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THE FIDUCIARY STANDARD: IT'S NOT WHAT IT IS, BUT HOW IT'S MADE, MEASURED, AND DECIDED

MERCER BULLARD†

The scope and substance of an investment adviser’s fiduciary duty has recently become a primary focus of U.S. legislators and regulators. A U.S. Securities and Exchange Commission (“Commission” or “SEC”) study (“Section 913 Study”) required by section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”),¹ concluded that broker-dealers should be subject to a fiduciary duty when providing personalized investment advice to retail investors.² In a similar vein, the Department of Labor (“DOL”) proposed to expand the kind of investment advice that would trigger fiduciary obligations under the Employee Retirement Income Security Act of 1974 (“ERISA”) for persons who provide investment advice to plans and plan participants.³ Both initiatives have provoked protests from legislators and the financial services industry that have, at least temporarily, stymied regulators’ plans.

This Article addresses the SEC’s fiduciary rulemaking under Section 913 of the Dodd-Frank Act, but takes a step back from the debate to frame the discussion in a more holistic context. This author’s previous article on the fiduciary standard discussed how the implementation of a fiduciary duty is largely contextual; a variety of factors other than the scope and substance of the fiduciary duty are proximately related to achieving the social

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benefits that the fiduciary duty is intended to create.4 Achieving these benefits may depend on, among other things: (1) the limiting of “investment advice” to advice regarding securities, as opposed to, for example, insurance and banking products; (2) the private venues that are available to enforce this right, for example, arbitration, or state or federal court; (3) the conduct standards imposed under non-securities regulatory regimes, for example, ERISA for employee benefit plans, state insurance law for insurance products; (4) the powers and jurisdiction of applicable regulators, for example, the Commission, self-regulatory organizations and states, enforcement versus rulemaking; and (5) the regulation of issuers and intermediaries, for example, mutual fund disclosure and broker sales practices. In each case, these factors turn on issues other than the scope—who should have a fiduciary duty—and substance—what should that duty require—of the fiduciary duty.

This Article considers three such factors that play an important role in framing the fiduciary debate: the rising prominence of a libertarian metric for evaluating the fiduciary duty; the development of a fiduciary duty for broker-dealers by their self-regulatory organization, rather than the Commission; and the existing fiduciary duty as applied in private claims, especially in arbitration proceedings. The first factor is one that has recently assumed a prominent role. The social utility of the fiduciary duty has generally been judged according to a utilitarian metric that evaluates social policy based on the policy’s effect on net social wealth. Under this metric, the fiduciary duty is good policy if it results in an increase in net social wealth, even if accompanied by a decrease in some utilities, such as individual freedom. Recent policy debates have reflected a competing metric for evaluating the fiduciary duty, however, based on libertarian values. Under this libertarian metric, reductions in individual freedom beyond a certain point trump the utilitarian metric. The fiduciary duty is not good social policy under a libertarian metric if it reduces individual freedom beyond a certain point, even if the policy would increase net

social wealth. The SEC’s current paralysis with respect to Section 913 rulemaking may be largely attributable to policymakers’ shift from utilitarian to libertarian values.

Next, this Article turns from the social metrics applied to evaluate the fiduciary duty to the second factor—the source of the fiduciary duty. The current debate has focused on Congress (the Dodd-Frank Act) and the Commission (Section 913 rulemaking) as the sources of an expanded fiduciary duty. However, the self-regulatory organization for broker-dealers, the Financial Industry Regulatory Authority (“FINRA”), has already taken significant steps toward imposing a *de facto* fiduciary duty on the same broker-dealers to which a Section 913 rulemaking would apply. FINRA’s new suitability rule, for example, embraces a strongly fiduciary approach. FINRA may be motivated to expand the fiduciary duty of broker-dealers in part because this position supports its stated goal of being designated the self-regulatory organization for investment advisers. The shift of the fiduciary debate to the FINRA arena may also reflect a broader re-alignment in the administrative state in which power is shifted from government agencies that are susceptible to political influence to more politically insulated SROs and other quasi-governmental entities. However, there are signs that FINRA’s insulation from political factors may be on the wane.

Finally, this Article moves from public sources of law—Congress, the SEC, and FINRA—to the third factor—private sources of law. A fiduciary duty as imposed by the Commission would not, and the existing quasi-fiduciary duty imposed by FINRA does not, create a private cause of action, but state law has long provided a private claim against broker-dealers for violating a fiduciary duty. In comparison with the SEC’s and FINRA’s inchoate public law fiduciary duty, the private law fiduciary duty is well-developed and frequently litigated. Fiduciary duty violations are the most frequently asserted claims in broker-dealer arbitration proceedings.

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7 See infra Part III; see generally infra note 124.

8 See infra Part III, note 123.
However, the substance and scope of this private fiduciary duty is indeterminate. The overwhelming majority of private claims are brought in arbitration, where arbitrators are not required to and do not explain their decisions, rather than in court, where public decisions allow for an empirical evaluation of claims.9 Some commentators have evaluated the “fairness” of arbitration claims based on plaintiffs’ win rates in fully litigated proceedings.10 This Article takes issue with this methodology on the ground that plaintiffs’ win rates actually reveal nothing about the substantive fairness or unfairness of arbitration as a whole. Thus, the private arena in which broker-dealers’ fiduciary duties are actually being sorted out defies critical analysis, which, in turn, frustrates any attempt to evaluate the full effects of the development of a public fiduciary duty by the SEC or FINRA.

I. SOCIAL METRICS OF THE FIDUCIARY DUTY

For the most part, the current debate about a Section 913 rulemaking has assumed that the social metric that should be used to evaluate a fiduciary duty is a utilitarian one.11 The debate has focused on whether the benefits of the fiduciary duty would outweigh its costs, with each side disagreeing about the types and amounts of costs and benefits.12 Nonetheless, each side seems to agree about using such a cost-benefit, utilitarian analysis to decide what form of fiduciary duty, if any, would be good public policy.13 There is evidence, however, that the utilitarian rhetoric of some opponents of a fiduciary duty serves an ulterior, non-utilitarian motive.14 They may be motivated, in fact, by a libertarian metric that elevates individual freedom above utilitarian values. This libertarian metric is consistent with the increasing purchase in elective politics of small government values and popular mistrust of cost-benefit analysis and social engineering by administrative agencies. The fiduciary

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9 See infra Part III.
10 See infra Part III.
12 See Short, supra note 11, at 641.
13 See id.
14 See discussion infra notes 32–60.
duty may not hold up well under a libertarian metric. Its future, therefore, may depend on the fiduciary debate being resolved beyond the influence of current Congressional politics.

The term “utilitarian metric” is used here to refer to the evaluation of public policy based on its effect on net social wealth. Under this metric, the fiduciary duty would be preferable to the suitability standard that currently applies to broker-dealers if it caused a net increase in social wealth, regardless of the wealth effect as to any subset of society, such as investors who do not need the protection that the fiduciary duty offers. For example, the fiduciary duty may be good policy if it corrects a market inefficiency arising from asymmetric information between broker-dealers and their customers. But some industry members have argued that a fiduciary duty may reduce net social wealth by raising the cost of some financial services, thereby leaving some existing broker-dealer customers unable to afford certain products or services. The fiduciary duty could generate a net decrease in social wealth if the additional costs incurred by society outweighed the improvement in investors’ investment outcomes.

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16 See Michael Finke & Thomas P. Langdon, The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice, 25 J. FIN. PLAN., no. 7, 2012, at 28, 28–37, available at http://www.fpanet.org/journal/TheImpactoftheBrokerDealerFiduciaryStandard (“Imposition of a universal fiduciary standard among financial advisers may result in a net welfare gain to society, and in particular to consumers who are ill-equipped to reduce agency costs on their own by more closely monitoring an adviser with superior information, although this will likely occur at the expense of the broker-dealer industry.”).

17 See Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals To Improve Investment Adviser Oversight: Hearing on H.R. 112-58 Before the Subcomm. on Capital Mkts. & Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs., 112th Cong. 1–18 (2011) [hereinafter Hearings] (statement of John Taft, Chairman, Security Industry and Financial Market Association and testimony of Terry Headley, President, National Association of Insurance and Financial Advisors) (fiduciary duty could make it “economically unfeasible for financial professionals to work with less affluent clients”); SIFMA & OLIVER WYMAN, STANDARD OF CARE HARMONIZATION: IMPACT ASSESSMENT FOR SEC (2010) (Section 913 fiduciary duty could make commission-based services more expensive for investors and “force the majority of these investors into fee-based managed accounts at a higher cost factor”).

18 See Hearings, supra note 17 (noting that the “universal fiduciary standard of care” would force many brokers to discontinue providing many important services to middle-market clients). Contra Finke & Langdon, supra note 16 (“Empirical results provide no evidence that the broker-dealer industry is affected significantly by the
The utilitarian metric can be illustrated in the context of variable annuity sales, which have often been cited by regulators and investor advocates as emblematic of the improper sales practices of non-fiduciaries. Some argue that broker-dealers often recommend variable annuities to investors for whom they are not the best option, in part because broker-dealers receive higher compensation for selling a variable annuity than from selling another variable annuity or a mutual fund. Investors’ imposition of a stricter legal fiduciary standard on the conduct of registered representatives.


purchases of variable annuities therefore may result in suboptimal financial results for investors and impose negative net costs on society.\textsuperscript{21} In theory, the fiduciary duty would require that broker-dealers recommend the best product, thereby improving investors' financial experience and increasing net social wealth.\textsuperscript{22}

Proponents of the fiduciary duty might argue that this could be accomplished in two ways. First, the fiduciary duty could mandate enhanced disclosure of selling compensation, which, like price transparency generally, could promote competition and lower prices by heightening investors' price sensitivity.\textsuperscript{23} Second,
it could mandate recommendations that not only were suitable, but also were in the client’s best interests. This would require the broker-dealer to recommend the best product for the customer, and not necessarily the one that pays the highest compensation.

This analysis makes empirical assumptions on which some critics of the fiduciary duty disagree. They argue that enhanced disclosure or a substantive best-interest standard might not produce enough benefits to outweigh any attendant increase in social costs.24 Two Republican Commissioners criticized the recommendations in the Section 913 Study on the ground that they lacked “a basis to reasonably conclude that a uniform standard or harmonization would enhance investor protection” and insisted upon a “stronger analytical and empirical foundation” before rulemaking could proceed.25

The utilitarian metric as applied in the fiduciary duty context reflects an increasing emphasis on utilitarian analysis by Congress, the courts, and the Commission. Examples include a series of recent D.C. Circuit cases in which the court vacated SEC rules for failing to conduct an adequate cost-benefit analysis.26 Members of Congress have attacked the SEC’s cost-benefit analyses, holding one hearing titled “The SEC’s Aversion to Cost-Benefit Analysis,”27 and released a flurry of bills imposing greater cost-benefit requirements on agency rulemaking.28
Commission has relented under this pressure, promising to hire dozens of additional economists and make evaluating the costs of regulation to the industry a top priority.

The fiduciary debate as framed above suggests that both proponents and critics of the fiduciary duty agree on using a utilitarian metric to measure the social value of the fiduciary duty. However, the use of a utilitarian metric by opponents of the fiduciary duty may actually reflect libertarian values. Libertarian values are implicated by the fiduciary duty because, for example, mandatory disclosure under a fiduciary duty may deny investors the freedom to contract privately for such disclosure while making them pay the costs of disclosure regardless of whether they need it. Requiring that broker-dealers’ recommendations be in the best interests of customers would impose additional transaction costs on those customers who would otherwise make their own best-interest determinations, possibly without providing them with any countervailing benefit. Certain legislators, judges, and regulators who are motivated by these libertarian concerns may

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29 See Cost-Benefit Hearing, supra note 27 (oral and written testimony of Mary Schapiro, Chairman, Securities and Exchange Commission).


simply be using the more intellectually acceptable rhetoric of utilitarian cost-benefit analysis as cover. This is an admittedly unprovable claim: Any assertion that libertarian motives stand behind stated cost-benefit concerns is inherently subjective and arguably counterintuitive. Nonetheless, there is evidence that the utilitarian concerns of cost-benefit advocates are motivated more by a desire to rein in rulemaking per se than to produce more accurate utilitarian analysis.33

In some cases, the cost-benefit analysis demanded by critics does not square with a utilitarian metric because it appears not to be practicably achievable. In a series of decisions vacating SEC rules,34 the D.C. Circuit has applied a seemingly impossible standard to meet, requiring that, no matter what cost-benefit findings the Commission had made, it was always required to go one step further.35 The empirical analysis demanded by the SEC Commissioners who dissented from the Section 913 study could not practicably be accomplished by the agency in any reasonable timeframe, if at all.36 They made it clear that any rulemaking

33 See Short, supra note 11, at 668–69 (finding that the dominant critique of regulation in academic literature reflects libertarian concern that regulation is coercive).

34 See supra note 26.


36 For example, they argued that the Commission should conduct an “[a]nalysis of the investor returns (controlling for risk and investor characteristics such as age, income, and education) generated under the two existing regulatory regimes.” Statement of Casey & Paredes, supra note 24. It would not be possible to identify with any precision the category of accounts that fit within a particular regime—it is the overlapping nature of commission, and fee-based arrangements, that has created the very problem that a universal fiduciary is intended to address—much less to calculate with any precision the investment returns experienced under a fiduciary and a non-fiduciary regime. See F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009) (“There are some propositions for which scant empirical evidence can be marshaled.”). There have been studies that address the general question of the value of brokers’ services, but they are so cabined by caveats as to provide little concrete direction as to the precise contours of the fiduciary duty.

conducted without doing this analysis “would be ill-conceived at best and harmful at worst.”

When agencies have requested cost-benefit data that critics have demanded they consider, they have been roundly chastised, as illustrated by Congressional and industry responses to a recent DOL request for economic data. A bill passed by the House in August 2012 generally prohibited agency rulemaking until the national unemployment rate declined below six percent. The idea that a specific national unemployment rate could be a rational determinant of the utilitarian value of specific SEC rulemaking is inherently unreasonable, but it is consistent with the advancement of a libertarian metric, albeit clothed as a utilitarian one.

A libertarian metric provides a more coherent explanation of the position of cost-benefit advocates. Cost-benefit advocates embrace utilitarian analysis when more paternalistic policies are being considered, whereas they have eschewed utilitarian analysis when the public policies considered would increase individual freedom rather than constrain it. The current regulatory environment has provided a relatively rare opportunity to see this inconsistency in action. Under the Dodd-Frank Act and the Jumpstart Our Business Startup Act (the

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37 Statement of Casey & Paredes, supra note 24.
“JOBS Act”), enacted only sixteen months apart, Congress ordered the Commission to engage in rulemaking at opposite ends of the paternalistic-to-libertarian regulatory spectrum. The Dodd-Frank Act requires rules generally increasing regulation, while the JOBS Act requires rules generally lessening it. The same members of Congress who have criticized the SEC’s cost-benefit analysis in connection with Dodd-Frank rulemaking that they oppose have expressed no such concerns regarding JOBS Act rulemaking that they support. They have complained that the Commission has not spent enough time considering the costs, for example, of the Dodd-Frank Act’s requirement that issuers disclose information regarding certain minerals produced in the Democratic Republic of Congo (“conflict minerals”), while expressing no such concern regarding the JOBS Act exemption for crowd funding securities offerings and private offerings under Regulation D.

The seemingly contradictory positions of cost-benefit advocates have been particularly apparent in connection with the SEC’s rulemaking on conflict minerals and the private offering exemption. Two Republican SEC Commissioners voted against and issued critiques of the SEC’s conflict minerals rule, the statutory deadline for which had passed seventeen months earlier, on the ground that the SEC staff’s cost-benefit analysis was inadequate. One week later, the same Commissioners supported a proposal to eliminate the ban on general solicitation

42 See Cost-Benefit Hearing, supra note 27.
and advertising without even mentioning cost-benefit requirements, much less whether the requirements had been satisfied.\footnote{See Troy A. Paredes, Comm’r, Sec. & Exch. Comm’n, Statement at Open Meeting To Propose Rule Amendments Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings (Aug. 29, 2012) [hereinafter Paredes Rule 506 Statement], available at http://sec.gov/news/speech/2012/spch082912tap.htm (supporting amendments to Regulation D); Daniel Gallagher, Comm’r, Sec. & Exch. Comm’n, Statement at SEC Open Meeting: Proposed Rules To Eliminate the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings (Aug. 29, 2012) [hereinafter Gallagher Rule 506 Statement], available at http://sec.gov/news/speech/2012/spch082912dgm.htm.} The conflict minerals rulemaking missed its 270-day deadline by more than seventeen months, while the general solicitation and advertising proposal was only fifty-seven days past its ninety-day deadline.\footnote{See JOBS Act, Pub. L. No. 112-106, § 201(a)(1), 126 Stat. 306 (2012) (requiring rulemaking no later than ninety days after the Act’s effective date of April 5, 2012, that is, by July 4, 2012); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, § 1502(b), 124 Stat. 1376 (2010) (requiring rulemaking no later than 270 days after the Act’s effective date of July 22, 2010, that is, by April 17, 2011). The JOBS Act deadline applies to the final rule, whereas only a proposal was issued on August 29, so the Commission will miss the final deadline by more than fifty-seven days. The Commission provided for a thirty-day comment period, and SEC Chairman Schapiro promised that the Commission would take action “shortly thereafter,” which means adoption of a final rule around October 5, or ninety-four days past the JOBS Act deadline. The Commission had planned to issue an interim rule without notice and comment but reversed its position under pressure from investor advocates. See Schapiro’s Boss, WALL ST. J. (Dec. 5, 2012, 7:06 PM), http://online.wsj.com/news/articles/SB1000142412788733234019045781573 92212779684 (describing SEC Chairman Schapiro as “fold[ing] faster than Jerry Brown in a union negotiation” after discussions with investor advocates); SEC Announces Additional Delay on General Solicitation Rule Change, CORE COMPLIANCE & LEGAL SERVICES, http://www.corecls.com/compliance-corner/general/sec-announces-additional-delay-on-general-solicitation-rule-change (last visited Jan. 8, 2014); Letter from Fund Democracy et al. to Mary Schapiro, Chairman, Sec. & Exch. Comm’n (Aug. 15, 2012), available at http://www.sec.gov/comments/jobs-title-ii/jobstitleii-59.pdf (noting that issuing an interim rule without public notice and comment would violate the APA); see also Letter From Fund Democracy et al. to Elizabeth M. Murphy, Sec’y, Sec. & Exch. Comm’n (Aug. 16, 2012), available at http://www.sec.gov/comments/jobs-title-ii/jobstitleii-60.pdf (describing issues for which costs and benefits must be evaluated pursuant to APA).} Nonetheless, the Republican Commissioners argued the former needed more work and should be delayed further, while the latter should not even have been subject to public notice and comment, much less any cost-benefit analysis.\footnote{See Paredes Minerals Statement, supra note 41. Congressman Patrick McHenry scheduled a hearing to examine Chairman Schapiro’s “failure” to meet the JOBS Act deadline, which he attributed to her “ideological opposition” to the Act’s} They would have held the former rulemaking, which
would increase regulatory burdens, to a high cost-benefit standard, while holding the deregulatory rulemaking, which would reduce regulatory burdens, to no cost-benefit standard at all. Nor has either Republican had any objection to the SEC’s continuing failure to take final action on prior Dodd-Frank Act mandate to amend the same private offering rules to bar bad actors from relying on the exemption. The one-year deadline for that rulemaking passed thirteen months before the Commission proposed private offering amendments under the JOBS Act.

The Commissioners’ intermittent advocacy for more rigorous cost-benefit analysis is far more consistent with libertarian values than utilitarian ones, which begs the question of why they do not simply argue from explicitly libertarian principles? One reason may be that libertarian principles are often associated with the kind of anti-intellectual populism that is considered simplistic and extremist in the elite regulatory community.


Individual freedom as an intrinsic value has currency in electoral politics, but the appointees of politicians who espouse individual liberty principles do not carry that flag into the regulatory arena. For example, supporters of crowdfunding and permitting general solicitation and advertising in private offerings argue that any resulting economic losses to investors will be small relative to the economic benefits, they generally do not argue that allowing investors greater individual freedom—even if the result is that they make bad investment decisions—has intrinsic social value. The concept of freedom typically finds its voice in the form of arguments for “free” markets, which are primarily based on the utilitarian view that free markets will maximize net social wealth. In other words, it is not the enhanced freedom of markets, and their participants, that justifies deregulatory policies, but the capacity of market-directed outcomes to create greater net social wealth than government-directed outcomes.

Another reason that libertarian metrics are not openly embraced in debates about SEC rulemaking is that these metrics implicitly reject the very raison d’être of a regulatory agency—to make public policy in complex fields based on expert evaluation of social costs and benefits. The libertarian metric doubts the

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52 It is not only the value of individual liberty that is difficult to quantify; the reduction in utility caused by the loss of one investment dollar may also depend on the social context. As Paul Slovic and others, have explained, the social context surrounding an event can increase the risk that the event presents. See Roger E. Kaspersen et al., The Social Amplification of Risk: A Conceptual Framework, 8 RISK ANALYSIS 177, 179 (1988). For example, the effect of the Three Mile Island nuclear reactor accident far exceeded what a cost-benefit analysis would have found was the risk of such an event. Id. Slovic has argued that the “traditional cost-benefit and risk analyses neglect the higher-order impact[ caused by social amplification of loss] . . . (and thereby underestimate the overall risk from the event).” Id. Incorporating the social amplification of risk into cost-benefit analysis is necessary to “bring the technical assessment of risk more in line with a fuller determination of risk.” Id. One example of this theory in action is the social amplification of the risk of Madoff-like fraud when it results from a regulator’s failure to act on credible tips, rather than from investors’ own decisions or the absence of specific rules. The risk of a dollar lost to the former is far greater.


54 See id.

55 See Michael Ray Harris, Breaking the Grip of the Administrative Triad: Agency Policy Making Under A Necessity-Based Doctrine, 86 Tul. L. Rev. 273, 277
very capacity of administrative agencies to improve the human condition through social engineering, as opposed to allowing the free market to evolve on its own.\footnote{See generally Jodi L. Short, The Political Turn in American Administrative Law: Power, Rationality, and Reasons, 61 DUKE L.J. 1811, 1815–16 (2012) (discussing dynamics of political-reason giving in administrative decisions).} Indeed, many government officials may be naturally uncomfortable with a libertarian metric because it undermines the premise of government—that effective public policy can be derived from public processes.\footnote{See generally Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231, 1231 (1995) (characterizing post-New Deal administrative state as unconstitutional and inconsistent with separation of powers); Cass R. Sunstein, Constitutionalism After the New Deal, 101 HARV. L. REV. 421, 446–48 (1987) (discussing failure to incorporate constitutional commitment to checks and balances into regulatory administration).}

Deregulatory SEC Commissioners may feel consciously compelled to support, or at least not openly undermine, this premise of public service, or they may unconsciously be prisoners of a kind of inverted regulatory capture.\footnote{See Carl Landauer, Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought, 12 YALE J.L. & HUMAN. 171, 174 (2000) (describing legal scholars’ “internalized attachment to government” and views of “government as efficacious rather than susceptible to the mood swings of a pathological society” as reflecting a “confident identification with government”).}

Alternatively, they may see an inconsistency in making empirical arguments about the cost of regulations while also arguing for individual liberty—a social utility that defies empirical analysis. They also may feel more comfortable and/or believe they may be more effective espousing a mainstream cost-benefit analysis. There is no reason to believe that SEC Commissioners are any less sensitive to peer norms than other professionals. Indeed, this Article’s discussion of freedom for freedom’s sake itself operates within the same constraints. Attempting to inject such an unquantifiable social utility as individual liberty—or, in contrast, the normative value of liberal,
redistributional policies—into a regulatory debate may be more likely to be met with polite disdain than afforded serious consideration.

The foregoing discussion raises the question of whether the debate about the costs and benefits of the fiduciary duty is beside the point. The debate may actually be less about the balancing of quantifiable social utilities than about not only the role, but also the primacy of libertarian values. Individual liberty could be viewed as having independent value, as opposed to incorporating it into the netting of utilities that a more communitarian ethic assumes. In other words, individual freedom may be viewed as an incommensurate value that must be considered independently when making public policy. Under this metric, a public policy would not be adopted if it reduced individual freedom below some minimum value, regardless of whether the policy would result in an increase in net social wealth. Whatever form it takes, the libertarian metric must be explicitly considered in order to explore fully the pros and cons of the fiduciary duty.

It is unlikely, however, that we will soon see an SEC study on the cost of a fiduciary duty as reflected in a reduction in individual liberty, or a reduction in investor confidence. Libertarian principles impose implicit constraints on, if not pose a direct threat to, administrative authority. Administrative agencies will respond to this challenge. One response may be to shift their regulatory functions to entities that are currently further from Congress’s reach yet still subject to agency authority. As discussed below, the result may be that it is not the Commission that guides the ultimate development of the fiduciary duty but an agency that it oversees.

59 Although this discussion is focused on the relationship between utilitarian analysis and libertarian values, the straightjacket of utilitarian cost-benefit analyses may similarly weaken the position of more communitarian values such as those reflected in investor protection policies. See Cost-Benefit Hearing, supra note 27, at 70–71, 74–75, 81–82 (statements of Mercer Bullard, Fund Democracy, and University of Mississippi School of Law, all three discussing derogation in cost-benefit analysis of benefits of deterring fraud and misleading sales practices).

60 See Robert P. Murphy, Do Libertarians Have a Problem with Authority?, THE AM. CONSERVATIVE (Dec. 12, 2012), http://www.theamericanconservative.com/articles/should-libertarians-have-a-problem-with-authority/ (stating that “many people are attracted to libertarianism because they simply don’t like rules”).
II. THE FINRA FIDUCIARY DUTY

If, as discussed immediately above, agency rulemaking has been paralyzed by political forces in the form of heightened cost-benefit requirements,61 one might look to the development of the fiduciary duty under sources of law that are not so susceptible to direct Congressional oversight and judicial power. One such source of law could be the Financial Industry Regulatory Authority ("FINRA"), the self-regulatory organization ("SRO") for broker-dealers. FINRA rulemaking and enforcement actions are not subject to nearly the same degree of accountability to which the SEC and other agencies are held.62 SEC enforcement actions and rulemakings are more likely to be challenged than are FINRA actions. FINRA is not subject to either the Administrative Procedures Act or the Freedom of Information Act and is not subject to any statutory cost-benefit standard.63

61 See Steven Sloan, Cost-Benefit Analysis Puts the Brakes on Dodd-Frank, BLOOMBERG NEWS (May 7, 2012), http://www.businessweek.com/news/2012-05-07/cost-benefit-analysis-puts-the-brakes-on-dodd-frank ("Business lobbyists and Republican lawmakers who failed to stop the Dodd-Frank Act from becoming law have managed to put the brakes on many of its provisions a second way: cost-benefit analysis.").

62 See Desiderio v. Nat’l Ass’n of Sec. Dealers, 191 F.3d 198, 206–07 (2d Cir. 1999) (The National Association of Securities Dealers ("NASD"), predecessor to FINRA, is generally not subject to constitutional requirements).

63 However, there are rumblings that suggest that critics of regulation may be taking aim at FINRA’s independence and/or authority. See Investment Adviser Oversight Act of 2012, H.R. 4624, 112th Cong. § 203(C)(b)(1) (2012) (proposing amendments to Investment Advisers Act to create self-regulatory organization for investment advisers, the rulemaking of which would be subject to APA notice and comment requirements); Fiero v. FINRA, 660 F.3d 569, 571 (2d Cir. 2011) (holding that FINRA does not have the power to obtain judicial enforcement of fines imposed on members); CTR. FOR CAPITAL MKTS. COMPETITIVENESS, U.S. CAPITAL MARKETS COMPETITIVENESS: THE UNFINISHED AGENDA (2011) (arguing that FINRA should be subject to additional administrative, due process and/or transparency requirements); Joseph McLaughlin, Is FINRA Constitutional?, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 111 (2011); Roberta S. Karmel, Is the Financial Industry Regulatory Authority a Government Agency? (Brooklyn Law Sch. Legal Studies Research Papers, Paper No. 86, 2007), available at http://ssrn.com/abstract=1018396; see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (finding unconstitutional the limitation on President’s power to terminate Public Company Accounting Oversight Board (”PCAOB”) board member). FINRA has occasionally referred to itself as an “independent” regulator in arguing its ability to oversee investment advisers who compete with FINRA’s broker-dealer membership, a claim that may backfire if Congress decides to treat it like any other administrative agency. See Investment Adviser Oversight Act Hearing, supra note 6, at 11–13 (statement of Chet Helck, Chairman-Elect, Securities Industry & Financial Markets Association); SEC. INDUS. & FIN. MKTS. ASS’N, TESTIMONY OF CHET HELCK,
Its self-funding frees it from the kind of short-term political pressure that Congress exerts through its control of the SEC’s budget. FINRA’s governance structure is less cumbersome than the SEC’s two-party system, which has evolved to echo the ideological culture wars more than the disinterested deliberations of an expert agency. These factors give FINRA


much greater freedom than the Commission to impose a fiduciary duty on broker-dealers when providing personalized, retail investment advice, and advice in other situations. Thus, resolving the debate about broker-dealer conduct standards may have more to do with choosing the source of law—government agency or SRO—than establishing the particular scope or substance of the fiduciary duty.65

In fact, while the debate regarding the fiduciary duty has been focused on the SEC’s and DOL’s efforts, FINRA has been steadily establishing a foundation for imposing a fiduciary duty on the same broker–dealers to which a fiduciary rule under Dodd-Frank Section 913 would apply. FINRA regulations have long included a strong fiduciary element. The Commission described FINRA rules as “embod[y]ing basic fiduciary responsibilities” almost twenty-five years ago,66 a characterization that has gained purchase ever since.

As a general matter, FINRA members are subject to broad fairness standards that are structurally akin to the principles-based fiduciary duty.67 For example, FINRA Rule 2010 requires

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67 See, e.g., N.Y. Stock Exch. Rule 2020 (2009) (“No member . . . shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.”); FINRA Rule 2210(d)(1)(A), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10648 (requiring that communications with the public be “based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service”); FINRA Rule 5121, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9456 (requiring participants in public offerings to disclose prominently conflicts of interest); FINRA Rule 5110(b)(4)(C), available at http://finra.complinet.com/en/
that members “observe high standards of commercial honor and just and equitable principles of trade.” 68 In some circumstances, broker-dealers’ duties are explicitly fiduciary, such as when executing customer transactions. 69 Other rules impose a broad principles-based standard and specific conduct requirements, which effectively couples a non-fiduciary conduct rule with a fiduciary-like overlay. For example, principal transactions with customers must be effected at prices that are “fair, taking into consideration all relevant circumstances”—a facts-and-circumstances, fiduciary-like standard—and not exceed a five percent mark-up or -down limit—a bright-line, rule-based, nonfiduciary standard. 70 Adding a further fiduciary gloss, a mark-up or -down of five percent or less still “may be considered unfair or unreasonable,” depending on the particular facts and circumstances.72

The closest cousin in broker-dealer regulation to a Section 913 fiduciary standard is FINRA’s suitability rule. The suitability rule requires that members have a “reasonable basis to believe that a recommended transaction or investment strategy” is suitable for the retail customer “based on the information obtained through the [member’s] reasonable display/main.html?rbid=2403&element_id=6831 (prohibiting participation in underwriting in which arrangements are “unfair or unreasonable”).

69 See Order Execution Obligations, Exchange Act Release No. 37619A, 1996 WL 506154 (Sept. 6, 1996) (“A broker-dealer’s duty of best execution derives from common law agency principles and fiduciary obligations, and is incorporated both in SRO rules and, through judicial and Commission decisions, in the antifraud provisions of the federal securities laws.”); FINRA Rule 5310(a)(1), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10455 (requiring members to “use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions”).
72 Id. FINRA has frequently found markups of less than five percent to be excessive. See Dan Jamieson, FINRA Backtracks on Plan To End 5% Markup Rule, INVESTMENT NEWS (Feb. 10, 2013), http://www.investmentnews.com/article/20130204/FREE/130209979 (commentator noting FINRA settlements involving three percent markups).
diligence . . . to ascertain the customer’s investment profile."73 A “customer’s investment profile” includes the customer’s age, other investments, financial situation and needs, other enumerated factors, and “any other information the customer may [choose] to disclose.”74

The suitability rule has been criticized by fiduciary advocates for not requiring that a recommendation be in the customer’s best interests, but only that it be suitable.75 Thus, for a customer for whom a variable annuity was “suitable” a broker-dealer could recommend the variable annuity that paid him the highest compensation as opposed to the one that would be in the customer’s best interests, as discussed above. Yet suitability goes some distance down the fiduciary road by establishing a qualitative test for investment advice that mandates that it be consistent with clients’ best interests, if not necessarily that it be the best option.76 It is, again, the kind of principles-based, fact-dependent conduct standard that reflects the structure of a fiduciary standard more than that of a specific conduct rule.

FINRA recently adopted a new suitability rule77 that, in two primary respects, moves the suitability standard closer to a fiduciary standard.78 First, in a number of ways, the new rule contemplates evaluating broker-dealer conduct in the context of

73 FINRA Rule 2111, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859 (formerly NASD Rule 2310). There is a parallel NYSE rule—the “know your customer” rule—that became a FINRA rule in 2011 following the merger of the two regulators in 2007. See FINRA Rule 2090, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9858 (formerly NYSE Rule 405) (“Every member shall use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer.”).
74 FINRA Rule 2111.
75 See BULLARD, supra note 65, at 6.
76 See id. at 6–7.
the kind of comprehensive, ongoing advisory relationship with customers that is more akin to a fiduciary relationship. For example, FINRA expanded the rule to cover not only recommendations, but also “investment strategies,” which include situations in which a security or strategy is recommended, regardless of whether a transaction takes place. Along with the rule’s expansion to cover “hold” recommendations, the inclusion of investment strategies expands the kind of recommendations covered by the rule well beyond the transactional advice that has been the core of the suitability rule.

FINRA’s assertion of authority over transactions that may involve non-securities, such as equity-indexed annuities, home-equity loans, and viatical settlements, has further extended the suitability rule beyond transactions in securities to encompass, at least indirectly, virtually every form of financial advice. FINRA has stated that broker-dealers must design their supervisory procedures to detect, investigate, and follow-up on “red flags” indicating that a broker may have recommended an unsuitable

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81 See Kenneth Corbin, FSI Wary of Investment Strategy, Hold Provisions in FINRA Suitability Rule, FINANCIAL PLANNING (July 9, 2012), http://www.financialplanning.com/news/fsi-wary-of-investment-strategy-hold-provisions-in-finra-suitability-rule-2679753-1.html (Comments of David Bellaire, General Counsel and Director of Government Affairs, Financial Services Institute, regarding suitability rule’s coverage of hold recommendations: “It’s very easy for firms to monitor a transaction . . . . Things happen—products are purchased or sold.’ But ‘the recommendation to hold is a situation where suitability rules now apply in which there is no clear moment, no resulting transaction.’ ”).

82 See FINRA, Regulatory Notice 12-25; FINRA, Regulatory Notice 12-55. The term “viatical settlement” refers to the sale of a life insurance policy to a third party.

investment strategy with both a security and non-security component,
which further extends the reach of investment strategies category discussed above.

FINRA’s interpretation of the new rule seems to portend a broker-dealer duty to monitor customer accounts on an ongoing basis. An ongoing duty to monitor an account makes brokers’ services more closely resemble the kind of ongoing relationship of trust and confidence that is characteristic of a fiduciary relationship, in contrast with the services of a salesperson who only makes a one-time recommendation. FINRA’s January 2011 guidance on the new suitability rule states that the broker-dealer must “know its customers not only at account opening but also throughout the life of its relationship with customers in order to, among other things, effectively service and supervise the customers’ accounts.” It refers further to the need to verify essential facts about customers “at intervals reasonably calculated to prevent and detect any mishandling of a customer’s account that might result from the customer’s change in circumstances” and reminds broker-dealers of their obligation under Exchange Act Rule 17a–3 to “attempt to update certain account information every 36 months regarding accounts for which the broker-dealers were required to make suitability determinations.” These pointed assertions of an ongoing duty to update information imply a developing affirmative duty to

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85 See De Kwiatkowski v. Bear, Stearns & Co., 306 F.3d 1293, 1302 (2d Cir. 2002) (broker-dealer ordinarily has no duty to monitor a non-discretionary account).
86 See Press v. Chemical Inv. Servs. Corp., 166 F.3d 529, 536 (2d Cir. 1999) (broker-client fiduciary duty is limited “to the narrow task of consummating the transaction requested”). Conversely, the Department has proposed to expand the definition of “fiduciary” under ERISA to include not only persons who provide investment advice on a “regular basis” but also to those who provide advice regarding a single transaction. See Definition of the Term “Fiduciary”, supra note 3.
87 FINRA, Regulatory Notice 11-02, Know Your Customer and Suitability: SEC Approves Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations (2011). Interestingly, Dodd-Frank’s rulemaking authorization expressly prohibited a rule that required a broker-dealer to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities, see Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, § 913(g)(1), 124 Stat. 1376 (2010), yet FINRA’s interpretation of the new suitability rule seems to apply to certain customer relationships and entails precisely such a relationship.
88 FINRA, Regulatory Notice 11-02.
update prior recommendations periodically and make new recommendations based on changed circumstances as appropriate. Although other FINRA guidance creates some doubt as to FINRA’s direction in this respect, it appears that, at a minimum, FINRA has put the suitability rule on a path of requiring that broker-dealers assume greater responsibility for the longer-term effects of their transaction and investment strategy recommendations.

Thus, FINRA’s comments about ongoing monitoring and its authority over non-securities transactions, combined with the expansion of the suitability rule to cover both hold recommendations and investment strategies, reflect a rule that is decidedly moving toward a fiduciary duty. The foregoing changes, like FINRA’s addition of “age, investment experience, time horizon, liquidity needs and risk tolerance” to the list of factors that broker-dealers must consider in developing a customer’s investment profile, envision something more akin to a full-blown financial planning relationship than an intermittent transactional relationship. At the same time that financial

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89 FINRA states that recommendations normally do “not create an ongoing duty to monitor and make subsequent recommendations.” FINRA, Regulatory Notice 12-25, at 7; FINRA, Regulatory Notice 11-25, Know Your Customer and Suitability: New Implementation Date for and Additional Guidance on the Consolidated FINRA Rules Governing Know-Your-Customer Suitability Obligations (2011). Further obscuring its January 2011 guidance, FINRA stated that a broker who meets with a customer for a quarterly or annual review and “remains silent regarding, or refrains from recommending the sale of, securities” would not be subject to the rule, even if the broker had “previously recommended the purchase of the securities.” Id. The rule would apply if the broker made an express recommendation to hold the securities, which seems to create an incentive to avoid potential suitability liability by saying nothing, even when the customer should sell—although private liability risk arising from silence might counsel otherwise. FINRA explains that explicit hold recommendations should be covered because they “constitute the type of advice upon which a customer can be expected to rely.” Id. However, the same reliance is likely to arise when a broker is silent during a customer account review meeting when there are securities that should be sold. It is unclear how FINRA will resolve these incongruities.

90 See Corbin, supra note 81 (Comments of David Bellaire, General Counsel and Director of Government Affairs, Financial Services Institute, regarding suitability rule’s coverage of non-securities and investment strategies: “[I]t’s questionable whether that’s a fair requirement for firms to be experts on things outside of their business. . . . That goes far afield from the business that our members are engaged in of selling securities and monitoring the suitability of those securities,” . . . warning that the rule sets ‘no outside limit’ on what constitutes a covered investment strategy.”). Ironically, in 2005 the Commission adopted a rule, later vacated by the D.C. Circuit, under which such financial planning services could have required a
planning organizations have pressed for separate regulation of financial planning as such.91 FINRA has moved aggressively to create and occupy that field on its own and its efforts have not gone unnoticed by the financial planning community.92 Through rulemaking—by text and interpretation—FINRA has expanded: (1) the idea of “suitability” to reflect the broader context in which broker-dealers advertise and deliver retail financial services, and (2) the suitability rule to impose a standard approaching the fiduciary standard that traditionally has applied to such advisory services.

The second way in which the suitability rule has moved toward a fiduciary standard is by FINRA’s position that the new rule entails a de facto requirement that broker-dealers reasonably believe not only that their recommendations are suitable, but also that they are in the best interests of their customers.93 There is no question that the fiduciary duty applicable to advisers continues to be a higher standard, in part because it requires that recommendations be suitable and that broker-dealer to register under the Advisers Act. See generally Black, supra note 20, at 48–49.


93 See Davilas et al., supra note 78, at 800 (“[FINRA’s] reading a fiduciary duty requirement into the suitability rule marks another attempted significant expansion of FINRA’s regulatory authority over broker-dealers.”).
conflicts of interest be fully disclosed, whereas broker-dealers generally have not been required to disclose conflicts of interest. However, FINRA has applied a strong fiduciary gloss to the “consistent with the best interests of [investors]” formulation in its most recent interpretive guidance on the suitability rule. In some respects, the suitability standard reaches the same result as the “act in the best interests of the [customer]” standard that appears in Dodd-Frank Section 913 and in cases applying the fiduciary duty under the Investment Advisers Act.

94 See Suitability of Investment Advice Provided by Investment Advisers, Custodial Account Statements for Certain Advisory Clients, Advisers Act Release No. 1406, 1994 WL 84902, at *2 (Mar. 22, 1994) (“Investment advisers are fiduciaries who owe their clients a series of duties, one of which is the duty to provide only suitable investment advice.”); ANGELA A. HUNG ET AL., RAND INST. FOR CIVIL JUSTICE, INVESTOR AND INDUSTRY PERSPECTIVES ON INVESTMENT ADVISERS AND BROKER-DEALERS 13 (2008) (“[T]he kernel of the fiduciary obligations that investment advisers owe to clients is to refrain from any undisclosed conflicts of interest, a requirement that constrains only some broker-dealers. In addition, even for those requirements that appear similar to those for broker-dealers, violation may be viewed as much more significant.”); MICHAEL KOFFLER, THE BRAVE NEW WORLD OF FIDUCIARY DUTY FOR BROKER-DEALERS AND INVESTMENT ADVISERS 13, 24 (2010) (subjecting broker-dealers to a fiduciary duty would require that they disclose the revenue sharing payments). Contra Barbara Black, How To Improve Retail Investor Protection After the Dodd-Frank Wall Street Reform and Consumer Protection Act, 13 U. PA. J. BUS. L. 59, 86 (2010) (“There is little support, either in the law or regulatory guidance, for this distinction” between suitability and fiduciary obligations). Cf. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 196–97 (1963) (fiduciary duty under section 206 of Advisers Act requires full disclosure of material conflicts of interest). Compare Focus Point Solutions, Inc., Release No. 3458, 2012 WL 3863221, at *1–2 (ALJ Sept. 6, 2012) (settling charges that investment adviser violated section 206(2) of Advisers Act by failing to disclose revenue sharing payments to client), with Benzon v. Morgan Stanley Distirbs., Inc., 420 F.3d 598, 612 (6th Cir. 2005) (broker-dealer has no duty to disclose that Class B shares of mutual fund are never the best option for shareholders or that it received greater compensation for selling Class B shares), and Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) (broker-dealer not required to disclose mutual fund 12b-1 fees), and Morgan Stanley & Van Kampen Mut. Fund Sec. Litig., 2006 WL 108183, at *7 (S.D.N.Y. Apr. 18, 2006) (“Form N-1A requires the disclosure of the total fees paid by the investor in connection with a securities purchase, as well as total commissions paid by the fund, but it does not require disclosure of how differential compensation is allocated. Nor does it require disclosure of the sales contests or management bonuses.”). The foregoing decisions in Benzon, Press and Morgan Stanley have not deterred the SEC’s enforcement division from bringing antifraud charges against and obtaining settlements with broker-dealers for failing to disclose revenue sharing payments. See Bullard, supra note 4, at 183 n.40.


96 In some cases, FINRA panels have interpreted the suitability rule to require that broker-dealers “act in the best interests of the client,” rather than merely
FINRA’s interpretation of the rule has made the “consistent with the best interests” standard essentially fiduciary in nature with respect to situations where a broker-dealer may be motivated to recommend one suitable investment over another in order to increase the broker-dealer’s compensation. This is the same sale-motivated-by-compensation fact pattern found in the sale of variable annuities, which the fiduciary standard reaches but the suitability standard may fail to cover, according to fiduciary advocates. FINRA’s interpretation of the “consistent with the best interests” standard implies a duty of care, rather than a duty of loyalty, that may achieve the practical effect of a disclosure-based fiduciary duty.

In its recent reinterpretation of the suitability rule, FINRA interpreted the “consistent with” formulation to “prohibit[] a broker from placing his or her interests ahead of the customer’s interests.” As examples, FINRA listed a series of suitability cases in which a broker-dealer’s recommendation was allegedly motivated by the prospect of higher compensation. It treated the suitability of the recommendation as separate from the question of whether “the broker [was] placing his or her interests ahead of the customer’s interests,” reflecting the view that an improperly motivated recommendation could violate the suitability rule even if the recommended investment was suitable.

The cases cited by FINRA reflect a mix of rules and allegations that make it difficult to pinpoint the legal standard being applied. For example, a case in which a broker recommended transactions that triggered unnecessary additional fees, both suitability violations and violations of the more general

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99 Id.
100 Id. at 4 (A broker is not obligated to recommend the least expensive security, “as long as the recommendation is suitable and the broker is not placing his or her interests ahead of the customer’s interests.”).
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“fair dealing” and “commercial honor” rules were involved. 101 Indeed, FINRA’s discussion of the “consistent with” standard includes a long citation to general misconduct rules and other rules that “provide broad and significant protections to investors”—that is, broad enforcement authority—as if to remind FINRA members of the breadth of FINRA’s authority to bring principles-based enforcement actions that might be considered outside of the scope of a strict reading of the suitability rule. 102 Regardless of whether transactions that are suitable, but compensation-motivated, violate the suitability rule, the fiduciary-like flexibility of other FINRA rules, in combination with FINRA’s interpretive discretion as an SRO, make such transactions actionable. This standard continues to lack the failure-to-disclose claim that a fiduciary duty would provide, and it is still an open question as to how well FINRA’s duty of care will weather challenges in courts—or before a more libertarian Commission—that may be less inclined than a FINRA panel to defer to a regulator’s rate-setting views regarding when expenses are so high as to make a recommendation unsuitable. 103


102 See generally FINRA, Regulatory Notice 12-25, at n.23 (citing FINRA Rules 1014, 1021, 1031, 2010, 2090, 2210, 2330, 2360, 2370, 3010 and 5310) (stating “[t]hese (and many other) FINRA rules provide broad and significant protections to investors”).

103 For example, no court has ever ruled in favor of plaintiffs who alleged that fees charged by a mutual fund were excessive in violation of the fiduciary duty in section 36(b) of the Investment Company Act. See Mercer E. Bullard, Dura, Loss
However, FINRA is already deeply engaged in forms of rate-setting in other contexts and openly refers to part of its suitability rule as including a “quantitative” suitability standard. FINRA’s under the radar status as a regulator may permit it to expand a “quantitative” suitability duty of care to make up much of the ground that a Section 913 fiduciary duty would cover.

The incorporation of compensation-motivated claims in suitability cases places broker-dealers in a difficult position. Any situation in which a broker-dealer may receive different compensation amounts for implementing different recommendations, which is the norm in the context of recommendations involving mutual funds and variable annuities, automatically begins to build the foundation for a suitability claim based on the recommendation having been compensation-motivated. A broker-dealer might defend on the ground that the transaction was suitable, the differential compensation was disclosed and/or the customer consented, but none of these arguments is a defense to a FINRA claim that the recommendation was, in fact, motivated by higher compensation. Alternatively, the broker-dealer could revise compensation arrangements so that its compensation—and any nonmonetary benefits or burdens—did not vary based on the particular security recommended. This “level fee” model mirrors

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106 See Davilas et al., supra note 78 (FINRA interpretation “[p]rovides that the suitability obligation includes a requirement to act in the ‘best interests of the client,’ seemingly pre-empting any rulemaking by the SEC pursuant to The Dodd-Frank Wall Street Reform and Consumer Protection Act (‘Dodd-Frank’) that broker-dealers are subject to a generalized fiduciary duty.


108 See discussion supra notes 98–100.
the approach taken under ERISA in permitted plan fiduciaries to provide beneficiaries with conflicted advice.\footnote{See Investment Advice—Participants and Beneficiaries, 76 Fed. Reg. 66,135, 66,139 (Oct. 25, 2011) (adopting rule permitting investment advice otherwise prohibited by ERISA where adviser’s fees do not vary based on the investment option selected).} Another defense would be for broker-dealers to document the reasons that a particular higher-compensation recommendation was the best option for the customer, that is, to adopt a de facto fiduciary “best interests” standard.

FINRA supports imposing a fiduciary duty on broker-dealers with respect to personalized, retail investment advice\footnote{See Investment Adviser Oversight Act Hearing, supra note 6, at 13 (statement of Richard G. Ketchum, Chairman and Chief Executive Officer, Financial Industry Regulatory Authority).} and appears to intend to continue moving the suitability standard further in that direction. FINRA’s Vice Chairman has stated that FINRA intends, before any SEC rulemaking under Section 913, to “begin implementing changes to move the standard forward” toward a fiduciary duty, including a proposal to require a disclosure document similar to the Form ADV required under the Advisers Act.\footnote{Stephen Luparello, Vice Chairman, Fin. Indus. Regulatory Auth., Remarks at the FSI Advocacy Summit (Oct. 5, 2011), available at http://www.finra.org/Newsroom/Speeches/Luparello/P124599; see FINRA, Regulatory Notice 10-54, Disclosure of Services, Conflicts and Duties (2010).} FINRA views this disclosure document as a stepping stone toward a fiduciary standard. [FINRA] supports the three principles FINRA believes are fundamental to a fiduciary relationship: avoiding conflicts where possible; fully disclosing conflicts that do exist; and taking actions that are in the best interests of customers.\footnote{Luparello, supra note 111.}

This requirement to take actions that “are in” a customer’s best interests, rather than merely “consistent with” those interests, echoes Section 913’s formulation of the fiduciary standard. FINRA has an incentive to further embrace the
fiduciary standard in order to strengthen its case to become the self-regulatory organization for investment advisers, a goal toward which it made significant strides in 2011.

The possibility that the fiduciary debate will be played out based not on SEC rulemaking but on FINRA’s evolving standards may reflect a broader dynamic in the evolution of administrative law. Financial services, like other heavily regulated industries, have become more complex at an accelerating rate. The agencies that oversee these industries may no longer have the knowledge or flexibility to adapt adequately to the speed of innovation. At the same time, agencies have increasingly been burdened with procedural requirements and political interference that further limit their ability to keep pace with the markets that they regulate, as discussed above. Government agencies have increasingly found their rulemaking initiatives paralyzed by internal and external political gridlock. This characterization aptly describes the current state of both the SEC’s position on the fiduciary duty, where it cannot even achieve sufficient internal consensus to release a request for information on the costs and benefits of a fiduciary rulemaking—after already failing to achieve consensus on the release of the staff’s Section 913 Study—and the Department of Labor’s fiduciary duty proposal, where a cost-benefit information request was released only to trigger an angry response from members of the President’s own party.

113 See Dan Jamieson, New FINRA Suitability Rule Worries B-Ds, INVESTMENT NEWS (July 8, 2012, 9:58 AM), http://www.investmentnews.com/article/20120708/REG/307089984 (“Mr. [Hardy] Callcott [partner at Bingham McCutchen, LLP] thinks that Finra is trying to get a jump on overseeing a fiduciary duty in an attempt to bolster its case for getting oversight of advisers.”).
Independent agencies such as the Commission may have no choice but to surrender a broader range of policymaking to quasi-governmental, or quasi-private, entities that operate one degree further from the zone of political conflicts. This could be a short-term shift that only responds to the current climate of heightened political polarization. Or it may reflect a longer-term, natural evolution of the modern administrative state to policymaking arenas that are further removed from political processes and closer to quasi-private structures. One could crudely posit four epochs in this evolution: (1) From the pre-1900 absence of governmental regulatory mechanisms during the birth of free market economies, (2) to the rise of legislative regulatory initiatives from 1900–1932, (3) to the delegation by legislatures to agencies from 1933–2000, (4) to the delegation by legislatures and agencies to quasi-private, self-regulatory forms from 2000 onward. Perhaps we are living in the age of the Fifth Branch.

III. THE PRIVATE FIDUCIARY DUTY

The foregoing analysis discusses the fiduciary debate in the context of a public duty, yet fiduciary claims, and their close cousin suitability claims, are addressed far more often in private litigation than in public enforcement actions. FINRA brought...

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120 Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573, 579 (1984). This evolution could just as well be characterized as the dismantling of the Fourth Branch, with the advent of self-regulation representing a return to a tripartite, limited federal government. See Short, supra note 11, at 674–75 (finding positive correlation between expressions of concern that regulation is coercive and support for self-regulatory structures). Cf. Sunstein, supra note 57. See generally FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (administrative agencies “have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking”); Lawson, supra note 57.

121 Compare Clifford Kirsch et al., Understanding FINRA’s Suitability Rules: Possible Enforcement Actions, FINANCIAL PLANNING BLOGS (Mar. 17, 2013), http://www.financial-planning.com/blogs/understanding-finra-new-suitability-rules-
only fifty-three suitability cases in 2010. Although it doubled that total in 2011, the total still pales in comparison with the tens of thousands of fiduciary duty and suitability claims brought in court and arbitration. The primary source of law as to the scope and substance of the fiduciary duty for broker-dealers is private claims.

Broker-dealers can be found to be fiduciaries under state common law when plaintiffs establish, for example, that they had a relationship of trust and confidence with their broker or where some inequality of bargaining position exists, although a broker-dealer's state law fiduciary duty is not a model of knowing-your-customer-2679758-1.html, with Dispute Resolution Statistics, FIN. INDUS. REGULATORY AUTH., http://www.finra.org/ArbitrationAndMediation/FINRA DisputeResolution/AdditionalResources/Statistics/ (last updated Dec. 16, 2013).

122 See Kirsch et al., supra note 121.


124 See, e.g., Banca Cremi, S.A. v. Alex, Brown & Sons, Inc., 132 F.3d 1017, 1038 (4th Cir. 1997) (under Texas law, “[f]iduciary relationships arise when a party occupies a position of confidence toward another”); MidAmerica Fed. Sav. & Loan Ass’n v. Shearson/Am. Express, Inc., 886 F.2d 1249, 1259 (10th Cir. 1989) (under Oklahoma law, “a fiduciary duty exists when the party in the weaker position reasonably places its confidence and responsibility in the party in the stronger position”); Amendolia v. Rothman, No. Civ.A 02-8065, 2003 WL 23162389, at *4 (E.D. Pa. Dec. 8, 2003) (under Pennsylvania law, the relationship between a securities broker and his customer is a fiduciary one as a matter of law); Courtland v. Walston & Co., 340 F. Supp. 1076, 1080 (S.D.N.Y. 1972) (“When a registered representative is giving more than the normal amount of incidental investment advice, and has instilled in customer such a degree of confidence in himself and reliance upon his advice that the customer clearly feels, and the registered representative knows that the customer feels, that the registered representative is acting in customer’s interest, a fiduciary relationship may arise.”); Dinsmore v. Piper Jaffray, Inc., 593 N.W.2d 41, 46 (S.D. 1999) (applying South Dakota law, “[s]ecurities [b]rokers owe . . . fiduciary obligations to their clients . . . ‘a duty of utmost good faith, integrity and loyalty’”). Broker-dealers also may be found to be fiduciaries when they exercise discretion over a client’s account, but these cases are not of interest here because broker-dealers who exercise discretion are already subject to the fiduciary duty under the Advisers Act. See Certain Broker-Dealers Deemed Not To Be Investment Advisers, Exchange Act Release No. 34-51523, 2005 WL 849053, at *1 (Apr. 15, 2005) (exercise of investment discretion is not solely incidental investment advice and therefore not eligible for broker-dealer exemption from the Advisers Act), vacated by Fin. Planning Ass’n v. SEC, 482 F.3d 481 (D.C. Cir. 2007). They therefore are not the focus of section 913 rulemaking, which would primarily affect broker-dealers who are not subject to the Advisers Act.
Broker-dealer customers may also be able to bring contract or negligence claims under state common law that are indirectly based on a suitability standard, which is somewhat akin to a fiduciary claim. Thus, state law has recognized a variety of circumstances in which a broker-dealer may be found to have a fiduciary relationship with a client.

Federal law is not nearly as hospitable to private fiduciary claims. There is no federal common law fiduciary duty outside the fiduciary duty under the Advisers Act, and there is no private right of action under the Act for a breach of the fiduciary duty. Nor is there a private right action for a violation of FINRA’s suitability rule. Courts have recognized private claims for unsuitable recommendations under the general anti-fraud provisions of the federal securities laws, but these claims are unlikely to succeed. Plaintiffs generally must show, along with other elements of a fraud claim, “that the defendant knew or reasonably believed the securities were unsuited to the buyer’s needs,” and “that, with scienter, the defendant made material misrepresentations (or, owing a duty to the buyer, failed to disclose material information) relating to the suitability of the securities.” This is a difficult, if not insurmountable, burden of proof for plaintiffs.

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127 See Black, supra note 94, at 67.

128 See HUNG ET AL., supra note 94, at 10.

129 Brown v. E.F. Hutton Grp., 991 F.2d 1020, 1031 (2d Cir. 1993); see also Coleman & Co. Sec., Inc. v. Giaquinto Family Trust, 236 F. Supp. 2d 288, 302 n.10
This scienter-proof problem could be remedied by legislation requiring that a broker-dealer show, as it must do in a FINRA proceeding, that it had a reasonable basis for believing that a recommendation was suitable. To comport with the scope of Section 913, this burden could be limited to particularized investment advice provided to retail investors. For example, Section 21D of the Exchange Act could be amended to provide as follows:

In any private action arising under this title in which a plaintiff who is a retail investor proves that the defendant provided particularized investment advice that was unsuitable, the defendant shall have the burden of proving that the defendant had a reasonable belief that the advice was suitable based on the exercise of reasonable diligence.130

This provision would leave the burden of proof on investors to show that a recommendation was actually unsuitable, but then shift the burden to the broker-dealer—where it already resides under the FINRA suitability rule—to show that the broker-dealer had a reasonable basis, based on the exercise of reasonable diligence, to believe that the recommendation was suitable. However, plaintiffs would still be left to deal with the hurdles created by the steady erosion of private rights of action under the federal securities law over the last two decades.131

A more significant problem for both state and federal private claimants may be that most broker-dealer customers do not have the right to bring claims in court. Since the Supreme Court’s McMahon decision in 1987 upholding a mandatory arbitration


130 Section 21D sets forth various requirements for private actions under the Exchange Act, such as those relating to pleading standards, lead plaintiffs, loss causation and limitations on damages. See 15 U.S.C. § 78u-4 (2012).

clause in a broker-dealer’s customer agreement, these clauses have become *de rigueur* in the industry. From 2002 through 2011, more than 60,000 arbitration claims were filed. No similar data is available for comparable state and federal court claims, but it is reasonable to assume, in light of the prevalence of mandatory arbitration clauses, that they are greatly outnumbered by arbitration claims. Thus, it is arbitration panels, not courts, that are the primary source of law for private claims based on fiduciary and suitability duties.

There is reason to believe that suitability and fiduciary claims have some success in arbitration proceedings. Breach of fiduciary duty was the most frequently asserted claim from 2008 through mid-2012; suitability claims consistently made the top six. Arbitration counsel presumably would not bring so many of these claims if they were not somewhat successful, but how successful they are is unknown. Arbitrators are not required to follow any particular source of substantive law, such as public law standards established by the Commission or FINRA, or to provide an explanation of their decisions unless both parties request one, and the requirement that those appealing an

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134 See *Dispute Resolution Statistics*, supra note 121.

135 See Black, supra note 94, at 68 (“[I]t is generally believed that investors frequently do recover damages from broker-dealers and investment advisers for careless or incompetent advice.”).

136 For example, of the 4,729 arbitration claims filed in 2011, 1,619 (thirty-four percent) and 2,589 (fifty-five percent) included, respectively, unsuitability and breach of fiduciary duty claims. See *Dispute Resolution Statistics*, supra note 121.


arbitration decision show a manifest disregard for the law is almost impossible to satisfy. These factors frustrate any attempt to determine the legal standard under which fiduciary and suitability claims are resolved. There is good reason to be concerned about how arbitration panels decide cases. The number of arbitration panels that have no industry representative has increased since FINRA allowed plaintiffs to opt for an all-public panel, which may have resulted in less expertise on panels and, accordingly, less predictability as to the law applied.

Some commentators have dealt with the dearth of information on the basis of arbitration decisions by extrapolating from data on litigated outcomes. A common approach has been to analyze investors' win rates to determine whether arbitration is “fair”—the theory being that the percentage of litigated outcomes in which the investor prevails indicates whether arbitration has a pro-industry or pro-investor bias. FINRA data shows that, from 2007 through July 2012, the percentage of decided cases in which claimants recovered monetary damages or obtained non-monetary relief ranged from thirty-seven to forty-seven percent. On the one hand, one might conclude that,

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141 See Choi et al., supra note 137, at 8 (“[M]ore knowledgeable arbitrators are likely to produce more accurate awards. Broker-customer disputes frequently involve technical issues in which familiarity with industry practices is valuable. Securities expertise enables an arbitrator to understand the nature of the claims better.”); SIFMA, WHITE PAPER ON ARBITRATION IN THE SECURITIES INDUSTRY 36–37 (2007) [hereinafter SIFMA White Paper], available at http://www.sifma.org/uploadedfiles/societies/sifma_compliance_and_legal_society/whitepaperonarbitration-october2007.pdf (industry arbitrators’ expertise improves arbitration); Jamieson, supra note 140 (quoting industry arbitrators: “[E]liminating industry panelists ‘is a mistake’ . . . ‘Finra doesn’t do a good job of educating [public] arbitrators about investments’ . . . ‘the public arbitrators are generally unprepared’ ”).

because in each year investors recovered nothing in more than half of these cases, arbitration was biased against them. On the other hand, based on other data showing a higher percentage of outcomes favorable to investors, some have concluded that arbitration is not biased against investors.\textsuperscript{143} For example, an oft-cited 1992 GAO report found no industry bias based in part on its finding that fifty-nine percent of litigated arbitrations were decided in favor of investors, and that monetary awards to investors averaged sixty-one percent of the amount of their claims.\textsuperscript{144} In his 2002 report, Professor Michael Perino similarly concluded that arbitration was not biased because of the balance of litigated outcomes.\textsuperscript{145}

This empirical approach is fraught with problems. For example, what qualifies as a “win” is inherently subjective. FINRA counts investors as prevailing when they recover monetary damages or other non-monetary relief, regardless of how small. In some of these cases, defendants would undoubtedly consider themselves to have prevailed. Even when investors recover monetary damages, most awards go uncollected.\textsuperscript{146} These analytical weaknesses have been recognized previously and are not necessarily fatal. However, evaluating arbitration based on outcomes and relief awarded actually may miss the point altogether. The issue is whether arbitration reaches the “right” result, not whether one side or the other prevails in a certain percentage of cases. Investors could


\textsuperscript{144} See GAO, HOW INVESTORS FARE, supra note 143, at 35. The GAO reached the same conclusions in an updated report. See GAO, ACTIONS NEEDED, supra note 143, at 4–5, 7.


\textsuperscript{146} See GAO, ACTIONS NEEDED, supra note 143, at 5 (estimating that $129 million (eighty percent) of $161 million awarded to investors in FINRA arbitration was unpaid).
May fifty percent of all arbitrations, which some would interpret to mean that arbitration was fair, but if cases in which plaintiffs prevailed consistently involved situations in which there was no legal basis for finding that the defendant owed a legal duty or that the duty was violated, then, in fact, arbitration would be unfairly biased in favor of plaintiffs.

Extrapolating “fairness” from litigated outcome data seems inherently flawed because the determinant of litigation outcome rates is not “fairness,” but prior litigation outcome rates. If the parties to arbitrations act efficiently, they will litigate to a final outcome rather than settle only when there is enough uncertainty regarding the outcome that they are unable to reach agreement on the expected value of the claim. If arbitrators consistently reach unfair outcomes, the parties will adjust their analysis of the expected value of their claims, which will in turn shift the set of facts under which there is sufficient outcome uncertainty to litigate. The cases in which outcomes may be uncertain and the parties therefore choose to litigate may comprise exclusively cases that plaintiffs, or defendants, should always win. In other words, every outcome might be unfair, no matter how outcomes are split.

An efficient arbitration “market” should produce litigation outcomes each year that reflect a normal distribution curve, with the midpoint reverting to a long-term mean as parties adjust their litigation decisions to incorporate the most recent set of outcome data.\textsuperscript{147} In other words, litigation outcomes necessarily represent an equilibrium point that moves in relation to prior outcomes based on participants’ past experience, regardless of the fairness of any particular set of prior outcomes.\textsuperscript{148} The equilibrium point should be the set of facts under which the odds

\textsuperscript{147} The GAO indirectly acknowledged this point in positing as one reason for a declining win rate for investors that “broker-dealers [were] more likely to try to settle cases that they think they might lose.” \textit{Id.} at 24.

\textsuperscript{148} This equilibrium theory is consistent with findings that investors fare better when represented by an attorney because one would expect an attorney to have more experience evaluating when a case’s expected litigation value exceeds the value of any settlement terms. \textit{See id.} at 26 (Investors were twenty-seven percent more likely to receive an award when represented by an attorney). Investors who are not represented by attorneys presumably generally overestimate their chances of success, leading to a lower percentage of favorable litigated outcomes.
of either party prevailing are about equal, regardless of whether, under that set of facts, the odds of either party prevailing should be equal.

It is beyond the scope of this Article to fully develop a theory regarding the irrelevance of investor win rates. For purposes of this Article, the point is that we cannot evaluate the efficacy of existing fiduciary or fiduciary-like private claims because the arbitration system prevents us from knowing how these claims fare in arbitration. In other contexts, legal standards can be debated largely because judges’ explanations of their decisions can be analyzed, categorized, and regurgitated in forms that identify and reinforce consistent principles of law as applied to generally similar fact patterns. When adjudicative forums do not afford such transparency, the rights and obligations of individuals become unknowable.

This might not be a concern where only a small percentage of disputes are heard by the nontransparent forum. When nontransparent forums operate on the periphery of a dominant core of transparent forums, they are likely to follow the law as applied in explained decisions in the latter forums. When adjudicators in these forums are retired judges who have spent decades creating, applying, and following this legal core, they may be likely to continue to do so even when their decisions are no longer subject to public scrutiny. Even if non-transparent forums do not follow this legal core, the social costs are small because these peripheral decisions make up only a small minority of disputes. However, when the overwhelming majority of cases involving a set of legal principles are decided in a non-transparent forum by non-judge decision-makers who have no industry expertise, achieving correct legal outcomes may be as likely as a roll of the dice. Yet this is how the majority of private claims against broker-dealers based on fiduciary or fiduciary-like legal principles are decided.

The mandatory, non-transparent nature of arbitration frustrates any attempt to develop a public, Section 913 fiduciary duty for broker-dealers that works in harmony with broker-dealers’ preexisting private legal obligations. How the fiduciary duty is applied in arbitration is a necessary component of any reasonable attempt to develop a uniform fiduciary duty with respect to retail investment advice, but the SEC’s Section 913 Study had virtually nothing to say about this primary source of fiduciary law. The Commission should give greater consideration to Section 921 of the Dodd-Frank Act, which granted the Commission broad authority to regulate the terms of mandatory arbitration clauses. A good use for that authority would be to adopt rules requiring arbitrators to explain their decisions.

IV. CONCLUSION

The SEC’s Section 913 rulemaking has run aground on the shoals of heightened cost-benefit requirements and expectations that cannot practicably be satisfied. Their impracticability may be by design, as they may simply be cover for libertarian values quite different from the utilitarian values that cost-benefit analysis presupposes. The Obama Administration, once a principal instigator of the push for a fiduciary duty, has now become an advocate for deregulatory initiatives under the JOBS Act, which was passed with bipartisan Congressional support. The courts have repeatedly demonstrated their hostility toward SEC rulemaking, and Republican SEC Commissioners have set the stage for a legal challenge on cost-benefit grounds to any Section 913 rulemaking. The near-term prospects for Section 913 rulemaking by the Commission are slim.


151 Section 919B of the Dodd-Frank Act also required the Commission to study ways to improve investor access to registration information relating to broker-dealers, including arbitration proceedings. See SEC. & EXCH. COMM’N, STUDY AND RECOMMENDATIONS ON IMPROVED INVESTOR ACCESS TO REGISTRATION INFORMATION ABOUT INVESTMENT ADVISERS AND BROKER-DEALERS 1 (2011), available at http://sec.gov/news/studies/2011/919bstudy.pdf. The study did not consider the mandatory publication of explanations of arbitration decisions.

152 See DEPT OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 71 (2009), available at http://www.financialstability.gov/docs/regfs/FinalReport_web.pdf (“Standards of care for all broker-dealers when providing investment advice about securities to retail investors should be raised to the fiduciary standard to align the legal framework with investment advisers.”).
However, the appropriate context in which to consider the fiduciary duty is far broader than merely SEC rulemaking. The goals of the fiduciary duty can be achieved through other sources of law that are not as susceptible to political influence. Indeed, while the SEC's rulemaking stalls, FINRA has been applying a form of fiduciary duty to broker-dealers. FINRA's rules have had a strong fiduciary element for quite some time, and its recent interpretation of its suitability rule represents a significant shift closer to a Section 913 fiduciary standard. FINRA has an incentive to continue this process because enhancing its credibility as a promulgator and enforcer of a fiduciary duty should help its bid to become the self-regulatory organization for investment advisers. Fiduciary duty advocates might do well to redirect their efforts away from the SEC arena and toward FINRA as a more reliable ally.

One difficulty with this approach is that FINRA is not even the primary source of fiduciary law for broker-dealers. Fiduciary claims are litigated most often in private lawsuits. Most private claims are brought in arbitration proceedings, where fiduciary claims are more frequently asserted than any other. Thus, there is a well-established body of private law under which broker-dealers are already subject to a fiduciary duty when providing particularized investment advice to retail customers, but the Section 913 Study had nothing to say about the substance or scope of this source of law, in part because arbitrators are not required to explain their decisions. The first step in the coherent development of a fiduciary standard for broker-dealers would be to evaluate whether the benefits of requiring arbitrators to reveal how that standard is already being applied would outweigh the potential costs.