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Symposium: Financial Regulatory Reform: Genesis, Progress, and Impact

Article

**\*577 THE ROLE OF TRUST IN FINANCIAL REGULATION**

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## I. Introduction

Aperennial justification, and a perennial objective, of financial regulatory reform is the restoration of trust and confidence in the marketplace for financial products and services. [FN1] From the 1933 and 1934 securities Acts, to the Sarbanes-Oxley Act of 2002, to the reform proposals circulating Washington, D.C. (and indeed, much of the world) today, it has been argued that increased, or improved, regulation is necessary in order to counter flagging trust and confidence in the financial markets and the institutions that operate in those markets. [FN2]

Thanks to a decade or so of important research on the phenomenon of trust, we are now in a position to critically examine this argument. That is, does increased regulation, and increased regulatory oversight, actually enhance investor trust and confidence in the financial markets?

The answer is: it depends. For trust comes in a variety of forms, and different forms of trust respond to regulation in different ways. Some forms of trust can, indeed, be enhanced by additional regulation. Other forms of trust, however, can be damaged by additional regulation. So, rather than regulate first, and ask questions later, the wise policy maker will make sure that he or she has identified the form of trust at issue in a given situation before proposing or implementing regulation aimed at restoring it.

Since the past serves as a prologue, [FN3] this Article shall survey traditional U.S. approaches to financial regulation--the three pillars of which are banking regulation, insurance regulation, and securities regulation. It shall explore the extent to which the existing regulatory approaches further or undermine trust, based on what trust literature tells us. This shall set the groundwork for future work delving more deeply into each of these areas and, moreover, examining current regulatory reform proposals.

**\*578** Of course, as my symposium colleagues have aptly demonstrated, there are a variety of reasons why governments regulate the financial services industry. Significant among these are the need to protect investors and consumers of financial products, [FN4] and the need to control for systemic risk. [FN5] Nevertheless, restoration, and/or maintenance of trust and confidence in the market for financial services remain paramount concerns as well. Although a prudent policy maker would take all such objectives into account, this Article shall focus solely on the goal of restoring and/or maintaining trust.

This Article shall proceed as follows: Part II will explain the importance of trust--why it has been, and should remain, a focus of financial services regulation. Part III will explore the nature of trust, identifying the critical dichotomy between affective versus cognitive trust, and why the former responds poorly to regulation whereas the latter responds favorably. Part IV will summarize the general regulatory approach to banking, insurance, and securities regulation in the United States, and critique each approach in light of the scholarship on trust. The Article will conclude that, whether by design or chance, existing financial services regulation in the U.S. generally comports well with our understanding of trust.

## II. The Importance of Trust

Over the past decade or so, an increasing number of experts have come to recognize, and explicitly identify, trust as an essential component of a properly functioning economy and society. Of particular importance are three books on the subject: in chronological order, Francis Fukuyama, *Trust*, [FN6] Robert D. Putnam, *Bowling Alone*, [FN7] and, Tamar Frankel, *Trust and Honesty*. [FN8] Each of these books forcefully propounds the thesis that the economy and the world as we know it simply could not function without a certain degree of trust. [FN9]

\*579 A few years ago, Alan Greenspan remarked: “[O]ur market system depends critically on trust--trust in the word of our colleagues and trust in the word of those with whom we do business.” [FN10] This captures not only Greenspan's thinking, but the thinking of many, if not most, who have considered the issue. [FN11]

Why is trust so critical? There are many reasons, but of these two appear particularly important.

The first is that transaction costs (including agency costs) become extraordinarily high in the absence of trust. [FN12] If each and every transaction must be accompanied by measures and mechanisms to ensure honesty and reliability, things get very expensive. These transaction costs are a “deadweight loss” to the economy, reducing efficiency and thwarting wealth maximization. [FN13]

Moreover, in some situations, transaction costs may actually eclipse any potential gain, thereby depriving the economy of an exchange that would have been a value-generating and mutually beneficial undertaking. [FN14]

Second, relationships characterized by trust give rise to greater opportunities for mutually beneficial exchange. [FN15] Counterparties who trust one another are more likely to “open up,” divulging thoughts and information beyond what is necessary to divulge in order to complete a given transaction. [FN16] This greater knowledge of one another can lead to the discovery of additional avenues of exchange between the parties. [FN17]

## \*580 III. The Nature of Trust

Before delving into the nature of trust, it would be helpful to set forth a working definition of “trust.” The one employed by most scholars is fairly straight-forward: trust is the willingness to make one's self vulnerable to another. [FN18] It represents a leap of faith--a decision to go forward in a relationship while recognizing the fact that your counterparty has an opportunity to cause you harm. [FN19]

But this leap of faith can be justified in a variety of ways--and hence trust's variety of forms. For the justific-

ation to trust can be primarily emotional, almost instinctual; or it can be primarily intellectual, and calculative. These two modes of justification form poles on a continuum, bounded by “affective” trust on one end, and “cognitive” trust on the other.

“Affective trust” is that form of trust that most people probably think of when they hear the word “trust.” It represents trust that is emotional in nature, predicated upon shared experiences, histories, or values. [FN20] It is the trust that exists between family members, members of the same religious community (especially if it's a tight-knit religious community), and that sometimes develops between co-workers or classmates over time. [FN21] It is usually developed over many years, by repeated, interpersonal interactions in which the parties prove, to an increasing degree, their trustworthiness to one another. [FN22]

Affective trust is the “gold standard” of trust. It is the form of trust that tolerates the least amount of suspicion, inspires the greatest amount of honesty and sacrifice, and exhibits the greatest resiliency in challenging and unfortunate situations. [FN23]

The opposite of affective trust is “cognitive trust.” Some theorists argue that “cognitive trust” is not even “trust” (as that word is popularly understood) at all. [FN24] Cognitive trust is confidence in another's word and/or ability based upon a cost-benefit analysis of a given situation. [FN25] Cognitive trust is not predicated upon emotion, but rather, upon calculation. [FN26] In a relationship characterized by cognitive trust, the trusting party weighs the \*581 potential benefits of pursuing a transaction with the counterparty in question, against the potential costs of being defrauded, or otherwise dissatisfied with the performance of that counterparty. [FN27] In assessing the likelihood of being defrauded by, or otherwise dissatisfied with, the counterparty in question, the trusting party takes into account everything that he or she knows about a potential counterparty--his or her reputation, education, background, past performance, and the like. [FN28]

Cognitive trust is not particularly resilient, but rather, quite dynamic--it increases or decreases as additional information is learned about the trustworthiness, ability, etc., of one's counterparty. Moreover, whereas affective trust serves to reduce transaction costs, thereby promoting efficiency, cognitive trust, to the contrary, is often purchased via the imposition of considerable transaction costs (such as negotiated contractual strictures, monitoring devices, and the like). [FN29] This is why, all things being equal, affective trust is preferable to relationships (and to society) than cognitive trust. [FN30]

It is highly unlikely that trust exists in either a purely affective or cognitive form, which is why most understand the nature of trust as falling somewhere on a continuum between these two poles. [FN31] Even a relationship marked by high levels of affective trust is likely to contain a touch of cognitive trust mixed in as well, and vice-versa. [FN32]

Identification of the form of trust implicated in a given relationship is important because, among other things, it enables us to predict the likely effects of law and regulation upon such relationships. This is because different forms of trust react differently to the imposition of legal rules and regulation.

Research has suggested that although law and regulation can serve to bolster trust that is primarily cognitive in nature, [FN33] it can, conversely, undermine trust that is primarily affective in nature. [FN34]

Perhaps the beneficial effects of law and regulation upon cognitive trust are the easiest to appreciate. After all, cognitive trust essentially boils down to a cost-benefit analysis; a calculation of risk given a specific set of facts and circumstances. Here, law and regulation serve as factors that (one would hope!) decrease the risk of

fraud, incompetence, and other \*582 unpleasantries. Less risk means lower costs, which translates into a greater willingness to (cognitively) trust one's counterparty.

Where things get interesting is when we examine the impact of law and regulation on affective trust.

Affective trust can potentially be supplanted, rather than bolstered, by the imposition of law and regulation. [FN35] In other words, relationships that were once, or might have become, based upon affective trust, have the tendency to devolve--once subject to regulation--into relationships that are arm's length; into relationships that are governed by the letter of the law, rather than a spirit of trust. [FN36]

This is because the law has a way of inserting itself between the parties. Consider the common reaction to prenuptial agreements. There's a sense that the law is intruding upon a relationship where it has no place--upon a relationship grounded upon mutual affection, not on contract law and legal formalities.

Similarly, in the business world, there's something about closing a deal with a handshake that simply feels so much better than "have your lawyer talk to my lawyer." [FN37] And the reason that this is so is because the former situation broadcasts "trust," and the involvement of lawyers broadcasts "distrust." [FN38] Although this may be a bit of an exaggeration, the fundamental point stands: relationships of affective trust are usually typified by a certain degree of informality--a certain obvious amount of simple trusting (in other words, trust without verification). [FN39] By replacing this informality with formalism and paperwork, by introducing law and lawyers, by transforming the "feel" of the relationship, regulation actually begins to transform the relationship itself.

As Simkin and Roth discovered in an important 1993 study:

The adoption of legalistic "remedies" (i.e., institutionalized mechanisms that mimic legal forms and exceed legal/regulatory requirements) imposes a psychological and/or an interactional barrier between the two parties that stimulates an escalating spiral of formality and distance and leads to a need for more rules. [FN40] \*583 Additionally, law and regulation threaten to choke off the air that is needed to develop and grow affective trust in the first place. Recall that "vulnerability" is at the heart of trust. By reducing vulnerability (usually a good thing) the law reduces the opportunities for parties to prove their trustworthiness to one another. [FN41] If I accidentally leave my wallet in my office after hours, and the cleaning crew returns it to me the next morning, I've earned quite a bit of trust in the cleaning crew. If, however, company regulation requires that the cleaning crew be supervised, and accompanied, at all times by an off-duty police officer--well, in that case, the cleaning crew hasn't earned exactly the same amount of trust in my book.

In other words, although regulatory micromanagement of a relationship might very well enhance one's confidence in a counterparty on a cognitive level, and with regard to, perhaps, the specific issues under micromanagement, it interferes with the parties' ability to form broader, more generalized bonds of trust.

#### IV. Financial Regulation and Trust

Having discussed the importance and nature of trust, we are now prepared to apply that understanding in order to evaluate the wisdom (from a trust perspective) of the U.S. approach to financial regulation. The three pillars of financial regulation shall be examined, in broad strokes, in turn: banking regulation, insurance regulation, and securities regulation.

## A. Banking Regulation

Banks are, arguably, the most heavily regulated financial institutions in the United States. [FN42] Although a certain degree of flexibility exists within the American system of banking regulation (in that banks may generally select whether they wish to be subject to state or federal regulators [FN43]), this flexibility does not permit banks to avoid substantial regulatory oversight. [FN44] As one commentator put it, “the degree of state and federal regulation is pervasive and thorough.” [FN45]

The panoply of regulations to which banks are subjected was well summarized by William Lovett:

**\*584** Commercial banking is extensively regulated for potential entrants, chartered bank corporations, and bank holding companies. Banks are subject to financial supervision and regular examination, with substantial corrective authority for dangerous practices. Reserve requirements are enforced for banks and their capital adequacy is an important concern of the regulatory authorities. The growth of banks, along with their branching, diversification and merger activity has been regulated. Significant limitations also apply to other bank activities, including lending limits, insider lending, some restrictions on investments and certain types of deposit liabilities . . . . There are disclosure requirements and privacy safeguards for borrowers and depositors. [FN46]

Indeed, no fewer than five federal agencies are currently involved in bank regulation, in addition to state regulatory authorities. [FN47]

Perhaps even more important than the substantial degree of regulatory oversight to which they are subjected, all nationally chartered banks, and virtually all other banks, have their deposits insured by the Federal Deposit Insurance Corporation (FDIC). [FN48] This insurance covers “all deposit accounts, including checking and savings accounts, money market deposit accounts and certificates of deposit” up to \$250,000 (as of this writing). [FN49] In terms of scope, over seventy-five percent of all bank deposits are covered by this insurance. [FN50] As such, the “federal deposit insurance program is one of the cornerstones of the U.S. banking system.” [FN51]

In short, then, for the vast majority of Americans, banking is a low risk undertaking. Heavy oversight and regulatory requirements exist to ensure bank integrity and solvency--and even in the event of bank failure, every dollar of a deposit account (for virtually every bank), up to \$250,000, is fully insured by the federal government.

From a trust perspective, the heavy regulation of American banking strongly supports the development of cognitive trust. By reducing the risk **\*585** of banking--to the point of insuring bank deposits--banking regulation reduces the cost of banking. [FN52] Since cognitive trust essentially boils down to a cost-benefit analysis, [FN53] this reduced cost engenders a greater degree of cognitive trust.

But this comes at the expense of affective trust. For, as mentioned, affective trust ordinarily suffers at the hands of legal rules and regulatory oversight. [FN54] Legal rules and regulations circumscribing a particular relationship tend to have an interesting psychological effect on the parties to that relationship: the parties come to view their duties toward one another as limited to such rules and regulations, displacing the more robust duties engendered by affective trust. [FN55]

Additionally, banking law's very success at reducing customer vulnerability directly serves to reduce the opportunity of banks to demonstrate their trustworthiness, for there is simply less room in which banks can maneuver to prove that they can be trusted. Customers know not whether their bank's “honesty,” for example, is truly authentic, or, rather, merely compelled by regulatory overseers. [FN56]

Certainly, some room to establish affective trust remains. Banks can, and often try, to compete upon (among other things) their customer service and general competency. Both areas can fairly be linked to the concept of trust: more satisfied customers probably translate into more trusting customers. Additionally, even though the banking regulatory apparatus provides a great deal of protection for banking customers, trust could certainly be earned by those banks whose customers rarely need to avail themselves of such apparatus for redress.

Nevertheless, the fact remains that the heavy regulation of banking suppresses affective trust while fostering cognitive trust. While opportunities to develop affective trust might still remain, these opportunities are quite limited.

Is this trade-off a matter of concern? Does it effectively amount to a wash? Less affective trust, but more cognitive trust, equaling the same amount of overall trust nonetheless?

**\*586** Perhaps, but the exchange of affective trust for cognitive trust is not a wise one. Recall that affective trust is the gold standard of trust. [FN57] Affective trust is of distinctively higher quality than cognitive trust. [FN58] It inspires greater sacrifice and cooperation, and weathers bad times and disappointments much better. Cognitive trust has been derided, accurately so, as “artificial trust” [FN59]--the trust that we “buy” via the heavy expense of lawyers, contracts, monitoring, and regulation.

This strongly suggests that, when the possibility for affective trust exists, we take full advantage of that opportunity. We ought to do everything we reasonably can to nurture and protect that form of trust. One of the last things we ought to do, all things being equal, is sacrifice that trust for the inferior substitute of cognitive trust.

Coming back to our question, then: is banking regulation sensible from a trust-enhancing perspective? Most likely, yes.

For even though banking regulation appears to sacrifice affective trust for cognitive trust, this sacrifice is largely illusory. And this is because, even if the banking industry were less heavily regulated, it is unlikely that affective trust would develop in plentiful supply.

Recall that affective trust is ordinarily developed within contexts of shared backgrounds, experiences, and/or cultures. [FN60] It often grows through repeated, interpersonal interaction. [FN61] Although scholarship suggests that affective trust may be developed in institutional settings, such development is an exception and not the rule. [FN62]

Banks have long been pilloried as the quintessential impersonal institution (a characterization that many have went to great lengths to change in recent years). [FN63] With the proliferation of direct deposit accounts, automatic\***587** teller machines, and Internet banking, the face-to-face interaction of customer-to-bank teller is quite yesteryear--compounding the impersonalized nature of retail banking. [FN64] Thus, the prospects for affective trust would seem quite bleak, aside from the question of regulation. In light of this, regulatory efforts should not be curtailed for fear of undermining affective trust. Indeed, robust regulation would seem to be the wisest way of furthering that trust most likely to exist within the banking industry (cognitive trust). [FN65] Moreover, the indispensability of a sound banking system to modern economies is such that it would be foolish to rely upon the materialization of affective trust at the expense of the near-certainty of cognitive trust brought about by regulation. [FN66] For this reason, the heavy regulation of banking is sensible and, perhaps, inevitable.

## B. Insurance Regulation

Like banks, insurance companies constitute a vital pillar of the American economy. In the aggregate, insurance premiums account for approximately ten percent of national income in the United States, and insurance companies hold billions of dollars in assets. [FN67]

Unlike banking regulation, [FN68] and especially unlike securities regulation, [FN69] insurance regulation is primarily state-based. [FN70] This was not initially a matter of design, inasmuch a matter of historical evolution and market realities. [FN71] Nevertheless, as of 1945 at least, with the passage of the McCarran-Ferguson Act, the state regulation of insurance is explicitly U.S. policy: “[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.” [FN72]

As a matter of state regulation, with variations from jurisdiction to jurisdiction, it is a bit more difficult to summarize the law of insurance regulation. That said, certain recurring themes and approaches \*588 abound--especially in light of recent trends toward state uniformity. [FN73] This enables the following generalized observations.

In terms of objectives, “[t]he goals of insurance regulation articulated by most states include fair pricing of insurance, protecting insurance company solvency, preventing unfair practices by insurance companies, and ensuring availability of insurance coverage.” [FN74]

To accomplish these objectives, insurance regulation is characterized by a number of recurring features. Insurance regulators control market entrants, and require minimum capital and financial reporting requirements of newly chartered insurance companies. [FN75] Out-of-state companies cannot automatically do business in a jurisdiction, but must also procure the approval of in-state regulators. [FN76]

Because of the importance of insurer solvency, insurance companies are restricted in their investment choices, and must generally avoid “[o]verly bold” risk taking with their assets. [FN77] And in order to protect consumers, insurance companies’ rates are regulated, and the products they offer must include certain standard contracts and features. [FN78]

The insurance industry, therefore, is indeed heavily regulated. [FN79] That said, it is not as heavily regulated as the banking industry. [FN80] Additionally, the resources of state regulators are generally inferior to those of their federal cousins in banking (“[m]any state insurance departments are hopelessly underfunded and understaffed and are sometimes unable to carry out basic regulatory functions adequately, much less oversight of complex international insurance networks”). [FN81] This serves to loosen the effective rigor of insurance regulation, and exacerbates the difference between insurance regulation and banking regulation.

Thus, although insurance regulation is certainly a model that prioritizes cognitive trust over affective trust, it does so to a relatively lesser degree than does banking regulation. Can this difference be justified from a trust perspective? Probably so.

Recall that banking institutions are paradigmatically impersonal--especially with the advent of ATM, telephone, and Internet banking. [FN82] As \*589 such, for all their efforts, banks are unlikely to gain much traction in attempts to develop and nurture affective trust.



Insurance companies, however, do enjoy customer relationships of a more personal nature (in certain contexts). For starters, the very subject matter of many insurance contracts, ranging from health, to life, to property, touch upon issues close to most people (their well-being and their homes, for example). With regard to life insurance, for example, a review of policy options ordinarily includes a discussion of those dearest to the customer's heart: his or her spouse, children, and other very close family members. It can involve some rather soul-searching questions, and the need to confront some rather dreadful, yet potential, scenarios. Discussions such as these provide fertile ground for the development of affective trust between the customer and his or her insurance agent. [FN83]

Additionally, it is not uncommon for insurance agents to pursue and develop long-term relationships with their clients. Periodic visits, or phone calls, from an agent to review a client's "insurance needs" are fairly common. Oftentimes, these conversations coincide, or quickly follow, a major life event: such as a marriage, or the birth or adoption of a child. This furthers the potential development of affective trust in the customer-insurance agent relationship.

Thus, when compared to banking relationships, insurance relationships would seem to hold out more promise for affective trust. From a trust perspective, this would counsel in favor of a regulatory regime (for insurance) that created more room for affective trust to develop. Coincidentally, perhaps, this is exactly the situation. Although heavily regulated, insurance is less heavily regulated than banking, arguably giving affective trust (a relatively) greater opportunity to develop.

That said, it must be quickly noted that, certain substantial differences notwithstanding, the impact (from a trust perspective) of the relatively lighter regulatory approach to insurance regulation is likely to be marginal. For it is unlikely that the consumer of insurance will notice, or be aware of, any appreciable regulatory differences than a consumer of banking services. In both contexts, consumers will observe and experience the hallmarks and formalities of a heavily regulated industry. Moreover, in both contexts, consumers are likely to be aware of the existence of a robust regulatory backdrop--even if such consumers are oblivious to the details of this regulatory backdrop. Thus, although the insurance industry might be slightly less regulated than the banking industry (both formally and, effectively, because of oversight limitations discussed above), [FN84] that \*590 difference is unlikely to have an impact on trust because it is most likely imperceptible to the consumer. [FN85]

### C. Securities Regulation

The most interesting application of trust scholarship to financial regulation occurs within the context of securities regulation. This is because securities regulation is itself marked by a broad range of regulatory approaches--from highly regulated (as in the case of broker-dealers) [FN86] to lightly regulated (as in the case of hedge funds). [FN87] The sensibility of this range will turn on the nature of the relationships impacted by these regulatory approaches.

Although a more thorough treatment of the interplay of trust and securities regulation will be treated elsewhere, [FN88] this Article will examine the issue within four important and representative securities industry contexts.

#### 1. Public Offering Regulation

U.S. securities regulation is largely governed by the Securities Act of 1933 (1933 Act) [FN89] and the Se-

curities Exchange Act of 1934 (1934 Act). [FN90] The 1933 Act focuses primarily on the sale of securities from an issuer to the public; the 1934 Act focuses primarily on secondary market trading. [FN91]

Arguably, the defining features of the U.S. approach to financial regulation are on display in the 1933 Act. More specifically, the 1933 Act's rules governing a public offering of securities shed much light on the philosophy of U.S. financial regulation generally.

In adopting the initial set of federal securities laws for the United States, the road not taken by Congress was that of merit regulation. [FN92] Instead, the 1933 Securities Act (and the 1934 Securities Exchange Act as well) embodies a philosophy of "full disclosure." [FN93] Pursuant to this philosophy, \*591 the government doesn't decide which securities are fit for sale, and which are unfit (as, say, the Food and Drug Administration does with regard to food and drugs). [FN94] Instead, the government, through the Securities Exchange Commission (SEC), requires that companies wishing to sell securities in a public offering make certain detailed, and rather extensive, disclosures to the public before doing so. [FN95] More specifically, an issuer seeking to sell securities in a public offering must, among other things, ordinarily file a registration statement with the SEC (which immediately becomes available to the public via the SEC's website), and must deliver to the investor (or otherwise make available) a prospectus once the securities are actually purchased. [FN96] Once the disclosures are made, it is up to the investor himself or herself to weigh the merits of the securities offering, and to decide whether purchasing the securities is wise or unwise. And since inaccurate or misleading disclosures are worse than no disclosure at all, the 1933 Securities Act adds to its mandatory disclosure regime important liability and antifraud provisions intended to safeguard the accuracy and truthfulness of the disclosed information. [FN97]

Congress's express purpose in enacting the 1933 and 1934 Acts was, primarily, to restore investor trust and confidence in the securities markets. [FN98] With regard to cognitive trust at least, the legislation appears to have hit the mark.

By requiring detailed disclosures, private rights of action, and governmental oversight, public offering regulations reduce investor vulnerability. [FN99] This reduces the cost of trusting an issuer, thereby increasing the likelihood of cognitive trust.

However, as with banking and insurance regulation, the possibility of affective trust materializing is diminished because the tight web of regulation leaves little room in which issuers can maneuver to demonstrate their trustworthiness. The antifraud rules, which reduce investor vulnerability, simultaneously reduce the opportunity that an issuer has to prove its genuine integrity. An investor knows not whether the issuer's disclosures are truthful because the issuer is honest, or because the issuer merely wishes \*592 to avoid legal sanction. Additionally, the very need for such antifraud rules arguably broadcasts the potential untrustworthiness of issuers. [FN100]

Even the requirement to make certain disclosures, as innocuous as that might seem to affective trust, can be problematic from a perspective favoring the enhancement of affective and generalized trust. For these disclosures nevertheless constitute a formal, regulatory imposition upon the issuer-investor relationship, thereby potentially transforming it. [FN101]

That said, by opting for a disclosure regime, versus merit-based regulation, Congress intentionally left investors exposed to a significant amount of obvious vulnerability--even after taking into account forceful anti-fraud provisions. This residual vulnerability serves as an opportunity for the development of some affective trust, but a stumbling block for cognitive trust. [FN102]

For affective trust can potentially be developed via a process-based route in which one's placement of trust in another is honored and rewarded, time after time. [FN103] The vulnerability inherent in an investor's purchasing of securities from an issuer furnishes the room that is needed for the issuer to demonstrate its trustworthiness. As forecasts and predictions prove accurate, and as the issuer continues to conduct its affairs with integrity and competence, an investor can grow to develop an amount of affective trust in the issuer. Such development of trust over time between an issuer and investors is of tremendous value to each: the company will be well positioned to raise money via subsequent public offerings more easily, and less expensively, and investors will be able to view the company's subsequent offerings with less skepticism and doubt. [FN104]

In short, the regulatory approach to public offerings largely favors cognitive trust over affective trust. At the same time, the approach certainly carves out some space for the development of affective trust--at the expense of some cognitive trust. Is the approach sensible? It would seem so.

With rare exception, investment decisions are based on cognitive, not affective, trust. [FN105] An investor's trust in a company is not ordinarily emotionally or morally generated, but rather is developed in a calculated fashion. All things considered, factors going into whether an investor trusts a company to perform well include its past performance, its management \*593 team, the quality of its products and services, its competitive environment, and the regulatory landscape. Management integrity may very well be a concern--but most likely, not in an emotional, or morally driven way, but rather as simply another (albeit an important) factor in the mix. Indeed, it is difficult for affective trust, which is primarily interpersonal in nature, to develop between an individual and an institution--especially an institution as far removed, and with as little contact with the investor, as an issuer of securities (for several intermediaries will separate the issuer from the ultimate investor, including, most likely, an underwriter, a dealer, and a broker; it is highly probable that the investor will have absolutely no direct contact with the issuer at all during the time in which he or she makes an investment decision). [FN106]

On balance, therefore, it would seem as though public offering regulation comports well with our understanding of trust in that it heavily regulates an area where trust is largely cognitive in nature.

Interestingly, the regulation does not go as far as it could in this direction, but, owing to its disclosure-based approach (versus a heavier-handed merit-based approach), actually allows some room for affective trust to develop as well, perhaps allowing certain exceptional issuers an opportunity to reap the benefits of this potentiality. [FN107]

## 2. Private Offering Regulation

In contrast to the regulation of public offerings under the 1933 Securities Act is the manner in which private offerings are regulated. Largely codified by Regulation D under the 1933 Act, private offerings permit the sale of securities, under certain conditions, without the need to file a registration statement with the SEC or prepare a prospectus. [FN108] Indeed, when selling securities to an "accredited investor" (an investor "capable of fending for him/herself" due to his or her presumed sophistication, as determined by factors such as income and net worth), [FN109] there are no information requirements whatsoever. [FN110]

Additionally, since no registration statement, and no prospectus, is prepared in connection with a private offering, certain antifraud and liability provisions applicable to public offerings are inapplicable to private \*594 offerings. [FN111] This removes important means by which investors can protect themselves when purchasing securities in a private offering. [FN112]

Thus, in comparison to a public offering, a private offering does not require the dissemination of circumscribed information (via the preparation of a registration statement, a prospectus, or any similar document) to accredited investors. [FN113] And whatever communications are made to the investor, the inaccuracies in such communications can only give rise to liability within a reduced set of circumstances.

In short, therefore, private offerings are less heavily regulated than public offerings. [FN114] Although this difference has been justified on a number of grounds, [FN115] can it be justified on grounds relating to the issue of trust? I believe it can.

A public offering and a private offering differ factually in a number of important respects. [FN116] Most relevant to the present analysis, a private “offering is more likely to be . . . ‘characterized by personal contact between the issuer and offerees free of public advertising or intermediaries such as investment bankers or securities exchanges.’” [FN117] A second important characteristic of private offerings is that of (oftentimes) a pre-existing relationship between the investor and the issuer. [FN118]

Unlike a public offering, then, a private offering often takes place in a context within which affective trust is more likely to develop. [FN119] Interpersonal relationships and communications are conducive to such trust, [FN120] and such relationships and communications are often found among the parties to a private offering.

Similarly, given the relationships and degree of direct communication between the parties, an investor's trust in a private offering issuer could actually be generalized. He or she may actually have developed a “feel” for \*595 the issuing corporation (through repeated contacts with its agents, and a relationship over time), such that he or she genuinely trusts in the integrity, honesty, and values of that organization.

The way in which private offerings are regulated appears to favor affective trust over cognitive trust. The lack of regulation (relatively speaking) does less to bolster the development of cognitive trust than a more robust regulatory regime possibly could, but, at the same time, creates ample space for affective trust to develop. Thus, the regulatory approach to private offerings appears to be the photographic negative to the regulatory approach to public offerings.

This divergence is justifiable given the nature of private offerings, and given the recommended preference for affective trust over cognitive trust. [FN121] For a greater potential for affective and generalized trust exists within the context of private offerings versus public offerings, presenting a greater societal opportunity: an opportunity to realistically further affective trust. Thus, it would seem that our regulation of offerings, both public and private, strikes the correct balance, from a trust-favoring perspective.

### 3. Underwriters and Due Diligence

Underwriters and due diligence are components of securities offerings-- especially public offerings. Nevertheless, their importance is such to merit separate consideration.

The underwriter, among other things, serves an important “gatekeeping” role in the securities offering process. [FN122] For unlike the issuer, it is ordinarily the underwriter (invariably an investment bank) that enjoys contacts and relationships with the investing public--either directly or indirectly through broker-dealers. [FN123] Thus, if the issuer's securities are to be sold, it will usually be a function of the expertise, ability, and credibility of the investment banks underwriting the offering. [FN124] In short, the underwriter's reputation, which serves as a shorthand for its expertise, ability, and credibility, is critical. [FN125] As Ronald Gilson and

Reiner Kraakman have explained:

It is in this setting that the critical role of the investment banker [underwriter] as a reputational intermediary becomes clear. In essence, the investment banker rents the issuer its reputation. The investment banker represents to the market (to whom it, and not the issuer, sells the security) that it has evaluated the \*596 issuer's product and good faith and that it is prepared to stake its reputation on the value of the innovation. [FN126]

“Reputation” is, of course, closely related to trust. The more deeply and widespread the trust is in an individual or organization, the greater his, her, or its reputation is likely to be. It is, therefore, critically important for underwriters to earn the trust of the investing public. How well do the securities laws enable underwriters to earn this trust?

The overriding provisions regulating underwriting conduct in a public offering are Sections 11 and 12(a)(2) of the 1933 Securities Act. [FN127] These sections give investors private rights of action in the event of a material misstatement or omission in a registration statement or prospectus. [FN128] This liability extends to underwriters involved in the underwriting process. [FN129]

Although neither Section 11 nor Section 12(a)(2) requires a plaintiff to demonstrate scienter, and thus may result in strict liability, it does provide defendant underwriters with an important means of escaping liability. [FN130] For if an underwriter can establish that it engaged in sufficient “due diligence” (under Section 11), or employed “reasonable care” (under Section 12(a)(2)), it will be absolved of liability under those Sections. [FN131] Fortunately (for analytical purposes, at least) courts have held that the standards for what amounts to “due diligence” and “reasonable care” are roughly equivalent, and hence I shall not address these defenses separately, but rather collectively under the title of “due diligence.” [FN132]

To prevail upon a due diligence defense, an underwriter must establish that:

[it] had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to \*597 be stated therein or necessary to make the statements therein not misleading. [FN133]

The U.S. Supreme Court has held that whether an investigation was reasonable invites a negligence analysis. [FN134]

Although efforts have been made to more explicitly define what constitutes due diligence, [FN135] there remains “a relative paucity of judicial authority on how a defendant can successfully establish his due diligence defense under Sections 11 and 12.” [FN136] Thus, for these critical players in the securities markets (underwriters), the circumstances under which they can be held liable for material misstatements and omissions in offering documentation remain murky. It should be added that if fraud is alleged by plaintiffs (which is often the case), heightened pleading standards under the Private Securities Litigation Reform Act of 1995 (PSLRA) make it particularly difficult for a plaintiff to pursue an action against an underwriter (or any other securities fraud defendant). [FN137]

From a trust perspective, it would seem as though existing regulation provides underwriters with ample room with which to earn the trust they so critically need within the industry. Their underwriting work is not circumscribed in detail, but rather subject to a general, and fairly low, standard--approximating negligence. [FN138] Moreover, in light of the PSLRA, investors victimized by securities fraud will find it particularly diffi-

cult to obtain relief from underwriter (and indeed, all non-issuer) defendants. [FN139]

Whether this lack of regulatory support for trust in underwriters is good public policy (from a trust perspective) depends, it would seem, upon the nature of the underwriting-investor relationship. As with our analysis of the regulatory approach toward public versus private offerings, [FN140] the pivotal inquiry is the degree to which trust in underwriters is affective versus cognitive in nature. [FN141]

**\*598** It would appear as though the relationship of an underwriter to the investing public is primarily cognitive in nature. As with issuers involved in public offerings, the underwriter is ordinarily removed by a step or two from the ultimate investor. The investor's trust in an underwriter seems more like an investor's trust in an issuer in a public offering: reliance on its technical skills and capability to fulfill its obligations professionally and competently. Emotion and a shared sense of values do not seem to play a predominant role here. Likewise, the trust in an underwriter's reputation is more akin to confidence in its ability to effectively investigate the issuer whose securities are being offered for sale--and less akin to a generalized convergence in the values and morals of the underwriting firm.

Given, therefore, that trust in underwriters is most likely cognitive in nature, and thus of the forms most susceptible to enhancement via regulation, it would seem as though (from a strictly trust-enhancing point of view) additional regulation of underwriters could be helpful. Measures taken to enhance underwriter liability, or more carefully circumscribe the conduct that constitutes due diligence, would most likely increase, rather than decrease, trust in underwriters from an investor's vantage point.

#### 4. Secondary Market Trading and Rule 10b-5

The vast majority of securities trading activity occurs in the secondary market--that is, between investors rather than between issuers and investors. [FN142] Not surprisingly, then, of paramount importance to most investors is the 1934 Securities Exchange Act (which focuses chiefly on the secondary market), and not the 1933 Securities Act (which focuses chiefly on the primary market and underwriting of securities). [FN143]

Since secondary market investors trade anonymously, any trust and confidence factoring into their decisions to trade (aside from any trust and confidence in their brokers) is largely grounded upon the market itself. [FN144] Prominent among the efforts of Congress and the SEC to foster trust in the secondary trading markets are the bans on fraudulent, manipulative, and insider trading. [FN145]

Pursuant to Section 10 of the 1934 Act, and Rule 10b-5 promulgated thereunder, it is unlawful to employ a manipulative or deceptive device in connection with the purchase or sale of a security. [FN146] "Manipulative" has **\*599** been described by the U.S. Supreme Court as a "term of art," encompassing "the full range of ingenious devices that might be used to manipulate securities prices." [FN147] And "deceptive device[s]" are generally practices in which the purchase or sale of a security is accomplished via the communication of a materially misleading misstatement or omission. [FN148]

Except for the relatively rare instance of a face-to-face purchase of securities between two secondary market actors, Section 10 and Rule 10b-5 instill trust and confidence by serving to protect the integrity of securities prices. [FN149] By (hopefully) reducing the occurrence of fraud and manipulation, Section 10 and Rule 10b-5 provide comfort to the investor purchasing a security over an exchange--comfort in the fact that the price paid for the security is a function of its value, as best estimated, and not the result (or less likely the result) of fraud and manipulation. [FN150]

The ban on insider trading works similarly. Again, assuming a typical secondary market transaction (and not a face-to-face sale), the investor does not know with whom he or she is actually trading. That said, it has long been assumed (and probably rightly so) that investors would be less willing to trade if they felt as though the market were “rigged” by insiders--individuals who knew exactly when to buy and when to sell, thanks to access to information unavailable to the common investor. [FN151] As with a ban on manipulation and fraud, a ban on insider trading promotes a sense of fairness in the securities markets (or so the supporters of the insider trading ban reasonably assert). [FN152]

Beyond the bans on fraudulent, manipulative, and insider trading, the secondary markets are subject to a host of other regulatory requirements. Prominent among these requirements are those promulgated by self-regulatory organizations (SROs), such as the New York Stock Exchange, which impose their own layer of rules and regulations upon the secondary trading markets, enforced and overseen by the Financial Industry Regulatory Authority (FINRA). [FN153] And broker-dealers, the key financial intermediaries through which the vast majority of investors trade in the secondary market, are themselves heavily regulated. [FN154]

**\*600** From a trust perspective, it seems as though the regulatory approach to secondary market trading is helpful and sensible. It is difficult to imagine the development of high-quality affective trust in the context of secondary market trading. [FN155] Affective trust is most commonly found between individuals, and less so between an individual and an institution--especially an institution as intangible as “the securities markets.” [FN156]

Thus, with little affective trust to be sacrificed, heavy regulation in this area does not seem ill-advised.

Conversely, since the trust in this area is likely to be of the cognitive variety, regulation can have a trust-enhancing effect here. [FN157] Investor trust in the institutions and actors involved in secondary market trading fundamentally boils down to confidence in those institutions and actors to correctly process trade requests--and in a manner devoid of fraud, duplicity, and incompetence. Regulation governing these trades, institutions, and actors can very well heighten that confidence.

## V. Conclusion

Trust is a critical ingredient in healthy financial markets, economies, and societies. Policy makers are correctly concerned with taking action to protect and/or restore trust--especially in times when events and circumstances imperil trust.

Unfortunately, good intentions and well-meaning policy prescriptions do not guarantee favorable results. [FN158] Indeed, perhaps counter-intuitively, regulation designed to shore up trust can actually serve to undermine trust. The critical determinant here is the nature of trust in question.

Fortunately, whether by chance or design, financial regulation in the United States generally comports well with what we know about trust. Trust relationships most amenable to regulatory improvement (namely, relationships of cognitive trust), are generally the most heavily regulated. Trust relationships that are least amenable to regulatory improvement, and/or exhibit a potential to generate and operate upon higher quality versions of non-regulatory trust (namely, relationships of affective trust), are generally the least heavily regulated. [FN159]

**\*601** Since the financial services industry is, generally speaking, impersonal and driven by economic con-

cerns, cognitive trust (based upon calculative, cost-benefit analysis), rather than affective trust (based upon emotion and shared backgrounds, experiences, and values) generally prevails. Consequently, the high degree of regulation that characterizes the financial services industry is sensible.

There are, of course, exceptions to this. There are pockets and niches in the world of financial services where affective trust does exist, or could be expected to exist. And there are a range of contexts in between: some places where affective trust is more likely to develop, and others where affective trust is less likely to develop. Interestingly, and gladly, existing regulation generally tracks these nuances well from a trust perspective; the hand of regulation is relatively heavier where appropriate, and relatively lighter where appropriate.

It would be wise to preserve this salutary state of affairs. As our policy makers continue to confront a crisis that some wish not to “waste,” [FN160] let us hope that their policy prescriptions avoid undoing what generations past have seemingly done well. Let us hope that they avoid deregulating those areas within the financial services industry where regulation serves trust most well (those areas characterized by the lowest potential to realize the benefits of affective trust). Similarly, let us hope that they avoid regulating (or avoid regulating to a greater degree), those areas where regulation threatens to harm trust more than help trust (those areas characterized by the greatest potential to realize the benefits of affective trust). At a bare minimum, let us hope that, if acting in the name of trust, policy makers at least take into account the likely effects of their actions on trust, in light of over a decade of scholarship on the subject.

[FN1]. Associate Professor of Law, Hofstra University School of Law. I would like to thank the Villanova University School of Law's first annual Morgan, Lewis & Bockius Symposium on Securities Regulation for inviting me to present an earlier draft of this Article, and for the helpful feedback and suggestions received therefrom. I would also like to extend my thanks to Jamie Feldman, Jennifer Riley, and Drew Summer for their most helpful research assistance.

[FN1]. See Susanna Kim Ripken, [The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation](#), 58 *Baylor L. Rev.* 139, 140-41 (2006).

[FN2]. See John H. Walsh, [A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry](#), 29 *Hofstra L. Rev.* 1015, 1036 (2001).

[FN3]. See William Shakespeare, *The Tempest*, 59 (Burton Raffel ed., Yale University Press 2006) (1610).

[FN4]. See Ann Graham, [The Consumer Financial Protection Agency: Love It or Hate It](#), *U.S. Financial Regulation Needs It*, 55 *Vill. L. Rev.* 603 (2010); Anita K. Krug, [Moving Beyond the Clamor for “Hedge Fund Regulation”: A Reconsideration of “Client” Under the Investment Advisors Act of 1940](#), 55 *Vill. L. Rev.* 661 (2010); Arthur Laby, [Fiduciary Obligations of Broker-Dealers and Investment Advisers](#), 55 *Vill. L. Rev.* 701 (2010).

[FN5]. See Eric J. Pan, [Four Challenges to Financial Regulatory Reform](#), 55 *Vill. L. Rev.* 743 (2010).

[FN6]. Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (1995).

[FN7]. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of the American Community* (2000).

[FN8]. Tamar Frankel, *Trust and Honesty* (2006).



[FN9]. See generally *id.*; see also Margaret M. Blair & Lynn A. Stout, [Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law](#), 149 U. Pa. L. Rev. 1735 (2001); Frank B. Cross, [Law and Trust](#), 93 Geo. L.J. 1457 (2005); Lawrence E. Mitchell, [Trust and Team Production in Post-Capitalist Society](#), 24 J. Corp. L. 869 (1999). Other important works address trust within the larger context of social capital. See, e.g., Fukuyama, *supra* note 6; Putnam, *supra* note 7.

[FN10]. R. William Ide, III & Douglas H. Yarn, [Public Independent Fact-Finding: A Trust-Generating Institution for an Age of Corporate Illegitimacy and Public Mistrust](#), 56 Vand. L. Rev. 1113, 1114 (2003) (quoting Federal Reserve's Second Monetary Policy Report for 2002: Hearing Before the S. Comm. on Banking, Hous. and Urban Affairs, 107th Cong. 44 (2002) (statement of Alan Greenspan)).

[FN11]. In fact, as this Article was being written, two new, significant articles on Trust were posted to the Social Science Research Network (SSRN). See Raymond H. Brescia, [Trust in the Shadows: Law, Behavior and Financial Re-Regulation](#), 57 Buff. L. Rev. 1361 (2009); Lynn Stout, [Trust Behavior: The Essential Foundation of Securities Markets](#) (UCLA School of Law, Law & Econ. Research Paper No. 09-15), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1442023](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442023).

[FN12]. See Oliver R. Goodenough, [Values, Mechanism Design, and Fairness](#), in *Moral Markets: The Critical Role of Values in the Economy* 28, 239 (Paul J. Zak ed., 2008). I have previously addressed the issue of transaction costs and, generally, the need for virtue (not simply trust). See Ronald J. Colombo, [Exposing The Myth of Homo Economicus](#), 32 Harv. J.L. & Pub. Pol'y 737 (2009).

[FN13]. See Goodenough, *supra* note 12, at 239; Tamar Frankel, [Trust and Non-Trusting on the Internet](#), 81 B.U. L. Rev. 457, 460-63 (2001).

[FN14]. See Frankel, *supra* note 13, at 460-63.

[FN15]. See Christel Lane, [Introduction](#), in *Trust Within and Between Organizations* 1, 20 (Christel Lane & Reinhard Bachmann eds., 1998) (citing L.G. Zucker, [Production of Trust: Institutional Sources of Economic Structure, 1840-1920](#), 8 Res. in Org. Behav. 53 (1986)).

[FN16]. See *id.* at 20 (citations omitted).

[FN17]. See *id.*

[FN18]. See Blair & Stout, *supra* note 9, at 1739-40.

[FN19]. See Claire A. Hill & Erin Ann O'Hara, [A Cognitive Theory of Trust](#), 84 Wash. U. L.R. 1717, 1724 (2006).

[FN20]. See Cross, *supra* note 9, at 1464.

[FN21]. See Oliver E. Williamson, [Calculativeness, Trust, and Economic Organization](#), 36 J.L. & Econ. 453, 479 (1993).

[FN22]. See *id.*

[FN23]. See Lane, *supra* note 15, at 23; Blair & Stout, *supra* note 9, at 1750-51, 1756-59 (extolling benefits of

“trust,” which authors have defined as “internalized [affective] trust and not calculative behavior [cognitive trust]”); Hill & O’Hara, *supra* note 19, at 1725-26; Larry E. Ribstein, [Law v. Trust](#), 81 B.U. L. Rev. 553, 560-63 (2001).

[FN24]. See Williamson, *supra* note 21, at 463.

[FN25]. See Cross, *supra* note 9, at 1465.

[FN26]. See *id.*

[FN27]. See Hill & O’Hara, *supra* note 19, at 1725.

[FN28]. See *id.*

[FN29]. See *id.* at 1752.

[FN30]. See Lane, *supra* note 15, at 23.

[FN31]. See Cross, *supra* note 9, at 1469.

[FN32]. See Hill & O’Hara, *supra* note 19, at 1727.

[FN33]. See Sim B. Sitkin & Nancy L. Roth, Explaining the Limited Effectiveness of Legalistic “Remedies” For Trust/Distrust, 4 J. Org. Sci. 367, 371-72 (1993).

[FN34]. See Hill & O’Hara, *supra* note 19, at 1751-52; Sergio G. Lazzarini et al., [Order with Some Law: Complementarity Versus Substitution of Formal and Informal Arrangements](#), 20 J.L. Econ. & Org. 261, 261-64 (2004).

[FN35]. See Hill & O’Hara, *supra* note 19, at 1725-26; see also Ribstein, *supra* note 23, at 559-68.

[FN36]. See Lane, *supra* note 15, at 15-16.

[FN37]. See Hill & O’Hara, *supra* note 19, at 1725-26.

[FN38]. See *id.*; see also Ribstein, *supra* note 23, at 559-68; cf. Paul J. Zak, Values and Value, in *Moral Markets: The Critical Role of Values in the Economy*, *supra* note 12, at 261, 265 (discussing how rules and policies can crowd out good behavior based simply on norms/an honor system). But see Cross, *supra* note 9, at 1498 (criticizing “crowding out” theories as not “logical”).

[FN39]. See Ribstein, *supra* note 23, at 581; accord George Dent, [Lawyers and Trust in Business Alliances](#), 58 Bus. Law. 45, 53-60 (2002).

[FN40]. Sitkin & Roth, *supra* note 33, at 369 (citations omitted); see also Mari Sako, Does Trust Improve Business Performance?, in *Trust Within and Between Organizations*, *supra* note 15, at 88, 99-100, 104-05. But see Lazzarini, *supra* note 34, at 264 (rejecting Sitkin and Roth’s conclusion).

[FN41]. See Lawrence E. Mitchell, [The Importance of Being Trusted](#), 81 B.U. L. Rev. 591, 600 (2001).

[FN42]. See Heidi Mandanis Schooner & Michael Taylor, [Convergence and Competition: The Case of Bank](#)

[Regulation in Britain and the United States](#), 20 *Mich. J. Int'l L.* 595, 605-06 (1999).

[FN43]. See Carl Felsenfeld & Genci Bilali, [Is There a Dual Banking System?](#), 2 *J. Bus. Entrepreneurship & L.* 30, 53 (2008).

[FN44]. See *id.*

[FN45]. Michael P. Malloy, *Bank Regulation* 1 (1999).

[FN46]. William A. Lovett, *Banking and Financial Institutions Law* 121 (6th ed. 2005).

[FN47]. Namely, the Board of Governors of the Federal Reserve, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the National Credit Union Administration. See Malloy, *supra* note 45, at 14 n.2. At the time of this writing, proposals to consolidate the functions of some of these agencies, and to do away with the OTS and OCC, are under serious consideration.

[FN48]. See William B. Glidden, [The Regulation of U.S. Banks' Operations Abroad](#), 108 *Banking L.J.* 108, 108 (1991).

[FN49]. FDIC, *Deposit Insurance Summary*, <http://www.fdic.gov/deposit/deposits/dis/index.html> (last visited May 16, 2010).

[FN50]. See Andrea M. Maechler & Kathleen M. McDill, *Dynamic Depositor Discipline in U.S. Banks* (FDIC Working Paper, Paper No. 2003-07, 2003), available at [http://www.fdic.gov/bank/analytical/working/wp2003\\_07/index.html#fig01](http://www.fdic.gov/bank/analytical/working/wp2003_07/index.html#fig01).

[FN51]. Harding de C. Williams, *Federal Banking Law and Regulations: A Handbook For Lawyers* 35 (2006).

[FN52]. See *id.* at 47 (observing that federal banking insurance “was responsible for restoring public confidence in the banking system during the Depression and has obviously worked since then”).

[FN53]. See *supra* notes 23-27 and accompanying text.

[FN54]. See *supra* notes 34-35 and accompanying text.

[FN55]. See *id.*

[FN56]. Of course, the customer operating pursuant to cognitive trust cares little one way or the other; his or her primary concern is simply that something is causing the bank to behave honestly. That said, there are powerful reasons why it is important to know whether one is truly trustworthy, versus merely appearing to be trustworthy. As I have written elsewhere: “when no one is looking, and when no can catch us, or when there is no law to hold us accountable, or no other means of chastisement, the only thing that compels us to do what is right is virtue.” Ronald J. Colombo, *A Crisis of Character*, *The Huffington Post*, May 12, 2009, [http://www.huffingtonpost.com/ronald-j-colombo/a-crisis-of-character\\_b\\_202562.html](http://www.huffingtonpost.com/ronald-j-colombo/a-crisis-of-character_b_202562.html).

[FN57]. See *supra* note 23 and accompanying text.

[FN58]. See *id.*

[FN59]. Marc Galanter, [The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse](#), 66 U. Cin. L. Rev. 805, 806-07 (1998), quoted in Fukuyama, *supra* note 6, at 147 (linking decline of personal trust in modern society to growth of professional trust in law, medicine, and banking). More colorful still is Grant Gilmore's well-known comment on the subject:

Law reflects, but in no sense determines the moral worth of a society.... The better the society, the less law there will be. In Heaven, there will be no law, and the lion will lie down with the lamb.... The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed.

Grant Gilmore, *The Ages of American Law* 110-111 (1977).

[FN60]. See *supra* notes 20-22 and accompanying text.

[FN61]. See *id.*

[FN62]. See Jorg Sydow, *Understanding the Constitution of Interorganizational Trust*, in *Trust Within and Between Organizations*, *supra* note 15, at 31, 32-49.

[FN63]. See, e.g., Norizan Mohd Kassim & Adbel Kader Mohommad Ahmed Abdulla, *The Influence of Attraction on Internet Banking: An Extension to the Trust-Relationship Commitment Model*, 24 Int'l J. Bank Mktg. 424, 425 (2006); Xerox, *Financial Services White Paper 2-6*, 14-15 (2008), available at [http://www.xerox.com/downloads/usa/en/xgs/whitepapers/xgs\\_whitepaper\\_financial\\_services\\_customer\\_communications.pdf](http://www.xerox.com/downloads/usa/en/xgs/whitepapers/xgs_whitepaper_financial_services_customer_communications.pdf).

[FN64]. See Lorene Yue, *Banking Industry's Embrace Of Technology is Leaving Some Consumers Cold*, Det. Free Press, May 13, 1998, at 1E.

[FN65]. Which is, after all, one of the primary goals of U.S. banking regulation. See [Rauscher Pierce Refsnes, Inc. v. FDIC](#), 789 F.2d 313, 315 (5th Cir. 1986) (“Congress established the Federal Deposit Insurance Corporation in 1933 as part of a system to restore public confidence and to safeguard bank deposits through a comprehensive deposit insurance program sponsored and regulated by the national government.”).

[FN66]. See Lovett, *supra* note 46, at 1.

[FN67]. See *id.* at 350.

[FN68]. See *supra* Part IV.A.

[FN69]. See *infra* Part IV.C.

[FN70]. See Lovett, *supra* note 46, at 351.

[FN71]. See *id.* at 354-62.

[FN72]. Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. Rev. 13, 14 (1993).

[FN73]. See Lovett, *supra* note 46, at 365.

[FN74]. Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National As-*

sociation of Insurance Commissioners, 26 Fla. St. U. L. Rev. 625, 629 (1999).

[FN75]. See Lovett, *supra* note 46, at 365.

[FN76]. See *id.*

[FN77]. *Id.* at 369.

[FN78]. See *id.* at 371, 376.

[FN79]. See *id.* at 364-65 (“The established system of U.S. insurance regulation is comprehensive, highly developed, with much technical detail.”).

[FN80]. See *supra* Part IV.A.

[FN81]. Randall, *supra* note 74, at 699.

[FN82]. See *supra* notes 63-64 and accompanying text.

[FN83]. Cf. Douglas R. Richmond, *Liability Issues in the Sale of Life Insurance*, 40 *Tort Trial & Ins. Prac. L.J.* 877, 906 (2005).

[FN84]. See *supra* note 80 and accompanying text.

[FN85]. To the extent that a particularly sophisticated individual or entity was fully aware of this discrepancy in regulatory vigor, then the increased possibilities for affective trust in the insurance context could materialize.

[FN86]. See Clifford E. Kirsch, *Broker-Dealer Regulation* § 1:2 (2008).

[FN87]. See Thierry Olivier Desmet, *Understanding Hedge Fund Adviser Regulation*, 4 *Hastings Bus. L.J.* 1, 13 (2008).

[FN88]. See Ronald J. Colombo, *Trust and Financial Regulation* 34-56 (Hofstra U. Law Sch. Legal Studies Research Paper Series, Paper No. 09-22, 2009), available at <http://ssrn.com/abstract=1481327>.

[FN89]. See Securities Act of 1933, 15 U.S.C. § 77a (2006).

[FN90]. See Securities Exchange Act of 1934, 15 U.S.C. § 78a (2006).

[FN91]. See Cheryl Nichols, H.R. 2179, *The Securities Fraud Deterrence and Investor Restitution Act of 2004: A Testament to Selective Federal Preemption*, 31 *Suffolk Transnat'l L. Rev.* 533, 545 (2008).

[FN92]. I discuss the history and purposes of the 1933 Securities Act and 1934 Securities Exchange Act in Ronald J. Colombo, *Buy, Sell, or Hold? Analyst Fraud from Economic and Natural Law Perspectives*, 73 *Brook. L. Rev.* 91, 122-23 (2007).

[FN93]. See *id.*

[FN94]. See U.S. Food and Drug Administration, *What We Do*, <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (last visited May 16, 2010).

[FN95]. See Colombo, *supra* note 92, at 122-23; see also Ripken, *supra* note 1, at 145, 150-56 (“For the last seventy years, federal securities legislation in general has consistently relied on the philosophy of disclosure as the primary tool for protecting investors and regulating the securities market.”).

[FN96]. See Michael McDonough, *Death in One Act: The Case For Company Registration*, 24 *Pepp. L. Rev.* 563, 566-68 (1997).

[FN97]. See *id.* at 577.

[FN98]. See Colombo, *supra* note 92, at 121.

[FN99]. But see Mark A. Hall, *Law, Medicine, and Trust*, 55 *Stan. L. Rev.* 463, 491 (2002) (asserting that, within the somewhat analogous context of physician regulation, “[t]he ability to sue one's doctor for negligent mistakes and the authority to discipline doctors for unprofessional conduct ... are not plausibly meant to sustain trust or to restore it once it is violated. Instead, they are meant to punish violations of trust.”).

[FN100]. Cf. *id.* at 492 (observing that medical malpractice law “casts seeds of doubt about all physicians”).

[FN101]. Cf. *id.* at 489 (observing that informed consent law operates “possibly to the detriment of trust” between patient and physician).

[FN102]. See Hill & O'Hara, *supra* note 19, at 1756.

[FN103]. See *supra* notes 21-23 and accompanying text.

[FN104]. See Patricia L. Guinn, *Investors are Demanding More Transparent Financial Reporting from Insurers ... But Companies Will Benefit Too* 3 (2002), <http://www.iisonline.org/pdf/Guinn%20%20-%20TG-SingaporeWhitePaper.pdf>.

[FN105]. See Michael Ferrary, *Trust and Social Capital in the Regulation of Lending Activities*, 31 *J. Socio-Econ.* 673, 678 (2003).

[FN106]. See Sydow, *supra* note 62, at 32-49.

[FN107]. But see Ripken, *supra* note 1, at 187-88 (arguing that cognitive biases undermine investors' ability to make rational investment decisions, which suggests that enhancement of trust in this area might not be entirely beneficial).

[FN108]. See Abigail Arms, *The Private Placement Alternative to a Public Offering*, 1734 *P.L.I. Corp.* 55, 61, 64 (2009).

[FN109]. See *id.* at 62.

[FN110]. See *id.* at 64.

[FN111]. See *id.* at 86.

[FN112]. Certain other avenues of liability remain (primarily, § 10(b) of the 1934 Securities Exchange Act and Rule 10b-5 promulgated thereunder), but these avenues lack many of the features that make civil liability under

the 1933 Securities Act so helpful to aggrieved plaintiffs. See Nelson S. Ebaugh, [Remedies for Defrauded Purchasers of Oil and Gas Interests Under the Securities Laws](#), 1 *Tex. J. Oil Gas & Energy L.* 51, 60-61 (2006).

[FN113]. Some information must be provided to non-accredited investors, but still less than that which an investor in a public offering would receive. See Arms, *supra* note 108, at 62.

[FN114]. The same could be said, of course, of private placements under Rule 144A, but in the interest of time and space Rule 144A shall not be independently evaluated in this Article. See *id.* at 86.

[FN115]. See Patrick Daugherty, [Rethinking the Ban on General Solicitation](#), 38 *Emory L.J.* 67, 72 (1989).

[FN116]. See *id.* at 77-79.

[FN117]. *Id.* at 77-78 (quoting *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 900 (5th Cir. 1977)).

[FN118]. See *id.* at 78.

[FN119]. See *supra* note 104 and accompanying text.

[FN120]. See Sydow, *supra* note 62, at 32-49.

[FN121]. See Lane, *supra* note 15, at 23.

[FN122]. Ronald J. Gilson & Reinier H. Kraakman, [The Mechanisms of Market Efficiency](#), 70 *Va. L. Rev.* 549, 620 (1984).

[FN123]. See *id.*

[FN124]. See *id.*

[FN125]. See *id.*

[FN126]. *Id.*; see also Lawrence Cunningham, [Beyond Liability: Rewarding Effective Gatekeepers](#), 92 *Minn. L. Rev.* 323, 328 (2007).

[FN127]. 15 U.S.C. § 77k (2006).

[FN128]. See *id.*

[FN129]. See *id.*; Joseph K. Leahy, [What Due Diligence Dilemma? Re-Envisioning Underwriters' Continuous Due Diligence After Worldcom](#), 30 *Cardozo L. Rev.* 2001, 2010-11 (2009).

[FN130]. See Leahy, *supra* note 129, at 2011.

[FN131]. See *id.* at 2011-12. Underwriters also have a “reliance defense” under Section 11 with regard to expertised portions of the registration statement. See *id.* Further still, if fraud is alleged, plaintiffs (and the SEC) could pursue an action against underwriters pursuant to Section 10 of the 1934 Act, and the SEC has the additional option of proceeding against the underwriters under Section 17 of the 1933 Act.

[FN132]. See *id.*

[FN133]. 15 U.S.C. § 77k(b)(3)(A).

[FN134]. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976).

[FN135]. See, e.g., *In re WorldCom Sec. Litig.*, 346 F. Supp. 2d 628, 662 (S.D.N.Y. 2004); Christian A. Young, *Looking Back on WorldCom: Addressing Underwriters' Due Diligence in Shelf Registration Offerings and the Need for Reform*, 40 *Suffolk U. L. Rev.* 521, 547-48 (2007).

[FN136]. Jonathan K. Youngwood, *Due Diligence as a Defense in Securities Litigation*, 1746 *P.L.I. Corp.* 57, 71 (2009).

[FN137]. Alexis Brown Stokes, *In Pursuit of the Naked Short*, 5 *N.Y.U. J. L. & Bus.* 1, 23-32 (2009).

[FN138]. See *supra* notes 131-32 and accompanying text.

[FN139]. See *supra* note 136 and accompanying text.

[FN140]. See *supra* notes 86-121 and accompanying text.

[FN141]. Here we are presented with an interesting complexity, in that the relationship between and among underwriters, and other market professionals, may very well exhibit a different blend of trust than the relationship between underwriters and the investing public at large. This complexity need not detain us, however, because the relationship we have been examining in this Part is that between the underwriters and investors, and thus the following analysis will limit itself to that same relationship.

[FN142]. See Steven M.H. Wallman, *Report of the Advisory Committee on the Capital Formation and Regulatory Processes*, 962 *P.L.I. Corp.* 417, 544 (1996).

[FN143]. See *id.*; see also *supra* notes 87-90 and accompanying text.

[FN144]. See Michelle N. Comeau, *The Hidden Contradiction Within Insider Trading Regulation*, 53 *UCLA L. Rev.* 1275, 1280-82 (2006).

[FN145]. See 79A *C.J.S. Securities Regulation* § 103 (2009). There are undoubtedly other important regulatory provisions governing the secondary market, including, but not limited to, the periodic disclosure requirements. These do not implicate “trust” as directly and as profoundly, and hence they shall not be addressed here.

[FN146]. See Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2006); 17 C.F.R. § 240.10b-5 (2008)

[FN147]. *Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977).

[FN148]. See Todd G. Cosenza, *Applying Stoneridge to Restrict Secondary Actor Liability Under Rule 10b-5*, 64 *Bus. Law.* 59, 61-62 (2008).

[FN149]. See Louis Loss & Joel Seligman, *Fundamentals of Securities Regulation* 1125 (5th ed. 2005); Julie A. Herzog, *Fraud Created the Market: An Unwise and Unwarranted Extension of Section 10(b) And Rule 10b-5*, 63 *Geo. Wash. L. Rev.* 359, 366-68 (1995).



[FN150]. See Herzog, *supra* note 149, at 373-74.

[FN151]. Carol B. Swanson, *Reinventing Insider Trading: The Supreme Court Misappropriates The Misappropriation Theory*, 32 *Wake Forest L. Rev.* 1157, 1161-64 (1997).

[FN152]. See *id.*

[FN153]. See Cheryl Nichols, *Mutual Recognition Based On Substituted Compliance: An Integral Component of the SEC's Mandate*, 34 *N.C. J. Int'l L. & Com. Reg.* 1, 18-21 (2008).

[FN154]. See Kirsch, *supra* note 86, § 1:2.

[FN155]. See Ferrary, *supra* note 105 and accompanying text.

[FN156]. See *id.*

[FN157]. See Hall, *supra* note 99, at 469, 498-507; see also Cross, *supra* note 9, at 1483; Williamson, *supra* note 21, at 475-78.

[FN158]. Cf. *Oxford Dictionary of Quotations* 630:12 (Elizabeth Knowles ed., 6th ed. 2004).

[FN159]. I strongly suspect that this happy confluence of regulatory structure and trust springs, in part, from design--even if unintentional. It is not particularly difficult to appreciate the fact that some relationships require more rather than less supervision in order to thrive, and that other relationships, conversely, require less rather than more supervision to thrive. Appreciation of this phenomenon among policy makers could very well explain the varying gradations of regulatory approaches to different component parts of the financial services industry.

[FN160]. See Jeff Zeleny, *Obama Weighs Quick Undoing of Bush Policy*, *N.Y. Times*, Nov. 9, 2008, available at <http://www.nytimes.com/2008/11/10/us/politics/10obama.html>.

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