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COMMENTS

The Regulation of Investment Advice: Subscription Advisers and Fiduciary Duties

The subscription adviser, who advises his clients through market services and other publications, plays a significant role in the securities industry. Holding himself out to the public as an expert in investment analysis, he provides individual investors with information and recommendations regarding investment opportunities in the securities market. In addition, and in contrast to the advice given by a broker-dealer pursuant to a selling effort, his advice is represented as being both disinterested and competent. The recent *Report of Special Study of Securities Markets*¹ indicated, however, that the advice offered by subscription advisers frequently does not conform to these purported standards. The *Special Study* noted such abusive practices as the use of highly misleading sales literature designed to excite the investor's desire for quick profits² and the failure to undertake research in conformity to standards professed to the client in support of recommendations to purchase, sell, or hold particular securities.³

To protect the investor relying upon subscription advice, the Securities and Exchange Commission has consistently taken the position that the adviser is a fiduciary to his client and therefore stands in a confidential relationship. In the landmark decision of *SEC v. Capital Gains Research Bureau, Inc.*,⁴ the United States Supreme Court upheld the Commission's interpretation of an adviser's quasi-fiduciary status under the Investment Advisers Act of 1940⁵ by holding fraudulent the failure of a subscription adviser to disclose to his clients his practice of acquiring securities before recommending their purchase, with the intent to resell immediately after the recommendation. It is the purpose of this comment to examine the major problems attending the dissemination of investment advice by subscription advisers, to evaluate those problems in the light of the higher standards of disclosure now judicially required of these advisers, and to suggest solutions to the still unanswered problems presented.

1. *Report of Special Study of Securities Markets of the Securities and Exchange Commission*, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1 (1963) [hereinafter cited as *Special Study*].

2. *Id.* at 367-69.

3. *Id.* at 363-67.

4. 375 U.S. 180 (1963).

5. 54 Stat. 847 (1940), as amended, 15 U.S.C. §§ 80b-1 to -21 (1958), as amended, 15 U.S.C. §§ 80b-2 to -6, -8 to -11, -17, -18a (Supp. V, 1964).

I. THE INVESTMENT ADVISORY INDUSTRY⁶

The general term "investment adviser" is used indiscriminately to describe two classes of advisers:⁷ investment counselors and subscription advisers. The former offer direct personal supervision of a client's investment portfolio. After analyzing an individual client's financial needs, means, and objectives, the investment counselor formulates an investment program for the client's account.⁸ Typically, the investment counselor will enter into an agency agreement with the client wherein the counselor is given either complete or limited discretion to invest and reinvest the client's funds and securities.⁹ Thus, the investment counselor is an actual fiduciary and is accountable for misapplication or commingling of a client's funds or securities. This type of personal management is expensive, however, and is usually practical only for wealthy clients, such as pension and endowment funds, with a minimum of approximately 100,000 dollars to invest.¹⁰ In quality and resources, investment counselors vary from large well-managed firms of over three hundred employees supervising up to three billion dollars in assets to much smaller firms with a minimum of invested capital and trained personnel.¹¹

The second type of investment adviser is the subscription adviser. Comprising an estimated 160 firms,¹² subscription advisers mail to the investor a weekly or biweekly letter summarizing the present condition of, and future prospects for, the economy and the stock market and making a number of specific recommendations regarding particular securities. Fees are modest, ranging from fifty to 150 dollars annually.¹³ The recommendations are classified into

6. The past two decades have seen a steady growth in the number of investment advisers in response to the investment advice requirements of a burgeoning class of individual investors. There are presently 1,613 registered investment advisers compared with 780 in 1945. This number is not as large as the record high of 1,959 individuals and firms registered during the bull market in 1961. 11 SEC ANN. REP. 78 (1945); Hillery, *The Market Letters*, *The Wall Street J.*, Sept. 30, 1964, p. 1, col. 1.

7. Investment Advisers Act § 202(a)(11), 54 Stat. 848 (1940), 15 U.S.C. § 80b-2(a)(11) (1958). The definition of investment adviser also includes those who collect and disseminate financial and statistical data and those who publish financial analyses for the benefit of other investment advisers. These are not specifically discussed herein except to the extent that the regulatory problems presented are applicable to all investment advisers. As used in this comment, the term investment adviser refers to both investment counselors and subscription advisers.

8. See *Special Study* 369-71; Wise, *How To Stay Rich*, *Fortune*, Nov. 1961, p. 132.

9. *Ibid.* Many of the larger investment counseling firms do not have custody of clients' funds or securities, although they may be placed in the possession of a broker authorized to act on the instructions of the account supervisor.

10. *Ibid.*

11. *Id.* at 135.

12. Hillery, *supra* note 6, at 1. A number of investment advisers are both subscription advisers and investment counselors.

13. Some investment advisers, such as United Business Service and Standard and

categories conforming to particular investment objectives, such as income, growth, and speculation; securities are evaluated by reference to criteria the adviser considers important, including estimated future earnings and dividends, market behavior of stock prices, and recommendations of other subscription advisers. The subscription adviser has no knowledge of the financial condition and objectives of the individual investor-subscriber and, thus, must leave with the latter the decision whether to follow the distributed prognostications. In size and resources, subscription advisers similarly vary from large firms, such as Moody's and Standard and Poor's, to small one-man enterprises.¹⁴

A. Federal Regulation

Until its amendment in 1960, the Investment Advisers Act of 1940 was the weakest and least effective of the federal securities acts.¹⁵ Before this amendment, the significant portions of the act required the registration of both subscription advisers and investment counselors with the Commission.¹⁶ The Commission could deny a registration if the investment adviser had willfully made any false or misleading statement in the registration filed with the Commission or had been convicted within the ten years prior to registration of specified felonies or misdemeanors involving securities or misuse of funds, provided the rejection would be in the

Poor's, also provide in their reports information on current market advice of other advisers, as well as industry surveys, bond and currency rates, chart studies, general business conditions, and many other developments relevant to investment analysis. See *Business Week*, Sept. 5, 1959, p. 115; *Fortune*, Oct. 1959, p. 141.

14. *Ibid.*

15. 2 Loss, *SECURITIES REGULATION* 1393 (2d ed. 1961). The other federal securities acts are: the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. §§ 77a-aa (1958), as amended, 15 U.S.C. § 77b(6) (Supp. V, 1964); the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §§ 78a to 78hh-1 (1958), as amended, 15 U.S.C. §§ 78c to 78d-2 (Supp. V, 1964); the Public Utility Holding Company Act of 1935, 48 Stat. 838, 15 U.S.C. §§ 79-79z (1958); the Trust Indenture Act of 1939, 53 Stat. 1149, 15 U.S.C. §§ 77aaa-77bbb (1958), as amended, 15 U.S.C. § 77ddd (Supp. V, 1964); and the Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C. §§ 80a-1 to -52 (1958), as amended, §§ 80a-2, -6, -8, -39 (Supp. V, 1964).

16. Not all persons rendering investment advice are included within the definition of investment adviser under the act. Bankers, lawyers, accountants, brokers, and dealers, for instance, are excluded when their advice is solely incidental to the conduct of their business. The protection of the act is obviated by the fact that the law otherwise imposes a fiduciary duty upon them. Investment Advisers Act § 202(a)(11), 54 Stat. 848 (1940), 15 U.S.C. § 80b-2(a)(11) (1958). Furthermore, certain investment advisers are exempt from the registration requirement of the act. A type of "intrastate" exemption is given to an investment adviser all of whose clients are residents of the state in which his principal place of business is located if he does not furnish advice with respect to any security traded on a national securities exchange. Also exempt are investment advisers who in the preceding twelve months had fewer than fifteen clients and did not hold themselves out to the public as investment advisers. In addition, investment advisers whose only clients are investment and insurance companies need not register. Investment Advisers Act § 203(b), 54 Stat. 850 (1940), 15 U.S.C. § 80b-3(b) (1958).

public interest.¹⁷ In addition, the act proscribed fraud and deceit by an investment adviser in his dealings with a client or prospective client.¹⁸ It also prohibited provisions in investment advisory contracts calling for compensation to the investment adviser on the basis of capital gains from, or appreciation of, securities purchased or permitting assignment of the contract by the investment adviser without the client's consent.¹⁹

The 1960 Amendments included several provisions intended to strengthen the act. First, the Commission was empowered to prescribe the books and records an investment adviser must keep and to inspect them whenever necessary to protect investors; formerly the SEC only had power to require the filing of reports.²⁰ A regulation under this provision requires that investment advisers maintain extensive financial statements and records of all correspondence and transactions involving their clients; these statements and records must be retained for at least five years.²¹ Second, in perhaps the most significant amendment, the Commission was given substantive rule-making power to define "fraudulent, deceptive and manipulative" practices and to prescribe means reasonably designed to prevent them.²² The Commission can thus promulgate standards for investment adviser behavior which it formerly could create only through adjudication, and it has implemented this power by two regulations. The first imposes certain obligations upon an investment counselor having a client's funds and securities in his possession,²³ and the second limits the contents of subscription adviser advertisements.²⁴ The new amendments did not, however, attempt to impose any requirement that the investment adviser possess any particular degree of expertise in investment analysis. Conse-

17. Investment Advisers Act § 203(d), 54 Stat. 851 (1940), 15 U.S.C. § 80b-3(d) (1958).

18. Investment Advisers Act §§ 206(1)-(2), 54 Stat. 852 (1940), 15 U.S.C. §§ 80b-6(1) to (2) (1958).

19. Investment Advisers Act § 205, 54 Stat. 852 (1940), 15 U.S.C. § 80b-5 (1958).

20. Investment Advisers Act § 204, 54 Stat. 852 (1940), 15 U.S.C. § 80b-4 (1958), as amended, 15 U.S.C. § 80b-4 (Supp. V, 1964).

21. 17 C.F.R. § 275.204-2 (1964).

22. Section 206, 54 Stat. 852 (1940), as amended, 15 U.S.C. § 80b-6 (Supp. V, 1964) now provides:

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

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

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

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

23. 17 C.F.R. § 275.206(4)-2 (1964).

24. 17 C.F.R. § 275.206(4)-1 (1964). See notes 86-88 *infra* and accompanying text.

quently, virtually any individual without a criminal record can become a subscription adviser or investment counselor.²⁵

The Investment Advisers Act presently provides the Commission with a number of sanctions against unlawful investment adviser behavior. The SEC may seek a criminal conviction against any investment adviser who willfully violates the act or any rule, regulation, or order promulgated thereunder.²⁶ The criminal sanction, however, is a drastic remedy which the Commission has used sparingly.²⁷ In addition, the Commission is empowered to revoke or to suspend, for a period not exceeding twelve months, an investment adviser's registration for any violation of the act resulting in a criminal conviction or in a permanent or temporary injunction, provided the revocation or suspension is in the public interest.²⁸ Finally, the Commission may enjoin any act or practice of the investment adviser constituting a violation of any provision of the act or any rule or regulation thereunder.²⁹ While no provision of the act expressly imposes civil liability upon investment advisers, and it has not been implied under the antifraud provisions,³⁰ absence of explicit statutory authorization has not precluded federal courts from applying civil liability under the Securities Act and the Exchange Act in cases involving fraudulent transactions in securities.³¹ Moreover, because of its powerful deterrent effect, civil liability has been advocated by both the Commission³² and the *Special Study*. The *Special Study* specifically recommended that civil liability be imposed upon subscription advisers who intentionally or recklessly disseminate fraudulent investment advice.³³ As the Investment Advisers Act becomes a stronger regulatory device, it appears that there will be an increased likelihood of recovery

25. The *Special Study* suggests that this lack of qualification requirements results in substandard personnel in the industry as a whole. See *Special Study* 146-48, 158-59.

26. Investment Advisers Act § 217, 54 Stat. 857 (1940), as amended, 15 U.S.C. § 80b-17 (Supp. V, 1964).

27. The SEC Annual Reports since 1940 indicate that there have been only two criminal convictions under the Investment Advisers Act.

28. Investment Advisers Act § 203(d), 54 Stat. 850 (1940), as amended, 15 U.S.C. § 80b-3(d) (Supp. V, 1964).

29. Investment Advisers Act § 209(e), 54 Stat. 854 (1940), as amended, 15 U.S.C. § 80b-9(e) (Supp. V, 1964).

30. In *Hull v. Newman, Kennedy & Co.*, Civil No. 118-283, S.D.N.Y., a private action for damages was brought under the act and the Commission filed an amicus curiae brief in support of the civil cause of action. However, the question of implied civil liability was never litigated because the case was settled out of court. See 24 SEC ANN. REP. 162 (1959). Nevertheless, the investor would still have a common-law action for deceit.

31. See 2 Loss, *op. cit. supra* note 15, at 1763-97.

32. See case cited note 30 *supra* and text accompanying note 99 *infra*.

33. The *Special Study* 387 suggests that failure of a subscription adviser to consider the most recently filed official disclosure by issuers, when he purports to do so, should be one of the factors considered in determining whether such advice is recklessly disseminated.

under it for an aggrieved investor.³⁴ In addition, the usual requirement of buyer-seller privity in civil actions brought under the Securities Exchange Act may not pose an obstacle to civil liability under section 206 because the latter is not restricted to fraud in connection with the purchase or sale of a security.³⁵ Moreover, some courts have dispensed with the privity limitation when the injured party is among the class of persons who could be expected to rely upon the defendant's misrepresentation.³⁶

B. State Regulation

Although it is a comparatively recent development, state regulation of subscription advisers and investment counselors is growing in importance. In 1958 only sixteen states required the registration of investment advisers,³⁷ but by 1965 the number had risen to twenty-five.³⁸ In ten of the states which have adopted the Uniform Securities Act, the state securities commissioner has the power to deny, suspend, or revoke an application for registration if he feels that the applicant is unqualified on the basis of such factors as training, experience, and knowledge of the securities business, provided the action is in the public interest.³⁹ In twelve other states,⁴⁰

34. *Ibid.*

35. Section 10(b) and Rule 10b-5 of the Exchange Act, 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1958) and 17 C.F.R. § 240.10b-5 (1964), proscribe fraudulent representations in connection with the purchase or sale of any security. Some courts have interpreted this language to require that the injured party actually have purchased from or sold to the defendant. See, e.g., *Joseph v. Farnsworth Radio & Television Corp.*, 99 F. Supp. 701 (S.D.N.Y. 1951), *aff'd mem.*, 198 F.2d 883 (2d Cir. 1952). Section 206 of the Investment Advisers Act, however, simply proscribes fraud by an investment adviser in interstate commerce. Hence, an injured investor, while not a client of an investment adviser, could conceivably recover damages where he reasonably relied on the adviser's fraudulent advice.

36. E.g., *Cochran v. Channing Corp.*, 211 F. Supp. 239 (S.D.N.Y. 1962). See also *Cady, Roberts & Co.*, 40 S.E.C. 907 (1961). Arguably, the fiduciary relationship of an investment counselor with his client fulfills any privity requirement. The investment counselor may be held on the theory that he should be held strictly accountable for any breach of the duty of complete disclosure owed to each client. In the case of the subscription adviser, however, there is the added consideration that the same advice is published and mailed to a large number of investors with the consequence that the subscription adviser may be subjected to unlimited liability. It may be that the contract for investment advice would suffice to establish privity. In such situations, however, the courts have been reluctant to impose civil liability for mere negligence. See *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

37. See Loss & Cowett, *BLUE SKY LAW* 20-21 (1958).

38. Alaska, Arkansas, California, Connecticut, Florida, Illinois, Kentucky, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, and Wisconsin.

39. UNIFORM SECURITIES ACT § 204(a)(1) & (a)(2)(I). The states having adopted this provision of the act are Alaska, Arkansas, Kentucky, Michigan, Montana, New Jersey, Oklahoma, South Carolina, Utah, and Washington.

40. California, Connecticut, Florida, Illinois, Minnesota, New Mexico, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, and Wisconsin.

registration is similarly predicated on passing an examination or on some other showing that the applicant is qualified to conduct an investment advisory business. Hence, unlike the Investment Advisers Act, some state laws do impose entrance requirements; no accurate data are available, however, concerning the stringency with which the standards are set and enforced.

The Uniform Securities Act,⁴¹ adopted in 1956 by the National Conference of Commissioners on Uniform State Laws, represents the most comprehensive attempt to regulate subscription advisers and investment counselors on the state level. Many of its provisions, such as the antifraud provision⁴² and the requirement that an investment advisory contract may neither be assigned without the client's consent⁴³ nor based upon appreciation of the securities purchased,⁴⁴ are modeled after the Investment Advisers Act. However, the Uniform Securities Act contains a number of significant innovations not found in the Investment Advisers Act. In addition to empowering the state commissioner to control the qualifications of investment advisers,⁴⁵ the Uniform Act permits the state commissioner to establish minimum capitalization requirements for investment advisers in order to protect against insolvency.⁴⁶ This latter provision is particularly important as applied to investment counselors, who may have funds and securities of their clients in custody. The Uniform Act also requires that a portion of the investment advisory contract be in writing.⁴⁷ Furthermore, while the Uniform Securities Act provides that no civil liability may be implied from an investment adviser's violation of the antifraud provisions, it permits the commissioner to require the posting of a bond by advisers whose net capital does not exceed 25,000 dollars and to determine who may receive its benefits.⁴⁸ Hence, in limited circumstances, clients injured by the machinations of an investment adviser may have an available remedy, although the adviser is not subjected to personal liability.

C. *Self-Regulation*

Self-regulation does not yet play an important role in the control of subscription adviser and investment counselor conduct. At present there is one private organization composed solely of the larger investment counselor firms. In its charter and bylaws, the

41. UNIFORM SECURITIES ACT §§ 101-419.

42. UNIFORM SECURITIES ACT § 102(a).

43. UNIFORM SECURITIES ACT § 102(b)(2).

44. UNIFORM SECURITIES ACT § 102(b)(1).

45. See note 34 *supra* and accompanying text.

46. UNIFORM SECURITIES ACT § 202(d).

47. UNIFORM SECURITIES ACT § 102(b).

48. UNIFORM SECURITIES ACT §§ 410(h), 202(e) & comment.

Investment Counsel Association of America espouses high principles of professional conduct.⁴⁹ However, limited size and lack of effective sanctions due to the purely private and voluntary character of the organization have caused its influence upon the industry as a whole to be minimal.⁵⁰ The Institute of Chartered Financial Analysts was formed in 1959 to promote the professional recognition of financial analysts, including investment advisers, broker-dealers, and employees in the research departments of those firms, banks, insurance companies, or investment companies.⁵¹ The Institute's objective is to foster higher educational standards in the field of financial analysis by conducting examinations designed to test individual competence and skill. An individual who meets the requirements is designated a "chartered financial analyst." In the long run, the Institute may contribute substantially to raising the standards of the advisory industry. At present, however, it is in its infancy and unable to exert any appreciable sanctions on the behavior of subscription advisers or investment counselors.⁵²

The *Special Study* recommended that the advisory industry be organized into an official self-regulatory body, comparable to the National Association of Securities Dealers for broker-dealers, which, under the supervision of the Commission, would have the authority to adopt and enforce substantive rules regulating its membership.⁵³ This recommendation is a sound and constructive one which should be implemented. Organization of the industry into one association or into separate associations for subscription advisers and investment counselors could help alleviate the Commission's task of developing and enforcing needed controls and regulations for both types of investment advisers.⁵⁴ At the same time, a self-regulatory body would provide the industry with a convenient forum to define and express its own consensus on issues affecting it. However, as in the case of the NASD,⁵⁵ legislative direction will probably be

49. *Special Study* 149-50.

50. *Ibid.*

51. *Ibid.*

52. *Ibid.*

53. *Id.* at 159, 387.

54. An example of a standard developed by a self-regulatory body and now enforced by the Commission is Article III, § 2 of the Rules of Fair Practice, in NATIONAL ASS'N OF SECURITIES DEALERS, MANUAL D-1: "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer as to his other security holdings and as to his financial situation and needs." Under this so-called suitability rule, the broker-dealer or his salesman has an obligation to ascertain the financial responsibility and objectives of the prospective purchaser and to make a recommendation which serves his best interests; the rule constitutes a very high standard of professional conduct. The Commission has not formally adopted this rule but has utilized it in a few "boiler-room" cases. See *e.g.*, *MacRobins & Co.*, SEC Securities Exchange Act Release No. 6846, July 11, 1962, *aff'd sub nom.* *Berko v. SEC*, 316 F.2d 137 (2d Cir. 1963); *Best Sec., Inc.*, 39 S.E.C. 931 (1960).

55. The NASD is registered with the SEC pursuant to Securities Exchange Act

necessary before self-regulation can be achieved among investment advisers.

II. THE SUBSCRIPTION ADVISER AS A FIDUCIARY

The Supreme Court's initial consideration of the Investment Advisers Act in the *Capital Gains* case is highly significant because of the express development and adoption of a fiduciary standard of conduct for subscription advisers and investment counselors. In *Capital Gains*, defendants Capital Gains Research Bureau and its owner Harry Schwarzmann, registered subscription advisers, published the Capital Gains Report, which was mailed monthly to approximately five thousand subscribers at an annual subscription rate of eighteen dollars.⁵⁶ The report, which might be distributed on a trial basis to an additional 100,000 investors, gave advice pertaining to the achievement of long-term capital gains through the selection of undervalued high-grade securities for its clients. On six different occasions between March 15 and November 7, 1960, the defendants purchased shares of a particular security before recommending it in their report as a long-term investment. In each instance defendants sold their shares at a profit a few days after the purchase and recommendation, when the volume of trading and the price of the security had risen, without disclosing either transaction to their clients.⁵⁷ The Commission sought an injunction to compel the defendants to disclose this practice, known as scalping, alleging that, since defendants were fiduciaries owing a duty of complete disclosure to their clients, scalping operated as a fraud and deceit within the meaning of sections 206(1) and (2) of the act.⁵⁸ The Court of Appeals for the Second Circuit denied the injunction, holding that, even assuming the defendants were fiduciaries, section 206 incorporated the terms fraud and deceit in the traditional common-law sense⁵⁹ requiring proof by the Commission of

§ 15A, 52 Stat. 1070 (1938), 15 U.S.C. § 78o-3(a) (1958). It was the main purpose of the Maloney Act of 1938, which added § 15A to the Exchange Act, to provide for a self-regulatory association in the over-the-counter market. See 2 Loss, *op. cit. supra* note 15, at 1359-64.

56. 375 U.S. 180, 183 (1963).

57. On another occasion defendants sold short a security before recommending its sale and then covered a few days after distribution of the report, when the price of the security had declined. *Id.* at 202.

58. Section 206(4), proscribing any fraudulent, deceptive, or manipulative practice, was enacted subsequent to the majority of violations by defendants and was, therefore, not considered by the Court in the determination of this case. The Senate Report noted that § 206(4) "would enable the Commission to deal adequately with such problems as a material adverse interest in securities which the adviser is recommending to his clients." S. REP. NO. 1760, 86th Cong., 2d Sess. 8 (1960).

59. At common law the elements of deceit were (1) a false representation (2) of a material fact (3) made with knowledge or belief that the representation is false and (4) for the purpose of inducing another to rely thereon; there must be (5) justifiable

the defendants' intent to injure their clients and of a subsequent actual injury.⁶⁰ The Supreme Court reversed and granted the injunction, holding that defendants, as investment advisers, entered into a relationship of trust and confidence with their clients which subjected them to the general duties of acting in utmost good faith, remaining impartial and objective, avoiding situations in which a possible conflict of interest might arise, and disclosing all facts essential to an intelligent decision by the client. Thus, since defendants' practice of scalping created a duality of interest which impaired their capacity to render impartial and objective advice, failure to disclose their personal interest violated the proscriptions of the act.⁶¹ The Court analyzed the duty of the investment adviser as applied to defendants thus:

"An adviser who, like respondents, secretly trades on the market effect of his own recommendation may be motivated—consciously or unconsciously—to recommend a given security not because of its potential for long-run price increase (which would profit the client), but because of its potential for short-run price increase in response to anticipated activity from the recommendation (which would profit the adviser).

"An investor seeking the advice of a registered investment adviser must, if the legislative purpose is to be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving

reliance (6) resulting in injury. However, the evolution of common-law deceit has witnessed a subsequent liberalization of its six technical elements. A false representation has been held to include a half-truth; a material fact to include an opinion or a promise; and recklessness or negligence to constitute sufficient intent. In addition, the courts have developed a number of exceptions to the common-law rule that an action for deceit could not lie for mere nondisclosure. For example, it has been held to be fraudulent conduct when one who has made statements fails to disclose enough information to prevent his words from becoming misleading. Also, it has been recognized that when one stands in a confidential or fiduciary relation to another, as does an investment adviser to his client, he has an affirmative duty to disclose all material facts. Simultaneously with the development of the common law, equity courts also fashioned relief for fraud, typically in the form of rescission, reformation, or restitution. Since equity was concerned primarily with restoring the parties to the status quo and not in rendering damages, the common-law elements of fraud, such as intent to injure and actual injury, were not required. See HANBURY, *MODERN EQUITY* 643 (8th ed. 1962); PROSSER, *TORTS* 699-753 (3d ed. 1964).

60. In *SEC v. Capital Gains Research Bureau, Inc.*, 191 F. Supp. 897 (S.D.N.Y. 1961), the Commission's request for a preliminary injunction was denied on the ground that there had been no showing of intent to injure or actual injury. A panel of the court of appeals affirmed the district court with one judge dissenting. 300 F.2d 745 (2d Cir. 1961). On a rehearing en banc the court of appeals reaffirmed by a 5-to-4 vote. 306 F.2d 606 (2d Cir. 1962).

61. Although accepting a broad construction of the antifraud provisions of the Investment Advisers Act, the Court noted that its holding that the Commission may seek an injunction for fraud without proving as elements either scienter or injury was consistent with the practice of equity courts. 375 U.S. 180, 192-95 (1963). Cf. note 59 *supra*.

'two masters' or only one, 'especially . . . if one of the masters happens to be economic self-interest.'"⁶²

A. *The Scope of Capital Gains*

The holding of *Capital Gains* raises several questions as to the application of a fiduciary duty to investment advisers. It should be determined whether the Court intended to adopt a high standard of conduct for both subscription advisers and investment counselors, and, if the Court did so intend, whether that result is desirable. Admitting the efficacy of the Court's holding insofar as it simply recognizes an investment adviser's fiduciary duty when a conflict of interest exists, it should further be determined to what degree the Court, in other circumstances, will adhere to this 'same high standard on the part of either the subscription adviser or investment counselor.

In *Capital Gains* the Court formulated a fiduciary standard of professional responsibility for investment counselors as well as subscription advisers on the basis of the legislative intent underlying the Investment Advisers Act. Relying upon the findings of the Commission's 1938 study on the advisory industry⁶³ and upon the testimony of investment advisers before Congress, the Court concluded that "the Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship.'"⁶⁴ The Court noted, however, that virtually all of this evidence and testimony either concerned, or was elicited from, investment counselors. Included in the evidence were the canons of ethics of a leading investment counselor organization; the Court suggested that the canons were representative of the high standards espoused by the industry.⁶⁵ In imposing a fiduciary obligation upon subscription advisers, therefore, the Court was applying to the subscription adviser the high standard which it recognized as already existent for investment counselors.

While it seems clear that the Court has adopted the same professional standard for both types of investment advisers, there are a number of important considerations which militate against such a result. For example, the relationship between the subscription adviser and his client, in contrast to that between the investment counselor and his client, is an impersonal one in which the adviser

62. 375 U.S. at 196.

63. H.R. Doc. No. 477, 76th Cong., 2d Sess. (1939).

64. 375 U.S. 180, 191 (1963).

65. "While the study concentrated on investment advisory services which provide personalized counseling to investors, . . . the Senate Committee on Banking and Currency did receive communications from publishers of investment advisory services, . . . and the Act specifically covers 'any person who, for compensation, engages in the business of advising others, either directly or through publication or writings. . . .'" *Id.* at 187 n.15.

typically has no knowledge of the financial resources and objectives of his client, while the client, in turn, has little awareness of the qualifications and practices of the adviser.⁶⁶ Therefore, it is probable that the client of the subscription adviser does not expect as confidential a relationship as does the client of the investment counselor. In addition, the high rate of turnover among the subscription adviser's clients means that his livelihood is predicated upon his ability to attract and maintain a large number of subscribers. Thus, he is continually engaged in an extensive selling effort,⁶⁷ making application of a fiduciary standard of conduct to his activities somewhat unrealistic. Moreover, the *Special Study* revealed that many subscription advisers do not regard themselves as fiduciaries.⁶⁸

Notwithstanding the disparity in the nature of the services performed by subscription advisers and investment counselors, the imposition of a similar fiduciary standard upon each would be desirable; the importance to the public of thorough and accurate analyses and opinions as to the investment value of securities far outweighs the burdens which would be placed upon subscription advisers. As Congress stated in enacting the Investment Advisers Act, the integrity of financial analyses and opinions, whether disseminated by investment counselors or by subscription advisers, underlies the health of the entire securities industry.⁶⁹ Furthermore, subscription advisers generally hold themselves out to the public as investment analysis experts whose advice meets certain minimum standards of reliability and competence and is primarily for the benefit of the client. The expectation is thus created by the adviser that a professional responsibility, if not a confidential relationship, exists. Moreover, if subscription advisers intend to seek and maintain recognition as a profession, they should be held to the same high standards as are members of other professions.

Although the Court in *Capital Gains* did not expressly indicate whether it intended to restrict application of an investment adviser's fiduciary duty to situations where a conflict of interest exists, the broad language of the opinion suggests that the entire adviser-client relationship was viewed as confidential.⁷⁰ Thus, while the Court recognized differences between the types of services offered by subscription advisers and investment counselors,⁷¹ it did not draw any distinctions, such as the more impersonal character of the

66. See text accompanying notes 7-14 *supra*.

67. *Special Study* 367-69. Investment counselor advertising is very discreetly conducted, in contrast to that of subscription advisers.

68. *Id.* at 360.

69. Investment Advisers Act § 201, 54 Stat. 847 (1940), 15 U.S.C. § 80b-1 (1958).

70. See note 64 *supra* and accompanying text.

71. See note 65 *supra* and accompanying text.

relationship between the subscription adviser and his client, which would make imposition of a fiduciary duty upon subscription advisers inapposite. Moreover, in prior judicial and Commission decisions a fiduciary relationship between the investment adviser and his client has been recognized in a number of other situations. In *Hughes v. SEC*,⁷² the Commission revoked the license of a broker-dealer who was also a registered investment counselor. The court of appeals affirmed the revocation, holding that the defendant's practice of omitting to disclose both the best price at which she could purchase securities in the open market and the price she actually charged her clients violated her fiduciary duty. Similarly, in a release which set forth the degree of disclosure required under section 206 when an investment counselor also acts as a broker-dealer, the Commission stated that the broker-dealer-adviser is a fiduciary and must serve the best interests of his client with undivided loyalty.⁷³ The Commission has also held that a subscription adviser is "a fiduciary and, as such, owes a duty of fair and impartial advice to his clients."⁷⁴ The adviser in that instance was avidly recommending the purchase of a stock without revealing that he was being subsidized by the issuer.

B. *The Regulation of Subscription Advisers*

As the findings of the *Special Study* revealed, the need for the Commission to develop specific standards of conduct is acute among subscription advisers;⁷⁵ this problem stems in large part from the relative ease with which unqualified individuals may develop a clientele in this field,⁷⁶ and from the lack of effective regulation until 1960 of subscription advisers by the Commission.⁷⁷ The characterization of subscription advisers as fiduciaries in *Capital Gains* should greatly facilitate the Commission's regulation of their conduct⁷⁸ by permitting the SEC to impose upon the investment adviser the common-law duties inherent in a confidential relationship. However, these duties are very broad and general and require refinement by the Commission into more carefully delineated stand-

72. 174 F.2d 969 (D.C. Cir. 1949).

73. SEC, Investment Advisers Act Release No. 40, Feb. 5, 1945.

74. Frank Payson Todd, 40 S.E.C. 303, 307 (1960).

75. See *Special Study* 363-69. There is, of course, also a need to develop standards of conduct for investment counselors. The more confidential nature of the investment counselor-client relationship increases the opportunity for injury to the client.

76. *Id.* at 146-48.

77. See Comment, *Investment Advice*, 62 MICH. L. REV. 716, 718 (1964).

78. The broker-dealer has been placed under a similar fiduciary duty in certain situations by lower court and Commission decisions. See *Norris & Hirshberg, Inc. v. SEC*, 177 F.2d 228 (D.C. Cir. 1949); *Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944); *Archer v. SEC*, 133 F.2d 795 (8th Cir.), *cert. denied*, 319 U.S. 767 (1943).

ards, which the Commission is attempting to establish through an increasing number of decisions.⁷⁹ In *Capital Gains* the Court applied to a subscription adviser's undisclosed trading in recommended securities the maxim that a fiduciary must avoid conflicts of interest and held that the adviser must disclose any holdings of a security which the adviser intends to sell shortly after recommending its purchase to his clients.⁸⁰ Similarly, the adviser must disclose his short interest in any security recommended for sale if he intends to cover his position shortly after the distribution of his market letter.⁸¹ Beyond these two situations, however, the scope of the requirement that an adviser disclose his trading activities in recommended securities is unclear. If an adviser purchases a security a year or two prior to, and sells shortly after, his recommendation, it is fairly clear that the conflict of interest is sufficient to warrant disclosure. If, on the other hand, an adviser acquires a stock shortly before recommending its purchase but retains it for a substantial period of time, for example, six months after the recommendation, arguably no conflict of interest would exist because the adviser would not benefit from the short-term appreciation effects of his advice.⁸² Disclosure may nevertheless still be desirable since the danger is not only the benefit the adviser may derive from a breach of his fiduciary duty, but also his lack of impartiality when giving advice.

While the *Special Study* noted a number of specific abusive practices by subscription advisers, two areas are particularly in need of regulatory standards. The first is subscription advisers' use of advertising. Because of the high rate of turn-over in subscribers,⁸³ which, in turn, is appreciably affected by the level of investor interest in the market,⁸⁴ subscription advisers must spend a sizeable amount for advertising to maintain and augment circulation. These advertisements are either mailed directly to prospective clients,⁸⁵

79. See text accompanying notes 94-97 *infra*.

80. The writer conducted his own survey of fifteen subscription adviser publications, primarily through trial subscriptions. The advisers selected were the larger and better known advisory services. In the course of the survey no disclosure of trading in recommended securities was discovered. A few advisers, however, stated specifically that all trading in recommended securities which might result in a conflict of interest on the part of officers, directors, and employees was prohibited.

81. See note 57 *supra*.

82. Studies of the effect of recommendations by investment advisers on stock market prices indicate that only a short-term influence is discernible. See Ferber, *Short-Run Effects of Stock Market Services on Stock Prices*, 13 J. FINANCE 80 (1958).

83. See note 67 *supra*.

84. "The stock services ebb and flow in demand. In bear markets, investors usually shun them. But in bull markets, the services flourish, . . . partly because investors look to the services' sometimes sophisticated analytical staffs to pick bargains in a market that's risen so high that bargains are harder and harder to find." *Business Week*, Sept. 5, 1959, p. 115.

85. Typically, once a prospective client has indicated interest in subscribing to a

published in the financial section of newspapers or business magazines, or disseminated on radio and television. Like the broker-dealer, therefore, the adviser is engaged in a selling effort not only to extol the merits of his own prognostications but also initially to persuade the prospective subscriber to invest in securities. While many subscription advisers pursue restrained advertising practices, some are given to misleading and overzealous representations which refer to particular securities or groups of securities as having appreciated in the past or as being certain to appreciate significantly in the future, or which make unjustifiably bullish projections for future market behavior.

To protect the prospective client who might rely upon these representations, the Commission promulgated regulations in 1961 proscribing any third-party testimonial praising the adviser's organization and any direct or indirect references to specific past recommendations made by the adviser which would have been profitable to a client.⁸⁶ The adviser is permitted, however, to list all recommendations made within the past year if the list contains the name of the security recommended, the date and nature of the recommendation, the price at which the recommendation was to be acted upon, and the price of the security as of the most recent practicable date.⁸⁷ The possible effect of this information is somewhat mitigated because the adviser must include on the first page of his letter a cautionary legend stating that "it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list."⁸⁸ However, while these new regulations may have curtailed some abusive practices, exaggerated and suggestive advertisements are still common.⁸⁹

To combat further abuses in the use of advertising, the Commission could adopt two approaches. First, it could promulgate more regulations defining specific fraudulent and misleading advertising practices. Such practices should include advertisements

particular subscription adviser, for example by obtaining a trial subscription, he receives weekly letters for a period of months beseeching him to acquire an annual subscription. Usually these letters will offer some inducement such as thirteen months service at the annual subscription rate or a free statistical handbook on securities.

86. 17 C.F.R. § 275.206(4)-1 (1964). The regulations also prohibit any claim that a chart or graph will predict the future of a stock or will aid in prediction, unless the limitations of that predictive method are set forth. *Ibid.*

87. *Ibid.*

88. *Ibid.*

89. The writer has noted that many of the same misleading advertising practices discovered by the *Special Study* are prevalent today. See *Special Study* 367-69. For example, the financial sections of many newspapers contain offers by subscription advisers to provide lists of "greatly undervalued" bonus stocks and names of low-priced stocks ready for a fast rise in price.

which purport to offer to new subscribers a list of particular securities claimed by the adviser to be certain to appreciate in the near future, for as a fiduciary the adviser has a duty to emphasize to the client the risks attending reliance upon such a list. Similarly, an advertisement claiming by reference to past predictions of the market's movements that the adviser's predictions are virtually infallible should be proscribed, since it may mislead the potential investor into believing that the adviser can predict all future market movements in sufficient time to be advantageous to the investor. It seems inconsistent for the Commission to permit this type of representation while prohibiting an adviser from listing specific securities he has recommended in the past. The major disadvantage to this approach is the difficulty of definition, which is reflected in the reluctance of the Commission to define misleading and fraudulent practices other than on an *ad hoc* basis.⁹⁰

Second, the Commission could require that all subscription advisers' advertisements contain cautionary legends similar to those now required when the adviser lists recommendations made within the past year.⁹¹ These warnings, if printed conspicuously on an advertisement, could have the salutary effect of preventing the adviser from presenting to the prospective client a picture of safety and assured success in the securities market and would not impose upon the Commission the burden of having to define, a priori, fraudulent and misleading advertising practices. For example, if the adviser represents that an investment in insurance stocks ten years ago would have quadrupled and that the same appreciation may occur in the coming decade, he should be required to include a cautionary legend stating that past behavior of particular groups of securities is not an accurate or reliable indication of their future performance.

The second area of subscription adviser conduct in need of regulation is that of research practices. The client who relies upon the recommendations contained in a market letter does so on the understanding that the adviser has performed a thorough and competent analysis of each security. Unfortunately, however, as the *Special Study* noted, the research practices of advisers may vary substantially not only among different advisers but even within market reports published by the same adviser.⁹² The pressures of

90. A self-regulatory body could be very instrumental in promulgating and enforcing such restrictions. For example, in the case of broker-dealers the New York Stock Exchange provides that all member firms' sales literature must be governed by the principle of "truthfulness and good taste." The NASD also applies specific standards and requires each member to maintain a separate file of all advertising and sales literature for a period of two years from the date of use. *Id.* at 376-87.

91. See text accompanying note 88 *supra*.

92. *Special Study* 363-67.

competition and time, as well as the lack of an adequate staff, have led some subscription advisers to make only superficial analyses of recommended securities, to circulate unverified rumors or tips received from corporate officers or publicity agents, and to publish another service's recommendations while representing that they have conducted their own independent research and appraisal.⁹³ While the Commission has not promulgated any regulations to combat inadequate research practices, *ad hoc* decisions of the Commission under the antifraud provisions of the Investment Advisers Act have provided some standards of disclosure to guide subscription advisers in the preparation and dissemination of investment advice. These include prohibition of a subscription adviser's making fraudulent representations such as a statement that the adviser's recommendation is based on an independent and impartial analysis when in fact he is being paid to recommend the security,⁹⁴ or an assertion that the adviser's information emanates from reliable sources when the adviser is actually publishing unverified tips.⁹⁵ Also, the adviser is proscribed from making representations which lack an adequate factual basis and are thus misleading, such as overoptimistic projections of a company's future profits.⁹⁶ The standards articulated by the Commission, however, have not proved adequate in view of the findings of the *Special Study*.⁹⁷ In part, this inadequacy stems from the reluctance of the Commission to provide comprehensive regulation; the result is that many of its own standards, such as the requirement of an adequate basis for a representation, remain undefined, and some aspects of subscription adviser conduct, such as the affirmative duty of disclosure based upon the fiduciary relationship, remain unregulated.

To protect the investor who relies upon the express or implied representations of the subscription adviser that he has employed research practices which meet certain minimum standards of competence and performance, the Commission could take three approaches. First, the subscription adviser could be required to disclose the source of all material information contained in his recommendations. Whether the adviser has relied upon an analysis of statistics compiled by Moody's or a phone conversation with an officer of the corporation, the adviser's source of information is important to the client in his own assessment of the recommendation. In this respect the Commission has permitted subscription advisers to use statements at the end of their recommendations that

93. *Ibid.*

94. Frank Payson Todd, 40 S.E.C. 303 (1960).

95. *In re* Robbin, d/b/a the Profitmaker, Investment Advisers Act Release No. 149, Sept. 10, 1963.

96. Security Forecaster Co., 39 S.E.C. 188 (1959).

97. *Special Study* 363-67.

their information is obtained from reliable sources and is believed to be reasonable, although accuracy is not guaranteed,⁹⁸ so long as the statement does not mislead a prospective investor into believing that he has waived any right or action against the adviser for fraud under section 206.⁹⁹ The justification for the use of these disclaimers in lieu of specific disclosures of sources has been, in part, that advisers could not obtain "inside information" if its source were disclosed. However, if by "inside information" is meant important information, not available to the public, derived from the officers, directors, or controlling interests of a corporation, this type of disclosure has consistently been proscribed in other contexts. Section 16(b) of the Securities Exchange Act allows recovery by the corporation of insiders' short-swing profits;¹⁰⁰ and the antifraud provisions support an SEC injunctive action against the insider.¹⁰¹ It would seem, therefore, that the Investment Advisers Act's regulatory scheme should not be influenced by this argument. The importance to the client of knowing the source of the adviser's information outweighs the hardship imposed upon the adviser. Moreover, it is suspected that "inside information" is often no more than a rumor; disclaimers permit the adviser who has performed no independent analysis to obscure that fact.

Second, the Commission could require the adviser to disclose enough facts and informed opinions to constitute a reasonable basis for his recommendations. The adviser should not be permitted merely to recommend the purchase or sale of a security without some adequate basis.¹⁰² For example, if an adviser believes

98. See *id.* at 344-50. While hedge clauses are more prevalent in published broker-dealer investment advice, the writer found the following hedge clauses in use by subscription advisers: "the information presented has been obtained from sources believed to be reliable, but its accuracy—and that of the opinions based thereon—is not guaranteed;" "the factual information contained herein has been derived from sources which are believed to be accurate, but is not guaranteed. Opinions and forecasts are based upon careful analyses, but are also not guaranteed and are subject to change without notice."

99. Investment Advisers Act Release No. 58, April 10, 1952.

100. 48 Stat. 896 (1934), 15 U.S.C. § 78p (1958). Section 16(b) requires insiders to disclose all transactions in stock of their own companies; it further attempts to deter the use of inside information by preventing insiders from turning over their stocks within a six-month period. See Painter, *The Evolving Role of Section 16(b)*, 62 MICH. L. REV. 649 (1964).

101. See Cady, Roberts & Co., 40 S.E.C. 907 (1961). The anti-fraud provisions are Securities Act § 17(a), 48 Stat. 84 (1933), as amended, 15 U.S.C. § 77q(a) (1958), Securities Exchange Act § 10(b), 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1958); Securities Exchange Act § 15(c)(1), 52 Stat. 1075 (1938), 15 U.S.C. § 78o(c)(1) (1958); Rule 10b-5, 17 C.F.R. § 240.10b-5 (1964), and Rule 15c1-2, 17 C.F.R. 240.15c1-2 (1964). See Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 632-35 (1964).

102. This approach differs significantly from the adequate basis test utilized by the Commission with respect to misleading representations. Under the former approach, the adviser would have an affirmative duty to disclose to the client reasonable facts to support his recommendation rather than merely being required to have an adequate

that a stock will appreciate in the short-run because mutual funds are going to buy in, this reason should be disclosed in place of an unsupported recommendation to purchase for short-term appreciation. While defining and enforcing the requirement of a reasonable basis might impose a difficult burden upon the Commission, that function could be delegated to a self-regulatory body.

Finally, the Commission could ask Congress to attack the problem of inadequate research practices by imposing some minimum standards of training and experience in investment analysis for subscription advisers. If, as the Investment Adviser Act states, there does exist a great public interest in accurate and competent investment information, it seems unjustifiable to permit unqualified individuals to disseminate investment advice. Requiring training or experience will discriminate against the adviser who desires to base his recommendations upon some unconventional method; however, if there is to be effective regulation Congress must make a value judgment as to the permissible scope of investment analysis. Although a standard of minimum training and experience cannot ensure ethical behavior on the part of subscription advisers, it will increase the likelihood that they can perform the type of financial analysis which the investing public expects. Moreover, both training and experience can serve as a means of informing subscription advisers of their responsibilities and duties to their client.

As a final addition to the foregoing proposed means of regulating abusive advertising and research practices, the Commission could require the subscription adviser to forward a prospectus with advertisements sent by mail, or upon request if the advertisement is published or broadcast.¹⁰³ The prospectus, though short and informal, should contain the following information: (1) whether the subscription adviser is organized as a corporation, partnership or individual proprietorship; (2) other lines of business in which the adviser is engaged; (3) the names, addresses and financial interests of each of the controlling interests and officers of the advisory firm; (4) a description of the educational background and the experience in securities analysis of the principals of the firm and of those employees engaged in investment analysis; (5) a statement of the theory and method of forecasting employed by the advisory firm; and (6) a recent balance sheet and income statement.¹⁰⁴ The purpose of the

basis to make a representation without being required to disclose it. See text accompanying note 96 *supra*.

103. Cf. Securities Act § 2(10), 48 Stat. 74 (1933), as amended, 15 U.S.C. § 77b(10) (1958) ("tombstone advertisements"), and Rule 134, 17 C.F.R. § 230.134 (1964) ("identifying statement"). Presently some subscription advisers do forward to prospective clients some information depicting the nature of the services offered and the research practices employed. *E.g.*, *American Investors Service*; *Moody's Investor Service*.

104. Much of this information is already required by registration form ADV which the adviser must file with the Commission. 3 CCH FED. SEC. L. REP. ¶ 57101-05 (1965).

prospectus would be to provide the potential client with sufficient information to make an informed and intelligent evaluation and choice of a subscription adviser. Too often, investors have no accurate or dependable information concerning the adviser and are dependent upon the few representations contained in advertising materials and in market reports received on a trial subscription basis. Furthermore, the disclosure contained in the suggested prospectus would provide the investor with an additional safeguard against misleading or fraudulent advertising and inadequate research practices by apprising him of the adviser's qualifications and method of research.

III. CONCLUSION

The *Special Study* brought to public attention a number of problems existing among subscription advisers. The solution to most of these problems, such as the proper use of advertising and the disclosure of research practices, may be found in clarification of the duties and obligations of a subscription adviser toward his client. The Supreme Court in *Capital Gains* provided a partial answer viewing a subscription adviser as a fiduciary, subject to a duty of good faith and full disclosure. What is presently needed is a translation of this fiduciary concept into specific standards and criteria to guide the conduct and practices of the adviser. While the Commission has begun to undertake the task through the use of its adjudicatory and rule-making powers, its progress to date has been slow. Therefore, the Commission should place a renewed emphasis upon the regulation of subscription advisers, possibly along some of the lines suggested above. In addition, the responsibility for reform should be shared both by the subscription advisers and by the states. The advisers should be organized into a self-regulatory body empowered to develop and enforce regulatory standards upon its members. The states, on the other hand, should not only enact comprehensive legislation, comparable to the Uniform Securities Act, but should also provide stringent enforcement. By such steps the public interest in competent and accurate financial advice could be protected and promoted to a greater extent than at present.

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