

11-1-2007

The Law and Economics of Interprofessional Frontier Skirmishing: *Financial Planning Association v. Securities and Exchange Commission*

George Steven Swan

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George Steven Swan, *The Law and Economics of Interprofessional Frontier Skirmishing: Financial Planning Association v. Securities and Exchange Commission*, 16 U. Miami Bus. L. Rev. 75 (2008)

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**THE LAW AND ECONOMICS OF INTERPROFESSIONAL
FRONTIER SKIRMISHING: FINANCIAL PLANNING
ASSOCIATION v. SECURITIES AND
EXCHANGE COMMISSION**

GEORGE STEVEN SWAN, S.J.D.*

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Though I speak with the tongues of men and of angels, and have not money, I am become as a sounding brass, or a tinkling cymbal. And though I have the gift of prophecy, and understand all mysteries, and all knowledge; and though I have all faith, so that I could remove mountains, and have not money, I am nothing. And though I bestow all my goods to feed the poor, and though I give my body to be burned, and have not money, it profiteth me nothing. Money suffereth long, and is kind; money envieth not; money vaunteth not itself, is not puffed up, doth not behave unseemly, seeketh not her own, is not easily provoked, thinketh no evil; rejoiceth not in iniquity, but rejoiceth in the truth; beareth all things, believeth all things, hopeth all things, endureth all things. ...And now abideth faith, hope, money, these three; but the greatest of these is money.
*1 Corinthians xiii (adapted)*¹

I. INTRODUCTION

Longstanding is the characteristically American aspiration that she be a commercial republic.² And the governmental role in the U.S. economy has proved long-running.³ Meanwhile, of course, stock markets of some ilk or other have been identifiable since ancient Rome.⁴ The public injury caused by investment scandals (and by the 1929 Stock Market Crash) spurred Congress to develop rules and regulations under which the registered representatives of 2008 toil.⁵ Joseph Deitch, Chairman and CEO of

¹ GEORGE ORWELL, *Keep the Aspidistra Flying*, in *ANIMAL FARM, BURMESE DAYS, A CLERGYMAN'S DAUGHTER, COMING UP FOR AIR, KEEP THE ASPIDISTRA FLYING*, NINETEEN EIGHTY-FOUR 545 (1976).

² See, e.g., STEPHEN L. ELKIN, *RECONSTRUCTING THE COMMERCIAL REPUBLIC* (2006); STEVE FRASER, *WALL STREET: A CULTURAL HISTORY* (2006). See also *THE POLITICAL ECONOMY OF REGULATION* (Thomas P. Lyon ed., 2007), for the most recent book-length study of the political economy of regulation.

³ See, e.g., PRICE V. FISHBACK ET AL., *GOVERNMENT AND THE AMERICAN ECONOMY* (2007); BENJAMIN M. ANDERSON, *ECONOMICS AND THE PUBLIC WELFARE* (1949). Questioned has been the economic rationality of the electorate behind the government doing the regulation. See, e.g., BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* (2007).

⁴ See, e.g., B. MARK SMITH, *A HISTORY OF THE GLOBAL STOCK MARKET* (2003).

⁵ Rick Adkins, *Ethics for Smarties: An "Out of Box" Way of Life*, J. FIN. PLANNING, Feb. 2007, at 36. "The modern structure of financial regulation in the United States has its origins in the Great Depression." Andrew S. Caron, *The Political Economy of Financial Regulation*, in *THE POLITICAL ECONOMY OF DEREGULATION* 69 (Roger G. Moll & Bruce M. Owen eds., 1983). According to Gary Becker, who won the Nobel Prize for Economics in 1992, "the appearance of a deregulation 'movement' is partly an echo of the regulatory 'movement' of the 1930s (itself a response to the Great Depression), when the securities, airline, banking, and many other industries became regulated." Gary Becker, *Public Policies*,

Commonwealth Financial Network, protests, "The regulatory environment has caused a lot of stress for investment professionals. Everyone understands it, but feels that much of the required paperwork is more burdensome than it is effective in achieving its objective of safeguarding investors. . . . It is generally perceived that the reaction to the market and regulatory issues of the early 2000s have caused an over-reaction and placed undue demands and costs on our industry."⁶ More specifically as to investment advisors, Chet Helck, President and C.O.O. of Raymond James Financial, posits: "Financial advisors feel overburdened from regulatory and compliance pressure."⁷ The extensive regulation of the securities markets by the Securities and Exchange Commission stands upon the foundation that securities markets would not function satisfactorily sans such regulation.⁸ Scholarly investigation of the political economy⁹ of regulation remains timely.¹⁰

The following pages will review the March 30, 2007, opinion of the United States Court of Appeals for the District of Columbia Circuit in *Financial Planning Association v. Securities and Exchange Commission*.¹¹ That opinion is thrown into relief by hearkening to the vision of the late scholar Peter F. Drucker. Dr. Drucker foresaw the prospects for the American financial services industry of 2008. Drucker's prophecies became timely upon the advent of the Pension Protection Act of 2006.¹² That enactment

Pressure Groups, and Deadweight Costs, in THE ESSENCE OF BECKER 544, 555-556 (Ramón Febrero & Pedro S. Schwartz eds., 1995).

⁶ *What's Keeping B/D Executives Up at Night?*, THE BROKER/DEALER REPORT, Apr. 2007, at 10, 26-28.

⁷ *Id.* at 28.

⁸ RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 480 (7th ed. 2007). On the other hand, in 2006 both financial advisors and securities brokers got relief when Securities and Exchange Commission referred fewer cases to the enforcement division of that agency. Jaime Levy Pessin, *Regulatory Spotlight: Is This Progress? Examiners Spot Fewer Problems*, WALL ST. J., May 7, 2007, at R8. The media and politicians seemingly assume that, to prove themselves on the job, the regulators must produce enforcement cases. Gillian Tett, *US Struggles to Change Its Rule Book in a Principled Way*, FIN. TIMES, June 1, 2007, at 22.

⁹ See, e.g., JOHN HOOD, INVESTOR POLITICS (2001). See also JAMES R. HACKNEY, UNDER COVER OF SCIENCE (2007) for the most recent book-length study of the field of law and economics.

¹⁰ See, e.g., THE POLITICAL ECONOMY OF REGULATION, *supra* note 2. Of course, there likewise obtains a global-scale regulation of financial systems. See, e.g., KERN ALEXANDER ET AL., GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS (2005). "In recent years, American investors, both institutional and individual, have increasingly recognized the potential gains from international diversification of their portfolios. Many brokers now trade for their customers 24 hours a day, following time zones around the globe. Thus they are paying increasing attention to stock markets abroad." HENDRIK S. HOUTHAKKER & PETER J. WILLIAMSON, THE ECONOMICS OF STOCK MARKETS 125 (1996).

¹¹ *Fin. Planning Ass'n. v. Sec. & Exch. Comm'n*, 482 F.3d 481 (D.C. Cir. 2007).

¹² Pension Protection Act of 2006, PUB. L. NO. 109-280, 120 Stat. 820.

summoned attention to the financial service middle-market and to the financial planner. Certified Financial Planners™ gather in the Financial Planning Association.¹³

The *Financial Planning Association* litigation witnessed an F.P.A. challenge to a 2005 rule of the Securities and Exchange Commission effectively advantaging broker-dealers in the competition to deliver compensated investment advice to the public. That the Commission gave birth to such a rule at all identified what element enjoys enfranchisement before the S.E.C. The Association's lawsuit, meanwhile, manifested a rentseeking offensive (pushing to extend regulation of the economy to the relative advantage of one faction, F.P.A. members, over another, the broker-dealers).¹⁴ The Court of Appeals held, favorably to the Association, that the Commission exceeded its authority.¹⁵ More might be heard this year from Congress relative to the unappeased appetite of the massive and muscular broker-dealer lobby to collect fees for delivering advice.

II. THE FINANCIAL SERVICES INDUSTRY

Everyone in the professional study of business recalls our loss upon the November 11, 2005 death of management guru Dr. Peter F. Drucker. Dr. Drucker long since proved to be well-known to a major segment of the literate portion of the planet.¹⁶ He was "the top business thinker of the last 50 years."¹⁷ And he virtually invented the field of Management Science.¹⁸ In a book that he published just six years ago, Dr. Drucker included a chapter entitled *Financial Services: Innovate or Die*.¹⁹ Financial services constitutes a new industry, boasting a success story since the early 1960s. Yet its novelty

¹³ See *infra* Section VI.

¹⁴ See *infra* Section XII.A.

¹⁵ See Fin. Planning Ass'n, 482 F.3d at 481.

¹⁶ JOHN J. TARRANT, *DRUCKER: THE MAN WHO INVENTED THE CORPORATE SOCIETY* 1 (1976).

¹⁷ Rich Karlgaard, *World's Worst Disease*, FORBES, Jan. 9, 2006, at 31. See also Heather Green, *A Web That Thinks Like You*, BUS. WK., July 9, 2007, at 94 ("[Drucker was] one of the towering management thinkers of the 20th century."); Stefan Stern, *Authoritarian Boss Belongs in the Past*, FIN. TIMES, Sept. 13, 2007, at 16 ("Drucker was the 20th century's pre-eminent management writer.").

¹⁸ See generally PETER F. DRUCKER, *MANAGEMENT* (1974). Also, a selection of Wall Street Journal columns by Dr. Drucker is available at <http://wsj.com/OnlineToday>. On the other hand, it has been argued that management science has proved a stillborn profession. See, e.g., RAKESH KHURANA, *FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION* (2007).

¹⁹ PETER F. DRUCKER, *MANAGING IN THE NEXT SOCIETY* 131-47 (2002) [hereinafter DRUCKER, *MANAGING*].

is concealed behind the old (even nineteenth-century) names of major players therein, like J.P. Morgan or Merrill Lynch.²⁰

Here are conclusions drawn by Drucker respecting the road to most appropriately be followed by the financial services industry.²¹

There is no lack of opportunities for new and highly profitable financial services. Indeed the biggest—and probably most profitable—opportunity does not require innovation at all. It requires only hard work. It lies in demographics; that is, in serving the new and different financial needs of the rapidly growing affluent and aging middle class in developed and emerging countries. These people are not “rich” and are thus not attractive customers for the traditional financial firms. But while their individual purchases are relatively modest—rarely more than \$30,000-\$50,000 a year per family—the sums they collectively pour into investments dwarf by several orders of magnitude everything all the world’s “superrich” together have available, including oil sheikhs, Indonesian rajahs, and software billionaires.

★ ★ ★

This market might become the twenty-first century’s successor to the world’s first financial “mass market”: life insurance. By providing financial protection against the major eighteenth- and nineteenth-century risk of dying too soon, life insurance became the biggest financial industry of that century, growing profitably worldwide for more than 150 years, i.e., until 1914. Providing financial protection against the new risk of not dying soon enough may well become the next century’s major and most profitable financial industry.²²

Traditionally, hands-on assistance with a portfolio meant something which solely well-heeled investors paying thousands of dollars annually might afford.²³ The highest societal value of financial planning emerges when it is presented to the middle market.²⁴ Financial planning has yet to

²⁰ *Id.* at 134.

²¹ *Id.* at 141-42.

²² *Id.* at 143-44.

²³ Jane J. Kim, *Finding Good, Cheap Advice*, WALL ST. J., Sept. 23, 2006, at B1.

²⁴ Shelley A. Lee, ‘Making of a Profession’ Roundtable: the Public’s Memory, the Public Benefit, a Profession’s Foundation—and Where You Go from Here, J. FIN. PLANNING, Feb. 2007, at 22, 23 (remarks of Jeanne Robinson, CFP®, Managing Partner, The Marshall Financial Group) (referring to article by Tom Warschauer).

seep down to the masses.²⁵ These professionals might genuinely experience a positive reinforcement from meeting a true social purpose.²⁶ One ultimately anticipates more financial planning guidance for the great middle market from the large institutions, which more effectively (and efficiently) can prepare it.²⁷

Some of the traditional American financial services institutions recently comprehended the importance of the middle-class investment market. Merrill Lynch & Co. is invading it energetically.²⁸ For over a decade, brokerage firms have gone beyond the role of middlemen in buying and selling stocks and bonds and restyled themselves as problem-solvers that can take into account clients' overall financial picture.²⁹ All of the major brokerage houses, like Merrill Lynch & Co. and Citicorp Inc.'s Smith Barney unit, as well as a multitude of smaller firms, already register as both broker-dealers and investment advisors so that their brokers can advise clients on how to reach various financial goals, such as retirement, beyond just investing.³⁰ Today there are over 8,600 advisory firms registered with the U.S. Securities and Exchange Commission.³¹ A dizzying array of institutions—including insurers, brokers, banks, trust companies, multifamily offices, and increasingly, independent firms—aggressively pursue financial advisory mandates.³² Their hour struck in 2006.

III. THE PENSION PROTECTION ACT OF 2006

Remember Drucker's insight that protecting against the new risk of not dying soon enough might be the twenty-first century's major financial industry.³³ Two years ago this August 17,³⁴ Congress passed the Pension Protection Act of 2006.³⁵ That statute helped facilitate companies' automatic

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 24 (remarks of Tom Bradley, President, TD Ameritrade Institutional).

²⁸ DRUCKER, MANAGING, *supra* note 19, at 147.

²⁹ Lingling Wei, *Broker? Adviser? SEC Draws a Line*, WALL ST. J., Dec. 12, 2005, at C3 [hereinafter Wei, SEC].

³⁰ Lingling Wei, *Brokers Face New Rules on Client Care*, WALL ST. J., Jan. 12, 2006, at D2 [hereinafter Wei, *New Rules*].

³¹ Elizabeth Harris, *Navigating the Advisory Jungle*, WORTH, Jan. 2006, available at <http://www.worth.com/Editorial/Wealth-Management/Advisors/Feature-Navigating-the-Advisory-Jungle.asp>.

³² *Id.*

³³ See DRUCKER, MANAGING, *supra* note 19, at 143-144.

³⁴ Peter Keating, *Let's Make a (Bad) Deal*, SMARTMONEY, Apr. 2007, at 41.

³⁵ Pension Protection Act of 2006, PUB. L. NO. 109-280, 120 Stat. 820.

enrollment of employees into 401(k) plans.³⁶ This new statute permitted plan providers such as Fidelity and T. Rowe Price to share investment advice with their 401(k) participants.³⁷ Those financial firms administering 401(k) plans earn hefty fees if more workers participate.³⁸ They urge companies to assume more control of the plans.³⁹ They also roll out new services, to accommodate those takecharge employers.⁴⁰ The steps toward automatic 401(k)s develop as such plans play an increasingly major role in employees' retirement savings.⁴¹

The prohibited transaction provisions in the Employee Retirement Income Security Act of 1974 (ERISA)⁴² bar various kinds of transactions between a plan and parties in interest.⁴³ They likewise ban, inter alia, a plan's fiduciary⁴⁴ from dealing with plan assets in its own account (or its own interest) or obtaining any consideration for her own personal account from any party dealing with that plan in relation to a transaction entailing plan

³⁶ Jonathan Clements, *A Victory for the Economists Who Want Investors to Change Their Behavior*, WALL ST. J., Sept. 27, 2006, at D1; accord Dawn Kopecki, *Wrestling for the 401(k) Purse*, BUS. WK., Sept. 10, 2007, at 60 ("Last August, Congress passed the Pension Protection Act, which encourages companies to sign up employees for 401(k) plans automatically."); cf. Jillian Mincer, *'Auto-Enroll' Retirement Plans Take Off*, WALL ST. J., July 11, 2007, at D3 (explaining how retirement plan automatic enrollment caught fire early). But cf. Eleanor Laise, *401(k) Use Doesn't Add Up*, WALL ST. J., Sept. 1, 2007, at B2 (stating that many employers automatically enroll not existing workers, but new hires alone and that in 2006, just 56.6 percent of eligible employees participated in defined-contribution plans administered by Fidelity Investments, down from 56.9 percent in 2005); Deborah Brewster, *Dangers That Lurk in 401(k)s*, FIN. TIMES, Aug. 31, 2004 (stating that a mutual fund industry trade group, the Investment Companies Institute, studied 401(k) retirement savings accounts held continuously over 1999-2006 and found a median account balance of only \$18,986).

³⁷ Rob Wherry, *A Capital Idea*, SMARTMONEY, Feb. 2007, at 26; accord Melody Hobson, *Broken Promises: Pension Plans Are Disappearing. So Take Control of your Retirement Plan*, BLACK ENTERPRISE, July 2007, at 44 ("Now don't get me wrong, I'm an advocate of the 401(k), but as a supplemental savings plan. When 401(k) plans came into existence in the early 1980s, they were never intended to serve as stand-alone retirement vehicles. They were designed to reinforce existing retirement programs, not displace them. My other big concern is financial literacy. Unfortunately, the off-loading of retirement planning to individuals without the requisite education is like handing people the keys to a car without driver's ed. Because investing is rarely taught in school, the majority of Americans do not have the knowledge, tools, or confidence to make savvy investment decisions.")

³⁸ Eleanor Laise, *Employers Grab Reins of Workers' 401(k)s*, WALL ST. J., Apr. 25, 2007, at D1.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* Even in the United Kingdom, "[m]any companies have moved from defined benefit to defined contribution schemes." Andrea Felsted, *'Everyone Wants a Solution to Longevity Risk'*, FIN. TIMES, May 1, 2007, at 5.

⁴² 29 U.S.C. §§ 1001-1461 (2007).

⁴³ 29 U.S.C. § 1002(14).

⁴⁴ 29 U.S.C. § 1002(21)(A).

assets.⁴⁵ But ERISA was amended via the insertion of new sections 408(b)(14)⁴⁶ and 408(g)⁴⁷ through section 601(a) of the Pension Protection Act of 2006.⁴⁸ (Of is this Pension Protection Act compared to ERISA in its complexity and comprehensiveness.⁴⁹) Section 408(b)(14) delivers conditional exemptive relief from section 406 for certain transactions relative to providing investment advice⁵⁰ (should requirements under section 408(g) be met). Under section 408(g), section 408(b)(14) is applicable when investment advice received from a fiduciary advisor is delivered under an eligible investment advice arrangement.⁵¹

Persons who may serve as investment advisors encompass but are not exhaustively limited to investment advisors registered under the Investment Advisers Act of 1940⁵², certain banks (and similar financial institutions), insurance companies qualified to transact business under state law, and brokers or dealers (registered under the Securities Exchange Act of 1934⁵³).⁵⁴ Meanwhile, an eligible advice arrangement is defined as one where either (1) fees (including commissions or other compensation) received by the fiduciary advisor for investment advice or regarding the sale, holding, or acquisition of any security or other property for purposes of plan asset-investment do not vary contingent upon the basis of any chosen investment alternative; or (2) a computer model is utilized under an investment advice program meeting specified demands relative to the provisions of investment advice by a fiduciary advisor to a participant or beneficiary (and where other requirements have been met.)⁵⁵

Moreover, the arrangement must, inter alia, have a financial advisor deliver to participants (and beneficiaries) written notice of all fees or other compensation regarding the advice that the fiduciary advisor or any affiliate thereof is to attract, including compensation collected from any third party,

⁴⁵ 29 U.S.C. § 1106(b).

⁴⁶ 29 U.S.C. § 1108(b)(14).

⁴⁷ 29 U.S.C. § 1108(g).

⁴⁸ Pension Protection Act of 2006 § 601(a), PUB. L. NO. 109-280, 120 Stat. 820.

⁴⁹ April K. Caudill, *Changing the Retirement Plan Landscape- The Pension Protection Act of 2006*, J. FIN. SERV. PROF'LS., Jan. 2007 at 32.

⁵⁰ 29 U.S.C. § 1108(b)(14).

⁵¹ Also, § 601(b) of the Pension Protection Act of 2006 added sections 4975(d)(17) and (f)(8) to the Internal Revenue Code. See 26 U.S.C. § 4975(d)(17) and (f)(8). This afforded conditional exemptive relief from proscriptions found in Internal Revenue Code § 4975(c) for certain transactions respecting delivery of investment advice as described in Internal Revenue Code § 4975(e)(3)(B). See 26 U.S.C. § 4975(c), (e)(3)(B).

⁵² Investment Advisers Act of 1940, 14 U.S.C. § 80(b).

⁵³ Securities Exchange Act of 1934, 15 U.S.C. § 78(a).

⁵⁴ 29 U.S.C. § 1108(g)(11)(A).

⁵⁵ 29 U.S.C. § 1108(g)(2).

as to the delivery of the advice or respecting the sale, acquisition, or holding of the security or other property.⁵⁶ Additionally, such notification must be written in a clear and conspicuous manner. And it must be calculated to be grasped by the average plan participant, and adequately accurate and comprehensive to reasonably apprise participants (and beneficiaries) of the required information.⁵⁷

On April 25, 2007, the Labor Department's Employee Benefit Security Administration solicited public comment prior to drafting new regulations as to what a company discloses to employees regarding fees on their retirement plans.⁵⁸ The Labor Department desired greater information on what investment- and administrative-related fee and expense information the participant ought to weight when investing her retirement funds in 401(k) and similar plans. The deadline for comments was last July 24.⁵⁹

Hence, the Pension Protection Act creates opportunities for practitioners in every nook and cranny of the qualified plan industry.⁶⁰ This enactment opens the door to the offer of advice by investment professionals to plan participants directly.⁶¹ The capacity of fiduciary advisors to share advice with participants, sans running afoul of prohibited transactions rules, entails longrun implications for the planning profession.⁶² It might benefit employees and employers alike.⁶³ But a glaring drawback in the 2006 enactment is the want of disclosure once a financial advisor is no longer

⁵⁶ 29 U.S.C. § 1108(g)(6).

⁵⁷ 29 U.S.C. § 1108(g)(8)(A).

⁵⁸ Fee and Expense Disclosures to Participants in Individual Account Plans, 72 FED. REG. 20457 (proposed Apr. 25, 2007) (to be codified at 29 C.F.R. pt. 2550).

⁵⁹ *Id.*; see also Jillian Mincer, *New 401(k) Fee Disclosures Are Considered*, WALL ST. J., Apr. 25, 2007, at C13.

⁶⁰ Adam C. Pozek, *The Pension Protection Act of 2006: It Isn't Just for Actuaries*, J. FIN. SERV. PROF'LS., May 2007, at 35, 41.

⁶¹ *Id.*; see also Walecia Conrad, *Who'll Coddle Your Nest Egg?: An Outside Adviser May Be the Ticket to Make Sure Your 401(k) Is Cooked to Order*, BUS. WK., Jul. 9, 2007, at 49 ("Are you getting the right advice about your 401(k)? Are you getting any advice at all? These questions are even more important if you hope to retire early. You need your company retirement account to earn as much as possible as quickly as possible, but at the same time you can't afford to take big risks with departure date looming sooner than ever. The inherent conflict between those two investing goals is pretty hard to handle on your own. It's one reason more employees are hiring outside advisers to help them manage their 401(k)s, says David Wray, president of the Profit Sharing/401(k) Council of America. These personal planners offer much more customized attention than the educational material, interactive Web sites, 24-hour help lines, and even third-party consultants such as Financial Engines and Morningstar (MORN) that many plan sponsors make available to their 401(k) participants.").

⁶² Caudhill, *supra* note 49, at 34.

⁶³ *Id.*

required to behave like one.⁶⁴ Once insurance and stockbroker agents enter the 401(k) advice market,⁶⁵ there is no demand under the statute that they disclose when they doff their fiduciary lots.⁶⁶

A survey of financial advisors by Fidelity Investments Institutional Services revealed that sixty-nine percent believed the Act will help enhance their business by ten to forty-nine percent over three years.⁶⁷ Eighty-seven percent fully plan to offer advice to persons with IRAs or 401(k) plans.⁶⁸ They anticipate a trebling of the number of their 401(k) plan sponsor clients.⁶⁹ Last year, IBM announced that it will afford free and comprehensive advice to its 127,000 U.S. employees, as it replaces its pension with an enhanced 401(k) plan.⁷⁰ Its program is to deliver individualized advice on over wide-ranging financial issues.⁷¹ Experts fancied this the first time a leading U.S. company provided such a level of individualized advice to all employees (financial planning being a common executive perk).⁷² It was Fidelity Investments and the Ayco Company LP (a unit of Goldman Sachs Group, Inc.) that developed this new program.⁷³

Had the day of the financial services middle market dawned?

IV. THE FINANCIAL SERVICE MIDDLE-MARKET

Remember Drucker's insight that the probably most profitable financial services opportunity lies in serving the financial needs of the rapidly growing, affluent, and aging middle class. Notably underserved with financial planning assistance has been the middle market or lower end of the

⁶⁴ Duane Thompson, *Coming Soon to a Theatre Near You: The Brave New World of Fiduciary Advisers*, J. FIN. PLAN., Nov. 2006 at 30, 33.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Fiduciary Uncertainty About Pension Act*, J. FIN. PLAN., Apr. 2007 at 12.

⁶⁸ *Id.*

⁶⁹ *Id.*; see also Roger Lowenstein, *Boomer Bust? The Sunset Years of the Children of the '60s Won't Lead to the Twilight of the Stock Market*, SMART MONEY, Jul. 24, 2007, at 54 ("Although 401(k)s began in the early '80s, few people had access to such plans at first, and among those who did, savings rates were not very high. As of 2000, 401(k) savings amounted to \$29,700 per person, and only \$87,000 among people who actually had accounts. Not very much to retire on. But there has been a steady rise in people eligible to participate in 401(k)s, and also in the ratio of those who actually save. Thus, people entering the workforce now are expected to save much more, on average, than boomers have. According to a study by three finance professors, by 2040, 401(k) assets will be much bigger in real terms than they are today—both on a per-person basis and for society overall. Indeed, total 401(k) accounts will rise from \$5 trillion today to \$36 trillion in 2040.").

⁷⁰ Jillian Mincer, *IBM to Provide Financial Advice for Workers*, WALL ST. J., Mar. 8, 2007, at D4.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

most affluent.⁷⁴ The demographic with the largest demand for such help is the thirty-five to forty-five age bloc, with \$100,000 to \$250,000 in investable assets.⁷⁵ The aging baby boomers also need financial advisors in addition to tax lawyers.⁷⁶ On January 1, 2011 the first baby boomers will turn age sixty-five.⁷⁷ There are seventy-six million baby boomers set to retire, with the last of the baby boomers not to reach sixty-five until December 31, 2029.⁷⁸ This wave of baby boomers' increased anxiety over their retirement income will immensely alter the way advisers transact business.⁷⁹ Where might the not-so-wealthy turn?⁸⁰ The Chairman of the Financial Planning Association admitted that three-quarters of financial planners only accept clients enjoying a million dollars in net worth and a minimum of \$500,000 in investable assets.⁸¹

Edward Liddy, Chairman and C.E.O. of Allstate, has eyed a grand strategies gamble.⁸² He looks for Allstate to become a one-stop shop⁸³ for

⁷⁴ Sean R. Walters, *Serving the Underserved: The Middle Market Gap*, J. FIN. PLAN., May 2007, at 42.

⁷⁵ *Id.* at 43; see also Kris Hudson, *Wal-Mart Pushes Financial-Services Menu*, WALL ST. J., Jun. 6, 2007, at A3 (last year even Wal-Mart discreetly unveiled its low-cut investing service from Share-Builder Corp); see also Jonathan Birchall, *Wal-Mart Plans Financial Services Push with 1,000 'MoneyCenters'*, FIN. TIMES, Jun. 21, 2007, at 13 (London) ("Wal-Mart yesterday ramped up its push into financial services, announcing plans to open 1,000 in-store 'MoneyCenters' in a move it hailed as a 'gamechanger for the industry'").

⁷⁶ Pat Regnier, *How to Make Money 2006*, MONEY, Dec. 1, 2005, at 108 ("Like the pharmaceutical industry, a substantial component of financial services has always been part of the silver industries—through the fundamental tasks of saving, investing, and accumulating wealth for use in older age. In what sense, you might ask, can financial services possibly be considered as a new or emerging silver industry? Parallel to pharmaceuticals and automobiles, the new older clients of financial services need and want new products and services—different from those they received when they were young clients and different from the older-age financial services provided to their parents."); see also Neil E. Cutler, *Are Financial Services a "Silver Industry"?*, J. FIN. SERV. PROF'LS., July 2007, at 24, 25.

⁷⁷ Daisy Maxey, *Advisers to See Their Roles Shift*, WALL ST. J., May 14, 2007, at C6.

⁷⁸ *Id.*

⁷⁹ *Id.* (People approaching 40 are those most eager for financial advice); see also Jeff D. Opdyke, *Financial Planning for the Not-Yet-Rich*, WALL ST. J., May 23, 2007, at D1.

⁸⁰ See, e.g., Melanie Waddell, *Serving the Not-So-Wealthy: At Myfinancialadvice.com, Advisors Can Hook Up With Clients Who Pay by the Hour*, INVESTMENT ADVISOR, June 2004, at 128.

⁸¹ Toddi Gunter, *Still Working, and Loving It*, BUS. WK., Oct. 2006, at 108, 110. "Wachovia, the fourth-largest US bank, said yesterday that it would more than double the size of its private bank as it seeks to improve its position in the lucrative business of managing wealth for affluent investors. Wachovia said it would hire about 300 private bankers over the next three years, adding to the 240 it already has." Ben White, *Wachovia Plans to Hire 300 Private Bankers*, FIN. TIMES, June 8, 2007, at 18. Wachovia lags Citigroup, JPMorgan, Bank of America, and Merrill in private wealth management. *Id.*

⁸² Liam Plevin, *Hurricane Losses Prompt Allstate to Pursue New Path*, WALL ST. J., Nov. 24, 2006, at A1.

⁸³ "A tide rolls toward one-stop shopping for professional services." George Steven Swan, *The Political Economy of Interprofessional Imperialism: The Bar and Multidisciplinary Practice, 1999-2001*, 24 J. LEGAL

the middle-income baby boomers' financial planning.⁸⁴ Allstate can unleash an army of 14,000 sales agents to promote a waxing number of annuities, life policies, and other products.⁸⁵ Approximately seventy million baby boomers are expected to retire in the next few decades.⁸⁶ Many will rely upon an annuity to guarantee a steady income.⁸⁷

Such matters as financial services one-stop shopping, the cross-training of financial salespeople, and the transferability of customer lists have been debated for decades.⁸⁸ Unfortunately, financial services companies display a mixed record in exploiting a first business relationship (e.g., an insurance policy, a checking account, or a credit card) as a jumping-off point toward establishing a second.⁸⁹ In the 1980s, Sears aimed to become a one-stop spot for real estate and financial services when it purchased brokerage house Dean Witter Reynolds Organization, Inc. and launched the Discover credit card.⁹⁰ It added those businesses to a stable which already included Allstate.⁹¹ That precedent was unpromising.

Nonetheless, Genworth Financial manifested strong earnings growth, and met (or exceeded) expectations for profitability over 2004–2007.⁹² It enjoys a fast-growing retirement/money management side to its business;⁹³ it pursues a womb-to-tomb strategy of selling financial security.⁹⁴ This encompasses everything from annuities to life insurance, and from mortgage insurance to longterm care insurance in 25 nations.⁹⁵ Genworth's vast client database, rich in all sorts of personal information, assure it a product-targeting edge.⁹⁶

PROF. 151, 156 (2000) (citing John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42, 43). "These days, all financial services firms, not just those that are black-owned, must look at new ways to develop revenue sources, add customers, and nimbly adapt to change while gracefully retaining existing customers." Jeffrey McKinney, *Feeling the Pinch*, BLACK ENTERPRISE, June 2007, at 169, 170.

⁸⁴ Plevin, *supra* note 82, at A1.

⁸⁵ *Id.*

⁸⁶ *Id.* at A8.

⁸⁷ *Id.*

⁸⁸ See, e.g., STEPHEN P. RAPPAPORT, *MANAGEMENT ON WALL STREET: MAKING SECURITIES FIRMS WORK* 312–22 (1988).

⁸⁹ Plevin, *supra* note 82, at A8.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Sandra Ward, *Protecting the World—and Boosting Profits*, BARRON'S, May 21, 2007, at 32.

⁹³ *Id.*

⁹⁴ *Id.* at 33. "... Genworth has been exiting low-return areas like small-group insurance, travel insurance, and structured settlements, a type of annuity awarded in personal-injury cases." *Id.* at 32.

⁹⁵ *Id.* at 33.

⁹⁶ *Id.*

About two years ago, T. Rowe Price began charging \$250 for a portfolio assessment, investment recommendations, and a customized retirement plan.⁹⁷ Investors could return for follow-up reviews gratis, even if they had no assets at that firm.⁹⁸ In 2006, Merrill Lynch & Co. began to offer customers who had a minimum investment of \$50,000 two free portfolio reviews annually with one of its financial advisors.⁹⁹ (This undertaking marks a formalized commitment.¹⁰⁰)

For Merrill Lynch, the financial advisory grazing has been lush because the clientele has been flush. In April 2007, *Barron's*¹⁰¹ reported its annual roster of the top hundred financial advisors.¹⁰² This annual listing has been compiled since 2004 by R.J. Shook, the brokerage-industry consultant, for *Barron's*.¹⁰³ It derives from banks, large brokerage houses, and other institutions.¹⁰⁴ (While many of these esteemed advisors hail from brokerage houses, their tendency is to levy management fees instead of commissions.¹⁰⁵ This distinguishes them from the brokers of yore.¹⁰⁶) The Merrill Lynch honorees numbered twenty-two of these 2007 honorees.¹⁰⁷ Of these twenty-two, only three deigned to service individual customers boasting an account of under a million dollars.¹⁰⁸

⁹⁷ Kim, *supra* note 23, at B1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Burton G. Malkiel, the Chemical Bank Chairman's Professor at Princeton U. opines: "Weeklies, such as *Barron's* should also be on your 'must-read' list." BURTON MALKIEL, *A RANDOM WALK DOWN WALL STREET*, 386 (rev. ed. 1999).

¹⁰² Suzanne McGee, *Best in Class*, *BARRON'S*, Apr. 23, 2007, at 37 [hereinafter McGee, *Best in Class*].

¹⁰³ *Id.* at 38.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* It has been objected that the firms surveyed by R. J. Shook are brokerage firms, but not advisory firms. See Gary M. Silverman, *Picking Advisers*, *BARRON'S*, May 8, 2006, at 42. Sure enough, the same investment journal would draw upon R. J. Shook to rank the leading 100 independent financial advisors (as distinguished from advisors from brokerage houses, banks, and other firms). See Suzanne McGee, *The Indie 100*, *BARRON'S*, Aug. 27, 2007, at 29-30 ("Reflecting the field's increased stature, *Barron's* for the first time is publishing a ranking of the top 100 independent financial advisors in the U.S.).

¹⁰⁷ McGee, *Best in Class*, *supra* note 102, at 40, 42.

¹⁰⁸ *Id.* See also Anojja Shah, *Full Service Brokers*, *SMARTMONEY*, Aug. 2007, at 73 ("Once famous for bringing Wall Street to Main Street, the big wirehouses have spent recent years narrowing their focus to the elite, leaving smaller investors to fend for themselves with the discounters. In January, Merrill Lynch said its \$1.8 billion agreement to buy First Republic Bank—a San Francisco bank focused on wealthy individuals—would help accelerate its strategy of expanding its high-net-worth business. At Morgan Stanley, where CEO John Mack has also taken sharp aim at the wealthy, 70 percent of client assets are in accounts of more than \$1 million. Discount brokers, meanwhile, are making a decent living

Who are the frontline troops championing the people?

V. THE FINANCIAL PLANNER

A. *Financial Planners Proliferate*

Drucker's assessment was delivered from a top-down, industry viewpoint. But it was long anticipated from a bottom-up, consumer viewpoint. In 1975, consumer-advisor Sylvia Porter identified what Drucker's middle class would need:

Still way out on the horizon is the organization which offers in one place *truly professional, high-caliber* assistance on services of such scope as: investment advice on stocks, bonds, mutual funds, other mediums; guidance on a sound over-all insurance program; help in making out your income tax; financial planning for retirement; assistance in planning your estate and drawing up your will; bill paying; on and on.

Why is the financial supermarket so easy to explain, so difficult to achieve?

The key stumbling block is the need for truly high-caliber professional experts. For such supermarkets can come into existence only when they are staffed by experts trained in each area, capable of giving you the assistance you want and guiding you, the individual. Although we have independent experts in each area, bringing them together in a constructive, profitable arrangement is something else again.

Another stumbling block is the establishment of standards for such a group, for in the long run this is imperative to protect the public. Several organizations are now at work to develop a professional category of "financial planner" and this should be a reality by the end of the 1970s.¹⁰⁹

off the scraps. E*Trade says that 42 percent of new accounts last year come from clients leaving full-service brokers. Average size of those accounts: \$136,000.").

¹⁰⁹ SYLVIA PORTER, SYLVIA PORTER'S MONEY BOOK 962-63 (1975). See also JANE BRYANT QUINN, SMART AND SIMPLE FINANCIAL STRATEGIES FOR BUSY PEOPLE 215 (2006) (emphasis in original) ("What planners *can* do is give you a kick, if you never seem to get around to fixing things yourself. You'll be paying for motivation (even a scolding), but when it works, it's worth every penny. Your planner will help you set financial goals, work out a sensible budget, improve your safety net, make better use of your employee benefits, and insist that you write a will. He or she will eyeball your tax return, to see if you've missed something obvious. You'll be shown how much more you ought to save,

Word has gotten out. According to the U.S. Department of Labor Bureau of Labor Statistics Occupational Outlook Handbook:

Overall employment of financial analysts and personal financial advisors is expected to increase *faster than average* for all occupations through 2014, resulting from increased investment by businesses and individuals. Personal financial advisors will benefit even more than financial analysts as baby boomers save for retirement and as a generally better educated and wealthier population requires investment advice. In addition, people are living longer and must plan to finance more years of retirement. The globalization of the securities markets also will increase the need for analysts and advisors to help investors make financial choices. Financial analysts and personal financial advisors who have earned a professional designation are expected to have the best opportunities.¹¹⁰

The magazine *Money* discussed the “Hot Jobs” of 2006: “Aging boomers need financial advisers and tax lawyers.”¹¹¹ The lead story in a recent *Jobpostings* directed students to the financial services industry.¹¹² The growth rate of full-time jobs in financial services looks to exceed that for jobs overall.¹¹³ After all, financial services represents nearly the only thing left in which America still excels globally.¹¹⁴ Last year it was recounted that the

to reach an acceptable level of retirement income (hearing the message in person might be more effective than doing the Ballpark Estimate). A three-hour session can probably put you on track.”)

¹¹⁰ <http://www.bls.gov/oco/ocos259.htm>.

¹¹¹ *What You Need to Do*, MONEY, Dec. 2005, at 108. A study of more than seven hundred investment advisory firms (with annual revenues of a minimum of \$50,000) from accounting and consulting firm Moss Adams LLP finds that they face an influx of new clients—but a shortfall in professionals to serve them. Kristen McNamara, *Advisory Firms See Influx of Clients, Talent Shortage*, WALL ST. J., Sept. 12, 2007, at B5.

¹¹² Sandy Cordeiro, *Careers in Financial Services & Insurance*, JOBPOSTINGS, Aug. 2007, at 19, available at <http://www.jobpostings.net/articleDetail.cfm?id=438>; Treena Hein, *Which Career in the Financial Sector Is Right for You?*, JOBPOSTINGS, Aug. 2005, at 22, available at <http://www.jobpostings.net/articleDetail.cfm?id=328>. Cf. Julie Bennett, *Jobs Are Aplenty for Those Who Can Help People Manage Their Money*, WALL ST. J., Sept. 20, 2005, at B9 (special advertising section).

¹¹³ See, e.g., CLAIR BROWN, JOHN HALTIWANGER & JULIA LANE, *ECONOMIC TURBULENCE* (2006). On the other hand, during last August alone, financial services firms whittled away over 25,000 positions. Kopin Tan, *The Bulls Have It!*, BARRON'S, Sept. 3, 2007, at 20, 21.

¹¹⁴ This statement represents the view of longtime investing pro, Dean LeBaron. Sandra Ward, *Awash in a Sea of Debt*, BARRON'S, July 24, 2006, at 34. A report on the top fifty centers of commerce (which was commissioned by MasterCard) found London leaving New York in second place, with Tokyo third, followed by Chicago. Alan Beattie, *London Named Top Financial Centre*, FIN. TIMES, June 12, 2007, at 3. “Over the past decade or so, Tokyo has its competitiveness as an international financial

lion's share of U.S. profits growth was derived from the financial sector.¹¹⁵ Students studying toward M.B.A.s at top-ranked U.S. schools favor employment with financial services institutions (like Citigroup, or Goldman Sachs).¹¹⁶ Also, they manifest interest in financial planning,¹¹⁷ having come of age when benefits like generous pensions have grown scarcer.¹¹⁸

Enterprising Americans of every background are curious about becoming financial planners.¹¹⁹ A 2006 Merrill Lynch survey of over 3,000 baby boomers disclosed that eighty-three percent intended to remain working during retirement.¹²⁰ Moreover, fifty-six percent of this eighty-three percent hoped to enter a new occupation.¹²¹ A financial planning career is held out as a choice option for older Americans¹²² seeking a new calling.¹²³ Truly, career-switchers are thriving as financial planners.¹²⁴ (Many derive from such professions as the law and accounting.)¹²⁵ Yet many have required support to survive the steep paycut typically sustained in the switch.¹²⁶ The fledgling financial planning field lacks a clear career path.¹²⁷

centre fall far behind New York and London." Michiyo Nakamoto, *Market Failure: Why Tokyo Is Losing Ground to New York and London*, FIN. TIMES, May 8, 2007, at 7. "Hong Kong, not Tokyo, is generally viewed as the leading international financial centre in Asia, even though Japan is the world's biggest creditor country. Hong Kong's legacy is British. The legal tradition and attitudes of English speaking countries appear to be big assets in the development of financial centres." Martin Wolf, *The New Capitalism: How Unfettered Finance is Fast Reshaping the Global Economy*, FIN. TIMES, June 19, 2007, at 11.

¹¹⁵ Tony Jackson, *Assessing the Cycle—Is It Really Different This Time?*, FIN. TIMES, May 14, 2007, at 17. See also Kevin Duffy, *For Whom Do the Bells Toll?*, BARRON'S, June 18, 2007, at 58 ("Over 45% of corporate profits now come from financing activity. The No. 1 S&P 500 sector weighting is financials at 22%. Of the current Forbes 400 members, 140 made their fortunes from real estate, investments or finance. Today 24 of 72 major sports stadiums have granted naming rights to financial firms, 14 of them banks.").

¹¹⁶ *Top Employers for MBAs*, FORTUNE, Dec. 11, 2006, at 194.

¹¹⁷ *Id.*

¹¹⁸ *Id.*; Cassie Simpson, *Why Is Financial Advising the Career for Generation Y?*, JOBPOSTINGS, Aug. 2002, at 22, 24, available at <http://www.jobpostings.net/articleDetail.cfm?id=250> ("Generation Y is looking for a career which enables them [sic: it] to conduct meaningful work. Financial planning provides what we call the 3 "I"s: Impact, Independence and Income.").

¹¹⁹ Trevor Delaney, *How to Become a Financial Planner*, BLACK ENTERPRISE, Apr. 2007, at 42.

¹²⁰ Gunter, *supra* note 81, at 108.

¹²¹ *Id.*

¹²² Jennifer Merritt, Carolyn Bigda & Donna Rosato, *Ready for a Fresh Start?*, MONEY, April 2007, at 100, 109.

¹²³ *Id.* at 110.

¹²⁴ Scott Stearns, *Why Career Switchers Thrive as Financial Advisors*, WALL ST. J., October 5, 2006, at D3.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Jim Grote, *Exploring Career Paths in Financial Planning*, J. FIN. PLAN, August 2005, at 36.

Trendy star Jennifer Aniston portrayed a financial planner in the recent motion picture, *Derailed*.¹²⁸ In real life, women are twice as likely as males to select a female financial advisor.¹²⁹ Yet fewer than one fifth of women actually have an advisor.¹³⁰ And baby boomers with more education and money are less (not more) likely to pay for fullservice financial advice.¹³¹ Would-be consumers of financial advice might have no clue where to turn.¹³²

B. Financial Planner or Financial Predator?

Insurance salespersons and brokerage executives are not financial advisors. Yet, generally the public lumps together everybody in the financial realm.¹³³ A profusion of investors cannot distinguish a stockbroker from an investment advisor.¹³⁴ Most frequently, delivery of financial services is styled on industry, rather than on a profession.¹³⁵ The latter has more to do with the proficiency and the specialized expertise of the person (or organization) providing advice.¹³⁶ Whereas an industry relates more to production and commerce (e.g., the transaction-based delivery of financial products).¹³⁷

¹²⁸ Wall St. J., November 11, 2005 at W5. On the other hand, it has been argued that the financial capital of the U.S. swept under the rug its continuing sex-discriminatory practices. See e.g. LUISE MARIE ROTH, *SELLING WOMEN SHORT: GENDER AND MONEY ON WALL STREET* (Princeton University Press 2006).

¹²⁹ Victoria Knight, *Money Advice for Boomer Women: Get an Adviser*, WALL ST. J., September 7, 2006, at D6 [hereinafter Knight, *Boomer Women*]. See generally *The Top 100*, BARRON'S, June 11, 2007, at 38 (listing the foremost one hundred female financial advisors, as honored by industry research R. L. Shook); Victoria E. Knight, *Teaching Young Woman to Brag*, WALL ST. J., May 9, 2007, at B3 ("Women in finance- including hedge-fund executives, investment bankers and financial advisers- are often in particular demand by charities because their success in fields dominated by men can teach disadvantaged women and girls valuable lessons.").

¹³⁰ Knight, *Boomer Women*, *supra* note 129, at D6.

¹³¹ Nancy Miller, *Delusions of Retirement Solvency*, BARRON'S, January 22, 2007, at 47.

¹³² Jeffrey R. Kosnett, *In Search of Good Advice*, KIPLINGER'S, June 2006 at 37, 38. See also *Can You Trust Your Financial Planner?*, CONSUMER REPORTS MONEY ADVISER, DATE, at 1 ("Falling into the hands of an unscrupulous adviser is easier than you think.").

¹³³ Richard J. Koreto, *Image Problems*, WEALTH MGR., March 2007, at 9.

¹³⁴ Gary Woolin, *Sell Yourself*, WEALTH MGR., January 2007, at 12. AMERITRADE INVESTOR PERCEPTION STUDY 1 (2006), <http://www.fpanet.org/journal/BetweenTheIssues/Contributions/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=46752>

¹³⁵ Michael L. Jones, *From Industry to Profession: Practice What You Preach*, J. FIN. PLAN., February 2007, at 46.

¹³⁶ *Id.*

¹³⁷ *Id.*

Does the tail wag the financial services industry dog by keeping demand product-focused, instead of planning-focused?¹³⁸ As the financial planning profession, generally, over the decade past has evolved from its original sales orientation toward a planning focus, its intraprofessional debate has grown louder over the most preferable of the three primary modes whereby investors pay for financial advice¹³⁹: the commission, the asset-based fee, or the flat fee.¹⁴⁰ A number of prominent thinkers in the financial planning field challenged that profession to examine its compensation.¹⁴¹ They have spoken out for a shift to a retainer model from a compensation model premised upon assets under management.¹⁴² Their line of thought is, at least partially, that in charging a percentage of assets under management one remains in the products business.¹⁴³ Over two-thirds of advisors polled by Cerulli Associates (of Boston)¹⁴⁴ viewed themselves as either wealth managers or financial planners. However, that consulting firm's own analysis discerned a paltry twenty percent of the five hundred advisors surveyed to actually fit those practice types.¹⁴⁵

When a broker's customer pays a load on a mutual fund¹⁴⁶ purchase, she essentially pays for advice.¹⁴⁷ The load is merely a sales charge on buying a fund available solely through brokers and through financial advisors.¹⁴⁸ This contrasts with a fund purchasable directly from the company (at no additional expense).¹⁴⁹ Regrettably for customers, a study by Daniel Bergstrasser and Peter Tufano (both of Harvard Business School) and John Chalmers (of the University of Oregon) concluded that broker-sold stock

¹³⁸ *Id.* at 47.

¹³⁹ John H. Robinson, *Who's the Fairest of Them All? A Comparative Analysis of Financial Advisor Compensation Models*, J. FIN. PLAN., May 2007, at 56.

¹⁴⁰ *Id.*

¹⁴¹ Courtney Pullen, *Changing for Wisdom*, J. FIN. PLAN., August 2003, at 24.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Cerulli Associates is a consulting firm which studies brokers. Dyan Machan, *The New Broker Game*, SMARTMONEY, April 2007, at 84, 86.

¹⁴⁵ Victoria Knight, *Financial Advisers Work to Hone Perfect Pitch for Winning Clients*, WALL ST. J., March 7, 2006, at B5.

¹⁴⁶ David L. Scott, *Wall Street Words*, 223 (Houghton Mifflin Co, 1988) ("**mutual fund**: An investment company that continually offers new shares and stands ready to redeem existing shares from owners. Since the shares are purchased directly from and are sold directly to the mutual fund, there is no secondary market in these companies' stock. Individual mutual funds vary substantially in terms of the types of investments, the sales charges (many have none), and the management fee.>").

¹⁴⁷ Stephanie Auwerter, *Ask SmartMoney*, SMARTMONEY, May 2007, at 36.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

and bond funds underperformed directly-sold funds.¹⁵⁰ This proved true even ignoring the impact of fundsale commissions¹⁵¹ and 12b-1 marketing fees.¹⁵² The outcome upon adjusting for differences in fund risk was even worse.¹⁵³

A *SmartMoney* reporter posing as a prospective client visited eight brokerages to garner a sampling of advice.¹⁵⁴ These were Banc of America, Charles Schwab, Dreyfus, Merrill Lynch, Morgan Stanley, Northwestern Mutual, Smith Barney, and Wachovia.¹⁵⁵ Asked what it meant to be a fiduciary, every broker but one either evaded the query or botched the reply.¹⁵⁶ None explained the clear difference between being a broker and being a fiduciary.¹⁵⁷ (Merrill Lynch propounded that its *broker* could pitch a financial plan, because (as indicated in Section II, *supra*) Merrill Lynch *itself* has registered as an investment advisor.¹⁵⁸)

The attorney, of course, is a fiduciary.¹⁵⁹ It is common knowledge that lawyers understand that to be a fiduciary means to act in trust upon another's behalf.¹⁶⁰ Still, every wealth manager has heard horror stories wherein, e.g., a lawyer is examining the face value of assets.¹⁶¹ She settles upon a judgment devoid of proper analysis. She leaves her client holding a subpar asset.¹⁶²

So the customer must tread warily the paths of the financial jungle. Warnings in the business press,¹⁶³ or in publications for the ordinary consumer-investor¹⁶⁴, prove crystal clear that a broker-dealer (think: stockbrokers) merely need abide by suitability rules. These demand that she

¹⁵⁰ Jonathan Clements, *Curb Your Enthusiasm: Why Investors Often Lag Behind the Market Indexes*, WALL ST. J., October 18, 2006, at D1.

¹⁵¹ *Id.*

¹⁵² Scott, *supra* note 146, at 369 ("12-b: plan A type of mutual fund in which the fund's operators are permitted to cover marketing expenses by using the fund's assets. This fee becomes a hidden load charge in that the cost to the buyer is not spelled out as clearly as the sales charge in a load fund is. Thus, a fund classified as no-load may take a fee out of assets rather than charge the buyer directly.").

¹⁵³ Clements, *supra* note 150, at D1.

¹⁵⁴ Machan, *supra* note 144, at 87.

¹⁵⁵ *Id.* at 86-87.

¹⁵⁶ *Id.* at 89.

¹⁵⁷ *Id.* at 90.

¹⁵⁸ *Id.* at 88.

¹⁵⁹ Morris Armstrong, *Fiduciary Facts*, WEALTH MGR., March 2007, at 12.

¹⁶⁰ Alan Murray, *When Firms Turn to Lawyers*, WALL ST. J., Jan. 10, 2007, at A11.

¹⁶¹ Armstrong, *supra* note 159, at 13..

¹⁶² *Id.*

¹⁶³ See Jeff D. Opdyke, 'Wait, let Me Call My ChFC', WALL ST. J., Jan. 28-29, 2007, at B1; See Wei, *New Rules*, *supra* note 30, at D2.

¹⁶⁴ See Penelope Wang, *Making Sure Your Broker Is on the Up and Up*, MONEY, May 2007, at 40.

know the customer and propose investments suitable to her needs. Instead, a registered investment advisor (think: financial planner) is measured against her fiduciary duty. She is legally bound to function solidly in the customer's interest, ahead of her own.¹⁶⁵

Each financial planner is challenged by an inherent conflict between giving professional service and pecuniary interest.¹⁶⁶ Conflicts of interest mark a notoriously hazy category of wrongdoing.¹⁶⁷ Cognitive dissonance, i.e., discomfort over holding a pair of conflicting beliefs, inevitably yields the upshot of a conviction one has done nothing wrong.¹⁶⁸ Even ethical financial advisors may resort to well-intentioned manipulation.¹⁶⁹

Just last year mortgage brokers were reaching for unholy alliances with financial planners.¹⁷⁰ (Borrowers frequently view mortgage brokers as their allies.¹⁷¹ But nowadays mortgage brokers are resisting state and federal initiatives to impose upon them a fiduciary duty like that of attorneys or of real estate agents.)¹⁷² A broker's incentives often conflict with a borrower's interests.¹⁷³ Those mortgage brokers would phone a planner to have her direct her clients the brokers' way.¹⁷⁴ The brokers looked to have the client

¹⁶⁵ See, e.g., *id.*; Opdyke, *supra* note 163, at B3; Wei, *New Rules*, *supra* note 30, at D2.

¹⁶⁶ Adkins, *supra* note 5, at 37.

¹⁶⁷ See Andrew Stark, *The Blame Game Revisited*, WALL ST. J., May 10, 2007, at D7 (reviewing CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE* (2007)).

¹⁶⁸ See, e.g., CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE* 13-14 (2007)).

¹⁶⁹ See, e.g., Jonathan Clements, *Don't Get Hit by the Pitch: How Advisors Manipulate You*, WALL ST. J., Jan. 3, 2007, at D1.

¹⁷⁰ See Anonymous, C.F.P., C.P.A., *Why Your Planner Wants You in Debt*, MONEY, May 2007, at 40B.

¹⁷¹ See James R. Hagerty, *Your Mortgage Broker: Friend or Foe?*, WALL ST. J., May 24, 2007, at D1.

¹⁷² *Id.*

¹⁷³ *Id.* at D6 ("In Washington, legislation was introduced this month by Sens. Charles Schumer (D., N.Y.), Sherrod Brown (D., Ohio) and Bob Casey (D., Pa.) that would impose on brokers a fiduciary duty to put their customers' interests first. The proposed legislation is considered a long shot for this year. In Minnesota, legislation enacted last month specifies that brokers have "an agency relationship" with borrowers, meaning they must act in a borrower's best interest and can't put the broker's interests first. Colorado legislators recently shied away from imposing such a standard. Instead, the state House and Senate passed bills stating that brokers have only "a duty of good faith and fair dealing." California is an exception. A 1979 ruling by the state Supreme Court established that mortgage brokers there do have fiduciary duties. Pete Ogilvie, president-elect of the California Association of Mortgage Brokers says that hasn't caused him any problems and clarifies his role."). See also, e.g., THE ECONOMICS OF CONSUMER CREDIT (Giuseppe Bertola, Richard Disney & Charles Grant eds., 2006) (discussing the thorny and multifarious issues in the economics of consumer credit).

¹⁷⁴ Anonymous, *supra* note 170, at 40B.

refinance a mortgage or borrow against the client's home.¹⁷⁵ This was to guarantee commissions/fees to broker and planner.¹⁷⁶

Where is the public to turn?

VI. THE CERTIFIED FINANCIAL PLANNER™

Ever since the stock market, after its then-peak in 2000, chewed up their portfolios more and more investors have shelled out money for financial management help.¹⁷⁷ Regrettably, the persons within the investment business can label themselves nearly anything.¹⁷⁸ They total approximately 650,000 offering their services to individual investors.¹⁷⁹ And, all in all, the financial services world encompasses upwards of ninety¹⁸⁰—some say over one hundred¹⁸¹—different designations, degrees, certifications, affiliations, titles, and accreditations.¹⁸²

As one discovers diploma mills in the college degree realm, so financial certification engenders the equivalent in chicanery.¹⁸³ No central regulator is keeping tabs on these titles.¹⁸⁴ (Some can be earned in hours.)¹⁸⁵ It is no surprise that according to an online poll of 1,052 investors, ninety-two percent concede that they cannot assess the merits of their advisors.¹⁸⁶ So who, by the twenty-first century, emerged as the professional financial planner demanded by Porter?

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*; *But see* Deryck Cheney, Letter to the Editor, MONEY, June 2007, at 20 (criticizing the characterization of a mortgage broker-financial planner as an "unholy alliance").

¹⁷⁷ Jane J. Kim, *Money's Worth: Figuring Out How Much You Should Pay for Financial Advice*, WALL ST. J., July 19, 2006, at D1.

¹⁷⁸ David Futrelle, *Should Your R.I.A. Be on CSI?*, MONEY, March 2006, at 48C.

¹⁷⁹ Lauren Young, *Taking Stock of Your Adviser*, BUSINESSWEEK, Sept. 11, 2006, at 114 [hereinafter Young, *Taking Stock*].

¹⁸⁰ Lauren Young, *Financial Pedigrees-Or Blarney?*, BUSINESSWEEK, Feb. 26, 2007, at 114 [hereinafter Young, *Pedigrees*].

¹⁸¹ Opdyke, *supra* note 163, at B1; DAVID W. LATKO, EVERYBODY WANTS YOUR MONEY: THE STRAIGHT-TALKING GUIDE TO PROTECTING (AND GROWING) THE WEALTH YOU WORKED SO HARD TO EARN 35 (2006) ("In the world of financial advice, you'll find CFP, CRPC, CDFA, and dozens more. It's enough to make one regret learning his ABCs.").

¹⁸² Young, *Pedigrees*, *supra* note 180, at 114.

¹⁸³ *Id.*

¹⁸⁴ Opdyke, *supra* note 163, at B1.

¹⁸⁵ *Id.*

¹⁸⁶ Young, *Taking Stock*, *supra* note 179, at 114; Machan, *supra* note 144, at 87 ("The tangle of rules helps explain why the National Association of Securities Dealers now lists more than 60 titles under which brokers can operate.").

Financial journalist Marla Brill, co-founder of MyFinancialAdvisor.com, determines, “CFP: Certified Financial Planner. This is perhaps the most common credential financial planners obtain and is considered by many to be the minimum standard”¹⁸⁷ *Black Enterprise* counsels, respecting financial advisory credentials, “The most common is the certified financial planner (CFP) designation.”¹⁸⁸ Naturally enough, “Fortunately, the Certified Financial Planner Board of Standards has very specific requirements for certification.”¹⁸⁹ According to *The Wall Street Journal*, “The certified financial planner, or CFP, designation is considered the gold standard in this crowd.”¹⁹⁰ In the appraisal of *BusinessWeek*, “Of all the financial planning designations, the one that carries the most clout is Certified Financial Planner.”¹⁹¹

In 2005, A.G. Edwards & Sons, Inc., inaugurated an internal campaign to spur more of its people to earn the Certified Financial Planner™ status.¹⁹² The goal was for that firm to have 1,200 Certified Financial Planners™ by the close of last year.¹⁹³ When in October 2006 *Worth* named the foremost

¹⁸⁷ MARLA BRILL, WINDFALL: MANAGING UNEXPECTED MONEY SO IT DOESN'T MANAGE YOU 155-56 (2002). Not to be confused with the Certified Financial Planner™ is the Chartered Financial Analyst. The C.F.A. credential is the core qualification for work in the securities industry. It constitutes the benchmark qualifications for financial market literacy. See Gillian Tett & Tony Tassell, *Asia Fields More Candidates than US for Financial Analysts' Exam*, FIN. TIMES, May 23, 2007, at 1.

The Chartered Financial Analyst is a fiduciary. See Daniel DelRe, *Credible Credentials*, WORTH, Jan. 1, 2006, at 74, 76.

¹⁸⁸ James A. Anderson, *Beware of Deceptive Financial Advisers*, BLACK ENTERPRISE, Dec. 2006, at 50.

¹⁸⁹ Sonia Alleyne, *No Fast Cash Class*, BLACK ENTERPRISE, Dec. 2006, at 72. The Certified Financial Planner™ credential has been recognized by the Supreme Court in *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, Bd. of Accountancy, 512 U.S. 136, 147-48 (1994). See also George Steven Swan, *The Political Economy of Professional Regulation: Ibanez v. Florida Department of Business and Professional Regulation*, Board of Accountancy, 19 J. LEGAL PROF. 121, 126 (1994).

¹⁹⁰ Opdyke, *supra* note 163, at B3 (“The ChFC designation, given by American College, a Bryn Mawr, Pa, institution dedicated to financial-services professions, is also well-regarded.”). “Look for someone with these credentials, which indicate an adherence to certain ethical standards as well as a level of knowledge: certified financial planner (CFP), chartered financial consultant (ChFC) or a certified public accountant with a personal-finance-specialist designation (CPA with a PFS). Advisers often sport one or more of these credentials as well.” Jeff D. Opdyke and Lingling Wei, *Stockbrokers Loosen Up Their Ties*, WALL ST. J., Apr. 29-30, 2006, at B1, B4.

¹⁹¹ Young, *Pedigrees*, *supra* note 180, at 115. “Anyone can claim to be a financial planner, so choose carefully. To start with, the planner should have one of two sets of initials after his or her name: CFP, for “Certified Financial Planner,” someone who has taken the CFP course and passed the exam. Or CPA/PFS for Certified Public Accountant/Personal Financial Specialist, a CPA with financial planner expertise. Neither set of initials is a guarantee of good advice and competence, but it clears the field.” Quinn, *supra* note 109, at 216.

¹⁹² Young, *Pedigrees*, *supra* note 180, at 115.

¹⁹³ *Id.* Last June the nuptials of A.G. Edward, Inc. and banking gargantua Wachovia Corp. were

one hundred wealth advisors,¹⁹⁴ who consistently set the excellence standard for the whole wealth advisory field,¹⁹⁵ sixty-one boasted the Certified Financial Planner™ credential.¹⁹⁶ When in October 2005 *Worth* named the leading one hundred wealth advisors,¹⁹⁷ sixty-four were Certified Financial Planners™.¹⁹⁸ In 2005, Ameriprise Financial Services, Inc. was born of American Express Company. Ameriprise Financial boasts, “We have more Certified Financial Planner practitioners than anyone [else] in the industry.”¹⁹⁹

In the assessment of the Occupational Outlook Handbook:

Although not required for financial analysts or personal financial advisors to practice, certification can enhance one’s professional standing and is strongly recommended by many employers. Financial analysts may receive the Chartered Financial Analyst (CFA) designation, sponsored by the CFA Institute. To qualify for this designation, applicants need a bachelor’s degree and [three] years of work experience in a related field and must pass a series of three examinations. These essay exams, administered once a year for [three] years, cover subjects such as accounting, economics, securities analysis, financial markets and instruments, corporate finance, asset valuation, and portfolio management. Personal financial advisors may obtain the Certified Financial Planner credential, often referred to as CFP (R), demonstrating extensive training and competency in financial planning. This certification, issued by the Certified Financial Planner Board of Standards, requires relevant experience, the completion of education requirements, passing a comprehensive examination, and adherence to an enforceable code of ethics. The CFP (R) exams test the candidate’s knowledge of the financial planning process, insurance and risk management, employee benefits planning, taxes and

variously announced as either a \$6.8 billion or \$6.95 billion merger. Compare Michael Mackenzie, *Wachovia a Focal Point Amid Flurry of Deal Activity*, FIN. TIMES (London), June 1, 2007, at 24, and Michael Mackenzie, *The Lex Column: US Regional Brokers*, FIN. TIMES (London), June 1, 2007, at 12, with Jane M. Kim, *Edwards Clients Might Regret Wachovia Deal*, WALL ST. J., June 2-3, 2007, at B1.

¹⁹⁴ Douglas McWhirter, *The Leading Financial Strategists for Braving Today’s Volatile Markets*, WORTH, Oct. 2006, at 63 [hereinafter McWhirter, *Volatile*].

¹⁹⁵ Douglas McWhirter, *Answering the Calls*, WORTH, Oct. 2006, at 72.

¹⁹⁶ McWhirter, *Volatile*, *supra* note 194, at 64, 66, 68, 70.

¹⁹⁷ *The Top 100 Wealth Advisors*, WORTH, Oct. 2005, at 75.

¹⁹⁸ *Id.* at 75-76, 78.

¹⁹⁹ Ameriprise Financial—Careers at Ameriprise Financial, <http://www.ameriprise.com/amp/global/careers.asp> (last visited Nov. 1, 2007).

retirement planning, and investment and estate planning. The exam has been revised in recent years. Candidates are now required to have a working knowledge of debt management, planning liability, emergency fund reserves, and statistical modeling. It may take from [two] to [three] years of study to complete these programs.²⁰⁰

The Certified Financial Planners™ organize in the Financial Planning Association.²⁰¹ And the latter knows how to roar.

VII. FINANCIAL PLANNING ASSOCIATION V. SECURITIES AND EXCHANGE COMMISSION

A. *The Statutory Background*

It is well well-known that Congress enacted the Investment Advisers Act of 1940²⁰² to allow for registration and regulation of investment companies

²⁰⁰ U.S. Dept. of Labor Financial Analysts and Personal Financial Advisors, <http://www.bls.gov/oco/ocos259.htm> (last visited Nov. 1, 2007).

²⁰¹ The Financial Planning Association (F.P.A.) website offers both job listings and resume listings. See *Welcome to the Financial Planning Association*, <http://www.fpanet.org/> (last visited on Nov. 1, 2007), and *FPA Helps Find the Job—or Candidate—you're Searching For*, SOLUTIONS, Sept./Oct. 2006, at 27 ("The FPA Career Center has become the central job board in the financial planning profession."). See generally Grote, *supra* note 127, at 36 (discussing launching a career as a Certified Financial Planner™).

²⁰² Wagner-Lea (Investment Advisers) Act of 1940, Pub. L. No. 76-768, 54 Stat. 847 (codified as amended at 15 U.S.C. §§ 80b-1 through 80b-21(2007)). The control of behavior via a network of detailed rules instead of a general standard entails costs in translating a standard into precise rules initially. POSNER, *supra* note 8, at 586 (footnote omitted). One example of this is found in the traffic code, which is more complex than the negligence standard. *Id.* at 588. There are further costs in periodically revising these rules to forestall their obsolescence. *Id.* at 586. On the other hand, the benefits of particularization can outweigh such costs, viz., by its guidance of the courts, of the people subject to a rule, and of actual disputants. *Id.* Arthur F. Burns Fellow in Financial Policy Studies at the American Enterprise Institute, Peter Wallison, finds that Posner's detailed rules, rather than the U.K.'s Financial Services Authority's standards (principles), more comfortably fit the U.S. environment, "Then, too, the US legal system is—to say the least—not hospitable to principles-based accounting or regulation. A principles-based regime may work if the only enforcer is the regulator and if the regulator—like the FSA—is more interested in achieving compliance than imposing fines and penalties. But public companies and securities companies are subject to civil enforcement actions by the SEC, criminal enforcement by US attorneys, criminal and civil enforcement by state attorneys-general and private class actions in both state and federal courts. Banks and insurance companies are subject to essentially the same array of public and private enforcers. In this unwieldy and enforcement-oriented structure, a principles-based system would open new doors to litigation and liability. Nor can a compliance-oriented regime like the FSA's work in the presence of the private class action system that continues to flourish in the US. By definition, private class actions are outside the range of government or regulatory policy.

and investment advisors.²⁰³ The second title was the Investment Company Act of 1940.²⁰⁴ But why ought the exchange of corporate property rights be allowed under restricted conditions alone, whereas exchanges of noncorporate rights (e.g., proprietorships in land and houses, or rights to nonprofit corporations) are not equally regulated?²⁰⁵ These climaxed a series of congressional enactments keyed to the elimination of certain securities industry abuses.²⁰⁶ These supposedly contributed to the Stock Market Crash of 1929 and to the Great Depression, which extended into the 1930s.²⁰⁷

The courts and Congress have found it impossible to restrict the scope and cost of private class actions under a single SEC rule—the famous 10b-5. It is not hard to imagine the mischief that might be done by class action lawyers if they were gifted with a whole series of SEC rules that were similarly broad and malleable. This raises the final point. A rules-based system, whether for accounting or regulation, has a safe harbor effect. If one complies with the rules there is some degree of absolution. This seems essential in the litigious environment of the US.” Peter Wallison, *America Will Prefer to Rely on Rules, Not Principles*, FIN. TIMES, July 6, 2007, at 9.

²⁰³ Fin. Planning Ass’n v. S.E.C., 482 F.3d 481, 483 (D.C. Cir. 2007).

²⁰⁴ Wagner-Lea (Investment Advisers) Act of 1940, Pub. L. No. 76-768, 54 Stat. 847 (codified as amended at 15 U.S.C. §§ 80b-1 through 80b-21 (2007)).

²⁰⁵ ARMEN A. ALCHIAN, THE COLLECTED WORKS OF ARMEN A. ALCHIAN VOL. 2: PROPERTY RIGHTS AND ECONOMIC BEHAVIOR 615 (Daniel K. Benjamin ed., Liberty Fund 2006). See also George Steven Swan, *The Law and Economics of Affirmative Action in Housing: The Diversity Impulse*, 15 U. MIAMI BUS. L. REV. 133, 157 (2006).

²⁰⁶ See *Fin. Planning Ass’n*, 482 F.3d at 483. On the other hand, on May 15, 2007 Federal Reserve Board Chairman Bernanke urged U.S. financial watchdogs to weigh a U.K.-style, principles-based, risk-focused mode of regulation, in contrast to the rules-based regulatory *status quo* which was in place since the 1930s. Jeremy Grant, *Bernanke Calls for UK-Style Regulation*, FIN. TIMES, May 16, 2007, at 1. “In financial services, as in health and safety, Europe has tended to favour the general and the discretionary, the US the specific and the legalistic. British accounting standards have relied on broad concepts such as true and fair rather than formal requirements of conformity. European securities markets depend more on the good faith of issuers and their agents and less on specific disclosures and warnings. Who would want to be a regulator? They tread a fine line between detailed prescription and inchoate principle, they must constantly listen to people who say ‘the government should do something about that’ and to people—often the same people—who deplore red tape. That is how we often get the unsatisfactory regulation and undistinguished regulators we deserve.” John Kay, *A Safety Compliance Officer’s Guide to Facial Hair*, FIN. TIMES, May 22, 2007, at 9. U.S. executives likewise push for accounting by standards, not rules. David Henry & Dawn Kopecki, *The Snag in Accounting-Made-Simple*, BUSINESSWEEK, June 4, 2007, at 82. “Critics of the US accounting system say financial statements are littered with detailed rules and ‘safe harbour’ statements often designed more to ward off litigation than to explain a company’s financial position.” Jeremy Grant, *Efforts Quicken to Reform Market Regulation*, FIN. TIMES, June 28, 2007, at 5. National Association of Securities Dealers head Mary Shapiro hopes to use the planned merger of the N.A.S.D. with N.Y.S.E. Regulation (a unit of N.Y.S.E. Euronext) to shift to a more streamlined, principles-based approach. Tett, *supra* note 8, at 22. Of course, an economic perspective informs dealing with “bijuralism” (generated when contracting parties are located in jurisdictions of differing legal systems). See, e.g., BIJURALISM: AN ECONOMIC APPROACH (Albert Breton & Michael Trebilcock eds., 2006).

²⁰⁷ *Id.*

Congress previously enacted the Securities Act of 1933,²⁰⁸ the Securities Exchange Act of 1934,²⁰⁹ and the Trust Indenture Act of 1939.²¹⁰

Securities regulation is rooted, partially, in a misapprehension concerning the Great Depression.²¹¹ Under post hoc ergo propter hoc logic, it is natural to suppose that the Crash of 1929 necessarily resulted from speculative fever, fraud, and additional abuses.²¹² Traditionally, financial activities ranked low in the public's estimation.²¹³ Yet an abrupt collapse in stock prices is far less likely to trigger a decline in economic activity than to stem from an expectation of that decline.²¹⁴

On several occasions Congress has amended the Investment Advisers Act.²¹⁵ For example, the Credit Rating Agency Reform Act of 2006²¹⁶ inserted an amendment into the Investment Advisers Act. This amendment aimed to add a fresh exception (for statistical rating organizations) to the definition of an investment advisor in the 1940 Act's section 202(a)(11).²¹⁷

Section 202(a)(11) of the Investment Advisers Act defined an investment adviser:

“Investment adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who,

²⁰⁸ Securities Act of 1933, 15 U.S.C. § 77a (2007).

²⁰⁹ 15 U.S.C. § 77b (2000).

²¹⁰ 15 U.S.C. § 77a.

²¹¹ POSNER, *supra* note 8, at 481.

²¹² *Id.*

²¹³ HOUTHAKKER & WILLIAMSON, *supra* note 10, at 283.

²¹⁴ “This point suggests that the crash is less likely to have been the result of abuses in the securities markets than an anticipation of the Depression. If this is right, one is entitled to be skeptical about aspects of securities regulation designed to prevent another 1929-type crash, such as the requirement that new issues of stock be sold only by means of a prospectus that must be submitted to the SEC in advance for review to make sure it contains all the information that the SEC deems material to investors.” POSNER, *supra* note 8, at 481. “On the other hand, Judge Posner might be a keener amateur economist than amateur historian: By the summer of 1929, the persistence of high interest rates and tight money (the money supply had been essentially flat since the summer of 1928) had begun to take its toll on the economy. Production in most industries began to decline in the second half of 1929. By September, the economy was in recession and the speculative bubble finally broke. The stock market peaked on September 3, 1929, when the Dow-Jones industrials hit 381.17. Then the market faltered.” RABURN M. WILLIAMS, *THE POLITICS OF BOOM AND BUST IN TWENTIETH-CENTURY AMERICA: A MACROECONOMIC HISTORY* 133 (1994).

²¹⁵ *Fin. Planning Ass'n v. S.E.C.*, 482 F.3d 481, 484 (D.C. Cir. 2007).

²¹⁶ Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, 120 Stat. 1327.

²¹⁷ Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, 120 Stat. 1327.

for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities;....²¹⁸

And Congress carved six exemptions from this definition:²¹⁹

- (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956, which is not an investment company, except that the term "investment adviser" includes any bank or bank holding company to the extent that such bank or bank holding company serves or acts as an investment adviser to a registered investment company, but if, in the case of a bank, such services or actions are performed through a separately identifiable department or division, the department or division, and not the bank itself, shall be deemed to be the investment adviser;
- (B) any lawyer, accountant, engineer, or teacher, whose performance of such services is solely incidental to the practice of his profession;
- (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor;
- (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation;
- (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Security of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; or

²¹⁸ 15 U.S.C. § 80b-2(a)(11).

²¹⁹ *Fin. Planning Ass'n.*, 482 F.3d at 484.

- (F) such other persons not within the intent of his paragraph, as the Commission may designate by rules and regulations or order.²²⁰

The Credit Agency Reform Act moved subsection (F) hereinabove into today's subsection (G).²²¹ Nevertheless, both the opinion for the Court by Circuit Judge Judith Rogers²²² and the dissenting opinion of Circuit Judge Garland²²³ refer to the pre-2006 amendment Investment Advisers Act.

Prior to the enactment of the Investment Advisers Act, broker-dealers and others offering investment advice obtained two general modes of compensation. Some simply charged traditional commissions. (The Court referred to brokers and dealers as broker-dealers, inasmuch as their divergent roles were irrelevant to the case at hand.)²²⁴ Others levied a separate advice fee.²²⁵ In 1999, the S.E.C. apprehended certain new forms of fee contracting.²²⁶

B. *The Wrap Account*

By April 12, 2005,²²⁷ the Commission adopted a rule²²⁸ exempting from the Investment Advisers Act a new category of broker-dealers.²²⁹ The S.E.C., under subsection (F), created an exception for broker-dealers receiving special compensation.²³⁰ These broker-dealers were those whose delivery of advice is wholly incidental to their brokerage services, yet who collect a specific type of non-commission compensation. Such broker-dealers levy either a fixed fee or a fee based on the total assets in a customer's account. (This group of broker-dealers was nonexistent in 1940.) In turn, they afford their customer a traditional brokerage services package

²²⁰ 15 U.S.C. § 80b-2(a)(11).

²²¹ 15 U.S.C. § 80b-2(a)(11)(G).

²²² *Fin. Planning Ass'n*, 482 F.3d at 483 n.1.

²²³ *Id.* at 493 (Garland, J., dissenting).

²²⁴ *Id.* at 483 n. 2.

²²⁵ *Id.* at 485 (citing 11 Fed. Reg. 10,996 (Sept. 27, 1946)).

²²⁶ *Id.*

²²⁷ "Certain Broker-Dealers Deemed Not to Be Investment Advisers," 70 Fed. Reg. 20,424 (Apr. 19, 2005).

²²⁸ 17 C.F.R. § 275.202(a)(11)-1. "Over the years, the SEC has anticipated, responded to, and, in certain instances, initiated new developments to improve the regulatory programs and fulfill its duties and responsibilities to both investors and registrants." ROBERT H. HERZ ET AL., *THE COOPERS & LYBRAND SEC MANUAL 1* (7th ed. 1997).

²²⁹ *Fin. Planning Ass'n*, 482 F.3d at 485.

²³⁰ *Id.*

encompassing investment advice, execution, arrangement for delivery and payment, and custodial and recordkeeping services.²³¹ Or, as framed by the business press, in 2007 some brokerage firms presented “fee-based brokerage programs, also known as wrap accounts, in which clients pay an annual fee for an unlimited number of transactions and can obtain basic advice from brokers on whether to buy, hold or sell a stock.”²³²

Brokerage firms in recent years heavily marketed fee-based accounts, as the revenue from commissions slumped.²³³ There is a trend for clients to opt for the fee-based relationship.²³⁴ Most of the established brokers at reputable firms (with broad client bases) now draw the bulk of their income not from commissions but management fees.²³⁵ Brokerage firms increasingly charging customers an asset-based or fixed fee elicited a steadier flow of revenue than might commissions linked to investment transactions.²³⁶ Regulators encouraged such a fee-based pricing model to better align the interests of customers and of brokers (than might the commission model).²³⁷ Supposedly, as brokers with broad client bases derive the bulk of their income from management fees (rather than commissions) there obtains less chance of a broker placing a client into underperforming—or even unsuitable—products with seductively higher commissions.²³⁸ Hopefully, there arises less risk of a flurry of ill-advised trades, merely to generate commissions.²³⁹

²³¹ *Id.* at 494 (Garland, J. dissenting) (citing “Certain Broker-Dealers Deemed Not to Be Investment Advisers.” 70 Fed. Reg. 20, 424 (Apr. 19, 2005)).

²³² Jane J. Kim & Eleanor Laise, *SEC Decision Forces Investors to Make Choice: Limit on Fee-Based Programs Could Spark Shifts to Pricier Accounts*, WALL ST. J., May 17, 2007, at D4. Of course, fee-based brokerage accounts are not to be confused with traditional brokerage accounts, nondiscretionary advisory accounts, mutual fund advisory accounts, nor separately managed accounts. See *id.* “Know this: with any brokerage, you are at a disadvantage. You are up against a finely tuned machine, designed to extract every last dollar they [sic: it] can from your pocket.” DAVID W. LATKO, *supra* note 181, at 6.

²³³ D.C. Circuit Throws Out SEC Rule on Fee-Based Accounts, <http://lawprofessors.typepad.com/securities/2007/week13/index.html> (March 31, 2007). “Heated competition among firms is steadily driving commissions lower in the traditional brokerage business. As a result, big firms have been trying to shift clients into so-called managed accounts, which charge clients a percentage of their assets (typically 1% to 3% annually) in exchange for unlimited trades and comprehensive advice. Wachovia, the Charlotte, N.C. bank, has a large business in managed accounts and is expected to encourage A.G. Edwards clients—the bulk of whom are in traditional brokerage accounts—to switch.” Jane M. Kim, *Edwards Clients Might Regret Wachovia Deal*, WALL ST. J., June 2, 2007, at B1.

²³⁴ *What’s Keeping B/D Executives Up at Night?*, *supra* note 6, at 22.

²³⁵ Suzanne McGee, *Sound Counsel?*, WORTH, Oct. 2005, at 69 [hereinafter McGee, *Counsel*].

²³⁶ Wei, *SEC*, *supra* note 29, at C3.

²³⁷ *Id.*

²³⁸ McGee, *Counsel*, *supra* note 235, at 68.

²³⁹ *Id.*

On the other hand, rather than churning accounts to collect commissions, brokerage firms charged one to two percent on assets.²⁴⁰ This totals ten or twenty percent in a decade.²⁴¹ The firms frequently stick these clients into accounts managed by others using computers to buy and sell stocks for clients en masse.²⁴² Brokerage firms supposedly can pay such managers a slice of the fee, and subsequently ignore whatever develops. A busy broker doing nothing but gather assets might garner a single \$100,000 client weekly over a decade, to finally boast \$50 million under management.²⁴³ She would harvest \$500,000 to \$1 million per annum in gross commissions even if doing nothing for these five hundred clients.²⁴⁴

The relevant Rule now read:

(a) Special compensation. A broker or dealer registered with the Commission under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) (the "Exchange Act"):

(1) Will not be deemed to be an investment adviser based solely on its receipt of special compensation (except as provided in paragraph (b)(1) of this section), provided that:

A. Any investment advice provided by the broker or dealer with respect to accounts from which it receives special compensation is solely incidental to the brokerage services provided to those accounts (including, in particular, that the broker or dealer does not exercise investment discretion as provided in paragraphs (b)(3) and (d) of this section); and

B. Advertisements for, and contracts, agreements, applications and other forms governing, accounts for which the broker or dealer receives special compensation include a prominent statement that: "Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you

²⁴⁰ Posting of Shepher Smith & Edwards to Stockbroker Fraud Blog, http://www.stockbrokerfraudblog.com/2007/04/court_rules_that_sec_exceeded.html (April 4, 2007).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time." The prominent statement also must identify an appropriate person at the firm with whom the customer can discuss the differences.

- (2) Will not be deemed to have received special compensation solely because the broker or dealer charges a commission, mark-up, mark-down or similar fee for brokerage services that is greater than or less than one it charges another customer.
- (b) *Solely incidental to.* A broker or dealer provides advice that is not solely incidental to the conduct of its business as a broker or dealer within the meaning of section 202(1)(11)(C) of the Advisers Act or to the brokerage services provided to accounts from which it receives special compensation within the meaning of paragraph (a)(1)(i) of this section if the broker or dealer (among other things, and without limitation):
- (1) Charges a separate fee, or separately contracts, for advisory services;
 - (2) Provides advice as part of a financial plan or in connection with providing financial planning services and:
 - (i) Holds itself out generally to the public as a financial planner or as providing financial planning services;
 - (ii) Delivers to the customer a financial plan; or
 - (iii) Represents to the customer that the advice is provided as part of a financial plan or in connection with financial planning services;
 or
 - (3) Exercises investment discretion, as that term is defined in paragraph (d) of this section, over any customer accounts.
- (c) *Special rule.* A broker or dealer registered with the Commission under section 15 of the Exchange Act is an

investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject the broker or dealer to the Advisers Act.

- (d) Investment discretion. For purpose of this section, the term investment discretion has the same meaning as given in section 3(a)(35) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(35)), except that it does not include investment discretion granted by a customer on a temporary or limited basis.²⁴⁵

Brokers and dealers not subject to demands of the Investment Advisers Act if their advice is solely incidental to their business as a broker or dealer (and the broker or dealer therefore collects no special compensation), and the S.E.C. promulgating a rule exempting broker-dealers if they do collect such special compensation, the Financial Planning Association took arms. It petitioned for review of this rule²⁴⁶ on the ground that the Commission overreached its authority.²⁴⁷ The judiciary, as the last resort in regulatory matters, renders decisions resembling another set of regulations.²⁴⁸ In the eyes of an economist, legal proceedings almost precisely mimic a fight between two lobbies.²⁴⁹ The difficulty in going to court is its expense and the length of litigation.²⁵⁰

²⁴⁵ 17 C.F.R. § 275.202(a)(11)-1.

²⁴⁶ “A recurrent question is whether judicial review of agency action should be in a district (trial) court initially, with a right of appeal to the court of appeals, as in the case of judicial review of denials of disability benefits by the Social Security Administration, or, as is more common, in the court of appeals initially, cutting out the district court. Two tiers of review will increase the total number of court cases but reduce the number of court of appeals cases. Suppose there are 100 administrative decisions, review is sought in 50, and if the district courts have an initial review jurisdiction 20 percent of their review decisions will be appealed to the courts of appeals. Then in a two-tier system there will be a total of 60 cases, 50 in the district courts and 10 in the courts of appeals, and in the one-tier system only 50 cases—but all in the courts of appeals. If court of appeals review is more costly to the judicial system, for reasons suggested...., the two-tier system may be more efficient even if the additional tier has little effect in reducing the number and hence costs of legal errors, provided the two-tier system reduces the total number of judicial review proceedings.” POSNER, *supra* note 8, at 673.

²⁴⁷ Fin. Planning Ass’n v. S.E.C., 482 F. 3d 481, 486 (D.C. Cir. 2007).

²⁴⁸ HOUTHAKKER & WILLIAMSON, *supra* note 10, at 288.

²⁴⁹ 5 GORDON TULLOCK, *The Rent-Seeking Society in THE SELECTED WORKS OF GORDON TULLOCK* 185 (Charles K. Rowley ed., 2005) [hereinafter, TULLOCK, *Rent-Seeking Society*].

²⁵⁰ HOUTHAKKER & WILLIAMSON, *supra* note 10, at 288.

C. The Standing Issue

A fundamental prerequisite to any exercise of jurisdiction is Article III standing.²⁵¹ A litigant must display, minimally, a particularized, concrete injury (imminent or actual) traceable to the challenged act and redressable by the court.²⁵² For representative standing, it is well-established that an association has standing to bring suit on behalf of its membership if: its members otherwise have standing in their own right; those interests which it champions prove germane to that organization's purpose; and neither the claim asserted, nor the requested relief, requires the participation of individual members in the lawsuit.²⁵³

The S.E.C. denied that the F.P.A. demonstrated injury-in-fact. Yet parties endure a constitutional injury if an agency allows increased competition against them.²⁵⁴ The F.P.A., a nonprofit organization of more than 27,000 members, exists to advance the profession of financial planning.²⁵⁵ The S.E.C. rule evokes a double standard in providing investment advice.

First, there are investment advisers covered by the Investment Advisers Act. (Many F.P.A. members, being investment advisers, must comply therewith.²⁵⁶) The Supreme Court held in *U.S. Securities and Exchange Commission v. Capital Gains Research Bureau, et al.*²⁵⁷ that a registered investment advisor is a fiduciary.²⁵⁸ The Investment Advisers Act of 1940 comprehended the delicate fiduciary nature of an investment advisory relationship.²⁵⁹ Congress itself recognized the investment advisor as a fiduciary.²⁶⁰

²⁵¹ *Fin. Planning Ass'n*, 482 F.3d at 486. Investigation continues into the niche between the political theory of the state (and its constitution), and law and economics. See, e.g., *DEMOCRACY, FREEDOM, AND COERCION: A LAW AND ECONOMICS APPROACH* (Alain Marciano and Jean-Michel Josselin eds., 2007).

²⁵² *Fin. Planning Ass'n*, 482 F.3d at 486.

²⁵³ See *id.* (quoting *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996)).

²⁵⁴ See *id.* (quoting *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002)).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *U.S. Securities and Exchange Commission v. Capital Gains Research Bureau, et al.*, 375 U.S. 180 (1963).

²⁵⁸ Jeffrey B. Kelvin, *Is a Registered Investment Adviser a "Fiduciary"?*, *J. FIN. SERV. PROF'LS.*, Nov. 2006, at 39. As Paul H. Kuhn, of Woodmont Investment Counsel (Nashville) reminded the investing community last September, "Only 'investment advisers' registered with the SEC under the Investment Advisers Act of 1940 are obligated to put their clients' interests first at all times, to disclose all costs and to disclose all conflicts of interest." Paul H. Kuhn, Letter to the Editor, *BARRON'S*, Sept. 10, 2007, at 60.

²⁵⁹ *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963) (citing 2 Louis Loss, *Securities Regulation* 1412 (2nd ed. 1961)).

²⁶⁰ *Capital Gains Research Bureau, Inc.*, 375 U.S. at 194. Justice Harlan dissented: "I think it clear

Section 206 of the Investment Advisers Act provides:

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph (3) shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.²⁶¹

A December 16, 2005 No-Action Letter (to Senior Vice President and General Counsel Ira D. Hammerman of the Securities Industry Association) representing the views of the staff of the S.E.C. Division of Investment Management (the letter not being a rule, regulation, nor statement of the S.E.C.)²⁶² unmistakably reiterated that investment advisors are fiduciaries,²⁶³ “Under section 206 of the Advisers Act, advisers owe fiduciary obligations to a ‘client or prospective client.’”²⁶⁴

that what was shown here would not make out a case of fraud or breach of fiduciary relationship under the most expansive concepts of common law or equitable principles.” *Id.* at 203 (Harlan, J., dissenting).

²⁶¹ Investment Advisers Act of 1940, Pub. L. No. 76-768, 54 Stat. 847 (1940) (codified at 15 U.S.C. §§ 80b-1 through 80b-21 (2002)).

²⁶² Sec. Indus. Ass’n., SEC No-Action Letter, available at <http://www.sec.gov/divisions/investment/noaction/sia121605.htm> (Dec. 16, 2005).

²⁶³ Dan Moisand, *Do the Right Thing*, WEALTH MANAGER, December 2006, at 12, 13.

²⁶⁴ Sec. Indus. Ass’n, *supra* note 262, at 2.

Second, one discerns the new bloc of broker-dealers exempted from that Act although their activities fail to conform with the two-pronged requirements of subsection (C): "The two groups compete for customers, and under the...rule one of them (including F.P.A. members) must continue to comply with the IAA, while the other one (the broker-dealers in the new, exempt category) need not."²⁶⁵ As the legal challenge was formulated during the litigation by the President of the Financial Planning Association:

Our concern was that the exemption basically allowed sales representatives to market and provide services identical to those provided by financial planners and investment advisors without having to meet the same high fiduciary standard. Instead, brokerages would be held to a lower "suitability" standard. A fiduciary standard requires a practitioner to put the client's interest first. Under the suitability standard, this is not necessary.²⁶⁶

The process of financial planning can entail a broad range of investment products, services, and strategies. Frequently it demands income tax work and estate planning, insurance-related advice, and retirement and pension services. And investment advice within a personal financial plan centers upon securities risk, rates of return, liquidity, and appreciation.²⁶⁷ How grave is the matter of a self-styled financial planner (e.g., a salesperson held to a less-than-fiduciary standard) extolling potential returns and failing to warn of client risk?

That essentially was the query put last year to William S. Sharpe, the co-recipient of the 1990 Nobel Prize for Economics:

²⁶⁵ Fin. Planning Ass'n v. S.E.C., 482 F.3d 481, 486-87 (D.C. Cir. 2007).

²⁶⁶ Dan Moisand, *A Stand on Standards*, WEALTH MANAGER, July/August 2006, at 12, 13. "Independent financial planners and consumer advocacy groups remain adamant that broker-advisers should fulfill the same fiduciary obligations with no exceptions. The Financial Planning Association, a trade group, has sued the SEC, seeking to vacate the new rule. Regulators also have acknowledged the confusion among investors over the rules and responsibilities of broker-advisers and investment advisers. They have promised a broader study on the issue. Brokerage firms have countered that they are just as accountable because of various regulations such as suitability and continuing-education requirements." Wei, *New Rules*, *supra* note 30, at D2. See also *Why "Trust Me" Makes Me Nervous*, MONEY, July 2007, at 43 ("I've never met a financial planner who didn't claim to put his client first.").

²⁶⁷ RAPPAPORT, *supra* note 88, at 32; See George Steven Swan, *Legal Education and Financial Planning: Preparation for the Multidisciplinary Practice Future*, 23 CAMPBELL L. REV. 1, 19 (2000) ("The legal profession if facing a multidisciplinary future, would do well to acquaint itself with the multidimensional financial planning profession.").

Q. *What if your adviser talks only about returns, not risk?*

A. Look, think for a second about what each of you knows. You know about you: who you are, what your goals are. Your financial planner knows—or is supposed to know—about the risks and returns of the capital markets. It's his job to take risk into account by telling you the range of possible outcomes you face. If he won't, go get a new planner, someone who will get real.²⁶⁸

Exactly twenty years ago, it was already an elementary cautionary point, "Although many people call themselves financial planners, a large number are primarily interested in selling a limited number of products they represent."²⁶⁹

Moreover, the Financial Planning Association was held to have prudential standing.²⁷⁰ The F.P.A. membership falls within the Investment Advisers Act's zone of interest.²⁷¹ A congressional aim in passing that statute²⁷² was to defend the capacity of bona fide investment advisers to compete on a level regulatory playing field against those advisers who failed to fully disclose their conflicts of interest.²⁷³

D. *The Sway of the Securities and Exchange Commission*

The Financial Planning Association contended that in subsection (C) Congress denominated that group of broker-dealers it desired to exempt, and so subsection (F) was intended solely to empower the Commission to exempt new groups.²⁷⁴ The resolution of the Association's challenge, consequently, hinged upon whether the Commission was authorized to exempt from Investment Adviser Act coverage an additional group of broker-dealers beyond those congressionally exempted in subsection (C), when the Commission moved under either subsection (F), or section 211(a).²⁷⁵ Section 211(a) provides:

²⁶⁸ *The Man Who Explained It All*, MONEY, June 2007, at 107.

²⁶⁹ SCOTT, *supra* note 146, at 135.

²⁷⁰ *Fin. Planning Ass'n*, 482 F.3d at 487.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this subchapter. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.²⁷⁶

The Court reviewed the Commission's exercise of its authority pursuant to subsection (F) under the two-step analysis of *I. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁷⁷ That approach is a familiar one.²⁷⁸ (Albeit when the Supreme Court in its *Chevron* opinion expanded judicial deference to administrative lawmaking—at least to lawmaking by those administrative agencies completely within the executive branch, e.g., the National Highway and Traffic Safety Administration, or the Environmental Protection Agency—it unwittingly debilitated the separation of powers.)²⁷⁹ Under the first step, a court determines whether Congress directly has addressed the exact issue in question.²⁸⁰ Under step two, if the statute is thus ambiguous or silent, the court's inquiry becomes whether the agency's answer is premised upon a reasonable statutory construction.²⁸¹ A court will uphold such statutory interpretation insofar as it is reasonable.²⁸²

Utilizing traditional statutory construction tools, courts examine texts, structure, an overall statutory scheme, and the problem that Congress endeavored to resolve.²⁸³ Whilst the S.E.C. maintained that the intent underlying paragraph 11 was the exemption of broker-dealers who receive

²⁷⁶ 15 U.S.C. § 80b-11(a).

²⁷⁷ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 847, 842-43 (1984).

²⁷⁸ *Fin. Planning Ass'n*, 482 F.3d at 487.

²⁷⁹ POSNER, *supra* note 8, at 683.

²⁸⁰ *Fin. Planning Ass'n*, 482 F.3d at 487.

²⁸¹ *Id.*

²⁸² *Id.* "At the nucleus of the American idea of the rule of law in a government of separated powers resides this question: Once 'implementation of law is divided between administrators and the judiciary, whose understanding of law prevails?' Chief Justice John Marshall presciently equated administrative legality with reasonableness and reason-giving. A statute conferring discretion implicitly embodies, at a minimum, the requirement to deliver reasons for an action should the actor be called to account in court." Jerry L. Marshall, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 16 YALE L. J. 1636, 1686 (2007) (citing *Otis v. Watkins*, 13 U.S. 339, 358 (1815)). But Marshall's view ran ahead of its time. *Id.* at 1677-78, 1686-87.

²⁸³ *Fin. Planning Ass'n*, 482 F.3d at 487.

special compensation for investment advice, the plain text of subsection (C) solely exempts broker-dealers who receive no special compensation for investment advice.²⁸⁴ Usually, the word ‘any’ is understood as all-inclusive.²⁸⁵ In bidding to exempt broker-dealers beyond those receiving only brokerage commissions for investment advice, the Commission promulgated a rule directly conflicting with the statutory text.²⁸⁶ Respecting broker-dealers, subsection (C) applied to *any* broker or dealer.²⁸⁷ If a statutory text is clear, no agency may exploit general clauses to redefine jurisdictional boundaries statutorily drawn.²⁸⁸ The text and structure of 202(a)(11) render it evident that Congress decided to define “investment adviser” broadly, and to press a precise exemption only for broker-dealers.²⁸⁹

The Investment Advisers Act’s overall statutory scheme confronted the problems identified to Congress in two principal ways: First, by establishing a federal fiduciary standard controlling the performance of investment advisors (defined expansively) and second, by demanding full disclosure of every conflict of interest.²⁹⁰ Apparently, Congress was not particularly worried about the regulatory burden laid upon broker-dealers.²⁹¹

Subsection (F) served the obvious end of enabling the Commission to address persons or classes entailing circumstances, which Congress had not foreseen in its text. It is not to widen those exemptions of the classes of persons (e.g., broker-dealers) which Congress explicitly had addressed.²⁹² Subsection (F) is no catchall whereby the Commission is deputized to rewrite the statute.²⁹³ The Court’s majority determined the text of subsections (C) and (F) to be unambiguous under *Chevron* step one.²⁹⁴ Thus the Commission exceeded its authority.²⁹⁵

Remaining for discussion was the Commission’s reliance on a general rule-making power under Investment Advisers Act section 211(a).²⁹⁶ Such reliance proved unavailing, inasmuch as it suggested no intent on the part of Congress that the Commission could ignore either of the two requirements

²⁸⁴ *Id.* at 487-88.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 489.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 490.

²⁹¹ *Id.*

²⁹² *Id.* at 491.

²⁹³ *Id.* at 490-91.

²⁹⁴ *Id.* at 492

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 493

in subsection (C) for broker-dealers to enjoy exemption from the Investment Advisers Acts.²⁹⁷ Even if the statute is imperfect, the Commission lacks the capacity to correct perceived flaws.²⁹⁸ The Court of Appeals for the District of Columbia Circuit granted the petition of the Financial Planning Association and vacated the rule at issue.²⁹⁹

Circuit Judge Garland dissented.³⁰⁰ Judge Garland did not suggest that the majority's interpretation was unreasonable.³⁰¹ Nevertheless, by contrast with the majority, Garland could extract no unambiguous meaning from the phrases "such other persons" and "within the intent of this paragraph."³⁰² In keeping with the dictates of *Chevron*, Garland consequently would defer to the Commission's reasonable reading of the statute it administers.³⁰³ Garland chose to uphold the Commission's fee-based brokerage rule.³⁰⁴

To be sure, decision-making in the United States Court of Appeals is a topic in itself.³⁰⁵ Suppose a reviewing court confronts the option of either reversing an agency decision on the premises that the agency committed error procedurally (or failed to enunciate a reasoned justification for its action), or else (as in *Financial Planning Association*) on a statutory interpretation ground. Should that court opt (as did the Court of Appeals for the District of Columbia Circuit) for the latter route, it renders it more difficult for the agency upon remand to reinstate its decision. But it will prove easier for the agency to persuade the Supreme Court to agree and reverse the judicial decision. This is because the Supreme Court cares more about issues of statutory interpretation than in correcting case-specific error.³⁰⁶ The Commission declared on May 14, 2007 that it would not appeal the decision in *Financial Planning Association*.³⁰⁷ The Commission requested the Court of Appeals delay implementing its decision until

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 493-501 (Garland, J., dissenting).

³⁰¹ *Id.* at 501 (Garland, J., dissenting).

³⁰² *Id.* at 498-99 (Garland, J., dissenting).

³⁰³ *Id.* at 498, 501 (Garland, J., dissenting).

³⁰⁴ *Id.* at 501 (Garland, J., dissenting).

³⁰⁵ See, e.g., FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007).

"Ultimate power over legal policy in the United States lies mainly in appellate courts, particularly the Supreme Court. These courts do not and could not hear all cases themselves. Rather, appellate courts make policy by laying down rules for disposing of cases, rules that the lower court judges who hear the vast majority of cases are to apply in their decision." Jeffrey R. Lax, *Constructing Legal Rules on Appellate Courts*, 101 AM. POL. SCI. REV. 591, 591 (2007).

³⁰⁶ POSNER, *supra* note 8, at 674.

³⁰⁷ Kim & Laise, *supra* note 232, at D1.

September 2007 so brokerage firms might determine what to do with the accounts in controversy.³⁰⁸

VIII. THE IMMEDIATE REACTION TO THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION

The financial press shortly noised of the opinion in Financial Planning Association:

In March, a federal court overturned the SEC rule in response to a suit by the Financial Planning Association, which objected to brokers giving advice while having to meet a lower standard of care for clients. Brokers are required to sell clients only products that are "suitable." Investment advisers, by contrast, must meet a more rigorous standard as a fiduciary, which means they must place the interests of the clients first.³⁰⁹

As would be anticipated, the *Financial Planning Association* crowed over Financial Planning Association as a large-scale victory for the consumer.³¹⁰ 2006³¹¹ F.P.A. President Nicholas A. Nicolette advanced last March 30, "We strongly urge the SEC to set a 90-day deadline for brokerage firms to convert fee-based accounts."³¹² That said, the brokerage firms merely needed to embrace fiduciary duties, to allow their customers to retain the fee-based accounts.³¹³

³⁰⁸ *Id.* at D4; see generally Investment Advisers Act of 1940 § 211(d), 15 U.S.C. 80b-11(d) (1940), which provides, "No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

³⁰⁹ Kim & Laise, *supra* note 232, at D4.

³¹⁰ Press Release, Fin. Planning Ass'n, FPA Says Consumers the Big Winner in Court Decision (Mar. 30, 2007), http://www.fpanet.org/member/press/releases/033007_lawsuit.cfm.

³¹¹ Shelley A. Lee, *Nick Nicolette on the Lawsuit, the Irrelevance of Legal Definitions, and Elder Care as the New Must-Know Topic*, J. FIN. PLAN., Jan. 2007, at 20.

³¹² Fin. Planning Ass'n President Nicholas A. Nicolette, CFP®, On the Decision in *Financial Planning Association v. Securities and Exchange Commission* (Mar. 30, 2007), http://www.fpanet.org/member/press/releases/033007_statement.cfm.

³¹³ Milo Benningfield, Letter to the Editor, *Blame the Brokers, Not the SEC*, WALL ST. J., May 26-27, 2007, at A7. Elaborated Mr. Benningfield, of Benningfield Financial Advisors, "It would seem fairly straightforward to require anyone advising a client on, say, an investment decision affecting their life savings to have to put that client's interest first. But the some 600,000 stockbrokers in the U.S. today have no such duty. Rather, they have only to satisfy a vague, minimal standard of "suitability" when making investment recommendations. By contrast, the approximately 40,000 Registered Investment

During the litigation, no one laid heavy bets on either side.³¹⁴ David B. Yeske, the 2003 F.P.A. President, recalled, "There were many Board conversations through the years where people gave it a low probability for success."³¹⁵ Elizabeth W. Jetton, the 2004 F.P.A. President, conceded, "I don't believe we thought we would win the lawsuit. Winning for us was doing the right thing, and getting our message out about what we consider to be the standards for financial planning."³¹⁶ In early 2007, President Nicolette offered:

I first want to point out that even if the lawsuit decision goes against us, some very positive things have happened as a result of the suit. Look at the SEC's decision to undertake a major study by the RAND Corporation to examine the issue of consumer confusion and overlapping functions and regulation of those who offer financial services. We've "won" if you consider the growing public perception of who planners are and what the issues are. Major publications such as the Wall Street Journal have written on this and that's been very positive.

If we win the lawsuit, we'll have to build relationships and take action quickly, because ultimately it could wind up with Congress proposing a bill that addresses the new landscape of brokerage firms not being able to do fee-based business under the SEC's exemption.

If we lose, it won't be that we weren't "right." Keep in mind that the lawsuit is based on the technicality of whether the SEC exceeded its authority to put the broker/dealer exemption in place. If it isn't decided in our favor, we'll move even more aggressively with our message about how this profession serves the public.³¹⁷

In hindsight, some F.P.A. opinion was that the Commission's *Financial Planning Association* defense was anemic or languid, at its best. Whereas the Commission could have filed a motion challenging F.P.A. standing, it hesitated to inject that argument until its final brief. While the investment advisor fiduciary standard as a protection for investors marked a central portion of the Association's argument, the Commission's brief relegated it

Advisors must satisfy the far more stringent—and fair—fiduciary duties imposed by the IAA." *Id.*

³¹⁴ Duane Thompson, *Solely Incidental to Financial Planning*, J. FIN. PLAN., Mar. 2006, at 36, 38.

³¹⁵ *Three Former FPA Presidents Share Their Reactions to the B/D Ruling*, SOLUTIONS, May/June 2007, at 5.

³¹⁶ *Id.*

³¹⁷ Lee, *supra* note 311, at 22.

to a footnote.³¹⁸ Simultaneously, the *Broker-Dealer Alert* moaned, “For reasons that are unclear, the Commission declined to argue that the Rule constituted a permissible interpretation of the terms “solely incidental” or “special compensation” under Section 202(a)(11)(C) itself, terms the Commission (as opposed to the staff) has rarely if ever defined.”³¹⁹

Meanwhile, on April 10, 2007, the Securities Industry and *Financial Market Association* announced that it was urging the S.E.C. to ask for a rehearing on the fee-based brokerage accounts issue in the Court of Appeals.³²⁰ S.I.F.M.A. represents the shared interests of over six hundred-fifty banks, securities firms, and asset managers.³²¹ Marc Lackritz, President and C.E.O. of S.I.F.M.A., protested the opinion in *Financial Planning Association*:

This ruling has the potential to significantly impair an important element of consumer choice for American investors and we strongly urge the SEC to ask for a rehearing. With this decision, one million investors, with nearly \$300 billion in assets, could see a significant reduction in their range of choices and options for receiving and paying for financial services. Investors deserve no less than robust choice and vigorous competition.³²²

Fee-based accounts make up approximately one-fifth of all retail brokerage accounts.³²³ At stake was \$281 billion in such wrap accounts. The average fee-based brokerage account was worth \$279 thousand.³²⁴

Admittedly, the consumer opting to rely on financial suggestions from a nonfiduciary (Lackritz’ “choices and options”) plunges into a faith-based initiative. When A.G. Edwards, Inc., announced its merger with Wachovia Corp. last year, Wachovia executive David Carroll pronounced that

³¹⁸ Duane Thompson, *In the End, Votes Count in the Broker/Advisor Donnybrook*, J. FIN. PLAN., May 2007, at 32 [hereinafter, Thompson, *Votes*].

³¹⁹ W. Hardy Callcott, Kevin Zambrowicz & Michael Burbach, *SEC Rulemaking Authority Takes Another Hit: Fee-Based Brokerage Rule Vacated*, *Broker-Dealer Alert*, April 2007, at 1, 2 n.10 (Bingham McCutchen, L.L.P.) (advertisement).

³²⁰ Press Release, Securities Industry and Financial Markets Association, *Fee-Based Account Decision Should be Reheard SIFMA Tells SEC* (Apr. 10, 2007), available at <http://www.sifma.org/news/42771328.shtml> (last visited Sept. 26, 2007).

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ Anne Kates Smith, *The New Rules on Investment Accounts*, KIPLINGER’S, Aug. 2007, at 18.

Envision, Wachovia's financial planning tool, would help its advisors create investment plans, and (potentially) shift clients into managed accounts:³²⁵

Wachovia says there are no financial incentives in place that would encourage its advisers to sell in-house products rather than, say, the mutual funds or other investments of other firms. But Alois Pirker, a senior analyst at Aite Group LLC, said a greater familiarity with Wachovia's own offerings could make advisers more inclined to offer clients proprietary funds over third-party products.³²⁶

Well, yes. The client puts faith in the advisor. But the non-fiduciary advisor need not devote her highest of loyalties to her customer.

The *Financial Planning Association* opinion generated turmoil among brokerage firms.³²⁷ In latter 2007, it was thought a million or so investors must hear from their brokers.³²⁸ (Remember Lackritz's "one million investors".) Those difficulties associated with the Commission's Rule cannot be cured through revisions to that Rule. Therefore, the outcome sought by the Commission by its enactment of the Rule might be attainable through congressional legislation alone.³²⁹ A dustup in Congress seems imminent.

IX. CONGRESS: BOXING RING OR AUCTIONHOUSE?

The big question in 2008 is not whether the potent securities industry is able to revitalize the broker/dealer rule via amendment of the Investment

³²⁵ Kim, *supra* note 193, at B1.

³²⁶ *Id.* at B2.

³²⁷ Jane J. Kim, *Picking an Account That Fits*, WALL ST. J., June 9-10, 2007, at B1.

³²⁸ Smith, *supra* note 324, at 18. "Most likely you'll have to choose between transferring your money to an account with full advisory services (assuming your broker offers one) or a commission-only account. You could pay \$200 a year more than you do now to go the full-advice route, according to consultant Cerulli Associates, so make sure you need the extra attention. If you choose to pay commissions instead, you may also end up shelling out more money, according to industry calculations. You'll want to monitor trading to make sure it's no more frequent than was the case in your wrap account." *Id.*

³²⁹ Alston & Bird, L.L.P., *Appeals Court Rejects SEC Rule Excepting Certain Broker-Dealers from the Definition of Investment Adviser*, Fin. Servs. Prods. Adv. 1, 3 (Apr. 9, 2007). "There is speculation that the brokerage industry would go to Congress to overturn the court ruling, but there has been little activity around the issue on Capitol Hill. Even if the brokerage industry succeeded in convincing Congress to pass such a law, would it be worthwhile from a business standpoint? These firms, having just finished the process of re-papering a million fee-based accounts, would then have to recontact their customers to again sign new account agreements re-converting them to fee-based accounts." Duane Thompson, *FPA v. SEC: What's Next?*, SOLUTIONS, July-August 2007, at 24, 25.

Advisers Act.³³⁰ (The *Broker-Dealer Alert* opined that “because of the political heft of the financial planning lobby, it is questionable whether Congress will provide a quick response to restore the Commission’s rulemaking authority.”³³¹) It is whether a wider-ranging dialogue over fiduciary protections of the public will evoke cries for substantial reforms.³³² (Remember Nicolette’s reference to Congress’ proposing a bill to address the new landscape of brokerage firms.) Unpromisingly, while the production of statutes might appear a straightforward process, the cost of the statutory production of rules is steep. A statutory enactment needs the concurrence of a legislative majority, and transaction costs weigh heavily if there are hundreds of parties to the transaction.³³³

The electoral process begets a legislative market.³³⁴ Therein, legislators peddle legislation to those who can assist their reelections. Politically effective blocs can procure wealth transfers to themselves by, e.g., limiting either entry or price competition. True, such tactics appear to be inefficient wealth-transfer devices.³³⁵ However, should wealth transfer be effectuated by tools like regulatory limits on competition, the cost of the subsidy remains implicit, and difficult to estimate, when contrasted with naked handouts of tax dollars.³³⁶ The public sector in modern democracies grows in response to popular egalitarian sentiment linked to a pronounced preference for governmental provision of specific services (instead of straightforward money transfers.)³³⁷

The attorney’s conventional comprehension of statutory interpretation is that a judge undertakes to disinter and give life to the intent of the enacting legislature.³³⁸ This understanding squares with the legislative process as one of deals cut among interest groups.³³⁹ The stability requisite to longterm legislative deals is reinforced by the independence of the

³³⁰ Thompson, *Votes*, *supra* note 318, at 45.

³³¹ Callcott et al., *supra* note 319, at 5.

³³² Thompson, *Votes*, *supra* note 318, at 45.

³³³ POSNER, *supra* note 8, at 586. “The president is not just a participant in a legislative coalition. Or, if so, s/he is a participant who notoriously defects from the legislative understanding of the agreement, often as early as at the time that s/he signs the bill. Moreover, s/he is a defector who has independent power to shape agency process and structure.” JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 128 (1997).

³³⁴ POSNER, *supra* note 8, at 562.

³³⁵ *Id.* at 563.

³³⁶ *Id.* at 564.

³³⁷ Ezra J. Mishan, *The Folklore of the Market: An Inquiry into the Economic Doctrines of the Chicago School*, in *THE CHICAGO SCHOOL OF POLITICAL ECONOMY* 95, 144 (Warren J. Samuels ed., 1993).

³³⁸ POSNER, *supra* note 8, at 565-66.

³³⁹ *Id.* at 566.

judiciary,³⁴⁰ when the judge applies a statute in accordance with the elements of the original deal between the enacting legislature and the beneficiaries of the legislation.³⁴¹ Unless the judiciary interpreted statutes in this way, judicial independence would disserve the interest group network (and hence might be legislatively curtailed).³⁴²

Legislation ineffective absent a hefty annual legislative appropriation to fund a subsidy would be of correspondingly diminished value to its beneficiaries because they would need anew to lease a legislative coalition yearly.³⁴³ So one expects interest group lawmaking, typically, to circumvent the need for substantial appropriations annually. Legislation creating regulatory agencies empowered to redistribute wealth is a prominent example. The annual budget of such an agency is trifling relative to the redistributions it can evoke.³⁴⁴

In other words, in one view the judiciary delivers the enforcement machinery necessary to keep a legislative deal stable through time, and thus the more precious.³⁴⁵ Judicial review cements the gains from private deal-making for public power.³⁴⁶ And agency processes are geared, foremost, to facilitate capture by those advantaged already.³⁴⁷ For administrative processes can be comprehended as those devices whereby political victors sustain their profits from successful, legislative-level interest group struggles.³⁴⁸ Thus legislatures deliver on electoral deals and stay in power.³⁴⁹ (Yet beware that all simple explanations of the origins and evolution of administrative processes might, to date, have proved incomplete or inconclusive.)³⁵⁰

Is Congress more like a boxing ring or more like an auction house?³⁵¹ George J. Stigler was awarded the 1982 Nobel Prize for Economics in tribute to his work on the theory of economic regulation. Stigler

³⁴⁰ *Id.* at 567.

³⁴¹ *Id.* at 569.

³⁴² *Id.* at 571.

³⁴³ *Id.* at 568.

³⁴⁴ *Id.*

³⁴⁵ MASHAW, *supra* note 333, at 20.

³⁴⁶ See generally, MASHAW, *supra* note 333.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 109.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 130.

³⁵¹ "For years, post-Stiglerian models of regulation have treated the political process as an off-the-books auction run by politicians to favour some group." Fred S. McChesney, *Rent From Regulation*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 310, 314 (Peter Newman ed., Stockton Press 1998) [hereinafter, 3 PALGRAVE].

emphasized that a representative and her party are recompensed (with electoral success and the perquisites of office) for their discovery and fulfillment of the desires of their constituents.³⁵² Should a representative deny ten large industries their slices of governmental power, or particular subsidies, they will devote themselves to the election of a more malleable successor.³⁵³ Of such impact are these high stakes.³⁵⁴ No representative can expect to retain office thanks to her reinforcement from foes of special privilege.³⁵⁵ (Dr. Friedrich A. Hayek, the distinguished jurist and the joint-winner of the 1974 Nobel Prize in Economics, discerned, "The true contrast to a reign of status is the reign of general and equal laws, of the rules which are the same for all, or, we might say, of the rule of *leges* in the original meaning of the Latin for laws—*leges* that is, as opposed to the *privileges*.")³⁵⁶

X. THE ECONOMICS OF ADMINISTRATIVE AGENCY ENFRANCHISEMENT

A. *What Is Capture?*

It has been said many times that the rise of administrative law was the twentieth century's most striking legal development.³⁵⁷ Even some ardent enthusiasts of the free market, like the late Milton Friedman, who was himself awarded the 1976 Nobel Prize in Economics, have conceded³⁵⁸ a

³⁵² *The Theory of Economic Regulation*, in THE ESSENCE OF STIGLER 243, 252 (Kurt R. Leube & Thomas Gale Moore eds., Hoover Institution Press 1986).

³⁵³ *Id.* at 253.

³⁵⁴ "If the representative denies ten large industries their special subsidies of money or governmental power, they will dedicate themselves to the election of a more complaisant [*sic*: compliant] successor: the stakes are that important." *Id.* A complacent representative would be pro-status quo. The industrial lobbyists want one anti-status quo, and hence compliant.

³⁵⁵ *Id.*

³⁵⁶ FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 154 (The University of Chicago Press 1960).

³⁵⁷ William Bishop, *Agency Cost and Administrative Law*, in 1 PALGRAVE 20, 21.

³⁵⁸ "The existence of a free market does not of course eliminate the need for government. On the contrary, government is essential both as a forum for determining the "rules of the game" and as an umpire to interpret and enforce the rules decided on. What the market does is greatly reduce the range of issues that must be decided through political means, and thereby to minimize the extent to which government need participate directly in the game. The characteristic feature of action through political channels is that it tends to require or enforce substantial conformity. The great advantage of the market, on the other hand, is that it permits wide diversity. It is, in political terms, a system of proportional representation. Each man can vote, as it were, for the color of tie he wants and get it; he does not have to see what color the majority wants and then, if he is in the minority, submit." MILTON FRIEDMAN, CAPITALISM AND FREEDOM 15 (The University of Chicago Press, 1962) (1963).

governmental role in defining rights to property, enforcement of contracts, curbing externalities, and producing public goods.³⁵⁹ But countless functions of the twenty-first century state extend far beyond such a list.³⁶⁰ The redistributive theory of the modern state implies that regulation is enacted and enforced primarily as a redistributive method.³⁶¹ This is the foundation for the capture theory of the regulatory agency.³⁶²

Legal scholars like to engage in policy analysis to assert that some particular result advances the public interest.³⁶³ This style of approach treats the public interest as a kind of vector of amorphous economic and social considerations.³⁶⁴ But regulatory capture signifies a situation wherein a regulated industry controls a regulatory agency's policies.³⁶⁵ In popular discourse, the notion summons attention to a regulatory process run aground.³⁶⁶

Formulated succinctly, for any regulator's decision to be captured, she must get the opportunity (thanks to monitoring costs and transaction costs) to hold decision-making discretion and then must decide other than would the polity itself.³⁶⁷ Moreover, she must render her decision not premised upon other-regarding public policy preferences, but in anticipation of reward from an entity to batten from her chosen alternative.³⁶⁸ (This entity ordinarily will be a special interest group rewarding capture with its

³⁵⁹ Bishop, *supra* note 357, at 23.

³⁶⁰ *Id.*

³⁶¹ *Id.* Economist Harry M. Trebing summarized Stigler's theory in this fashion: "He argued that every industry will perceive government regulation either as a potential resource or as a potential threat. By employing regulation to its advantage, an industry can achieve control over entry, substitute goods and services, and prices. However, utilizing government in this fashion involves potential hazards in the form of some loss of control by the dominant firms, procedural delays in the effecting changes, and the possible intrusion of outside forces into the decision-making process. Accordingly, an industry is confronted with a trade-off, and it will endeavor to select that degree of regulation which it believes to be optimal for its purposes. What emerges is essentially a perception of regulation in which government involvement is a function of the strategies of various parties, with the result that regulation is apparently incapable of pursuing an independent course to promote the public interest." Harry M. Trebing, *The Chicago School versus Public Utility Regulation*, THE CHICAGO SCHOOL OF POLITICAL ECONOMY, 331, 316 (Warren J. Samuels ed., 1993).

³⁶² *Id.* See also Lisa L. Miller, *The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited*, 5 PERSP. ON POLITICS, 303, 312 (2007) ("Highly sophisticated groups such as business interests, trade associations, and some single-issue groups (e.g., gun lobbies or death penalty activists) can seek out venues that are most favorable to their interests and the opposing groups sometimes cannot or will not follow.").

³⁶³ Michael E. Levine, *Regulatory Capture*, in 3 PALGRAVE 267, 268.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 267.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 270.

³⁶⁸ *Id.*

membership's political support.)³⁶⁹ A regulator can be fancied to have been captured, in a meaningful sense, solely in adopting an outcome which would not be ratified by the polity, and by so adopting it in exchange for benefit (personal or political).³⁷⁰ In the economist's model, governors distort the market mechanism, in return for which service to a special interest the governmental regulator is rewarded with higher office or pecuniary gain.³⁷¹ This latter is discussed in terms of the revolving door (netting lucrative employment in the regulated industry post-governmental service).³⁷²

B. *What Is Enfranchisement?*

The utilization of economics might not be so widespread in apprehending administrative law as in understanding other legal doctrines or practices.³⁷³ But public behavior is susceptible, unambiguously, to economic investigation.³⁷⁴ One approach to the domain of administrative law and economics deals with both efficiency and control over administration (within any given constitutional framework).³⁷⁵ Coherence of administrative behaviors and actions must be assured respecting the goals of the state and the defense of private rights.³⁷⁶ (For example, is an agency's statutory construction, like that of the Securities and Exchange Commission in *Financial Planning Association*, reasonable?) Salient features influencing administrative moves toward the goals of the state (and vindicating private rights) prove to be corruption and rentseeking.³⁷⁷ *Corruption. Rentseeking.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at 268.

³⁷² *Id.*

³⁷³ Jean-Michel Josselin and Alain Marciano, *Administrative Law and Economics*, in THE ELGAR COMPANION TO LAW AND ECONOMICS 115 (Jürgen G. Backhaus ed. 1999).

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.* See also John Maynard Keynes, *Introduction* to CAMBRIDGE ECONOMIC HANDBOOKS II (1922), quoted in C.W. Guillebaud, *Introduction* to CAMBRIDGE ECONOMIC HANDBOOK II at v, viii-ix (C.W. Guillebaud ed., 1948) (stating that the utility of economics is not to be overestimated, "The Theory of Economics does not furnish a body of settled conclusions immediately applicable to a policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor to draw correct conclusions"). Compare CHRISTOPHER J. INSOLE, THE REALIST HOPE: A CRITIQUE OF ANTI-REALIST APPROACHES IN CONTEMPORARY PHILOSOPHICAL THEOLOGY (2007) (explaining the anti-realist concept of religious discourse. Thereunder, religious speech has not been interpreted as assertions concerning objective reality, but instead as performing some such function as expressing a given perspective on the world).

The Securities and Exchange Commission bears a crucial mandate—to enforce the rule of law.³⁷⁸ Over the lifetime just past, it established its record of enforcing the rule of law in the American capital markets.³⁷⁹ During fiscal year 2005, the S.E.C. received almost 20,000 complaints against rogue stock-brokers: seven hundred complaints entailing the theft of funds or securities.³⁸⁰ The agency's annual expenditure roughly equals \$888 million.³⁸¹

But the critical post of S.E.C. Commissioner has routinely been allotted to industry insiders.³⁸² The former S.E.C. Chairman, William Donaldson, was co-founder of Donaldson, Lufkin and Jenrette, the investment bank. Allegedly, directors of divisions within the S.E.C. (like market regulation and investment management) are selected in accordance with their chumminess with Wall Street movers and shakers.³⁸³ In the words of Lewis S. "Mike" Edison, President of the American Association for Justice (a movement glibed by skeptics as anti-business), "Unfortunately, the SEC is becoming increasingly sympathetic to the pleadings of powerful corporations at the expense of public protection, providing substantial opportunities for unethical corporate executives to steal billions of dollars."³⁸⁴ The *Wall Street Journal* (a forum felt by a few to be pro-business) corresponds, stating that consternation waxes over the Commission's favoring of business interests in its decision-making.³⁸⁵ Former S.E.C. managers slide into comfortable industry berths with celerity following their stretch of governmental employ.³⁸⁶

³⁷⁸ Harvey L. Pitt, *Over-Lawyered at the SEC*, WALL ST. J., July 26, 2006, at A15.

³⁷⁹ *Id.*

³⁸⁰ Lynnette Khalfani, *Is Your Broker a Crook?*, BLACK ENTERPRISE, Aug. 2006, at 108.

³⁸¹ Edward Siedle, *The Irrelevant SEC: In Bed With the Industry It's Supposed to Regulate, It Needs a Shakeup*, FORBES, Nov. 27, 2006, at 40.

³⁸² *Id.*

³⁸³ *Id.* According to Don Trone (founder of Fiduciary 360, which coordinates the resources of the Center for Fiduciary Studies, and the Foundation for Fiduciary Studies), "The truth is that whether we're talking about an individual investor or the trustee of multi-billion dollar pension funds, the public perception is the SEC is a watchdog agency that ensures that industry is operating properly. But the reality is that they haven't been doing a complete job, at least from the standpoint of the investment advisory and consulting part of the industry." Nancy Opiela, *Paving the Way: Court Ruling and New Standards a Good Start for Consumers—But Only the Beginning*, J. FIN. PLAN., Sept. 2007, at 26, 33.

³⁸⁴ Lewis S. "Mike" Edison, *Keeping Corporations Accountable*, TRIAL, June 2007, at 9.

³⁸⁵ Kara Scannell, *SEC'S Allegiances Are Put to Test*, WALL ST. J., May 29, 2007 at A2 [hereinafter Scannell, *Allegiances*]; Kara Scannell, *(Entire) SEC Makes House Call: Rough Week on Street Prompts Congress Panel to Study Market Issues*, WALL ST. J., June 26, 2007, at C2 (House Financial Services Committee) ("The SEC is under interesting pressure for what some see as several pro-business moves. In the latest sign Congress is turning a skeptical eye toward Wall Street, an influential House committee is set to hear testimony from all five commissioners of the Securities and Exchange Commission today—the first time that has happened in at least 10 years").

³⁸⁶ Siedle, *supra* note 381, at 40. "Regulatory agencies are often set up after some political crusaders have successfully launched investigations or publicity campaigns that convince the authorities

An important observation about the bureaucracy in a representative democracy,³⁸⁷ according to Roger G. Noll and Barry R. Weingast in their *Rational Actor Theory, Social Norms, and Policy Implementation: Applications to Administrative Processes and Bureaucratic Culture*,³⁸⁸ is that daily decisions of bureaucrats are not rigorously monitored by elected officials.³⁸⁹ (Recall that for a regulator's decisions to be captured, there must be monitoring costs.) Most decisions regarding regulatory rules applied to a specific industry are rendered by professional civil servants.³⁹⁰ Some conclude from the seemingly independent activities of the bureaucracy that unelected officials actually command the government, barely subject to political control.³⁹¹ However, agency autonomy is largely a fiction.³⁹²

Instead, the relationship between an agency and the citizenry replicates the relationships (the comparative partisan strengths, values, and interests touched by a program) within the political environment of that agency

to establish a permanent commission to oversee and control a monopoly or some group of firms few enough in number to be a threat to behave in collusion as if they were one monopoly. However, after a commission has been set up and its powers established, crusaders and the media tend to lose interest over the years and turn their attention to other things. Meanwhile, the firms being regulated continue to take a keen interest in the activities of the commission and to lobby the government for favorable regulations and favorable appointments of individuals to these commissions." Thomas M. Sowell, *BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY* 148 (3rd ed. 2007).

³⁸⁷ Roger G. Noll and Barry R. Weingast, *Rational Actor Theory, Social Norms, and Policy Implementation: Applications to Administrative Processes and Bureaucratic Culture*, in *THE ECONOMIC APPROACH TO POLITICS: A CRITICAL REASSESSMENT OF THE THEORY OF RATIONAL ACTION* 237, 243 (Kristen Renwick Monroe ed., 1991). "As it developed in classical economics, there obtain seven assumptions of the economic theory of rational action. These are:

1. Actors pursue goals.
2. These goals reflect the actors' perceived self-interest.
3. Behavior results from a process that actually involves (or functions as if it entails) conscious choice.
4. The individual is the basic actor in society.
5. Actors have preference orderings that are consistent and stable.
6. If given options, actors choose the alternative with the highest expected utility.

Actors possess extensive information on both the available alternatives and the likely consequences of their choices."

Kristen Renwick Monroe, *The Theory of Rational Action: Origins and Usefulness for Political Science*, in *THE ECONOMIC APPROACH TO POLITICS: A CRITICAL REASSESSMENT OF THE THEORY OF RATIONAL ACTION*, 1, 4 (Kristen Renwick Monroe ed., 1991) (footnotes omitted) [hereinafter, Monroe, *Rational Action*].

³⁸⁸ Noll and Weingast, *supra* note 387, at 237.

³⁸⁹ *Id.* at 244. See, e.g., Ethan Bueno de Mesquita and Matthew C. Stephenson, *Regulatory Quality Under Imperfect Oversight*, 101 A.P.S.R. 605 (2007).

³⁹⁰ Noll and Weingast, *supra* note 387, at 244.

³⁹¹ *Id.*

³⁹² *Id.* at 248.

itself.³⁹³ Hence agency norms come to enfranchise only certain groups and to disenfranchise others. The manner whereby these norms function is recreating the political balance of power that agency policy is supposed to serve.³⁹⁴ Agency norms thus tend to mimic whatever political coalition supports a program, favoring the values of constituencies nurturing that coalition.³⁹⁵ The appearance of agency discretion is truly illusory. An agency's decisions prove sympathetically responsive to shifts in the goals of those aforementioned certain groups enfranchised before it.³⁹⁶

The agency which gave birth to Rule 202(a)(11)-1 was the Securities and Exchange Commission. Who is enfranchised before the Securities and Exchange Commission? The likes of Merrill Lynch. For Merrill Lynch & Co. and UBS AG wield some \$300 billion in fee-based brokerage account assets.³⁹⁷ Merrill Lynch was the firm with the most at stake, its Merrill Lynch Unlimited Advantage fee-based brokerage program commanding over \$100 billion in assets.³⁹⁸ Merrill Lynch is the largest brokerage house, by revenue, in America.³⁹⁹ Merrill Lynch is the employer of 15,930 brokers nationally.⁴⁰⁰ This is a total exceeding that of any other company.⁴⁰¹

Rule 202(a)(11)-1 was known as the S.E.C.'s Broker-Dealer Rule,⁴⁰² or more simply, the B-D Rule.⁴⁰³ There is truly nothing sinister about a Rule to bridle broker-dealers being called the Broker-Dealer Rule. What more self-explanatory label is possible for an S.E.C. tactic to protect customers from Wall Street institutions? But Rule 202(a)(11)-1 actually came to be styled the Merrill-Lynch Rule,⁴⁰⁴ or more simply, the Merrill Rule.⁴⁰⁵ What

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ Kim & Laise, *supra* note 232, at D1.

³⁹⁸ *Id.* at D4.

³⁹⁹ Ann Cairns & Randall Smith, *Wachovia Takes on Street*, WALL ST. J., June 1, 2007, at C1.

⁴⁰⁰ *Id.*

⁴⁰¹ Machan, *supra* note 144, at 87. The newly-combined A.G. Edwards, Inc., and Wachovia Corp. could boast 14,784 brokers. Cairns & Smith, *supra* note 399, at C1. Citigroup claims 15,120 brokers. *Id.* at C2.

⁴⁰² Dan Moisand, *Watch Your Speed*, WEALTH MANAGER, Feb. 2007, at 12, 13 (Moisand was Chair of the F.P.A.); Thompson, *supra* note 64, at 33; Legal Challenge to SEC's Broker-Dealer Rule, at 1, http://www.fpanet.org/member/govt_relation/lawsuit-against-sec-broker-dealer-rule.cfm.

⁴⁰³ Nancy Lininger, *Cry Me a River*, WEALTH MANAGER, Feb. 2006, at 12; Duane Thompson, *Warehouse Planners: FPA's Best-Kept Secret*, J. FIN. PLAN., July 2006, at 34, 37. "Many refer to it as the 'broker-dealer rule,' but I'll just call it 'Rule 202' for brevity's sake." Dan Moisand, *Do the Right Thing*, WEALTH MANAGER, Dec. 2006, at 12.

⁴⁰⁴ Machan, *supra* note 144, at 88; Bisisretirement.com, SEC Ruling on Broker-Dealer Advice Exemption, <http://www.bisisretirement.com/news/news.aspx?ID=431> (last visited Nov. 1, 2007); Stockbrokerfraudblog.com, Court Rules That SEC Exceeded Authority With Decision Regarding IAA

more self-explanatory label is possible for identifying who is really enfranchised before the S.E.C.?⁴⁰⁶ Rule 202(a)(11)-1 is not a policing regulation of Wall Street, which regulation is geared to protect consumers. It is a legitimatizing exemption *from* regulation, which exemption is calculated to protect Wall Street institutions from their own customers.⁴⁰⁷ Now abide faith, hope, and money, but the greatest of these is money.

XI. THE ECONOMICS OF RENTSEEKING

A. What Is Rentseeking?

Rentseeking is all the rage in the economics profession. This idea was conceived by Professor Gordon Tullock,⁴⁰⁸ albeit the term was coined not by Tullock⁴⁰⁹ but by Anne O. Krueger.⁴¹⁰ Tullock once propounded, "My personal definition of rent seeking essentially is using resources to obtain rents for people where the rents themselves come from something with negative social value."⁴¹¹ (For example, imagine a government-protected

Exemption, at 1, 2, http://www.stockbrokerfraudblog.com/2007/04/court_rules_that_sec_exceeded.html (last visited Oct. 06, 2007); James J. Pasztor, Jr., *Future of the CFP Certification: Profession Standard or Just Another Marketing Tool?*, J. FIN. PLAN., Mar. 2006, at 16, 18; R Rebecca McReynolds, *A Precarious Perch*, WEALTH MANAGER, Mar. 2006, at 50, 53.

⁴⁰⁵ Ronald F. Duska, *Fiduciaries or Providers of Suitable Products? When Advice Is Not Advice*, J. FIN. SERV. PROF., Jan. 2007, at 13, 14.

⁴⁰⁶ Last year, the Foundation for Taxpayer and Consumer Rights, a California nonprofit, filed requests under the Freedom of Information Act to learn of certain commission meetings with Merrill Lynch regarding a Supreme Court case. Scannell, *Allegiances*, *supra* note 385, at A2.

⁴⁰⁷ "Since the SEC's raison d'être is to look out for the welfare of the consumer, the commission's position taken in Rule 202(a)(11)-1 is somewhat puzzling. It seems to protect brokers more than investors." Duska, *supra* note 405, at 14.

⁴⁰⁸ GORDON TULLOCK, *Rent Seeking and the Importance of Disorganization*, in BUREAUCRACY 375 (Charles K. Rowley ed. 2005). The first generation of law and economics scholars remains among us. See, e.g., THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS (Francesco Parisi & Charles K. Rowley eds., 2007). Tullock was a major pioneer of the law and economics movement. Charles Goetz, *Tullock, Gordon*, in 3 PALGRAVE 628, 629. Tullock's *The Logic of the Law* predated the first edition of Richard A. Posner's, *Economic Analysis of the Law*, by at least a year, and was the first book in law and economics ever to be published. Charles K. Rowley, *Law-and-Economics from the Perspective of Economics*, in 2 PALGRAVE 474, 481.

⁴⁰⁹ JAMES BUCHANAN, *From Private Preferences to Public Philosophy: The Development of Public Choice*, in POLITICS AS PUBLIC CHOICE 39, 49 (2000) (citing Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 224-32 (1967)).

⁴¹⁰ Robert D. Tollison, *Rent Seeking*, in 3 PALGRAVE 315, 315 (citing Anne O. Krueger, *The Political Economy of the Rent Seeking Society*, 64 AM. ECON. R. 291, 291-03 (1974)).

⁴¹¹ Gordon Tullock, *Rent Seeking and Tax Reform*, in TULLOCK, *Rent-Seeking Society*, *supra* note 249, at 171.

cartel clinging to its above-market profits by arguing that the governmental protection is an entitlement, and that removal of a governmental guarantee against free entry of competitors into the cartel's market is a constitutional taking.)⁴¹² He elsewhere offered, "Thus, an individual who invests in something that will not actually improve productivity, or will actually lower it, but that does raise his income because it gives him some special position or monopoly power, is 'rent seeking,' and the 'rent' is the income derived."⁴¹³ In short, rentseeking means the socially costly pursuit of wealth transfer.⁴¹⁴ Employing a lobbyist or lawyer to elicit a friendly law marks rentseeking.⁴¹⁵ Notwithstanding whatever goals for which an organization might have been convened, lobbying for special interest legislation emerges as a comparatively cheap by-product.⁴¹⁶

James Buchanan established public choice theory.⁴¹⁷ He was awarded the Nobel Prize for Economics in 1986 and is Tullock's sometime coauthor.⁴¹⁸ According to Buchanan, the now-familiar⁴¹⁹ principle of

⁴¹² See, e.g., a report by the Pulitzer Prize-winning Dr. George F. Will: George F. Will, *Cabs and Cupidity: Luis Paucar Tackles Twisted Sense of Entitlement*, WASH. POST, May 27, 2007, at B07 ("textbook example of rent-seeking").

⁴¹³ Gordon Tullock, *Rent Seeking as a Negative Sum Game*, in TULLOCK, *Rent-Seeking Society*, *supra* note 249, at 103, 104.

⁴¹⁴ Tollison, *supra* note 410, at 315.

⁴¹⁵ *Id.* at 316.

⁴¹⁶ *Id.* at 320.

⁴¹⁷ See, e.g., PUBLIC CHOICE AND THE CHALLENGES OF DEMOCRACY (José Casas Pardo & Pedro Schwartz eds., 2007); PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber ed., 2007). "Public choice theory is the application of the method and analytic apparatus of modern economics to the study of political processes. An integral part of this theory is the assumption that participants in political processes act "rationally"—that is, they act purposively to secure their particular individual ends." Geoffrey Brennan & James Buchanan, *Voter Choice: Evaluating Political Alternatives*, in POLITICS AS PUBLIC CHOICE 153 (2000). "Public choice is a subdiscipline of rational actor theory." Monroe, *Rational Action*, *supra* note 387, at 2.

⁴¹⁸ See, e.g., 3 JAMES BUCHANAN & GORDON TULLOCK, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, in THE COLLECTED WORKS OF JAMES M. BUCHANAN (1999). Buchanan and Tullock earning kudos together, they are flailed together. Economist H. H. Liebhafsky grouched of the Chicago School of Political Economy: "No Chicagoan, including Buchanan and Gordon Tullock, has examined the place of the theology of the law as it has emanated from Chicago in the field of jurisprudence in general. Chicago jurisprudence is distinguished by the paucity of its references to the ideas of non-Chicago writers. The Chicago "price theory as jurisprudence" approach is a curious mixture, not a compound, of particles of logical positivist methodology suspended randomly in a mythical or secular natural law philosophy." H. H. LIEBHAFSKY, *Price Theory as Jurisprudence: Law and Economics, Chicago Style*, in THE CHICAGO SCHOOL OF POLITICAL ECONOMY 351, 237, 239-40 (Warren J. Samuels ed., 1993). To the Chicago School Liebhafsky preferred the Instrumentalism of the late Dr. Wolfgang Friedmann of the University of Toronto Faculty of Law. *Id.* at 253.

⁴¹⁹ See, e.g., George Steven Swan, *The Law and Economics of State-Sanctioned Marijuana*: Gonzales v. Raich, 7 FLA. COASTAL L. REV. 473, 515-18 (2006) (economic theory of bureaucracy as rentseeker).

rentseeking represents the extension to politics of standard price theory. The emergence of an opportunity for differentially high profits attracts investment until returns equalize with those available generally through the economy.⁴²⁰ If politics creates scarcity rents, investment takes the form of bids to procure access thereto.⁴²¹ Should the state license an occupation, one expects wasteful investments to win the favored plum.⁴²²

Political rentseeking is a major concern of public choice.⁴²³ The public choice analysis of rentseeking focuses more on the presumptively wasteful expenditure of resources (e.g., costly attorneys, accountants, lobbyists, press agents, and economists) to seize or sustain privileged positions, rather than on the resource misallocations granted to favored elements by the government.⁴²⁴ Concededly, some types of rentseeking can be economically desirable.⁴²⁵ Consider a commons area transfigured into a multistory carpark by a firm awarded the contract through lobbying.⁴²⁶ The community surrendering the resource is compensated.⁴²⁷ It obtains a local public good.⁴²⁸

Nonetheless, twisting the regulatory machinery to shield entrenched businesses is costly for the nation.⁴²⁹ And regulation can impede productivity in financial services.⁴³⁰ Make no mistake, Rule 202(a)11-1 is an exemption *from* regulation. Therefore the assault on Rule 202(a)11-1 meant an

⁴²⁰ BUCHANAN, *supra* note 409, at 50.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM AND BEYOND* 202 (2d ed. 2006).

⁴²⁴ *Id.*

⁴²⁵ PATRICK A. MCNUTT, *THE ECONOMICS OF PUBLIC CHOICE* 188 (2d ed. 2002).

⁴²⁶ *Id.*

⁴²⁷ *Id.* A high rent from competitive bidding reveals which uses are the most valued, and directs land to that use. ARMEN A. ALCHIAN, *Rent*, in *CHOICE AND COST UNDER UNCERTAINTY* 586, 593 (Daniel K. Benjamin ed., 2006) (The Collected Works of Armen A. Alchian, vol. 1). The rationing function of delivering land to its highest-valued use evidences the value of pure economic rent for any permanent, indestructible asset. ARMEN A. ALCHIAN, *Words: Musical or Meaningful?*, in *CHOICE AND COST UNDER UNCERTAINTY*, *id.* at 549, 581.

⁴²⁸ MCNUTT, *supra* note 425, at 188. The externality (e.g., a public good) is (like rentseeking) a familiar notion. See, e.g., Swan, *supra* note 419, at 503-14; George Steven Swan, *The Economics of Obstruction of Justice and Employment at Will: Rowan v. Tractor Supply Co.*, 81 U. DET. MERCYL. REV. 305, 311-27 (2004); George Steven Swan, *The Economics of the Retaliatory Discharge Public Policy Action*, 9 ST. LOUIS U. PUB. L. REV. 605, 630-32 (1990). But the issue of externalities presented one of the most challenging areas for economic theory in the final quarter of the twentieth century. Charles K. Wilber & Jon D. Wisman, *The Chicago School: Positivism or Ideal Type*, in *THE CHICAGO SCHOOL OF POLITICAL ECONOMY* 79, 87 (Warren J. Samuels ed., 1993).

⁴²⁹ Bert Ely, *Government Regulation: The Real Crisis in Financial Services*, in *MARKET LIBERALISM: A PARADIGM FOR THE 21ST CENTURY* 115, 121 (David Boaz & Edward H. Crane eds., 1993).

⁴³⁰ *Id.*

offensive to *extend* regulation. Turf skirmishes among regulated businesses betray an underlying war.⁴³¹ That war is the titanic conflict between the market and the political machinery to control the financial services industry and the flow of capital through the economy.⁴³²

B. What Happened in 2005?

What squawk arose given the 1940 Investment Advisers Act exemption from the definition of investment advisers for those brokers or dealers incidentally giving advice, but to receive “no special compensation therefore?” The Financial Planning Association instead took umbrage when, by 2005, it found that the broker-dealer advice market rivals of many F.P.A. members could ride a competitive advantage in commanding fees by being held legally to the more lenient (*viz.*, nonfiduciary) practice standard. The key motivation behind the *Financial Planning Association* lawsuit seemed to be whether the Securities and Exchange Commission could be impelled to, or compelled to (by the United States Court of Appeals for the District of Columbia Circuit), reserve for 1940 Act investment advisers alone an increasingly lucrative vein of advisory monies.

The *Wall Street Journal* repeatedly noted the special fee dimension of Rule 202(a)(11)-1: “The 2005 SEC rule provides that, even if the broker gets paid a special fee for investment advice from the client or from a mutual-fund company whose funds he is recommending—he can be exempt from the Advisers Act.”⁴³³ *Paid a special fee.* “The rule exempts only brokerage duties, such as executing stock or bond transactions for clients, even though they may charge an asset-based fee for their services just like investment advisers.”⁴³⁴ *Fee for their services.*

Such a reservation of advisory fees to one organized faction—the 1940 Act investment advisers—would block (from their would-be purchase of advice from broker-dealers) those consumers willing to offer their custom to those advice purveyors held to a non-fiduciary standard. In the regulatory minuet, the consumer interest and the producer interest are opposed. Regulation being a political bureaucratic process, it is plausible to suppose that the sellers of a regulated product impose pressure on the regulators. Generally, the number of sellers is small (although most regulated industries are not monopolies). It surely will be small relative to the population of

⁴³¹ *Id.* at 118.

⁴³² *Id.*

⁴³³ Shefali Anand, *Quarterly Mutual Funds Review - The Quarter Ahead*, WALL ST. J., July 5, 2006, at R20.

⁴³⁴ Wei, *New Rules*, *supra* note 30, at D2.

consumers.⁴³⁵ Remember the lament of Securities Industry and Financial Market Association President Lackritz that the *Financial Planning Association* opinion must choke consumer choice and curtail rigorous competition. Is bridling competition for fees not the idea? It is an old idea. The curb isprecedented.

Throughout much of the nineteenth century, the economic backbone of America's bar consisted primarily in offering assurances regarding real property title. Even into the final third of the century just past, examining title abstracts and preparing title opinions could be a prop of support for members of the bar.⁴³⁶ The public turned to persons other than attorneys to provide what were traditionally legal services.⁴³⁷ Nationwide, committees on the Unauthorized Practice of Law haled into court real estate brokers, insurance companies, banks, accountants, and mutual fund sellers discovered to be sharing legal advice.⁴³⁸ Perhaps anything could be dispensed with, but the attorney's fee.⁴³⁹ Now abide faith, hope, and money, but the greatest of these is money.

By 1937, the American Bar Association resorted to formal treaties, whereunder competitors would respect one another's turf.⁴⁴⁰ These encompassed a separate peace with each competitor among real estate brokers, insurance adjusters, bankers, accountants, and life insurance underwriters. Many state associations reached comparable accommodations.⁴⁴¹ (Where in these negotiations were the public interest representatives?) Such is the unfinished history of inter-professional frontier skirmishing.⁴⁴²

In 2008, the attorney herself often provides law-related services,⁴⁴³ but acts as a non-lawyer. She performs as, e.g., a licensed real estate or insurance

⁴³⁵ DENNIS C. MUELLER, PUBLIC CHOICE III 344 (2003).

⁴³⁶ MARTIN MAYER, THE LAWYERS 45 (1967).

⁴³⁷ *Id.* at 64.

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 65 (citing *Green v. Huntington Nat'l Bank*, 212 N.E.2d 585 (Ohio 1965)). "For where your treasure is, there will your heart be also." *Matthew* 6:21; *Luke* 12:34 (King James).

⁴⁴⁰ MAYER, *supra* note 436, at 66.

⁴⁴¹ *Id.*

⁴⁴² The headline says it all in recounting the latest conflict between the second-oldest profession and its competitors (who more greatly satisfy the contested clientele). *Bar Clarifies Policy on Nonlawyer Help in Filling Out Forms: Spelling and Grammar Checking Immigration Forms is OK; Giving Legal Advice is Still Prohibited*, THE FLORIDA BAR NEWS, June 1, 2007, at 8.

⁴⁴³ "A free market response to widespread pressure for multidisciplinary practice would expand the opportunities for clients to enjoy the package of professional services they most prefer. Numbered among such clients are both multinational corporations and monied individuals. In a free market, the price mechanism can impel service providers to deliver high quality efforts. Furthermore, a free market environment could enrich the career potential of youthful lawyers." George Steven Swan, *A Multidisciplinary Bar and Financial Planners: The Recommendations of the District of Columbia Bar Special Committee on Multidisciplinary Practice*, 32 CAP. U. L. REV. 369, 370 (2003).

broker.⁴⁴⁴ For numerous attorneys, their legal practice is but a single portion of their overall professional posture. This is due to varied interests plopping their thumbs into overlapping business pies. Do the attorney's ethical duties differ when performing in non-attorney roles generally?⁴⁴⁵ New District of Columbia Rule of Professional Conduct 5.7 sheds a bit of light onto this quite murky area concerning tasks embraced by lawyers, which plainly can be done by a non-attorney.⁴⁴⁶ It marks a promising start at guidance in the field, even if not yet tackling every major topic.⁴⁴⁷

XII. THE ECONOMICS OF FINANCIAL PLANNING ASSOCIATION

A. Our Story So Far

How does one draw together the ideas of Congress as auctionhouse, of rentseeking, and of a differential enfranchisement before the administrative agency? First, the auctionhouse proposition sees Congress as a legislative bazaar.⁴⁴⁸ It proposes judicial review as a strategy of perpetuating legislative pacts. The *Financial Planning Association* majority opinion fits comfortably into this explanatory slot. Judicial review of Rule 202(a)(11)-1 applied the language of the 1940 Act in a fashion very plausibly perpetuating the overt policy of the 76th Congress elected in 1938.

Second, the rentseeking proposition sees special interests mobilize to extend regulation, thereby transferring wealth to the rentseeking faction. The *Financial Planning Association* majority opinion slips snugly into this explanatory pigeonhole. Judicial rejection of S.E.C. Rule 202(a)(11)-1 at the Association's behest meant expanded regulation, for hereafter must broker-dealers lose their exemption from the 1940 Act's Section 202(a)(11) definition of an investment advisor. The broker-dealers' loss is a competitive gain to many F.P.A. members. That gain is the rent being fought for.

Third, the differential enfranchisement before an administrative agency proposition sees an agency's norms enfranchising before it that political

⁴⁴⁴ Heather Bupp-Habuda, *Law-Related Services*, WASHINGTON LAWYER, May 2007, at 12.

⁴⁴⁵ Heather Bupp-Habuda, *When a Lawyer Is a Guardian*, WASHINGTON LAWYER, Jan. 2007, at 10.

⁴⁴⁶ D.C. RULES OF PROFESSIONAL CONDUCT, R. 5.7 (2007); Daniel Joseph and Heather Bupp-Habuda, *Guide to New Rules of Ethics: An Overview of Recent Amendments to the D.C. Rules of Professional Conduct*, WASHINGTON LAWYER, Mar. 2007, at 30, 35.

⁴⁴⁷ Joseph and Bupp-Habuda, *supra* note 446, at 35.

⁴⁴⁸ U.S. Court of Appeals for the Seventh Circuit Judge Posner, whose lead has been followed in this matter, is expert in the law and economics of securities regulation. See, e.g., KENNETH E. SCOTT AND RICHARD POSNER, *ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION* (1980).

coalition which the agency serves. Administratively servicing their enfranchisees perpetuates the Congressional will, first declared statutorily. Exactly what was the statutorily-declared Congressional will of 1940?

The enactment of the Investment Advisors Act largely stemmed from an August 1939 report to Congress from the Securities and Exchange Commission,⁴⁴⁹ *Investment Counsel, Investment Management, Investment Supervisory and Investment Advisory Services*.⁴⁵⁰ The respected Professor Louis Loss of Harvard Law School characterized this 1940 statute as “little more than a continuing census of the Nation’s investment advisors in this country.”⁴⁵¹ That was the statutorily-declared Congressional will of 1940. Loss’s appraisal was realistic inasmuch as, for well over the next decade, proceedings under the Act numbered one or two per annum.⁴⁵² Even in 1945 the S.E.C. was already formally boosting an improvement of the Act.⁴⁵³ With a two-decade perspective on the Act a congressional committee would discount it as—among the five statutes then being administered by the S.E.C.—by far the least adequate to deal with the problems which it was supposed to resolve.⁴⁵⁴

If the relationship between an agency and the citizenry (partisan strengths, values, interests) replicates the relationships within the political environment of the agency itself, then agency norms should mimic the values of the coalition supporting the agency’s program. And the 1940 Act sounds like a scarecrow—a flimsy façade of regulation, behind which the

⁴⁴⁹ See H.R. DOC. NO. 79-158, pt. VII, at 185 (1945).

⁴⁵⁰ *Id.* at 179.

⁴⁵¹ Robert N. Dorosin, Ira J. Jaffe, Rolfe A. Worden, James C. Lockwood and Willoughby C. Johnson, Comment, *Current Problems in Securities Regulation*, 62 MICH. L. REV. 680, 718 (1964) (quoting Louis Loss, 2 *Securities Regulation* 1393 (1951)).

⁴⁵² *Id.* (citing Loomis, *The Securities Exchange Act of 1934 and the Investment Advisors Act of 1940*, 28 GEO. WASH. L. REV. 214, 248 (1959)).

⁴⁵³ *Id.* (citing SEC, PROTECTION OF CLIENTS SECURITIES AND FUNDS IN THE CUSTODY OF INVESTMENT ADVISERS (1945)).

⁴⁵⁴ *Id.* (citing S. Rep. No. 1760, 86th Cong., 2d Sess. (1960)). “Congress passed the Securities Act of 1933 to regulate the primary market—the market for new securities. Sometimes called the “truth in issuance act”, the 1933 act required a company to submit independently verified financial information, a registration statement, and a prospectus to the Federal Trade Commission. The Securities and Exchange Act of 1934 created the Securities and Exchange Commission, giving it the power to regulate the stock exchanges and the trading practices of the secondary market (a market for currently traded shares). In 1935 the Public Utility Holding Company Act was enacted to regulate all interstate holding companies (a holding company controls other companies by owning their stock) in the utility business. In 1940 Congress passed two laws covering the people working in the security business. The Investment Company Act of 1940 provided for the regulation of investment companies, including those involved with mutual funds. The Investment Advisors Act of 1940 established regulation of investment advisers and their activities. In 1974 the Employee Retirement Income Security Act gave the SEC jurisdiction over pension funds.” Mary Jean Lush and Val Hinton, *Securities and Exchange Commission*, ENCYCLOPEDIA OF BUSINESS 761 (2d ed. 1999).

allegedly regulated industry romps unfettered. Indeed, why bother passing such a statute at all? Through such an enactment a craven or duplicitous Congress (or president) could pretend to an anxious public that action was being launched against malefactors, while actually offending no entrenched interests. It was on November 1, 1940 that the Investment Advisors Act became effective.⁴⁵⁵ Perhaps coincidentally, the congressional (and presidential⁴⁵⁶) election was held on November 5, 1940.

Consequently, the parties enfranchised since 1940 before the Securities and Exchange Commission, one should anticipate, would be the behemoth broker-dealers. Such broker-dealers would be expected to exploit the Commission as a mere ceremonial-legitimatizing body⁴⁵⁷ (instead of a policing-regulatory body).⁴⁵⁸ In fact, the financial media as late as June reported of the backwash from *Financial Planning Association*:

In the wake of the SEC retreat, some firms told financial advisers to stop offering fee-based brokerage accounts immediately, while Merrill Lynch & Co. told brokers to continue business as usual. In a memo to financial advisers, Robert J. McCann, president of the firm's global private-client division, said Merrill would work with regulators "to preserve our clients' choice."⁴⁵⁹

⁴⁵⁵ H.R. DOC. NO. 79-158, *supra* note 449.

⁴⁵⁶ The attorney-President of 1940 bragged of his administration's independence from the laws of economics, "We must lay hold of the fact that economic laws are not made by nature. They are made by human beings." *Speech Before the 1932 Democratic National Convention: Chicago, Illinois, July 2, 1932*, in THE ESSENTIAL FRANKLIN DELANO ROOSEVELT 17, 27 (John Gabriel Hunt ed., Portland House 1996). Roosevelt's announcement that economic laws are manmade is still quoted with approval by respected, *see, e.g.*, Swan, *supra* note 205, at 142-44 (discussing contributions of Cass R. Sunstein), sources. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 25 (2004). The most recent discussion of the New Deal's prolonging of the Great Depression is AMITY SHALES, THE FORGOTTEN MAN (2007).

⁴⁵⁷ This tactic has long since proved widespread in many contexts, "Civil commitment proceedings are frequently such that the legal trappings of due process are mostly ceremonial and not genuinely protective." George Steven Swan, *A New Emancipation: Toward an End to Involuntary Civil Commitments*, 48 NOTRE DAME L. REV. 1334, 1335 (1973) (citing Schneider, *Civil Commitment of the Mentally Ill*, 58 A.B.A. J. 1059, 1060 (1972)).

⁴⁵⁸ "To gain their political ends, the robber barons and monopolists of the Gilded Age were content with corrupting officials and buying elections. Their modern counterparts have taken things a big step further, erecting a loose network of think tanks, corporate spokespeople, and friendly press commentators to shape the way Americans think about the economy. Much as corporate marketing directs our aspirations disproportionately toward new communications the apparatus wants us to believe that our economic well-being depends almost entirely on the so-called free market—a euphemism for letting the private sector set its own rules." James Lardner, *The Specter Haunting Your Office*, N.Y. REV. BOOKS, June 14, 2007, at 62, 65.

⁴⁵⁹ *Brokers' Liability for Advice*, WALL ST. J., June 4, 2007, at R2. Even in August, U.S. brokerage firms only were nearing agreement on the brokerage accounts which had been declared illegal. Judith

The acerbic query obtrudes: Does the Securities and Exchange Commission oversee Merrill Lynch, or does Merrill Lynch supervise the Securities and Exchange Commission?

Further, if Congress is a legislative market for which the judiciary constitutes an enforcement device protracting legislative deal-stability into the future, then the *courts* should ceremonially bless the catering by a presumptively tame *agency* (the S.E.C.) to its presumptive enfranchisees (dollar-bloated broker-dealers). But *Financial Planning Association* came out contra. Why?

B. *Enfranchisement Only Can Carry So Far*

First, more legalistically, the U.S. Court of Appeals for the District of Columbia Circuit in 2007 took its marching orders not from the 76th Congress, elected in 1938, but from the Supreme Court. And in 1963 the Supreme Court in *Capital Gains Research Bureau* proclaimed that the 1940 Act comprehended the delicate fiduciary nature of the investor advisory relationship. Political science, shortly post-issuance of the *Financial Planning Association* opinion, reminded the bench and bar that Supreme Court Justices might feel strong preferences respecting securities regulation.⁴⁶⁰ So the *Financial Planning Association* panel majority might well have read the Investment Advisers Act as it were a serious mode of consumer protection.

Additionally, and more cynically, what happens once the environment of the original legislation changes? In *Financial Planning Association*, the Commission discovered the wrap account to be something new in the world, not to have been envisioned by Congress in 1940.⁴⁶¹ It has been suggested by Noll, Weingast, and Mathew D. McCubbins that an administrative agency (like the S.E.C.) might be allotted sufficient discretion (as by Congress) to deviate from an original legislative objective (like the explicitly enunciated Section 202(a)(11)(A)-(E) exemptions), because the

Burns, *Brokerage Firms, SEC Near Agreement on Fate of Fee-Based Accounts*, WALL ST. J., August 11, 2007, at A6. "The securities industry has been prodding the SEC for guidance before the court's ruling goes into effect Oct. 1." *Id.*

⁴⁶⁰ "Some of the justices may have strong preferences regarding securities regulation, and they all have strong preferences regarding police interrogations, welfare rights, and religious freedom." Thomas Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 335 (2007). "The most difficult line to draw is between economics and political science. Certainly governmental institutions of the kind studied by political science are means whereby a particular society uses scarce means to satisfy alternative ends." MILTON FRIEDMAN, *PRICE THEORY* 2,3 (Aldine Transaction 2007) (1962). "One of the most the most stimulating developments disciplines since the early 1960s has been the use of economic tools to analyze political arrangements." *Id.* at 3.

⁴⁶¹ See, e.g., Chelcie C. Bosland, *The Investment Company Act of 1940 and its Background II*, 49 J. POL. ECON. 687, 717-19 (1941).

political chiefs (as in Congress) want to use administrative procedure as an autopilot. Thus a dominant coalition of Congress' constituents would work their will administratively (as by Rule 202(a)(11)-1) as those constituents' own preferences evolve. No further input would be required of the Congress or president.⁴⁶²

So much is imaginable.⁴⁶³ But the *Financial Planning Association* majority determined otherwise. How might this decision best be comprehensible? The Investment Advisors Act was sold in the auctionhouse of 1940 to buyers of 1940 to meet their needs of 1940. The Securities and Exchange Commission is deputized to enforce the deals of 1940 for the Commission's enfranchisees. But if circumstances (e.g., the irruption of the wrap account) so change as to make the original deal passé, the Congressional-constituent/agency-enfranchisee coalition cannot simply go to the auctionhouse's Refund and Exchange Counter (the Securities and Exchange Commission) to replace the outdated law with a new one. (So held *Financial Planning Association*.) These law-consumers (heavyweight Wall Street broker-dealers) must dip into their long purses to purchase a new enactment from their statute-vendor—Congress. Pay in 1940 for an enactment in 1940. Pay anew in 2008 for a new enactment in 2009. Now abideth faith, hope, and money, but the greatest of these is money.

XIII. CONCLUSION

A. *The Story in Brief*

The preceding discussion revisited the District of Columbia Circuit's 2007 opinion in the *Financial Planning Association* case. Study thereof has been enhanced through the apprehension by Peter F. Drucker of the twenty-first century potential of the U.S. financial services industry. Satisfying the needs of America's financial services middle-market must be a daunting, but rewarding, professional prospect. The Pension Protection Act of 2006 might have facilitated the servicing of this advice-hungry populace by financial planners. Such specialist counselors are numbered in the Financial Services Association.

⁴⁶² According to MASHAW, *supra* note 333, at 120 (citing Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedure as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243-77 (1987)); and Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangement and the Political Control of Agencies*, 75 VA. L. REV. 431-82 (1989)). "Mashaw, a Sterling Professor of Law at Yale Law School, has had a major influence on federal administrative law for nearly three decades." Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746, 1747 (1998).

⁴⁶³ MASHAW, *supra* note 333, at 120.

A rule finally promulgated by the Securities and Exchange Commission during 2005 benefited broker-dealers (over other persons, who were members of the F.P.A.) in the marketplace struggle to attract fees from the public for investment advice. The S.E.C. rule itself demonstrated who practically is enfranchised before that Commission. Likewise did the consequent litigation expose the kind of stake which special interests can sink into rentseeking. For the suit to annul the 2005 S.E.C. rule endeavored to broaden regulation (over broker-dealers) to the comparative benefit of fee-minded F.P.A. members themselves. The Association shunned any crusade against the Investment Advisers Act of 1940 itself. And, perhaps coincidentally, that statute exempted from investment adviser legal burdens those broker-dealers sharing incidental advice for “no special compensation.” In *Financial Planning Association*, the F.P.A. prevailed, setting the stage for a Congressional response to that 2007 opinion. One function of constitutional and administrative law as applied by the judiciary is to guarantee that effective revisions of the law are publicly rendered with the searching scrutiny of legislative procedure.⁴⁶⁴

B. *The Moral of the Story*

The idea of an independent judiciary as a means whereby legislative deals are perpetuated (and thus rendered more valuable) is identified with the long-time scholarly team⁴⁶⁵ of William M. Landes and Richard A. Posner.⁴⁶⁶ Both were associated with the University of Chicago. George Stigler’s economic regulation theory depicts commission regulation as prone to subversion by special interests.⁴⁶⁷ Stigler himself was affiliated with the University of Chicago.

Economists Eva and Abraham Hirsch posit that the basic nature of the economic theory to which economists (deemed the Chicago School of political economy)⁴⁶⁸ adhere condenses into a pair of fundamental premises:

⁴⁶⁴ William Bishop, *Comparative Administrative Law*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, *supra* note 351, at 327.

⁴⁶⁵ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).

⁴⁶⁶ Tollison, *supra* note 410, at 320 (citing William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975)).

⁴⁶⁷ “Stigler’s theory of economic regulation portrays commission regulation as vulnerable to manipulation and subversion by firms and special interest groups.” Harry M. Trebing, *The Chicago School versus Public Utility Regulation*, in THE CHICAGO SCHOOL OF POLITICAL ECONOMY 319 (Warren J. Samuels ed., 1993).

⁴⁶⁸ See, e.g., JOHAN VAN OVERTVELDT, THE CHICAGO SCHOOL: HOW THE UNIVERSITY OF CHICAGO ASSEMBLED THE THINKERS WHO REVOLUTIONIZED ECONOMICS AND BUSINESS (2007). “The University of Chicago is unique among U.S. universities in having produced a genuine ‘school’

The two basic notions are: (1) Mainstream economic theory, which was developed from Adam Smith to [Alfred] Marshall, is not mere analysis; it has empirical significance, that is, it tells us what actually happens in the real world. It may be only part of the truth, but it is the truth nonetheless; and (2) while economic theory tells us what actually happens, it gives us a picture that is true only in the most broad and general terms. Thus, if we hold the theory too closely to account for detailed observation, it may appear to be falsified, even though, on a broader view, it is generally valid.⁴⁶⁹

Commensurately, the auction house proposition fancying Congress as a legislative bazaar, with judicial review as a tool of perpetuating legislative pacts, comports with the history of the *Financial Planning Association* case. Too, the rentseeking proposition, whereunder special interests arm themselves to extend regulation (which regulation redounds to the benefit of the rentseekers) comports with the history of *Financial Planning Association*. So economic theory has empirical significance. It recounts what really

of economists." John McKinney, *Frank H. Knight and Chicago Libertarianism*, in *THE CHICAGO SCHOOL OF POLITICAL ECONOMY* 191 (Warren J. Samuels ed., 1993).

⁴⁶⁹ Eva Hirsch and Abraham Hirsch, *The Heterodox Methodology of Two Chicago Economists*, in *THE CHICAGO SCHOOL OF POLITICAL ECONOMY* 59, 69 (Warren J. Samuels ed., 1993). "Alfred Marshall (b. 1842-d. 1924) was a great English economist." George Steven Swan, *The Political Economy of the Interstate Commerce Clause: United States v. Lopez and United States v. Robertson*, 5 J. OF LEGAL STUD. IN BUS. 165, 76 n.84 (1997) (citing HUGH S. NORTON, *THE WORLD OF THE ECONOMIST* 12 (1973)). The Hirsches might well emphasize that economic theory is only part of the truth. "Economists often assert that economic theory says this or predicts that, but economic theory will never hold a mirror to nature. Good economic arguments are specific to their context. There are no universal economic laws, only trends and tendencies." John Kay, *Why Rorty's Search for What Works Has Lessons for Business*, *FIN. TIMES*, June 19, 2007, at 13. Conceded economist Robert Skidelsky, "The purpose of models is not to describe reality but to clarify the conditions under which a statement is true." Robert Skidelsky, *N. Y. Rev. Books*, May 31, 2007, at 50, 52. For Skidelsky's "models" read Kay's "arguments." For Skidelsky's "conditions," read Kay's "context."

Franklin D. Roosevelt erred to suppose that economic laws are made by human beings, *THE ESSENTIAL FRANKLIN DELANO ROOSEVELT*, *supra* note 456, at 27, at least in the face of Kay's economic trends and tendencies. These are resistible no more than the tide. (Hence the utility in *Financial Planning Association* of the auction house, and rentseeking, propositions.) But an economist would err to boast of mathematically precise universal economic laws notwithstanding such studies as, e.g., *Regulatory Economics and Quantitative Methods*. See *REGULATORY ECONOMICS AND QUANTITATIVE METHODS* (Omar Osvaldo Chisari ed. 2007) (most recent discussion of quantitative methods and regulatory economics). For economics is mere human behavior, too ragged to be predicted with mathematical exactness. (Hence the minimal value in *Financial Planning Association* of the differential enfranchisement proposition.)

transpires on the actual globe. It might constitute but a portion of the truth, but it is true nevertheless.⁴⁷⁰

Sure enough, the servicing of potent Securities and Exchange Commission enfranchisees (broker-dealers) via Rule 202(a)(11)-1 comports, likewise, with the proposition of differential enfranchisement before administrative agencies. However, Rule 202(a)(11)-1 was stymied by the Court of Appeals for the District of Columbia Circuit in *Financial Planning Association*. So the law and economics approach tends to appear discredited by *Financial Planning Association*, if one holds the controversy too closely. But on a broader view (encompassing the impact of changing circumstances—like the wrap account—upon the ongoing functioning of Congress' legislative auctionhouse) the law and economics approach, generally, is validated by the *Financial Planning Association* opinion. For while economic theory informs us of what actually takes place, it paints a picture accurate in the most broad and general terms only.⁴⁷¹

⁴⁷⁰ And of what use is the truth, anyway? See, e.g., COST BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVE (Matthew D. Adler & Eric A. Posner eds. 2001); RICHARD RORTY & PASCAL ENGEL, WHAT'S THE USE OF TRUTH? (2007). By certain interpretation (only) is economics a sound empirical science. See, e.g., DON ROSS, ECONOMIC THEORY AND COGNITIVE SCIENCE: MICROEXPLANATION (2005). High scholarly authority holds economics to be *a priori*: "Economics is paraxeological, i.e., its propositions are absolutely true given the existence of the axioms—the basic axiom being the existence of human action itself. Economics, therefore, is not and cannot be "empirical" in the positivist sense, i.e., it cannot establish some sort of empirical hypothesis which could or could not be true, and at best is only true approximately. Quantitative, empirico-historical 'laws' are worthless in economics, since they may only be coincidences of complex facts, and not isolable, repeatable laws which will hold true in the future." MURRAY N. ROTHBARD, 1 MAN, ECONOMY, AND STATE 756-57 (1970). Dr. Rothbard represented the Austrian School of Economics, see, e.g., JOSEPH A. SHUMPETER, HISTORY OF ECONOMIC ANALYSIS 844 *et seq.* (1976), not the Chicago School assessed by the Hirsches.

⁴⁷¹ Not only is economics limited (in that it paints a picture accurate in general terms alone), but some argue that the discipline of economics actually produces phenomena which it dissects (rather than the economist serving as detached observer, like an astronomer). See, e.g., DO ECONOMISTS MAKE MARKETS?: ON THE PERFORMATIVITY OF ECONOMICS (Donald MacKenzie, Fabian Muniesa & Lucia Siu eds., 2007).