

A GENERAL DEFENSE OF INFORMATION FIDUCIARIES

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ABSTRACT

Countless high-profile abuses of user data by leading technology companies have raised a basic question: should firms that traffic in user data be held legally responsible to their users as “information fiduciaries”? Privacy legislation to impose fiduciary-like duties on data collectors enjoys bipartisan support but faces strong opposition from scholars. First, critics argue that the information-fiduciary concept flies in the face of fundamental corporate law principles that require firms to prioritize shareholder interests over those of consumers. Second, it is said that the overwhelming self-interest of large technology companies makes fiduciary loyalty impossible as a practical matter from the outset.

This Essay finds neither objection convincing. The first objection rests on a mischaracterization of corporate law, which in reality would require compliance with user-regarding fiduciary obligations—the opposite of what critics fear. The second objection fails to convince because fiduciary law has proven itself adaptable enough to survive such challenges in other settings, such as in the asset management industry. The second objection nevertheless reveals a need for greater specificity of the scope and intensity of fiduciary duties that would be imposed under the information fiduciary model. Even so, neither objection plausibly undermines the model.

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INTRODUCTION

Lawmakers have their sights on the leviathans of our time—Facebook, Google, and other digital companies. Across the political spectrum, legislators condemn these firms' conduct, accusing them of undermining user privacy and data security.¹ Scholars and other commentators decry the regulatory status quo, seeking reform.² One especially influential proposal has emerged: making digital companies “information fiduciaries” of their users.³ This reform, if implemented, would impose fiduciary duties of care,

1. See, e.g., Daisuke Wakabayashi, Mike Isaac, Karen Weise, Jack Nicas & Sophia June, *13 Ways the Government Went After Google, Facebook and Other Tech Giants This Year*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/interactive/2019/technology/tech-investigations.html> [<https://perma.cc/Y5XU-DXXS>]. (“Lawmakers and federal and state officials have repeatedly gone after America’s tech giants in 2020 The backlash over big tech is one of the few areas where Democrats and Republicans are increasingly in agreement.”); David McLaughlin & Ben Brody, *Big Tech Is Taking a Bipartisan Beating All over Washington*, BLOOMBERG (July 18, 2019, 2:55 PM), <https://www.bloombergrquint.com/business/big-tech-is-taking-a-bipartisan-beating-all-over-washington> [<https://perma.cc/MP3T-33VX>] (“The technology platforms that came under fire Tuesday were darlings of official Washington in the Obama years That admiration has been swept away amid criticism from Republicans and Democrats over competition, privacy and control over content on their platform.”).

2. See *infra* notes 4, 6, 7, 15, and 17 and accompanying text.

3. The information fiduciary proposal has attracted favorable attention in congressional hearings and the press. See, e.g., 164 CONG. REC. S2026 (daily ed. Apr. 10, 2018) (statement of Sen. John Cornyn) (“Perhaps we should treat social media platforms as information fiduciaries and impose legal obligations on them”); Nathan Heller, *We May Own Our Data, but Facebook Has a Duty to Protect It*, NEW YORKER (Apr. 12, 2018), <https://www.newyorker.com/tech/annals-of-technology/we-may-own-our-data-but-facebook-has-a-duty-to-protect-it> [<https://perma.cc/G6X6-2X6F>] (“To a striking

confidentiality, and loyalty, intended to ensure that firms do not betray the confidence users place in them.⁴ The information fiduciary model is reflected in consumer privacy laws now under review by legislatures at the federal and state levels.⁵

But while there is enthusiasm behind this model, it also faces significant opposition. The information-fiduciary model “could cure at most a small fraction of the problems associated with online platforms—and to the extent it does, only by undercutting directors’ duties to shareholders, undermining foundational principles of fiduciary law, or both,”⁶ write Lina Khan and David Pozen, referring to a proposal by Jack Balkin.⁷ Summarizing their critique, Pozen has written that this proposal is “flawed—likely beyond repair—on conceptual, legal, and normative grounds.”⁸ Their analysis raises two principal objections. First, the proposal is incompatible with corporate law in Delaware, where the relevant companies incorporate.⁹ Balkin’s *user*-regarding duties would clash with *shareholder*-regarding corporate law duties, creating the problem of “conflicting fiduciary obligations”¹⁰ or

degree, the [information] fiduciary model was the one toward which discussion [at the Senate Judiciary and Commerce Committees] slowly and chaotically converged.”); Russell Brandom, *This Plan Would Regulate Facebook Without Going Through Congress*, VERGE (Apr. 12, 2018, 11:32 AM), <https://www.theverge.com/2018/4/12/17229258/facebook-regulation-fiduciaryrule-data-proposal-balkin> [<https://perma.cc/7V4Y-ZUFG>] (“[W]hen Sen. Brian Schatz (D-HI) mentioned . . . [the] concept of an information fiduciary, [Mark] Zuckerberg seemed to perk up.”).

4. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1205–09 (2016) [hereinafter Balkin, *Information Fiduciaries*]; Jack M. Balkin, Lecture, *2016 Sidley Austin Distinguished Lecture on Big Data Law and Policy: The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L.J. 1217, 1227–31 (2017) [hereinafter Balkin, *Big Data Law and Policy*].

5. See Data Care Act of 2018, S. 3744, 115th Cong. (2018); New York Privacy Act, S.B. 5642, 2019–2020 Reg. Sess. § 1102 (NY 2019). These proposed laws are regarded as reflecting the information fiduciary model. See Issie Lapowsky, *New York’s Privacy Bill Is Even Bolder Than California’s*, WIRED (June 4, 2019, 7:00 AM), <https://www.wired.com/story/new-york-privacy-act-bolder/> [<https://perma.cc/JQG4-FPH3>].

6. Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 529 (2019).

7. The proposal is most fully developed in Balkin, *Information Fiduciaries*, *supra* note 4. See also Jack M. Balkin, Essay, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1160–63 (2018); Jack M. Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L. REV. F. 11 (2020) [hereinafter Balkin, *Fiduciary Model of Privacy*]; Jack M. Balkin, Essay, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2047–54 (2018); Jack M. Balkin, *Fixing Social Media’s Grand Bargain* 11–15 (Hoover Working Grp. on Nat’l Sec., Tech., & L., Aegis Series Paper No. 1814, 2018), https://www.hoover.org/sites/default/files/research/docs/balkin_webreadypdf.pdf [<https://perma.cc/EZ79-Q3CN>] [hereinafter Balkin, *Fixing Social Media*]; Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/informationfiduciary/502346/> [<https://perma.cc/PXQ6-8VBUI>].

8. See David Pozen, *Balkanization on Balkinization: A Skeptical View of Information Fiduciaries*, BALKINIZATION (Feb. 25, 2019, 5:26 PM), <https://balkin.blogspot.com/2019/02/balkanizati-on-on-balkanization.html> [<https://perma.cc/6J9S-Y2TT>].

9. See Section I.A.

10. Khan & Pozen, *supra* note 6, at 510.

“divided loyalties.”¹¹ Managing this problem would require either reform of corporate law or the watering down of the proposed duties,¹² with companies forced to prioritize shareholders’ interests over those of users.¹³ Second, digital companies’ powerful self-regarding incentives are at odds with users’ interests, undermining the case that these proposed duties can be fiduciary at all.¹⁴ Khan and Pozen’s critique has been broadly accepted by scholars¹⁵ and has led advocates to qualify their support for the fiduciary model.¹⁶

Although these principal criticisms are levelled at Balkin’s proposal, they are directed at the information fiduciary at large, which “has, in one form or another, been circulating for some time.”¹⁷ Other scholars have contributed to the model.¹⁸ These criticisms threaten the entire, many-

11. *Id.* at 507.

12. *See supra* notes 205–206 and accompanying text; *see also* Khan & Pozen, *supra* note 6, at 535 (referring to “the watered-down version of fiduciary responsibility such a statute [imposing Balkin’s proposal] would codify”).

13. Khan & Pozen, *supra* note 6, at 509 (“Delaware law would remain unaffected. The interests of shareholders would still come first.”).

14. *Id.* at 512–13; *see also* Section II.A.

15. *See, e.g.*, Bryan H. Choi, *Software as a Profession*, 33 HARV. J.L. & TECH. 557, 562–63 (2020) (“[C]ritics of the ‘information fiduciary’ model have rightly questioned whether software developers are genuine fiduciaries of their customers”); Julie E. Cohen, *Scaling Trust and Other Fictions*, L. & POL. ECON. PROJECT (May 29, 2019), <https://lpeblog.org/2019/05/29/scaling-trust-and-other-fictions/#more-2442> [<https://perma.cc/GJM5-XE9N>] (“The trenchant critique by Khan and Pozen effectively exposes the emptiness at the heart of any proposal that proclaims a ‘fiduciary’ arrangement while leaving both the basic platform business model and the basic structure of the platform-consumer relationship undisturbed.”); Tamara Piety, *Radical Skepticism About Information Fiduciaries*, L. & POL. ECON. PROJECT (May 31, 2019), <https://lpeblog.org/2019/05/31/radical-skepticism-about-information-fiduciaries/?fbclid=IwAR3iWoZEs54UEzz3m0ViNYcpLWkphZ53T1-q52OwrsID36Q6OHV-p3xyWM> [<https://perma.cc/S5KA-GK62>] (“Khan and Pozen are skeptical that such a fundamental conflict [between duties to shareholders and duties to users] can be resolved and I agree.”); *id.* (“Khan and Pozen do a good job at showing why the information fiduciary concept is [sic] offers false hope.”); Haochen Sun, *Corporate Fundamental Responsibility: What Do Technology Companies Owe the World?*, 74 U. MIAMI L. REV. 898, 908 (2020) (“A major problem with the information fiduciary approach . . . is its inability to address this potential conflict [identified by Khan and Pozen].”); Michal Lavi, *Do Platforms Kill?*, 43 HARV. J.L. & PUB. POL’Y 477, 545 n.458 (2020) (Khan and Pozen’s analysis “identifies tensions and ambiguities in the theory of information fiduciaries, as well as a number of reasons to doubt the theory’s capacity to resolve them satisfactorily.”). The one point scholars seem to agree on is the need for reform. For example, Khan and Pozen “largely agree with [Balkin’s] analysis of why certain digital firms should be regulated more vigorously.” Khan & Pozen, *supra* note 6, at 501.

16. *See* Lapowsky, *supra* note 5 (referring to privacy groups that would continue supporting the fiduciary approach “given the right legislation” to accommodate Khan and Pozen criticisms). Balkin is said to now “assume[] the corporate-law fiduciary duties . . . would have to be curtailed in important respects to operationalize his proposal.” Khan & Pozen, *supra* note 6, at 509 n.58 (referring to the authors’ “recent conversations” with Balkin).

17. Neil Richards & Woodrow Hartzog, *A Duty of Loyalty for Privacy Law*, 99 WASH. U. L. REV. (forthcoming 2021) (manuscript at 18) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642217).

18. In referring to the information fiduciary model, I mean proposals that would cast digital data collectors as fiduciaries or that would impose duties explicitly influenced by fiduciary law on these

tendrilled project. Indeed, they may cast doubt on any regulatory approach that would impose conduct-regulating obligations, fiduciary or not, on digital companies since the argument is quite general: that obligating corporations to serve users' interests creates divided loyalties among corporate directors enjoined to shareholder loyalty as well.

But Khan and Pozen are not simply critics. They see the information fiduciary model as in direct competition with "more ambitious approaches."¹⁹ These approaches could require reform of technology firms' organizational structures. In other work, Khan examines the case for separating the operations of Facebook and its ilk,²⁰ suggesting that "full structural separation" may be needed²¹—a strategy requiring the break-up of firms, much as Congress famously did to Wall Street firms in the 1930s when it separated commercial and investment banks.²² Khan and Pozen worry that "if pursued with any real vigor, [the fiduciary approach] would tend to cannibalize rather than complement" other regulatory options.²³

If accepted, the critique of the information fiduciary model may have sweeping implications, extending beyond major technology firms. Many of the largest financial services firms are subject to fiduciary regimes that arguably impose dual loyalties, as the information fiduciary model might. For example, Delaware-incorporated Goldman Sachs, a financial services conglomerate, often acts as a fiduciary for customers, even as its directors owe duties of loyalty to shareholders.²⁴ The same is true of Delaware-incorporated BlackRock, one of the world's largest asset managers.²⁵ On

actors in order to protect users' privacy interests. For contributions to this model, see DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 103–04 (2004); Lindsey Barrett, *Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries*, 42 SEATTLE U. L. REV. 1057 (2019); Ariel Dobkin, *Information Fiduciaries in Practice: Data Privacy and User Expectations*, 33 BERKELEY TECH. L.J. 1 (2018); Ian R. Kerr, *The Legal Relationship Between Online Service Providers and Users*, 35 CAN. BUS. L.J. 419, 454–58 (2001); Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 457–58 (2016); Neil Richards & Woodrow Hartzog, *Privacy's Trust Gap: A Review*, 126 YALE L.J. 1180, 1213–23 (2017) (book review); Neil Richards & Woodrow Hartzog, *Trusting Big Data Research*, 66 DEPAUL L. REV. 579, 588–90 (2017); Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in A Networked World*, 69 U. MIAMI L. REV. 559, 600–01 (2015); Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 340 (2014); Richard S. Whitt, *Old School Goes Online: Exploring Fiduciary Obligations of Loyalty and Care in the Digital Platforms Era*, 36 SANTA CLARA HIGH TECH. L.J. 75 (2019).

19. Khan & Pozen, *supra* note 6, at 536.

20. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1065–85 (2019).

21. *Id.* at 1084.

22. See MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, *FINANCIAL REGULATION: LAW AND POLICY* 51 (2d ed., 2018).

23. Khan & Pozen, *supra* note 6, at 537.

24. See *infra* notes 133–134 and accompanying text.

25. The corporation managed \$8.68 trillion for its customers as of December 2020. See BLACKROCK, INC., ANNUAL REPORT (FORM 10-K), at 1 (Feb. 25, 2021).

their face, Khan and Pozen's arguments would seem to extend to these fiduciary regimes, with similarly troubling consequences.

Khan and Pozen argue eloquently and emphatically, but their central criticisms significantly overstate the threat that corporate and fiduciary law poses for the information fiduciary model. In this Essay, I show that imposing user-regarding obligations on corporations will not create untenable frictions between duties to users and duties to shareholders. In Part I, I argue that the primary criticism—that Delaware corporate law undermines the information fiduciary regime—should be dismissed. The criticism rests on a partial understanding of corporate law doctrine and theory. The criticism sees conflicting obligations where none exist and identifies strategies for resolving these apparent conflicts that are unknown to corporate law. In fact, the plausible outcome of an information fiduciary regime is exactly the opposite of what Khan and Pozen fear. Under the information fiduciary model, corporate law would require compliance with user-regarding obligations, creating incentives for directors to favor users' interests over those of shareholders. I also argue that Khan and Pozen's arguments are not merely mistaken but, if accepted, may do harm. Applying their case to financial conglomerates—more apt analogues for social media companies than the “[d]octors, lawyers, accountants, and the like”²⁶ to whom scholars often draw their comparison—shows that Khan and Pozen's arguments, if accepted, may have pernicious effects on broad spheres of corporate regulation.

In Part II, I address the other primary objection to the information fiduciary model—that the model is incompatible with social media companies' powerful self-interests. The objection reflects twin concerns. According to the first, Facebook and other digital companies have such powerful self-regarding incentives that these companies may not properly be characterized as fiduciaries of their users; such incentives should be seen “as an insuperable obstacle to a fiduciary relationship,” Khan and Pozen suggest.²⁷ Under the related concern, digital companies could not satisfy fiduciary duties unless their business models were fundamentally transformed. To impose user-regarding duties on digital companies, Khan and Pozen write, “and wind up with anything recognizable as a fiduciary relationship, it seems to us that the legislators would have to force fundamental changes in the companies' business practices . . . and preempt or dilute the stockholder-regarding norms under which the companies currently operate.”²⁸

26. Khan & Pozen, *supra* note 6, at 506.

27. *Id.* at 513.

28. *Id.* at 511.

Even if one accepts that Facebook's interests are completely misaligned with those of its users—a contestable claim—fiduciary law may be adaptable enough to survive such challenges. Fiduciary duties may be, and frequently are, imposed on actors with powerful incentives to serve their own interests rather than those of their customers. This is because self-interested incentives themselves are not a barrier to the imposition of fiduciary duties. In fact, it is often the very drive to serve self-interest at the expense of another that creates the *need* for fiduciary protection. Financial services regulation includes examples of fiduciary law operating in the presence of the conflicting interests and tensions much like those that Khan and Pozen claim beset the relationships between social media companies and their users.

It is also no barrier to the information fiduciary model to assert that digital companies currently fall short of fiduciary standards. To the extent Khan and Pozen argue that digital companies cannot *now* act with fiduciary loyalty, this suggests that firms' existing practices would need to change under the force of fiduciary duties, not that fiduciary duties could not be imposed. As fiduciaries, digital companies would hardly be unique in having powerful self-regarding motivations and relying on business practices that create opportunities and incentives for firms to act contrary to customers' interests.

The concern that these companies could not satisfy fiduciary duties without “fundamental changes in the companies' business practices” is similarly overstated. Khan and Pozen do not specify what “fundamental changes” may be required under a fiduciary regime, although, importantly, they never claim that these firms could not continue to operate or earn profits under a strong fiduciary regime.

Still, Khan and Pozen rightly point to potential tension between the business models of major digital companies and the imposition of particularly strict fiduciary duties. Such duties may disrupt firms' business models, requiring major changes to their ways of doing business, even cutting off certain income streams. If their point is that a particularly strong version of fiduciary duties may require significant changes in digital firms' practices, I agree. But the need for such changes should not be seen as necessarily undermining the information fiduciary model; it is entirely possible that these changes in firms' practices would be desirable since they would be the product of strongly user-protective duties. These changes might also be consistent with the “more ambitious approaches” to regulatory reform that Khan and Pozen favor.²⁹ Accordingly, if an information

29. *Id.* at 536; *id.* at 502 (noting their fear that the information-fiduciary framework “invites an enervating complacency about issues of structural power and a premature abandonment of more robust visions of public regulation”).

fiduciary model were to require “fundamental changes” of digital companies, this might give Khan and Pozen reason to support, rather than oppose, particularly robust fiduciary duties.

In Part III, I consider the implications of the analysis in Parts I and II. The information fiduciary model remains a viable policy option for regulating digital data collectors. No fundamental reform of corporate law would be required to implement the model. The objections to the fiduciary model fail to undermine other spheres of corporate regulation or commonly used tools for keeping corporate misconduct in check.

Importantly, in this Essay I do not seek to promote the information fiduciary model so much as to ensure it receives due consideration.³⁰ Once one clears away Khan and Pozen’s primary criticisms, the information fiduciary model remains subject to various questions about calibration, fit, and comparison. Is the model framed too widely or not widely enough? To which firms, specifically, would it apply?³¹ Would it tackle the most severe problems posed by digital companies? Would an information fiduciary regime be cost-effective? How does it weigh against alternatives? How well would it fit with other regulatory strategies? These are reasonable questions, many of which Khan and Pozen also consider to varying degrees in response to Balkin’s proposal.³² Such questions may equally be asked of other proposals, as well. My purpose is not to consider these questions or to dismiss discussion of other reforms, including structural solutions. I seek instead to ensure that all viable options—including the information fiduciary model—remain on the table for consideration and that we do not let stand those criticisms that would also have adverse consequences for stakeholder protections in other spheres of regulation.

30. Nor do I question whether the model’s concern for greater protective barriers around data may in some settings come at the expense of other regulatory goals, such as innovation and competition. As to potential tradeoffs in achieving these objectives, see William J. Magnuson & Cesare Fracassi, *Data Autonomy*, 74 VAND. L. REV. 327 (2021).

31. According to Balkin, writing after Khan and Pozen’s critique, “the fiduciary model applies not only to large social media platforms like Facebook but also to all businesses that collect information from end users in return for services, whether or not the end user pays fees or has a subscription.” Balkin, *Fiduciary Model of Privacy*, *supra* note 7, at 17. The model could thus have vast reach, sweeping in “bricks and mortar” companies as well as technology companies. Khan and Pozen use the terms “digital companies” and “social media companies” interchangeably, without providing definitions, to describe the firms to which the information fiduciary model might apply. *See, e.g.*, Khan & Pozen, *supra* note 6, at 499, 502, 509, 521 (referring to “digital companies”); *id.* at 504, 511, 515, 517, 525, 530 (referring to “social media companies”). Khan and Pozen nevertheless give examples of such firms. *See, e.g., id.* at 498.

32. *See, e.g.*, Khan & Pozen, *supra* note 6, at 526–27 (listing “profound problems” that Balkin’s proposal would fail to address); *id.* at 529–537 (considering certain benefits and costs of the proposal).

I. CLAIMED TENSION WITH CORPORATE LAW

This Part assesses Khan and Pozen’s primary criticism of the information fiduciaries model, which holds that the model is in tension with Delaware corporate law. I reject this criticism, showing that Delaware law aligns with the information fiduciary model by creating incentives for compliance with a corporation’s obligations.

A. *The Problem of Conflicting Fiduciary Obligations*

Khan and Pozen identify “the problem of conflicting fiduciary obligations,”³³ “the problem of divided loyalties,”³⁴ or “the issue of crosscutting loyalties,”³⁵ which they fault Balkin for “never [having] squarely addressed.”³⁶ Using Facebook to illustrate this problem,³⁷ Khan and Pozen assert that Balkin’s proposed duties would require Facebook to serve *users’* interests, while Delaware corporate fiduciary law already requires Facebook’s directors to act in *shareholders’* interests.³⁸ These interests, those of users and shareholders, are in “acute tension[.]”³⁹ For example, consider that “[b]y and large, addictive user behavior is good for [Facebook’s] business” as are “[d]ivisive and inflammatory content” and “[d]eterioration of privacy and confidentiality norms.”⁴⁰ But if Facebook were to prioritize users’ interests, the company would “make the site less addictive,” “deemphasize sensationalistic material,” and “enhance personal privacy.”⁴¹ Each of these reforms would “pose a threat to Facebook’s bottom line and therefore to the interests of shareholders.”⁴² Khan and Pozen worry that Facebook’s directors will face the “untenable position of having to violate their fiduciary duties (to stockholders) under Delaware law in order to fulfill their fiduciary duties (to end users) under the new body of law that Balkin proposes—at least barring some sort of ‘heavy-handed government intervention’ that clearly prioritizes the latter set of duties.”⁴³

33. Khan & Pozen, *supra* note 6, at 510.

34. *Id.* at 507.

35. *Id.* at 508.

36. *Id.* In faulting Balkin, Khan and Pozen refer specifically to “the issue of crosscutting loyalties,” although they also refer to this issue using the expressions above. *See supra* notes 33 and 34.

37. *See id.* at 501 n.14.

38. *Id.* at 503–04.

39. *Id.* at 506; *see also id.* at 507 (“The potential conflicts between equity owners and end users that arise [at social media companies] are not isolated or incidental but go to the core of the firms’ business.”).

40. *Id.* at 505.

41. *Id.* at 505–06.

42. *Id.* at 506.

43. *Id.* at 504 (internal footnotes omitted).

Khan and Pozen claim that “[d]igital information fiduciaries would not be unique in facing crosscutting fiduciary obligations.”⁴⁴ The authors give the examples of “a financial servicer acting on behalf of multiple investors or a law firm partner with fiduciary duties to her copartners as well as to her clients.”⁴⁵ Still, digital companies like Facebook are specially positioned because “[d]octors, lawyers, accountants, and the like do not experience such acute tensions within their sets of fiduciary obligations.”⁴⁶ While this problem of conflicting obligations for fiduciaries may be “manage[d],”⁴⁷ Khan and Pozen question whether “the same legal strategies” for managing conflicts in other settings would “work for digital information fiduciaries.”⁴⁸ They ask whether “the duties [digital companies] already owe to stockholders” can “be harmonized with the new duties they would owe to users without doing too much violence either to the companies themselves or to fundamental principles of fiduciary law?”⁴⁹

Khan and Pozen’s answer to this question is an emphatic no. Their analysis begins by identifying four strategies for trying to reconcile such conflicting duties,⁵⁰ the first two of which they quickly reject. First, they reject the possibility that Facebook could permissibly prioritize users’ interests, in compliance with Balkin’s duties, over those of shareholders. That strategy “runs counter to the prevailing understanding of Delaware doctrine.”⁵¹ Second, they consider the possibility that social media companies might serve users’ interests *while also* advancing shareholders’ interests, “for instance because fostering trust in the present period may make it easier to retain and recruit users in future periods.”⁵² They reject this too, arguing, “[t]he fact that corporations like Facebook have persistently declined to self-regulate along such lines . . . suggests that their boards do not see these reforms [to advance the best interests of users] as likely to enhance firm value or shareholder wealth either in the short term or in the long term.”⁵³

Khan and Pozen also appear to dismiss the third strategy as a way for managing “the problem of conflicting fiduciary obligations.”⁵⁴ Under this

44. *Id.*

45. *Id.* at 506 (internal footnotes omitted).

46. *Id.* at 506.

47. *Id.* at 507 (“Within the context of such [fiduciary] relationships, the law is generally able to manage the problem of divided loyalties . . .”).

48. *Id.*

49. *Id.*

50. *Id.* at 508 (“It is possible to imagine at least four ways one might try to reconcile a corporation like Facebook’s fiduciary obligations to stockholders with fiduciary obligations to end users.”). The analysis goes on to identify only four such strategies. *Id.* at 508–10.

51. *Id.*

52. *Id.*

53. *Id.* (internal footnote omitted).

54. Khan & Pozen, *supra* note 6, at 510.

strategy, “corporate law might be modified through state or federal legislation to authorize or compel platforms to put users’ interests ahead of stockholders’ interests (either in general or in specific respects).”⁵⁵ Khan and Pozen do not pursue this strategy further, noting that advocates of the information-fiduciary concept have not suggested the need to reform corporate law to give effect to the information fiduciary proposal.⁵⁶

Barring such reform of corporate law, Khan and Pozen see “a fourth and final strategy” for managing the problem⁵⁷: Balkin’s duties would yield to directors’ duties.⁵⁸ Under this strategy, “any fiduciary duties afforded to users” would be “cabin[ed] . . . so that they do not seriously threaten firm value.”⁵⁹ To Khan and Pozen, “it seems that Facebook, Google, and Twitter would, as a rule, have to temper their duties to users with a higher duty of loyalty to shareholders. Delaware law would remain unaffected. The interests of shareholders would still come first.”⁶⁰ Accordingly, Khan and Pozen contend, this strategy would “mitigate the problem of conflicting fiduciary obligations and purchase legal coherence—but at a steep price. For if the concept of digital information fiduciaries does not require online platforms to place their users’ interests above all other interests, it is unclear what work the concept is supposed to be doing.”⁶¹ “More than this,” Khan and Pozen write, “it is unclear how this is a fiduciary approach in any

55. Khan & Pozen, *supra* note 6, at 509. Here, Khan and Pozen have in mind reform of *corporate law* specifically. Elsewhere, Khan and Pozen are less specific, referring to law reform generally but without ruling out reform of corporate law. *See id.* at 504 (asserting that the problem of conflicting obligations might be resolved by “some sort of ‘heavy-handed government intervention’ that clearly prioritizes the latter set of duties [owed to users]” (internal footnote omitted); *id.* at 534 (“The tension between what it would take to implement a fiduciary duty of loyalty to users, on the one hand, and these companies’ economic incentives and duties to shareholders, on the other, is too deep to resolve without fundamental reform.”).

56. *Id.* at 509 (“At no point has Balkin or Zittrain indicated that their proposal would require modification of companies’ existing fiduciary duties to accommodate new duties to users.”).

57. *Id.* at 509. To Khan and Pozen, “information-fiduciary advocates generally appear to endorse” this fourth strategy to mitigate “the problem of conflicting fiduciary obligations.” *Id.* Earlier, they fault information-fiduciary advocates for never having “squarely addressed” the problem. *Id.* at 508. Based on this Essay’s analysis, it seems more plausible that information-fiduciary advocates never believed that “problem” needed mitigation than that they endorsed this fourth strategy. *See* Sections I.B–I.D.

58. *Id.* at 509–10 (arguing that “the problem of conflicting fiduciary obligations” may be managed by “cabin[ing] any fiduciary duties afforded to users so that they do not seriously threaten firm value—and thus might even be implemented by judges in the absence of legislation”).

59. *Id.* at 509.

60. *Id.* The claim is conditional: “If traditional professional fiduciaries must temper their duties to any other beneficiaries with a higher duty of loyalty to patients and clients,” then digital companies “would, as a rule, have to temper their duties to users.” *Id.* However, earlier analysis asserts the truth of this condition. *See id.* at 507 (“Within the context of such [‘traditional’ fiduciary] relationships, the law is generally able to manage the problem of divided loyalties by requiring fiduciaries to minimize self-dealing and obvious conflicts . . . and, above all, to prioritize the interests of clients and patients over the fiduciary’s own interests and the interests of any other beneficiaries.”).

61. *Id.* at 510.

meaningful sense.”⁶²

It follows that Balkin’s proposal would, if implemented, codify a “watered-down version of fiduciary responsibility.”⁶³ Moreover, the tension between Balkin’s proposal, on the one hand, and “digital companies’ economic incentives and duties to shareholders, on the other, is too deep to resolve without fundamental reform. To suggest otherwise is to risk mystification of ‘surveillance capitalism,’ entrenchment of prevailing business models, and legitimation of a wide range of troubling practices, if not also the unraveling of fiduciary law itself.”⁶⁴

B. Fiduciary Duties Owed by Whom?

Facing such strident criticism from prominent scholars, Balkin’s proposal and the information fiduciary model more generally face doubt. There is also concern that other approaches for regulating digital companies would result in conflicts with corporate law’s duties.⁶⁵ And yet Khan and Pozen’s analysis is mistaken in key ways.

Importantly, Khan and Pozen frequently confuse, or mistake, the identities of the fiduciaries themselves. In particular, the analysis elides the difference between corporations and their directors, an oversight that allows Khan and Pozen readily to see conflicting obligations under Balkin’s proposal. Khan and Pozen wrongly claim that corporate law imposes fiduciary duties on *Facebook*, duties conflicting with those duties Balkin would also impose on *Facebook*. For example, Khan and Pozen ask, “Can the duties *they* [information fiduciaries] already owe to stockholders be harmonized with the new duties *they* [information fiduciaries] would owe to users”?⁶⁶ Similarly, Khan and Pozen consider ways in which it is possible to “reconcile a corporation like *Facebook*’s fiduciary obligations to stockholders with fiduciary obligations to end users.”⁶⁷ In more recent remarks critical of Balkin’s idea, Pozen is quoted as saying, “[f]or this idea that platforms such as Facebook and Google should owe fiduciary obligations to their users, I’d first note that the platforms already owe

62. *Id.*

63. *Id.* at 535.

64. *Id.* at 534–35 (internal footnote omitted).

65. See text accompanying notes 17–19.

66. Khan & Pozen, *supra* note 6, at 507 (emphasis added).

67. *Id.* at 508 (emphasis added). For another example, see *id.* at 534–35 (“The tension between what it would take to implement a fiduciary duty of loyalty to users, on the one hand, and *these companies*’ economic incentives and duties to shareholders, on the other, is too deep to resolve without fundamental reform.”) (emphasis added).

fiduciary obligations to their stockholders.”⁶⁸ At other times, Khan and Pozen’s critique asserts the opposite, wrongly claiming that Balkin would impose fiduciary duties on Facebook’s *directors*, duties conflicting with those that corporate law already imposes on *directors*. For example, Khan and Pozen worry that “the officers and directors of these [social media] companies may . . . hav[e] to violate *their* fiduciary duties (to stockholders) under Delaware law in order to fulfill *their* fiduciary duties (to end users)” under the proposed information fiduciary model.⁶⁹ Readers of the critique would be forgiven for believing that Balkin’s proposal would result in particular fiduciaries—whether social media companies or their directors—laboring under two sets of obligations, each set requiring service of differing interests that are in conflict.

But this analysis misconstrues both corporate law and Balkin’s proposal. Corporate law imposes its duties on *directors*, not corporations,⁷⁰ while Balkin would impose duties on *corporations*, not directors.⁷¹ To be sure, when directors act collectively as the board of directors, they make decisions for the corporation, and directors individually may act on behalf of a corporation if they are invested with the authority to do so.⁷² Nevertheless, corporate law carefully distinguishes between corporations

68. Andy Fitch, *They Are Not Your Fiduciaries: Talking to David Pozen*, L.A. REVIEW OF BOOKS: BLOG (Jan. 31, 2020), <https://blog.lareviewofbooks.org/interviews/fiduciaries-talking-david-pozen/> [<https://perma.cc/MW7F-FDAB>].

69. Khan & Pozen, *supra* note 6, at 504 (emphasis added). For another example, see *id.* at 508 (considering and rejecting the possibility that “a Facebook director’s duties to stockholders could simply be subordinated to *her* duties to users [under Balkin’s proposal] when the two collide”) (emphasis added).

70. *In re Converge*, No. 7368, 2014 WL 6686570, at *8 n.19 (Del. Ch. Nov. 25, 2014) (“Under settled Delaware law, however, [f]iduciary duties are owed by the directors and officers to the corporation and its shareholders. In other words, a corporation does not owe fiduciary duties to its stockholders.” (omitting internal quotation marks) (quoting *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, No. 9250, 2014 WL 3954987, at *4 (Del. Ch. Aug. 7, 2014))); see also *Arnold v. Soc’y for Savs. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996) (“Plaintiff has not cited a single case in which Delaware courts have held a corporation directly liable for breach of the fiduciary duty of disclosure. Fiduciary duties are owed by the directors and officers to the corporation and its stockholders.”).

71. See, e.g., Balkin, *Information Fiduciaries*, *supra* note 4, at 1221 (“I do not claim that Facebook or Uber is managing my estate, or is my accountant, my doctor, or my lawyer. What I do claim is that in the digital age, because we trust them with sensitive information, certain types of online service providers take on fiduciary responsibilities.”); see also *id.* at 1225 (“By suggesting that online service providers are information fiduciaries, I have been analogizing *these companies* to traditional professional fiduciaries like doctors or lawyers.”) (emphasis added); *id.* (referring to “digital information fiduciaries like Uber, Facebook, and Google”); *id.* at 1222–24 (proposing fiduciary duties on “online service providers,” referred to also as “digital organizations,” “companies” and “entities”); Balkin, *Big Data Law and Policy*, *supra* note 4, at 1228 (“The digital age has created a new set of entities that have many features similar to traditional fiduciaries. They include large online businesses like Google, Facebook, and Uber.”).

72. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f.(2) (AM. LAW. INST. 2006).

and the individuals who direct them, imposing fiduciary duties only on the latter.⁷³

Recall Khan and Pozen’s arguments that “the problem of conflicting fiduciary obligations” also arises in other settings but that this problem cannot be “managed” nearly as successfully for digital companies as it is elsewhere.⁷⁴ A problem of conflicting fiduciary obligations may exist, although this typically occurs when a *single fiduciary* owes sets of inconsistent obligations.⁷⁵ In the financial services industry, for example, a corporate fiduciary may owe conflicting fiduciary obligations when it has obligations to two distinct clients with competing interests.⁷⁶ The nation’s largest financial institutions provide myriad services—often as fiduciaries—to their clients and, therefore, often owe conflicting fiduciary obligations.⁷⁷

The “problem” Khan and Pozen point to, however, occurs routinely and differs from the conflicts that may afflict a single fiduciary. Under Balkin’s proposal, fiduciary obligations would be imposed on *distinct* actors: each fiduciary—corporations under Balkin’s proposal and directors under Delaware corporate law—is bound by a *single set* of fiduciary obligations. This “problem” is routine; it arises whenever fiduciary obligations are imposed on a Delaware corporation. For instance, it occurs in the financial services industry when Goldman Sachs or BlackRock act as investment advisers (and therefore as fiduciaries to customers).⁷⁸ Khan and Pozen offer no reason to doubt that the “problem” afflicting social media companies is any different.

73. Since Delaware law imposes fiduciary duties on directors for the benefit of corporations and their shareholders, directors serve as fiduciaries of corporations. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (“[T]he board’s power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders”); see also *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (“While technically not trustees, they [directors] stand in a fiduciary relation to the corporation and its stockholders.”). See also *supra* note 70.

74. See *supra* note 46–48 and accompanying text.

75. Khan and Pozen give examples of a single fiduciary owing multiple sets of obligations. See *supra* note 46 and accompanying text. Khan and Pozen do observe in passing that some of these fiduciaries “may even be employed by publicly traded companies, although most are not,” Khan & Pozen, *supra* note 6, at 506 (internal footnote omitted), although they do not explore the relevance of this possibility.

76. The literature recognizing conflicting fiduciary duties is voluminous. For early recognition of the issue, see, for example, Martin Lipton & Robert B. Mazur, *The Chinese Wall Solution to the Conflict Problems of Securities Firms*, 50 N.Y.U. L. REV. 459 (1975); Note, *Conflicting Duties of Brokerage Firms*, 88 HARV. L. REV. 396 (1974). The issue is not unique to corporations. See, e.g., John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1261–62 (2014).

77. See, e.g., Andrew F. Tuch, *Financial Conglomerates and Information Barriers*, 39 J. CORP. L. 563, 572–78 (2014) [hereinafter Tuch, *Financial Conglomerates*]; Andrew F. Tuch, *The Weakening of Fiduciary Law*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 354, 356–60 (D. Gordon Smith & Andrew S. Gold eds., 2018) [hereinafter Tuch, *Weakening of Fiduciary Law*].

78. See *supra* notes 25, 133–134 and accompanying text.

When this “problem” occurs, that is, when fiduciary obligations are imposed on a Delaware corporation, do those duties conflict with directors’ duties, as Khan and Pozen assert in the social media setting, or otherwise undermine the information fiduciary model? Under Balkin’s proposal, it is readily apparent that *corporations* face no conflicting fiduciary obligations since they would be bound by a single set of fiduciary obligations (to users). *Directors* are also bound by a single set of fiduciary obligations (to their corporation), and yet their position might seem more complicated because their obligations to the corporation require them to serve shareholders’ interests and may therefore be seen as conflicting with proposed obligations on the corporation to serve users’ interests. But, as explained next, Delaware corporate law does not put directors in such a position of conflict.

C. *The Risk of Directorial Breach*

In considering whether digital companies’ directors face conflicting fiduciary obligations, recall how this conflict-of-duties problem is said to arise: “officers and directors of these companies may be put in the untenable position of having to violate their fiduciary duties (to stockholders) under Delaware law in order to fulfill their fiduciary duties (to end users)” under Balkin’s proposed regime.⁷⁹ Central to perceived conflict is the risk of liability for directors when they attempt to ensure compliance with the corporation’s “fiduciary duties (to end users)” under the information fiduciary model.⁸⁰

Khan and Pozen rightly note that Delaware corporate law is conventionally understood as adopting the norm of shareholder primacy, or profit maximization, and that the law therefore requires directors to pursue the end of shareholder wealth maximization.⁸¹ Importantly, even under the shareholder primacy approach, directors may take into account and serve non-shareholder interests, such as customer or employee interests, to the

79. Khan & Pozen, *supra* note 6, at 504.

80. *Id.*

81. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (“Having chosen a for-profit corporate form, the [corporation’s] directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of shareholders”); see also Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 773 (2015) (Delaware law permits directors to consider the interests of non-shareholder constituencies, such as users, but only “[a]s a means to the end of increasing stockholder welfare . . . and not as an end”); *id.* at 771 (directors may have regard to non-shareholder interests “instrumentally, . . . when giving consideration to them can be justified as benefiting the stockholders”).

extent that doing so promotes shareholder value.⁸² In other words, shareholder primacy does not forbid corporate leaders from taking into account or serving non-shareholder interests. Indeed, shareholder primacy requires directors to serve non-shareholder interests when doing so will maximize long-term shareholder value.⁸³ Khan and Pozen seem on board with this starting position.⁸⁴

However, from this point Khan and Pozen's analysis goes astray, interpreting directors' duties too strictly, seeing real risk that directors will violate their duties to maximize shareholder value if, as required by Balkin's proposal, they (or the corporation) act in users' interests.⁸⁵ This view is hyperbolic on its face, as clarified by the above-described complications inherent in the shareholder wealth maximization doctrine.⁸⁶ But the analysis is wrong for other reasons, too. First, Delaware law takes a broad view of shareholder interests: the relevant shareholders are not current shareholders; they are "(hypothetical) stockholders who have entrusted their capital to the firm indefinitely."⁸⁷ Shareholders' interests are therefore often equated with the long-term interests of either potential shareholders or the corporation.⁸⁸ Never in Delaware law are shareholders' interests equated with the corporation's immediate profitability to the exclusion of long-term

82. Although this view—which allows corporate leaders to take into account non-shareholder interests as instruments for maximizing shareholder value—is sometimes referred to as enlightened shareholder value, it is conceptually identical to shareholder primacy as conventionally understood. See Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 110 (2020) (“Whenever treating stakeholders well in a given way would be useful for long-term shareholder value, such treatment would be called for under either enlightened shareholder value or ‘old-fashioned’ shareholder value.”).

83. See *id.* at 109 (“It is thus unsurprising that maximizing long-term value for shareholders requires paying close attention to the effects of the company’s operations on stakeholders. . . . [I]t is undeniable that, to effectively serve the goal of enhancing long-term shareholder value, corporate leaders should take into account stakeholder effects—as they should consider any other relevant factors.”).

84. Khan & Pozen, *supra* note 6, at 503 (“[D]irectors ‘must, within the limits of [their] legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.’” (alteration in original) (quoting Frederick Hsu Living Tr. v. ODN Holding Corp., No. 12108, 2017 WL 1437308, at *17 (Del. Ch. Apr. 24, 2017))). However, Khan and Pozen later assert the opposite as the “conventional” position, without attempting to reconcile the contrary positions. See Khan & Pozen, *supra* note 6, at 504 (“Delaware fiduciary law simply ‘does not permit traditional corporations to consider non-stockholder constituencies.’” (citation omitted)).

85. See Khan & Pozen, *supra* note 6, at 505–06.

86. See *supra* notes 82–83.

87. Strine, *supra* note 81, at 774 (attributing the view to Delaware Chancellor William Allen).

88. See *TW Servs., Inc. v. SWT Acquisition Corp.*, Nos. 10427, 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989); Bebchuk & Tallarita, *supra* note 82, at 109. Moreover, shareholders themselves have often advocated for corporations to take public-regarding actions rather than strictly to promote the corporation's financial interests. See Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHIC. L. REV. ONLINE (Apr. 15, 2020), <https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili/> [<https://perma.cc/8K6Z-LFWJ>].

interests,⁸⁹ as Khan and Pozen suggest by focusing on the “bottom line” effects of directors’ decisions.⁹⁰ Second, directors’ decisions are protected by the business judgment rule, a bedrock of Delaware corporate law, which immunizes directors from judicial review⁹¹ and therefore liability by presuming that directors “acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”⁹² The doctrine is rarely rebutted.⁹³ Under this doctrine, courts defer to directors’ perceptions of shareholders’ interests rather than identify those interests themselves. Delaware corporate law is therefore said to give “directors . . . wide leeway to pursue the best interests of stockholders as they perceive them.”⁹⁴

Accordingly, directors seldom face liability for fiduciary breach for failure to maximize shareholder value. Realistically, only when directors admit that their decisions were not intended to maximize shareholder value may liability arise.⁹⁵ Extreme facts would be required, as illustrated by the iconic Michigan decision early last century of *Dodge v. Ford Motor Co.*,⁹⁶

89. See ROBERT CHARLES CLARK, CORPORATE LAW 18 n.46 (1986) (regarding it as a “serious conceptual mistake” to treat the corporate purpose as requiring a “focus only on short-run results”); Edward Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose* 12 (Eur. Corp. Governance Inst., Working Paper No. 515/2020, 2020), <https://ssrn.com/abstract=3589951> [<https://perma.cc/M67Q-6DHX>] (“[T]here is nothing in the Delaware conception of ‘shareholder primacy’ that mandates that directors choose short term share price maximization over long term value creation or that mandates paying employees the minimum salary necessary or charging customers the highest price that the market will bear.”). Nor do scholars even argue that corporations should be run to promote shareholder interests while disregarding other stakeholder interests. See Henry Hansmann & Reimier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 504 (2020).

90. See Khan & Pozen, *supra* note 6, at 506.

91. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (“A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose.” (internal citations and quotation marks omitted)).

92. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

93. To rebut the presumption, a plaintiff carries a heavy burden. See *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1988).

94. Strine, *supra* note 81 at 773. Strine observes that directors’ position is different in change-of-control transactions like corporate mergers. *Id.*; see also Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) (“Corporate managers have never had an enforceable legal duty to maximize corporate profits. Rather, they have always had some legal discretion (implicit or explicit) to sacrifice corporate profits in the public interest.”); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, TEX. L. REV. (forthcoming 2021) (manuscript at 103) (available at https://scholarship.law.upenn.edu/faculty_scholarship/2163) (“[C]ommentators widely agree that shareholder primacy affords managers substantial latitude to consider the interests of non-shareholder constituencies . . .”).

95. Strine, *supra* note 81, at 776–77 (“[I]f a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.”).

96. 170 N.W. 668 (Mich. 1919).

arising from Ford's decision to stop paying special dividends to shareholders as it expanded its business and lowered the price of its cars. The company's chief executive officer and majority shareholder Henry Ford admitted on cross-examination that the company was "[o]rganized to do as much good as we can, everywhere, for everybody concerned. . . . And incidentally to make money."⁹⁷ Ford tried to convince the court that "he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public . . . ought to be undertaken."⁹⁸ The court intervened, a remarkable decision that later courts explained on the basis that directors had committed fraud or bad faith, thereby rebutting the business judgment rule.⁹⁹ This century-old decision is believed to be the only instance outside the corporate-takeover context in which the shareholder primacy norm had bite, leading a court to fault directors for failing to maximize shareholder value.¹⁰⁰ Delaware's most relevant authority contains a similar admission by directors, who "prove[d] that they personally believe[d] [the company] should not be about the business of stockholder wealth maximization, now or in the future."¹⁰¹

Scholars underscore how rarely directors face liability for failure to maximize shareholder value. Stephen Bainbridge regards shareholder primacy as "no more than an exhortation. The court may hold forth on the primacy of shareholder interests. . . , but ultimately it does not matter. . . . [D]irectors who consider nonshareholder interests in making corporate decisions, like directors who do not, will be insulated from liability by the business judgment rule."¹⁰² Lynn Stout opines that the business judgment rule will "shield directors from liability . . . so long as any plausible connection can be made between the directors' decision and some possible

97. J. MARK RAMSEYER, BUSINESS ORGANIZATIONS 110 (2012).

98. *Dodge*, 170 N.W. at 683–84.

99. *See, e.g., Shlensky v. Wrigley*, 237 N.E.2d 776, 779–80 (Ill. App. Ct. 1968) ("From the authority relied upon in that case it is clear that the court felt [in *Dodge v. Ford*] that there must be fraud or a breach of that good faith which directors are bound to exercise toward the stockholders in order to justify the courts entering into the internal affairs of corporations.").

100. Jonathan R. Macey, *A Close Reading of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 180 (2008).

101. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010). The case concerned the permissibility of a rights plan (a measure designed to thwart corporate takeover) adopted by the board of Delaware-incorporated craigslist, Inc, and so deals with corporate takeovers, a setting that raises distinct considerations from those presently relevant. Chancellor Chandler rejected "a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders." *Id.* Directors' decision to adopt a rights plan amounted to fiduciary breach. *See id.* at 35.

102. STEPHEN M. BAINBRIDGE, CORPORATE LAW 248 (3d ed. 2015).

future benefit, however intangible and unlikely, to shareholders.”¹⁰³ Jonathan Macey agrees, observing

there are no cases other than *Dodge v. Ford* that actually operationalize the rule that corporations must maximize profits. The goal of profit maximization is to incorporate law what observations about the weather are in ordinary conversation. Everybody talks about it, including judges, but with the lone exception of *Dodge v. Ford*, nobody actually does anything about it.¹⁰⁴

Accordingly, Khan and Pozen are mistaken in seeing real risk that directors will violate their duties to maximize shareholder value if, as required by Balkin’s proposal, directors (or the corporation) act in users’ interests. The critique fails to recognize the leeway courts give directors to determine themselves what will promote shareholders’ interests and gives no credit to the business judgment rule, omitting it from analysis. The critique also overlooks the rarity with which such liability arises. In short, the likelihood of fiduciary breach that Khan and Pozen point to in claiming tension between Balkin’s proposal and corporate law is theoretically remote and, in practical terms, nonexistent. Indeed, every indication is that directors under Balkin’s regime could comply with the information fiduciary model with little fear of liability under Delaware corporate law.

None of this is to say that directors generally face weak fiduciary constraints under Delaware law. Directors owe a distinct and freestanding duty of loyalty, which limits directorial self-dealing transactions, subjecting them to rigorous fairness review.¹⁰⁵ These duties are not infrequently targeted by top plaintiff law firms, especially in transactions with a high risk of self-dealing.¹⁰⁶ But Khan and Pozen’s analysis does not implicate these duties of loyalty.¹⁰⁷

Even if directors would face no real risk of fiduciary breach under duties requiring shareholder wealth maximization, might Delaware law nevertheless create incentives for directors to seek to maximize shareholder

103. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 170–71 (2008); see also *id.* at 171 (“If the directors lack the imagination to offer such a ‘long-run’ rationalization for their decision, courts will invent one.”).

104. Macey, *supra* note 100, at 180.

105. *Oberly v. Kirby*, 592 A.2d 445, 466 (Del. 1991). As to the duty of loyalty, see generally Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939, 951–58 (2019).

106. See Adam B. Badawi & David H. Webber, *Does the Quality of the Plaintiffs’ Law Firm Matter in Deal Litigation?*, 41 J. CORP. L. 359, 372 (2015); Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 VAND. L. REV. 1777, 1814–15 (2019).

107. Khan and Pozen often refer to the “duty of loyalty” in their analysis. See, e.g., Khan & Pozen, *supra* note 6, at 509. But they are not referring to fiduciary constraints on self-dealing transactions, since they do not mention these transactions or other circumstances calling for fairness review.

value, given the broadly expressed requirement to do so, in violation of an information fiduciary regime? If so, corporate law might be in tension with Balkin's proposal, though not for the reasons Khan and Pozen claim.

Although Khan and Pozen do not consider this argument, it may capture their concern about diverging user and shareholder interests. It may be that, enjoined to comply with the general requirement to maximize shareholder value and to consider users' interests only in service of that goal, directors will act contrary to users' interests, even if they would face no realistic chance of personal liability for failing to do so. I address this argument in the next section, showing why it also fails. This argument ignores that complying with users' interests under Balkin's proposal would be legally obliged. It is one thing for directors to prefer shareholders' interests over those of users to the extent they diverge; it is another for directors to elide users' interests when the company is legally obliged to serve them.

D. The Requirement to Act Within the Law

Fundamentally, Delaware law altogether avoids tension with regimes such as Balkin's. Delaware corporate law requires directors to exercise their discretion within legal limits imposed on the corporation;¹⁰⁸ it does not license or excuse non-compliance with corporate obligations, even if directors believe that doing so would maximize shareholder value.¹⁰⁹ And Delaware law offers no suggestion that a corporation's duties or responsibilities should be diluted or otherwise shaped by the content of directors' duties. Instead, case law indicates that directors must act "within

108. Khan and Pozen appear to note this requirement, that is, the notion that directors must exercise their discretion within legal limits imposed on the corporation. *Id.* at 503 ("[T]o act loyally, officers and directors 'must, within the limits of [their] legal discretion, treat stockholder welfare as the only end . . .'" (citation omitted)); *id.* at 506–07 ("Delaware law allows for directors' duties to shareholders to be qualified by other legal duties . . ."). However, Khan and Pozen's analysis takes no account of this requirement. First, they immediately cut back against the possibility that directors' duties might be so "qualified by other legal duties," observing that "the nature and scope of the conflicts they [directors] would face seem qualitatively distinct." *Id.* at 507. Second, they take a position fundamentally at odds with this requirement when they reject the proposition that under Delaware law, Facebook could permissibly prioritize users' interests, in compliance with Balkin's duties, over those of shareholders. *Id.* at 508. Wrongly, they state that the proposition "runs counter to the prevailing understanding of Delaware doctrine." *Id.* Third, the analytical approach Khan and Pozen adopt, summarized in Section I.A.—identifying "the problem of conflicting fiduciary obligations," examining "strategies" for managing or mitigating that "problem," and settling on the strategy of digital companies "as a rule, hav[ing] to temper their duties to users with a higher duty of loyalty to shareholders"—is antithetical to this requirement.

109. For example, the business judgment rule would not endorse or protect directors acting in violation of the corporation's obligations, even in service of shareholder wealth maximization.

the law.”¹¹⁰ As the Delaware Chancery Court once put it, “one cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.”¹¹¹ On another occasion, the Delaware Chancery Court explained, “a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity.”¹¹² According to former Chief Justice Leo Strine and distinguished coauthors, “American corporate law embeds law compliance within the very mission of the corporation. Loyalty to the corporation’s obligation as a citizen to attempt in good faith to abide by the law is not incidental to a director’s duties, it is fundamental.”¹¹³ Reflecting corporate law’s attitude toward legal compliance, former Harvard Law Dean Robert Clark identifies the corporation’s purpose as to “maximize the value of the company’s shares, subject to the constraint that the corporation must meet all its legal obligations to others who are related to or affected by it.”¹¹⁴

To be sure, there is scholarly debate about the desirability of corporate law’s inflexible approach to lawbreaking.¹¹⁵ And there is a range of perspectives on the extent to which corporations—like individuals—in fact

110. *TW Servs., Inc. v. SWT Acquisition Corp.*, Nos. 10427, 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989). This requirement to act within the law may be understood as an internal constraint on directors’ loyalty mandate. *See* Andrew S. Gold, *Pernicious Loyalty*, 62 WM. & MARY L. REV. 1187, 1208 (2021). Professor Gold’s notion of “pernicious loyalty,” the idea that directors and other fiduciaries seeking to satisfy their duties of loyalty may harm beneficiaries and third parties, offers no comfort to Khan and Pozen; Gold never suggests that directors’ duties may require them to act contrary to the corporation’s obligations, but argues the opposite. *See id.* at 1196–98, 1208. Nor does Professor Gold suggest directors’ duties license or excuse non-compliance with corporate obligations. Some scholars nevertheless observe that “it is not obvious that corporate law should hold directors accountable simply for deciding that the corporation’s interests are served by violating a particular statute.” Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 593 (2008). *See also* Gold, *supra* note 110, at 1198.

111. *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003); *see also* *Desimone v. Barrows*, 924 A.2d 908, 934–35 (Del. Ch. 2007) (“Delaware corporate law has long been clear on this rather obvious notion; namely, that it is utterly inconsistent with one’s duty of fidelity to the corporation to consciously cause the corporation to act unlawfully. The knowing use of illegal means to pursue profit for the corporation is director misconduct.” (internal footnotes omitted)).

112. *Metro Comm’n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 131 (Del. Ch. 2004); *see also* Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Garris, *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 651 (2010) (“Law compliance . . . comes ahead of profit-seeking as a matter of the corporation’s mission, and directors owe a duty of loyalty to that hierarchy.”); Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 722 (2019) (“Legal compliance is a first-order requirement; profit-seeking follows in the hierarchy of the business corporation’s mission.”).

113. Strine et al., *supra* note 112, at 653 n.71.

114. CLARK, *supra* note 89, at 17–18.

115. Notably, Elizabeth Pollman discusses the complexity of lawbreaking by corporations, recognizing that some corporate lawbreaking may have social value. Pollman, *supra* note 112, at 718 (“Examining corporate disobedience reveals that there is a wide array of lawbreaking . . . This Article aims . . . to suggest that, to the extent that innovation or legal change can benefit society, some corporate disobedience could at least have the potential to provide value.”). *See also supra* note 110.

comply with their legal obligations.¹¹⁶ But there is no debate as to what Delaware law requires of directors. Even the most ardent advocates of shareholder primacy have not suggested that corporate law requires, or should require, corporations or directors to maximize shareholder value in violation of a corporation's legal obligations. For example, economist Milton Friedman, who is often credited with espousing the notion of shareholder primacy,¹¹⁷ identified the corporation's purpose as "to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game."¹¹⁸

Contrary to Khan and Pozen's analysis, therefore, corporate law would not create a "problem of conflicting fiduciary obligations" or create incentives for directors to serve shareholders' interests over other interests protected by legal obligations imposed on the corporation. Nor would corporate law create incentives for directors to prefer shareholders' interests over users' interests under the information fiduciary model to the extent those interests diverged. To be sure, shareholders' and users' interests may well diverge, but when corporations are obliged to serve users' interests, as they would be under the information fiduciary model, directors' duties would require service of those interests even where shareholders' interests differ. The corporation's obligations require nothing less. Accordingly, if Khan and Pozen are correct in suggesting that social media companies like Facebook have not adopted "reforms to advance the best interests of users" because "their boards do not see these reforms as likely to enhance firm value or shareholder wealth,"¹¹⁹ then one solution would be to impose obligations on these corporations, perhaps along the lines that Balkin has proposed. Directors would then be obliged to act within these constraints.

Delaware law not only provides no room for directors to operate in the way Khan and Pozen fear they will, the law also affirmatively seeks to prevent directors from reneging on obligations. Delaware law exposes directors to liability if they intentionally violate the corporation's obligations. A director who "acts with the intent to violate applicable positive law, or . . . [who] intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties" may fail to

116. The notion of optimal deterrence in the economic analysis of law even regards some lawbreaking as not worth eliminating. As to the theory, see STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 473–91 (2004).

117. See Brian R. Cheffins, *Stop Blaming Milton Friedman!*, 98 WASH U. L. REV. 1607, 1611 (2021) (asserting that Milton Friedman is given "substantial blame (or credit) for the ascendance of shareholder value in public companies"). Professor Cheffins argues that it is wrong to ascribe the rise of shareholder primacy to Friedman. *Id.*

118. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 (§ 6), at 126 (quoting his book *CAPITALISM AND FREEDOM*).

119. Khan & Pozen, *supra* note 6, at 508.

act in good faith and thereby face liability for fiduciary breach.¹²⁰ It is no excuse to claim that disregarding the corporation's obligations nevertheless increased profits.¹²¹ Corporate fiduciary law thus creates incentives for directors to ensure corporations comply with their obligations.¹²² These incentives would apply to compliance with obligations under the information fiduciary model as well.

Distinguishing between directors and corporations helps explain this approach to legal compliance. In Delaware, corporations may be formed “to conduct or promote any lawful business or purposes.”¹²³ In service of a corporation, directors may not exercise authority that the corporation itself lacks,¹²⁴ and they are therefore constrained by corporations' own legal constraints. Moreover, it makes no sense that corporate law would require a fiduciary to make decisions violating obligations owed by its beneficiary (the corporation) in the name of serving that beneficiary's interests. Similarly, it makes no sense that a beneficiary's obligations (such as those under the information fiduciary model) would be diluted in an attempt to manage apparent conflict between those obligations and the fiduciary's obligations to that beneficiary.

In sum, corporate law has already accounted for just about every concern Khan and Pozen raise. Directors would not be stuck between a rock and a hard place under the information fiduciary model. They would not have to fear liability due to carrying out the corporation's obligations to users. Nor is it the case that obligations to users would be weakened because they would be superseded by directors' duties to serve shareholders' interests. Quite the opposite. By threatening directors with liability for conscious disregard of known duties, Delaware law would create incentives for

120. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (quoting *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005)); see also *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006) (“The failure to act in good faith may result in liability [for directors] because the requirement to act in good faith ‘is a subsidiary element[,]’ i.e., a condition, ‘of the fundamental duty of loyalty.’” (alteration in original) (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003))).

121. See *supra* notes 112–113 and accompanying text.

122. While scholars debate the effectiveness of directors' duties in deterring corporate misconduct, recent cases—in which “*Caremark* claims” (alleging failures of board oversight) have survived motions to dismiss—suggest that fiduciary doctrine incentivizes directors to attempt to ensure corporate compliance. For a discussion of recent cases, see Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1855 (2021); John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. REGUL. 1, 56–58 (2020). Regarding the debate, see, for example, Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135 (2019).

123. Del. Code Ann. tit. 8, § 101(b) (2021).

124. See Strine, *supra* note 112, at 651 (“In the case of a corporation, the corporation has no power to give directors that authority because the corporation's existence is premised on the nondefeasible promise that it will conduct only lawful business through lawful activities.”).

directors to ensure corporate compliance with information fiduciary obligations, including those Balkin proposes.

For reasons beyond Khan and Pozen's analysis, critics may still worry about corporations' likely compliance with an information fiduciary regime. For example, corporate directors face extra-legal forces operating in tension with their duties as fiduciaries. Corporate directors who are shareholders have enhanced incentives to maximize shareholder value, incentives that may lead them to act contrary to the corporation's obligations and, in doing so, the duties they owe as fiduciaries.¹²⁵ Of course, these countervailing forces may reduce the effectiveness of any obligations—information fiduciary or not—imposed on the corporation.¹²⁶ Moreover, these forces are not the product of corporate law but in direct tension with it. They may be addressed by calibrating the liability regime to improve outcomes, for example, by increasing the probability of detecting violations or increasing sanctions.¹²⁷

Finally, there is an aspect of Khan and Pozen's reasoning that is vague and elusive but nonetheless potentially useful to try to understand. As noted previously, Khan and Pozen assert that, under Balkin's proposal, "Facebook, Google, and Twitter would, as a rule, have to temper their duties to users with a higher duty of loyalty to shareholders."¹²⁸ The authors do not explain the setting in which these companies would have to do this or what liability, specifically, they might incur if accused of violating their obligations to users under Balkin's proposal. Do Khan and Pozen envisage Facebook, when accused of violating its duties to users, pointing to the corporate fiduciary duties of Mark Zuckerberg and his fellow directors, claiming that they were obliged to pursue shareholders' interests, even if they diverged from users' interests, and that the company's fiduciary obligations should therefore be diluted or the company otherwise escape

125. As to concerns about corporate compliance based on *corporations'* self-regarding motivations, see text accompanying *infra* note 159.

126. To pursue the analysis, one would examine whether these extra-legal forces operate more strongly for digital companies than other companies and whether such forces are more likely to overwhelm information fiduciary duties than they are to overwhelm other strategies for governing directors' conduct. As to the latter issue, there is no a priori reason to think that fiduciary duties of the type Balkin proposes would be less effective than alternative legal rules in the face of such forces; in fact, the reverse might often be true because of the frequency with which courts use moralistic language to describe fiduciary breach. See Robert C. Clark, *Agency Costs versus Fiduciary Duties*, in PRINCIPLES AND AGENTS: THE STRUCTURE OF BUSINESS 55, at 76 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (arguing that "[f]iduciary law is stricter on fiduciaries than contract law is on ordinary contracting parties" due in part to "more intrusive normative [judicial] rhetoric" in fiduciary law); *id.* at 75 ("[T]hey [courts] often intrude into the psyches of fiduciaries. . . . [and] try to create feelings of guilt for violation of duty and rectitude for fulfillment of duty"). For a nuanced analysis of fiduciary law and morality, see MATTHEW CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* 106–41 (2010).

127. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 479–488 (2004).

128. Khan & Pozen, *supra* note 6, at 509.

liability? (Khan and Pozen cannot have in mind Facebook incurring liability under Balkin's proposal because, under Khan and Pozen's analysis, the corporation's user-regarding duties yield to directors' shareholder-regarding duties.¹²⁹) It is difficult to imagine in what other setting Balkin's proposed duties would be diluted. Yet, as I have explained, such an approach finds no support in Delaware law, which avoids the possibility that directors' obligations will conflict with—let alone be prioritized over—obligations imposed on the corporation, such as those proposed under the information fiduciary model.

E. Potential Reach of Critics' Claims

In the preceding sections, I argued that Khan and Pozen's reasoning and claims are doctrinally and conceptually mistaken. Still, given the esteem in which their arguments are held, it is important to take their implications seriously. To this end, I look beyond digital companies to the financial services industry. Financial institutions are more apt analogues for large technology corporations than are “[d]octors, lawyers, accountants, and the like”¹³⁰ because they hold vast reservoirs of customer information, are subject to fiduciary duties, and engage in activities that create tensions with customers' interests.¹³¹ Most are Delaware corporations.¹³² I show that, despite the parallels between digital companies and financial services, Khan and Pozen's arguments find no support in this setting. Even financial corporations themselves do not make these arguments, though the corporations would be expected to benefit if courts found them convincing. I conclude that Khan and Pozen's claims, if taken seriously, would have pernicious effects on financial services regulation and should also be rejected on that basis.

129. *Id.* at 508–10 (examining interactions between directors' duties and those under Balkin's regime).

130. *Id.* at 506.

131. See Tuch, *Weakening of Fiduciary Law*, *supra* note 77; Tuch, *Financial Conglomerates*, *supra* note 77. Cf. Claudia E. Haupt, *Platforms as Trustees: Information Fiduciaries and the Value of Analogy*, 134 HARV. L. REV. F. 34, 35–39 (2020) (in critiquing the information fiduciary model, suggesting that digital companies “in many respects are more usefully analogized to trustees than to professionals”).

132. For example, all five of the largest U.S. financial holding companies are Delaware-incorporated. See JPMORGAN CHASE & CO, ANNUAL REPORT (FORM 10-K), at cover page (Feb. 23, 2021); BANK OF AMERICA, ANNUAL REPORT (FORM 10-K), at 1 (Feb. 24, 2021); CITIGROUP INC., ANNUAL REPORT (FORM 10-K), at cover page (Feb. 26, 2021); WELLS FARGO & COMPANY, ANNUAL REPORT (FORM 10-K), at 1 (Feb. 23, 2021); THE GOLDMAN SACHS GRP., INC., ANNUAL REPORT (FORM 10-K), at coverage page (Mar. 20, 2020) [hereinafter GOLDMAN, 2019 ANNUAL REPORT]. For further detailed of financial holding companies, including a ranking by total assets, see <https://www.ffiec.gov/npw/Institution/TopHoldings> [<https://perma.cc/B7K4-77DV>].

Consider Delaware-incorporated Goldman Sachs, Inc., one of the largest U.S. financial institutions. Goldman is not a fiduciary across all of its operations, but it is a fiduciary across significant parts of its business.¹³³ For instance, the firm manages over \$1 trillion of customers' assets and, in doing so, owes fiduciary duties to those customers.¹³⁴ When it acts as a broker-dealer, Goldman at times also owes fiduciary duties.¹³⁵ It may be a fiduciary when it acts as an advisor on a corporate merger or acquisition.¹³⁶ Goldman has even been held to owe fiduciary duties to its underwriting client in an initial public offering.¹³⁷

If requiring Facebook to treat users as fiduciaries would generate the problem of conflicting fiduciary obligations, would the same problem not also apply to Goldman Sachs today? Goldman's directors—like Facebook's—owe fiduciary duties under Delaware law. Both companies have powerful self-serving incentives.¹³⁸ The interests of Goldman's customers, like those of Facebook's users, may conflict with those of the corporation's shareholders. Indeed, Goldman's interests, like those of financial institutions generally, often conflict with those of their customers.¹³⁹ Many even regard the financial conglomerate business model that Goldman and its competitors adopt as inherently conflicted, inevitably putting them at odds with their clients' interests.¹⁴⁰ Like social media

133. GOLDMAN, 2019 ANNUAL REPORT, *supra* note 132, at 4, 17, 60 (describing regimes imposing fiduciary duties on the corporation); *see also* GOLDMAN SACHS, BUSINESS STANDARDS COMMITTEE IMPACT REPORT 8 (2013), <https://www.goldmansachs.com/our-firm/people-and-culture/bcs-report.pdf> [<https://perma.cc/77P2-4DXV>] [hereinafter GOLDMAN, BUSINESS STANDARDS REPORT].

134. GOLDMAN, 2019 ANNUAL REPORT, *supra* note 132, at 64 (showing assets under management for Asset Management business of \$1,298 billion); *id.* at 60 (“[Our asset management business] provide[s] investment solutions including those managed on a fiduciary basis by our portfolio managers”); GOLDMAN, BUSINESS STANDARDS REPORT, *supra* note 133, at 8 (“Goldman Sachs acts in many different roles across our various businesses, including as advisor, fiduciary, market maker and underwriter.”).

135. Broker-dealers may owe fiduciary duties to their customers. *See* U.S. SEC. & EXCH. COMM’N, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS 54 (2011) [hereinafter SEC INVESTMENT ADVISER STUDY]; Howell E. Jackson & Talia B. Gillis, *Fiduciary Law and Financial Regulation*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 851, 862 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (describing the duties of broker-dealers as “at root fiduciary in nature”).

136. *See* Andrew F. Tuch, *Fiduciary Principles in Banking Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 135, at 125, 133–37 [hereinafter Tuch, *Fiduciary Principles*]. For an example, *see* Baker v. Goldman Sachs & Co., 656 F. Supp. 2d 226 (D. Mass. 2009).

137. *See, e.g.*, EBC I, Inc. v. Goldman Sachs & Co., 832 N.E.2d 26 (N.Y. 2005). Banks now routinely attempt to disclaim fiduciary liability in their underwriting agreements. As to the likely success of these provisions, *see* Tuch, *Fiduciary Principles*, *supra* note 136, at 139–41.

138. *See infra* notes 173–174 and accompanying text.

139. Goldman readily admits that its business model produces conflicts with clients' interests. *See, e.g.*, GOLDMAN, 2019 ANNUAL REPORT, *supra* note 132, at 36; *Goldman's Responses on Relations with Clients*, N.Y. TIMES (May 19, 2010), <https://www.nytimes.com/2010/05/19/business/19goldmanquestions.html> [<https://perma.cc/CE3L-WDYA>] (attributing the following statements to Goldman Sachs: “every large financial institution, in fact virtually any business in any industry, has potential conflicts and we all have an obligation to manage them effectively.”).

140. *See infra* notes 179–181 and accompanying text.

companies, financial institutions are huge repositories of customer information, much of it gained from the customers themselves.¹⁴¹ They have ample opportunities to use customers' information for their own profit.¹⁴² Thus Goldman and other financial services firms seem to be in much the same position Facebook would be if it were treated as an information fiduciary to users.

Yet, the problem of conflicting fiduciary obligations as described by Khan and Pozen—that *user*-regarding corporate duties would clash with *shareholder*-regarding directors' duties—has not been addressed or even identified by courts, policymakers, or commentators in the financial services setting.¹⁴³ Nor have corporations themselves identified the issue or suggested that corporate duties must be diluted in the face of “higher” directors' duties. This is what one would expect given the analysis in Sections I.B–D above. When customers have sought to impose fiduciary duties on a financial institution, neither parties nor courts have suggested any tension between directors' duties and those the corporation may owe. For example, when eToys went bankrupt during the dot com bubble of 2000–01, the company sued Goldman, claiming that the bank owed it fiduciary duties when the bank underwrote its initial public offering.¹⁴⁴ The court made Goldman a fiduciary, seeing no conflict with—or any relevance whatsoever in—the duties that Goldman's directors owe Goldman and its shareholders, even though identifying such a conflict, on Khan and Pozen's reasoning, could well have helped Goldman's case by diluting its obligations or justifying its pursuit of shareholders' interests at the expense of customers'.¹⁴⁵

Considering that financial services firms are already in the position Khan and Pozen consider untenable, giving weight to their arguments would result in substantial and broad adverse consequences. Consider this world in which suddenly we see conflict where Delaware corporate law currently sees none. What would be the pernicious effects? The first-order effect is that corporations would be empowered to prioritize shareholders' interests

141. See *infra* notes 175–182 and accompanying text.

142. See *infra* notes 175–182 and accompanying text.

143. For example, a large-scale Securities and Exchange Commission study of the regulation of investment advisers makes no reference to the possibility that advisers' fiduciary duties may conflict or otherwise stand in tension with directors' duties under state corporate law. Similarly, the same study considers the imposition of fiduciary duties on broker-dealers without suggesting that such duties might conflict with state corporate law. See SEC INVESTMENT ADVISER STUDY, *supra* note 135.

144. See *EBC I, Inc. v. Goldman Sachs & Co.*, 832 N.E.2d 26 (N.Y. 2005).

145. The decision makes no reference to directors' duties or state corporate law. *Id.* Similarly, Goldman similarly makes no reference to directors' duties or Delaware law in its Opening Brief or Reply Brief. See Opening Brief for Defendant-Respondent-Cross-Appellant, *EBC I, Inc., v. Goldman, Sachs & Co.*, 832 N.E.2d at 26 (No. 601805-2002); Reply Brief for Defendant-Respondent-Cross-Appellant, *EBC I, Inc., v. Goldman, Sachs & Co.*, 832 N.E.2d at 26 (No. 601805-2002).

over customer and other interests protected by fiduciary obligations on corporations. This, according to Khan and Pozen's incorrect analysis, is already the case. What if they were right? Customer protections would be weakened. At a minimum, there would be uncertainty about the content and scope of existing corporate obligations, potentially diminishing corporate compliance with them and reducing customers' or regulators' willingness to enforce them. Furthermore, directors may be emboldened to promote shareholder welfare at the expense of other corporate constituencies—not just customers but also suppliers and employees. Directors might scoff at laws enjoining them to account for environmental interests where such accounting does not serve shareholders' immediate interests.

Under the crude, shareholders-first-and-only version of corporate law Khan and Pozen seem to take for granted, the consequences may indeed be far-reaching and harmful. But that version of corporate law does not exist today. Far from undermining the information fiduciary model, Delaware corporate law would require directors to exercise their discretion within the corporation's legal limits, creating incentives for them to favor legally protected users' interests over those of shareholders. The claimed tension between Balkin's proposal and Delaware corporate law is illusory.

II. CLAIMED INCOMPATIBILITY WITH DIGITAL COMPANIES' SELF-INTEREST

Khan and Pozen also regard the information fiduciaries model as incompatible with digital companies' powerful self-interests. In this Part, I explore this objection, arguing that it is significantly overstated.

A. *The Objection*

Khan and Pozen's objection reflects two related concerns grounded in general fiduciary law. The first is that Facebook and other digital companies have such powerful self-regarding incentives that these companies may not properly be characterized as fiduciaries of their users.¹⁴⁶ These incentives arise by virtue of firms' business models or practices. To Khan and Pozen, the "business model matters. It determines the degree to which a commercial enterprise is motivated to advance the best interests of its customers, or the exact opposite."¹⁴⁷ For digital companies, their use of personally targeted advertisements motivates them to "extract as much data

146. Khan and Pozen also question digital fiduciaries' capacity for loyalty given their self-serving incentives. *See, e.g.*, Khan & Pozen, *supra* note 6, at 513 ("[I]t is unclear how a digital fiduciary is supposed to fulfill its duty of loyalty to users under conditions of profound and 'perpetual' conflict."); *id.* at 515 (companies' divergence of interests may "render[] fiduciary loyalty implausible").

147. *Id.* at 515.

from their users as they can—a motivation that runs headfirst into users’ privacy [and other] interests.”¹⁴⁸ Such powerful incentives to act contrary to users’ interests should be seen “as an insuperable obstacle to a fiduciary relationship,” Khan and Pozen suggest.¹⁴⁹ “[F]iduciary law cannot tolerate an arrangement that places the fiduciary’s economic livelihood and its beneficiaries’ well-being fundamentally at odds,” Khan and Pozen note.¹⁵⁰ “[T]here are cases where the degree of misalignment [between fiduciaries’ incentives and their customers’ interests] renders fiduciary loyalty implausible. Businesses built on behaviorally targeted advertising appear to be one such case.”¹⁵¹

Khan and Pozen’s second concern is that these companies could not satisfy fiduciary duties unless their business models were fundamentally transformed. To impose user-regarding obligations on digital companies, they write, “and wind up with anything recognizable as a fiduciary relationship, it seems to us that the legislators would have to force fundamental changes in the companies’ business practices . . . and preempt or dilute the stockholder-regarding norms under which the companies currently operate.”¹⁵²

B. Self-Interest and the Identification of Fiduciary Relationships

In evaluating the first concern, I accept initially, and for the sake of argument, Khan and Pozen’s claim that social media companies’ business models create powerful incentives for corporations to act contrary to users’ interests, although I later interrogate this claim. But even accepting this claim, fiduciary law can, and often does, operate in settings in which fiduciaries have powerful self-interests.

Fiduciary duties may well be imposed on self-interested actors because self-interested incentives themselves are not a barrier to the imposition of fiduciary duties. The judicial task of determining when fiduciary duties arise outside of categorical fiduciary relationships (trustee-beneficiary, lawyer-client, director-company, agent-principal, etc.) is complex. Courts analogize to other relationships, but they often also consider the presence

148. *Id.* at 512 (referring to “users’ privacy interests as well as any interests users might have in exercising behavioral autonomy or ensuring that their personal data is not stolen, sold, mined, or otherwise monetized down the line”).

149. *Id.* at 512–13.

150. *Id.* at 513.

151. *Id.* at 515.

152. *Id.* at 511; *see also id.* at 534 (“The tension between what it would take to implement a fiduciary duty of loyalty to users, on the one hand, and these companies’ economic incentives and duties to shareholders, on the other, is too deep to resolve without fundamental reform.”).

(or not) of certain factors for identifying fiduciary relationships.¹⁵³ No factor is decisive in either establishing or excluding a fiduciary relationship.¹⁵⁴ As for self-interest in particular, it may well be the drive to serve self-interest, to exploit opportunities for self-advantage, that creates the need for fiduciary protection.¹⁵⁵ As explained below, financial firms like Goldman Sachs owe fiduciary duties in a range of settings in which they face compelling incentives to act contrary to customers' interests. After all, constraints on self-interested conduct are most valuable when parties would otherwise be likely to act on their self-serving incentives.

There is another reason to reject Khan and Pozen's concern that Facebook and other digital companies have such powerful self-regarding incentives that these companies may not properly be characterized as fiduciaries. When fiduciary relationships are stipulated by a statutory or regulatory regime, as they sometimes are, there is no need for strong supporting analogies or clear indicia of fiduciary relationships.¹⁵⁶ For example, several states have recently proposed imposing fiduciary duties on broker-dealers even though courts applying analogical and other reasoning often do not characterize broker-dealers as fiduciaries.¹⁵⁷ If the information fiduciary model were the product of legislation or regulation, which seems possible, there would be no need to consider whether the duties imposed were justified by analogical or other reasoning.

It is also no barrier to the information fiduciary model that digital companies currently fall short of fiduciary standards. To the extent Khan and Pozen argue that digital companies cannot *now* act with fiduciary loyalty—that “fiduciary loyalty [is] implausible”¹⁵⁸—this suggests that firms' existing practices would need to change under the force of fiduciary duties, not that fiduciary duties could not be imposed. As fiduciaries, digital companies would hardly be unique in having powerful self-regarding

153. As to the factors the presence of which will make a court more likely to regard a relationship as “fiduciary,” see Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 135, at 3, 9–10. None of the identified indicia clearly concern the alignment between parties' interests, although that factor may be relevant to the indicia of a repose of trust or an expectation of loyalty.

154. *Id.*

155. See, e.g., Jackson & Gillis, *supra* note 135, at 861–63.

156. As Paul Miller observes, “lawmakers assert monopoly control over elaboration of the meaning and extension (or use) of the concept ‘fiduciary relationship.’” Paul B. Miller, *The Identification of Fiduciary Relationships*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 135, at 367, 369.

157. See GOLDMAN, 2019 ANNUAL REPORT, *supra* note 132, at 17. As to the usual judicial characterization of broker-dealers, see SEC INVESTMENT ADVISER STUDY, *supra* note 135, iii–iv; Arthur B. Laby, *Fiduciary Principles in Investment Advice*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 135, at 145–47; Andrew F. Tuch, *Conduct of Business Regulation*, in THE OXFORD HANDBOOK OF FINANCIAL REGULATION 537, 549 (Niamh Moloney, Eilis Ferran & Jennifer Payne eds., 2015).

158. Khan Pozen, *supra* note 6, at 515.

motivations and relying on business practices that create opportunities and incentives for firms to act contrary to customers' interests. If firms exploited these opportunities or acted on these incentives, they might well violate their duties, but this possibility—discussed below—is no necessary barrier to a fiduciary relationship.

Finally, we might question the likely effectiveness of fiduciary duties on firms with powerful self-regarding motivations.¹⁵⁹ These firms may be less likely to comply with user-regarding obligations than companies having interests aligned strongly with their users. However, Khan and Pozen's expressed concern is distinct: not that fiduciary duties would be ineffective on firms with powerful self-regarding incentives but that those incentives are a barrier to fiduciary duties in the first place.¹⁶⁰ In any case, concern about the effectiveness of regulation in the face of powerful countervailing incentives would exist whatever regulatory technique was adopted; it is not peculiar to fiduciary regimes. And, as discussed above,¹⁶¹ policymakers might address the potential problem by calibrating the liability regime to improve outcomes.

C. Business Models and Fiduciary Duties

Khan and Pozen's second concern—that these companies could not satisfy fiduciary duties without “fundamental changes in the companies' business practices”¹⁶²—is similarly overstated. Khan and Pozen do not specify what “fundamental changes” may be required under a fiduciary regime, although, importantly, they never claim that these firms could not continue to operate or earn profits under a strong fiduciary regime.¹⁶³

This concern implicitly concedes that fiduciary duties may be imposed on online platforms—that a firm's powerful self-serving incentives need not be an obstacle to a relationship that is recognizably fiduciary. The concern reveals an important potential tension between fiduciary duties and firm structure or business practices but nevertheless fails to undermine the information fiduciary model.

159. Although Khan and Pozen's objection goes to *corporations'* self-regarding motivations, they may in fact have in mind the motivations of corporate leaders, including directors and officers, attributing these individuals' motivations to their corporations. The discussion here therefore generally mirrors the discussion above regarding the concern that corporations may violate their obligations by reason of *directors'* self-serving incentives. See *supra* notes 125–126 and accompanying text.

160. *Id.* at 512–13 (suggesting that conflicts of interest between online providers and users are “an insuperable obstacle to a fiduciary relationship”).

161. See *supra* note 127 and accompanying text.

162. *Id.* at 511.

163. At most, they suggest that “behaviorally targeted advertising” would be incompatible with a fiduciary regime, which would still leave available other forms of advertising (less lucrative perhaps but still profit-generating). *Id.* at 515 (“[T]here are cases where the degree of misalignment renders fiduciary loyalty implausible. Businesses built on behaviorally targeted advertising appear to be one such case.”).

First, it is far from certain that an information fiduciary regime would fundamentally disrupt digital companies' business models. Fiduciary duties, even strict prohibitions on conflicts of interest, are rarely categorical duties. They are subject to informed client consent, have limited scope, and are often qualified in other ways.¹⁶⁴ For example, lawyers' clients may give informed consent to most of the basic conflicts of interest that their lawyers face.¹⁶⁵ Agents may contractually modify their duties or narrow the scope of their fiduciary relationships.¹⁶⁶ And, even in the absence of informed consent, not every instance of self-interest amounts to a "conflict of interest" sufficient to violate a fiduciary duty of loyalty. If the fiduciary obligations on digital companies operated as they do in other settings, fiduciaries would be likely to obtain their users' informed consent to conflicts or otherwise seek to limit the risk of fiduciary breach.

Advocates of the information fiduciary model do not specify the scope or intensity of the fiduciary duties they would impose, but it is doubtful they have in mind fiduciary duties that are subject to informed consent, as fiduciary duties are in other settings.¹⁶⁷ To the extent they have in mind especially strict fiduciary duties, duties not subject to informed consent or other qualifications, the model may disrupt digital firms' business models, forcing firms to change their ways of doing business significantly. Courts have imposed fiduciary duties even if these duties might force firms to change their ways of doing business.¹⁶⁸ Generally speaking, the stricter the fiduciary duties imposed and the broader their scope, the greater the pressure on organizational models that routinely creates opportunities and incentives for self-regarding conduct. It is not that fiduciary duties could not be imposed on such conflictual businesses; rather, these duties would be so routinely breached that, in practice, firms would need to reform their practices to continue operating within legal limits.

Accordingly, if Khan and Pozen's point is that a particularly strong version of fiduciary duties may require significant changes in the

164. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 121–22 (AM. LAW INST. 2000).

165. *Id.* § 122 cmt. a. ("Pursuant to this § 122, informed consent of affected clients is effective with respect to most conflicts of interest defined in § 121 and imputations of conflicts to affiliated lawyers in § 123.")

166. See, e.g., Deborah A. DeMott, *Defining Agency and Its Scope II*, in *COMPARATIVE CONTRACT LAW: A TALE OF TWO LEGAL SYSTEMS* 396, 403–06 (Larry A. DiMatteo & Martin Hogg eds., 2016).

167. Neil Richards and Woodrow Hartzog propose a duty of loyalty for digital companies, modeled on fiduciary law but distinct from Balkin's information fiduciary model. They outline the content and scope of their duty, under which attempted waivers of duty would be invalid. See Richards & Hartzog, *supra* note 17, at 34–36.

168. See, e.g., *Morris v. Resol. Tr. Corp.*, 622 A.2d 708, 712 n.3 (Me. 1993); *In re Parmalat Sec. Litig.*, 684 F. Supp. 2d 453, 478 (S.D.N.Y. 2010). An exception may arise if the legislature has endorsed the business model in question. See Tuch, *Weakening of Fiduciary Law*, *supra* note 77, at 370.

companies' business practices, I agree. But the need for such changes should not be seen as necessarily undermining the information fiduciary model; it is entirely possible that these changes in firms' practices would be desirable since they would be the product of strongly user-protective duties.¹⁶⁹ At a minimum, these changes must be evaluated before they can be dismissed. The changes might even be consistent with the "more ambitious approaches" to regulatory reform that Khan and Pozen favor.¹⁷⁰ Accordingly, if an information fiduciary model were to require "fundamental changes" of digital companies, this might give Khan and Pozen reason to support, rather than oppose, particularly robust fiduciary duties.¹⁷¹ After all, they do argue for major changes of these firms' business practices.¹⁷²

To illustrate these ideas, consider how fiduciary law adapted in the financial services industry in the face of challenges posed by firms' business models. Matt Taibbi famously described Goldman Sachs as "a great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money."¹⁷³ Anthropologist Karen Ho has described financial institutions like Goldman as having a "presentist strategy of no strategy"—they engage in "the milking of the present."¹⁷⁴ While probably exaggerated, these descriptions capture what is inherent in the business model of firms like Goldman: powerful economic incentives for self-regarding behavior.

Like social media companies, Goldman and its competitors are huge reservoirs of non-public information about their clients.¹⁷⁵ Some scholars even view Goldman's information-gathering role as among its central

169. Khan and Pozen suggest that such changes to firms' business practices would need to be imposed from outside fiduciary law. See Khan & Pozen, *supra* note 6, at 511 ("[I]t seems to us that the legislators would have to force fundamental changes in the companies' business practices . . ."). However, change may result from the force of fiduciary duties without the need for intervention of the type Khan and Pozen seem to have in mind.

170. *Id.* at 536.

171. I leave aside the argument that pursuing the information fiduciary model may "cannibalize rather than complement" structural reforms. *Id.* at 537. The argument rests on the proposition that "lawmakers can regulate the leading online platforms as information fiduciaries or target their market dominance and business models, but lawmakers very likely will not do both." *Id.*

172. Although Khan & Pozen engage in "critique, not prescription," they suggest close consideration be given to "structural" interventions, which "[i]mportantly, . . . do not necessarily have to break up firms. They can also reshape business incentives through bright-line prohibitions on specific modes of earning revenue . . ." *Id.* at 538–39.

173. Matt Taibbi, *The Great American Bubble Machine*, ROLLING STONE (Apr. 5, 2010, 7:58 PM), <http://www.rollingstone.com/politics/news/the-great-american-bubble-machine-20100405> [https://perma.cc/M62A-KRJ9].

174. KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET 302, 322* (2009) (ebook).

175. See Tuch, *Financial Conglomerates*, *supra* note 77, at 564 ("[T]he structure [of financial conglomerates] provides firms with vast reservoirs of non-public information as well as the opportunities and incentives to exploit that information . . ."). *Id.* at 573 (such information is "largely garnered from [their]clients").

functions.¹⁷⁶ If exploited, this information—covering everything from proposed mergers and acquisitions, to stock offerings, to large securities trades—may well produce a financial windfall for the firm while also harming client and other interests.¹⁷⁷

Conflicts with clients' interests are hardly theoretical concerns to Goldman and other major financial institutions.¹⁷⁸ Conflicts result from the structure of financial conglomerates.¹⁷⁹ A former chief executive officer from Morgan Stanley, Goldman's longstanding investment banking rival, explained, "[i]n our business, we are surrounded by conflicts—not just conflicts between our interests and those of our clients, but between different parts of our firms, and between the clients in one part of the firm and the clients in another."¹⁸⁰ More recently, Morgan Stanley's Global Head of Mergers and Acquisitions quipped, "We are all totally conflicted—get used to it."¹⁸¹ Former Chairman of the Federal Reserve Paul Volcker noted

the strong conflicts of interest inherent in the participation of commercial banking organizations in proprietary or private investment activity. That is especially evident for banks conducting substantial investment management activities, in which they are acting explicitly or implicitly in a fiduciary capacity. When the bank itself is . . . trading for its own account, it will almost inevitably find

176. See ALAN D. MORRISON & WILLIAM J. WILHELM, JR., *INVESTMENT BANKING: INSTITUTIONS, POLITICS, AND LAW* 5–6 (2007) (arguing that the investment bank's "core function" is to act as an informational intermediary or manager of an informational marketplace, gathering otherwise-private information and distributing it to other market actors); see also *id.* at 71–96 (elaborating on investment banks' role at the nexus of an informational marketplace).

177. See Tuch, *Financial Conglomerates*, *supra* note 77, at 578–81; see also Gretchen Morgenson & Louise Story, *Clients Worried About Goldman's Dueling Goals*, N.Y. TIMES (May 18, 2010) <https://www.nytimes.com/2010/05/19/business/19client.html> [<https://perma.cc/2DB9-M3KH>] (raising concerns about Goldman's self-interested use of confidential client information).

178. See *supra* note 139 and accompanying text.

179. See *supra* note 139. As early as the 1960s, the Securities and Exchange Commission recognized the "multifarious possibilities of conflict of obligation or interest in matters large and small" in large financial institutions. See REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. DOC. NO. 88-95, pt. 5, at 65 (1963). Since that time, firms have grown massively in size and scope, magnifying the risk of conflict with clients' interests. See Tuch, *Weakening of Fiduciary Law*, *supra* note 77, at 359–61.

180. PHILIP AUGAR, *THE GREED MERCHANTS: HOW THE INVESTMENT BANKS PLAYED THE FREE MARKET GAME* (2005) (quoting Philip Purcell, Chief Exec. Officer, Morgan Stanley, Speech at Securities Industry Association 2003 Annual Meeting Conference: Reconnecting with America (Nov. 7, 2003)).

181. Andrew Ross Sorkin, *Conflicted, and Often Getting a Pass*, N.Y. TIMES: DEALBOOK (Mar. 12, 2012, 8:12 PM), <https://dealbook.nytimes.com/2012/03/12/conflicted-and-often-getting-a-pass> [<https://perma.cc/TR79-UKUB>] (attributing the statement to Robert A. Kindler, Global Head and Mergers and Acquisitions and Vice Chairman of Morgan Stanley).

itself, consciously or inadvertently, acting at cross purposes to the interests of an unrelated commercial customer of a bank.¹⁸²

What this suggests is that social media and other technology companies would be hardly unique in having powerful self-regarding motivations and relying on business models that create incentives for firms to act contrary to customers' interests. Indeed, financial firms' self-regarding motivations may be considerably stronger than those of social media companies because of employee remuneration policies. In financial institutions, individuals are often remunerated on the basis of the profits they generate, supercharging individual incentives to promote corporate profitability in the short term.¹⁸³ Nothing suggests that these individual remuneration arrangements are nearly as widespread at social media companies. On the contrary, at least some employees at Facebook and Google seem willing to subvert corporate profits, which suggests that their incentives are not well aligned with those of corporate managers. At times, these employees appear to act according to their consciences, criticizing managers.¹⁸⁴ In doing so, employees may blunt the incentives of firms (and their leaders) to the extent firms' interests diverge from those of users.

Yet, despite having powerful self-interest, financial services firms act as fiduciaries in numerous settings, which subjects them to duties that protect customers and constrain firms' incentives and opportunities for self-regarding behavior.¹⁸⁵ As explained above, self-interested incentives themselves are not a barrier to fiduciary duties. The asset management industry exemplifies a setting in which firms have powerful economic incentives and opportunities to act contrary to their clients' interests; nonetheless, they owe fiduciary duties to clients that impose strong constraints on self-interest.

Moreover, major financial services firms' business models have remained relatively intact, despite routinely producing conflicts of

182. *Paul Volcker's Prepared Testimony to Senate Bank Panel*, REUTERS (Feb. 2, 2010, 3:35 PM), <http://www.reuters.com/article/us-financial-regulation-volcker-text/paul-volckers-prepared-testimony-to-senate-bank-panel-idUSTRE6115WK20100202> [<https://perma.cc/XR9Q-DXHJ>]. Volcker was advocating for reforms that would have reduced financial conglomerates' conflicts.

183. See HO, *supra* note 174, at 257–71, 284.

184. See, e.g., Makena Kelly, *Facebook Employees Walk Out in Protest of Donald Trump's Posts*, VERGE (June 1, 2020, 1:34 PM), <https://www.theverge.com/2020/6/1/21277135/facebook-walkout-protest-virtual-president-donald-trump-posts> [<https://perma.cc/RB6U-NC5J>] (describing criticism—internal and external to the company—by Facebook employees of its leaders' decisions regarding content moderation); see also Anat Alon-Beck, *Times They Are a-Changin': When Tech Employees Revolt!*, 80 MD. L. REV. 120, 131–35 (2020) (discussing “activism” by employees of large tech companies directed against corporate leaders); *id.* at 135 (“Since 2018, Amazon, Google, Microsoft, Salesforce and other tech giants have also dealt with employee activism” (omitting internal footnotes)).

185. See *supra* notes 133–137 and accompanying text.

interest.¹⁸⁶ It is not entirely clear why this is so since the combination of robust fiduciary duties and conflictual business models would be expected to require firms to significantly alter their practices. The use of informed consent and the contractual modification of fiduciary duties seem to be part of the answer as does the non-enforcement of fiduciary duties.¹⁸⁷ And yet fiduciary law is strong in important respects. When acting as an investment adviser, Goldman is generally held to a duty of “utmost good faith, and full and fair disclosure of all material facts,” among other duties,¹⁸⁸ which effectively bar certain conflicts of interest.¹⁸⁹ Firms themselves seem to regard the fiduciary regimes they owe as robust,¹⁹⁰ and their duties are easily recognizable as fiduciary in nature.¹⁹¹

I do not hold up financial institutions to deny that the imposition of user-regarding duties on digital companies would disrupt their business models. We cannot tell whether the information fiduciary model, as implemented, would have this effect on certain firms without greater specification of the content and scope of the proposed duties and also, perhaps, without better understanding firms’ practices of collecting and using data. Rather, I point to them to illustrate that robust fiduciary duties may well be imposed on firms with both powerful self-interests and inherently conflictual business models. Whether an information fiduciary regime would disrupt digital companies’ models will depend on business practices and the particular duties imposed. And whether digital companies should owe more stringent fiduciary duties than those imposed on financial institutions is an open issue. While Balkin’s proposal to implement an information fiduciary regime may require further development, one cannot reasonably conclude based on the reasons considered in this Essay that it is “flawed—likely beyond repair”¹⁹² or that it may “undermin[e] foundational principles of fiduciary law.”¹⁹³

186. There have been some significant changes, although it is questionable whether these have occurred under the force of fiduciary duties. For example, major financial conglomerates, particularly investment banks, no longer engage in significant proprietary trading and have limited private equity operations. See Andrew F. Tuch, *The Remaking of Wall Street*, 7 HARV. BUS. L. REV. 315, 333 (2017).

187. See Tuch, *Weakening of Fiduciary Law*, *supra* note 77, at 356–67, 373–74.

188. *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 194 (1963) (quoting PROSSER, LAW OF TORTS 534–35 (1955)).

189. See Laby, *supra* note 157, at 155.

190. For instance, financial services firms warn their investors about the risks they face if they breach their existing fiduciary duties or if new fiduciary duties are imposed. See, e.g., GOLDMAN, 2019 ANNUAL REPORT, *supra* note 132, at 25 (warning that the imposition of fiduciary duties or fiduciary breach “could increase [costs and liabilities] significantly” and “could have materially negative legal, regulatory and reputational consequences”).

191. Cf. Khan & Pozen, *supra* note 6, at 511 (“[T]o . . . wind up with anything recognizable as a fiduciary relationship, it seems to us that the legislators would have to force fundamental changes in the companies’ business practices . . .”).

192. See Pozen, *supra* note 8.

193. See Khan & Pozen, *supra* note 6, at 529.

D. Alignment of Interests

Finally, it is worth examining a basic assumption of Khan and Pozen's argument in this Part: that the self-interests of major technology firms are fundamentally misaligned with those of their users. Never do Khan and Pozen seem to entertain the possibility of overlapping interests—the possibility that, to some extent, corporate conduct might serve both the corporation's and users' interests.¹⁹⁴

“[A]s long as such companies make most of their money through personally targeted advertisements, they will be economically motivated to extract as much data from their users as they can—a motivation that runs headfirst into users' privacy interests as well as any interests users might have in exercising behavioral autonomy or ensuring that their personal data is not stolen, sold, mined, or otherwise monetized down the line.”¹⁹⁵

Khan and Pozen presumptively reject the idea that “reforms to advance the best interests of users by reducing addiction, limiting advertising, protecting privacy, and so on would *also* advance the best interests of an online platform and its shareholders.”¹⁹⁶ But the evidentiary support offered for these claims is mixed. On the one hand, the conduct of “corporations like Facebook” “suggests that their boards do not see these reforms [to advance users' interests] as likely to enhance firm value or shareholder wealth either in the short term or in the long term.”¹⁹⁷ On the other hand, Khan and Pozen acknowledge that “[e]xperts debate whether and under what conditions online behavioral advertising actually enhances consumer welfare.”¹⁹⁸

What we do know with certainty is that online platform companies are not required to behave as though their own self-interests are at odds with those of users. As we have seen, corporate law gives considerable license for directors to make decisions accounting for the interests of many different stakeholders.¹⁹⁹ Although inevitably some divergence occurs, shareholders' interests are often aligned with those of customers and other stakeholders in

194. In fact, they seem to argue the reverse. *See infra* note 196 and accompanying text; *see also* Khan & Pozen, *supra* note 6, at 505 (referring to Facebook, asserting that “addictive user behavior,” “divisive and inflammatory content,” and “[d]eterioration of privacy and confidentiality norms” are, by and large, all “good for business”).

195. Khan & Pozen, *supra* note 6, at 512; *see also id.* at 515 (“[T]here are cases where the degree of misalignment [between fiduciaries' incentives and their customers' interests] renders fiduciary loyalty implausible. Businesses built on behaviorally targeted advertising appear to be one such case.”); text accompanying notes 147–151.

196. Khan & Pozen, *supra* note 6, at 508.

197. *Id.*

198. *Id.* at 512 n.67.

199. *See supra* notes 82–83 and accompanying text.

basic respects.²⁰⁰ A widely noted recent statement by the Business Roundtable, a trade group of chief executives from the country's largest corporations, asserts "it is important to recognize that the interests of all stakeholders are inseparable in the long term"²⁰¹—roughly the opposite view to Khan and Pozen's because it suggests entirely overlapping interests. Like the Business Roundtable's view asserting total overlap between users' and shareholders' interests, Khan and Pozen's position is extreme. Rather, it seems trivially true that the interests of social media companies are in some ways aligned with those of users and in some ways misaligned. Thus users continue to take advantage of platforms like Facebook, even as those same users object to many of Facebook's practices and encourage legislators to regulate Facebook. Even if the interests of large technology companies and their users are completely misaligned, Khan and Pozen give no plausible reason why this misalignment undermines the information fiduciary model.

III. IMPLICATIONS AND EXTENSIONS

The most obvious implication of the analysis in Parts I and II is that the information fiduciary model should not be dismissed as a viable policy option for regulating digital data collectors based on Khan and Pozen's objections. Balkin's proposal is not incompatible with corporate law or fiduciary law more generally. If Balkin's proposal or similar reforms were adopted, there would be no sensible risk of "the unraveling of fiduciary law,"²⁰² of "violence either to the companies themselves or to fundamental principles of fiduciary law,"²⁰³ or of the resulting regime "teeter[ing] on the edge of contradiction."²⁰⁴

The second implication of this Essay's analysis is that no reform of corporate law would be required to implement Balkin's proposal. In vague terms, Khan and Pozen suggest otherwise. They assert a need for reform to "preempt or dilute the stockholder-regarding norms under which the

200. See Bechuk & Tallarita, *supra* note 82, at 109 ("For example, how the company treats employees could well affect its ability to attract, retain, and motivate the members of its labor force; how the company deals with customers could affect its ability to attract and retain them; and how the company deals with local communities or the environment could well affect its reputation and standing in ways that could be important for its success.").

201. *Redefined Purpose of a Corporation: Welcoming the Debate*, BUS. ROUNDTABLE (Aug. 25, 2019), <https://medium.com/@BizRoundtable/redefined-purpose-of-a-corporationwelcoming-the-debat-e-8f03176f7ad8> [<https://perma.cc/A5ZJ-PUST>].

202. Khan & Pozen, *supra* note 6, at 534–35.

203. *Id.* at 507.

204. *Id.* at 504 ("Right off the bat, these observations [about what directors' duties require] give reason to question the feasibility, if not also the coherence, of applying the information-fiduciary idea to the leading social media companies. A fiduciary with sharply opposed loyalties teeters on the edge of contradiction.").

companies currently operate.”²⁰⁵ They also refer to government intervention that would “clearly prioritize” fiduciary duties to users under Balkin’s proposal over shareholder-regarding directors’ duties.²⁰⁶ The critique refers to “modif[ying]” corporate law “through state or federal legislation to authorize or compel platforms to put users’ interests ahead of stockholders’ interests (either in general or in specific respects).”²⁰⁷ So convincing has Khan and Pozen’s critique proven that some continued supporters of Balkin’s proposal now regard legal reform of corporate law as necessary.²⁰⁸ But this is misguided. Whatever reform to corporate law critics have in mind, it would be unnecessary for the reasons detailed above.

In fact, such reform may be harmful. Since existing corporate law already allows directors to take into account users’ interests instrumentally (in service of shareholders’ interests), as Khan and Pozen acknowledge,²⁰⁹ the reforms they refer to would need to go further and allow directors to make decisions in service of users’ interests as well—a reform of the corporation’s objectives. Such reform may succeed in diluting “stockholder-regarding norms under which the companies currently operate.”²¹⁰ But scholars worry that altering the corporation’s purpose in this way would weaken monitoring of corporate leaders and thereby “increase managerial slack, worsen corporate performance, and reduce economic efficiency and value-creation.”²¹¹

Third, Khan and Pozen’s argument is less with Balkin than with the traditional model of corporate regulation. Better understood, their criticisms are directed at the model of regulating corporations by imposing obligations and constraints on corporations themselves. Under this model, corporate law governs relations between directors and shareholders, but the protection of non-shareholder interests must occur outside corporate law. “Environmental regulations control environmental externalities. . . . Labor law governs the relationship between employees and firms. Competition law protects and preserves competitive markets.”²¹² According to this approach, corporate leaders face “a constrained optimization problem:

205. *Id.* at 511.

206. *Id.* at 504.

207. *Id.* at 509.

208. *See supra* note 16 and accompanying text.

209. Khan & Pozen, *supra* note 6, at 503.

210. *Id.* at 511.

211. Bebhuk & Tallarita, *supra* note 82, at 167; *see, e.g., id.* at 164 (“Stakeholderism would increase the insulation of corporate leaders from shareholders and make them less accountable to them.”); *id.* at 101 (“Increased insulation and reduced accountability would increase managerial slack and agency costs, thus undermining economic performance and thereby damaging both shareholders and stakeholders.”).

212. Rock, *supra* note 89, at 5; *see also* Hansmann & Kraakman, *supra* note 89, at 442; Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 969 (2020).

maximize the value of the company *subject to side constraints imposed by regulation.*²¹³ Many doubt the merits of this traditional approach, questioning whether regulations outside corporate law will adequately protect stakeholder interests other than shareholders.²¹⁴ Others prefer this approach, asking whether relaxing corporate leaders' fiduciary duties to allow them to protect non-shareholder interests (a change that would give leaders greater decision-making discretion) will actually better address societal concerns.²¹⁵ But neither side contends, as Khan and Pozen do in the social media setting, that corporate law is in tension with outside constraints on corporations or that those constraints may yield to directors' shareholder-regarding duties. Corporate law does not operate in this way, nor should it.

Still, there is much more to be determined about the content and scope of duties in the information fiduciary model. Khan and Pozen examine a potential tension between fiduciary law and business models. Whether the model will disrupt digital companies' businesses, requiring significant changes to the ways they make money, is not clear. But even if the model will have this effect, it does not follow that we need to reject the model without an assessment of those changes.

CONCLUSION

This Essay responds to widely noted, influential, and trenchant criticism of a model that would make Facebook, Google, Twitter, and other digital companies information fiduciaries, a model that has been inscribed in proposed federal and state legislation. These criticisms regard the information fiduciary model as “undercutting directors’ duties to shareholders, undermining foundational principles of fiduciary law, or both.”²¹⁶ I have attempted to expose and highlight the flaws in these criticisms. They fail to undermine the model or similar reforms that would impose user-regarding obligations on corporations. Claims of incompatibility with corporate law rely on a partial understanding of corporate law, which, if accepted, would have pernicious and far-reaching consequences in other spheres of corporate regulation. Concern that social media companies’ powerful self-interests—whether the product of their business models or corporate law—are incompatible with fiduciary duties is overstated; this is true even though the information fiduciary model needs greater specificity of the scope and intensity of the duties it would impose.

213. Rock, *supra* note 89, at 5 (emphasis added).

214. See, e.g., THE BRITISH ACADEMY, REFORMING BUSINESS FOR THE 21ST CENTURY: A FRAMEWORK FOR THE FUTURE OF THE CORPORATION 22 (2018).

215. See, e.g., Bechuk & Tallarita, *supra* note 82.

216. Khan & Pozen, *supra* note 6, at 529.

The information fiduciary model deserves careful and rigorous assessment, given the risks major digital companies pose for user privacy and data security. Although critics demonstrate laudable concern for these risks, their core criticisms provide no basis for denying the information fiduciary model that assessment.