United States Senate

Committee on the Judiciary

Subcommittee on Crime and Drugs

HEARING ON

"WALL STREET AND FIDUCIARY DUTIES: CAN JAIL TIME SERVE AS AN ADEQUATE DETERRENT FOR WILLFUL VIOLATIONS"

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Chairman Specter, Ranking Member Graham, and distinguished members of the Committee:

Thank you for the invitation to testify today. My name is Larry E. Ribstein. I am Associate Dean for Research and Mildred Van Voorhis Jones Chair, University of Illinois College of Law. I have taught and written extensively in the areas of corporate and securities law for 35 years. Among my main current areas of research are the law and theory of fiduciary duties and corporate criminal liability. A more complete biography is appended to this testimony.

My testimony focuses on two issues raised by this hearing. First, to what extent should investment bankers have fiduciary duties to investors? Second, should there be criminal liability for willful breach of these duties?

To summarize my conclusions, these duties are the wrong tool for dealing with any problems that might exist in the investment banking industry. Based on my analysis and research concerning the nature and function of fiduciary duties,[1] fiduciary duties are an amorphous concept which courts and commentators have applied in many different forms to many different types of conduct. Applying these duties to investment bankers would cast a potentially wide net over not only bad conduct but also conduct that should be viewed as clearly legitimate. Moreover, even under a narrow view of these duties, they are inappropriate for most aspects of investment banking. These problems with fiduciary duties would be significantly exacerbated by imposing criminal liability for their breach.

I. THE AMORPHOUS NATURE OF FIDUCIARY DUTIES

"Fiduciary duty" is one of the most amorphous concepts in the law. The concept has been developed through centuries of case law. Part of the problem is that courts and commentators have used fiduciary language to describe duties in a bewildering variety of circumstances ranging from seemingly straightforward contractual relationships between franchisees and franchisors[2] to professional relationships of dependence such as between patients

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[1] *See* Larry E. Ribstein, *Are Partners Fiduciaries?* 2005 U. ILL. L. REV. 209.

[2] Harold Brown, *Franchising: A Fiduciary Relationship*, 49 Tex. L. Rev. 650 (1971).

and doctors[3] and pharmacists and customers.[4] J.C. Shepherd, a leading commentator, despairs of "confusion and uncertainty in applying the fiduciary principle to disparate fact situations."[5] As discussed in the following sections, numerous questions arise concerning the definition of fiduciary duties.

A. DUTY OF CARE

A fiduciary duty may or may not include a duty of care as distinguished from one to refrain from stealing or outright cheating. The two types of conduct are similar in that a careless fiduciary in effect cheats on her obligation of devoted service. However, a strict duty to devote time to the beneficiary's business would have no natural limit. Thus, Shepherd notes that "the duty of care has absolutely no necessary connection with fiduciary relationships."[6]

B. GOOD FAITH

A fiduciary duty differs from the implied covenant of good faith and fair dealing courts have generally applied to contractual relationships. In most types of commercial relationships, arguably including many of those in the investment banking business, the parties operate at arm's length and expect to be able to bargain on their own behalf and serve their own interests as long as they do so in good faith.[7]

The duty to bargain in good faith is illustrated by the leading case of *Katz v. Oak Industries, Inc.*,[8] involving a corporation's duties to holders of its debt securities. Delaware Chancellor Allen held that "[t]he terms of the contractual relationship agreed to and not broad concepts such as fairness define the corporation's obligation to its bondholders. . . [I]f courts are to provide protection against such enhanced risk, they will require either legislative direction to do so or the negotiation of indenture provisions designed to afford such protection." The court further determined the corporation's duty by asking whether it is

> clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith--had they thought to negotiate with respect to that matter. If the answer to this question is yes, then, in my opinion, a court is justified in concluding that such act constitutes a breach of the implied covenant of good faith.[9]

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[3] Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System,* 21 Am. J.L. & Med. 241, 247-48 (1995)

[4] *Anonymous v. CVS Corp.,* 728 N.Y.S.2d 333, 336-39 (N.Y. Sup. Ct. 2001).

[5] J.C. Shepherd, LAW OF FIDUCIARIES 7 (1981).

[6] *Id.* at 49.

[7] *See, e.g.,* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role,* 89 Colum. L. Rev. 1618, 1658 (1989) (noting that "a contracting party may seek to advance his own interests in good faith").

[8] 508 A.2d 873, 879 (Del. Ch. 1986).

[9] Id. at 880.

In other words, the implied covenant of good faith is to be determined by examining the terms of the parties' contract. This raises the question of when the contract provides the limits of the parties' duties and when the court should add a default fiduciary duty to the express contract.

C. CONFIDENTIAL RELATIONSHIPS

A fiduciary duty differs from a "confidential relationship" which involves the entrustment of information by one party to another. A federal case illustrates this difference. *United States v. Chestman*[10] held that a broker was not liable for insider trading based on his client's alleged misappropriation of information from the client's wife because the husband and wife did not have a fiduciary relationship breach of which was necessary to find misappropriation. The court made clear that it meant that there was no fiduciary duty in the specific sense of an expectation of confidentiality arising from "repeated disclosure of business secrets between family members."[11] Even viewing fiduciary duties from this same narrow perspective, a dissenting judge disagreed as to their application, basing an expectation of confidentiality on shared control within a family corporation. Importantly for present purposes, even if the parties had a duty to maintain confidentiality of information, they would not necessarily have had other fiduciary duties, including the core fiduciary duty of unselfish conduct discussed below.

D. UNEQUAL POSITION

A fiduciary duty cannot be based solely on disparities between the parties of sophistication, information or bargaining power. Where the problem is simply disparity of bargaining power, the appropriate remedy is to refuse to enforce the contract between the parties on the ground that it is unconscionable, rather than to enforce the contract and add a fiduciary duty to it. A broad fiduciary duty may not be appropriate even if one party is more sophisticated or informed than the other. For example, in *Burdett v. Miller*,[12] although Judge Richard Posner held that an accountant who held himself out as a financial advisor was a fiduciary under the facts of the specific case, he was careful to note that "we do not mean to suggest that every expert is automatically a fiduciary." Rather, he reasoned that a fiduciary duty was justified under the particular facts of the case because the accountant

> cultivated a relation of trust with [the client] over a period of years, holding himself out as an expert in a field (investments) in which she was inexperienced and unsophisticated. He knew that she took his advice uncritically and unquestioningly and that she sought no "second opinion" or even--until the end, when at last her suspicions were aroused--any documentary confirmation of the investments to which he steered her.[13]

In other words, even where there is a clear disparity between the parties as to expertise and sophistication, courts will impose a fiduciary duty only after analyzing the precise nature of the

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[10] 947 F.2d 551 (2d Cir. 1991).

[11] Id. at 569.

[12] 957 F.2d 1375, 1381 (7th Cir. 1992).

[13] *Id.*

client's reliance on the alleged fiduciary. The relationship in *Burdett* obviously differs from the arm's length relationships between sophisticated parties that are common in investment banking.

II. APPROPRIATE APPLICATION OF FIDUCIARY DUTIES

Although the courts have used fiduciary language to describe many types of duties in a wide variety of situations, closer examination of the cases and consideration of underlying theory suggests that only one type of case is appropriate for the application of fiduciary duties in the strict sense of the term – that is, a situation in which the owner of property delegates open-ended management power over the property to a manager or fiduciary. This specific situation justifies requiring the entrusted party to refrain from self-interested conduct.

The most famous description of this duty is that of Justice Cardozo in *Meinhard v. Salmon*[14]:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions (citation omitted). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

As Justice Cardozo indicates, it is necessary to distinguish relationships in the "workaday world" in which "[m]any forms of conduct permissible . . . for those acting at arm's length" from relationships in which the parties are "bound by fiduciary ties" and forbidden from engaging in this ordinary commercial conduct. Delegating power to manage a business, as Meinhard did to Salmon, is such a situation. The beneficiary of the duty wants and expects the fiduciary to maximize the value of her property. However, the delegation of power means the beneficiary has little ability to force the fiduciary to perform or even to determine whether the fiduciary has performed adequately.[15]

The law's response in this situation is to empower the courts to supervise the fiduciary through the imposition of the fiduciary duty. However, courts are not in much better position than the beneficiary to determine whether the fiduciary has performed adequately. After all, courts are not business experts and a courtroom is not a good place to analyze business decisions.

Fiduciary duties address these problems by subjecting fiduciaries, at least in the absence of contrary agreement, to a duty under which "thought of self was to be renounced, however hard the abnegation," in Justice Cardozo's words. This means fiduciaries have a legal duty to forego

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[14] 164 N.E. 545, 546 (N.Y. 1928).

[15] See Robert Cooter & Bradley J. Friedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences,* 66 N.Y.U. L. Rev. 1045 (1991).

any gain from the relationship except perhaps for some reasonable compensation. This clear-cut remedy saves courts from having to fully evaluate how well the fiduciary performed while significantly reducing the fiduciary's motive to cheat the beneficiary.

The problem with this remedy, as Justice Cardozo suggests, is that it is quite harsh and remote from conduct generally expected in the commercial world. It is accordingly necessary to carefully define the relationships in which the harsh fiduciary remedy is appropriate. Otherwise, imposing the default fiduciary duty may either unnecessarily require parties to incur the costs of contracting around the duty, or cause them to avoid potentially valuable relationships because the fiduciary duty makes the relationship too costly. Examples of relationships involving fiduciary-like delegation of control over property include the trustee-beneficiary relationship in a trust and the relationship between a manager and a publicly held corporation. On the other hand, a stringent fiduciary duty is unnecessary when an owner has significant ability to control or supervise the agent's conduct through other means.

As indicated above, fiduciary duties are appropriately viewed as "default" duties in the sense that they are subject to the parties' contrary agreement. This qualification is necessary because the wide variation in contractual relationships makes it impossible for courts or legislators to design a duty or set of duties that precisely fit all contexts. In particular, contracts differ across the critical dimension of the amount of control property owners delegate to managers, and therefore the extent to which fiduciary duties are necessary. Also, the parties may want to provide for exceptions to the strict duty of unselfishness to enable them, for example, to engage in particular types of business outside the duty. Even if a particular state law purports to impose a mandatory fiduciary duty, the parties may be able in effect to contract out of the duty by contracting for the application of another state's law. Moreover, the parties have flexibility to contractually define their relationships so that they are not "fiduciary" in nature.

III. STATE VS. FEDERAL LAW

Fiduciary duties are predominantly a matter of *state* law. State courts, or federal courts applying state law, have defined these duties and the situations in which they arise case by case over hundreds of years. There is no general federal common law on which courts can draw to determine when fiduciary duties should be applied, the precise nature of default fiduciary duties, or the interpretation or enforcement of contracts varying the default rules. Rather, to the extent fiduciary duties arise under federal law they do so under specific statutes. Courts applying these statutes must decide which elements of or approaches to fiduciary law to borrow from the states, and how to adapt this large body of law to suit the objectives of the federal statute at issue.

An example of the problems raised by federal fiduciary duties is Section 36(b),[16] added to the Investment Company Act in 1970 and recently interpreted by the Supreme Court in *Jones v. Harris.*[17] This section provides that the investment adviser of a registered investment company "shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature" from the investment company or its investors. This provision forced the federal courts to develop for the first time a "fiduciary duty" for mutual

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[16] 15 U.S.C. § 80a-35(b).

[17] 2010 WL 1189560 (S. Ct. March 30, 2010).

fund investment advisers. Although the federal courts ultimately converged on the Second Circuit standard for applying the Section 36(b) duty articulated in *Gartenberg v. Merrill Lynch Asset Management, Inc.,*[18] the resulting litigation produced much smoke in terms of litigation costs without a single plaintiff victory at trial.[19] The Supreme Court in *Jones* ultimately vacated the Seventh Circuit's rejection of *Gartenberg,* but according to a concurring opinion did not "endorse the "*Gartenberg* standard" and "does not countenance the free-ranging judicial 'fairness' review of fees that *Gartenberg* could be read to authorize."[20] Thus, forty years after Congress added the "fiduciary duty" to the Investment Company Act, there is still no clear standard that meaningfully constrains mutual fund adviser fees.

The difficulties with a fiduciary duty under federal law reflect the broader problem of imposing inflexible, one-size-fits-all mandatory duties of any kind under the federal securities laws. These laws must keep pace with dynamic and constantly evolving financial markets. Congress recognized the limitations of the securities laws when it enacted the first federal securities statute, the Securities Act of 1933. In the words of William O. Douglas, chair of the SEC before serving on the Supreme Court, "[a]ll the Act pretends to do is to require the "truth about securities" at the time of issue, and to impose a penalty for failure to tell the truth. Once it is told, the matter is left to the investor."[21] A disclosure duty can adjust to myriad new structures and mechanisms by simply requiring firms to tell the truth about them. By contrast, enacting a new substantive obligation such as a fiduciary duty freezes this obligation into place, perhaps for decades as with Section 36(b). Although the SEC can promulgate new rules and exceptions, it is ultimately limited by the statute. There is therefore only so much the SEC can do to mitigate the problems created by statutory imposition of a mandatory fiduciary duty that is inappropriate for many situations to which it is being applied.

IV. APPLICATION TO INVESTMENT BANKING

The application of a mandatory fiduciary duty to investment bankers would be inappropriate for several reasons under the above analysis.

First, a general "fiduciary duty" applicable to a broad range of investment banker dealings would leave significant uncertainty as to the nature of the duties in each specific context. As discussed above, courts and commentators have applied the fiduciary concept to a wide variety of relationships and to embrace a number of different duties in those relationships, including due care, good faith, confidentiality and absence of self dealing. Thus, a prominent commentator has noted that "the fiduciary duty principle, both generally and in the context of

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[18] 694 F.2d 923, 928 (2d Cir. 1982).

[19] *See* M. Todd Henderson, *Justifying Jones* (November 10, 2009), forthcoming University of Chicago Law Review, U of Chicago Law & Economics, Olin Working Paper No. 491, available at http://ssrn.com/abstract=1499410.

[20] 2010 WL 1189560 at 12.

[21] William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171 (1933).

investment advice providers, is too amorphous to serve as a standard setter."[22] Among the many questions posed by the creation of a new fiduciary duty are:

(1) What types of conflicts of interest are permissible (particularly including whether investment bankers can participate in market-making, which inherently involves positions on both sides of the market)?

(2) What types of compensation investment bankers are entitled to earn?

(3) When are contracts waiving fiduciary duties, including those entered into by investment bankers' sophisticated clients, enforceable?

(4) Is disclosure of conflicts alone sufficient to avoid a fiduciary duty?

(5) What types of information must the fiduciary disclose?

(6) How material must omitted information be to trigger liability?

(7) To whom is the fiduciary duty owed (that is, to the issuers that are the investment bankers' clients, the issuers' shareholders, or the market as a whole)?

(8) What are the remedies for breach?

Second, the above analysis shows that a fiduciary duty in the properly narrow sense of refraining from self-dealing would be inappropriate in most investment banking situations. Although investment bankers may be delegated discretion by the customer, this rarely is the sort of complete delegation that justifies imposing what Justice Cardozo called "the punctilio of an honor the most sensitive." If the situation clearly does not call for such a duty, the courts would have to invent the appropriate duty out of a whole cloth without the benefit of contractual adjustment of statutory default rules as under state law.

In most, if not all, investment banking situations, disclosure duties are sufficient without resorting to inventing a new investment banker fiduciary duty. For example, in the situation alleged in the SEC's recent complaint against Goldman, Sachs & Co, Goldman was said to have "structured and marketed" a security to investors, particularly including a bank (IKB). To the extent there was any fiduciary-type delegation of discretion, it was to the collateral manager, ACA, which is not a defendant in the case and has not been accused of wrongdoing. Rather, the alleged wrongdoing in the case is Goldman's failure to disclose John Paulson's role in selecting the reference portfolio for the security. The SEC alleged violations of antifraud provisions in existing securities statutes arising from Goldman's incomplete disclosures regarding the portfolio selection process. If the facts are as alleged and the non-disclosures are material, Goldman may be held liable under existing law and no new fiduciary duty is necessary to create an obligation to disclose. On the other hand, if Goldman did not breach an existing duty to disclose material facts, there is no apparent justification for holding Goldman liable under *any* theory, including a

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[22] Barbara Black, *Fiduciary Duty, Professionalism and Investment Advice* at 3 (March 28, 2010), University of Cincinnati Public Law Research Paper, http://ssrn.com/abstract=1579719.

fiduciary theory. This is true whether or not Goldman can be deemed to have an interest that conflicts with that of its customer.

In short, simply imposing an ill-defined "fiduciary duty" would result in massive uncertainty. Moreover, in the absence of a classic fiduciary relationship discussed above involving complete delegation of control, the parties should be able to act self-interestedly just as they do in general commercial dealings, subject to the contractual covenant of good faith and fair dealing. Where a contracting party is deemed to require protection, the federal securities laws generally should provide that protection through mandatory disclosure or antifraud rules.

Under some circumstances investment bankers might be subjected to new professional duties beyond pure disclosure. However, for the reasons discussed above, any such new duty should be articulated in detail and should not be imposed as part of a general fiduciary duty. The current version of the Restoring American Financial Stability Act calls for the SEC to study existing standards of care for broker-dealers and investment advisers who provide personalized investment advice and recommend securities to retail customers. This call for study reflects the fact that there is currently no well-developed set of federal fiduciary duties for either investment advisers or broker-dealers even in their dealings with retail customers. Clearly such additional study would be even more necessary before imposing new federal fiduciary duties in connection with investment bankers' advice at the wholesale level.

Finally, the arguments against fiduciary duties apply regardless of the nature of the security or instrument being sold. These instruments might involve new types of risks that customers do not well understand or create systemic risks that the dealer and customer do not internalize. More disclosure may be appropriate. However, a vague or inappropriate fiduciary duty would still not be the right way to deal with the situation. The broad application of strict fiduciary duties might discourage legitimate conduct. Conversely, the vagueness and ambiguity of the fiduciary duty might lead courts to permit conduct that should be forbidden, perhaps without appropriate disclosures.

Whatever problems Congress might find to exist in investment banking, fiduciary duties are the wrong tool for dealing with the problems.

V. CRIMINAL PENALTIES EXACERBATE THE PROBLEMS OF FIDUCIARY DUTIES

The above analysis of fiduciary duties applies irrespective of the nature of the remedy applied to breach of the duty. However, the application of criminal penalties significantly exacerbates the problems of applying inherently vague and ambiguous fiduciary duties. This is so even if criminal penalties are attached only to "willful" violations, since it is necessary to define what behavior is being engaged in "willfully." Some of these additional problems from criminal liability for fiduciary breach are discussed in the following sections.

A. VAGUENESS

As stated in Senator Specter's press release announcing this hearing, "a jail sentence is enormously different" from a mere civil liability or fine. The Fifth Amendment of our Constitution recognizes this difference by seeking to ensure that defendants are alerted to the

precise nature of conduct that triggers criminal punishment. Although vague laws are always a concern, they are particularly problematic when they result in jail terms.

As discussed above, courts have applied fiduciary duties to many types of conduct. Unless the statute prescribing such duties is very clear, it will leave courts wide discretion in deciding what situations give rise to fiduciary duties and what those duties entail. Even if the statute precisely describes the situations to which the duty applies, this still may leave a lot of ambiguity, particularly if the duty applies outside the traditional range of fiduciary relationships. For example, Congress articulated the fiduciary duty under Section 36(b) of the Investment Company Act applied in *Jones v. Harris* to apply solely to investment advisers' role in setting their compensation. Yet despite this definition, the statute triggered decades of costly and fruitless litigation.

B. DETERRENCE

The press release and remarks on the Senate floor announcing this hearing emphasize that "criminal prosecutions are an effective deterrent." This may be true in general, but the effectiveness of criminal penalties depends on the conduct that is sought to be deterred being precisely defined in the statute. As discussed above, fiduciary duties have been used quite broadly to refer to a wide variety of conduct of obligations.

One effect of using criminal fiduciary duties to deter investment banker misconduct is that the vagueness of these duties may actually result in *less* deterrence of misconduct than would be accomplished by more precise remedies. This was noted in the 19th century by Jeremy Bentham, who argued that common law crimes failed to achieve effective deterrence. He called these crimes "dog law" because, similar to the way dogs perceived discipline by their owners, the judges made up crimes as they went along without adequately notifying potential miscreants of what conduct to avoid. A broad new fiduciary duty for investment bankers could fall into this category because, like common law crimes, courts would develop it a case at a time.

Under-deterrence also may result from the difficulty of proving criminal liability. Prosecutors may find it difficult to win cases under a willfulness standard and the criminal standard of proof beyond a reasonable doubt. This is particularly so if courts and prosecutors are wary of the social consequences of applying new fiduciary standards in a criminal context. For example, only a couple of criminal backdating prosecutions ultimately were successful despite reports of potentially very widespread misrepresentations, and although these cases involved conventional disclosure violations rather than a new and untried federal fiduciary duty. As a result, a new criminal fiduciary duty could divert prosecutorial resources from their more effective use in deterring conventional fraud to a lower-value pursuit of elusive criminal penalties.

In addition to the problem of under-deterring bad behavior, fiduciary duties may over-deter by threatening punishment even of socially valuable behavior. Given the seriousness of criminal prosecution, legitimate firms seeking profits over the long haul will give a very wide berth to behavior that poses even the slightest risk of putting them out of business or sending the individual employees to jail. This is clearly true for securities firms for which criminal prosecution might be a death sentence. Thus, the fact that civil remedies may be, as Senator

Specter noted, merely a "cost of doing business" is actually a good thing to the extent that it avoids this over-deterrence effect of criminal penalties.

Over-deterrence may impose significant costs on society by inhibiting innovation. Firms may stick to the most established practices and financial instruments for which fiduciary standards have been well-developed in order to avoid liability risks through behavior whose risks are uncertain. Although new financial instruments and practices have inflicted harm on the market, they have also significantly added to the markets' liquidity and efficiency.

Some over-deterrence may be worth getting rid of socially costly behavior by irresponsible firms. However, these bad firms bent on destructive behavior may not be much deterred by the threat of new criminal penalties from breach of fiduciary duties. Irresponsible firms likely already are committing criminal fraud by lying about what they are doing.

At the same time, broad criminal liability for fiduciary breach might even turn good firms into criminals. A legitimate firm might unwittingly find that it may have committed a crime by possibly having breached a new fiduciary duty. The firm then might have an incentive to cover up its offense by committing criminal fraud. In other words, vague laws pose a risk of entangling firms in a web of guilt not unlike what enveloped the hapless protagonist of Kafka's *The Trial.*

C. ABUSE OF PROSECUTORIAL POWER

Broad criminal liability for breach of fiduciary duty could have the perverse effect of encouraging abuse of prosecutorial power. That is not to say that abuse of prosecutorial power is a widespread problem in society. Most prosecutors are honest and operate with great integrity. However, even the smallest increased risk of prosecutorial misconduct can be a serious social problem given the importance of an honest criminal justice system. Criminal penalties for corporate misconduct give rise to highly politicized trials in which the stakes for the prosecutors for their jobs and future careers are particularly high. At the same time, the high standard of proof required for a criminal conviction increases the prosecutors' incentive to cheat.

While a new corporate criminal liability increases prosecutors' incentive to cheat, criminal liability for breach of fiduciary duty gives them a powerful new weapon that is subject to potential abuse. Again in the backdating cases, judges dismissed trials and even threw out convictions in the face of evidence of prosecutorial misconduct, including threatening potential defense witnesses. Broad and vague criminal penalties for breach of fiduciary duty increase the range of threats prosecutors can make even against defendants and potential witnesses who reasonably believe their conduct was legitimate. For example, prosecutors might be able to increase their chances of success by using the threat of a fiduciary duty prosecution to get firms facing possible shut-down to put pressure on their employees to cooperate with prosecutors.

VI. CONCLUSION

Any proposal to impose new fiduciary duties on investment banking firms, and particularly one for criminal penalties for breach of any such duties, is very likely to be ill-advised, and should be adopted only after extensive study that takes into account the significant potential costs and risks discussed above. Such new duties and penalties almost certainly will have little or no effect in decreasing the level of fraud in the investment banking industry or

reducing systemic risk in securities markets. On the contrary, these penalties may even increase risk and fraud by deterring efficient practices in the securities industry and reducing effective discipline of fraudulent behavior. Clearly in light of these potential dangers, new fiduciary duties and penalties require the most careful and extensive deliberation.

BIOGRAPHY

Professor Larry E. Ribstein is the Mildred Van Voorhis Jones Chair in Law, the Associate Dean for Research and Co-Director of the Program in Business Law and Policy at the University of Illinois College of Law. He is a graduate of the Johns Hopkins University and the University of Chicago Law School. In addition to full-time appointments in the law schools of University of Illinois, George Mason University and Mercer University he has visited at the law schools of the University of Texas, New York University, Washington University, Southern Methodist University and St. Louis University.

Professor Ribstein has taught business associations and securities law for 35 years. He is the author of leading treatises on limited liability companies (*Ribstein & Keatinge on Limited Liability Companies*) and partnership law (*Bromberg & Ribstein on Partnerships*), as well as two business associations casebooks (Ribstein & Lipshaw, *Unincorporated Business Entities,* 4th edition 2009 and Ribstein & Letsou, *Business Associations, 4th edition, 2003*). His books also include *The Sarbanes-Oxley Debacle* and *The Constitution and the Corporation* (both with Henry Butler), *The Law Market* (2009, with Erin O'Hara), *The Rise of the Uncorporation* (2010) and *The Economics of Federalism* (with Kobayashi). From 1998-2001 he was co-editor of the *Supreme Court Economic Review*.

Ribstein has written or co-authored approximately 150 articles on subjects including corporate, securities and partnership law, constitutional law, bankruptcy, film, the internet, family law, professional ethics and licensing, uniform laws, choice of law and jurisdictional competition.