

‘The New SEC in 2021’

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What is *fiduciary*? Justice Cardozo called it “Not honor alone ... the punctilio of an honor the most sensitive” in 1928. The Supreme court in 1963 affirmed that the Investment Advisers Act of 1940 reflects congressional recognition "of the delicate fiduciary nature of an investment advisory relationship.”

This means, according to professor Tamar Frankel, care that is, “true expertise, knowledge, and avoidance of negligence; and avoids conflict of interest, that is, for the *dependents’ benefit* and for *no one else’s benefit*, without dependent’s consent.”

After many years of watering down or simply rejecting these traditional concepts, the working meaning of fiduciary today is far different if not unrecognizable. The Reg BI release on best interest is filled with dubious or inaccurate or nonsensical views defying legal precedent or logic or common sense.

2021 is already indelibly marked a year of national historic challenges. From covid and climate to Afghanistan and world balance of power. These are not small challenges.

But neither is the challenge to rebalance the social contract. That is the social contract between the need for market innovation and the need for rules to moderate market behavior. Moderating market behavior is vital to preserving trust and confidence.

Rebalancing is what capitalism needs and investors reasonably expect. Rebalancing is essential to defend and protect investors and the sanctity of the meaning of fiduciary.

We live in an historic moment. The aspirations of the new SEC appear to match the challenges of the time. Three points should be remembered about the new SEC.

First, we start in a hole. A sober view of the status of fiduciary advice and investor protection in 2021 should acknowledge the harms of shortcomings and backsliding from the SEC over the past twenty years. They have have taken a toll. The Chair’s newly appointed advisor, Barbara Roper incisively reminds the SEC of these shortcomings in her April letter to Chair Gensler.

The problem is not four years in the making. It's closer to 44 years in the making. Consider the decades of broker-dealer advertising, which law professor Arthur Laby reminds us, *worked*.

This advertising worked to make broker-dealers that are designed to trade and sell securities to appear to be purveyors of trusted advice. It worked to help create an aura around registered representatives that helped mightily to confuse investors, the industry and, yes, even many regulators as to their role and purpose. Acknowledging at the outset the depth of the hole is important to informing the needed remedies.

Second, there is a need for swift action. There to an urgency for action to rebalance the social contract. An urgency that demands swift action on priority issues that set conduct standards, define fiduciary and protect investors. And do so by thinking outside the box. This calls for the active and vocal participation of advisor and investor groups.

Third, we have a Commission with new perspectives and aspirations.

It has already expressed in statements, enforcement actions and new initiatives that it embodies new aspirations and a new vision of its mission. Individual members, while speaking for themselves, have made no bones about their priorities reflecting these aspirations. Their rules, guidance and enforcement can make this SEC the most investor and fiduciary-centric SEC in modern history.

The new SEC knows well the challenges ahead are “clear and present”, in the words of the Supreme Court. Their remedies deserve the broadest and strongest support. The need to re-balance the social contract is no small challenge.

The Institute seeks to do its part. We have urged specific actions on Reg BI, the fiduciary interpretation and form CRS. We have met with commissioners. We are finalizing initial phases of testing of CRS forms. We are counting on a ‘New SEC’ in 2021 and beyond.