

# MUTUAL FUND PROXY VOTING AND THE IMPORTANCE OF FIDUCIARY FLEXIBILITY

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## INTRODUCTION

For almost a century, a central problem (perhaps *the* central problem) of corporate law has been the separation of ownership from control and the agency costs it generates.<sup>1</sup> Although it was not until 1976 that Michael Jensen and William Meckling first formalized a theory of agency costs,<sup>2</sup> the structural feature responsible for the corporate agency problem was the subject of a well-known corporate law text first published in 1933. In *The Modern Corporation and Private Property*, Alfred Berle and Gardiner Means explain:

[I]t is no longer the individual himself who uses his wealth. Those in control of that wealth, and therefore in a position to secure industrial efficiency and produce profits, are no longer, as owners, entitled to the bulk of such profits. Those who control the destinies of the typical modern corporation own so insignificant a fraction of the company's stock that the returns from running the corporation profitably accrue to them in only a very minor degree. The stockholders, on the other hand, to whom the profits of the corporation go, cannot be motivated by those profits to a more efficient use of the property, since they have surrendered all disposi-

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<sup>1</sup> See William Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE L. REV. 767, 789 (2017) (describing the decades-long treatment by legal scholars of the separation of ownership and control as an “over-arching political economic problem” in need of a solution).

<sup>2</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305 (1976).

tion of it to those in control of the enterprise . . . . Economic power, in terms of control over physical assets, is apparently responding to a centripetal force, tending more and more to concentrate in the hands of a few corporate managements. At the same time, beneficial ownership is centrifugal, tending to dive and subdivide, to split into ever smaller units and to pass freely from hand to hand. In other words, ownership continually becomes more dispersed . . . .<sup>3</sup>

This “canonical account of U.S. corporate governance”<sup>4</sup> is no longer accurate. Record ownership of securities is now concentrated in the hands of large, institutional investors.<sup>5</sup> The beneficial owners on whose behalf they hold securities are largely “forced capitalists,” (to borrow a term from Chief Justice Leo E. Strine, Jr. of the Delaware Supreme Court<sup>6</sup>)—“ordinary Americans” whose only real option for financing their own retirement and children’s education is through regular investments of income into a 401(k) plan or other tax-advantaged investment account.<sup>7</sup> The separation of ownership from control has trans-

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<sup>3</sup> Adolf A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* 9 (1933).

<sup>4</sup> Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 864 (2013).

<sup>5</sup> Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1824 (2011).

<sup>6</sup> Leo E. Strine, Jr. *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 IOWA J. CORP. L. 1, 4 (2007).

<sup>7</sup> *Id.* Professor Anne Tucker calls them “citizen shareholders.” Anne M. Tucker, *Locked In: The Competitive Disadvantage of Citizen Shareholders*, 125 YALE L. J. F. 163, 164 (2015).

formed into the “separation of ownership from ownership.”<sup>8</sup> The era of “agency capitalism” is well underway.<sup>9</sup>

With the rise of agency capitalism comes an additional fiduciary relationship in the ownership structure of many publicly-traded companies.<sup>10</sup> The fiduciary relationship between management and record owners of securities (the institutional investor) remains,<sup>11</sup> but the record owners are now themselves fiduciaries that “hold equity . . . for their beneficiaries.”<sup>12</sup> A pair of interlocking fiduciary relationships now exists, and with it comes a level of intermediation between the issuers of securities and their beneficial owners.<sup>13</sup>

Professor Lipton explores the relationship that exists between one type of institutional investor—mutual funds—and their investors. The fiduciary duties that are applicable in this context arise under both state and federal law: the Investment Company Act of 1940<sup>14</sup> as well as the state business association statutes under which mutual funds are organized impose duties on the directors and advisors of the funds.<sup>15</sup> But,

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<sup>8</sup> Rodrigues, *supra* note 5, at 1828. Professor Rodrigues attributes this phrase to Chief Justice Strine.

<sup>9</sup> See Gilson & Gordon, *supra* note 4, at 865.

<sup>10</sup> See Gilson & Gordon, *supra* note 4, at 865.

<sup>11</sup> See, e.g., *Green v. Freeman*, 749 S.E.2d 262 (N.C. 2013); *Schoon v. Smith*, 953 A.2d 196, 206 (Del. 2008); *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) (“In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders.”).

<sup>12</sup> Gilson & Gordon, *supra* note 4, at 865.

<sup>13</sup> See *id.*

<sup>14</sup> 15 U.S.C. § 80a-35; see also *Galfand v. Chestnutt*, 402 F. Supp. 1318, 1328 (1975) (“The directors of the Fund held a position of trust and confidence with respect to the Fund’s shareholders, and owed them the obligations commonly associated with fiduciaries. Section 80a-35(b) explicitly imposed upon Chestnutt Corporation the standard traditionally applied to persons in a fiduciary position . . .”).

<sup>15</sup> 15 U.S.C. § 80a-35 (provision of Investor Company Act of 1940); *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 191 (1963); LOIS YUROW ET AL., *MUTUAL FUND REGULATION AND COMPLIANCE HANDBOOK* § 3:14 (2017) (“Federal law does not provide any legal vehicle for organizing a mutual fund. Accordingly, a sponsor must

as Professor Lipton demonstrates, application of fiduciary principles to specific aspects of the advisor-fund-investor relationships raise difficult issues.<sup>16</sup> In particular, what role should fiduciary duties play in mutual fund proxy voting? And, are common voting practices—in particular family voting—consistent with those duties?

In this Comment, I argue that a flexible approach to fiduciary duties is appropriate in this context. Given the variation in mutual fund investors and fund strategy, there is no one-size-fits-all answer to how mutual fund fiduciary duties require fund directors and advisers to vote proxies. Recognizing the need to allow entity governance to reflect firm-specific circumstances and attributes, state law has incorporated varying degrees of flexibility with regard to the traditional fiduciary duties that apply in the context of the first agency relationship. As I argue below, the second agency relationship—between record and beneficial owners—also requires a flexible approach. Specifically, application of fiduciary principles to mutual fund proxy voting practices should take into account the objectives of fund investors, fund strategy, and the ways in which fund investors resemble customers.

### THE DUAL STATUS OF MUTUAL FUND INVESTORS AND THE NEED FOR FIDUCIARY FLEXIBILITY

In a very real sense, people who purchase shares in a mutual fund play two roles at once—they are customers,<sup>17</sup> but they also provide capi-

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organize the fund under state law—typically as a business trust or a corporation. The law of the state where the mutual fund is organized will affect the fund's governance and operation in areas that the Investment Company Act has not preempted.”)

<sup>16</sup>Ann M. Lipton, *Family Loyalty: Mutual Fund Voting and Fiduciary Obligation*, 19 TENN. J. BUS. L. 175 (2017).

<sup>17</sup> See, e.g., Donald C. Langevoort, *Private Litigation to Enforce Fiduciary Duties in Mutual Funds: Derivative Suits, Disinterested Directors, and the Ideology of Investor Sovereignty*, 83 WASH. U. L. Q. 1017, 1037 (“[M]utual fund investments are products . . . .”); Ribstein, *supra* note 19. Professor Ribstein seems to argue in favor of treating mutual fund investors as customers and nothing more. In his words, “[m]utual fund investors buy a product rather than investing in a firm, and the law should treat investors accordingly.” *Id.* at 303. Advocates for this position look to the ability of mutual fund investors’ right to redeem—or “cash out”—their shares. Not all mutual fund investors actually have this ability, however. Those “forced capitalists” who invest through tax-advantaged ac-

tal and have the legal status of shareholders or trust beneficiaries (depending on how the fund is organized<sup>18</sup>). In this regard, they are the beneficiaries of traditional, corporate-style fiduciary duties.<sup>19</sup> The Investment Company Act of 1940 implicitly recognizes the tension between these two capacities (shareholder and customer) insofar as it specifically provides for a fiduciary duty owed by investment advisers “with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company or by the security holders thereof . . . .”<sup>20</sup> This dual capacity is, perhaps, most obvious when it comes to investors in a low-fee index fund.<sup>21</sup> Such investors are looking for cheap diversification—they are buying a piece of the market and are looking to the mutual fund as a way to do so without incurring the costs that would be involved in purchasing individual securities in the companies that are part of the index. They are, in effect, purchasing the bundling and administrative services of the mutual fund and its adviser. The same applies to actively-managed funds, through which investor-

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counts provided by their employers are limited to the funds included in the plan and face a variety of barriers to exit. See Anne M. Tucker, *Locked In: The Competitive Disadvantage of Citizen Shareholders*, 125 YALE L. J. F. 163 (2015). For this reason, mutual fund investors are best understood as having a dual or mixed status, rather than as exclusively customers or exclusively investors.

<sup>18</sup> Mutual funds are typically organized as either Delaware or Massachusetts trusts or as Maryland corporations. Deborah A. DeMott, *Fiduciary Contours: Perspectives on Mutual Funds and Private Funds*, RESEARCH HANDBOOK ON MUTUAL FUNDS (William A. Birdthistle & John D. Morley eds.) (Edward Elgar Publishing, forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2800305](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800305).

<sup>19</sup> Larry E. Ribstein, *Federal Misgovernance of Mutual Funds*, 2010 Cato Sup. Ct. Rev. 301, 306 (2009-2010).

<sup>20</sup> 15 U.S.C. § 80a-35(b) (2017).

<sup>21</sup> “Index funds . . . are designed to closely track a specific benchmark, allowing investors to invest money knowing that they will get performance roughly equal to the performance of the benchmark followed.” K.J. Martijn Cremers & Quinn Curtis, *Overpaying For Closet Index Funds: A Legal Analysis*, 36 No. 4 BANKING & FIN. SERVS. POL’Y REP. 1, 3 (April 2017).

customers purchase the expertise of the fund manager whose efforts will hopefully lead to returns that exceed some specified benchmark.<sup>22</sup>

This dual capacity is, in large part, what makes assessing the contours of the fiduciary duties difficult,<sup>23</sup> especially in relation to proxy voting. Family voting, the practice that Professor Lipton focuses on in her article, does not seem to categorically implicate the duty of loyalty, although it is clear that certain policies would be violations and that circumstances relating to particular votes could involve a conflict of interest.<sup>24</sup> Family voting could raise duty of care issues for directors of a particular fund (if, for example, they defer to the investment adviser without considering the issue in their own capacity as director of a particular fund), but even the SEC has acknowledged that extensive research may not be cost-effective and, therefore, authorizes funds to refrain from voting on issues if the costs involved in researching the issue and reaching a decision outweigh the potential benefits of an informed vote.<sup>25</sup> Furthermore, fund directors and investment advisers can articulate princi-

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<sup>22</sup> K.J. Martijn Cremers & Quinn Curtis, *Overpaying For Closet Index Funds: A Legal Analysis*, 36 No. 4 BANKING & FIN. SERVS. POL'Y REP. 1, 3 (April 2017) ("Actively managed funds are operated with the goal of producing returns that outperform a particular benchmark (providing higher returns or lower risk, or both) by carefully choosing stocks that fit the fund's investing style and that the manager expects to collectively outperform other holdings in the fund's style space.").

<sup>23</sup> Langevoort, *supra* note 17, at 1037–38 ("Once the mutual fund is viewed as a product to be marketed within liberal societal expectations as to fair advertising like any other, then any notion that the producer is a 'fiduciary' is awkward and disorienting. The transaction is instead simply embedded in the morals of the marketplace. To be sure, the law disagrees--the adviser *is* deemed a fiduciary to the fund and its investors. From a business standpoint, however, the law's move makes little sense.").

<sup>24</sup> If, for example, the fund officers employed by an investment adviser had funds in the family vote to benefit the adviser's pension business.

<sup>25</sup> See Proxy Voting by Investment Advisers, 68 Fed. Reg. 6585, 6587 (Feb. 7, 2003) ("We do not suggest that an adviser that fails to vote every proxy would necessarily violate its fiduciary obligations. There may even be times when refraining from voting a proxy is in the client's best interest, such as when the adviser determines that the cost of voting the proxy exceeds the expected benefit to the client.").

pled defenses of family voting policies on both economic and other grounds.<sup>26</sup>

When the dual capacity of mutual fund investors is taken into account, it becomes clear that there is more than one way for mutual fund directors to manage those funds for the benefit of fund investors. For those investor/customers who have placed their money in a low-fee index fund, family voting may, on the whole, be completely consistent with the fiduciary obligations of the fund investors. Increased costs incurred as a result requiring each fund's board to either independently research each proxy issue or form a fund-specific conclusion based on common research would result in higher administrative costs for investors. When those investors' objectives are taken into account (fundamentally, cheap diversification as a stable investment strategy to finance future spending) it may very well be that family voting is in their best interests. No doubt, there have been and will continue to be votes which ultimately do not ultimately benefit the investors in these funds. However, family voting may still be in their best interests overall if the increased costs of fund-specific voting are not offset by better returns. It's worth noting, as well, that votes in which family voting is not in the best interest of investors in low-fee funds will not always be obvious *ex ante*. A fiduciary duty rule that requires individualized voting on certain categories of votes will almost certainly be over-inclusive, thereby forcing increased costs onto mutual funds and their investors in connection with votes for which family voting presents no issues. In the parlance of agency cost theory, my point is really a reminder that agency costs can take many forms—measures adopted to prevent or otherwise mitigate the costs imposed by deviant agents will themselves create costs, a point reflected in Jensen & Meckling's formal definition of agency costs.<sup>27</sup>

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<sup>26</sup> Family voting policies create economies of scale. *See, e.g.*, Stephen Choi et al., *Who Calls the Shots? How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 36, 38 (2013). Family voting policies can also be used to increase leverage with portfolio companies, which may be used to benefit all of the funds in the family when needed. *See* Alan R. Palmiter, *Mutual Fund Voting of Portfolio Shares: Why Not Disclose?*, 23 CARDOZO L. REV. 1419, 1465–66 (2002).

<sup>27</sup> *See* Jensen & Meckling, *supra* note 2.

The same might not hold true for actively-managed funds. For those funds—in which investors purchase shares with the hopes of securing returns in excess of some benchmark—fiduciary principles may require more individualized, active involvement in decisions related to proxy voting. If investors are not simply seeking low-cost diversification and are, instead, seeking superior returns on account of the skill and expertise of the fund’s adviser and directors, their fiduciary duties may very well require that they do more to consider the significance of each vote to the fund and its objectives.

The need for fiduciary flexibility is not a new observation. Returning to the first agency relationship (between management and record holders), state law already recognizes its importance. Uniform statutes governing alternative entities—partnerships, limited partnerships, and limited liability companies—recognize the ability to alter and eliminate fiduciary duties, provided such departures from the default fiduciary duties are not manifestly unreasonable.<sup>28</sup> Delaware’s alternative entity statutes have embraced fiduciary flexibility completely and allow total elimination without any backstop for unreasonable alterations.<sup>29</sup> Notably, Delaware extends this ability even to publicly traded alternative entities.<sup>30</sup> Even in the context of corporations, where fiduciary duties remain mandatory, state law often offers some degree of flexibility to narrow certain

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<sup>28</sup> *See, e.g.*, REVISED UNIFORM PARTNERSHIP ACT § 103(b)(3) (2017) (allowing partnership agreements to alter or eliminate various fiduciary duties if those changes are not “manifestly unreasonable”); REVISED LIMITED LIABILITY COMPANY ACT § 110(d).

<sup>29</sup> DEL. CODE ANN. tit. 6, § 18-1101(c) (2013); DEL. CODE ANN. tit. 6 § 17-1101(d) (2013); *see also* DEL. CODE ANN. tit. 6, § 18-1101(b) (2013); DEL. CODE ANN. tit. 6 § 17-1101(c) (2013).

<sup>30</sup> *See, e.g.*, *Hite Hedge LP v. El Paso Corp.*, 2012 WL 4788658 (Del. Ch. 2012); *In re Atlas Energy Resources, LLC*, 2010 WL 4273122 (Del. Ch. 2010).



aspects of the duty of loyalty.<sup>31</sup> And, of course, corporate charters are authorized to include provisions which take much of the “bite” out of the duty of care.<sup>32</sup>

This flexibility recognizes the fact that mandatory, one-size-fits-all terms—even ones that are well-suited to most situations—impose costs and create inefficiencies when applied outside the context for which they were designed.<sup>33</sup> Different businesses need different governance rules, and even the same company may need one set of rules today and a different set at some point in the future. “[E]ven a rule that is formulated by an all-wise and disinterested policymaker cannot suit every business equally well, any more than a well-made suit is right for everybody.”<sup>34</sup>

By way of illustration, consider the governance of publicly-traded alternative entities, which are widely known as master limited partnerships (or MLPs). The flexibility afforded to these entities under Delaware law has allowed the adoption of governance structures that are tailored to the business models of these entities and the objectives of their investors. On account of Internal Revenue Code restrictions on source of income,<sup>35</sup> almost all of these entities are in the energy and natural re-

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<sup>31</sup> DEL. CODE ANN. tit. 8 § 122 (17) (providing that a Delaware corporation has the power to “[r]enounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders”); MODEL BUSINESS CORPORATION ACT § 2.02(6).

<sup>32</sup> DEL. COD. ANN. tit. 8 § 102(b)(7); MODEL BUSINESS CORPORATION ACT § 2.02(4).

<sup>33</sup> Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 53–64 (1990). In the case of fiduciary duties, some argue that they should not even be *default* rules on account of the contracting and litigation costs they impose. Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnership and Limited Liability Companies*, 46 AM. BUS. L. J. 221, 238–42 (2009).

<sup>34</sup> Butler, *supra* note 33, at 57.

<sup>35</sup> I.R.C. § 7704 (2017). This section of the Internal Revenue Code requires that a publicly-traded alternative entity will be treated as a corporation for tax purposes unless

sources sector. Their tax treatment allows them to make tax-advantaged cash distributions to their investors,<sup>36</sup> and for this reason, MLP units are widely considered to be yield securities.<sup>37</sup> Investors that buy MLP units do so with strong expectations of regular cash distributions. Most MLPs eliminate (or significantly pare down) traditional fiduciary duties<sup>38</sup> and with good reason. The imposition of a rigid, traditional duty of loyalty to these entities would have a negative effect on a variety of related-party transactions that are undertaken on a regular basis and often lead to increases in cash distributions for investors.<sup>39</sup> Although the absence of traditional fiduciary duties certainly enables some degree of management misbehavior,<sup>40</sup> imposing such a duty in the name of investor protection would actually imperil the objectives that MLP investors have when they

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90% or more of its income is “qualifying income” which includes that “derived from the exploration, development, mining or production, processing, refining, transportation (including pipelines transporting gas, oil, or products thereof), or the marketing of any mineral or natural resources . . .”. I.R.C. § 7704(d)(1)(E) (2017).

<sup>36</sup> See, e.g., John Goodgame, *Master Limited Partnership Governance*, 60 BUS. L. 471, 472 (2005) (“[A] publicly-traded limited partnership that generates almost exclusively qualifying income is not subject to entity-level taxation. A dollar of income generated by such a partnership would only be taxed once (“passed-through”), at the marginal tax rate of the limited partner to whom that dollar of income was allocated. Accordingly, assuming that the relevant entity distributes all of its income to its equity holders and that the equity holder's marginal tax rate is thirty-five percent, an MLP must generate \$1.54 of income for an equity holder to have one dollar of after-tax income, although a corporation must generate \$2.20 of income for its equity holder to have one dollar of after-tax income.”).

<sup>37</sup> See, e.g., Deborah Fields et al., *Triangles in a World of Squares: A Primer on Significant U.S. Federal Income Tax Issues for Natural Resources Publicly Traded Partnerships (Part I)*, TAXES-THE TAX MAGAZINE, Dec. 2009, at 21, 30 (“From a market perspective, investors typically view a PTP unit as a yield-based security.”).

<sup>38</sup> See Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 562–64 (2012) (documenting widespread elimination of fiduciary duties in the operating agreements of publicly traded limited partnership and limited liability companies).

<sup>39</sup> See Jonathan G. Rohr, *Freedom of Contract and the Publicly Traded Uncorporation*, 14 NYU J. L. & BUS. 247, 301 (2017).

<sup>40</sup> See, e.g., *In re El Paso Pipeline Partners L.P. Derivative Litigation*, 2014 WL 2768782 (Del. Ch. June 12, 2014).

purchase units insofar as that rule would almost certainly lead to fewer accretive transactions. Furthermore, investors' expectations of cash distributions can themselves act as a constraint on management's behavior, at least insofar as misbehavior will compromise the entity's ability to meet or surpass distribution expectations.<sup>41</sup> In this context, there are good reasons to depart from traditional fiduciary duties, and overall, state law accommodates those reasons.

The same concerns should inform any attempts to clarify the fiduciary duty of mutual fund directors – mutual funds are not homogeneous; nor are their investor-customers. Any duty imposed to help those investors should be consistent with their dual status and their investment objectives—for investors in a low-cost, index fund, a rule which would increase the fees paid by those investors without offsetting increases in the returns they enjoy would not actually be in the best interests of those investors. A sector-specific, actively managed fund, on the other hand, may benefit from independent, fund-specific research and decision-making and, in this regard, its investors may be best served by something other than family voting. Any attempt to apply general fiduciary principles to the voting practices of mutual funds should take into account the fund's strategy and how investors in that fund are best served in relation to that strategy.

### CONCLUSION

The era of agency capitalism is well-underway and with it a refocusing of corporate lawmaking and scholarship. The Berle & Means paradigm no longer holds true, and the legal principles that matured in the age of the Berle & Means corporation have uneasy application in a world of institutional investors and multiple layers of ownership. In her Article, Professor Lipton raises the uneasy fit between traditional fiduciary principles and mutual fund proxy voting practices, specifically whether family voting policies are consistent with the fiduciary obligations of

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<sup>41</sup> See Rohr, *supra* note 39, at 275–76; see also Larry E. Ribstein, *Energy Infrastructure Investment and the Rise of the Uncorporation*, 23 J. APPLIED CORP. FIN. 75, 80 (2011) (noting the trade-off between cash distribution requirements and more traditional governance features like fiduciary duties).

fund boards and advisors.<sup>42</sup> Complicating this inquiry is the dual nature of mutual fund investors—they provide capital in their capacity as shareholders and, in that regard, benefit from traditional fiduciary duties. But, they are also customers who (depending on the time of fund) seek and pay for low cost diversification or the investing prowess of the investment advisor. For this reason, attempts to apply traditional fiduciary principles to mutual fund voting practices become tricky. Family voting raises obvious duty of loyalty and duty of care issues, but it is also not without strong justifications. The practice permits funds to capitalize on economies of scale and leads to lower fees, an important consideration for the millions of mutual fund investors looking for low-cost diversification. Any attempt to apply traditional fiduciary duty analysis to mutual fund voting should take into account the dual capacity of mutual fund investor-customers and their investment objectives. For low-fee, index funds – whose investors are ultimately seeking to own a piece of the market and avoid the high transaction costs involved in compiling a portfolio of securities on their own – voting policies designed to minimize fees may very well be consistent with the best interests of investors, even if there are occasional votes in which conflicts exist between that fund and others in the family.

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<sup>42</sup> Lipton, *supra* note 16.