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THE FIDUCIARY STANDARD

Fiduciary Reference

Analysis of Investment Fiduciary Issues

May 13, 2014

Fiduciary Advisors
Must Craft, Uphold and Advocate for
Fiduciary Best Practices

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Introduction

2014 may be the year Washington regulators proceed – or decide whether to proceed – with rulemaking on the fiduciary standard. Over the past two months Securities & Exchange Commission (SEC) Chair Mary Jo White and Department of Labor Assistant Secretary Phyllis Borzi (DOL) have spoken with clarity on their intentions. White recently stated that the agency would decide this year whether rulemaking would proceed, and Borzi stated that a redraft and reintroduction of a rule to redefine *fiduciary* is DOL's "No, 1 priority." **

The question should be, however, whether rulemaking will materialize. A sober review of the past fifteen years – with a focus on the past three years – of the results of herculean efforts of many dedicated policy makers and fiduciary advocates are revealing. Efforts to advance the idea that personalized investment advice of broker-dealers (brokers) should be *fiduciary* advice in federal regulations have been stalled. The outlook in some key respects appears far dimmer today than it did just three years ago.

Fiduciary advisors need to act. They need to define themselves by Adviser Act fiduciary best practices. They need to craft and uphold and articulate the vital importance of fiduciary best practices that investors want and sorely need and on which the capital markets depend.

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** http://www.thinkadvisor.com/2014/03/31/white-borzi-and-legislators-focus-on-fiduciary

Executive Summary

- Advisers Act separated sales from advice. The Investment Advisors Act of 1940 (Advisers Act) was enacted, in part, to separate securities sales brokers from Advisers in federal regulation. Market and regulatory changes over the past 40 years have largely blurred these once sharp legal distinctions.

- Investors' misconceptions…. Independent research is unambiguous. Many investors possess misconceptions that harm their investing decisions. Investors often misunderstand what brokers and advisors do and how they are compensated; and that brokers and advisors have totally different roles. A broker sells to investors, while an adviser represents investors.

- … Are harmful. The harm to investors from their misconceptions is concrete and significant. Research suggests investors often pay too much for lower quality products and inadequate advice. Further, much research suggests that 'investor education' initiatives are ineffective.

- A new SEC uniform standard may parallel a sales suitability standard. Nonetheless, there are indications that the SEC, if it proceeds with rulemaking, may apply a uniform standard that is far less stringent than the fiduciary standard under the Advisers Act, and far closer to the sales suitability standard.

- Investor distrust of Wall Street and …. Investor distrust of Wall Street has deepened over the past five years. This distrust appears to have spilled over to the adviser community resulting in corroded investor confidence in the advisory industry.

- Brokers and advisors. Research suggests investor distrust of brokers and financial advisors is associated with conflicts, opaqueness (especially regarding fees and expenses) and unclear communications. The remedy is straightforward – 'Sincerity, honesty, and transparency'.

- Discussion and Conclusion. Financial advisory professionals must embrace a high standard of stringent best practices, best practices which unequivocally demonstrate their commitment to the fiduciary duties of loyalty, due care and utmost good faith. Practices which especially demonstrate their commitment to do what's right, to avoid conflicts, to control investment fees and expenses and to be transparent and communicate clearly, among other duties.

… investment advisers could not completely perform their basic function – furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments -- unless all conflicts of interest between the investment counsel and the client were removed.

Supreme Court of the United States
Capital Gains Research V SEC (at 187)

Advisors Act of 1940 Was Enacted, In Part,
To Separate Securities Sales Brokers from Advisers in Law

The Advisers Act of 1940 was enacted to mainly fill two needs. The first was to separate, in law, sales brokers from fiduciary advisers because blurring these roles was viewed as undermining investment counsel. The harsh lessons of the 1929 market crash were fresh. "So-called tipster organizations were disguising themselves as legitimate advisory organizations. Certain firms providing advice were affiliated with investment banks or brokerage firms and, therefore, had a vested interest in recommending particular securities." All issues pertaining to adviser organization and operation also needed to be addressed in Washington. **0**

The Advisers Act of 1940 legislative history is imbued with testimony and arguments explaining why fiduciary principles are essential to a trusting client adviser relationship. The Supreme Court affirmed this point in 1963, as well as the Advisers Act purpose to clearly separate brokerage sales from fiduciary advice.

Market changes spanning some 40 years have complicated investing and dated existing regulations. Today the once sharp line between brokerage sales and fiduciary advice established in the Advisers Act is largely gone. To investors with an untrained eye, broker and adviser marketing materials appear identical. Consequently, most investors today assume (wrongly) that all brokers and advisers are required by law to act in their best interest as fiduciaries, they let their guard down and conflicted advice often becomes accepted. Research suggests investors are often harmed by conflicted advice.

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"Even if … more confusion does lead to worse outcomes, its not clear to me that that's enough to justify engaging in rulemaking" on a uniform standard.

SEC Commissioner Michael Piwowar
January 27, 2014

What Investors Do Not Know About Advisers and Brokers
Harms Their Investing Decisions

On March 1, 2013 the Securities & Exchange Commission released a request for information (RFI) regarding File Number 4-606, Rulemaking Re: Brokers, Dealer and Investment Advisers. In the RFI announcement, the SEC notes the importance of what investors "do not know." In the RFI announcement, Elyse B. Walter, then Chairman, states how "few investors realize that the standard of care they receive depends on the type of investment professional they use" and investors often "do not know" whether their investment professional is a fiduciary adviser or a broker subject to the lower commercial standard.

What investors "do not know" about their investment professional far exceeds their registration status. Research suggests what investors often "do not know" entails two of the most essential features that define any professional or commercial relationship. The first is what and how they pay for services rendered, and the second is what they get in return.

The most authoritative research of the retail investor's weaknesses may be the 2008 *Rand Report.* (Rand) Rand .This SEC commissioned report that has been widely cited by regulators and in academic papers. 1

On fees, Rand concludes, "In fact, focus group participants with investments acknowledged uncertainty about the fees they paid for their investments and survey participants also indicate confusion about fees." Among investors surveyed by Rand, 25% of the respondents who reported using an adviser or broker also reported they pay $0 for the services they received. A similar research finding was reached in a 2011 AARP study of 401 (k) plan participants, as 71% of participants reported they did not pay any fees, while only 23% said they do pay fees. 2

Do investors get for what they pay for? Often investors believe they get far more (in terms of a higher standard of care) than the law requires. In one focus group, 63% of focus group participants agreed that brokers "Are required by law to act in the client's best interest." A 2010 survey of investors by InfoGroup reveals 76% of investors believe brokers are fiduciaries; 60% believe insurance sales people are fiduciaries. 3

From a certain perspective, investors acute misunderstandings of what brokers do is understandable to some degree, as are misunderstandings regarding "free" services. National advertising often imply that sales brokers are acting as fiduciary advisers, and offers of "free services" are common. 4

Investor Harms Are Often Evident in Practices Permitted Under the Sales Suitability Standard That are Not Allowed Under the 1940 Act Best Practices Standard; Investor Education is not Generally Helpful

Investor misconceptions that are not mitigated or otherwise neutralized by the fiduciary standard lead to investor harms and often are due to practices permitted under the sales suitability standard. There is significant research that documents these harms.

- A GAO report, Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans, GAO–09–503T, Testimony Before the Subcommittee on Health, Employment, Labor and Pensions, Education and Labor Committee, House of Representatives (March 24, 2009), accessible at http://www.gao.gov/new.items/d09503t.pdf;

- Daniel B. Bergstresser, John Chambers, and Peter Trufano. "Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry," Social Science Research Network Abstract 616981 (Sept. 2007), accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=616981;

- Bullard, Mercer, Friesen, Geoffrey C. and Sapp, Travis. "Investor Timing and Fund Distribution Channels" SSRN Working Paper, Dec. 2007, accessible at: http://ssrn.com/abstract=1070545;

- Zhao, Xinge. "The Role of Brokers and Financial Advisors Behind Investments into Load Funds," December 2005, accessible at: http://www.ceibs.edu/knowledge/papers/images/20060317/2845.pdf;

- GAO, Improved Regulation Could Better Protect Participants from Conflicts of Interest January 2011, http://www.gao.gov/products/GAO-11-119

Key harms are also identified in a recent letter to the Securities & Exchange Commission from several pro-fiduciary organizations. http://www.cfp.net/docs/public-policy/2014-04-14-sec-investor-harm-letter---final.pdf?sfvrsn=4. Among those harms identified in the letter, the sales suitability standard permits high cost products, products with "substandard features," and leads to the targeting of less affluent investors,

"Financial education" initiatives that seek to inform investors about budgeting, finance, or investing are often advocated to ameliorate what investors "do not know." Sometimes calls for "education" take the form of recommendations for increased disclosure. While well intended, much research suggests these initiatives may not be effective. In the opinions of some observers and academics, the results of investor education are questionable, at best. One observer concluded that financial education is "a colossal waste of time and money for everyone except the companies that sponsor it." [5]

"No thinking man can believe that an economy built upon a business foundation ... can permanently endure without some loyalty to that (fiduciary) principle."

Justice Harland Fiske Stone
Harvard Law Review, 1934

Fiduciary Law, Intended to Mitigate 'What Investors do not Know,' Must Be Sufficiently Strict to Overcome Investors' Misconceptions

The implications of what investors "do not know," and the ineffectiveness of "investor education" speak clearly to the need for stringent fiduciary duties to meet the risks investor misconceptions present. These duties can mitigate behavioral finance factors (heuristics or framing), and disallow misleading disclosure or communications which may wrongly imply trusted advice is given (when it is not), or wrongly suggesting services are "free."

Fiduciary law exists to restrain the conduct of experts who provide socially important services or advice in relationships of trust and confidence. Fiduciary duties serve to mitigate the information asymmetry that separates advisors from clients. Obligated to be loyal, render due care and act in utmost good faith, the fiduciary must adopt the client's ends or objectives.[6] Fiduciary conduct nurtures investor *trust,* the central pillar on which capital markets and the economy depend.
.
"The strictness of fiduciary law conflict-of-interest rules depends mainly on the level of entrustors' (clients) risks from the fiduciaries abuse of trust." "Stricter rules apply in fiduciary relationships that pose the most risk to investors. The risk, however, is not measured only by the magnitude and expertise of the fiduciary, but also by the ability of the entrustor to protect himself and any other controls over the fiduciary's performance of his services."[7] The gap between brokers and retail investors is widely acknowledged as large. [8]

The importance of the stringency of fiduciary rules is underscored by the deceptive and corrosive nature of conflicts of interest on advisors and the general ineffectiveness of disclosure to mitigate the harms of conflicts. Yale Management Professor Daylian Cain offers a sobering view of the academic research regarding disclosure ineffectiveness and harms when conflicts are present. Cain concludes, that conflicts are far more corrosive to independent advice, and disclosure far more ineffective, than is generally acknowledged. "Conflicts of interest are a cancer on objectivity. Even well-meaning advisors often cannot overcome a conflict and give objective advice. More worrisome, perhaps, investors usually do not sufficiently heed even the briefest, bluntest and clearest disclosure warnings of conflicts of interest." [9]

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Assumptions in the RFI Regarding the Uniform Fiduciary Standard and the Duty of Loyalty

The recent Securities& Exchange Commission RFI (noted above) provides assumptions regarding the uniform fiduciary standard and the duty of loyalty. (As noted above, the RFI states these assumptions may not represent the views of the SEC.) The RFI picture of fiduciary duties is far more restricted and far less stringent than the fiduciary duties required by the Investment Advisers Act of 1940 Act. An analysis by the Institute concludes the RFI:

1. <u>Sharply restricts what is defined as fiduciary advice, and adds new ambiguity about the difference between fiduciary advice and sales communications.</u> Communications that are clearly "fiduciary advice" are narrowly defined. 'Facts and circumstances' exploration will be necessary to parse language and review materials to draw the line between fiduciary and non fiduciary communications. This new uncertainty and ambiguity is likely to confuse investors.

2. <u>Allows fiduciary duties to be waived</u>. Fiduciary duties may be waived through contract provisions, marketing materials or disclosure, disclosure that does not require informed consent. Without any discussion, notice or 'informed consent' requirement, clients may not be aware that fiduciary duties have been simply removed.

3. <u>Suggests disclosure best addresses conflicts, and omits noting disclosure alone is insufficient</u>. Stressing disclosing conflicts at the exclusion of discussing the benefits of avoiding conflicts may be interpreted to suggest that disclosure is the best remedy. This interpretation would be misleading. Further, the failure to note that, irrespective of the disclosure, the recommendation must remain in the best interest of the client, implies disclosure alone is sufficient.

4. <u>Weakens disclosure requirements, and omits mention of "informed consent"</u>
   It allows more casual disclosure and oral disclosure (disclosure that is more "efficient" for the firm to deliver) while, not requiring either "client consent" or "informed client consent" of material conflicts of interest (disclosure more effective for the client).

5. <u>Rebrands *conflicts*.</u> Conflicts are essentially rebranded. There is no mention of any harm associated with conflicts. It questions whether principal trading (an advisor selling product from his own inventory) is a conflict. It omits any mention of associated benefits of avoiding conflicts, and omits urging broker dealers and investment advisers to avoid conflicts. By these omissions, conflicts are implied to be benign.

6. <u>Redefines *loyalty*.</u> Loyalty today means "do the right thing." By minimizing the harm of conflicts, and stressing disclosure, it essentially urges that the duty of *loyalty* be redefined to mean "disclose doing the wrong thing."

Each of these assumptions, individually, undermines the stringency of the uniform fiduciary standard as compared to the Advisers Act. Taken together, these assumptions represent a profound departure from the Advisers Act. If adopted in rulemaking, fiduciary duties would be effectively removed for brokers and advisers giving investment advice to retail investors.

"The whole industry is evil ..... you are lumped in with Madoff"

Industry Consultant, Chip Roame
Speaking to BDs and IAs about investors' views of financial services. October, 2012

Distrust of Wall Street is Deep

Researchers Karlyn Bowman and Andrew Rugg of the American Enterprise Institute (AEI), published, "What Americans Think about Wall Street, Banks, Business and Free Enterprise." [10] The paper is important, because it describes the nature of the distrust of Wall Street, how Americans distinguish "Wall Street" from "business" and "free enterprise."

Bowman and Rugg note that critical views of Wall Street are hardly new. What is new is these negative views were magnified by the financial crisis and have become "deep-seated." The researchers point tothe Harris Reputation Quotient Survey, which has measured confidence in Wall Street for 23 years. In 2012, "51% of respondents had very little or no confidence in the financial industry. 28% agree "people on Wall Street are as honest and moral as other people," while 70% agree "Most people on Wall Street would be willing to break the law if they believed they could make a lot of money and get away with it." Bowman and Rugg conclude, "Americans see Wall Street as a culture apart, one that operates by a foreign code of conduct."

In contrast, "small business" typically get higher ratings, and views of "big business" tend to be weighted down by the public's "innate skepticism of big, powerful institutions;" although, some industries fare much better than others. [11]

Bowman and Rugg refer to the public sentiment on business regulation as "antiregulatory," exclusive of Wall Street. While the public trusts business to drive the free market, the public distrusts Wall Street. "People want more oversight of financial firms and Wall Street…. In fact eighty two per cent agree with Harris pollsters in 2012 that "recent events have shown that Wall Street should be subject to tougher regulations."

Americans generally support increasing Wall Street regulations while decreasing regulations on business. An insight in the Bowman and Rugg paper suggests why. Anti Wall Street views are not about, as suggested by some observers, Wall Street big bonuses, class warfare, or envy.

The views here appear connected to deeper concerns. Fair or not, Main Street believes that Wall Street, the authors say, "operates by a foreign code of conduct," i. e.: with a different set of values and mores. The authors conclude, "The consensus is that many of these firms are not ethical or concerned about the wellbeing of the country."

"Financial advisers are trusted by a meager 15% of respondents… according to the Forgotten Investor Survey by State Street Corp."

Investment News, July 31 2013

Distrust of Brokers and Financial Advisors Associated with Opaque Fees and Expenses, According to Research, Experts; the Remedy: 'Sincerity, Honesty, and Transparency'.

There are two distinct views about the relevance of investor distrust of Wall Street in regards to investment advisers and broker-dealers. One view suggests investor distrust is generally immaterial to investment advisers and broker-dealers, and the other is that bad behavior by the big banks has infected everyone in financial services.

The first narrative goes that advice is personal. Clients of advisers and brokers know that their representatives are far removed from big Wall Street banks. Satisfaction is measured individually by each client. Industry asset flows (and my own firm asset flows) over many years 'prove it.' This view, once more dominant, has been heard less over the past five years. The opposing view is that bad behavior of the big banks has infected everyone in financial services. In State Street's 2013 Forgotten Investor Survey, according to Investment News, [12] just 15% of respondents reported trusting their advisor. Industry consultant Chip Roame has a more ominous view. He says the public believes, "The whole industry is evil...you are lumped in with Madoff."

Some recent research and commentary puts the blame directly at the feet of advisors who communicate incompletely or unclearly. Such poor communications means clients do not know the fees and expenses they pay for advisor services, or how advisors are compensated. The impact of this lack of clarity is believed to be large. For example:

Wealthmanagement editor, David Armstrong, questions whether the industry is concerned at all about investor distrust when he notes, despite ongoing discussion about "trust" in some quarters, "Too often it seems as if the industry isn't really concerned with building client trust at all." As evidence, Armstrong writes, "Consider the recent debacle over the Certified Financial Planning Board's lax standards when it comes to enforcing the way financial advisors label themselves. Turns out the Board allowed hundreds, if not thousands of financial advisors from wire houses and other brokerages to call themselves "fee-only" advisors, when in fact they are anything but; these are advisors working for brokerages where commissions are part of the gig … "[13]

Armstrong then offers another example, a panel at Ron Carson's Peak Adviser Alliance conference where consultant Michael Maslansky brought investors on stage to react to a series of pre-recorded pitches from advisors. As Armstrong reports, in interviews afterward, "the way advisors talked about how they were paid – belaboring the concepts of 'fees' and 'fiduciary mandates' made it seem as though they had something to hide… what the clients wanted … was a number. How much do I pay you? Who else pays you?" Armstrong writes that Malansky concluded, "Every second you talk about fees and don't give a number it becomes that much more important."

Jack Waymire, CEO of the Paladin Registry, a company that screens RIAs and IAR reps (who are all either fee-only or fee-based), has surveyed his member registered advisers on the issue of transparency regarding, "credentials, ethics, compensation, investment expenses, and potential conflicts of interest. His findings are revealing. 14 Waymire states the survey showed "advisors want to selectively disclose the information they provide to investors." 86% said they did not practice voluntary transparency or documentation;" only 14% of advisers voluntarily discussed their method of compensation when marketing their services.

A separate Palidin registry survey of 421 investors 15, found that 81% said they were "most concerned" about the various fees and commissions deducted from their accounts. A very large 86% said they were "very confused" about the different expenses; only 19% said they were "comfortable" comparing fees and expenses of different advisors.

3Ethos CEO, Don Trone, pointedly writes in a Financial Adviser Magazine column about *deception*. Citing practices including 'pay to play,' 'obtuse disclosures,' and 'faux fiduciaries', Trone notes these involve efforts "to get the public to believe something that's not true" and are at the core of the state of distrust. "People who deceive or attempt to deceive are the key reasons the public puts so little trust in our industry," Trone says. 16

Bank of America Merrill Lynch wealth unit chief, John Thiel, according to an industry news report, recently spoke about the need to "create transparency around fees." According to the report, Thiel explicitly said investors need three sets of information: an overall picture of what they pay in fees and commissions, specific information about what they are charged for transactions, and annual summaries. 17

According to the news report, Thiel "Related a story of one client who said he used four advisers because he didn't trust a single adviser with his assets…. Tell me what I pay" the clients said, according to Thiel, 'Put it out front and then I'll trust you and start to consolidate with you."

Robert Fronk, the author of the Harris Reputation Quotient Survey 18 annually measures the reputations of corporations and identifies the factors consumers consider in measuring reputation: financial performance, workplace environment, products/services, social responsibility, leadership, and "emotional appeal." In the 2013 survey the large financial service companies ranked near the bottom of the rankings. Fronk noted about them, "One thing the public is screaming loud and clear about financial services is: be more sincere, be more honest, be more transparent." 19

Discussion

Fiduciary duties exist to ensure that professionals in relationships of trust and confidence earn investor trust. Duties of loyalty, due care and utmost good faith are necessarily high bars. They are the central pillars on which *trust* and the capital markets and economy rest.

That fiduciary duties have been widely breeched and investors' trust violated is not, in most circles, disputed. This national infection continues to be felt, through a regulatory response that has been uneven. Just this past year both record-setting fines and compensation packages made headlines on Wall Street. Further, notwithstanding courageous efforts from many fiduciary advocates, policy makers and regulators (but for DOL Assistant Secretary Phyllis Borzi) concrete regulatory actions have, generally, not followed the words supporting fiduciary duties.

Advisers' reputations have been harmed by wounds from the Wall Street financial crisis. This taint has been exacerbated, it appears, by brokers and advisers own shortcomings, particularly concerning the opaqueness of fees and expenses. Brokers seemed to be harmed worse than advisers, as asset flows abandoning the wire houses for RIAs continue and soften the impact of investor distrust.

Advisers have also been harmed by their *silence*. Apart from advocacy (noted above) there have been too few adviser voices speaking out to broader media sources and investors when financial firms or individuals behave badly. [20] There have been too few adviser voices distinguishing Wall Street "sales" from fiduciary advice, articulating what true fiduciaries do, and advocating for adviser accountability to fiduciary standard best practices. Six years since the start of the financial crisis and almost four years since the passage of Dodd Frank, the state of fiduciary advice is at a critical juncture.

Conclusion

Fiduciary advisors need to act. They need to craft and uphold and articulate the vital importance of fiduciary best practices that investors want and sorely need. They need to give particular attention to duties in areas where individual investors face significant risk and appear to be greatly concerned; i.e.: conflicts of interests, fees and expenses, and unclear or inaccurate communications.

This Institute Best Practices Board initiative complements the very good work of other groups in the practice setting / accrediting field, and hopes these groups will align themselves with this initiative. (These include: CFA Institute, AICPA, CFP Board, fi360, CEFEX, Paladin and 3Ethos) The Best Practices Board fills a need for an independent non profit entity to adopt best practices, and accredit and validate practitioners who primarily serve individual clients.

The Institute Best Practices Board has undertaken this project with an overriding ambition. It seeks to shift the direction of the discussion of fiduciary duties and definition of *acceptable* best practices to reflect the principles and values so well expressed by highly respected jurists and regulators in recent history when they, also, spoke of "The highest standard under the law."

NOTES

0. Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries; Arthur Laby, Washington Law Review, Vol. 87:70 http://digital.law.washington.edu/dspacelaw/bitstream/handle/ 1773.1/1175/87WLR707.pdf?sequence=1

1. "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers," http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf Rand set out to provide the SEC with "a factual description of the current state of the investment advisory and brokerage industries" and determine whether investors understand the differences between the relationships between investors and brokers or advisors.

2. http://assets.aarp.org/rgcenter/econ/401k-fees-awareness-11.pdf

3. http://www.bloomberg.com/news/2010-09-15/-clueless-u-s-investors-believe-brokers-have-fiduciary-duty-survey-says.html

4. Brokerages have for years stressed their advisory services over their brokerage services and used titles to imply their advisory role is widely understood. Further, as noted by scholar Arthur Laby, in law, rendering *advice* means rendering *impartial advice*, "When one advises another, he is purporting to provide independent, impartial information in the best interest of the recipient." See note "0" above and Laby paper at 768.

   Further, A GAO report exploring the market place for 401 (k) rollovers finds numerous firms communicating "free" services, see, http://www.gao.gov/products/GAO-13-30

5. Notwithstanding the huge efforts to improve investor financial literacy, there are basic questions about whether it works, with precious little independent credible research clearly demonstrating so. Wall Street Journal columnist Jason Zweig recently reviewed the financial education landscape and concluded it "is a colossal waste of time and money for everyone except the companies that sponsor it." http://blogs.wsj.com/totalreturn/2013/05/01/financial-literacy-month-is soover/?mg=blogswsj&url=http%253A%252F%252Fblogs.wsj.com%252Ftotalreturn%252F2013%252F05%252F01%252Ffinancial-literacy-month

6. For a discussion of the fiduciary obligation as adopting the ends or objectives of the principal, see: Arthur Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 Buffalo Law Review, 99, 104—129.

7. Tamar Frankel, Fiduciary Duties of Brokers-Advisers-Financial Planners and Money Managers, Boston University School of law Working Paper No. 09-36, August10, 2009, Revised February 17, 2010. See also, *Fiduciary laws in the 21st Century*, Boston University Law Review, Volume 91: 1289, at 1292.

8. In the 1995 *Report of the Committee on Compensation Practices* (aka The Tully Report, for its Chairman, Daniel B. Tully), the report points out in clear terms the level and importance of investors' lack of knowledge of investment products and confusion derived from misunderstanding what's written in prospectuses. The report states that registered representatives and their clients are:

   "Separated by a wide gap of knowledge – knowledge of the technical and financial aspects of investing. The pace of product innovation in the securities industry has only widened this gap. It is a rare client who truly understand the risks and market behaviors of his or her investments, and the language of prospectuses intended to communicate those understandings is impenetrable to many. It also makes communication between a registered representative and investor difficult and puts too much responsibility for decision-making on the shoulders of RRs – a responsibility that belongs with the investor."

9. Professor Cain's remarks, and those of Rutgers law professor Arthur Laby, SIFMA General Counsel Ira Hammerman, and Financial Services Institute General Counsel, David Bellaire can be seem on the website of the Institute for the Fiduciary Standard at http://www.thefiduciaryinstitute.org/fiduciary-forum-2011

10. http://www.aei.org/files/2013/09/10/-five-years-after-the-crash-what-americans-think-about-wall-street-banks-business-and-free-enterprise_083339502447.pdf

11. Another factor that contributes to a "mixed" view of big business, a point not mentioned in this paper, the industry. In a Harris Interactive February 2013 survey that measures the reputations of the "60 most visible companies" the consumer technology companies {Amazon, Apple and Google], actually rated quite high, at "excellent," and occupy three of the top four positions, while financial institutions rated quite low, Wells Fargo, JP Morgan, Citigroup, Bank of America and Goldman Sachs occupy, respectively, positions 52, 53, 55, 56, and 59, all rated "poor," "very poor," or "critical.

12. http://www.investmentnews.com/article/20130731/FREE/130739991#

13. http://wealthmanagement.com/opinions/editors-letter-november-2013

14. http://www.riabiz.com/a/24103040/why-a-reputation-of-shadiness-persists-in-the-financial-advisory-industry

15. http://www.riabiz.com/a/22621375/why-only-14-of-rias-volunteer-complete-pricing-information-to-clients-and-why-selective-fee-disclosure-is-not-a-winning-strategy

16. http://www.fa-mag.com/news/deception-13794.html

17. http://www.investmentnews.com/article/20140410/FREE/140419988

18. http://www.harrisinteractive.com/vault/2013%20RQ%20Summary%20Report%20FINAL.pdf

19. http://www.harrisinteractive.com/Insights/RQMedia.aspx, NBC Nightly News, February 27, 2012.

20. Two notable exceptions to this general "silence" from organizations are evident. The first is the CFA Institute's *Future of Finance* campaign, which is aimed at galvanizing the financial services industry to restore investor trust. For more information, http://www.cfainstitute.org/learning/future/pages/index.aspx?WPID=Strategic_Home&PageName=Homepage. The second is Paladin CEO Jack Waymire (see above page 10). Waymire has over many years articulated the differences between sales brokers and fiduciary advisers.