are likely to be misled into believing that their brokers are investment advisers, with the fiduciary obligations the law requires of them, instead of brokers, whom the law generally treats as salespersons. She proposes two recommendations: (1) that brokers should not be allowed to call themselves "financial advisers" or

"financial consultants"; or, assuming the SEC will not adopt this recommendation, (2) brokers should be held to their word and be obligated to provide the "competent, unbiased and continuous advice" that they promise."

9. **Black, Barbara and Gross, Jill, Economic Suicide: The Collision of Ethics and Risk in Securities Law (2003). University of Pittsburgh Law Review, Vol. 64, 2003. Available at SSRN: http://ssrn.com/abstract=1028189.** Abstract: "The article discusses what has now become apparent: that during the 1990s many investors engaged in risky trading and investing strategies without an understanding of the risks involved. It is settled law that, while brokers owe duties to their customers when they control the account or make recommendations, brokers can, in the absence of fraud, stand by and allow their customers to place financially disastrous trades, considered by the securities industry to be "economic suicide." This article first analyzes whether there are any legal principles to support an expanded view of the broker's duties to prevent the customer's economic suicide. Because most broker-dealer disputes currently are resolved through arbitration, the authors next examine arbitration awards to decide whether, as has been frequently reported, arbitrators are routinely awarding damages to customers in economic suicide cases. The article then addresses whether policy considerations support an extension of brokers' duties. It concludes: (1) arbitrators generally are following the law and not imposing liability on brokers for their customers' economic suicide; and (2) policy considerations, including the regulatory focus on full disclosure, support a modest expansion of brokers' duties to include a duty to warn investors about risky trading strategies."

10. **Black, Barbara, Transforming Rhetoric into Reality: A Federal Remedy for Negligent Brokerage Advice. Tennessee Journal of Business Law, Fall 2006; U of Cincinnati Public Law Research Paper No. 06-24. Available at SSRN: http://ssrn.com/abstract=940080.** Excerpt from Abstract: "[A] major deficiency in the federal regulatory system, as currently interpreted by the federal courts, is that investors have no federal remedy to compensate them for injuries caused by incompetent and careless brokers. This is the law, despite the fact that Congress, the Supreme Court, the SEC, and the self-regulatory organizations all agree about the centrality of broker competence and care in the federal regulatory system. Unfortunately, then, their lofty language is largely rhetoric. This paper argues that Congress should adopt federal standards of competence and care for brokers and provide investors with a damages remedy for violation of these standards. I first explain why state law does not provide adequate protection for investors. I then set forth my proposal for federal standards. I next consider, as an alternative to congressional enactment, promulgation of these standards by the SEC and explore possible ways that investors could use them as the basis of a damages claim. I then assess the policy objections made by the Supreme Court and other federal courts to expanding private damages remedies for investors and find them inapplicable or not convincing in the context of the customer-broker relationship, where virtually all of customers' claims are resolved through SRO arbitration. Finally, I explain why adoption of legal standards of competence and care is important as SRO arbitration moves away from its origins as an equitable forum toward a quasi-judicial system where investors' claims may need a firmer grounding in legal principles."

11. **Boatright, John R., Conflict of Interest in Financial Services: A Contractual Risk-Management Analysis.** Argues that, unlike the legal profession, conflicts of interest in financial services should result in management of the risks created thereby, not the prohibition of the conflict. Available at http://www.sba.luc.edu/research/wpapers/040602-B.pdf.

12. **Bullard, Mercer. *Investor as Purchaser Subcommittee, SEC's Investor Advisory Committee.*** While we don't cite any specific articles here, Professor Bullard's work and that of his Subcommittee should be obtained and closely examined. As noted in the minutes of the Feb. 22, 2010 Committee meeting, "Mr. Bullard led a discussion of fiduciary responsibility, based on an informational memo presented by the Subcommittee. He discussed subjects including: (i) the distinction between federal public duty and non-federal private duty; (ii) the structure of the broker exclusion; and (iii) the role of common law versus rule-based law. Ms. Roper noted, among other issues, that the Commission had a large role to play in addressing the issue, including the issue of the distinction between advice and sales activities. Mr. Hisey discussed the importance of considering the perspective of the individual investor. In response to a question from Mr. Friedman, Mr. Bullard described the issue of disclosure of broker-dealer fees in the context of fiduciary duty. Ms. Roper described the suitability standard for broker-dealers. Mr. Brown noted that there exists a diversity of opinion on the issue and that the Commission would have an active role to play. Mr. Stocker offered that there should be one standard for financial professionals, and that should be a fiduciary standard. Mr. Silvers noted his support of eliminating a hidden (from the perspective of individual investors) legal boundary with respect to financial professionals. Mr. Davis noted his interest in a different aspect of fiduciary duty, that of institutional investor trustees in the context of governance issues. Mr. Brown noted the importance of an effective regulatory regime in this area. Ms. Roper noted that there was agreement on a number of issues in this

area, and that it was important not to ignore other related issues." These minutes available at http://www.sec.gov/spotlight/invadvcomm/iacmeeting022210-minutes.pdf. *See also* Feb. 15, 2010 Memorandum, to the Investor Advisory Committee, from the Investor as Purchaser Subcommittee, summarizing the Federal fiduciary duty, the non-federal fiduciary duty, and other related subjects.

13. **Cackowski, Ted , Fiduciary Selection and Monitoring of Investment Managers Under Daubert: Statistically Testing the Hypothesis that a Money Manager is Better or Worse than Random (July 20, 2007). Available at SSRN: http://ssrn.com/abstract=1001922.** Abstract: "Statutory fiduciary standards relevant to the selection of investment managers and the monitoring of investment decisions offer very little operational guidance. The guidance cautions little more than that the fiduciary exercise ordinary prudence, diversify and adhere to modern portfolio theory. No specific process or quantitative measures are defined. The most common approaches to satisfying the fiduciary's need for quantitative specificity, in one form or another, reduce to the mean-variance (risk-reward) metrics that underpin the Capital Asset Pricing Model ("CAPM"). Though widely employed, the array of risk adjusted performance measures such as the "Sharpe Ratio" and Morningstar's "Star" rating system provide only rankings and do not meet the Daubert judicial standard. The Supreme Court in the Daubert decision adopted the proposition that Scientific methodology should be "based on generating hypotheses and testing them to see if they can be falsified..." The "generated" hypotheses should be supported by an articulation of credible principles. There must be more than the ipse dixit of the proponent. Applying the mandate to the context of investment advice, the decision effectively requires that the tools of statistical inference be employed when offering opinion testimony as to the adequacy of an investment manager's performance or process. The solution presented in this paper is to reduce the manager's decision process to a binomial model and then perform a "back test." The "back testing" results are in turn then used to accept or reject the hypothesis that the manager or strategy is more than random and will likely, at some level of statistical significance, outperform the appropriate benchmark. To illustrate the technique and provide operational specificity, a naïve "best performer" strategy is "back tested." Over the ten year period studied the strategy has a 20% annual return. Analysis of the illustrative "best performer" strategy concludes that the estimated success rate is between 51% and 68% with a 93% probability, rejecting the random hypothesis. An articulation of the causal mechanism is discussed. In the binomial model success is defined as the strategy out performing the benchmark in a sample trading period. Mapping the manager's performance to a binomial decision process admits the panoply of "runs" tests and non parametric analysis available for the binomial model. The results can then be used to monitor the consistency of future performance."

14. **Clemons, Morgan, Harmonization vs. Demarcation: The Problems with a Broker Fiduciary Duty and the Benefits of the Merrill Rule (Dec. 19, 2009). Available at http://lawlib.wlu.edu/works/661-1.pdf.** Summary: "Imposing a fiduciary duty on brokers is not the allusive solution. Investors need to differentiate better between the duties of an investment adviser to his client and the duties of a broker to his client. Once this confusion concerning the duties of brokers and investment advisers is quelled, American investors will not be taken advantage of … The best solution for the investment industry for demarcation purposes would be to readopt the Merrill Rule of 2005."

15. **Cooter, Robert, and Freedman, Bradley, An Economic Model of the Fiduciary's Duty of Loyalty (1991).** An interesting view of the fiduciary duty of loyalty, tracing roots of the duty. Discusses self-dealing and the concept of "informed consent." Available at http://works.bepress.com/cgi/viewcontent.cgi?article=1055&context=robert_cooter

16. **DeMott, Deborah, Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences. Arizona Law Review, Vol. 48, 2006; Duke Law School Legal Studies Paper No. 113. Available at SSRN: http://ssrn.com/abstract=924776.** Professor DeMott served as the Reporter for the Restatement of the Law, Agency. "This paper covers three distinct but inter-related topics. These are: (1) the functions served by characterizing breach of fiduciary duty as a tort; (2) how best to define a fiduciary relationship in light of the range of situations in which one party is subject to a fiduciary duty to another; and (3) implications and questions that follow from the fact that many contemporary fiduciaries are organizations that assign individual employees or other agents to act on behalf of clients to whom the organization itself owes fiduciary duties. The paper begins by examining how breach of fiduciary duty is characterized by Restatement (Second) of Torts. In Section 874, Restatement (Second) treats breach of fiduciary duty as a tort that subjects a fiduciary to liability to the beneficiary for harm caused by the breach. The definition of a "fiduciary" relation articulated in Section 874 is both under- and over-inclusive, leaving out some well-established categories of fiduciaries but also potentially encompassing many non-fiduciary relationships. Nonetheless, the paper argues that it's useful to situate breach of fiduciary duty within tort law to anchor the basic availability of damages for harm caused by the breach. This anchoring has practical as

well as theoretical significance because some breaches of fiduciary duty, although productive of loss to the beneficiary, generate no identifiable profit for the fiduciary to which restitutionary remedies might apply. The paper then articulates a proposed approach for defining when a relationship is fiduciary in character. This is whether the plaintiff (or claimed beneficiary of a fiduciary duty) could justifiably expect of loyal conduct on the part of an actor. Breach of fiduciary duty then turns on whether the actor's conduct contravened that expectation. This test turns on what's distinctive about fiduciary duties, as opposed to the wider range of duties recognized by the law. The paper uses this approach as a framework to evaluate a series of recent cases that assess whether one party owed another a fiduciary duty when the parties' relationship was not one conventionally characterized as fiduciary, such as agent-principal, trustee-trust beneficiary, director-corporation, or lawyer-client. Within this framework, the paper articulates characteristics that define patterns of relationships in which expectations of loyalty may be justified. Finally, the paper explores implications of the fact that many contemporary actors who are subject - on one basis or another - to fiduciary duties are themselves corporations or other legally-constituted organizations. On the ground level, the conduct that constitutes a breach of fiduciary duty is conduct of an employee or other agent of the organization. The paper examines the bases on which the agent's wrongful conduct may be attributed to the organization for purposes of imposing liability and awarding remedies. It is necessary to consider principles of agency law and restitution, in addition to tort law, to reach a complete answer."

17. **DeMott, Deborah, Disloyal Agents. Alabama Law Review, Vol. 58, No. 4, Spring 2007; Duke Law School Legal Studies Paper No. 146. Available at SSRN: http://ssrn.com/abstract=963193.** Abstract: "This paper examines the consequences of an agent's breach of the fiduciary duty of loyalty. These consequences are underexplored in academic literature, in contrast to rationales for fiduciary duties more generally. The consequences of an agent's disloyalty are, moreover, not uniform across jurisdictions. The paper begins by differentiating between the meaning and consequences that the law ascribes to agency and its meaning in other academic disciplines, including economics and philosophy. It then considers the extent to which principles derived from contract and tort law can account for the consequences that courts assign to agents' disloyal conduct and concludes that a more complex doctrinal and normative vocabulary is required. The paper focuses more specifically on remedies available to a principal when an agent acts disloyally, then turns to an agent's duty to disclose prior misconduct to the principal and then to the impact of disloyalty on contractual provisions and to the consequence for organizations that carry out agency functions when employees of the organization indulge in self-interested fiduciary transgressions. These specific topics are addressed (often with divergent outcomes) by recent or well-known cases and provide good vehicles for analysis of the implications and limitations of more general questions about the nature and function of the fiduciary of loyalty. In general, the remedies available to a principal when an agent is disloyal are varied, distinctive, and in some respects ferocious, all qualities the paper argues are helpful in understanding the theoretical and functional position of fiduciary duties of loyalty."

18. **Diermeier, Jeff, Remember the Age and Purpose of Our Profession. Financial Analysts Journal, Vol. 61, No. 6, pp. 78-79, November/December 2005. Abstract only available at SSRN: http://ssrn.com/abstract=872787.** In a paper directed at financial (stock) analysts, abstract: "We should remember two aspects about our profession. The first is that we began as an honest and noble profession that adhered to the concept of fiduciary. The second is that we are a young profession and should not accept our history as the norm or as predictive of the future."

19. **Dibadj, Reza, The Misguided Transformation of Loyalty into Contract. Tulsa Law Review (Symposium Issue), Vol. 41, p. 451, 2006; Univ. of San Francisco Law Research Paper No. 2009-25. Available at SSRN: http://ssrn.com/abstract=874845.** Abstract: "The law of unincorporated associations is engaged in a misguided march in transforming the duty of loyalty into a contractarian construct. This Article argues that these developments reflect doctrinal confusion, outworn economics, and weak policy. The Article begins by tracing the evolution of the duty of loyalty in the law of unincorporated associations. It begins with a discussion of the struggle between contractarianism and fiduciary duty in the uniform laws promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). It then shifts gears to the more squarely contractarian, and likely highly influential, Delaware statutes. The current state of the doctrine suggests that precious little is left of the duty of loyalty. The article then shifts to showing that the transformation is troublesome along three dimensions. First, the move conflates fiduciary with contractual duties, notably weak and nebulous notions of good faith. Second, it deploys outworn economic concepts reminiscent of the neoclassical Chicago School. The economic justifications for contractarianism are based on facile assumptions applied in a static manner; they do not represent real humans interacting in real institutions over time. Third, the move from loyalty to contract brings with it a host of public policy problems: it tries to toss out a well developed legal tradition, downplays the role of trust and morality, and ignores the role positive law can play in shaping norms. In the end, the rise of contractarianism reflects a step

backward to nineteenth-century legal formalism and presents the risk that its faulty precepts may spread further into corporate law."

20. **Easterbrook, Frank H.; Fischel, Daniel R., Contract and Fiduciary Duty 36 J.L. & Econ. 425 (1993**). Available for purchase via Google Scholar search. Professor Easterbrook was one of the leaders of the movement which cast fiduciary duties as "default rules" which could be modified by contract of the parties. Since this movement, there have been many criticisms of this approach, including those of Scott Fitzgibbon, Fiduciary Duties are Not Contracts (1999) and many others. The tension between "freedom of contract" and the view that certain fiduciary duties, imposed by law on public policy considerations, are non-waivable, underlies much of the disputes on the application of fiduciary standards of conduct today.

21. **Fein, Melanie L. , The Fiduciary Duty of Securities Brokers and Investment Advisers: Sole Interest or Best Interest? An Analysis of the Administration's Proposal (August 29, 2009). Available at SSRN: http://ssrn.com/abstract=1646938.** Abstract: "An analysis of the fiduciary duty standard for securities brokers as proposed by the Obama Administration. The paper compares the "sole interest" standard applicable to trustees with the "best interest" standard generally applicable to other fiduciaries. The paper recommends that the Securities and Exchange Commission be given flexibility to determine the fiduciary standard applicable to brokers."

22. **Fein, Melanie L. , Financial Institutions as Fiduciaries: Managing Conflicts of Interest in the Wealth Management Business (October 6, 2006). Available at SSRN: http://ssrn.com/abstract=1646972.** Abstract: "This paper examines the different fiduciary and regulatory standards applicable to bank trust departments, securities brokers, and investment advisers and suggests guidelines for managing conflicts of interest in the wealth management business."

23. **Fi360.** Fi360 is an important source for the application of fiduciary law to the delivery of investment advice, particularly with respect to its development of a "prudent process" for investment product selection. Several publications are available at www.fi360.com, including but not limited to:

    a. **Prudent Practices for Investment Advisors.** This booklet presents a "timeless and flexible process for successful investment management decision making that is specifically tailored for Investment Advisors-professionals who provide comprehensive and continuous investment advice."

    b. **Articles Regarding Fiduciary Responsibility** – from leading industry publications. Available at http://www.fi360.com/main/resources_articles_fiduciary.jsp.

24. **Fanto, James A., The Continuing Need for Broker-Dealer Professionalism in IPOs. Ohio State Entrepreneurial Business Law Journal, Vol. 2, No. 2, pp. 679-701, 2008; Brooklyn Law School, Legal Studies Paper No. 104. Available at SSRN: http://ssrn.com/abstract=1114222.** Abstract: "In this essay, I contend that the IPO process and its abuses of the late 1990s reveal a fundamental problem in the brokerage industry. The abuses show the culmination of a concerted training in business, business schools, and even law schools and, more generally, in society: the acceptance of self-interested profit maximization as the sole goal for business and financial activities. I first review the IPO abuses from the perspective of individual self-interest and the group enhancement of it to show the fundamental motivation of the abuses. I then examine the regulatory responses to these abuses in order to point out their incompleteness. I argue that the reforms were incomplete because they established limited broker-dealer professionalism, focusing only on research analysts, which perversely encouraged those not directly touched to continue to engage in self-interested conduct. I also contend that this absence of full broker-dealer professionalism can lead to reputational risk that threatens these financial institutions and even the stability of the securities markets. I thus suggest that the professional reform for broker-dealers must be wide-ranging and must reach into the training of future bankers and brokers in the business schools. However, I also offer a practical, stopgap reform suggestion that can help alleviate reputational risk."

25. **Fisch, Jill E., The Analyst as Fiduciary: A Misguided Quest for Analyst Independence? (September 2006). Available at SSRN: http://ssrn.com/abstract=934850.** Abstract: "The role of the research analyst has come under extensive scrutiny. Analyst conflicts of interest have been blamed for distorting analyst reports and recommendations, and undermining the analyst's role as an information conduit for investors and a gatekeeper of the integrity of the securities markets. The regulatory response has been a call for mandated analyst independence from conflicts of interest, particularly those relating to investment banking. This Article challenges the regulatory goal of analyst independence. The Article questions the extent to which so-called analyst business relationships are inconsistent with their client obligations and the degree to which the supposed conflicts reduce the quality of analyst

information. The Article also demonstrates that the independence requirement can only be predicated on a conception of the analyst a fiduciary - a conception that is inconsistent with the nature of the research industry. More importantly, the Article argues that the costs of imposing fiduciary status on research analysts are too high. By removing viable sources of funding analyst research, mandated independence is likely to be counter-productive and to reduce market efficiency. As an alternative, the Article identifies several more limited regulatory changes that are likely to increase the value of analyst research to the market while maintaining its financial viability."

26. **Fitzgibbon, Scott Thomas, Fiduciary Relationships Are Not Contracts. Marquette Law Review, Vol. 82, pp. 303-354, 1999; Boston College Law School Research Paper No. 1999-06. Available at SSRN: http://ssrn.com/abstract=780384.** Abstract: "This Article, which explores the nature of fiduciary relationships, demonstrates that these relationships arise and function in ways that are alien to contractualist thought. While the relationships may, like marriage relationships, be part of the same genus, they are indeed members of a different species. Fiduciary relationships differ both in doctrinal structure and ethical basis. However, some contractualist writing denies one or the other of these two propostitions. This Article, therefore, aims to establish that both are in fact true. The author presents that fiduciary relationships have value and serve purposes that are largely unknown to contractualists. Furthermore, these relationships facilitate the doing of justice, promote virtue, and enhance freedom in a distinctive way."

27. **Forell, Caroline Anne and Sortun, Anna, The Tort of Betrayal of Trust. University of Michigan Journal of Law Reform, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1112073.** Abstract: "Fiduciary betrayal is a serious harm. When the fiduciary is a doctor or a lawyer, and the entrustor is a patient or client, this harm frequently goes unremedied. Betrayals arise out of disloyalty and conflicts of interest where the lawyer or doctor puts his or her interest above that of his or her client or patient. It causes dignitary harm that is different than the harm flowing from negligent malpractice. Nevertheless, courts, concerned with overcompensation and double damages, have for the most part refused to allow a separate claim for betrayal. In this Article we assert that betrayal deserves a remedy and propose a new statutory tort with limits on the available money damages. We begin by explaining the importance of trust and the inadequacy of common law remedies such as malpractice, lack of informed consent, and breach of fiduciary duty. We then set out a statutorily-limited monetary proposal and illustrate how this remedy would work by examining a series of cases in which the courts have struggled to address betrayals and then applying our statutory tort to the facts of those cases. Our proposed statutory tort offers a solution to the current failure to hold professionals accountable for disloyalty that will provide justice to those who are injured by the exploitive self-dealing while setting clear parameters that address judicial concerns of runaway juries and overlap with other tort claims."

28. **Frankel, Tamar, Fiduciary Duties as Default Rules, 74 Oregon Law Review 1209 (1995), available at http://www.tamarfrankel.com/support-files/fiduciary-duties.pdf.** Summary: "In recent years innovative legal scholars have adopted a view of fiduciary relationships as contracts. ... The starting point of the fiduciary relationship is the vesting in a fiduciary someone else's property or power for a defined purpose (to enable the fiduciary to perform his service to the entrustor). ... When the parties are sophisticated, however, courts are likely to refrain from examining the content of the transactions and uphold consents, as tort cases have demonstrated. ... However, termination is less valuable for entrustors than such a remedy is for contract parties, because under fiduciary law each party to a fiduciary relationship, except the beneficiary of a trust, can always terminate the relationship. ... Default Rules in Public Fiduciary Law ... Both private and public fiduciary relationships deal with entrusted power or property, and both involve problems that fiduciary law is designed to solve. ... One is to eliminate fiduciary law altogether. ... A. Eliminating the Fiduciary Law ... If, as I suggest, the model of fiduciary law will be erased in the public fiduciary context, the cost to society will be quite high. ... Finally, at this point it seems clear that the main problem with public fiduciary law is the absence of a reliable entity to consent to conflict of interest transactions. ... Make All Public Fiduciary Rules Mandatory ...."

29. **Frankel, Tamar, Comment, Regulation and Investors' Trust in the Securities Markets (September 23, 2002). Brooklyn Law Review, Forthcoming. Available at SSRN: http://ssrn.com/abstract=333340.** Abstract: "This comment focuses on the relationship between investors' trust and government market regulation. The costs of regulation may be a barrier to issuers; however, when market prices rise, government regulation relaxes, and when prices fall, regulation becomes stricter. Regulated financial institutions benefit from regulation, by offering issuers and investors government support in their efforts to gain investors' trust and for other reasons. Regulation may be less meaningful to investors during rising markets and more meaningful after a crash because investors use prices as a surrogate for market integrity. Investors do not have appeared to have fled the markets in the last thirty years as

they did in the 1930s, possibly because some have been locked into investments for tax benefits, and some have fled the equity markets for banks. Thus, investors do not react to falling prices as they did in the past. If investors' trust wanes, a change to a corporate culture of honesty may restore it."

30. **Gedicks, Frederick Mark, Suitability Claims and Purchases of Unrecommended Securities: a Theory of Broker-Dealer Liability. 37 Arizona State Law Journal 535-88 (2005). Available at SSRN: http://ssrn.com/abstract=607322.** Abstract: "It is well-established that full-service broker-dealers have an obligation to recommend to their customers only the purchase of securities that are "suitable" to the customer's investment objectives and financial situation. There seems to be widespread agreement, however, that a broker-dealer cannot incur liability on suitability grounds unless it first recommends a securities purchase to a customer. Accordingly, discount broker-dealers argue they are necessarily immune from liability on suitability claims because they act as "order clerks" who merely execute unsolicited customer orders; online discounters have adopted the same position. Full-service broker-dealers similarly argue that although they owe a suitability obligation for recommended purchases, they cannot be liable for a customer's purchase of an unsuitable security when the broker-dealer merely executed the customer's purchase order without having recommended or otherwise encouraged the order. This Article argues that it was judicial application of the suitability obligation largely in the context of customer disputes with full-service broker-dealers that led to establishment of the recommendation as a condition precedent to suitability liability. The shift to arbitration in the late 1980s, which undermined judicially developed legal limitations on suitability liability, combined with the further shift to unbundled online order-execution in the early 1990s, which significantly reduced the incidence of customer interaction with account executives, eliminated factors which undergirded the recommendation as a condition precedent to suitability liability, and opened the door to liability on suitability grounds for unrecommended customer purchases. This Article develops a theory of broker-dealer liability for suitability claims on unrecommended purchases by inexperienced and unsophisticated customers. Since the market turn early 2001, it has become clear that many individual investors lack basic knowledge about investing, and regularly incur substantial losses due to lack of diversification, speculation, and over-leveraging. This Article argues that the common law duty of an agent to provide information to his or her principal justifies imposition on brokers-dealers of a "duty to warn" inexperienced and unsophisticated customers when their trades are inconsistent with their investment objectives or other aspects of their personal financial situation of which their broker-dealer is aware. The Article also suggests that the agent's duty to give information might support imposition on broker-dealers of a "duty to rescue" in certain limited circumstances when such customers persist in financially destructive or otherwise irrational trading that entails no reasonable prospect of investment profits and has already resulted in large losses. Unlike common law agents, broker-dealers should not be permitted to contract out of this duty, because of the general statutory policy of the securities laws against waiver of rights under such laws, and because of specific policies promoting investor protection and market efficiency that would be undermined by waiver. The Article concludes with the suggestion that in light of the looming social security funding crisis that will require greater reliance on private savings to fund retirement, a general broker-dealer duty to warn inexperienced and unsophisticated investors of the unsuitability of unrecommended purchases is sound policy."

31. **Georgakopoulos, Nicholas L., Meinhard v. Salmon and the Economics of Honor (April 1998). Available at SSRN: http://ssrn.com/abstract=81788.** Justice Cardoza's opinion is nearly a mandatory read for law school students as they commence their study of fiduciary law concepts. The abstract to this paper notes: "The classic corporate law case Meinhard v. Salmon is a gem of rhetoric and morality. This article argues that under its polished surface lies one more Cardozo opinion with superb economic ramifications. The broad fiduciary obligations that Cardozo champions have numerous benefits: (i) They allow the financing of projects that create primarily remote value, (ii) they mitigate managerial risk-aversion, (iii) they further the social desirability of financing decisions, and (iv) they induce desirable managerial incentives."

32. **Gross, Jill and Black, Barbara, Perceptions of Fairness of Securities Arbitration: An Empirical Study (February 6, 2008). U of Cincinnati Public Law Research Paper No. 08-01. Available at SSRN: http://ssrn.com/abstract=1090969.** Abstract: "This Report to the Securities Industry Conference on Arbitration (SICA) documents the results of the authors' empirical study, through a one-time mailed survey, of survey participants' perceptions of fairness of securities Self-Regulatory Organization (SRO) arbitrations involving customers. The survey was designed to assess participants' perceptions of the: (1) fairness of the SRO arbitration process; (2) competence of arbitrators to resolve investors' disputes with their broker-dealers; (3) fairness of SRO arbitration as compared to their perceptions of fairness in securities litigation in similar disputes; and (4) fairness of the outcome of arbitrations. We conclude that survey participants have divided views about the fairness of securities arbitration based on their most recent experience with the process. When asked about their overall

impressions of securities arbitration, survey participants were more negative. For almost every question in the survey, statistical analysis reveals that customers have a more negative perception of the process than non-customers. Part I of this report provides an Executive Summary of our findings. Part II details the Background of the survey's development. Part III describes the Methodologies and Procedures we implemented to conduct the survey. Part IV identifies the Error Structure potentially contained in our methodologies. Part V contains our Findings as to each survey question, including, for many questions, breakdowns that isolate responses of customers only and compares them to all other categories of survey participants, as well as comparisons of regional differences among survey participants. We conclude in Part VI by noting the complexities of the findings."

33. **Gross, Jill and Black, Barbara, When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration (April 15, 2009). Journal of Dispute Resolution, Vol. 2008, p. 349, 2008; 3rd Annual Conference on Empirical Legal Studies Paper; U of Cincinnati Public Law Research Paper No. 09-12. Available at SSRN: http://ssrn.com/abstract=1118430.** Abstract: "Arbitration in securities industry-sponsored forums is the primary mechanism to resolve disputes between investors and their brokerage firms. Because it is mandatory, participants debate its fairness, and Congress has introduced legislation to ban pre-dispute arbitration clauses in customer agreements. Missing from the debate has been empirical research of perceptions of fairness by the participants, especially investors. To fill that gap, we mailed 25,000 surveys to participants in recent securities arbitrations involving customers to learn their views of the process. The article first details the survey's background, explains the importance of surveying perceptions of fairness, and describes our methodologies, procedures, and survey error structure. We then present our findings, including our primary conclusions that (1) investors have a far more negative perception of securities arbitration than all other participants, (2) investors have a strong negative perception of the bias of arbitrators, and (3) investors lack knowledge of the securities arbitration process. We also offer several explanations for these negative perceptions. We conclude that customers' negative perceptions transform the reality faced by policy-makers and mandate reform of the process, including the elimination of the industry arbitrator requirement and further public deliberation on the value of the explained award."

34. **Hooker, John, Professional Ethics: Does It Matter Which Hat We Wear?** While not an article about financial services, the article explores that nature of a "profession" particularly as it relates to conflicting duties, and asks: "If professional obligation rests on the duty to keep a promise, and conflicts derive from promises that conflict with other duties, it is essential to understand why one should keep a promise." A link to his speech, and the working paper, can be found at http://tepper.cmu.edu/alumni/lifelong-learning/speaker-presentations/john-hooker-keynote-talk-on-professional-ethics-does-it-matter-which-hat-we-wear/index.aspx .

35. **Johnson, Alex M., "An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine" (January 9, 2007). bepress Legal Series. Working Paper 1933. Available at http://law.bepress.com/expresso/eps/1933.** While not discussing securities law, this article provides a good overview of the doctrine of caveat emptor in arms-length relationships. From the introduction: "[T]his Article examines the evolution of the caveat emptor doctrine from its Common Law origins to its current status in American law. In so doing, this historical analysis tests several economic theories and attempts to analyze same in light of the evolution of the doctrine. By using economic theory regarding when material facts should be disclosed, I hope to demonstrate that the original formulation of caveat emptor at Common Law was the correct and efficient rule for the parties at that time. Conversely, I demonstrate that the exceptions which have become associated with the caveat emptor rule-which have riddled the rule-represent attempts by the courts to align disclosure requirements to parties to a transaction which bears little resemblance to the vendor-vendee transaction that originated at Common Law in agrarian England."

36. **Kirsch, Clifford E., and Bruce W. Maisel, A Fiduciary Duty for Broker-Dealers - The Stage is Set. What You Should Be Doing Now!, ALI-ABA Topical Course Outline (June 30, 2010), available for $19 fee at http://ali-aba.org/index.cfm?fuseaction=courses.course&course_code=TSRP16&contenttype=6**. From the introduction: "This outline looks at legislative and related proposals calling for a fiduciary duty to be imposed on broker-dealers and suggest possible implications to product issuers. We begin with a chronology detailing the convergence of broker-dealer and investment advisory services and the regulatory and legislative response. We then look at the current standard of care imposed on broker-dealers and investment advisers and then we review the current proposals. We conclude with a discussion of potential practical implications."

37. **Kleinberger, Daniel S., Seven Points to Explain Why the Law Ought Not Allow the Elimination of Fiduciary Duty Within Closely Held Businesses - Cardozo is Dead: We Have Killed Him. William Mitchell Legal Studies Research Paper No. 61. Available at SSRN: http://ssrn.com/abstract=948234**. An interesting take on whether contracting

out of fiduciary duties should be permitted, in the closely held business context. Abstract: "Prepared as part of the author's work as co-reporter for the Revised Uniform Limited Liability Company Act, this essay argues against legislation that empowers private agreements to eliminate fiduciary duty within a business organization. The essay considers: (i) the venerable role of fiduciary duty within business organizations and the limited predictive powers of those urging radical reform; (ii) the absence of prescience in contract drafters; (iii) the strict construction function of fiduciary law; (iv) the inevitable and inappropriate pressure that elimination would put on the obligation of good faith and fair dealing; (v) the differences in remedy available for fiduciary claims as distinguished from contract claims; (vi) the difference between drafting law for Delaware and drafting a uniform act; and (vii) reasons that public corporation law is different from LLC law and why Delaware law should not dominate the latter context."

38. **Langevoort, Donald C., Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation. Northwestern University Law Review, Forthcoming. Available at SSRN: http://ssrn.com/abstract=305241.** Abstract: "Recent advances in behavioral finance and economics have offered fascinating, albeit tentative, suggestions that may be useful to securities law policy-makers, especially in the aftermath of Enron and similar scandals. Because of the tentative nature of the findings, however, strong incorporation seems premature. After reviewing some of the literature, I look at three different problem areas - internet fraud, selective disclosure and the measurement of damages in class actions - where this literature might at least provoke creative ideas on how to respond, even if it doesn't generate a clear-cut solution."

39. **Langevoort, Donald C., Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and their Sophisticated Customers. California Law Review, Vol. 83, Issue 3 (1996). Available at SSRN: http://ssrn.com/abstract=10121.** Abstract: "Disputes involving the sale of risky securities to apparently sophisticated customers arise frequently, and pose vexing legal problems. This article draws from the literature on psychology and economics to develop a rich descriptive account of investment decision-making by both individual and institutional investors, and analyzes the temptations that brokers face to exploit individual cognitive and motivational slack and (in institutional settings) moral hazard problems that may also be subject to denial and rationalization. It then turns to normative questions involving issues such as the treatment of brokers as fiduciaries, the duty to read, and the nature of the brokers' risk disclosure obligations."

40. **Lemke, Thomas P., and Stone, Steven W., The Madoff 'Opportunity': Harmonizing the Overarching Standard of Care for Financial Professionals Who Give Investment Advice. Wall Street Lawyer, Vol. 13, Issue 6 (June 2009). Available at http://www.morganlewis.com/pubs/WSL_TheMadoffOpportunity_June2009.pdf.** The authors compare the standards of care of BDs and RIAs, propose a uniform standard of care "grounded on fiduciary principles, that is focused on what is in the investor's best interests," and discuss areas which of regulatory focus which may require harmonization.

41. **Leslie, Melanie B., In Defense of the No Further Inquiry Rule: A Response to Professor Langbein. William & Mary Law Review, Vol. 47, 2005; Cardozo Legal Studies Research Paper No. 135. Available at SSRN: http://ssrn.com/abstract=837764.** Abstract: "In an article just published in the Yale Law Journal, Professor John Langbein argues for abolition of the "no-further-inquiry" rule. This rule has, for close to two hundred years, prohibited a trustee from engaging personally in transactions with the trust, unless the trustee obtains advance approval from a court or beneficiaries. Langbein contends that the rule deters trustee behavior that benefits trust beneficiaries, and urges substitution of a "best interest" defense that mirrors rules currently applied to corporate fiduciaries. Langbein's analysis, however, fails to recognize that trustees of private express trusts face fewer incentives to act in the financial interest of trust beneficiaries than do other parties who face conflicts of interest. Trust beneficiaries are typically poor monitors of trustee behavior; beneficiaries have few opportunities to exit from the trust relationship; and market forces play a much more limited role in disciplining trustee behavior than they do in the case of the corporate fiduciary. The no-further-inquiry rule, with its bright-line prohibition and its advance approval requirement, compensates for the unique vulnerability of trust beneficiaries. The rule responds to the significant prospect of underdeterrence. This problem is inadequately addressed by a "best interest" defense, and is far more significant than the overdeterrence problem on which Langbein focuses. Judicial and legislative recognition of limited exceptions to the no-further-inquiry rule provides no evidence that the rule has outlived its usefulness. Instead, some of the exceptions are entirely consistent with the rule's rationale, while more recent exceptions reflect the lobbying power of the banking industry, not the inefficiency of the long-established rule."

42. **Leslie, Melanie B., Common Law, Common Sense: Fiduciary Standards and Trustee Identity. Cardozo Law Review, Vol. 27, 2006; Cardozo Legal Studies Research Paper No. 136. Available at SSRN: http://ssrn.com/abstract=837804**. Abstract: "The past twenty years have seen significant changes in the law

governing trustees' fiduciary duties. Though fiduciary duty law is a common law creation, recent changes are not a result of common-law evolution, but legislative action. The push to codify trust law, including fiduciary duties, has come from a few sources, including academics, who have argued that trust law should be more uniform, and banking institutions, who have pushed for legislation to ease the burdens of trust management. In some significant respects, legislative changes to fiduciary duties have not improved upon the common law. In fact, a few important statutes have replaced theoretically sound common law standards with rules that undermine the historical objectives of trust law. In some instances, scholars have justified changes by claiming that they are necessary to protect the non-professional, poorly counseled trustee. But, by and large, it is the large, institutional trustees who have benefited - significantly - from the statutory changes in the rules. This article argues that recent statutes would be much improved if they differentiated between professional and non-professional trustees. There are critical distinctions between professional and non-professionals: differences in settlor's expectations and objectives, negotiation settings, monitoring costs and the trustee's response to liability rules. These distinctions justify having different fiduciary standards for different types of trustees. Courts, with their case specific approach to rules, intuitively understand that the identity of the trustee should make a difference in assessing liability for breach of fiduciary duty. Either expressly or implicitly, courts gradually have developed two sets of rules. Thus, changing fiduciary standards to protect the non-professional was never really necessary."

43. **Loss, Louis, Speech, The SEC and the Broker-Dealer (1948), available at http://www.sec.gov/news/speech/1948/031648loss.pdf.** The Arleen Hughes case is discussed at length in this address by the SEC's former Chief Counsel, and contrasted with the Charles Hughes & Co. case. Mr. Loss opined: "[W]hen one is engaged as agent to act on behalf of another, the law requires him to do just that. He must not bring his own interests into conflict with his client's. If he does, he must explain in detail what his own self-interest in the transaction is in order to give his client an opportunity to make up his own mind whether to employ an agent who is riding two horses. This requirement has nothing to do with good or bad motive. In this kind of situation the law does not require proof of actual abuse. The law guards against the potentiality of abuse which is inherent in a situation presenting conflicts between self-interest and loyalty to principal or client. As the Supreme Court said a hundred years ago, the law "acts not on the possibility, that, in some cases the sense of duty may prevail over the motive of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty." Or, as an eloquent Tennessee jurist put it before the Civil War, the doctrine "has its foundation, not so much in the commission of actual fraud, but in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil, and that caused the announcement of the infallible truth, that 'a man cannot 'serve two masters.'" In discussing the facts and circumstances test regarding the application of fiduciary duties, the SEC's Chief Counsel goes on to state: "Even more typically, of course, the customer does not come in off the street but is actively solicited by a salesman, who will almost inevitably render some advice as an incident to his selling activities, and who may go further to the point where he instills in the customer such a degree of confidence in himself and reliance upon his advice that the customer clearly feels -- and the salesman knows the customer feels -- that the salesman is acting in the customer's interest. When you have gotten to that point, you have nothing resembling an arm's-length principal transaction regardless of the form of the confirmation. You have what is in effect and in law a fiduciary relationship. Whether or not it is technically an agency relationship does not matter, because an agent is simply one type of fiduciary and the obligations in this respect are the same."

44. **Mitnick, Barry M., The Theory of Agency: The Policing 'Paradox' and Regulatory Behavior. Public Choice, Vol. 24, Winter 1975. Available at SSRN: http://ssrn.com/abstract=1021143.** Abstract: "This was the first article explicitly on the theory of agency published in a regular, i.e., nonproceedings, issue of a journal in social science. The paper presents a fiduciary function model of policing in agency, with an application to attempts to influence regulatory performance by policing the behavior of regulators. Four types of agents - the pure fiduciary, lexical fiduciary, lexical self-interest agent, and pure self-interest agents - are identified. The paper notes that the rational principal would not police his agent if he did not expect a net gain from the attempt; this is one of the key logics of agency theory. The paper notes the effects of the fiduciary norm in economizing on specification and policing (agency) costs. An apparent paradox can occur when policing the agent appears to lower rather than increase the return to the principal. In other words, agent fidelity does not necessarily correlate with the level of principal return. In the context of public regulation, this can take the form of producing a more honest or better-behaved regulatory agent in a government that produces a poorer return to the public interest."

45. **Pargendler, Mariana, Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered. Tulane Law Review, Vol. 82, 2008. Available at SSRN: http://ssrn.com/abstract=1008400.** Abstract: "This article offers a novel account

of the doctrines of good faith and fiduciary duties under a functional perspective that reconciles the theoretical contributions of the law-and-economics scholarship with the actual application of the law. The traditional doctrinal statements on this matter assert that fiduciary duties impose high standards of behavior on the parties named fiduciaries, while the duty of good faith is highly context-specific and constantly escapes definition. Law-and-economics scholars argue that although good faith and fiduciary duties differ in the strength of the obligations imposed, a continuum exists between these different doctrines. In this view, both share the same nature as contract gap-fillers that help promote efficiency by providing the parties with the terms they would have contracted for in a world of zero transaction costs and unlimited foresight. This article adds to the conventional wisdom and demonstrates that good faith and fiduciary duties embody distinct gap-filling methods. While fiduciary duties are untailored defaults that supply the term that most parties in a certain fiduciary category would have wanted, the doctrine of good faith mandates the application of a tailored gap-filling method that fills in contractual gaps with the terms that the parties before the court would have contracted for. I show how the hidden tension between a tailored and an untailored gap-filling method sheds light on the outcome and the dissenting opinions of prominent fiduciary law cases. Finally, I argue that there is reason to believe that the existence of these different gap-filling methods represented by the doctrines of good faith and fiduciary duties is not only descriptively accurate, but also normatively desirable."

46. **Prentice, Robert A., Perspectives: Ethical Decision Making: More Needed than Good Intentions. Financial Analysts Journal, Vol. 63, No. 6, 2007. Available at SSRN: http://ssrn.com/abstract=1070836.** Abstract: "The flourishing field of behavioral finance indicates that people often do not engage in optimal decision making when investing. The same cognitive biases and mental heuristics that cause suboptimal investing may also cause people to make unethical decisions. For that reason, good intentions are necessary, but they are not sufficient for finance professionals who desire to act ethically. Insights presented in this article can assist the well-intentioned to do the right thing in difficult circumstances."

47. **Rhoades, Ron A., How the Large Modern Financial Services Firm Can Better Compete as Financial Advisors and Clients Migrate to a Fiduciary Business Model, including as Exhibit: Understanding the Fiduciary Standard of Conduct for Investment Advisers and Financial Planners, A Summary of Key Principles. Available at http://fpcompliance.com/EmbraceFiduciaryBusinessModel20091201.pdf.** From the article's introduction: "In this outline, I review the major developments of the last several decades affecting the provision of financial and investment advisory services. I then suggest ways that a forward-thinking, large financial services firm could embrace a bona fide fiduciary standard of conduct – and use it to their advantage to more effectively compete against the smaller registered investment adviser (RIA) firms. Larger firms possess the opportunity to gain, rather than lose, market share and increased shareholder value, if effective long-term business strategies are embraced."

48. **Rhoades, Ron A., Chapters 1-8, draft of book, Financial Planners: Fiduciary Duties and Compliance (2009).** Still under development, this book explores fiduciary duties as imposed on the delivery of financial planning and investment advice, primarily from the perspective of state common law and the Investment Advisers Act. Draft chapters, as revised from time to time, are available upon request by any scholar or policy maker to rrhoades@josephcapital.com.

    Chapter 1. The Importance of Understanding Fiduciary Duties
    Chapter 2. Arms-Length vs. Fiduciary Relationships
    Chapter 3. Why is Fiduciary Status Imposed upon Financial Planners?
    Chapter 4. When is Fiduciary Status Imposed upon Financial Planners? (also includes discussion of state common law imposition of fiduciary status in relationships based upon trust and confidence, with abstracts of cases)
    Chapter 5. Industry Associations and their Codes of Ethics: Effect of Your Membership on Your Standard of Care
    Chapter 6. Overview of the Three Major Fiduciary Duties
    Chapter 7. Exploring the Fiduciary Duty of Loyalty
    Chapter 8. Conflicts of Interest as to Compensation: Reconciling Industry Practices with Fiduciary Duties

49. **Rhoades, Ron A., Managing Conflicts of Interest: The Limits of Disclosure and Informed Consent (2008). Available at http://www.fiduciarynow.com/ManagingConflictsofInterest.pdf.** In this memorandum exploring the inadequacy of disclosures as a means of leveling the playing field between fiduciary financial planners and investment advisers and their clients, Ron concludes: "The choice of one or more remedies to the persistent problem of the ineffectiveness of disclosures is a policy choice, and one which should be undertaken following an examination of the various costs and benefits which result for consumers of financial planning services, individual financial planners, and the profession of financial planning."

50. **Rhoades, Ron A., Proposed "Professional Standards of Conduct" for financial planners/investment advisers. Available at http://www.fiduciarynow.com/WhatAreTheSpecificFiduciaryDutiesofFinancialAdvisors.pdf.** Suggests specific "Professional Standards of Conduct" to provide greater guidance to investment advisers and financial planners as to the nature and scope of their fiduciary obligations.

51. **Ribstein, Larry E., The Structure of the Fiduciary Relationship (January 4, 2003). U Illinois Law & Economics Research Paper No. LE03-003. Available at SSRN: http://ssrn.com/abstract=397641.** Abstract: "Fiduciary duties might be said to grow out of a variety of relationships involving one party's exercise of some measure of control. Fiduciary duties therefore are "structural" in the sense that they arise from the structure of the parties' relationship rather than from the parties' individual attributes, such as ignorance and lack of sophistication. This view of fiduciary duties is bound with the contractual nature of fiduciary duties. Moreover, this article shows that there are significant costs in extending fiduciary duties beyond the specific situation in which they are most appropriate -- that involving clear separation of management powers and ownership. Extending fiduciary duties beyond this paradigm case increases litigation and contracting costs, decreases the effectiveness of owners' governance rights, and dilutes true fiduciaries' legal and extralegal incentives.")

52. **Rosen, Kenneth M., Fiduciaries. Alabama Law Review, Vol. 58, No. 1041, 2007; U of Alabama Public Law Research Paper No. 1000278. Available at SSRN: http://ssrn.com/abstract=1000278.** Abstract: "This essay reflects on the long and continuing significance of fiduciary duties in the law. Illustrating this significance are efforts to formalize fiduciary obligations over time and the appearance of fiduciary principles in additional areas of the law. The observations in this essay accompanied the Meador Lectures on Fiduciaries published in the Alabama Law Review. The lectures originally were presented at The University of Alabama School of Law by Professor Deborah DeMott of Duke School of Law, Professor Jill Fisch of Fordham Law School, and Professor John Langbein of Yale Law School."

53. **Sah, Sunita, Loewenstein, George F. and Cain, Daylian M., The Burden of Disclosure. IACM 23rd Annual Conference Paper. Available at SSRN: http://ssrn.com/abstract=1615025.** Abstract: "Although disclosure is often advanced as a potential solution to conflicts of interest, research on disclosure has found both positive and negative effects. We present 3 experiments that reveal a previously unrecognized perverse effect of disclosure: Disclosure of an advisor's conflict of interest can decrease advisees' trust in the advice while simultaneously increasing pressure to comply with that advice. This compliance pressure comes from two mechanisms: (1) recipients fear signaling distrust of the advisor, and (2) recipients feel an increased pressure to help their advisor when the advisor's personal interests have been disclosed. Hence, disclosure can place a burden on those it was supposed to protect. We also show that the increased pressure to comply effect is reduced if the disclosure is provided by an external source rather than directly from the advisor."

54. **Schwarcz, Steven L., Fiduciaries with Conflicting Obligations (May 26, 2010). Minnesota Law Review, Vol. 94, No. 6, p. 1867, 2010. Available at SSRN: http://ssrn.com/abstract=1441225.** Abstract: "This Article examines the dilemma of a fiduciary acting for parties who, as among themselves, have conflicting commercial interests - an inquiry fundamentally different from that of the traditional study of conflicts between fiduciaries and their beneficiaries. Existing legal principles do not fully capture this dilemma because agency law focuses primarily on an agent's duty to a given principal, not on conflicts among principals; trust law focuses primarily on gratuitous transfers; and commercial law generally addresses arm's length, not fiduciary, relationships. The dilemma has become critically important, however, as defaults increase in the multitude of conflicting securities (e.g., classes of securities of the same issuer having different priorities or sources of payment) that are typical of modern finance. A fiduciary, such as a trustee, acting for investors in these securities faces the difficult task of trying to understand and balance the respective obligations owed to conflicting classes and the risk of being sued no matter how the balancing is performed."

55. **Seiland, Robert P., Caveat Emptor! After All The Regulatory Hoopla, Securities Analysts Remain Conflicted On Wall Street (2003). Available at http://www.law.uiuc.edu/lrev/publications/2000s/2003/2003_2/Sieland.pdf.** From the abstract: "The author examines the common conflicts of interest between securities analysts, investment bankers, and the companies analysts evaluate and considers their implications. The author then analyzes several possible solutions. While a complete separation of analyst research from investment banking is overly broad, the author argues the current industry rules, regulations, and standards cannot be strengthened without potentially reducing the amount of analysis available. At the same time, the author argues that analysts affiliated with investment banks will inevitably be subject to some pressure to serve underwriters and companies rather than investors."

56. **Smith, D. Gordon, The Critical Resource Theory of Fiduciary Duty. Vanderbilt Law Review, Vol. 55, p. 1399. Available at SSRN: http://ssrn.com/abstract=339100.** Abstract: "This Article proposes a new theory to unify the law of fiduciary duty. The prevailing view holds that fiduciary law is atomistic, arising for varied reasons in established categories of cases (such as trustee-beneficiary and director-shareholder) and ad hoc in relationships where one person trusts another and becomes vulnerable to harm as a result. By contrast, the critical resource theory of fiduciary duty holds that every relationship properly designated as "fiduciary" conforms to the following pattern: one party (the "fiduciary") acts on behalf of another party (the "beneficiary") while exercising discretion with respect to a critical resource belonging to the beneficiary. Relying on insights from the property rights theory of the firm, this critical resource theory holds that the primary purpose of the law of fiduciary duty is to combat opportunism within relationships that fit this pattern. The beneficiary initially protects against opportunism through self-help denying or threatening to deny the fiduciary access to the critical resource that is an essential platform for opportunistic behavior in these settings. Fiduciary law supplements self-help by depriving the fiduciary of the benefits from opportunism. By requiring the existence of a critical resource at the core of all fiduciary relationships, the critical resource theory assists courts in differentiating fiduciary relationships from relationships in which harm is caused merely by misplaced trust. The critical resource theory also justifies the varying intensity of fiduciary duties across fiduciary relationships: Where self-help is effective, fiduciary constraints are relatively weak, and where self-help is weak, fiduciary constraints are relatively intense. Three additional implications of the critical resource theory of fiduciary duty are also developed: (1) The critical resource theory implies that fiduciary duty and the contractual obligation of good faith and fair dealing are close cousins, both imposing loyalty obligations of varying intensity to combat opportunism; (2) the critical resource theory affirms the capacity of parties in a fiduciary relationship to contract out of fiduciary duties; and (3) the critical resource theory explains why restitution is the usual remedy for a breach of fiduciary duty."

57. **Thompson, Robert B., The Story of Meinhard v. Salmon and Fiduciary Duty's Punctilio (October 16, 2008). Vanderbilt Public Law Research Paper No. 08-44. Available at SSRN: http://ssrn.com/abstract=1285705.** ("Benjamin Cardozo's 1928 opinion in Meinhard v. Salmon that co-venturers owe each other "the punctilio of an honor the most sensitive" remains. 80 years later, a defining point for framing the discussion of fiduciary duty, still the most important issue in the law of business associations. This work develops the story of Messers. Meinhard and Salmon and their relationship with the very wealthy Livingston/Gerry family who owned the land in New York City at Fifth Avenue and 42nd Street that gave rise to this long-running dispute. The context helps delineate the scope of fiduciary duty in a way that Cardozo's memorable language does not. This in turn leads to a discussion of the role of private ordering in structuring relationships where such a duty may not be desired and what this classic case may tell us about contracting out of fiduciary duty in a modern setting."

58. **Welle, Elaine A., Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement. Available at SSRN: http://ssrn.com/abstract=183354.** Abstract: "This article considers whether parties should be permitted to waive coverage of the securities laws. Several securities law scholars have called for selective securities law deregulation. The article examines these proposals from both theoretical and practical perspectives. The thesis of this article is that the reform initiatives present more than a choice of rules over standards, certainty over flexibility, and law over facts--they present a choice of values. The article also challenges the premise that bright-line rules, such as opting out by entity type or waiver, promote fairness, equity, equality, predictability, efficiency, and utility better than the current regulatory regime. Finally the article questions whether we should permit parties to waive their rights and bargain away their statutory protections. Particularly, since the reform initiatives would result in the adoption of industry-protective terms that indivdual investors would have little or no power to change."

59. **Yeung, Amy and Freeman, Kristen J., Gartenberg, Jones, and the Meaning of Fiduciary: A Legislative Investigation of Section 36(b) (February 22, 2010). Delaware Journal of Corporate Law (DJCL), Vol. 35, No. 2, 2010. Available at SSRN: http://ssrn.com/abstract=1557349.** Abstract: "Section 36(b) of the Investment Company Act of 1940 creates a "fiduciary duty" on the part of an investment adviser with respect to the receipts of compensation for services or of payments of a material nature. The term "fiduciary," however, conveys a range of obligations, the breadth of which comes before the Supreme Court in Jones v. Harris, as two circuits diverge on the meaning of fiduciary duty under Section 36(b), and by doing so, call into question whether a fund's investment adviser breached its fiduciary duty by charging an excessive fee. Notably absent from the language of Section 36(b) is any description of substantive or procedural application of the term "fiduciary." Justice Kennedy pressed for such analysis in the Jones oral arguments: "Is Harris a fiduciary in the same sense as a corporate officer and a corporate director? Or does his fiduciary duty differ?" This article provides a comprehensive review of the legislative history creating the "fiduciary"

obligation under Section 36(b) of the Investment Company Act. It identifies key Congressional and industry themes, and draws conclusions on the legislative intent of Section 36(b), in an attempt to clarify the use of "fiduciary."

C. Additional Papers Addressing Fiduciary Law from Perspective of Other Jurisdictions (Papers Available Online).

1. **Argandoña, Antonio, Conflicts of Interest: The Ethical Viewpoint. IESE Business School Working Paper No. 552. Available at SSRN: http://ssrn.com/abstract=683784.** Abstract: "Conflicts of interest are a very widespread ethical problem which, precisely for that reason, deserves special attention, both from a legal viewpoint and from the point of view of ethics applied to organizations and professions. In this paper we use the conceptual framework of agency theory to explain what constitutes a conflict of interest. This enables us to identify what causes conflicts of interest and analyze the ethical criteria to be applied to them and the solutions commonly proposed. Because our processing of information, our judgments and our decision making are subject to significant unconscious and unintended biases, the emphasis in this paper is on the conditions that an agent's decision must satisfy in a conflict of interest situation in order to be ethically correct."

2. **Avgouleas, Emilios, Cognitive Biases and Investor Protection Regulation an Evolutionary Approach (September 2, 2006). Available at SSRN: http://ssrn.com/abstract=1133214. (UK).** Abstract: "Based on the findings of cognitive psychology and experimental economics, Behavioural Decision Theory (BDT) has mounted a powerful challenge on the Standard Social Sciences Model of hyper-rationality. In this mode, the notion of fully informed investors making rational choices in order to maximize gains, one of the main theoretical foundations of modern investor protection regulation, has been heavily challenged. Although BDT's findings are not as inconsistent with rational choice theory as initially suggested, this does not mean that public policy-makers and financial market regulators should ignore the least controversial of the findings of BDT. This article provides a number of suggestions for the gradual incorporation of certain of BDT's insights, such as those explaining investors' bounded rationality and the impact of specific cognitive biases, in four areas of investor protection regulation: investment advice, investment promotions, mandatory disclosure, and asset management. Suggested measures include further fragmentation of investor classes for the purposes of protective regulation, pluralism in the prescribed volume of information disclosed to various investor classes, regulatory prescriptions of the structure ('framing') of investment promotions, and the mandatory use of long-term performance targets for fund managers. Although such measures would amount to soft paternalism, they are justified by the distracting effect of certain cognitive biases on investor and market welfare. Furthermore, the use of economic experiments, can facilitate the identification of optimal disclosure formats and assist in the ex ante evaluation of new regulatory measures."

3. **Bahar, Rashid and Thévenoz, Luc, Conflicts of Interest: Disclosure, Incentives, and the Market. CONFLICTS OF INTEREST: CORPORATE GOVERNANCE & FINANCIAL MARKETS, Luc Thévenoz and Rashid Bahar, eds., Kluwer Law International and Schulthess, 2007. Available at SSRN: http://ssrn.com/abstract=964778.** Abstract: "Conflicts of interests are at the heart of numerous problems in business and finance. The law has not ignored them. The obligation to avoid or manage them finds its roots in the duty of loyalty. This duty is common to both the Anglo-American and Continental European legal traditions. Although the doctrinal foundation may vary from one system to another - from a fiduciary position or a statutory provision to an express or implied contractual obligation - the core is equivalent. Moreover, regulators are increasingly using the instruments of administrative law to expand the scope of this duty and systematically enforce it. As this paper, an introduction to a book collecting original papers from lawyers and financial economists on conflicts of interests in corporate governance and finance, points out, while the rules on conflicts have expanded their scope, they have also lost their sharpness through the increasing recognition of waivers and redefinition of the duties of the agent. This trend does not eliminate the core concern relating to conflicts of interest but it draws the attention to the trade-off between integrity, on the one hand, and scope or quality of services, on the other. Thus, in corporate governance as well as in financial markets, the regulatory focus has shifted from a prohibition of conflicts of interest to a duty to manage them appropriately. This transformation is carried out through a large variety of institutional devices. We discuss the advantages and disadvantages of some tools such as incentive schemes and compensation, market mechanisms, organisational measures, and disclosure. We also consider how various forms of law enforcement, civil, criminal and administrative enforcement can be deployed to ensure an effective implementation of the regulatory policies relating to conflicts of interests."

4. **Band, Christa, Conflicts of Interest in Financial Services and Markets (2006) (Australia). Available at http://www.herbertsmith.com/NR/rdonlyres/0F6F44C6-CD8C-43E8-8F15-F0DB54D59B0F/3735/Band_Anderson2.pdf.** From the introduction: "The first part of this article offers an analysis of the extent to which, at law, financial services institutions may owe fiduciary duties and hence render themselves susceptible to a conflict of interest. The second part will consider the regulatory position and also examine whether compliance with regulatory duties on conflicts of interest makes an institution immune from civil claims and vice versa."

5. **Flannigan, Robert, The Core Nature of Fiduciary Accountability (December 14, 2009). New Zealand Law Review, Vol. 2009, p. 375, 2009. Available at SSRN: http://ssrn.com/abstract=1523382. (New Zealand.)** Professor Flannigan has authored several articles addressing the nature of fiduciary duties from the perspective of 50,000 feet. This article surveys English law, among other sources, and contrasts tort, trust, and agency law, and he observes: "The function of fiduciary regulation was to control the opportunism of those who entered into or assumed limited access arrangements. That understanding of function subsequently was confirmed regularly and without ambiguity at the highest levels … The fiduciary duty is a separate parallel or general obligation designed to support the nominate undertaking in one specific respect — to suppress regard for self."

6. **Flannigan, Robert, The Strict Character of Fiduciary Liability. New Zealand Law Review, p. 209, 2006. Available at SSRN: http://ssrn.com/abstract=940659. (New Zealand)** Abstract: "A number of commentators have challenged the strict character of fiduciary liability. They prefer a contextual assessment of the circumstances of the parties. Their arguments, however, lack substance. They fail to demonstrate any social erosion of the policy foundation for the strict ethic. They also fail to account for the capacity of the parties to contract out of fiduciary liability. Their analyses ultimately have the unintended consequence of confirming the prudence of the conventional position."

7. **Flannigan, Robert, Fiduciary Mechanics (August 22, 2008). Canadian Labour and Employment Law Journal, Vol. 14, p. 25, 2008. Available at SSRN: http://ssrn.com/abstract=1247852. (Canada.)** Abstract: "There is a stubborn confusion as to the scope of fiduciary accountability. That confusion may be relieved in part by examining the fiduciary aspects of the mechanic undertaking. Some might think it fanciful to regard mechanics as subject to fiduciary accountability. That, however, is only the sequelae of the existing confusion. Mechanics are engaged in limited access arrangements, and all such arrangements are regulated by fiduciary accountability. It does not matter that an arrangement may be of modest character, or may not involve subjective trust. Other employment and independent contractor arrangements further illustrate the nature of the opportunism mischief that fiduciary regulation is designed to control. Professors, lawyers, police officers and interior designers have fiduciary obligations to the extent of their limited access. That fuller appreciation of the nature of the fiduciary jurisdiction leads to rejection or reconstruction of a number of propositions that enjoy currency in the courts today."

8. **Georgosouli, Andromachi, Investor Protection Regulation: Economically Rational? (March 2006). Available at SSRN: http://ssrn.com/abstract=893451.** Abstract: "In this essay I discuss the debate about the rationale for investor protection in the retail financial sector by means of conduct of business regulation. The two theses I examine have been heavily informed, on the one hand, by the simultaneous debate surrounding the general issue of consumer protection and, on the other, by the contemporary discussions concerning the economic rationale for regulating non-banking financial institutions specializing in the retail industry. I start by shedding some light on the theoretical background underpinning the thesis for and the thesis against investor protection regulation. Then, I focus on the various arguments juxtaposed and discuss their reasoning. I argue that the economic case for conduct of business regulation remains as much obscure as controversial."

9. **Giannetti, Mariassunta and Koskinen, Yrjo, Investor Protection and the Demand for Equity (August 2005). European Corporate Governance Institute (ECGI) Research Paper No. 64/2004. Available at SSRN: http://ssrn.com/abstract=554522. (EU).** This article is one of several articles by various authors over the past few decades which explores the rationale that increases in investor protection result in increases in attracting capital (thereby benefitting the overall economy of a country). [For more articles on this subject, search for "investor protection" at SSRN.] Abstract: "Anecdotal evidence suggests that investor protection affects the demand for equity, but existing theories emphasize only the effect of investor protection on the supply of equity. We build a model showing that the demand for equity is important in explaining stock market development. If the level of investor protection is low, wealthy investors have an incentive to become controlling shareholders, because they can earn additional benefits by expropriating outside shareholders. In

equilibrium, since the market price reflects the demand from both controlling and outside shareholders, the stock price of weak corporate governance stocks is not low enough to fully discount the extraction of private benefits. This generates the following empirical implications. First, stocks have lower expected return when investor protection is weak. Second, differences in stock market participation rates across countries, home equity bias and flow of foreign direct investment depend on investor protection. Finally, we uncover a good country bias in investment decisions as portfolio investors from countries with low level of investor protection hold relatively more foreign equity. We provide novel international evidence on stock market participation rates, and on holdings of domestic and foreign stocks consistent with the predictions of the model."

10. **Hanrahan, Pamela, Fiduciary Duty and the Market: Private Law and the Public Good. U of Melbourne Legal Studies Research Paper No. 347. Available at SSRN: http://ssrn.com/abstract=1184443.** Abstract: "One of the key goals of securities regulation is to maintain confidence in financial markets. That confidence depends in part on participants in the market believing that others act with integrity - including that securities intermediaries (such as broker/dealers, advisers and CIS operators) act in furtherance of their clients' interests, rather than their own, in discharging their functions in those markets. Securities regulators and regulatory systems have adopted various approaches to ensuring the (actual and perceived) loyalty of intermediaries to their clients' interests, including treating securities intermediaries as fiduciaries or seeking to subject them to 'fiduciary-sounding' statutory duties in relation to conflicts of interest. In Australia, the 'intermediaries as fiduciaries' approach was recently tested in Australian Securities and Investments Commission v Citigroup. This paper argues that ASIC v Citigroup usefully illustrates some of the difficulties of adopting the (private) law of fiduciary duty as either a means or a model for realizing the (public) good of confidence in the integrity of securities intermediaries."

11. **Kumpan, Christoph and Leyens, Patrick C., Conflicts of Interest of Financial Intermediaries - Towards a Global Common Core in Conflicts of Interest Regulation. European Company and Financial Law Review, Vol. 4, No. 1, pp. 72-100, 2008. Available at SSRN: http://ssrn.com/abstract=1119546. (EU Perspective.)** Abstract: "Conflicts of interest are a fundamental and pervasive issue of the modern service-oriented society. Current developments in the regulation of capital markets and elsewhere demonstrate the need for commonly accepted rules for dealing with conflicts of interest. Taking the conflicts of interest of financial intermediaries in securities offerings as a paradigm, the article sets out a definition of conflicts of interest and analyses the possible and appropriate legal strategies to address them."

12. **Law Council of Australia, ASIC Discussion Paper – Managing Conflicts of Interest in the Financial Services Sector (2006). Available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C74EACA-1C23-CACD-22EB-62BF255D5B8B&siteName=lca.** Discusses the three rules existing under the fiduciary duty of loyalty, "the best interests of the client" terminology, and suggests that "each factual scenario needs to be examined to determine whether in those factual circumstances: a. a conflict exists; b. the conflict can be managed; c. the conflict need be avoided."

13. **Leach, Raymond F.. The Concept and Application of Fiduciary Duty in the Realm of Securities Brokers and Their Client Relations (2004) (Canada). Available at: http://www.siskinds.com/content/Articles/Fiduciary_Duty_Article.pdf. From** the introduction: There have been several instructive decisions in the recent past dealing with fiduciary duty which serve to give some instruction relative to the expansion or contraction of both the circumstances in which a "fiduciary relationship" can be said to have been established as well as how the remedy will be applied to the harm alleged. These decisions have been rendered in various areas of the law, however, I intend to briefly canvass decisions which have explored the duties as they have arisen between investment brokers and their relationship with their clients in the area of securities law. Before embarking on that review, however, I would like to first visit the concept of fiduciary duty as developed and applied in Canada previously in some of its most important aspects."

14. **Leeming, Mark, The Scope of Fiduciary Obligations: How Contract Informs, But Does Not Determine, the Scope of Fiduciary Obligations (2009). Journal of Equity, Vol. 3, No. 3, pp. 181-203, 2009; Sydney Law School Research Paper No. 10/26. Available at SSRN: http://ssrn.com/abstract=1556828. (Australia.)** Abstract: "This article concerns one aspect of the interrelationship between law and equity. The scope of the fiduciary obligations owed by trustees, partners and other fiduciaries whose status is sourced in contract depends substantially, but not wholly, on what that contract has provided. That in large measure is a consequence of the

fact that those heightened obligations depend on the status given to the fiduciary by virtue of the contract and the fact that they may be discharged by informed consent. But contract is not decisive, for the parties' conduct, as well as their promises, can add to and subtract from the extent to which they are subject to heightened fiduciary obligations. This article seeks to explain how those mechanisms operate."

15. **McGhee, John, The Role of Fiduciary Obligations in Commercial Disputes (UK). Available at http://www.maitlandchambers.com/Files/Article/PDF/art-fiduciaryobligations-jmqc.pdf.** This article presents a concise history of the history of fiduciary obligations, as they arose from England's common law of trusts, and subsequently diverged from same.

16. **Rotman, Leonard I., Is Fiduciary Law Efficient? A Preliminary Analysis (October 8, 2009). Available at SSRN: http://ssrn.com/abstract=1485853**. "The fiduciary concept has been described in many different ways over the years. However, one adjective that is seldom, if ever, used to describe it is "efficient." Notions of efficiency in law are generally associated with the Law and Economics movement. Law and Economics understandings of the fiduciary concept ascribe to it a rather limited role, regarding it as a gap filler for incomplete contracts. This paper contends that the fiduciary concept is efficient, but that its efficiency looks to different standards than Law and Economics benchmarks, The paper illustrates that there are a variety of reasons why the fiduciary concept ought to be regarded as efficient, not the least of which is the creation of norms that provide a greater measure of certainty in actions and expectation in important social and economic interactions of high trust and confidence."

17. **Rotman, Leonard I., Fiduciary Law (June 1, 2005). (Table of Contents for the book, FIDUCIARY LAW, Thomson, 2005.) Table of contents only is available at SSRN: http://ssrn.com/abstract=1401588. Chapter 1 is available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1408615.** Abstract: "Fiduciary law is one of those peculiar areas of law that appears to be better understood than it is. Indeed, the frequency of its application and its pervasiveness suggest that its meaning is widely and clearly known. This is true not only of Canadian jurisprudence, but also of that in Australia, England, New Zealand and the United States. Yet, even a cursory examination of fiduciary jurisprudence reveals that the fiduciary concept is not well understood or properly implemented. While there has been a proliferation of cases argued and decided on fiduciary principles and fiduciary rhetoric abounds in pleadings, judgments and legal commentaries, the understanding of the fiduciary concept possessed by judges, legal practitioners and academics is incommensurate with the continued effusion of fiduciary case law and commentaries.

    While the importance and widespread use of fiduciary law is now an accepted fact, a number of questions remain. Among the most basic of these are: Where did fiduciary law come from? What are the rules that govern its application? And where is it, in fact, going? These are all important questions. Significant insight into these queries may be obtained by looking to the equitable origins of the fiduciary concept. However, it is also necessary to step back from the fiduciary concept's application to uncover the rationale behind its existence.

    The purpose of this book is to identify the theory and function of the fiduciary concept in order to facilitate an enhanced appreciation of the fiduciary concept's purpose and how it is effected. While it is not possible to cover all the relevant areas in which the fiduciary concept may manifest itself, this book attempts to address those most salient to forging a sophisticated understanding of the fiduciary concept. Thus, it will uncover the governing principles of the fiduciary concept so that it may be better understood and more appropriately used by judges, legal practitioners and academics. This will be accomplished through reference to existing case law and the development of a new vision of the fiduciary concept. The theoretical aspects of the fiduciary concept illustrated in this new vision will be complemented by the development of a functional approach to the fiduciary concept.

    The method by which the fiduciary concept will be uncovered begins with the identification of existing difficulties associated with the use of the fiduciary concept in Part I, including the identification of what is described as the fiduciary "paradox," which have inhibited its doctrinally-appropriate application. Part II is dedicated to developing a greater understanding of the fiduciary concept by examining its ideological, historical, and jurisprudential foundations. This is accomplished by providing the context in which to appreciate the fiduciary concept's raison d'ètre. In this environment, a new vision of the fiduciary concept and a functional method for its implementation are developed. Part III illustrates two instances of fiduciary obligation - directors' and officers' fiduciary duties and Crown-Aboriginal fiduciary relations - which provide their own unique challenges for the application of fiduciary concept. In Part IV, discussion centres on ascertaining where breaches of fiduciary duty occur and issues pertaining to the attribution of harm or loss, followed by the measures of relief available for breaches of fiduciary duty.

The reader may notice that there is a considerable amount of overlap in the various chapters in the book. This is purposeful, since each chapter is intended to be as free-standing as possible, notwithstanding the fact that they each build towards a larger whole. Thus, in some instances, quotes or references will be repeated entirely, while on other occasions, references will be made to discussions in other chapters. The idea is to make the book as user-friendly as possible and the references that are contained within it are designed with this goal in mind.

This book certainly cannot answer all of the outstanding questions about the fiduciary concept and its application. Nonetheless, it seeks to provide the means to respond to specific queries through an examination of fiduciary theory and jurisprudence. It will address many of the problems in the contemporary application of the fiduciary concept, initially in a general fashion, followed by more specific consideration of specific types of relations that are said to be fiduciary.

Although efforts have been made to maintain currency with the most recent developments in fiduciary jurisprudence, this book has placed its primary emphasis on principles rather than precedent. Thus, while most of the major cases in fiduciary jurisprudence have received attention, the cases and commentaries relied upon herein have been used primarily towards identifying and pulling together the various principles of the fiduciary concept in order to construct the conceptual vision and functional theory in Part II of the book."

18. **Samet, Irit, Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-Stripping Rule (Winter 2008). Oxford Journal of Legal Studies, Vol. 28, Issue 4, pp. 763-781, 2008. Available at SSRN: http://ssrn.com/abstract=1315597.** (Available for a fee - $46.) Abstract: "This article argues that considerations of moral psychology support the traditional stringency of the rule according to which fiduciaries who get involved in a potential conflict of interest shall be stripped of all their gains. The application of the rule, regardless of good faith on the part of the fiduciary, is being contested by courts and academia alike. The article is focused on the 'deterrence' justification for the rule, and argues that its unusual strictness should be read as a response to a substantial risk of conscious-silencing self-deception. Given the knowledge gap between them, the principal is very much dependent on the fiduciary's personal integrity but, in the grip of self-deception, the fiduciary's inner checks break down so that manipulative transactions are approved as harmless ones. Two distinctive features of the fiduciary relationship increase the chances that even a professional and virtuous fiduciary will be moved by self-deception to misapprehend the harm which a conflict of interest might cause to the principal: first, the wide discretion in the application of the fiduciary's duty to specific situations; and, second, the power gap between the fiduciary and the principal which enhances the temptation to exploit the fiduciary's position. This risk can only be averted by the more stringent version of the rule, as it is only by preventing the fiduciary from ever considering the legitimacy of a specific conflict of interest that we can hinder the process of reflection which is so prone to being subverted by self-deception."

19. **Smith, Lionel, The Motive, Not the Deed. MODERN LAW OF REAL PROPERTY AND TRUSTS - ESSAYS FOR EDWARD BURN, Butterworths UK, August 2003. Available at SSRN: http://ssrn.com/abstract=382341 (Canada).** Abstract: "The fiduciary's duty of loyalty has been subjected to a great deal of analysis. That analysis usually focuses on the distinctive proscriptive rules, which forbid the fiduciary from being in a conflict of interest and related situations. This paper argues that in order to understand what is truly distinctive about fiduciary obligations, it is necessary to take account of another body of fiduciary law: That which controls the exercise by fiduciaries (such as trustees or corporate directors) of their powers. When the two are considered together, the unique feature of fiduciary obligations becomes clearer. In the vast majority of obligations, in both the common law and the civil law traditions, observance or breach of the duty is judged by whether or not a particular result was brought about, an inquiry which may be associated with a 'standard of care' or an 'intensity' of the duty. What is unique about the fiduciary obligation of loyalty is that its observance or breach depends on the motive with which the fiduciary acted. The control of fiduciary powers follows a model of analysis which is much closer to the judicial review of administrative action than to the law of negligence. Once this is understood, the strict proscriptive rules which forbid conflicts of interest can be better analysed as protecting the beneficiary of a fiduciary obligation from the burden of proving an improper motive. The fiduciary must not only act with the proper motive; he must be seen so to act, and so he is forbidden to be in situations of conflicting motivational pressure."

20. **Tuch, Andrew F., The Paradox of Financial Services Regulation: Preserving Client Expectations of Loyalty in an Industry Rife with Conflicts of Interest (January 2008). Sydney Law School Research Paper No. 08/21. Available at SSRN: http://ssrn.com/abstract=1086480. (Australia.)** "The paper discusses the dynamic nature of investment banks, their organizational structure, the types of conflicts they typically face and recent trends in the industry. It also considers a number of questions about the regulation of conflicts of interest at these firms. First, when an investment bank performs one of its traditional functions, what fiduciary constraints is it likely to face? Second, to what extent will the classic formulation of fiduciary obligations take account of both the conglomerate structure of the modern investment bank and the co-existence of legislation that regulates conflicts of interest? Finally, quite apart from the fiduciary obligation, what does – and should – a statutory obligation to "manage" conflicts of interest require? These questions are considered against the backdrop of *ASIC v Citigroup*."

21. **Tuch, Andrew F., Securities Underwriters in Public Capital Markets: The Existence, Parameters and Consequences of the Fiduciary Obligation to Avoid Conflicts. ; Sydney Law School Research Paper No. 07/36. Available at SSRN: http://ssrn.com/abstract=989891. (Australia.)** Abstract: "This article considers whether an investment bank, when acting as underwriter of a public securities offering, owes the issuing company the fiduciary obligation to avoid conflicts of interest. The question has not arisen for final judicial determination and has been overlooked by scholars and regulators. The highly lucrative and visible nature of underwriting work creates powerful incentives for investment banks to accept instructions in the face of this duty. At the same time, the web of loyalties that these institutions owe, by virtue of their broad and diverse range of products and services, creates intractable practical difficulties for compliance with the duty. The article considers the factual nature of the relationship between a securities underwriter and issuing company, the circumstances in which fiduciary obligations will exist outside the established fiduciary categories, and the existence, content and scope of any fiduciary obligation to avoid conflicts that arises. It also examines the practical and regulatory consequences for firms of the existence of such an obligation."

22. **Tuch, Andrew F., Investment Banking: Immediate Challenges and Future Directions. Commercial Law Quarterly, Vol. 20, No. 4, pp. 37-46, 2006; Sydney Law School Research Paper No. 06/63. Available at SSRN: http://ssrn.com/abstract=952243. (Australia.)** Abstract: "This article discusses the organizational nature of the integrated (or full-service) investment bank, the incidence of conflicts of interest in the financial services industry and the role and effectiveness of information barriers such as Chinese walls as an arrangement for managing conflicts. The paper also describes the growing importance to investment banks of proprietary trading and principal investing, the conflicts of interest that they can produce, and the recent responses of financial regulators to these developments. The paper was presented at a discussion forum involving senior investment bankers, lawyers and scholars in August 2006, organized against the backdrop of litigation recently brought by Australia's financial regulator against a major investment bank for alleged conflicts of interest and insider trading."

23. **Tuch, Andrew F., Investment Banks as Fiduciaries: Implications for Conflicts of Interest. Melbourne University Law Review, Vol. 29, No. 2, pp. 478-517, 2005; Sydney Law School Research Paper No. 06/04. Available at SSRN: http://ssrn.com/abstract=871291. (Australia.)** Abstract: "Investment banks play an intermediary role in the financial system that is integral to its efficient operation. A core, and highly visible, part of their work involves providing financial advisory services to institutional clients on transactions that have strategic importance, such as mergers and acquisitions. As these services are but one aspect of the broad and diverse range of financial services that investment banks typically provide, challenges such as conflicts of interest inevitably arise. Somewhat anomalously, the question of whether these firms owe fiduciary duties to their clients when providing financial advisory services has received little regulatory, judicial or scholarly attention. This essay will address that question, consider the parameters of any fiduciary obligation to avoid conflicts of interest that may arise and discuss the implications of their responses to these conflicts."

24. **Tuch, Andrew F., Obligations of Financial Advisers in Change-of-Control Transactions: Fiduciary and Other Questions. ; Company and Securities Law Journal, Vol. 24, No. 2, pp. 488-521, 2006. Available at SSRN: http://ssrn.com/abstract=950373. (Australia.)** Abstract: "Outside the United States, financial regulators have recently focused their attention on whether a financial adviser to a party in a change-of-control transaction (such as a takeover) is obliged to avoid being in positions of conflict with the interests of that party. Because financial advisers in these transactions are typically investment banks, the integrated structure of which may make conflicts of interest inevitable, such an obligation is likely to pose difficult challenges for the investment

banking industry. The question is complicated by two apparently inconsistent standards being applied: the fiduciary obligation to avoid conflicts and the statutory obligation in many jurisdictions to manage conflicts. This article considers whether a financial adviser is, and should be, obliged to avoid conflicts in this context and, in doing so, attempts to reconcile the apparent inconsistency between these standards."

25. **Vann, Vicki, Causation and Breach of Fiduciary Duty. Monash University Faculty of Law Legal Studies Research Paper No. 2006/60; Singapore Journal of Legal Studies, pp. 86-107, July 2006. Available at SSRN: http://ssrn.com/abstract=1096413.** Abstract: "Two recent English decisions have highlighted the issue of causation in the context of breach of fiduciary duty. In both cases, the defendant implicitly argued that whether the profits or conflicts rule is breached, the causation standard is the same. This article suggests that the causation standards applicable for the profits and conflicts rules are different. When equitable compensation is sought for loss due to breach of the conflicts rule, there must be a causal connection between the conflict and the loss. But there is not special causation standard applicable when an account of profits is sought following a breach of the profits rule. Any unauthorised profit made within the scope of the relationship attracting fiduciary duties must be accounted for. These standards are appropriate in the context of the rules breached, because they best achieve approximation of loyal performance of the duties owed."