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Article 1

Introduction to Symposium: Revolution in the Regulation of Financial Advice: The U.S., the U.K. and Australia

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SYMPOSIUM

REVOLUTION IN THE REGULATION OF FINANCIAL ADVICE: THE U.S., THE U.K. AND AUSTRALIA

INTRODUCTION

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This Symposium brought together legal academics, practicing lawyers and business people to discuss new directions in the regulation of financial advice to retail investors. Recently, this has been the subject of many initiatives around the world. The Symposium examined three of these initiatives in the United States, the United Kingdom and Australia. In the U.S., the approach historically has been based on disclosure to manage conflicts of interest. Although the U.K. and Australia have not done away with disclosure, they have moved to banning certain practices, especially in the area of compensation to investment advisers from product providers that can result in conflicts of interest between an investment adviser and its clients.

The initiatives in the United States have grown out of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Dodd-Frank") and Department of Labor initiatives involving pension funds regulated by ERISA. Dodd-Frank mandated that the Securities and Exchange Commission ("SEC") conduct two studies of investment advisers and broker-dealers. In section 913 of Dodd-Frank, Congress directed the SEC to study "the effectiveness of existing legal or regulatory standards of care for brokers, dealers, [and] investment advisers . . . for providing personalized investment advice and recommendations about securities to retail customers" and

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possible "legal or regulatory gaps, shortcomings, or overlaps in [such] legal . . . standards."[1] The resulting study is normally referred to as the Section 913 Study. In section 914 of Dodd-Frank, Congress directed the SEC to "review and analyze the need for enhanced examination and enforcement resources for investment advisers."[2] The resulting study is normally referred to as the Section 914 Study. The first two panels of the Symposium were devoted to issues raised by the Section 913 Study and Section 914 Study.

Independently of Dodd-Frank, the Department of Labor ("DoL") has pursued its own initiatives involving ERISA regulated plans. We were exceptionally pleased that Phyllis C. Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration, presented the keynote speech at the Symposium. Unlike the SEC, the DoL does not regularly publish speeches by its senior employees; therefore, her speech is not being published in the Symposium issue. But one can get a good feel for the Department of Labor's approach to the issues from Borzi's testimony before the House of Representatives on July 26, 2011. Borzi noted that

> [u]nder the [Department of Labor] regulation [defining investment advice], a person is a fiduciary under ERISA and/or the tax code . . . only if they: (1) make recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value; (2) on a regular basis; (3) pursuant to a mutual understanding that the advice; (4) will serve as a primary basis for investment decisions; and (5) will be individualized to the particular needs of the plan.[3]

This five factor test is very restrictive as each element must be met "for *each* instance of advice" for a fiduciary duty to be imposed on an investment adviser.[4] The proposed DoL rule[5]

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913(b), 124 Stat. 1376, 1824 (2010).

[2] *Id.* § 914(a)(1).

[3] *Redefining 'Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees: Hearing Before the S. Comm. on Health, Emp't, Labor, & Pensions of the H. Comm. on Educ. & the Workforce*, 112th Cong. 8 (2011) (statement of Phyllis Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration) [hereinafter *Borzi Hearing*].

[4] *Id.* (emphasis added).

[5] Employee Benefits Security Administration Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (proposed Oct. 22, 2010) (to be codified at 29 C.F.R. pt. 2510).

would "(1) replac[e] the five-part test with a broader definition more in keeping with the statutory language; and (2) provid[e] clear exceptions for conduct that should not result in fiduciary status."[6]

The proposed rule proved to be very controversial and it was withdrawn by the Department of Labor in September 2011.[7] Currently, the Department of Labor is considering proposing a revised rule, although it is unclear when the new rule will be released.

The United Kingdom and Australia have also been pursuing radical reforms of the regulation of financial advice given to retail customers. The purpose of these reforms is to restrict compensation practices for investment advisers that might influence the advice that they give to retail customers because of their compensation arrangements with financial product producers. The third panel of the Symposium was devoted to issues raised by these international developments.

One of the issues that was raised, but not addressed, by the papers presented in the first two panels was why Dodd-Frank contained anything related to investment advice. The first panel was entitled "The Future of Fiduciary Duties for Financial Advice." The papers in this panel addressed the advantages and disadvantages of a fiduciary standard as applied to broker-dealers. This new standard would bring broker-dealers and investment advisers under a single umbrella with both groups held to a fiduciary relationship with their clients, as opposed to the current suitability standard for broker-dealers and the current fiduciary standard for investment advisers. Even those papers that advocated for such a standard did not explore how such a standard was related to the financial crisis that commenced in 2008 and provided the impetus for Dodd-Frank.

As the legislative history of the Dodd-Frank Act is so sparse, perhaps the concern was that institutions such as Goldman Sachs were structuring financial products in such a way as to disadvantage certain buyers of these products. Presumably, a fiduciary could not structure products in such a way and then sell them to its own customers. But the buyers of these products

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[6] *Borzi Hearing*, *supra* note 3, at 13.

[7] Press Release, Dep't of Labor, U.S. Labor Department's ESBA To Re-Propose Rule on Definition of a Fiduciary (Sept. 19, 2011), *available at* http://www.dol.gov/opa/media/press/ebsa/EBSA20111382.htm.

were also sophisticated investors and the lawsuits by these buyers have foundered on the fact that there was proper disclosure of the dangers presented by such products. One should not be surprised by such a result as, under American black letter law, at least, informed consent of a principal to actions by an agent such as a broker immunizes the agent from liability for those actions.[8]

The first panel addressed the issue of whether brokers should be held to the same fiduciary duty standard that investment advisers are held to under the Investment Advisers Act of 1940 ("Advisers Act"), the issue studied by the SEC in the Section 913 Study. All but one of the papers delivered in the first panel assumed that the imposition of such a standard would have a material impact on the brokerage business and differed over whether such an impact was good for the investing public. To simplify what are complicated arguments, the proponents of a fiduciary standard assume that a fiduciary standard would improve investment advice by the very nature of the standard. In other words, the authors adopt a Platonic position and assume that a legal principle such as a fiduciary standard will logically lead to changes in how investment advice is rendered. The opponents make a similarly Platonic assumption but assume that a fiduciary standard would lead to changes in investment advice, rendering it too expensive for many small investors.

I encourage future debate to move from the Platonic to the Aristotlean. In my view, rather than discussing abstractly how the fiduciary principle is a favorable principle for individual investors or damages some parts of the financial services industry, it would help if the debate focused in detail on how such a standard would actually operate. We, therefore, could get some sense of what the expected costs and benefits might be. For example, does the fiduciary duty principle have any current impact in arbitrations between FINRA members and their customers? This question was raised several times by panel members and no clear answer was forthcoming. All that was clear from the panelists' answers is that arbitration pleadings

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[8] *See* Francis J. Facciolo, Do I Have a Bridge for You: Fiduciary Duties and Financial Advice 3 (June 21, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283200.

often contain allegations of breaches of fiduciary duty. But no panel member was willing to speculate about whether such allegations were important in arbitration decisions.

Ryan Baktiari, Katrina Boice, and Jeffrey S. Majors, in their article entitled *The Time for a Uniform Fiduciary Duty Is Now*, present an excellent overview of how the debate on fiduciary duties for broker-dealers has developed since 2008 and the RAND Report that documented the confusion experienced by retail investors in distinguishing broker-dealers from investment advisers.[9]

Paul Walsh, in his article entitled *Can the Retail Investor Survive the Fiduciary Standard?*, pushes the story back to the 1990s, when broker-dealers began to create fee-based accounts and, therefore, moved away from commission-based compensation. The SEC favored this movement because it diminished the motivations for broker-dealers to churn a brokerage account for the commission income that it generated. At the same time, these new fee-based accounts raised an issue of whether the sponsoring broker-dealers were no longer able to take advantage of the exemption from registration as an investment adviser contained in section 202(a)(11)(C) of the Advisers Act. The SEC issued Rule 202(a)(11)-1. This rule was successfully challenged by an investment adviser trade group in *Financial Planning Association v. SEC*, which vacated the rule.[10]

Christine Lazaro, in her article entitled *The Future of Financial Advice: Eliminating the False Distinction Between Brokers and Investment Advisers*, gives a detailed analysis of the different statutory regimes covering broker-dealers and investment advisers and the differences in the standards of care in the Securities Exchange Act of 1934 ("Exchange Act") and the Advisers Act, as interpreted by the Supreme Court. She notes that, despite the convoluted intellectual journey to the conclusion that section 206 of the Advisers Act creates a federal fiduciary duty for investment advisers, the Supreme Court arrived at this conclusion in *Transamerica Mortgage Advisors, Inc. v. Lewis*. In contrast, broker-dealers do not have a general fiduciary duty under federal securities law because the general anti-fraud provision of the Exchange Act, section 10(b), contains a scienter

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[9] Ryan K. Bakhtiari et al., *The Time for a Uniform Fiduciary Duty Is Now*, 87.2/3 ST. JOHN'S L. REV. 313, 319 (2013).

[10] Fin. Planning Ass'n v. SEC, 482 F.3d 481, 493 (D.C. Cir. 2007).

requirement. As a matter of black letter law, violations of fiduciary duties do not necessarily require that the fiduciary act with scienter.

Andrew Melnick, in his article entitled *What's in a Name: The Battle over a Uniform Fiduciary Standard for Investment Advisers and Broker-Dealers*, carefully considers some of the practical difficulties that broker-dealers will face if a uniform fiduciary duty is adopted. He urges the SEC to clarify that "receipt of a commission does not create a violation of the proposed fiduciary standard in and of itself."[11] Melnick concedes that Dodd-Frank already so provides but he is concerned that, as part of litigation, arbitration, or regulatory action, the argument might be made that "putting the client in a particular product, account, or strategy [might not be in the client's best interests] when there was a lower-cost alternative available";[12] therefore, he recommends more detailed guidance from the SEC on commissions. In addition, he is very concerned that the Dodd-Frank proscription against requiring any ongoing monitoring of a client's account or investment strategy, absent an agreement to do so, be clearly defined in any SEC rules.

Baktiari and Lazaro favor a uniform fiduciary standard, in large part due to the difficulty that clients have in distinguishing broker-dealers from investment advisers. Although there certainly is an argument for avoiding retail investor confusion, it is difficult to know how a uniform standard would actually affect broker-dealer practices. Walsh is opposed to any uniform fiduciary standard. He fears that small investors will be denied any advice, as the fiduciary model of advice is inherently more expensive than a transaction-by-transaction model of advice. As he summarizes his view: "How could a fiduciary standard, which would require disinterested investment advice, be reconciled with a compensation structure linked to the product? It would not be reconciled; the average investor will lose access to transactional investment brokers, and access to professional investment advice would be limited to the wealthy."[13] Melnick shares the same

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[11] Andrew Melnick, *What's in a Name: The Battle over a Uniform Fiduciary Standard for Investment Advisers and Broker-Dealers*, 87.2/3 ST. JOHN'S L. REV. 415, 433 (2013).

[12] *Id.*

[13] Paul R. Walsh & David W. Johns, *Can the Retail Investor Survive the Fiduciary Standard?*, 87.2/3 ST. JOHN'S L. REV. 437, 449 (2013).

concerns but believes that a uniform standard is inevitable and that broker-dealers should make sure that SEC "rules are sufficiently flexible to account for the broker-dealer business model."[14]

Lazaro raises one possibility that is worth further exploration. She suggests that we need "a new regulatory scheme, . . . a Financial Advice Act."[15] The Financial Advice Act would distinguish between trading accounts, where presumably the traditional duties of providing suitable recommendations and best execution would still apply, and investment accounts, where both a duty of loyalty and a duty of care would apply. She argues that the form of compensation should not determine how an account is characterized; rather, what should matter is what the retail investor expects from the financial professional advising her. One can imagine legislation requiring that the different types of accounts have different specified names, much like attorney trust accounts have specified names, with corresponding disclosure to the retail investor and legislative duties imposed on the financial professional. Again, one can imagine the "FDIC insured" and "non-FDIC insured" as a model for this. I hope that Lazaro will further develop her ideas on this subject in a future article.

Mercer Bullard, in his article entitled *The Fiduciary Standard: It's Not What It Is, But How It's Made, Measured, and Decided*, looks outside of the narrow confines of the debate over fiduciary duties to suggest that a legal standard has meaning only if it can be enforced. Arbitration between a customer and a broker-dealer is the predominant form of dispute resolution for customer disputes in the financial services industry. Arbitrators, under FINRA rules, however, do not have to provide reasoned decisions. Thus, it would be almost impossible to know what a new section 913 fiduciary duty would mean. Here, Bullard makes the sensible suggestion that the SEC exercise the authority granted to it by Congress in Dodd-Frank over mandatory arbitrations in the financial services industry "to

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[14] Melnick, *supra* note 11, at 435.

[15] Christine Lazaro, *The Future of Financial Advice: Eliminating the False Distinction Between Brokers and Investment Advisers*, 87.2/3 ST. JOHN'S L. REV. 381, 413 (2013).

adopt rules requiring arbitrators to explain their decisions."[16] Only then would we be able to evaluate what a new section 913 fiduciary duty, if it were adopted, would actually mean in practice and whether it would be an effective or appropriate standard for investor protection.

Bullard also examines whether the SEC or FINRA will be the organization that guides the development of the fiduciary duty standard. First, he discusses the role of cost-benefit analysis in SEC rulemaking and asks whether, under the guise of cost-benefit analysis, libertarian values, which question the value of restricting individual choice, may not be driving the debate over issues such as fiduciary duties. As Bullard points out, a libertarian might view "mandatory disclosure under a fiduciary duty . . . [as] deny[ing] investors the freedom to contract privately for such disclosure while making them pay the costs of disclosure regardless of whether they need it."[17] Bullard implies that a libertarian philosophy is the real motive behind the emphasis on cost-benefit analysis. In other words, cost-benefit analysis is being used by many opponents of further regulation of financial services as a screen for what are really libertarian objections to this regulation.

Second, Bullard argues that the political forces that have buffeted the SEC, often using cost-benefit analysis as their standard, may lead FINRA to be more important than the SEC in developing fiduciary law. Many of the freedoms from political pressures that FINRA enjoys, notably freedom from funding pressures and from the Administrative Procedure Act, which are also discussed by David Tittsworth in his article on a self-regulatory organization for investment advisers, allow FINRA more freedom to regulate than the SEC enjoys. Bullard speculates that this freedom has allowed FINRA to move toward a fiduciary-type standard in its suitability rule, Rule 2111, and the guidance that FINRA has issued with respect to the rule.

Subsequent to this Symposium, on March 1, 2013, the SEC released a Request for Data and Other Information (the "RFI") in which it sought "particular quantitative data and economic analysis, relating to the benefits and costs that could result from various alternative approaches regarding the standards of

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[16] Mercer Bullard, *The Fiduciary Standard: It's Not What It Is, But How It's Made, Measured, and Decided*, 87.2/3 ST. JOHN'S L. REV. 337, 378 (2013).

[17] *Id.* at 345.

conduct and other obligations of broker-dealers and investment advisers."[18] The structure of this request has raised concerns among advocates for a fiduciary standard that any standard based on the "RFI assumptions . . . would be weaker than that originally set forth in the Section 913 Study and far less stringent than that currently imposed under the Advisers Act. Indeed, the RFI seems to contemplate little more than the existing suitability standard supplemented by some conflict of interest disclosures."[19] Comments are due on the RFI by July 5, 2013. As of July 5, 2013, several hundred comment letters had been received, although many are duplicative form letters. It is unclear whether the SEC will issue a proposed rule after the comment period closes or, if a proposed rule were to be issued, what its content would be.

The second panel, entitled "The Structure of Regulation for Investment Advisers: A Self-Regulatory Organization or Not?", addressed the issue of changes that should be made to the institutional structure for regulating investment advisers. Concern that the SEC does not have adequate resources to inspect and examine investment advisers has given rise to this issue. Pursuant to congressional mandate in the Dodd-Frank Act, the SEC issued the Section 914 Study on this problem and set out three possible solutions: increased funding for the SEC through user fees charged to SEC-registered investment advisers; a self-regulatory organization for investment advisers similar to FINRA for broker-dealers; and, as a variation on the SRO proposal, allowing FINRA to function as the SRO for investment advisers. Competing proposed bills have been introduced in Congress on user fees and FINRA as a SRO for investment advisers. Neither bill has made it to a committee hearing. The bill making FINRA an SRO was actually withdrawn by its sponsor, Representative Bacchus, although there have been rumors that it may be reintroduced.

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[18] Duties of Brokers, Dealers, and Investment Advisors, Exchange Act Release No. 69,013, Investment Advisers Act Release No. 3558, 2013 WL 771910, at *1 (Mar. 1, 2013).

[19] Letter from Joyce A. Rogers, Senior Vice President, AARP, et al., to Mary Jo White, Chairman, Sec. & Exch. Comm'n (June 4, 2013), *available at* http://www.sec.gov/comments/4-606/4606-3063.pdf.

David Tittsworth, in his article entitled *H.R. 4624: The Pitfalls of a Self-Regulatory Organization for Investment Advisers and Why User Fees Would Better Accomplish the Goal of Investment Adviser Accountability*, makes a strong plea for the user fee approach. In his role as Executive Director and Executive Vice President of the Investment Adviser Association, a major trade organization of investment advisers, Tittsworth is a prominent participant in the debate over the form of investment adviser regulation. In this article, he expresses strong opposition to an SRO for investment advisers. Tittsworth does a close analysis of the Bacchus bill, but the conclusions that he draws are more generally applicable to any use of an SRO for investment advisers. Tittsworth's opposition to an SRO is based in part on the fact that the SRO model has not been shown to be effective for broker-dealers. Further, SROs "are not subject to requirements related to the Administrative Procedure Act . . . , the public records laws, due process, the Freedom of Information Act, cost-benefit analysis, and other critical protections" for the public.[20] He is also concerned that an SRO would cost more than increased funding of the SEC and that these increased costs would particularly impact investment advisers, as so many of them are small businesses. Finally, Tittsworth raises the issue that broker-dealers, who are currently regulated by FINRA, perform a different role in the financial services industry (the sell-side) than investment advisers (the buy-side). Therefore, FINRA would have conflicts of interest when it regulates both.

Anita Krug, in her article entitled *Rethinking U.S. Investment Adviser Regulation*, steps back from the debate arising out of the Section 914 Study and proposes that we rethink investment adviser regulation in general. She uses a series of case studies of problems with the current regulation of investment advisers to highlight the need for a fundamental change in such regulation. As Krug sees it, investment adviser regulation is the result of the accretion of piecemeal solutions to problems that have created a structure that is "too complex and

[20] David G. Tittsworth, *H.R. 4624: The Pitfalls of a Self-Regulatory Organization for Investment Advisers and Why User Fees Would Better Accomplish the Goal of Investment Adviser Accountability*, 87.2/3 ST. JOHN'S L. REV. 477, 483 (2013).

too incoherent."[21] From her perspective, "[b]etter investment adviser regulation—that is, more effective and efficient investor protection and promotion of market integrity—requires, in some sense, returning to square one and thinking critically about what that regulation should be and what it should accomplish."[22]

In a recent article published in the *Columbia Law Review*,[23] Krug has presented one principle that she believes should underlie financial services regulation, including investment adviser regulation that is hinted at in her article for the Symposium. Her more recent article argues that we should not automatically focus on entity-specific rules. Rather, we should consider how a regulated area actually functions when determining how to regulate that area. As one simple example, Krug suggests that investment company registration perhaps should not be focused on the investment company but rather on the investment adviser to the investment company. Her point is that, since

> a mutual fund may be viewed merely as a facilitating structure, one that allows the fund's investment adviser to provide advisory services to the fund's shareholders[,] . . . directing regulatory obligations toward those who control the fund [the investment adviser] and are responsible for its existence and ongoing operations may better promote regulatory goals.[24]

The third panel, entitled "International Issues in the Regulation of Financial Advice," discussed international developments in investment adviser regulation. The first two articles describe how the reforms in Australia and the U.K. actually dictate the fashion in which investment advice will be given to small investors. This is in contrast to relying on principles governing such advice, which is the underlying premise of the Section 913 Study, or strengthening regulatory oversight, which is the underlying premise of the Section 914 Study. The Australian reforms have gone forward under the rubric of the Future of Financial Advice ("FOFA"), while the U.K.

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[21] Anita K. Krug, *Rethinking U.S. Investment Adviser Regulation*, 87.2/3 ST. JOHN'S L. REV. 451, 476 (2013).

[22] *Id.*

[23] Anita K. Krug, *Escaping Entity-Centrism in Financial Services Regulation*, 113 COLUM. L. REV. 2039 (2013).

[24] *Id.* at 2054.

reforms have gone forward as the Retail Distribution Review.[25] The third article discusses the impact of the U.S. Supreme Court's *Morrison* decision on investment adviser regulation and the reach of domestic U.S. regulation. The third panel raises the issue of whether, at least for retail investors, there should be substantive restrictions on certain compensation practices that might create conflicts for investment advisers between their own interests and the interests of their clients. The approach in the U.S. has been to favor disclosure of such conflicts by investment advisers to their clients. Although disclosure has played and continues to play a role in the U.K. and Australia, the balance has shifted to prescriptive regulation of practices when retail investors are involved.

Richard Batten and Gail Pearson, in their article entitled *Financial Advice in Australia: Principles to Proscriptions; Managing to Banning*, provide a detailed review of the initiatives that have been undertaken in Australia under the rubric of the FOFA. As they note, there is a compulsory superannuation system in Australia for retirement, what we would call a compulsory defined contribution system, that places market risk on individuals. Due to this compulsory system, financial advice plays a "vital" role in Australia. The regulatory regime in Australia has moved from a principles-based system to one in which explicit regulation of certain practices as well as principles are applied. As summarized by Batten and Pearson, the legislation enacting the FOFA has several components:

> (1) to act in the best interests of the client; (2) to follow prescribed steps to meet the best interests obligation; (3) to reach and give appropriate advice through meeting the best interests obligation; (4) in case of a conflict of interest, to give priority to the interests of the client; (5) to ban conflicted remuneration, volume-based benefits, shelf fees, and asset-based fees on borrowed monies; and (6) to require that every two years, clients must opt-in to any ongoing fee arrangement.

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[25] For a brief, general description of these two reform efforts, see Francis J. Facciolo, *The Revolution in Investment Adviser Regulation*, 18 THE INVESTMENT LAW., no 10, Oct. 2011.

> The first four obligations are linked and generally fall on individuals. The remuneration rules are not restricted to individuals.[26]

What the FOFA does not have is an explicit statement that investment advisers owe a fiduciary duty to their clients, although fiduciary duty had been part of the debate leading up to the legislation.[27] Batten and Pearson do make some interesting observations about Australian concepts of fiduciary duties in the investment advice context. They also describe the superseded rules that "required financial services licensees to give only 'appropriate advice,' " which is very much like the U.S. concept of suitability that is applied to brokers and their interactions with clients.[28]

The initiatives leading up to the FOFA legislation have led to some interesting writing on the nature of fiduciary duties, which Batten and Pearson mention and which should be of interest to U.S.-based practitioners and academics. Gerard Craddock takes the view that legislation cannot be the basis of fiduciary duties, as they are so fact specific. Indeed, "[s]tatutory fiduciary duties stand the law of fiduciaries on its head. Careful fact-finding . . . is eliminated, and with it the capacity to determine precisely the adviser's obligations in context."[29] He particularly criticizes the prescriptive approach to the best interests obligation taken by the FOFA legislation. This approach provides a safe harbor to an investment adviser if it follows the prescribed steps in providing advice.[30] Craddock is concerned that "[o]ne risk with statutory prescription is that it may promote minimum compliance. Another is that it may stultify the development of the role of the common law in promoting professional quality via the standard of care."[31] His solution is to strengthen the disclosure of conflicts provided to

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[26] Richard Batten & Gail Pearson, *Financial Advice in Australia: Principles to Proscription; Managing to Banning*, 87.2/3 ST. JOHN'S L. REV. 511, 514 (2013) (footnotes omitted).

[27] Gerard Craddock, *The Ripoll Committee Recommendation for a Fiduciary Duty in the Broader Regulatory Context*, 30 COMPANY & SEC. L.J. 216, 220, 222, 233 (2012). For more background on the FOFA, see Andrew J. Serpell, *The Future of Financial Advice Reforms*, 30 COMPANY & SEC. L.J. 240, 240–41 (2012).

[28] Batten & Pearson, *supra* note 26.

[29] Craddock, *supra* note 27, at 222.

[30] Batten & Pearson, *supra* note 26, at 524–30 (describing best interests and appropriate advice obligations).

[31] Craddock, *supra* note 27, at 235.

retail investors. Craddock's model for this strengthened disclosure are the disclosures contained in the Form ADV Part 2 required for registration with the SEC.[32]

Gerard McMeel, in his article entitled *International Issues in the Regulation of Financial Advice: A United Kingdom Perspective—The Retail Distribution Review and the Ban on Commission Payments to Financial Intermediaries*, provides a rich history of the regulation of financial advice in the U.K. leading up to the Retail Distribution Review, before describing the RDR. As in Australia, the U.K. has moved to a system of banning product providers from providing commissions to investment advisers in order to encourage sales of their products. McMeel reminds us that the U.K. operates within a European context and that various European Union Markets in Financial Instruments Directives have played a large role in shaping the U.K. reforms. Finally, McMeel reviews English fiduciary law, focusing on the receipt of benefits, such as secret commissions, by fiduciaries.

Arthur Laby, in his article entitled *Regulation of Global Financial Firms After Morrison v. National Australia Bank*, discusses the regulatory impact of *Morrison* rather than the impact of *Morrison* on enforcement of the federal securities laws through either lawsuits or administrative procedures. He is concerned with discerning the impact on U.S. regulation of both non-U.S. domiciled investment advisers and broker-dealers. Laby carefully lays out the implications of *Morrison* and then applies them to the doctrines that the SEC has relied upon in regulating these two groups. His conclusion is that the current regulatory structure has been demolished by Morrison as "[r]egulation of non-U.S. advisers depends heavily on the conduct and effects test . . . [and] [r]egulation of non-U.S. brokers assumes the Exchange Act applies extraterritorially in face of congressional silence."[33] As the Supreme Court "unmistakably rejected the conduct and effects test and forcefully asserted a presumption against extraterritoriality," the SEC's regulatory

[32] *Id.* at 237–38.

[33] Arthur B. Laby, *Regulation of Global Financial Firms After* Morrison v. National Australia Bank, 87.2/3 ST. JOHN'S L. REV. 561, 594 (2013).

regime rests on quicksand.[34] Laby does suggest two possible rulemaking fixes under the Exchange Act for the broker-dealer problem. He does not suggest any fix under the Advisers Act.

In discussing *Morrison* and its impact on the regulation of investment advisers, Laby discusses *SEC v. Gruss*,[35] in which the district court held that *Morrison* does not apply to an action under the Advisers Act. Laby makes a strong argument for why *Gruss* was incorrectly decided. But what is not clear from his article is that *Gruss* has been cited approvingly at least seven times, both in cases involving the Advisers Act[36] and in cases involving other federal statutes.[37] In addition, there does not appear to be a single published case that disapproves of the *Gruss* reasoning. Although the *Gruss* reasoning has not been tested at the circuit court level, it has achieved some real traction at the trial level.

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[34] *Id.*

[35] SEC v. Gruss, 859 F. Supp. 2d 653, 664 (S.D.N.Y. 2012).

[36] SEC v. Amerindo Inv. Advisors, Inc., No. 05 Civ. 5231(RJS), 2013 WL 1385013, at *9 (S.D.N.Y. Mar. 11, 2013); SEC v. Ficeto, No. CV 11–1637–GHK(RZx), 2013 WL 1196356, at *1 (C.D. Cal. Feb. 7, 2013); SEC v. ICP Asset Mgmt., LLC, No. 10 Civ. 4791(LAK), 2012 WL 2359830, at *1 (S.D.N.Y. June 21, 2012); Lloyd v. Metro. W. Asset Mgmt., LLC, B238724, 2013 WL 136237, at * 1 (Cal. Ct. App. Jan. 11, 2013).

[37] SEC v. Tourre, No. 10 Civ. 3229(KBF), 2013 WL 2407172, at *1 (S.D.N.Y. June 4, 2013); Loginovskaya v. Batratchenko, No. 12 Civ. 336(JPO), 2013 WL 1285421, at *1 (S.D.N.Y. Mar. 29, 2013); Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 480 B.R. 501, 506 (Bankr. S.D.N.Y. 2012).