GARTENBERG, *JONES*, AND THE MEANING OF FIDUCIARY: A LEGISLATIVE INVESTIGATION OF SECTION 36(B)

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EXECUTIVE SUMMARY

Section 36(b) of the Investment Company Act of 1940 creates a "fiduciary duty" on the part of an investment adviser with respect to the receipt of compensation for services or of payments of a material nature. The term "fiduciary," however, conveys a range of obligations, the breadth of which comes before the Supreme Court in Jones v. Harris, *as two circuits diverge on the meaning of fiduciary duty under section 36(b), doing so, this controversy calls into question whether a fund's investment adviser breached its fiduciary duty by charging an excessive fee.*

Notably absent from the language of section 36(b) is any description of substantive or procedural application of the term "fiduciary." Justice Kennedy pressed for such analysis in the Jones *oral arguments: "Is Harris a fiduciary in the same sense as a corporate officer and a corporate director? Or does his fiduciary duty differ?" This article provides a comprehensive review of the legislative history creating the "fiduciary" obligation under section 36(b) of the Investment Company Act. It identifies key congressional and industry themes, and draws conclusions on the legislative intent of section 36(b), in an attempt to clarify the use of "fiduciary."*

I. INTRODUCTION

Since the organization of State Street Investment Trust in 1924,[1] the phrase "mutual fund" has joined the common vernacular and now makes a

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[1]See Margaret Pantridge, *Fund City*, BOSTON MAG., June 1992, at 68, 68-70, for historical insight into how State Street and Paul C. Cabot's lobbying efforts maximized tax efficiencies to significantly increase the industry and consumers.

comfortable place in American homes.[2] With the liquidity of redeemable shares[3] and the potential for higher yields with comparatively low monitoring costs, the allure of mutual fund investment has undeniably caught the eye—and wallets—of investors.

Outsourcing investment decisions to external management is a hallmark of mutual funds.[4] Typically, an investment adviser creates a fund and selects the initial shareholder who, in turn, appoints the initial board of directors and ratifies the advisory agreement between the fund and the adviser. Under the advisory agreement, which shareholders must ratify under section 15(a) of the Investment Company Act of 1940 (ICA),[5] the adviser often provides all the day-to-day management of the fund, including the officers, staff, and even office space. This close affiliation and interdependence creates inherent conflicts of interest between advisers, boards, and shareholders.

Legislators sought to counterbalance[6] this conflict by promulgating section 36(b),[7] which creates a fiduciary duty on the part of an adviser with respect to the receipts of "compensation for services, or of payments of a

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[2]Almost 53 million American households hold assets through mutual funds. INV. CO. INST., 2009 INVESTMENT COMPANY FACT BOOK 72 (49th ed. 2009), *available at* http://www.ici.org/pdf/2009_factbook.pdf. This holding strategy is not a recent phenomenon. *See* INV. CO. INST., 2005 INVESTMENT COMPANY FACT BOOK 12 (45th ed. 2005), *available at* http://www.ici.org/ pdf/2005_factbook.pdf (stating in 2004, "households held nearly 20 percent of their $37 trillion in financial assets . . . through mutual funds."); *see also* Michael O'D. Moore, *Mutuals Outpace Pension Funds,* AM. BANKER, Mar. 22, 1993, at 7 (noting the Securities Industry Association statistic that mutual funds gained more equity from 1990 through 1992 ($120 billion) than private pension funds gained in twenty years ($108 billion)).

[3]*See* Jeremy C. Stein, *Why Are Most Funds Open-End? Competition and the Limits of Arbitrage*, 120 Q. J. ECON. 247, 251 (discussing the distinction between open-end and close-end funds, specifically investors ability to liquidate shares on demand in an open-end fund).

[4]*See* Victoria E. Schonfeld & Thomas M. J. Kerwin, *Organization of a Mutual Fund*, 49 BUS. LAW. 107, 120-34 (1993) (providing a basic introduction to fund operations). Although "mutual fund" is used herein, Section 36(b) applies to all investment companies, including closed-end funds. Investment Company Act of 1940 § 36(b), 15 U.S.C. § 35(b) (2006).

[5]15 U.S.C. § 80a-15(a) (2006). Unless otherwise noted, sections referred to herein are sections of the ICA. Subsection 15(a) provides, in relevant part: "It shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract, which contract . . . has been approved by the vote of a majority of the outstanding voting securities of such registered [investment] company . . . ." *Id.*

[6]Congress provided that "the national public interest and the interest of investors are adversely affected . . . when investment companies are organized, operated, [and] managed . . . in the interest of . . . investment advisers, . . . rather than in the interest of [shareholders] . . . [or] when investment companies . . . are not subjected to adequate independent scrutiny . . . ." Investment Company Act of 1940 § 36(b), 15 U.S.C. § 80a-1(b) (2006).

[7]Section 36(b) was added in 1970. Investment Company Amendments Act of 1970, Pub. L. No. 91-547, sec. 20, § 36(b), 84 Stat. 1413, 1429 (codified as amended at 15 U.S.C. § 80a-35(b) (2006)).

material nature . . . ."[8] Litigation initiated under this section has hinged on the fiduciary responsibilities owed by the adviser to the fund.[9] The pivotal question of how "fiduciary" should be interpreted now comes before the Supreme Court in *Jones v. Harris*.[10] The lower courts' application of the Supreme Court holding could, as a practical matter, result in shifting tens of billions of dollars between advisers and shareholders.[11]

In Part II, we describe the treatment of excessive fee cases under state law, which fueled the Securities and Exchange Commission's (SEC or Commission) discussions with Congress and the industry. Part III provides background on the developed law as it stands today, and the opinions

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[8]*Id.*; *see also Mutual Fund Amendments: Hearings on H.R. 11995, S. 2224, H.R. 13754, and H.R. 14737 Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 187-90 (1969) [hereinafter 1969 *House Hearings*] (memorandum of the SEC).

[9]Also present is the related question of whether fiduciary duties arise between the fund directors and the fund, or the fund directors and the shareholders. *See generally* Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 596-98 (1997) (describing the concept of fiduciary in contractual relationships).

[10]No. 08-586, 2010 WL 1189560, at *1 (U.S. Mar. 30, 2010). The first question during oral arguments was an inquiry by Justice Kennedy into the scope of the fiduciary obligation under section 36(b). Transcript of Oral Argument at 4-5, Jones v. Harris Assocs. L.P., No. 08-586, 2010 WL 1189560, at *1 (U.S. Mar. 30, 2010) [hereinafter Oral Argument] ("Is Harris a fiduciary in the same sense as a corporate officer and a corporate director? Or does his fiduciary duty differ? Is it higher or lower, same with a guardian, same with a trustee?"). Justice Kennedy then questioned whether Congress used the term fiduciary in some special sense:

> Do you think Congress used the term "fiduciary" in a very special sense here? I will just tell you the problem I'm having with the case. If I look at a standard that fees must be reasonable and I compare that with what a fiduciary would do, I thought a fiduciary has the highest possible duty. But apparently the submission is the fiduciary has a lower duty, a lesser duty than to charge a reasonable fee. I just find that quite a puzzling use of the word "fiduciary."

Id. at 19; *See* Peter Ortiz, *Justices Debate Fee Case, Question Attorneys*, IGNITES, Nov. 3, 2009, http://www.ignites.com/articles/20091103/justices_debate_case_question_attorneys (discussing the oral arguments); *see also* Peter Ortiz, *Fund Industry Awaits Ruling in Charging Case*, FIN. TIMES (LONDON), Dec. 7, 2009, at 11 (describing the oral arguments and the practical implications of the pending Supreme Court decision).

[11]*See* William A. Birdthistle, *Investment Indiscipline: A Behavioral Approach to Mutual Fund Jurisprudence*, 2010 U. ILL. L. REV. 61, 64 (noting that the practical implications of *Jones* will be enormous and "could save investors – or, alternatively, reward investment advisors – tens of billions of dollars a year in expenses and even greater amounts in future compounded returns"). The Supreme Court's decision to side with the Second or Seventh Circuit—or adopt its own standard—could change the face of the mutual fund industry and cost—or save—investors billions of dollars. Securities law experts believe *Jones v. Harris* will be the latest in a long line of 5-4 decisions with Justice Kennedy as the swing vote. As a result, Justice Kennedy's focus on the term "fiduciary" during the oral arguments indicates the outcome of the case will hinge on the meaning of that term under section 36(b). *See* Oral Argument, *supra* note 10, at 4-5, 19. Nevertheless, a thorough examination of the legislative history under section 36(b), in order to ascertain Congress's intent, has not been done. This article fills that void.

coming before the Supreme Court. Part IV details the legislative history of section 36(b). Finally, in Part V, we analyze and draw conclusions from the legislative history, in an effort to define "fiduciary."

II. STATE LAW EXCESSIVE FEE LITIGATION

Prior to the 1970 Amendments, fund shareholders used state court venues to challenge "excessive fees" charged by investment advisers. We use Delaware law[12] as an archetype to identify the fiduciary responsibilities of directors under state law, and the treatment of state claims pertaining to excessive fees. As discussed *infra*, plaintiffs have alleged breaches of fiduciary duty based on excessive advisory fees; courts, however, applying the waste standard refuse to conclude that those fees are "shocking" or "unconscionable."[13]

Delaware courts have long held that fiduciaries owe duties of loyalty and due care to their beneficiaries.[14] Generally, in order to fulfill these duties, directors must "use their own business judgment to advance the interests of the corporation and its stockholders."[15] Provided that directors act on an informed basis, in good faith, and with the honest belief that a decision was in the best interest of shareholders and the corporation, the business judgment rule establishes a rebuttable presumption against judicial review of duty of care claims.[16]

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[12]Delaware has been a popular jurisdiction to organize mutual funds since 1988, when the state enacted a liberal business trust act to match its permissive business corporation laws. *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 187-88 (1997).

[13]*See infra* note 20-26 and accompanying text.

[14]*See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 872-73 (Del. 1985) (describing the fiduciary duty of directors, which includes a duty of care and loyalty), *overruled on other grounds*, Gantler v. Stephens, 965 A.2d 695 (Del. 2009). Fiduciary obligations of corporate management stem from the law of trusts and have developed into a fiduciary duty of loyalty and a reciprocal prohibition on self-dealing. Brudney, *supra* note 9, at 601. The Delaware Supreme Court recently distinguished the so-called duty of good faith from the duties of loyalty and due care, noting that:

> [T]he obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability, whereas a failure to act in good faith may do so, but indirectly.

Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006). Since 1967, the Delaware General Corporation Law has required that corporate affairs be managed by an elected board of directors. DEL. CODE ANN. tit. 8, § 141(a) (2006). Note the several exceptions to this proposition (e.g., the integration of a special provision in the certificate of incorporation). *Id.*

[15]*In re* Lear Corp. S'holder Litig., 967 A.2d 640, 655 (Del. Ch. 2008).

[16]*See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine* 8 (UCLA Sch. of Law, Law & Econ. Research Paper No. 03-18, 2003), *available at*

Breaching the duty of loyalty or duty of care rebuts the business judgment rule.[17] Similarly, interested directors may not claim business judgment protection. In those circumstances, the courts presume that the defendant-director acted unfairly and shift the burden of proof to the defendant-director. The defendant-directors must meet a higher burden and prove the "entire fairness" of the transaction.[18]

Shareholder ratification purifies any interest or breach by directors and requires a plaintiff to show corporate "waste." Under these circumstances, Delaware courts require plaintiffs to show whether "'an exchange of corporate assets for consideration [was] so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.'"[19] In the excessive fee cases arising before the 1970 Amendments, plaintiffs used this approach, and courts applied this standard.

Saxe v. Brady[20] is characteristic of the difficulty plaintiffs encounter when attempting to prove "waste." In this landmark case, the plaintiffs alleged that the fund's advisory fee, approved as part of the annual renewal of the advisory contract, was excessive when compared to fees charged by other large funds (0.5% of the fund's assets).[21] The plaintiffs further alleged the adviser's profits demonstrated the fee was, in fact, "excessive."[22]

As a result of the shareholder's ratification (required under section 15(a) of the ICA),[23] the court applied the corporate waste standard: "whether what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid."[24] Consequently, the court rejected the plaintiffs' allegation of excessive profits, dismissing the complaint.[25] Despite holding

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http://ssrn.com/abstract=429260; *see also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (describing the business judgment rule as "a powerful presumption"), *modified on reargument*, 636 A.2d 956 (Del. 1994).

[17]EDWARD P. WELCH ET AL.,, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 141.2.2.3 (5th ed. 1999); *see also Grimes v. Donald*, 673 A.2d 1207, 1215 (Del. 1996) (discussing losing business judgment rule protection when services rendered constitute waste), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000).

[18]*Cede*, 634 A.2d at 361.

[19]*In re* Citigroup Inc. S'holder Deriv. Litig., 964 A.2d 106, 138 (Del. Ch. 2009) (quoting Brehm, 746 A.2d at 263).

[20]184 A.2d 602 (Del. Ch. 1962).

[21]*Id.* at 604.

[22]*Id.* at 613.

[23]15 U.S.C. § 80a-15(a) (2006).

[24]*Saxe*, 184 A.2d at 610.

[25]*Id.* at 617. Only two other excessive fee cases were fully litigated prior to the 1970 Amendments. In both cases the plaintiffs were unable to prove waste. *See* Acampora v. Birkland, 220 F. Supp. 527, 548-49 (D. Colo. 1963); Meiselman v. Eberstadt, 170 A.2d 720, 723 (Del. Ch. 1961). For a detailed discussion of these cases, see SEC, PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH, H.R. REP. NO. 89-2337, at 133-38 (1966) [hereinafter PUBLIC

that outsized profits are—at best—an "indicator" of excessive fees, the court observed that the "profits are certainly approaching the point where they are outstripping any reasonable relationship to expenses and effort even in a legal sense."[26]

Prior to the 1970 Amendments, courts applied the waste standard in excessive fee cases largely because shareholders ratified the advisory contract; therefore, effectively precluding plaintiffs from successfully pleading an excessive fee case. This context is the starting point for industry deliberations relating to adviser obligations further described in Part III.

III. SECTION 36(B) PRIVATE RIGHT OF ACTION AND EXCESSIVE FEE LITIGATION

Following the aforementioned corporate waste cases, Congress enacted section 36(b) in 1970, which established a private right of action against advisers for violations of a fiduciary duty.[27] The statute, however, did not explicate the phrase "fiduciary duty." As a result, interpreting the term fell to the courts, and a divergence as to the meaning of "fiduciary" has emerged.

A. Gartenberg v. Merrill Lynch Asset Management: *The Second Circuit Interpretation of "Fiduciary"*

In the seminal case of *Gartenberg v. Merrill Lynch Asset Management*,[28] the Court of Appeals for the Second Circuit set forth a standard to interpret "fiduciary" under section 36(b).[29] Holding that Congress implicitly rejected the corporate waste standard as unduly

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POLICY IMPLICATIONS]. In addition to state law claims, prior to the 1970 Amendments, a body of federal fiduciary liability law was developing under section 36. *See* Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961). *See generally* Meyer Eisenberg & Dennis J. Lehr, *An Aspect of the Emerging "Federal Corporation Law": Directorial Responsibility Under the Investment Company Act of 1940*, 20 RUTGERS L. REV. 181 (1966); Meyer Eisenberg & Richard M. Phillips, *Mutual Fund Litigation—New Frontiers for the Investment Company Act*, 62 COLUM. L. REV. 73 (1962) (examining the early history of federal litigation under the ICA).

[26] *Saxe*, 184 A.2d at 616.

[27] Investment Company Amendments Act of 1970, Pub. L. No. 91-547, sec. 20, § 36(b), 84 Stat. 1413, 1429 (codified as amended at 15 U.S.C. § 80a-35(b) (2006)).

[28] 694 F.2d 923 (2d Cir. 1982).

[29] *Id.* at 928. Prior to *Gartenberg*, the Supreme Court held that state law should govern allegations brought under the Act relating to corporate governance where the issue is not specifically addressed. Burks v. Lasker, 441 U.S. 471, 486 (1979). Because no federal common law existed for mutual funds, the Supreme Court essentially created a fresh slate for mutual fund litigation. *See id.* at 477-79.

restrictive, the Second Circuit developed what is now recognized as the "*Gartenberg* standard": an adviser must charge a fee that is "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."[30] To clarify this standard, the Second Circuit identified a number of factors to consider in determining whether an adviser violated its fiduciary duty. The *Gartenberg* factors, derived from the legislative history of section 36(b), include: (1) "rates charged by advisers of other similar funds"; (2) "the adviser-manager's cost in providing the service"; (3) "the nature and quality of the service"; (4) "the extent to which the adviser-manager realizes economies of scale as the fund grows larger"; and (5) "the volume of orders which must be processed by the manager."[31]

The major consequences of this standard have been twofold. First, the *Gartenberg* standard effectuates a *de facto* "floor" for advisers, which provides directors discrete considerations when negotiating compensation with advisers. Inasmuch as it creates a predictable set of considerations, however, the *Gartenberg* "floor" creates obligations largely procedural in nature and removes from directors the onus of weighing the outcome—as "reasonable," "objectively fair," or "wasteful." So long as the directors conclude that the rates, costs, and services are similar, the *Gartenberg* standard assumes the existence of another, substantive, parameter: free market competition between funds that produces objectively competitive rates.[32]

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[30]Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982).

[31]*Id.* at 929-30. Following the decision in *Gartenberg*, both the Third and Fourth Circuits adopted and followed the *Gartenberg* application. *See, e.g.*, Green v. Fund Asset Mgmt., L.P., 286 F.3d 682, 685 (3d Cir. 2002); Migdal v. Rowe Price-Fleming Int'l, Inc., 248 F.3d 321, 326 (4th Cir. 2001). The Supreme Court also noted the following factors:

> the nature and quality of the services provided to the fund and shareholders; the profitability of the fund to the adviser; any 'fall-out financial benefits,' those collateral benefits that accrue to the adviser because of its relationship with the mutual fund; comparative fee structure (meaning a comparison of the fees with those paid by similar funds); and the independence, expertise, care, and conscientiousness of the board in evaluating adviser compensation.

Jones v. Harris Assocs. L.P., 130 S. Ct. 1318, 1426 n.5 (U.S. 2010) (quoting Gartenberg, 694 F.2d at 929-32). Some courts have used these factors in previous permutations of excessive fee analysis. Krinsk v. Fund Asset Mgmt, Inc., 875 F.2d 404, 409 (2d Cir. 1989); *In re* Am. Mut. Funds Fee Litig., No. CV 04-5593, 2009 WL 5215755, at *2-3 (C.D. Cal. Dec. 28, 2009).

[32]*Compare* John C. Coates IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J. CORP. L. 151, 163 (2007) ("[T]he mutual fund industry's market structure is consistent with [price] competition providing strong constraints on advisory fees."), *with* John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest*, 26 J. CORP. L. 609, 613 (2001) (discussing "the absence of price competition within the [mutual] fund industry"). Coates and Hubbard conclude that funds have,

Second, post-*Gartenberg,* no plaintiff shareholder has persuaded a court that an adviser breached its fiduciary duty by charging excessive fees.[33] Consequently, there has been little clarification of the substantive responsibilities derived from an adviser's fiduciary duty until the Court of Appeals for the Seventh Circuit rejected the *Gartenberg* standard in 2009.

B. Jones v. Harris: *The Seventh Circuit's Interpretation of "Fiduciary"*[34]

In *Jones*, the plaintiffs allege that Harris Associates violated its fiduciary duty under section 36(b) by charging excessive fees.[35] Parties do not dispute that the fees charged by Harris Associates are roughly the same as those charged to funds of similar size and with similar investment goals. Instead, the plaintiffs allege that retail clients of the adviser pay a higher percentage of fees than institutional clients, evincing an implied breach of fiduciary duty.[36]

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over time, reduced fees and funds, and fund complexes "experience large and frequent changes in market share," suggesting that shareholders "vote with their feet." Coates, *supra*, at 163.

[33]*See* JAMES D. COX, ET AL., SECURITIES REGULATION: CASES AND MATERIALS 1211 (3d ed. 2001); *see also* Jones v. Harris Assocs. L.P., 537 F.3d 728, 730 (7th Cir. 2008) (per curiam) (Posner, J., dissenting from denial of rehearing en banc) (recognizing that "'[s]ubsequent litigation [after *Gartenberg*] in excessive fee cases has resulted almost uniformly in judgments for the defendants . . . although there have been some notable settlements wherein defendants have agreed to prospective reduction in the fee schedule.'" (quoting COX, *supra*, at 1211)).

[34]We should also note that the Eighth Circuit released an opinion in another excessive fees case shortly after the Supreme Court granted certiorari in *Jones v. Harris*. In *Gallus v. Ameriprise Financial, Inc.*, 561 F.3d 816 (8th Cir. 2009), plaintiffs alleged that the fee negotiation of Ameriprise was based not on costs and profits of Ameriprise, but instead based on the fee agreements of similar mutual funds in the market; institutional clients who received comparable advisory services received substantially lower advisory services, and adviser misleading of board members preventing the fund's board of directors from questioning the alleged higher fees.. The Eighth Circuit vehemently disagreed with Judge Easterbrook's reasoning in *Jones v. Harris*, endorsed Posner's contentions, and discussed the discrepancies between rates charged to institutional investors versus ordinary investors, concluding that the "proper approach to [section] 36(b) is one that looks to both the adviser's conduct during negotiation and the end result." *Gallus*, 561 F.3d at 823 (citing *In re* Mutual Funds Inv. Litig., 590 F. Supp. 2d 741, 760 (D. Md. 2008)), *vacated*, No. 09-163, 2010 WL 1265857, at *1 (U.S. April 5, 2010). We do not discuss *Ameriprise* in length because our focus is on the historical context in which the fiduciary duty was integrated, and the parallels that the Supreme Court could draw from other applications of the fiduciary standard. Nonetheless, such an opinion has its obvious impact on the overall tenor surrounding the Supreme Court's analysis regarding a mutual fund director's fiduciary obligations.

[35]Jones v. Harris Assocs. L.P., 527 F.3d 627, 629-30 (7th Cir. 2008), *vacated*, No. 08-586, 2010 WL 1189560, at *1 (U.S. March, 30, 2010). Harris Associates is adviser to Oakmark complex of mutual funds and institutional clients, specifically those invested in separately-managed accounts and limited partnerships. *Id.*

[36]"Oakmark Fund paid [the adviser,] Harris Associates 1% (per year) of the first $2 billion of the fund's assets, 0.9% of the next $1 billion, 0.8% of the next $2 billion, and 0.75% of anything over $5 billion." *Id.* at 631. Nonetheless, for institutional clients (e.g., pension funds) with similar investment goals as Oakmark Fund, "Harris Associates charges 0.75% of the first $15 million

Using the *Gartenberg* standard, the district court granted summary judgment to the defendant,[37] holding that "the only question we need consider is whether [the funds' board] could have agreed to the fee schedule in the advisory contracts after engaging in good-faith bargaining."[38] The court concluded that the board operated without any conflict that otherwise prevented arm's-length bargaining, and that the fees were comparable to those paid by other mutual funds.[39] Plaintiffs appealed.

The Seventh Circuit panel affirmed the lower court decision, but expressly rejected the application of the *Gartenberg* standard.[40] Judge Easterbrook asserted that the *Gartenberg* standard "relies too little on markets,"[41] thereby challenging the lower court's—and the *Gartenberg* court's—skepticism of the effect of market forces on advisory fees.[42] The Seventh Circuit Panel held that the substantive obligation of "[a] fiduciary [is one who] must make full disclosure and play[s] no tricks but is not subject to a cap on compensation."[43] "A trustee owes an obligation of candor in negotiation, and honesty in performance, but may negotiate in his own interest and accept what the settlor or governance institution agrees to pay."[44] An allegation of excessive fees, therefore, cannot survive unless the plaintiff alleges that the adviser also misled the fund's board of directors in obtaining their approval of the compensation.[45]

Judge Easterbrook also compared section 36(b) obligations to business corporations, where managers owe a fiduciary duty of loyalty to investors.[46] Specifically, he noted that judicial review for "reasonableness" of executive salary, bonus, and stock options is not implicated by compensation procedures (e.g., independent directors setting the top

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under management and 0.35% of the amount over $500 million, with intermediate breakpoints." *Id.*

[37]Jones v. Harris Assocs. L.P., No. 04 C 8305, 2007 WL 627640, at *9 (N.D. Ill. Feb. 27, 2007), *aff'd*, 527 F.3d 627 (7th Cir. 2008), *and vacated*, No. 08-586, 2010 WL 1189560, at *1 (U.S. March, 30, 2010).

[38]*Id.* at *8.

[39]*Id.* at *8-9.

[40]Jones v. Harris Assocs. L.P., 527 F.3d 627, 632, 635 (7th Cir. 2008), *vacated*, No. 08-586, 2010 WL 1189560, at *1 (U.S. March, 30, 2010).

[41]*Id.* at 632.

[42]*See id.* at 631-32.

[43]*Id.* at 632. Judge Easterbrook further stated that "[t]he trustees (and in the end investors, who vote with their feet and dollars), rather than a judge or jury, determine how much advisory services are worth." *Id.*

[44]*Jones*, 527 F.3d at 632 (citing RESTATEMENT (SECOND) OF TRUSTS § 242 & cmt. f (1959)).

[45]*See id.* at 633 ("[T]he question a court will ask . . . is whether the client made a voluntary choice *ex ante* with the benefit of adequate information.").

[46]*Id.* at 632.

managers' compensation), which both mutual funds and business corporations use.[47] Further, he clarified that the judiciary is less able to adjudicate "reasonableness" than a "just price."[48] In short, he concluded, "[j]udicial price-setting does not accompany fiduciary duties."[49]

The plaintiffs petitioned for a rehearing and rehearing en banc. A majority of the judges did not vote in favor of the rehearing and denied the petition.[50] Four judges, however, joined Judge Richard Posner in dissent.[51] Posner's response: "The panel opinion points out that courts do not review corporate salaries for excessiveness. That misses the point, which is that unreasonable compensation can be evidence of a breach of fiduciary duty."[52]

Citing the Seventh Circuit's disapproval of the *Gartenberg* standard and the en banc dissent,[53] the plaintiffs petitioned for a writ of certiorari,

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[47] *Id.* at 633.

[48] *Jones*, 527 F.3d at 633. *But cf. In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27 (Del. 2006) (evaluating the actions of directors in approving an employment agreement that provided for a termination benefit to the executive totaling $130 million and other non-fault termination benefits after the executive had only been on the job for fourteen months). The standard of adjudication, as discussed earlier, is not one of "reasonableness." But we note that under state law, a breach is assessed only after the determination of the facts and circumstances.

[49] *Jones*, 527 F.3d at 633. Easterbrook contends that, from the consumer's perspective, fiduciary obligations do not mean comparing fees in the abstract. *See id.* at 634. Instead, Easterbrook posits that adviser fees are contextual, and the most sophisticated individuals develop competitive pressures that benefit the remaining investors. *See id.* Notably, Easterbrook recognizes that "the most substantial and sophisticated investors" are carved out from this particular investment pool, instead investing in investment pools commonly referred to as hedge funds. *Id.* Thus, Easterbrook views the marketplace for investment dollars broadly. Included in this marketplace, *inter alia*, are other investment vehicles such as hedge funds and other investment services resulting in advisory fees. *Id.* at 633. Because these types of investors pay higher fees for professional advisers, he concludes the fees charged by Harris can hardly be considered "excessive." *Id.* at 634.

[50] Jones v. Harris Assocs. L.P., 537 F.3d 728, 729 (7th Cir. 2008).

[51] *Id.*

[52] *Id.* at 732 (Posner, J., dissenting). Noting ongoing historical abuses in the fund industry, Posner challenged the panel opinion's failure to identify causation for the discrepancy between retail and institutional clients, stating that "the adviser's charging its captive funds more than twice what it charges independent funds." *Id.* at 731 (analogizing the Oakmark-Harris relationship to that described as a captive fund in the Senate Report accompanying section 36(b)). Posner then challenged the market premises from which Easterbrook draws his conclusions. Among them: Posner contends that the ongoing and never-changed relationship between the adviser and its fund complexes causes lax monitoring. *Id.* at 730-31. Further, he questions true arm's length bargaining for retail shareholders when comparing reduced fees in institutional space versus retail market. *Id.* at 732 (quoting John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest*, 26 J. CORP. L. 609, 634 (2001) (concluding that mutual fund shareholders don't "benefit from arm's length bargaining or prices that approximate those that arm's-length bargaining would yield were it the norm")).

[53] Petition for Writ of Certiorari at 1, Jones v. Harris Assocs. L.P., No. 08-586, 2010 WL

seeking review of the Seventh Circuit's holding that a private right of action for excessive fees is not cognizable under section 36(b) unless plaintiffs allege that the adviser misled the fund's directors in approving the fee.[54] The Supreme Court granted certiorari.[55]

IV. THE LEGISLATIVE HISTORY OF SECTION 36(B)

In light of courts' divergent interpretations of "fiduciary," we turn to legislative history to infer Congress's intent. Perhaps at the heart of the dispute: do the obligations arise out of contract (status implication) or from the adviser-fund relationship? More than "mere" contract doctrine,[56] "fiduciary" is shorthand for certain obligations and consequences when failing to discharge such obligations.[57] Because the word itself cannot instruct us on its accorded meaning, we seek a contextual interpretation through a review of over a decade of legislative history. As becomes clear *infra*, the meaning of the term was debated heavily, and Congress, accepting the language negotiated between the SEC and fund industry, intended to exceed the threshold level of review used by state courts. In doing so, Congress attempted to address a perceived lack of arm's length bargaining between advisers and boards without resorting to an onerous rate regulation scheme. Their goal was to create a fiduciary obligation protecting shareholders from advisers that might overreach in determining their advisory fee.[58]

1189560, at *1 (U.S. March 30, 2010).

[54] *Id.* at 9-11.

[55] Jones v. Harris Assocs. L.P., 129 S. Ct. 1579, 1580 (2009).

[56] *See* Brudney, *supra* note 9, at 598 (comparing the concept of "fiduciary" with contract doctrine, specifically addressing restrictions imposed by each). A "fiduciary" is a legal construct embodying both normative and analytical functions. *See* Brudney, *supra* note 9, at 598. *But cf.* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) ("[A] 'fiduciary' relation is a contractual one characterized by unusually high costs of specification and monitoring.").

[57] For a discussion of the term fiduciary as a symbolic and rhetorical device, see Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879.

[58] For additional discussion of the legislative history of the 1970 Amendments, see Gerard T. Manges, *The Investment Company Amendments Act of 1970*, 26 BUS. LAW. 1311 (1971); Gerard H. Manges, *The Investment Company Amendments Act of 1970—An Analysis and Appraisal After Two Years*, 14 B.C. INDUS. & COM. L. REV 387 (1973); Walter P. North, *A Brief History of Federal Investment Company Legislation*, 44 NOTRE DAME LAW. 677 (1969); Walter P. North, *The Investment Company Amendments Act of 1970*, 46 NOTRE DAME LAW. 712 (1971); Alan W. Rottenberg, *Developing Limits on Compensation of Mutual Fund Advisers*, 7 HARV. J. ON LEGIS. 309 (1970); Robert N. Cowen, Note, *Mutual Fund Advisory Fees and the New Standard of Fiduciary Duty—Interpreting the 1970 Mutual Fund Act*, 56 CORNELL L. REV. 627 (1971).

A. Wharton Report

In 1958, the SEC commissioned the Wharton School of Business at the University of Pennsylvania to study the impact of fund growth on the financial markets.[59] The SEC sought to identify the impact of funds on the operating companies in their portfolio and the affect of fund size on fund operations.[60] By the time the report was presented to Congress in 1962, however, the Wharton working group had extended the investigation into the presence of arm's length negotiations between advisers and fund boards over adviser compensation.[61]

The Wharton Report established that advisers charged registered funds' shareholders more than private non-fund clients. Advisers tended to charge funds a fee of approximately 0.5%of assets,[62] but a majority of advisers charged non-fund clients a fee of less than 0.3%.[63] Costs attributable to providing fund services did not appear to fully explain this price differential.[64] In addition, the working group found that the vast majority of advisers charged their fund clients a flat percentage fee, while a majority of non-fund clients were charged a scaled fee.[65]

The working group also analyzed the efficiency of internalized management costs. Generally, a fund with an internal advisory function was more efficient for shareholders than an externally managed fund, largely because shareholders benefited from economies of scale.[66] But advisers of externally managed funds relished generous economies of

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[59]Agreement between the Wharton School and the S.E.C. (May 29, 1958), *available at* http://www.sechistorical.org/museum/papers/1950. The SEC authorized the report in accordance with its obligations under section 14(b) of the ICA. *Id.*

[60]*Id.*

[61]WHARTON SCH. OF FIN. & COMMERCE, A STUDY OF MUTUAL FUNDS, H.R. REP. NO. 87-2274, at 1 (1962) [hereinafter WHARTON]. The working group included Professors Irwin Friend, F. E. Brown, Edward S. Herman, and Douglas Vickers. *Id.* at 1 n.1.

[62]*Id.* at 484 (showing "a heavy concentration of effective rates at the 0.5 percent fee level").

[63]*Id.* at 489 (indicating that 57.4% of advisers with non-fund clients had fee rates below 0.3%).

[64]WHARTON, *supra* note 61, at 492. In their questionnaires, advisers argued that the cost of administering a fund with thousands of individual investors was more than the cost of administering an individual's non-fund account. *Id.* at 492-93. The working group dismissed these arguments and instead concluded that the price differential resulted from differences in negotiating power. *Id.* at 493.

[65]*See id.* at 480 (noting that 79.3% of funds were charged a flat fee while 79.3% of non-fund clients were charged a scaled or negotiated fee).

[66]*See id.* at 525 (comparing the cost savings as assets increase for both internally and externally managed funds).

scale,[67] earning profits in excess of comparable industries.[68] Because of these findings, the working group concluded that boards were in a weakened bargaining position with respect to advisory fee rates because of the close affiliation between advisers and fund management.[69] In short, the working group questioned the presence of arm's length negotiation.

Immediately before the release of the report, members of the working group discussed the report's findings and made recommendations to the SEC staff.[70] Notwithstanding the market variances, the working group advised against SEC regulation of the advisory fee.[71] Such a decision, the working group opined, would result in government price fixing.[72] Instead, they sought to strengthen the fund's leverage by requiring a majority of independent directors on the board, and by giving the Commission veto power over such appointments.[73] Alternatively, but not without reservation, the working group recommended internalizing fund management.[74]

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[67]*See id.* at 503 (noting that advisers that exclusively managed funds had expenses as a percentage of assets under management of 135.5% when assets under management were less than $10 million, but the expenses decreased to 48.8% when assets increased to $300 million or more).

[68]*See* WHARTON, *supra* note 61, at 521. The Wharton Report compared adviser rates of return to those of corporations in the business services and personal services industries. *Id.* On average, advisers earned 29.5% before taxes. *Id.* In contrast, the business services and personal services corporations earned 17.6% and 12.1%, respectively. *Id.*

[69]*Id.* at 30.

> These findings suggest that the special structural characteristics of this industry, with an external adviser closely affiliated with the management of the mutual fund, tend to weaken the bargaining position of the fund in the establishment of advisory fee rates. Other clients have effective alternatives, and the rates charged them are more clearly influenced by the force of competition.

Id.

[70]Conference Memorandum on Wharton School Size Study to SEC 1 (Apr. 25, 1962), *available at* http://www.sechistorical.org/collection/papers/1960/1962_0425_WhartonSECT.pdf [hereinafter Wharton School Memorandum].

[71]*Id.* at 4.

[72]*Id.*.

[73]*Id.* at 3.

[74]Wharton School Memorandum, *supra* note 70, at 5. The Wharton Report, and the working group, faced considerable criticism as a result of their findings and recommendations. *See, e.g.*, Nathan D. Lobell, *A Critique of the Wharton School Report on Mutual Funds*, 49 VA. L. REV. 1 (1963) (criticizing the Wharton School's unfavorable treatment of funds in many areas). *But see* Edward S. Herman, *Lobell on the Wharton School Study of Mutual Funds: A Rebuttal*, 49 VA. L. REV. 938 (1963) (rebuttal by a member of the Wharton working group).

B. Public Policy Implications of Investment Company Growth

At the request of the U.S. House of Representatives (House), the SEC authorized its own investigation into funds and their advisers.[75] Three years later, the SEC released its report, The Public Policy Implications of Investment Company Growth.[76] The SEC findings were consistent with the Wharton Report. Advisers to registered funds continued to charge higher fees to fund shareholders than to private non-fund clients.[77] Fee reductions, which advisers initiated subsequent to the release of the Wharton Report, were "not substantial."[78] Furthermore, the profitability of advisers, in the Commission's fourteen-adviser sample set, averaged an astounding 42.6%.[79]

The SEC included bank products and institutional funds in its investigation.[80] It conceded that significant differences existed between these products and funds. It found that banks, in particular, received additional benefits when providing products that advisers did not receive from the funds.[81] Even so, the SEC's research found that banks charged these accounts a typical fee of .06%,[82] and industry trait variance could not fully explain the "extent of the disparity."[83] The SEC also analyzed the fees charged by five institutional funds.[84] Such fees ranged between 0.04% and 0.18%.[85]

The SEC then examined existing constraints on advisory fees, including: (1) competition; (2) disclosure; (3) shareholder voting rights; (4) unaffiliated directors; and (5) derivative suits. The SEC concluded that

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[75] *In re* Investment Companies Registered under the Investment Company Act of 1940, Order Directing Investigation and Study and Designating Officers to Take Testimony 1 (Sept. 26, 1962) (indicating that the Wharton Report findings warranted further study and analysis in order to propose changes to the ICA).

[76] PUBLIC POLICY IMPLICATIONS, *supra* note 25.

[77] *Id.* at 119-20. The Commission also determined that fund shareholders in internally managed funds paid higher fees than fund shareholders in externally managed funds. *Id.* at 103-04 (reporting that median management cost was 0.25% for internally managed funds and 0.48% for externally managed funds).

[78] *Id.* at 102. Consistent with this analysis, the Commission concluded that the fee reductions would not have a substantial impact on profitability. *Id.* at 125.

[79] *Id.* at 122. Pre-tax profits ranged from a loss of 14.3% to a profit of 68.5%. *Id.*

[80] *See* PUBLIC POLICY IMPLICATIONS, *supra* note 25, at 114. Bank products, including pension assets and profit-sharing plans, involve asset management similar to what advisers provide to funds. *Id.*

[81] *Id.* at 116.

[82] *Id.* at 115 (dealing with accounts greater than $100 million in assets).

[83] *Id.* at 116-17.

[84] PUBLIC POLICY IMPLICATIONS, *supra* note 25, at 118-19. In this context, institutional funds are funds created for the use of banks and other financial institutions. *See id.* at 118.

[85] *Id.* at 118-19.

competition did not pose a sufficient counterbalance, because advisers rarely competed to provide services to a specific fund.[86] Though advisers sold fund shares in competition with other advisers, the Commission argued that this did not create a downward pressure on fee pricing.[87] The Commission explained this price inelasticity by observing that funds were largely similarly—priced and that transaction costs constrained an investor's ability to switch funds.[88]

Acknowledging disclosure as a "keystone" of its own regulatory scheme, the SEC nonetheless concluded that disclosure produced no more than a tepid effect on fee prices.[89] Disclosure helped to maintain fees at the historic norm of 0.5%, but it failed to result in fee reductions based on economies of scale.[90] Excerpting the legislative history of the 1940 Act, the SEC concluded that disclosure may not alone be sufficient to ameliorate the conflicts of interest in the industry.[91]

The SEC concluded that shareholder voting rights in this context were an impotent safeguard. If a fund failed to ratify the agreement (including the advisory fee),[92] the fund would be left without an adviser—and in most cases—without any management staff whatsoever, effectively eliminating any possibility of ouster.[93]

Unaffiliated directors, the SEC determined, could not effectively negotiate fees on behalf of shareholders.[94] While cognizant of the value of their presence on the board, the SEC believed that an unaffiliated director could not be expected to terminate the advisory contract because of the

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[86] *Id.* at 126. Non-competitive fee rates are "the consequence of the virtually complete merger of the funds' management with the advisory organizations." *Id.* at 126-27.

[87] *Id.* (competing instead on selling efforts, performance, and investment objectives, among others).

[88] PUBLIC POLICY IMPLICATIONS, *supra* note 25, at 126.

[89] *Id.* at 127 (noting that "disclosure develops and maintains conventional limitations over the relationships between corporate managements and public shareholders . . . by making publicly available a body of information which guides investors . . . in appraising the propriety of particular actions").

[90] *Id.* at 128 ("To the extent that disclosure has served to develop and maintain conventional limitations on the level of advisory fees . . . , these limitations have served mainly to keep advisory fee rates from rising above the 0.50 percent fee rate traditionally in the industry.").

[91] *Id.* at 127 (quoting H.R. REP. NO. 76-2639, at X (3d Sess. 1940)).

[92] *See* PUBLIC POLICY IMPLICATIONS, *supra* note 25, at 129. The Commission reported that proxy contexts were "very rare." *Id.* Consequently, shareholders did not have any "meaningful alternatives" to ratifying the agreement. *Id.*

[93] *See id.* at 129 (noting that under the ICA, "no person or organization may serve as an . . . adviser . . . except pursuant to a written contract"); *see also* 15 U.S.C. § 80a-15(a) (2006).

[94] PUBLIC POLICY IMPLICATIONS, *supra* note 25, at 130-31. In addition, the Commission observed that because of the unique structure of shareholder ownership of funds, "the power to select the fund's directors remains with the original organizers or their successors." *Id.* at 130.

close affiliation between a fund and its adviser.[95] Without that capacity, the SEC concluded that unaffiliated directors lacked a key component of arm's length bargaining in adviser negotiations.[96]

Finally, the SEC discussed at some length the ability to challenge advisory fees through shareholder derivative suits. But as articulated *supra*, plaintiffs challenging advisory fees under state law failed to allege facts tantamount to wasting corporate assets.[97] Notably, the SEC characterized the outcome of these cases as a defect in the regulatory system, an unintended consequence of section 15(a),[98] which prevented "judicial inquiry into the 'reasonableness' or 'fairness' of advisory fees."[99]

Together, these findings led the SEC to conclude that the existing constraints on advisory fees insufficiently protected investors from adviser overreaching. As a result, it recommended the 1940 Act be revised to provide that all compensation received by any person affiliated with the adviser "be reasonable."[100] The Commission described the factors to be considered under this standard of "reasonableness," as:

> the fees paid for comparable services by other financial institutions with pools of investment capital of like size and purpose such as pension and profit sharing plans, insurance companies, trust accounts, and other investment companies; the nature and quality of the of the services . . . ; [the] benefits . . . received by persons affiliated with an investment company . . . ; and such competitive or other factors as the Commission

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[95] *Id.* at 130-31. "[Directors] often bring broad perspectives from their diverse business and professional experience to the management of fund affairs, and in many instances they have sought to fulfill their responsibilities in a highly responsible dedicated way." *Id.* at 130. The adviser and its affiliates typically manage the portfolio, distribute fund shares, provide all management, and maintain control over a fund's books and records. *See id.* at 131. The costs and disruption that would accompany the replacement of an adviser "make termination of the existing advisory relationship a wholly unrealistic alternative in negotiations over advisory fees." *Id.*

[96] *Id.* at 130-31. As a consequence, the SEC concluded that "advisory fees negotiated between advisers and the unaffiliated directors . . . provide inadequate assurance that the fees bear a reasonable relationship to the price at which similar services could be obtained in a genuinely competitive market." *Id.* at 131.

[97] *See supra* Part II.

[98] PUBLIC POLICY IMPLICATIONS, *supra* note 25, at 141-42.

[99] *Id.* at 142 (referring to the interaction of state common law principles and section 15(a)). The SEC argued that this outcome was contrary to Congressional intent and pointed to section 1(b), which the Court of Appeals for the First Circuit has interpreted to "'codif[y] the fiduciary obligations placed upon officers and directors of investment companies.'" *Id.* (quoting Aldred Inv. Trust v. SEC, 151 F.2d 254, 260 (1st Cir. 1945)).

[100] *Id.* at 144.

> may by rule or regulation or . . . by order determine are appropriate and material . . . .[101]

Further, in a court's determination of reasonableness, the Commission rejected placing any weight on shareholder or director approval.[102]

The SEC's Public Policy Implications of Investment Company Growth Report (PPI) occasioned considerable controversy with industry officials, among others, criticizing the report as both factually erroneous and irresponsible.[103] In February 1967 critics and SEC officials, along with legal and financial experts, met at a conference to discuss the PPI and its recommendations.[104] It was at this conference that the defining issue of fee legislation emerged at this conference: whether an adviser does have or should have a fiduciary obligation in determining the amount of its fees. During the panel discussion on advisory fees, the SEC General Counsel expressed his view that advisers had a fiduciary duty to charge no more than a reasonable fee,[105] a position critics vehemently denied.[106]

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[101] *Id.* at 144.

[102] PUBLIC POLICY IMPLICATIONS, *supra* note 25, at 144.

[103] *See, e.g.*, Letter from William F. Shelley, President, Vance, Sanders & Company, Inc., to Investment Dealers of Vance, Sanders & Company, Inc.'s Selling Group (Jan. 26, 1967), *available at* http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1960/1967_0131_Rebuttal Vance.pdf (criticizing PPI for being inaccurate, misleading, and lacking support for various conclusions); *see also Management Compensation: The SEC Mutual Funds Report*, 3 COLUM. J.L. & SOC. PROBS. 66, 68-69 (1967) (examining the deficiencies of the PPI).

[104] *See Foreword: University of Pennsylvania Conference on Mutual Funds*, 115 U. PA. L. REV. 659, 659 (1967); *The Mutual Fund Management Fee*, 115 U. PA. L. REV. 726, 726 (1967). Attendees included members of the Wharton working group; SEC officials; Abraham Pomerantz, a noted plaintiff's attorney; unaffiliated directors; and top executives from a number of advisers. *University of Pennsylvania Conference on Mutual Funds*, 115 U. PA. L. REV. 659, 668 (1967).

[105] *The Mutual Fund Management Fee*, *supra* note 104, at 741-42 (statement of Philip A. Loomis, Jr., SEC General Counsel).

[106] *See id.* at 745 (statement of Alfred Jaretzki, Jr.) This conference also saw the emergence of the "shell theory" as an argument against legislative action. *Id.* at 747-49 (discussion between Alfred Jaretzki, Jr. and Professor Morgan Shipman). Under the shell theory, the fund is merely a vehicle through which advisers offer and shareholders purchase the services of an adviser at a lower rate than they would be able to access the same service individually. *See id.* The relationship runs directly between the shareholder and the adviser. Consequently, directors do not have a responsibility, or in the extreme view, even a right to negotiate the fee or terminate the advisory contract. *See id.*; *see also* Nathan D. Lobell, *The Mutual Fund: A Structural Analysis*, 47 VA. L. REV. 181, 203-06 (1961) (discussing the effects of increased shareholder access to information in regard to management fees and the practical problems of fee negotiation by directors). The Commission would later criticize the theory by noting that the ICA rejects the shell theory. *Mutual Fund Legislation of 1967: Hearings on S. 1659 Before the S. Comm. on Banking and Currency*, 90th Cong. 1197-98 (1967) [hereinafter *1967 Senate Hearings*] (statement of Manuel F. Cohen, Chairman, SEC). In addition, the SEC argued that if in fact the fund is merely a shell, then a fiduciary relationship should run from the adviser to each shareholder. *Id.* In its

C. 1967 Legislation

The SEC's recommendations were introduced in the U.S. Senate[107] and the House in May 1967.[108] The proposed criteria for "reasonableness," however, had changed. Proposed section 15(d)(2) identified the following factors on which a court should base its determination of reasonableness, including

> [t]he nature and extent of the services to be provided . . . [t]he quality of the services . . . rendered . . . [t]he extent to which the . . . contract takes into account economies attributable to the growth and size . . . [t]he value of all benefits . . . received . . . by the . . . adviser [and] [s]uch other factors as are appropriate and material.[109]

The SEC also proposed that a plaintiff prove unreasonableness by a preponderance of the evidence.[110] No mention was made, however, of the weight accorded to shareholder or unaffiliated director approval of the advisory agreement.[111]

1. 1967 Congressional Hearings

The Senate[112] and House[113] held hearings in July 1967 and October 1967, respectively. At the urging of both congressional committees, the Investment Company Institute (ICI), an industry association for advisers, and the SEC resumed their negotiations in order to resolve their legislative differences.[114] From the SEC's perspective, economies of scale were not

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view, an adviser could not rely on the protection of a corporate entity while simultaneously arguing that the entity was merely a legal fiction. *Id.*

[107]Investment Company Amendments Act of 1967, S. 1659, 90th Cong. § 8(d) (1967).

[108]Investment Company Amendments Act of 1967, H.R. 9510, 90th Cong., § 8(d) (1967).

[109]S. 1659 § 8(d); H.R. 9510 § 8(d).

[110]S. 1659 § 8(d); H.R. 9510 § 8(d).

[111]*See* S. 1659 § 8(d); H.R. 9510 § 8(d).

[112]*See 1967 Senate Hearings*, *supra* note 106.

[113]*Investment Company Act Amendments of 1967: Hearings on H.R. 9510 and H.R. 9511 Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 90th Cong. (1967) [hereinafter *1967 House Hearings*]. Additional hearings on H.R. 14742, an amended version of H.R. 9510 and H.R. 9511, were held in the House in February 1968. *Investment Company Act Amendments of 1967: Hearings on H.R. 14742 Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 90th Cong. (1968). These hearings, however, were limited to new provisions involving bank collective investment funds. *Id.* at 1-2.

[114]*See 1967 Senate Hearings*, *supra* note 106, at 6-7. The PPI, which included a request

shared with investors[115] and existing measures intended to protect investors from overreaching failed to achieve their goal.[116] The SEC also believed that section 15(a)—shareholder ratification—inadvertently shielded advisers from traditional fiduciary liability contrary to congressional intent.[117] Absent shareholder ratification, the SEC believed that advisory agreements would be subject to an entire fairness standard.[118] In contrast to an entire fairness standard, the SEC believed that its proposed "reasonableness" standard would be more favorable to industry because it would place the burden of proof on the plaintiff shareholder.[119] In sum, the SEC argued that the pro-posed legislation provided "an explicit and adequate means for enforcing the basic fiduciary standard of fairness in respect to investment advisory fees."[120]

The industry aggregated its counterarguments through the ICI[121] and largely refuted the factual findings of the Wharton Report and the PPI.[122] The ICI emphatically denied that industry profits were high, let alone excessive. In support of this contention, the ICI provided its own statistics showing that profits as a percentage of assets under management were lower than comparable industries.[123] It provided competing statistics showing

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for comment on the recommendations, was the starting point for an ongoing dialogue between the Commission and industry representatives, including the ICI. *Id.* at 6.

[115] *Id.* at 17; *1967 House Hearings*, *supra* note 113, at 35-36 (statement of SEC).

[116] *1967 Senate Hearings*, *supra* note 106, at 17-21; *1967 House Hearings*, *supra* note 113, at 39-40 (statement of SEC).

[117] *1967 Senate Hearings*, *supra* note 106, at 21; *1967 House Hearings*, *supra* note 113, at 43 (statement of SEC). In essence, the SEC essentially recapitulated the findings, analysis, and conclusions described earlier in the Wharton Report and the PPI. *See 1967 Senate Hearings*, *supra* note 106, at 4-5; *1967 House Hearings*, *supra* note 113, at 1-2. During testimony before the House Committee, the SEC submitted additional evidence that sub-advisory fees—negotiated at arm's length—were typically scaled and a fraction of the amount charged by the adviser. *1967 House Hearings*, *supra* note 113, at 136-39 (testimony of Manuel F. Cohen, Chairman, SEC).

[118] *See 1967 Senate Hearings*, *supra* note 106, at 20-21 (citing Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921)); *1967 House Hearings*, *supra* note 113, at 105 (citing Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921)).

[119] *1967 Senate Hearings*, *supra* note 106, at 85.

[120] *Id.* at 10 ("In the absence of competition or arm's-length bargaining, the basic fiduciary obligation of fairness must serve as an effective substitute.").

[121] *Id.* at 186. At that time, the ICI represented advisers responsible for 93% of the total assets of the mutual fund industry. *Id.* at 187.

[122] *See id.* at 186 (statement of Francis S. Williams, on behalf of ICI); *id.* at 295 (statement of Joseph E. Welch, on behalf of ICI); *id.* at 328 (statement of Robert J. Fahey, on behalf of ICI); *id.* at 336 (statement of Jesse Markham, on behalf of ICI); *id.* at 337 (statement of Ralph H. Demmler, on behalf of ICI); *1967 House Hearings*, *supra* note 113, at 228 (statement of Francis S. Williams, on behalf of the ICI); *id.* at 233 (testimony of John R. Haire); *id.* at 251 (statement of Robert J. Fahey, on behalf of the ICI); *id.* at 257 (statement of Jesse Markham, on behalf of the ICI); *id.* at 258 (statement of Ralph H. Demmler, on behalf of ICI).

[123] *1967 Senate Hearings*, *supra* note 106, at 298 (statement of Joseph E. Welch, on behalf of ICI); *1967 House Hearings*, *supra* note 113, at 240-41 (testimony of John R. Haire).

average advisory fees as 0.39% rather than the 0.48% claimed by the Commission[124] and identified an existing trend of declining fees prior to the pre-36(b) litigation.[125] The ICI also asserted that two anomalous funds dominated and distorted the SEC's statistics on internally managed funds.[126] In addition, the ICI emphasized that pension and profit sharing plans involved significantly different levels of service than traditional funds.[127]

The ICI contended that the existing safeguards described by the Commission in the PPI (and discussed above) were adequate and had resulted in fee reductions.[128] It asserted that competition was vigorous because investors could choose between hundreds of different funds.[129] It characterized unaffiliated directors as diligent fiduciaries fully empowered to negotiate on behalf of the fund under state law.[130] Also, it asserted that shareholders knowingly approved their advisory agreements,[131] and that any overreaching could be redressed in court, just as with any other corporation.[132]

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[124] *1967 Senate Hearings*, *supra* note 106, at 284 (letter from ICI to Chairman Sparkman). The divergence in statistics was subsequently explained by the Commission in a memorandum subsequently submitted for the record in response to an inquiry by Senator Bennett. *Id.* at 63 (information provided by Manuel F. Cohen, Chairman, SEC) The ICI also contended that investors received services for far less than what they would otherwise pay for professional money management. *Id.* at 192-93 (testimony of Joseph E. Welch, on behalf of ICI).

[125] *Id.* at 193 (testimony of Joseph E. Welch, on behalf of ICI); *1967 House Hearings*, *supra* note 113, at 239-41 (testimony of John R. Haire).

[126] *1967 Senate Hearings*, *supra* note 106, at 219; *see also 1967 House Hearings*, *supra* note 113, at 274 (analyzing why expenses of internally managed funds are apparently lower than those of externally managed funds).

[127] *1967 Senate Hearings*, *supra* note 106, at 297 (statement of Joseph E. Welch, on behalf of ICI).

[128] *Id.* at 193 (testimony of Joseph E. Welch); *1967 House Hearings*, *supra* note 113, at 238-39 (testimony of John R. Haire).

[129] *1967 Senate Hearings*, *supra* note 106, at 191 (testimony of Francis S. Williams); *1967 House Hearings*, *supra* note 113, at 239 (testimony of John R. Haire).

[130] *1967 Senate Hearings*, *supra* note 106, at 197-98 (testimony of Joseph E. Welch). In addition, the ICI noted that for a majority of its members the board consisted of a majority of independent directors rather than the 40% required by the Act. *Id.* at 194.

[131] *Id.* at 199.

[132] *1967 House Hearings*, *supra* note 113, at 242 (statement of John R. Haire). In addition, the ICI expressed concern that the legislation would result in a flood of strike litigation. *See 1967 Senate Hearings*, supra note 106, at 201. Additionally, the ICI worried the SEC would use its coercive authority to create a price fixing regime, which might discourage new entrants into the market. *See id.* at 197, 299. The Wharton working group expressed similar fears that regulation of advisory fees would lead to inefficient price fixing in earlier discussions with the SEC. Nonetheless, the members of the working group indicated their support for the proposed legislation in testimony before the Committee. *Id.* at 682-83, 730 (statements of Professor Irwin Friend and Professor Edward Herman).

In negotiations with the SEC, the ICI proposed two alternate recommendations for legislative action. First, the ICI proposed strengthening unaffiliated director independence by revising section 15(c) to incorporate a new term called "interested person" and requiring that a majority of the board be independent.[133] The SEC integrated the "interested person" language into the congressional bill,[134] but questioned whether such language was sufficient to protect shareholders from adviser overreaching.[135]

Second, the ICI proposed that if a majority of unaffiliated directors fail to approve the transaction "as reasonable in the exercise of business judgment," then the directors would be liable if shareholders could prove that such a failure was, by clear and convincing evidence, "a clear abuse of business judgment."[136] The Commission dismissed this proposal, determining that it precluded courts from fulfilling "their traditional role in examining the fairness of the *fees* imposed by a fiduciary."[137]

Following the SEC-industry negotiation, both Committees obtained expert testimony to identify the current legal standards and the viability of using a reasonableness standard. Professor Ernest Folk explained the existing waste standard applied by the courts and challenged the ICI's characterization that the reasonableness standard was too vague.[138]

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[133] *1967 Senate Hearings*, *supra* note 106, at 98-99 (letter from Robert L. Augenblick, ICI, to Manuel F. Cohen, Chairman, SEC).

[134] Investment Company Amendments Act of 1967, S. 1659, 90th Cong. § 8(d) (1967); Investment Company Amendments Act of 1967, H.R. 9510, 90th Cong. § 8(d) (1967). It is not clear from the legislative history whether the SEC originally proposed this language and the ICI believed it to be sufficient, or whether this recommendation by the ICI caused the Commission to insert this language into the legislative proposals.

[135] *See 1967 Senate Hearings*, *supra* note 106, at 96 (answers provided by SEC Chairman Cohen in response to questions from Senator Bennett) ("The adoption of this 'alternative' alone might well confirm the present unwarranted belief of a number of courts that Congress wishes them to close their eyes to the excessiveness of some advisory fees as long as the requisite procedural steps have been followed."); *1967 House Hearings*, *supra* note 113, at 46 (statement of SEC). In particular the Commission refuted the assertion that directors were effective by quoting testimony elicited in connection with *Saxe v. Brady*, discussed *supra*, that indicated that directors did not consider negotiating fees. *Id.* at 46-47 (quoting Record at 520, 525-28, *Saxe v. Brady*, 184 A.2d 602 (Del. Ch. 1962)..

[136] *1967 Senate Hearings*, *supra* note 106, at 100-01 (letter from Robert L. Augenblick, ICI, to Manuel F. Cohen, Chairman, SEC).

[137] *Id.* at 96; *see also 1967 House Hearings*, *supra* note 113, at 46 (statement the SEC).

[138] *1967 Senate Hearings*, *supra* note 106, at 1001-03 (statement of Ernest L. Folk, III, Professor, University of North Carolina at Chapel Hill) (supporting enactment of the Investment Company Amendments of 1967); *1967 House Hearings*, *supra* note 113, at 801-03 (statement of Ernest L. Folk, III, Professor, University of North Carolina at Chapel Hill); *see also In re* Citigroup Inc. S'holder Deriv. Litig., 946 A.2d 106, 138 (Del. Ch. 2009); *supra* notes 19-25 and accompanying text (describing the application of the waste standard to excessive fee cases brought

Reasonableness, he noted, was used in corporate law to assess executive compensation.[139]

Congress also sought the opinion of Judge Friendly on whether courts could effectively administer a reasonableness standard.[140] In response, Judge Friendly observed that courts routinely inquire into the reasonableness of compensation in cases of public utilities, corporate mergers and acquisitions, attorney's fees, and compensation for personal services "between a fiduciary and his beneficiaries, a standard of fairness that might well apply to this very problem but for the effect that has been given to the ratification . . . by stockholders or unaffiliated directors."[141] Judge Friendly doubted the statute would result in a flood of strike suits and instead advanced the value of shareholder derivative litigation.[142]

2. 1968 Senate Report

During the next term, Senate Bill 3724 reported out of the Senate Committee.[143] Specifically noting the unique structure of funds, the Committee concluded that inherent conflicts of interest reduced the effectiveness of price competition and arm's-length bargaining.[144] Concerned with potential strike suits, the Committee's final bill prohibited a shareholder from bringing an action unless the SEC had failed to do so within six months of receiving a request by the shareholder.[145] In addition, Senate Bill 3724 provided that director approval "be given 'substantial weight,'"[146] and shareholder approval "be given such weight as is deemed appropriate."[147] The reported bill also contained the "reasonableness" standard recommended by the SEC and constructed enforcement

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before the enactment of the 1970 amendments).

[139] *1967 Senate Hearings*, *supra* note 106, at 1003. Additionally, Folk criticized the decision to place the burden of proof on the plaintiff and suggested a further tightening of the "interested person" definition. *Id.* at 1003-06.

[140] *Id.* at 1014 (statement of Henry J. Friendly, Judge, Second Circuit); *1967 House Hearings*, *supra* note 113, at 608-09 (statement of Henry J. Friendly, Judge, Second Circuit).

[141] *1967 House Hearings*, *supra* note 113, at 609-10.

[142] *Id.* at 612-13 (creating, *inter alia*, an additional means of enforcing statutory requirements). Judge Friendly further observed the existence of "many safeguards against unjustified suits" in the proposed legislation. *Id.* at 613. Nevertheless, he analogizes the reasonableness determination to judicial-resource-intensive inquiries like those involving public utilities, railroads, and takings. *Id.* at 609-10.

[143] U.S. SENATE COMM. ON BANKING & CURRENCY, INVESTMENT COMPANY AMENDMENTS ACT OF 1968, S. REP. NO. 90-1351 (1968).

[144] *See id.* at 4.

[145] *Id.* at 6.

[146] *Id.*.

[147] S. REP. NO. 1351, at 6.

mechanisms for the SEC and shareholders.[148] Senate Bill 3724, however, omitted the list of recommended factors because it would be "difficult to specify all or the most relevant of these factors outside of the context of a specific case."[149] This legislation, the committee insisted, was not meant to imply that fees in the industry were unreasonable or that directors were not responsible for "managing and controlling the affairs of a corporation."[150] Rather, the amendment was to "provide a meaningful mechanism through which the management fee which may be unreasonable can be effectively challenged."[151]

3. 1968 Senate Debates

Over the next three days, senators vigorously debated Senate Bill 3724 on the floor of the Senate.[152] Senator Bennett of Utah strongly opposed the legislation and proposed that an advisory fee should be deemed reasonable if approved by two-thirds of shareholders and all of the independent directors.[153] This sparked considerable controversy.[154] Senator Case of New Jersey proposed, as an alternative, a rebuttable presumption for reasonableness if the advisory agreement was approved by two-thirds of shareholders and a majority of the independent directors.[155]

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[148] *Id.* at 5-6.

[149] *Id.* at 13. While the final version of the bill reported by the Senate Committee omitted these factors, the Senate Report indicated that the factors would still be relevant to an inquiry into the reasonableness of fees. *Id.* at 5.

[150] S. REP. NO. 1351, at 5-6. In addition, the Committee noted that some advisers had begun to share the economies of scale with shareholders and that this practice should "provide a guide." *Id.* at 5.

[151] *Id.*

[152] 114 CONG. REC. 23,050-58, 23,294-313, 23,519-52 (1968).

[153] *Id.* at 23,531.

> [N]o compensation or payments shall be found to be unreasonable . . . if such compensation or payments have been approved or ratified by the affirmative vote of two-thirds of the outstanding voting securities of such company and by the unanimous vote of all directors of such company who are not interested persons of such company.

Id. Senator Proxmire, however, commented that such a condition would "nullify" the reasonableness standard. *Id.*.

[154] *Id.* (expressing disapproval of Senator Bennett's proposal).

[155] *Id.* at 23,539. The text of the modified amendment stated:

> [A]ny compensation . . . shall be presumed reasonable . . . if such compensation . . . ha[s] been approved or ratified by the affirmative vote of holders of a majority of the outstanding voting securities of such company and by the vote of a majority of directors of such company who are not interested persons of such company, but such presumption may be rebutted by a preponderance of the evidence.

The Case Amendment passed.[156] In this final iteration, Senate Bill 3724 contained the reasonableness standard recommended by the SEC, the provisions giving substantial weight to director approval and "appropriate" weight to share-holder ratification, and the rebuttable presumption appended by Senator Case. This final Senate bill was referred to the House for consideration, but was tabled for that session.[157]

D. The 1969 Legislation

Senator Sparkman of Alabama reintroduced Senate Bill 3724 as Senate Bill 34 in the next session of Congress.[158]

1. 1969 Senate Legislation

The Senate held brief hearings[159] before the bill was reported out of Committee.[160] After those hearings and in the month before the release of the 1969 Senate Report, a compromise was reached between the SEC and the ICI.[161] The compromise language represented a drastically different approach—rather than amending section 15 of the ICA, it amended section 36 to include a new section 36(b).[162]

Id. The original amendment offered by Senator Case required the unanimous vote of all uninterested directors. *Id.* at 23,532.

[156] 114 CONG. REC 23,544 (passing the Senate on July 26, 1968).

[157] *See* Press Release, Betty Furness Critical of House Commerce Committee on Investment Company Amendments Act (Sept. 16, 1968), *available at* http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1960/1968_0916_FurnessCohenT.pdf. In September 1968, the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce determined not to consider it during that session. *See id.*

[158] Investment Company Amendments Act of 1968, S. 34, 91st Cong. (1969).

[159] *Investment Company Amendments Act of 1969: Hearings on S. 34 and S. 296 Before the S. Comm. on Banking and Currency*, 91st Cong. (1969). The hearings were held over three days and were mainly concerned with the ongoing negotiations between the Commission and the ICI. The main sticking point between the two groups remained the management fee. *Id.* at 8. In addition, the ICI reiterated its concerns as discussed in section IV above. *See id.* at 98-100.

[160] U.S. SENATE COMM. ON BANKING & CURRENCY, INVESTMENT COMPANY AMENDMENTS ACT OF 1969, S. REP. NO. 91-184 (1969).

[161] *Mutual Fund Amendments: Hearings on H.R. 11995, S. 2224, H.R. 13754, and H.R. 14737 Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 174 (1969) (testimony of Hamer H. Budge, Chairman, SEC) ("At the urging of the Senate committee and your committee, we renewed discussions with representatives of the industry. The agreements which were reached in these discussions were embodied in S. 2224 . . . .").

[162] S. REP. NO. 91-184, at 15.

The revised section 36(b) stated that advisers had a fiduciary duty with respect to compensation.[163] In determining whether a breach had occurred, the statute provided that courts should give ratification by shareholders and approval by the board as much weight as is "deem[ed] appropriate under all the circumstances."[164]

The Committee reiterated its earlier concerns and rationale.[165] The Senate did not intend to substitute director judgment for judicial decision making; instead, this legislation was meant to create a duty for advisers in "determining or receiving" their fees.[166] Moreover, it was not intended to proxy the independent directors' fiduciary responsibilities.[167] Rather, in considering the weight to grant director approval, the court may "wish to evaluate whether the deliberations . . . were a matter of substance or a mere formality."[168] Shortly after the bill was reported out of the Committee, it was passed by the Senate[169] and referred to the House for consideration.[170]

2. 1969 House Hearings[171]

The House Subcommittee considered two bills: one identical to the Senate Bill and a similar bill proposed by Representative Stuckey of Georgia.[172] Both bills included the fiduciary language. Representative Stuckey's bill, however, differed in three key respects, it: (1) explicated that only bona fide shareholders acting in good faith could sue; (2) changed the

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[163] *Id.*

[164] *Id.*

[165] *See id.* at 5 (previously expressed in the 1968 Senate Report discussed *supra*).

[166] S. REP. NO. 91-184, at 6.

[167] *See id.* Indeed, the Committee noted that the bill was intended to assist directors by requiring the adviser to disclose material information that the directors need to evaluate the advisory agreement. *Id.* at 7.

[168] *Id.* at 15. In addition, the statutes were "not intended to introduce general concepts of rate regulation as applied to public utilities." *Id.* at 6. The Committee also recommended that industry-best practices should guide sharing economies of scale. *Id.* Nonetheless, the Committee emphasized "such consideration would not be controlling in determining whether or not the fee encompassed a breach of fiduciary duty." *Id.* at 15.

[169] 115 CONG. REC. 13,700 (1969). Unlike S. 3724, S. 2224 passed the Senate without significant controversy. *See id.* at 13,692-700; *see also id.* at 13,650 (remarks of Sen. McIntyre) (stating "I would like to think that all of the controversy which surrounded this legislation 3 years ago has vanished in the general agreement of all parties affected that this bill is highly desirable").

[170] *Id.* at 14,109.

[171] The hearings in the House were held in November and December of 1969, subsequent to passage in Senate. 1969 *House Hearings*, *supra* note 8, at III.

[172] Investment Company Amendments of 1969, H.R. 14737, 91st Cong. (1969). An additional bill related to face amount certificates was also considered during the course of these hearings. H.R. 13754, 91st Cong. (1969).

standard of proof from a preponderance of the evidence to clear and convincing evidence; and (3) included a presumption that a fee arrangement was not a breach if unanimously approved by the unaffiliated directors and if unaffiliated directors comprised the majority of the board.[173] The SEC analyzed extensively each of the proposed bills and maintained that the Senate Bill's language was jointly submitted by the SEC and the ICI as a legislative compromise.[174] The Committee questioned this latter statement, inquiring into the nature of—and persons in—discussions between the ICI and SEC, the percentage of the industry represented by the ICI, and the existence of compromise dissent.[175]

Notably, the Committee also sought further explanation of what each party meant by the term "fiduciary." In its memorandum, the SEC described the fiduciary language as a "procedural" rather than a "substantive" change from the reasonableness standard.[176] In its view, this standard promoted the legislative purpose described in section 1(b) by ameliorating the problems caused by funds being "managed . . . in the interests of . . . investment advisers," rather than in the interests of shareholders.[177] The modification, the SEC explained, was to "shift the focus of any litigation . . . from the directors . . . to the investment adviser."[178] The SEC compared the fiduciary duties encompassed in management fees with the fiduciary duties of an interested corporate transaction where courts examine transactions under "entire fairness."[179] Taking into account the factors described in earlier versions of the legislation,[180] a breach of fiduciary duty "would occur when compensation

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[173]H.R. 14737, § 19.

[174]1969 *House Hearings*, *supra* note 8, at 138-39 (memorandum of SEC). The ICI indicated during the hearings that its agreement was without enthusiasm and reiterated its view that such legislation was unnecessary. *Id.* at 442 (statement of Robert L. Augenblick, President, ICI). The SEC was not pleased with the ICI. *See id.* at 859-60 (statement of Hamer H. Budge, Chairman, SEC). Nevertheless, when given the opportunity to recommend stronger language than agreed to, the Commission remained firm in their support of the fiduciary compromise. *Id.* at 915.

[175]*Id.* at 184-87.

[176]*Id.* at 190 (stating, "the shift in language from 'reasonableness' to 'breach fiduciary duty' is primarily procedural not substantive. It was designed to assure reasonable fees just as the original language of S. 34 was meant to do").

[177]15 U.S.C. § 80a-1(b)(2) (2006); *see also* 1969 *House Hearings*, *supra* note 8, at 189 (quoting 15 U.S.C. § 80a-1(b)(2)).

[178]1969 *House Hearings*, *supra* note 8, at 190. In the SEC's view, the fiduciary standard was "at least as helpful as the reasonableness standard." *Id.* at 177.

[179]*Id.* at 190 (citing Pepper v. Litton, 308 U.S. 295, 311 (1939)).

[180]*See id.* at 188 (stating the pertinent factors in determining the excessiveness of fees are: "[t]he nature, quality and extent of the service to be rendered, the extent to which economies of scale and common management were shared with the fund, comparable charges made by the

to the adviser for his services is excessive in view of the services rendered—where the fund pays what is an unfair fee under the circumstances."[181]

The ICI described both a procedural and substantive shift.[182] In their view, reasonableness might have required the courts "to determine *de novo* . . . whether such compensation was . . . in fact, 'reasonable'" and "to substitute their business judgment for that of the directors of the fund." [183] The fiduciary standard, by contrast, would require the courts to look to the general principles of fiduciary law.[184] In this context, a fiduciary "may not overreach in the amount of his fee even though the other party to the transaction, in full possession of all the facts, does not believe the fee is excessive."[185]

3. 1970 House Report

House Bill 17333 represented an uneasy compromise between the Senate Bill and the Stuckey Bill used in the mark-up session.[186] While the final bill rejected incorporating the presumption of reasonableness proposed in the Stuckey Bill, the House integrated both the bona fide shareholder acting in good faith requirement,[187] and the clear and convincing burden of proof standard.[188]

The House Committee shared many of the same concerns as the Senate.[189] It found that arm's length bargaining was not particularly effective in the fund industry, and "a change in the standard for testing management fees is appropriate and needed."[190] Also, it determined that the revised language "embodies" an agreement between the Commission and

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adviser to others and in the industry generally and the value of all other benefits received").

[181] 1969 *House Hearings*, *supra* note 8, at 190 (memorandum of the SEC).

[182] *See id.* at 441 (letter from Robert L. Augenblick, President, ICI).

[183] *Id.*

[184] *See id.*

[185] 1969 *House Hearings*, supra note 8, at 441. In addition, the ICI indicated that they felt a judicial inquiry "would focus on the substance and quality of the negotiations" between advisers and fund boards. *Id.*

[186] *See* COMM. ON INTERSTATE & FOREIGN COMMERCE, INVESTMENT COMPANY AMENDMENTS ACT OF 1970, H.R. REP. NO. 91-1382, at 201(1970). This language was intended to serve as a clarification rather than "a substantive change" to the Senate Bill. *Id.* at 7.

[187] *Id.* at 7.

[188] *Id.* at 8. The clear and convincing evidence standard was intended to prevent strike suits. *Id.*

[189] *See* S. REP. NO. 90-1351, at 4-6 (1968); S. REP. NO. 91-184. 5-7 (1969). Indeed, much of the language is substantively identical. *Compare* H. REP. NO. 91-1382, at 37-38, *with* S. REP. NO. 91-184, at 6-7.

[190] H.R. REP. NO. 91-1382, at 7.

industry representatives.[191] The Committee also supported the Senate Committee's suggestions regarding the role of director approval in judicial consideration.[192]

4. The Conference Report and Final Passage

House Bill 17333 passed the House with relatively little debate.[193] While certain Committee members declared their intent to remove the clear and convincing standard on the floor,[194] no such amendment occurred.[195] The House requested a conference with the Senate to resolve the disputed issues,[196] and the Senate agreed.[197]

The final bill used the Senate's section 36(b) language—the "SEC-ICI compromise."[198] The bill was passed by both the House[199] and Senate[200] and signed by President Nixon on December 14, 1970.[201]

V. ANALYSIS

From the legislative history, we conclude that Congress had discrete goals in passing section 36(b). First, and perhaps most importantly, the legislation appears in large part to constitute collaboration between the SEC, industry, and Congress. Much of the legislative history reflects initiation by the SEC, and negotiations between the SEC and the ICI. Perhaps because of this, Congress insisted on investigating the level of deliberation between the SEC and the ICI. The legislative history makes

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[191] *Id.* at 3; *see also id.* at 200-01 (detailing separate views of Mr. Dingell, Mr. Adams, and Mr. Eckhardt regarding their objection to section 36(b)). *But see* 116 CONG. REC. 33,285 (1970) (statement of Rep. Thompson) (pointing out that the statement, "[t]he forces of arm's length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy," is misleading).

[192] *See* H.R. REP. NO. 91-1382, at 37; *see also* S. REP. NO. 90-1351, at 14 (recognizing the judiciary will give directors' determinations of reasonableness of fees substantial weight). In addition, the Committee suggested that with respect to fund complexes, the services provided and the fees paid by other funds in the complex may be relevant to the court in determining whether there has been a breach of fiduciary duty. H.R. REP. NO. 91-1382, at 37.

[193] *See* 116 CONG. REC. 33,279-95 (1970).

[194] H.R. REP. NO. 91-1382, at 200-04.

[195] *See* 116 CONG. REC.33,279-95.

[196] *Id.* at 33,296.

[197] *See Id.* at 36,459.

[198] H.R. REP. NO. 91-1631, at 26 (1970).

[199] 116 CONG. REC. 39,345.

[200] *Id.* at 39,125.

[201] *Id.* at 41,623.

clear that section 36(b) is hardly a circumstance of unintended consequences.

Second, Congress appeared to be uniformly convinced that, on the whole, minimal arm's-length bargaining was present in the fund industry. Much of the Wharton Report, which was then independently evaluated in the PPI, concluded that fund directors were in a weakened bargaining position with respect to advisory fees because of the externalized structure of a fund. While Congress was not especially concerned with limiting the profits earned by advisers, legislators questioned the ability of unaffiliated directors to negotiate competitive advisory fees. Merely strengthening the independence requirements of the unaffiliated directors who approved the advisory agreement was not, in and of itself, sufficient to ameliorate the problem.[202] Similarly, increasing the number of unaffiliated directors on the board and requiring unanimous approval by the unaffiliated directors was inadequate to counterbalance the conflict of interest between advisers and boards.[203]

Even so, the legislative history makes clear that neither Congress, nor the Commission, was interested in creating a rate-regulation provision.[204] This position, further buttressed by members of the Wharton working group testifying in support of the congressional bills, identifies the scope of the perceived issue: an industry-wide condition, solvable under a regulated price-fixing mechanism, but insufficient to merit such a comprehensive scheme. Congress was concerned with the impact that these cases would have on court dockets, suggesting the possibility that the cases envisioned could be quite burdensome. When assessing the cost to adjudicate matters under the proposed language, Judge Friendly's remarks also reflect the assumption that litigation might be significant, and the judicial process comprehensive.[205]

What the SEC had hoped would be a persistent, natural pressure—section 15(a)—did not work as Congress envisioned. Based on the legislative history, Congress did not appear to disagree. Instead, their questions focused on the stringency of a new standard by which to adjudicate these matters, for example, the debate between "reasonableness" and "fiduciary duty," as well as the debate between "clear and convincing"

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[202] *See supra* note 136 and accompanying text.

[203] *See supra* notes 154-57 and accompanying text.

[204] *See supra* note 2 and accompanying text.

[205] *See supra* notes 141-43 and accompanying text (analogizing mutual funds to public utilities, railroads, and takings cases). Such industries are heavily regulated with complicated cases.

and "preponderance of the evidence." In all of these deliberations, the standard considered was at least that of the state law corporate waste standard: "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid."[206] In their view, the waste standard shielded advisers from liability when shareholders ratified the agreement and was "unduly restrictive." In that vein, Congress also rejected awarding advisers business judgment deference under section 36(b), further indicating that Congress was contemplating a standard more stringent than that of corporate waste.

Finally, in crafting the fiduciary standard of section 36(b), Congress ultimately inured the understanding between the SEC and the ICI in the term "fiduciary." The reasonableness standard first proposed by the SEC and approved by the Senate created the opportunity for courts to assess the "fairness" of the fee. Industry representatives, however, were strongly opposed to the reasonableness standard, and Congress sought a brokered compromise that resulted in section 36(b). Congress gave legal effect to the understanding reached between the SEC and the ICI when it passed the compromise language without modification. As their respective memoranda and testimony make clear, imposing the fiduciary duty was intended to ensure that an adviser did not overreach[207] in setting its fee.

VI. CONCLUSION

In this light, we conclude that the *Gartenberg* standard is consistent with the legislative history. When assessing the obligations stemming from the use of the term "fiduciary," the factors in *Gartenberg* are consistent with congressional intent. Further, the Second Circuit's rejection of "price" as the principal factor to be considered is consistent with our assessment of the legislative history. As Congress made clear, in making a determination, all factors must be considered.

We note, however, that tension exists in the utilization of the *Gartenberg* factors when applied. One could infer from the legislative history that the factors should be utilized as a list of near-exhaustive elements which indicate the presence of arm's-length bargaining. In this

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[206] *See supra* notes 20-26 and accompanying text (quoting Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962)).

[207] While "overreach" often connotes fraud, the Commission and the ICI did not intend such connotation. As the ICI notes, the overreaching may occur even when the fund—"in full possession of all the facts"—determines the fee to be acceptable. *See supra* note 186 and accompanying text.

regard, one might posit that the manner in which the factors are applied may be inconsistent with the contemplations of Congress.[208]

Another interpretation of the legislative history creates the possibility that *Jones* and *Gartenberg* could be reconciled with each other. If, under prudential considerations, Congress intended the elements to be determinants in assessing a breach of fiduciary duty, then Judge Easterbrook's holding could be seen as an interpretation of one *of several* factors Congress intended for a court to consider.[209]

Whether or not the Court deems the present-day circumstances to be sufficiently similar to the legislative debates, the legislative history makes clear that, on the pivotal question of the meaning of fiduciary duty, Congress expected courts to protect investors by making a substantive inquiry into the advisory fees charged to funds. No principle is clearer than when section 36(b) is understood with section 1(b), which instructs that provisions of the ICA "shall be interpreted . . . so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors."[210]

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[208]The outcome of the most recent excessive fees case, *In re Am. Mut. Funds Fee Litig.*, CV 04-5593 GAF (RNBX), 2009 WL 5215755, at *1 (C.D. Cal. Dec. 28, 2009) can be interpreted to crystallize this inconsistency. The court identifies the discrepancy that exists between the phrase "could not have been the product of arm's-length bargaining," and "is so disproportionately large that it bears no reasonable relationship to the services rendered," when applying the factors. Judge Feess further identifies that "[b]ecause there is no real arm's-length bargaining between funds and their management," a practical difficulty exists in procuring and analyzing whether certain data is consistent with arm's-length bargaining. *Id.* at *2. The court points out that even if such data were available, the ability to obtain a better bargain, under *Gartenberg*, would not prove useful in analyzing whether plaintiffs breached their fiduciary duty under section 36(b). *Id.*

[209]Under prudential considerations, courts often read cases consistently with each other. Here, Easterbrook's rationale would be consistent with the legislative history as describing one of the factors: the fiduciary responsibilities owed by the adviser to the shareholders, specifically, full-disclosure. "A trustee owes an obligation of candor in negotiation, and honesty in performance, but may negotiate in his own interest and accept what the settlor or governance institution agrees to pay." Jones v. Harris Assocs. L.P., 527 F.3d 627, 632 (7th Cir. 2008) (citing RESTATEMENT (SECOND) OF TRUSTS § 242 & cmt. f (1959)). Notably, Congress increased the disclosure obligations the adviser owed to the board in approving the advisory transaction and the advisory contract during the 1970 Amendments. *See supra* note 168 and accompanying text. Based on the legislative history, the actions of the adviser would affect at least one of the factors balanced in the determination of a breach of fiduciary duty.

[210]15 U.S.C. § 80a-1(b) (2006); *see also Jones*, 537 F.3d at 732 (recognizing that "unreasonable compensation can be evidence of a breach of fiduciary duty"). One could read the conclusion to mean, consistent with the *Gartenberg* factors, that such evidence should be considered as one of many factors, and not the single determinant for assessing a breach of fiduciary duty. *See supra* note 26 and accompanying text (opining under state law, in *Saxe*, the possibility that adviser profitability could be determined as excessive "in a legal sense"); *see also* 15 U.S.C. § 80a-1(b)(2) (stating that "the national public interest and the interest of investors are adversely affected . . . when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, [or] investment advisors").