ENSURING APPROPRIATE REGULATORY OVERSIGHT OF BROKER-DEALERS AND LEGISLATIVE PROPOSALS TO IMPROVE INVESTMENT ADVISER OVERSIGHT

HEARING

BEFORE THE

SUBCOMMITTEE ON CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

SEPTEMBER 13, 2011

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WITNESSES

TUESDAY, SEPTEMBER 13, 2011

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

ENSURING APPROPRIATE REGULATORY OVERSIGHT OF BROKER-DEALERS AND LEGISLATIVE PROPOSALS TO IMPROVE INVESTMENT ADVISER OVERSIGHT

Tuesday, September 13, 2011

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CAPITAL MARKETS AND
GOVERNMENT SPONSORED ENTERPRISES,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:03 a.m., in room 2128, Rayburn House Office Building, Hon. Scott Garrett [chairman of the subcommittee] presiding.

Members present: Representatives Garrett, Schweikert, Royce, Biggert, Neugebauer, Campbell, Pearce, Posey, Fitzpatrick, Hayworth, Hurt, Grimm, Stivers, Dold; Waters, Sherman, Hinojosa, Lynch, Miller of North Carolina, Maloney, Perlmutter, Donnelly, Carson, Himes, Peters, Green, and Ellison.

Ex officio present: Representative Bachus.

Also present: Representative McCarthy of New York.

Chairman GARRETT. Good morning. The Subcommittee on Capital Markets and Government Sponsored Enterprises is called to order.

I would like to seek unanimous consent for the gentlelady from New York, who is not on this subcommittee, to be able to participate in today's hearing. Seeing no objections, we welcome the gentlelady with us to the subcommittee.

We have a fairly large panel. We managed to do it somehow without the extra kiddie table at the end, so you are all squeezed in there. Sorry about that. But welcome to all of you.

We are going to begin the process. I understand the ranking member is on her way, but we will begin with opening statements and then proceed from there to the panel. With that, I yield myself 3 minutes for an opening statement.

The SEC, I think most people here will agree, has a lot on its plate to deal with. Some would argue that it has too much on its plate. This is one of the reasons we see a legislative proposal such as the one from Chairman Bachus, who is with us here today, which would shift oversight of retail investment advisers from the SEC to an SRO.

With too much on the plate over at the SEC, some of the basics arguably are not getting done. For instance, the SEC in recent history has been examining investment advisers approximately once

every decade. Because of this, we know that there have been crooks out there such as Bernie Madoff and others who have had a greater chance to defraud the innocent investors. The frequency of examinations, of course, is not the only consideration. There are other things we can go into here. FINRA, for instance, also examined Madoff's broker-dealer unit more frequently than the SEC did, but unfortunately still missed the fraud that was there.

Nevertheless, I look forward to a robust discussion this morning on Chairman Bachus' bill and what are the—it is in draft form, which means that today is a good opportunity to discuss the merits of it and any changes that might be necessary.

Another concept the Commission should be mindful of, especially with its crowded agenda, is the appropriate use of their resources, which you often hear that they need more of. The Dodd-Frank Act requires an unprecedented avalanche of new rulemakings by the SEC. People can agree, or people can disagree with how many of them are needed or addressing actual problems, you have heard that discussion in the past, but they are required in Dodd-Frank and will require a large amount of the Commission's resources to get them all done and to get them all done right.

Furthermore, the SEC has a history of having rulemakings, unfortunately, overturned in the courts. Just recently, for instance, the SEC had its proxy access rule basically vacated. Unfortunately, the rule was vacated after the SEC spent a lot of its resources, over 23,000 staff hours, on the rulemaking and subsequent litigation at a cost of around $2 million or $2.5 million. When a potential rulemaking on a uniform fiduciary standard is considered, the Commission, we believe, needs to thoughtfully and thoroughly consider the most prudent course of action that it should be taking.

First, this would be undertaking a discretionary rulemaking at a time when the SEC is required to do so many other tasks. And remember, this is at the same time that they are only examining investment advisers, as I said, once about every 10 years, every decade. Many would argue that more attention needs to be paid to get this done and other core tasks than additional discretionary tasks that they have been doing.

Second, no one needs to be reminded here about the Federal Government's serious spending problems that fortunately, the Congress is now finally beginning to address. Additional resources for an agency that has tripled its budget in recent years basically is not an option.

Finally, the SEC has already wasted, we would say, millions of dollars pursuing rules without doing the proper economic and cost-benefit analysis before the rules go out.

So, until the SEC comes forward with a reason backed by credible and real data that a uniform fiduciary standard is necessary to address an actual problem, which is not produced in the study required by Dodd-Frank Section 913, I am not sure why such a rulemaking would be under consideration now or at any point.

I thank the panel for coming today before this committee, and I look forward to what should be an interesting discussion and diverse opinion from this panel.

With that, I yield to Mrs. Maloney for 3 minutes.

Mrs. MALONEY. Thank you, Mr. Chairman, and welcome to all eight witnesses today. I don't think we have ever had such a large panel, and it speaks to the importance of the oversight of investment advisers and broker-dealers. It is a very important part of this committee's work, and I am pleased that we are exploring this today.

The committee has looked at scams or schemes in the past, especially in the wake of Madoff, and today we are looking at two specific issues that have emerged. The first issue is whether broker-dealers should be held to a higher standard of care than they currently are held to, and whether that standard should be harmonized with what investment advisers are held to.

As it stands now, broker-dealers are required to suggest products that are suitable to their clients. Investment advisers, on the other hand, are required to suggest products that are in the best interests of their clients. The question is whether consumers will be better served if the standard for broker-dealers is elevated.

The second issue is whether broker-dealers and investment advisers are adequately examined and supervised. We are all wondering on this committee how it is that Bernie Madoff was able to operate fraudulently for so long without anyone realizing it, with so many whistleblowers reporting it. Will more rigorous oversight and examination either on the part of the SEC, a new SRO or another entity prevent another Bernie Madoff? Who should be conducting these examinations, and how often should they be done? These are some of the questions that we are hoping to obtain answers to today.

Last year's Dodd-Frank bill authorized studies on these important issues to be conducted by the SEC, both of which were completed in January, and the study recommended that the standard for broker-dealers be elevated to something akin to the standard for investment advisers, and the SEC has indicated that it will go forward with such a rule. While I do not oppose the SEC moving forward, I do want to make sure that sufficient economic impact analysis is done to ensure that consumers will benefit in the end, and I hope we will explore that today.

The study also suggested three ways that Congress may move forward to address the issue of examinations: first, imposing user fees on SEC-registered investment advisers; second, authorizing one or more self-regulatory organizations, or SROs, to examine; and third, authorizing FINRA to examine dual registrants for compliance with the Advisers Act.

Chairman Bachus, I understand, has put forward legislation that would codify the second of these three suggestions and would authorize an SRO to supplement the SEC's oversight of investment advisers.

I think we can all agree that something needs to change, and that the status quo is not acceptable. So I hope the witnesses today will be able to comment on the various proposals and shed light on whether they think it is preferable to the other suggestions and the suggestions that the SEC made in their study.

We have a lot of ground to cover today, Mr. Chairman, and thank you for calling this hearing. I yield back.

Chairman GARRETT. I thank the gentlelady.

The chairman of the full Financial Services Committee, the gentleman from Alabama, is recognized for 4 minutes.

Chairman BACHUS. Thank you, Chairman Garrett, for convening this important hearing to examine Sections 913 and 914 of the Dodd-Frank Act. Section 913 of the Act gave authority to, but did not require, the SEC to create a new standard of care for broker-dealers. Even though the SEC has yet to provide Congress with any empirical data or economic analysis to justify a rulemaking on the standard of care for broker-dealers, the SEC's apparent plan is to push forward with rulemaking by recalling examiners and reassigning them to write these optional rules.

It is questionable whether the SEC should undertake rulemaking for a new standard of care for broker-dealers at the expense of other statutory mandated rulemaking. If the SEC decides, however, to issue a proposal to implement Section 913, it must carefully act and comprehensively act to avoid disrupting an investor's relationship with his or her chosen investment professional. Furthermore, the Administration must coordinate disparate and potentially conflicting rulemaking efforts regarding the standard of care for investment professionals.

The Labor Department's proposed rule to modify the existing definition of fiduciary status under ERISA appears to be moving forward even though it creates conflicting standards between advisers for investment accounts and advisers for retirement accounts and would make it illegal for swap dealers to enter into swaps with retirement plans. The SEC, the CFTC, and the Department of Labor must coordinate their efforts to minimize harm to investors. The last thing our economy needs is additional disruption or elimination of financial products and services currently available to American investors.

Investment advisers and broker-dealers often provide indistinguishable services to retail customers, yet only 9 percent of investment advisers are examined by the SEC or were examined by the SEC in 2010, compared to 44 percent of broker-dealers. The Dodd-Frank Act did not fix this serious examination disparity. Rather, Section 914 merely requires the SEC to study how to improve investment adviser oversight.

The SEC staff proposed three options to address oversight. One option, imposing user fees, is unworkable and essentially amounts to an expansion of the SEC, which is in desperate need of fundamental reform, not increased responsibility.

A second alternative, allowing FINRA to examine duly registered entities, would be a partial solution, however, stand-alone retail investment advisers' examination rates would not improve.

In my view, the SEC staff's third option, authorizing one or more self-regulatory organizations or SROs to examine SEC-registered investment advisers would provide the most comprehensive and streamlined approach to increase investment adviser examination rates. Therefore, I have prepared draft legislation that would authorize the creation of national investment adviser associations to register, examine, and discipline investment advisers to retail customers. The chairman of the subcommittee provided industry groups and other special interest groups and consumer groups with a draft last week.

Regardless of the standard of care, bad actors will naturally flow to a regime where they are least likely to be examined, therefore, it is essential that we augment and supplement the SEC's oversight to dramatically increase the examination rate for investment advisers with retail customers.

In conclusion, customers may not understand the different titles that investment professionals use, but they do believe that someone is looking out for them and their investments. For broker-dealers, that is true. For investment advisers, it all too often is not true, as was the case with the Bernie Madoff Ponzi scheme. That must change. I hope my colleagues will support this legislation and that all interested parties will join the committee's efforts to improve investor adviser oversight and enhance investor protection to avoid another Bernie Madoff experience.

Thank you, Chairman Garrett. I yield back.

Chairman GARRETT. I thank the gentleman for yielding back.

And I also thank the gentleman for the work he has done on the draft legislation that we are considering today.

The gentleman from Massachusetts is recognized for 3 minutes. Mr. Lynch?

Mr. LYNCH. Thank you, Mr. Chairman.

I would like to welcome all the witnesses gathered here today and thank them for their time and effort in helping this committee with its work, especially Bill Dwyer, who is here today as the chairman of the Financial Services Institute, but he is also a resident of Massachusetts. He runs a company called LPL Financial in Massachusetts. He is a graduate of Boston College, which at least puts him in good stead with this Congressman.

Investment advisers and broker-dealers are important stewards of the wealth of American families, whether by helping middle-class families with their retirement savings or advising small businesses on raising capital. Businesses that give financial advice provide much needed growth in job creation, and they are a vital part of the economy not only in my district, but across the country.

It is important that we foster an environment in which investment advisers and broker-dealers can continue to help investors grow their money wisely. It is also incumbent upon this Congress and this committee to ensure that American families and small businesses that entrust their savings to financial advisers can be confident that trust is not misplaced. That is why we must also remain vigilant to ensure that regulators, whomever they may be, have the resources they need to keep investors well-informed and their money safe.

I am very interested in hearing the witnesses' testimony today about the proposals contained in the SEC studies required under Dodd-Frank as well as any constructive ideas to improve investor confidence in financial advisers. I hope that we can have a productive discussion here today about improving this important industry, and I yield back.

Chairman GARRETT. Thank you.

The gentleman yields back.

The gentleman from Arizona is recognized for 1 minute.

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

Mr. Chairman, looking up and seeing the new cracks on the walls, I hope those aren't a message from above.

Mr. Chairman, with so many panelists here today, for someone like myself, what I am looking for is your insight into the law of unintended consequences. With the way the regulatory environment is moving, the promulgation of future rules that are maybe being drafted, are we heading towards that unintended consequence of making it harder, making it more difficult, taking away choices both on advice and in product; and by doing so, do we ultimately damage through that unintended consequence the financial futures of our citizens?

Thank you, Mr. Chairman.

Chairman GARRETT. The ranking member is recognized for 2 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman. Thank you for holding this hearing today.

Improving the regulation of brokers, investment advisers, and other financial professionals was a central goal of Dodd-Frank and is crucial to ensuring that families are protected as they save for retirement and their children's education or to buy a home. Research indicates that the average unsophisticated retail investor often does not understand the differences between investment advisers and broker-dealers. In fact, investors, unsurprisingly, expect their financial advisers to act in their best interests, regardless of the technical legal standard they may be held to. As the lines between broker-dealers and investment advisers have blurred in recent decades, improving consumer protection has become increasingly important.

For this reason, I applaud the SEC for recommending in their Section 913 study that broker-dealers and investment advisers should both be subject to a fiduciary duty standard when they render investment advice to retail customers, and I am pleased that many of the industry witnesses here today agree with me, the SEC, and the investor advocates that this is the appropriate approach.

Given the widespread agreement on this point, I think that differences in approaches can be worked out during the rulemaking process, and there is no need to stop rulemaking in its tracks, as some of my colleagues have suggested.

Finally, I would caution against delegating more responsibilities to a self-regulatory organization when it comes to investment advisers. I would agree with today's witness from the Consumer Federation of America saying that, as a general principle, I believe in funding government agencies to do their jobs rather than farming out those responsibilities to private entities. It is essential that we provide the SEC, our cop on the beat for Wall Street, with the funding it needs to do its job, but with that said, I am interested to hear the witnesses' comments on Chairman Bachus' bill and how an investment adviser SRO might work.

I yield back the balance of my time.

Chairman GARRETT. The gentlelady yields back.

Mr. Royce is recognized for 1½ minutes.

Mr. ROYCE. Thank you, Mr. Chairman.

I would urge the Members to take a look at the arguments made by two of the SEC Commissioners, Kathleen Casey and Troy Paredes, as they go forward here. I think that when you look at their arguments about the study, they say that at the end of the day, investors may have fewer broker-dealers and investment advisers to choose from, they may have access to fewer products and services, they may have to pay more for the services and advice they do receive. Any such results are not in the best interests of investors, nor do they serve to protect them.

The argument they are making is that this is a flawed study, and they are suggesting that this aspect be studied. They say regulation based on poorly supported recommendations runs the risk of restricting retail investors' access to affordable, personalized investment advice and the range of products and services that they currently enjoy. They are arguing that without consideration of that, this is a step back. They say that there is a need for that particular research and analysis going into this report, and frankly, grasping potential costs and implications has escaped the SEC in the past.

That is one of our concerns here, with the corporate culture at the SEC and other regulatory agencies, and that is a concerning trend. I think it should be. I think it should be, for us, a reason to ask that the advice of these two Commissioners be deployed here in this study. Given the sorry state of our economy and the continued slide in the competitiveness of this country and of the competitiveness of our capital markets, I don't think now is the time to issue rules without fully understanding the ramifications, and when two Commissioners say, let us put that into the analysis, I think it is time to do it. That is the recommendation that I would certainly have, Mr. Chairman. Thank you.

Chairman GARRETT. I thank the gentleman.

Mr. Carson is recognized for 1½ minutes.

Mr. CARSON. Thank you, Mr. Chairman.

Mr. Chairman, as we discuss another study the SEC was mandated to do through Dodd-Frank, I would like to use this opportunity to again voice my support to increase funding at the SEC. My friends, my good friends on the other side of the aisle have not hidden their desire to slow down or undo parts of the Dodd-Frank Act by suffocating funds to agencies charged with enforcing the new law. The Dodd-Frank Act requires the SEC to implement over 100 new regulations, create 5 new offices, and undertake about 20 studies. This is a significant undertaking that needs our support. The SEC needs funds to carry out new powers to police large hedge funds, derivatives dealers, and credit raters that it was tasked with by the Dodd-Frank law. Government watchdogs on Wall Street have long been outnumbered and outspent by the companies that are opposed to policing. With the current funding recommendation, Republican leaders look to continue this imbalance and limit protections.

Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman GARRETT. The gentleman yields back.

Mrs. Biggert is recognized for 2 minutes.

Mrs. BIGGERT. I thank the chairman, and good morning to all of you and thank you for being here.

As you are all well aware, Section 13 of the Dodd-Frank Act required the SEC to report to the House Financial Services Committee and the Senate Banking Committee on the standard of care applicable to broker-dealers and investment advisers. This section permits, but does not require, the SEC to issue rules to address inadequacies in the standard of care. Also, under Dodd-Frank, Section 914 has a mandate which specifically requires the SEC to study the authorization of one or more self-regulatory organizations to supplement the oversight and investigation of investment advisers.

Despite the congressional mandate for the SEC to extensively study the fiduciary standard, the Department of Labor unilaterally decided to preempt the SEC and propose a rule to overhaul the standard without allowing the SEC to finish its study. Unfortunately, this is another example of the Administration imposing duplicative, overreaching, and burdensome regulations on the wrong folks at the wrong time.

I am deeply concerned that just as Americans are worried about how much is left in their 401(k)s, the DOL proposal could reduce the number of options that the middle class rely on for retirement. Now that the SEC has concluded its study and the DOL has released its proposal, I am interested to hear from all of you particularly your opinions on whether the SEC has the resources to examine all investment advisers and how self-regulatory organizations could help. Most importantly, I would like to hear how we can ensure the industry is efficiently regulated without disseminating the investment options so vital to millions of Americans.

Thank you all for being here today, and I look forward to your testimony. I yield back.

Chairman GARRETT. The gentlelady yields back.

Mr. Peters is recognized for 1 minute.

Mr. PETERS. Thank you, Mr. Chairman, and thanks to the witnesses for being here today in support of the hearing.

As a former investment adviser who is also a registered broker-dealer, I understand how important the issues we are discussing today are to industry professionals and consumers. I think we can all agree that what is most important is making sure that consumers are getting good advice. Consumers don't understand the difference between a broker-dealer and an investment adviser, and quite frankly, they shouldn't have to, but when they are given personalized investment advice, they have the right to expect that advice is in their best interests.

That said, consumers are not being served if they have diminished access to quality advice or the full range of products and services. I will be interested in hearing from the witnesses how these two very important goals can be accommodated.

I would also be interested in hearing more about the Department of Labor's proposed business conduct standards, which I believe run the risk of severely limiting small individual investors' access to quality advice.

Consumers also have the right to expect that investment advisers they rely on are being properly policed. As a former investment adviser, I know firsthand that the best regulator is an informed

and educated consumer, but unfortunately we have seen instances where even savvy investors have been taken advantage of.

Whatever entity is going to regulate investment advisers in the future, it is critical they are given the resources they need to do their job. I firmly believe that consumers and industry both benefit from the investor confidence that comes from a strong regulator that has the capacity to keep bad actors out of the system, but that kind of regulator requires resources which the Republican leadership seems unwilling to provide.

I look forward to your testimony.

Chairman GARRETT. And the gentleman yields back.

We were looking for Mr. Grimm. Unless he is not right there, then Mr. Stivers is recognized for 1 minute.

Mr. STIVERS. Thank you, Mr. Chairman.

I appreciate the witnesses being here today, and with regard to the three issues we are going to talk about today, I wanted to sort of have you focus your comments to help us on a few things.

With regard to the uniform fiduciary standard for broker-dealers and investment advisers, I have really four questions: one, what are the substantial problems that this regulation attempts to address; two, what kind of cost-benefit analysis has occurred; three, what does the cost-benefit analysis tell us; and four, what is the impact on consumers?

With regard to the Department of Labor regulation, their fiduciary rule through ERISA, I am curious what the impact will be on IRA holders, what the costs will be, and what it will mean to their options of investments.

And, finally, with regard to examinations, I am a fan of Chairman Bachus' approach, but I am curious to hear from the witnesses what they think of Chairman Bachus' approach with SROs.

I am looking forward to hearing the witnesses' testimony today. I want to thank you for being with us today.

Mr. Chairman, thank you for allowing me some time. I yield back.

Chairman GARRETT. I thank you for your comments.

Mr. Perlmutter is recognized for 2 minutes.

Mr. PERLMUTTER. Thank you, Mr. Chairman, and I look forward to the testimony this morning. I think this is an important subject, whether regulation should be extended to various individuals for various products or not. All of this came from—in my opinion—the frauds that we saw conducted by Bernie Madoff as well as Stanford and some others. Whether these regulations really resolve those kinds of frauds or not is something I would like to hear about.

But as to my friends in the Republican Majority, when the chairman says maybe the SEC has too much on its plate, when you take the plate and you shrink it from what you have for the main course and you make it a dessert plate, yes, there probably is too much on that plate. But whether or not we need that regulation, I think is what is important.

Between Madoff and Stanford, about $50 billion to $60 billion was stolen, and the question is, do you want to take the cops off the beat? Whether these regulations that are being discussed today are appropriate or warranted, that is one question, but to take the cops off the beat to allow investor confidence to erode as it did in

the fall of 2008, I think is just the wrong way to go. We need to be focusing on more investor confidence, not less, and we need to be focusing on jobs, and I would ask the Republican Majority to turn their attention to those things.

I yield back.

Mr. SCHWEIKERT. [presiding]. Thank you.

Mr. SCHWEIKERT. Mr. Dold, for 1 minute.

Mr. DOLD. Thank you, Mr. Chairman.

I certainly want to thank the witnesses for being here today.

As you all know, approximately 11,000 SEC-registered investment advisers manage over $38 trillion for more than 14 million customers, and over 5,000 broker-dealers manage over 100 million accounts. With so many millions of Americans trusting so much wealth to investment advisers and broker-dealers, it is critical that we create a strong, modern, rational, and balanced regulatory framework that provides meaningful investor protections, while avoiding unnecessarily high costs that investors will ultimately pay.

For this hearing, I am particularly interested in four specific areas: first, have bifurcated duty standards created undue investor risk, and would a uniform fiduciary duty standard effectively enhance investor protection; second, what are the likely costs, benefits, and risks of a uniform fiduciary duty standard for broker-dealers and investment advisers, and how likely and quantifiable are those costs, benefits, and risks; third, what is the best way to finance necessary investment adviser examinations, and who can most cost-effectively conduct those necessary examinations; and fourth, will the Labor Department's ERISA fiduciary rulemaking proposal lead to inconsistency and affirmative conflicts with other statutes and regulations?

And again, I thank the witnesses for being here. I look forward to your testimony.

Thank you, Mr. Chairman.

Mr. SCHWEIKERT. Thank you, Mr. Dold.

Mr. Dwyer, you are our first witness. Thank you for joining us.

Mr. DWYER. Thank you, Mr. Chairman.

STATEMENT OF WILLIAM E. DWYER III, CHAIRMAN, FINANCIAL SERVICES INSTITUTE (FSI)

Mr. DWYER. My name is Bill Dwyer, and I am president of national sales and marketing for LPL Financial. By way of background, LPL is the Nation's 4th largest broker-dealer, with 12,600 FINRA-registered advisers, approximately 95 percent of whom are also registered under our RIA, making LPL one of the largest registered investment advisers in the Nation. I am pleased to testify today on behalf of the Financial Services Institute, which represents firms supporting over 200,000 independent financial advisers.

As dual registrants that work almost exclusively with retail investors, FSI members live under both broker-dealer and investment adviser oversight. This gives us the flexibility to support clients across the spectrum of wealth, whether they are small-town investors opening their first IRA or affluent clients with more com-

plex wealth management needs. We bring a unique perspective on the issues being considered here today.

Congress should take two critical steps to improve regulation for hard-working Americans who rely on investment advice. First, Congress should vigorously oversee the SEC's work on a new uniform fiduciary standard of care for broker-dealers. Second, Congress should quickly pass legislation proposed by Chairman Bachus authorizing the SEC to approve an SRO for retail investment advisers.

The SEC study found that a uniform fiduciary standard of care would be in the best interests of the client. We agree. This new standard should preserve investor access to personalized investment advice from a broad range of service providers. The SEC should create core principles of fiduciary conduct. These will serve as the basis for regulatory requirements specific to RIAs and broker-dealers. This will enhance investor protection while preserving investor choice.

Congress should aggressively oversee the SEC's efforts to develop and implement this new uniform fiduciary standard. In addition, Congress should insist that the Department of Labor withdraw and repropose its flawed fiduciary duty rule, which is in blatant conflict with Congress' stated intent under 913. As drafted, the DOL rule would limit access to affordable advice for those who need it most. Also, adoption of the DOL rule is likely to result in confusing and conflicting fiduciary standards.

These measures must be paired with effective regulatory supervision to truly improve investor protection. That is why we strongly support closing a significant regulatory gap by increasing examinations of investment advisers. The simple fact is the SEC does not have sufficient resources to examine investment advisers. State examination programs are also inadequate.

To close this gap, Congress should authorize the SEC to approve an SRO for investment advisers. We believe that FINRA is in the best position to serve as this SRO. FSI's endorsement of FINRA is based upon practicality. FINRA has the flexibility to set user fees and hire staff as needed. FINRA already has more than 1,000 examiners on its staff. Its private funding structure is a model for increasing RIA examinations at no additional cost to the taxpayer. FSI's support of FINRA as the SRO is also based on precedent. The SEC has more than 70 years of experience with the SRO model that can be adapted to ensure a transparent and publicly accountable regulatory structure over both RIAs and broker-dealers.

In conclusion, this approach to the fiduciary standard and advisory examination will provide a consistent level of protections to all investors, level the playing field for industry participants and boost investor confidence.

Mr. Chairman, Main Street Americans deserve a smarter system that ensures true investor protection coupled with access to the best independent financial advice possible. We deeply appreciate the leadership Chairman Bachus has provided on these critical issues.

Thank you for your time this morning, and I would be happy to answer any questions.

[The prepared statement of Mr. Dwyer can be found on page 51 of the appendix.]

Mr. SCHWEIKERT. Thank you.

Next, Mr. Ken Ehinger, president and chief executive officer of M Holdings Securities.

STATEMENT OF KEN EHINGER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, M HOLDINGS SECURITIES, INC., ON BEHALF OF THE ASSOCIATION FOR ADVANCED LIFE UNDERWRITING (AALU)

Mr. EHINGER. Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Waters, and members of the subcommittee, I am Ken Ehinger, president and chief executive officer of M Holdings Securities. I am testifying today on behalf of the Association for Advanced Life Underwriting. AALU appreciates the opportunity you have given us to testify on the important issues raised by the Dodd-Frank 913 and 914 studies.

Based upon my experience and more than 3 decades in the securities and insurance business, I can tell you that a standard of care for financial professionals that sounds good in theory may fail in practice if it is vague and amorphous and provides no guideposts for compliance. And a fiduciary duty offers little protection if regulators do not have the tools and resources to effectively oversee the financial professionals who are subject to it.

AALU does not support the SEC staff recommendation in the 913 study that broker-dealers be subject to the legal standard of care under the Investment Advisers Act. We believe SEC Commissioners Casey and Paredes got it right when they said that the study provided no empirical evidence or data that such a change would improve investor protection. We also agree with their conclusion that the study failed to assess the costs and impact of a change as required by Dodd-Frank, including the risk that such a change would reduce investor access to products and services and increase costs.

The need for empirical basis and rigorous cost-benefit analysis in SEC rulemaking is critical, particularly in view of the SEC's recent experiences with rulemaking challenges in the D.C. Court of Appeals. It is in the interests of all of us who are regulated by the Commission to have a strong and respected regulator to police our markets and to instill and enhance investor confidence. The full committee will be holding a hearing on these broader issues 2 days from now. We want to add our voice to those who are saying that the Commission, with its limited resources, simply has to focus on the most critical issues at hand.

With respect to the SEC's priorities, let me say that Chairman Bachus, Chairman Garrett, and members of this committee are performing an important service for investors in focusing on the need to substantially increase SEC inspections of investment advisers potentially through a self-regulatory organization such as FINRA.

AALU members are licensed life insurance professionals. Many are licensed in multiple States. Most AALU members are registered representatives of SEC- and FINRA-registered broker-dealers and/or investment adviser representatives of SEC-registered

advisers. Our members are subject to multiple layers of Federal and State regulation.

The variable insurance products our members sell give customers investment choices and an insurance guarantee, which has been recognized as even more important in recent years of volatility. It is the sale of these products that triggers broker-dealer registration and SEC, FINRA, and State securities regulation and oversight for insurance producers. In fact, the regulatory requirements for variable insurance products are far more detailed and rigorous than anything that exists in the regulation of investment advisers.

Although AALU's submission to the SEC on the 913 study explained the regulation of variable insurance products in great detail, the SEC staff did not acknowledge this anywhere in its study. This concerns us because the range and features of products such as variable life and variable annuities make it difficult to determine which product is best, and a best interest standard almost certainly would lead to increased litigation. Determining what is best would be highly subjective, opening up producers to second-guessing, often years after the sale of a product.

The SEC staff's recommendation for a uniform fiduciary duty rests almost entirely on a 2008 RAND Report finding investor confusion over the legal duties that apply to financial professionals. That same report also found that investors were satisfied with their own financial service providers. This points to the need for more effective disclosures and investor education, not the need for wholesale changes in the legal standards.

The regulatory and oversight regime for broker-dealers is superior to the regulation of investment advisers. If any changes are to be made to enhance investor protection, priority should be given to bringing adviser regulation up to the level for broker-dealers.

Let me close by saying that life insurance enables individuals and families from all economic brackets to maintain independence in the face of financial catastrophe. The life insurance industry, through permanent life insurance and annuities, provides 20 percent of America's long-term savings. Two out of three families, that is 75 million families, count on the important financial security that life insurance products provide. Therefore, any proposed change in regulation that could limit consumer choices and access to these critical protection and savings vehicles should meet a high burden with respect to the need for the changes.

Thank you for the opportunity to testify in this important hearing. AALU looks forward to continuing to work with you on these critical issues.

[The prepared statement of Mr. Ehinger can be found on page 67 of the appendix.]

Mr. SCHWEIKERT. Thank you.

Terry Headley, president of National Association of Financial and Insurance Advisors.

STATEMENT OF TERRY HEADLEY, PRESIDENT, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS (NAIFA)

Mr. HEADLEY. Thank you, and good morning, Mr. Chairman, Ranking Member Waters, and members of the subcommittee. My

name is Terry Headley, and I am the president of the National Association of Insurance and Financial Advisors. For 38 years, I have been an insurance licensed agent, financial adviser, registered representative, and an investment adviser representative. I greatly appreciate the opportunity to share with you NAIFA's views on the regulation and oversight of broker-dealers and investment advisers.

I will focus on two issues. First, the imposition of a fiduciary standard of care on broker-dealers, and secondly, the creation of an SRO for investment advisers.

Like most of my NAIFA colleagues, I have spent my career helping Main Street investors achieve their financial goals by providing affordable financial services for middle-class investors. Virtually all NAIFA members sell life insurance. Two-thirds of us are also broker-dealer registered representatives, selling primarily mutual funds and annuities, and, like me, about 40 percent of the registered representatives are also investment adviser representatives. Many of us provide retirement planning services as well. NAIFA members are largely small business owners serving the middle class. The majority of our clients have household incomes under $100,000, and a sizable percentage have less than $50,000 invested in the financial markets.

The SEC has said they will oppose a single uniform fiduciary standard of care on broker-dealers and investment advisers. At the same time, the Department of Labor is promulgating its own rule, expanding the fiduciary standard. The DOL's rule, however, is different from the approach required under Dodd-Frank. As a result, we can see two different agencies with two different fiduciary standards serving two different purposes.

We are deeply concerned about the impact these rules could have on our ability to serve middle-market clients. If, as the SEC study concludes, consumers are indeed confused, I can guarantee you that the confusion will only multiply if the rules are not properly constructed. NAIFA supports clarification to address client confusion, to ensure that clients understand the different rules and business models of investment advisers and broker-dealers, but simply applying the 1940 Investment Advisers Act standard to broker-dealers in a one-size-fits-all manner would negatively impact product access, product choice, and affordability of services for consumers who need them the most.

NAIFA has collected industry data over the past year showing that if compliance costs and liabilities increase, many NAIFA members would be forced to discontinue providing services to middle-class clients. Middle-class investors must be able to obtain personalized financial advice so they can plan adequately for their futures.

The SEC study unduly discounts the risk that additional regulatory burdens could result in middle-class investors having fewer financial advisers from which to choose.

If the Commission imposes a uniform fiduciary duty, it must: one, incorporate the Dodd-Frank exceptions providing that broker-dealer commission compensation and the sale of proprietary products would not inherently violate a possible uniform standard; two, account for the unique attributes of the broker-dealer business model; three, provide new guidance documents for the industry;

and four, be sufficiently clear and comprehensible so broker-dealers can adjust their business practices with minimal disruption.

Finally, I would like to mention our belief and official policy decision that FINRA should serve as the self-regulatory organization to conduct periodic examinations of SEC-registered investment advisers. It is clear to us that would be the most efficient and cost-effective approach to regulating the examination of investment advisers.

Although we have not had time to fully analyze the bill, we believe that the draft legislation that would establish an application and registration process for national investment adviser associations moves in the right direction and provides a useful basis for further discussion and consideration. We look forward to working with the subcommittee on this important matter.

In conclusion, thank you for the opportunity to share our views with you today that we deem critical to ensuring all investors are both protected and have access to competent financial advice and services. We welcome the opportunity to assist you in any way that we can. Thank you.

[The prepared statement of Mr. Headley can be found on page 80 of the appendix.]

Mr. SCHWEIKERT. Thank you.

Steven D. Irwin, commissioner, Pennsylvania Securities Commission, on behalf of the North American Securities Administrators Association.

STATEMENT OF STEVEN D. IRWIN, PENNSYLVANIA SECURITIES COMMISSIONER, ON BEHALF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. (NASAA)

Mr. IRWIN. Congressman Schweikert, Ranking Member Waters, and members of the subcommittee, I am Steve Irwin, chairman of the Federal Legislative Committee of the North American Securities Administrators Association, or NASAA.

At this moment, securities regulators from nearly all 50 States are in Kansas celebrating the 100th anniversary of our Nation's first Blue Sky Law. For a century, State securities regulators have combated fraud against mainstream investors, especially those less able to protect their own interests. In 2010 alone, State securities regulators conducted more than 7,000 investigations, leading to nearly 3,500 enforcement actions, including 1,100 criminal actions. Last year, 3,200 licenses of brokers and investment advisers were withdrawn, denied, revoked, suspended or conditioned by the States. Since 2004, State regulators have secured convictions with prison sentences of nearly 6,000 years.

Traditionally, State securities regulators have pursued perpetrators trying to defraud mom-and-pop investors locally, but this does not mean that States do not also play a vital role in shutting down many more complex schemes involving national markets. State investigation of violations on a national level have forced, for example, Wall Street to correct rampant conflicts of interest among stock analysts, illegal late trading, and market timing in mutual funds. Most recently, State regulators returned to investors $61 billion stuck in illiquid auction rate securities.

Today's hearing is intended to review the Dodd-Frank Section 914 study and consider steps to improve the oversight of SEC-registered investment advisers. Mr. Chairman, it is important to note that the Section 914 study considered only the question of federally regulated investment advisers. The study did not consider or make any recommendations regarding State-regulated IAs. Currently, the States are the sole regulators of investment advisers with less than $25 million in assets under management. In mid-2012, this will increase to $200 million. NASAA would vigorously oppose the creation of any self-regulatory organization for these State-regulated investment advisers and their associated persons.

Oversight of investment advisers should remain a government responsibility. Investment adviser regulations should continue to reside with State and Federal Governments, which must zealously carry out their mandates. Government regulators bring to the table decades of unmatched experience. We see little benefit in constructing a new layer of bureaucracy with its incumbent expense. If the goal is strengthening investor protection through improved oversight of SEC regulated investment advisers, then the fastest route is to ensure that Federal regulators have the resources that they need.

Numerous issues must be resolved before establishing an SRO for SEC-registered investment advisers. The discussion draft would require small and midsized firms to register with a new investment adviser SRO. Such advisers usually operate in a single State. Shifting such regulation to a central office would subject these small businesses to redundant regulation and add unnecessary costs to support the new organization. As the local cops on the beat, the States are best positioned to be the primary regulator for small and midsized firms. When it restored State authority over these firms last year, Congress recognized we are more likely to visit their offices across America than the SEC or an organization headquartered in New York or Washington.

The current securities industry SRO model is replete with conflicts of interest. Industry representatives serve on the SRO's board and occupy other positions of prominence within the organization. Premised on self-rule, they are primarily accountable to their members, not the investing public. As the 914 study observed, any SRO that depends on its members for funding is highly susceptible to industry capture.

Sharing information among State and Federal regulators is essential to protecting investors, but the State or government actor doctrine has become a barrier to collaboration and cooperation under the SRO model. Any increased—FINRA has pointed to the doctrine as a reason to refuse State regulators' requests for investigatory cooperation. The present SRO model is flawed, and Congress should not consider expanding it until it is fixed. This may require addressing the State actor issue by statute to ensure it no longer is an impediment to swift, aggressive, and efficient enforcement.

An SRO further hobbles investor protection by its lack of transparency. Unlike the States and the SEC, subject to FOIA, FINRA can and does filter regulatory records, which may deprive the public of information pertinent to their investment decisions. SROs

cannot claim the accountability of State regulators answerable to the elected officials who appoint them, nor can SROs duplicate State regulators' proximity to their constituents and familiarity with the investment advisers they routinely license and examine. To the extent an SRO may be federally designated, government must check it.

In view of the SRO's role in the government and securities markets today, it is critical that the SEC exercise robust oversight. Any increased SRO role with respect to federally covered advisers cannot displace State laws. The notion that State law might one day be preempted by administrative rules issued by a private corporation is unconscionable. Preemption occurring because of industry self-made rules would undermine basic tenets of Federalism and the democratic values from which regulation derives legitimacy.

Thank you, Mr. Chairman.

Wait, one more thing. The subcommittee also considers today whether the SEC should apply the same duty of care to broker-dealers and investment advisers. Financial professionals who provide personalized investment advice to retail investors should be held to the fiduciary duty under the Investment Advisers Act of 1940. Ninety-seven percent of those surveyed believe financial professionals should put the investors' interests before their own and disclose up front any fees, commissions or conflicts of interest. Any minimal increase in compliance costs will be outweighed by the direct benefit to investors, who expect and deserve to have their interests come first.

It is an honor to work beside State securities regulators from throughout North America. On a mission to protect investors, they stepped up to fill the gap in the regulation of investment advisers.

Thank you, Mr. Chairman, Ranking Member Waters, and members of the committee for the opportunity to work with you toward restoring trust on Main Street in our capital markets. Rest assured that we are all innovating, being strategic, and maximizing all available resources to get the job done.

[The prepared statement of Mr. Irwin can be found on page 89 of the appendix.]

Mr. SCHWEIKERT. Thank you.

Richard Ketchum, chairman, chief executive officer, Financial Industry Regulatory Authority. Mr. Ketchum.

STATEMENT OF RICHARD G. KETCHUM, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)

Mr. KETCHUM. Thank you, Mr. Chairman, Ranking Member Waters, Chairman Bachus, and members of the subcommittee. As you note, I am Richard Ketchum, chairman and CEO of the Financial Industry Regulatory Authority, or FINRA. On behalf of FINRA, I would like to thank you for the opportunity to testify today. I will just note from the earlier statement, I feel very much today and every day as accountable to this subcommittee.

The issue being discussed today, the oversight of investment advisers and broker-dealers, is a critical one for investors, and I strongly believe that significant improvements are needed if investors are to receive the protections that they deserve. Increasing

numbers of retail investors are seeking the advice of financial professionals, both brokers and investment advisers. At one time, these two businesses were distinct and separate, but today in many ways they have converged. Nevertheless, the regulation of investment advisers and broker-dealers remains quite different. The two industries are subject to different standards of conduct and very different levels of oversight and enforcement.

FINRA believes that the standard of care on both channels should be a fiduciary standard for the provision of personalized investment advice to retail customers. We have found under the present broker-dealer regime that too often regulators have been forced to respond issue by issue or violation by violation rather than addressing problems more broadly and prospectively. Extending a fiduciary duty to all professionals providing individualized advice to retail customers should, of course, be done carefully in a way that provides interpretive guidance as to the application of such a duty to the variety of broker-dealer business models that currently exist.

Harmonization of the standard of care is an important first step; however, just as critical is a consistent oversight regime to ensure investors of being properly protected. Compliance with the fiduciary standard must be regularly and vigorously examined and enforced to ensure the protection of investors. The SEC study on investment adviser exams concludes that the agency will not have sufficient capacity in the near or long term to conduct effective examinations of registered investment advisers with adequate frequency.

The SEC oversees more than 11,000 investment advisers, but in 2010 conducted only 1,083 exams of those firms due to the lack of resources. As such, the average registered adviser could expect to be examined less than once every 11 years.

While the Commission examines only about 9 percent of investment advisers each year, 55 percent of broker-dealers are examined each year by the SEC and FINRA. The SEC has estimated that it would need to double the number of examiners to increase the frequency of adviser exams to even 20 percent.

The gap in investment adviser oversight is a significant void and should be addressed as quickly as possible. Providing the SEC authority to designate one or more SROs for investment advisers subject to Commission oversight is the most practical and efficient way to address this problem. Chairman Bachus' draft legislation circulated for this hearing would establish that authority and set a framework of requirements for any entities that would be designated as adviser SROs.

The draft is a thoughtful approach to addressing the critical need for increased adviser oversight. The draft ensures that an adviser SRO would do regular examinations of members and their associated persons, while not imposing burdens on advisers that are not necessary or appropriate. The draft sets out criteria for governance that would require a majority of public representatives on any SRO's board, and that members of the investment industry would be allocated a number of the remaining seats.

Another significant issue is the scope of authority of any investment adviser SRO. Any adviser SRO should have authority to ex-

amine for and enforce compliance with the Investment Advisers Act, the rules under that Act, and its own rules. We believe that the primary regulatory structure for advisers should remain the fiduciary standard incorporated in the Advisers Act and related SEC rulemaking and interpretations. Adviser SROs should have limited rulemaking authority, but the extent of that authority should be a matter for Congress and the SEC to determine.

The discussion draft addresses these issues, establishes a high standard for SEC approval of SROs in the adviser area, and a requirement for consultation with the SEC in developing an examination program for investment advisers. We support this approach.

The SEC and State regulators play vital roles in overseeing both broker-dealers and investment advisers, and they should continue always to do so. FINRA has worked alongside both in overseeing broker-dealers, making hundreds of referrals at both the Federal and State level, and providing information in response to numerous requests each year. The problem at issue today is not about coordination among regulators, but about ensuring oversight where otherwise there is not acceptable coverage.

Investor protection demands that more resources be dedicated to regular and rigorous examination and day-to-day oversight of investment advisers. SROs can help fill an untenable gap in the protection of investment advisory clients. FINRA is committed to working closely with other regulators and this subcommittee as you consider how best to address the lack of examination resources for investment advisers.

I appreciate the opportunity to testify today and I will be happy to answer any questions you may have.

[The prepared statement of Mr. Ketchum can be found on page 101 of the appendix.]

Chairman GARRETT. Ms. Roper, you are recognized.

STATEMENT OF BARBARA ROPER, DIRECTOR OF INVESTOR PROTECTION, CONSUMER FEDERATION OF AMERICA (CFA)

Ms. ROPER. Thank you, Chairman Garrett, Ranking Member Waters, Chairman Bachus, and members of the subcommittee.

I am Barbara Roper, director of investor protection for the Consumer Federation of America. I appreciate the opportunity to appear before you today to talk about a topic that has been a priority for CFA for a quarter century, improving protections for investors in their dealings with brokers and investment advisers.

The policies advocated in the two SEC studies that are the subject of this hearing have the potential to plug two significant gaps that put retail investors at risk: the fact that brokers are allowed to market themselves as advisers and offer extensive advisory services without having to act in their customers' best interest; and the fact that investment advisers are subject to inadequate regulatory oversight. My written testimony deals with both topics.

While both are priorities, I am going to focus on the standard of care issue in my oral statement since, of the two, we believe it has the greater potential to increase investor protection.

In the Section 913 study, the Securities and Exchange Commission has proposed an approach for imposing a fiduciary duty on brokers when they give personalized investment advice to retail in-

vestors that has won praise, on the one hand, from investor advocates, State securities regulators, and others who have long advocated for a broker-dealer fiduciary duty and, on the other hand, has won praise from the likes of SIFMA and FSI who long resisted such an approach.

It has earned the support of the first group by pledging that the existing standard of protection under the Investment Advisers Act would not be weakened. It has earned the praise of the second group by proposing an approach that would preserve the broker-dealer business model by ensuring that brokers would remain free to charge commissions, to sell proprietary products, to sell from a limited menu of products, to engage in principal trading, and to offer transaction-based recommendations.

If the Commission moves forward with a rulemaking along these lines, the result for investors would be the best of both worlds. They would retain their ability to choose whether they want ongoing account management or transaction-based recommendations, whether they want to pay through fees or through commissions. But they would be able to make that choice without giving up their right to recommendations that are in their best interest; and they could expect to see their costs drop, not rise, if brokers had to take costs into account in making their recommendations.

Some, including some members of this subcommittee, have suggested that the Commission hasn't adequately demonstrated the need to raise the standard. But here is what we know: We know that investors can't tell brokers from investment advisers. Indeed, they cannot tell whether their own financial professional is a broker or adviser, even after the differences have been explained to them. And we know this confusion cannot be disclosed away.

We know that investors do not understand that brokers and investment advisers are subject to different legal standards when they perform the same functions, and we know that investors expect that anyone who is providing them with investment advice will be acting in their best interest. As a result, we know that investors are simply not able to make an informed choice among providers on whom they rely for recommendations; and they are not sufficiently on their guard when dealing with so-called financial advisers who are really just selling products.

Some continue to maintain, however, that the SEC has not done enough to demonstrate that investors are being harmed. And it is true that the Section 913 study does not provide extensive evidence of that harm, something that we had advocated that the SEC do. But the simple truth is that investors pay significant excess costs and lose out on important long-term benefits as a result of conduct that is permissible under the suitability standard but not under a fiduciary duty.

Take, for example, the investor who is purchasing a variable annuity with a guaranteed living benefit. As long as that is a suitable investment in light of the investor's circumstance, the broker selling the annuity is free to select one that offers him the biggest paycheck. He doesn't even have to check to see if another variable annuity would offer the investor a better deal, let alone whether a different investment strategy might be in the investor's best interest. But the difference can amount to thousands of dollars a year in in-

come for investors and tens of thousands of dollars over the lifetime of the investment. The investor who is sold the inferior product will likely never know that he or she has been had. But a couple of thousand dollars of income is real money to middle-income investors, money they cannot afford to sacrifice just so the broker can enjoy a more profitable payday.

A well-enforced fiduciary duty would change that, not by imposing an unrealistic requirement that the broker consider every product available in the market, not by requiring brokers to give up their expectation of reasonable pay for their services, but by requiring the broker to have a reasonable basis for believing that, among the products he has to sell, the one he recommended is, in fact, the one that is best for that investor. And if product sponsors had to start competing based on benefits to investors, rather than compensation to the broker, the change could be truly revolutionary.

The kind of harm that occurs when advice is offered under a sales standard isn't always dramatic and it isn't easy to quantify. But for the average investors whose retirement security is put at risk, it more than justifies the long-overdue rulemaking to subject brokers to the same standards all other advisers live under when they offer personalized investment advice.

The Commission has pledged to gather additional data before moving forward on a rulemaking. We urge members of this committee to support, rather than impede, those efforts.

Thank you.

[The prepared statement of Ms. Roper can be found on page 109 of the appendix.]

Chairman GARRETT. Thank you.

Mr. Taft, you are recognized.

STATEMENT OF JOHN TAFT, CHAIRMAN, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION (SIFMA)

Mr. TAFT. Good morning, Chairman Garrett, Ranking Member Waters, Chairman Bachus, and members of the subcommittee.

I am the chairman of the Securities Industry and Financial Markets Association, and CEO of RBC U.S. Wealth Management, which has over 2,000 financial advisers serving 800,000 client accounts. Thank you for the opportunity to testify.

Today, I will present SIFMA's views in support of establishing a uniform fiduciary standard for brokers and advisers and ensuring uniform examination of that standard. We believe that such a standard is consistent with the current best practices in our industry, and we hope it will ultimately result in a heightened industry focused on serving the best interests of retail customers.

Our support, however, is premised on achieving this standard in a manner that protects investor choice, protects investors, is cost-effective, is business model neutral, and avoids regulatory duplication or conflict. The development of such a standard is a complex undertaking that must be well thought out, reflect both the statute and congressional intent, and reflect the thorough cost-benefit analysis.

Further, it is our strong view that the Department of Labor's expansive new proposed definition of fiduciary under ERISA directly

conflicts with Section 913. Unless DOL reproposes, their proposal will result in decreased investor choice and increased investor cost.

That said, Congress explicitly intended for the SEC to craft a uniform fiduciary standard that not only protects investors but also preserves investor choice and access to cost-effective financial products and services. The standard must also be adaptable to the substantially different operating models of broker-dealers and investment advisers.

Section 913 of Dodd-Frank requires that the uniform fiduciary standard be no less stringent than the general fiduciary duty applied by the Advisers Act. However, the plain language of Dodd-Frank, together with its legislative history, makes clear that the no less stringent language does not require the SEC to impose the Advisers Act on broker-dealers. If the SEC did so, it would negatively affect client choice, product access, and affordability of customer services. By definition, such a move would not be in the best interests of retail customers.

The general fiduciary duty implied under the Advisers Act also provides incompatible and insufficient guidance for broker-dealers on how to manage, disclose or, where necessary, obtain consents to potential conflicts of interest. Imposing the Advisers Act standard would also be problematic for broker-dealers from a commercial, legal, compliance, and supervisory perspective, thereby undercutting the SEC's intent to take a business model-neutral approach.

Under our proposed framework, the general fiduciary duty implied under the Advisers Act would be newly articulated through SEC rulemaking under the Advisers Act and parallel, consistent, and equally stringent rulemaking under the Exchange Act which governs broker-dealers. The SEC would also issue rules and guidance to provide the structure and detail necessary to enable broker-dealers to apply the standard to their distinct operating models.

We continue to urge the SEC to newly articulate a uniform fiduciary standard rather than attempt to overlay the Advisers Act, which would result in significant negative effects for investor protection and choice.

The DOL's fiduciary proposal conflicts with Section 913 and with SEC efforts to implement Section 913 and could subject brokers and advisers to multiple and conflicting regimes when dealing with retail customers. The DOL proposal also suffers from inadequate cost-benefit analysis, particularly with respect to retirement plans and IRAs and the impact on retirement savings. We strongly believe that the DOL proposal should be withdrawn and reproposed.

In conclusion, if we succeed in establishing a uniform fiduciary standard, avoiding an Advisers Act overlay and removing conflicts with a DOL proposal, what next? That is a central question raised by Section 914 of Dodd-Frank, which required the SEC to review the need for enhanced examination of advisers.

The SEC's Section 914 study recommends three options. We believe that the third option, the SRO option, is the most practical and prudent. Oversight of broker-dealers is bolstered by the examination activities of SROs like FINRA, particularly with respect to conduct directed towards retail customers. Consistent with establishing a uniform fiduciary standard, we ought to hold brokers and advisers to that same standard through uniform examination. Our

SRO recommendation, however, does not extend to institutional advisers, and we would not support legislation that extends SRO oversight to institutional investors.

Thank you, Chairman Garrett, and members of the subcommittee for allowing me to present SIFMA's views on these critically important topics.

[The prepared statement of Mr. Taft can be found on page 139 of the appendix.]

Chairman GARRETT. Thank you, Mr. Taft.

Mr. Tittsworth, you are recognized for 5 minutes.

STATEMENT OF DAVID G. TITTSWORTH, EXECUTIVE DIRECTOR AND EXECUTIVE VICE PRESIDENT, INVESTMENT ADVISER ASSOCIATION (IAA)

Mr. TITTSWORTH. Chairman Garrett, Ranking Member Waters, Chairman Bachus, thank you very much for the opportunity to be here today.

The Investment Adviser Association represents SEC-registered investment advisory firms. Our members serve a wide range of clients including individuals, trusts, and families, as well as institutions such as endowments, charities, foundations, State and local governments, pension funds, mutual funds, and hedge funds.

Today, there are about 11,500 SEC-registered advisers. Most of these are small businesses. More than two-thirds employ fewer than 10 employees, and more than 90 percent employ fewer than 50 employees. Our members engage in a wide range of advisory activities and investment strategies on behalf of their clients. They perform a critical role in helping investors achieve their financial goals.

Our written statement addresses a number of issues relating to SEC studies required under Sections 913 and 914 of the Dodd-Frank Act. I would like to highlight a few key points about each.

With respect to the Section 913 report, we support the recommendation urging the SEC to propose rules or guidance providing for a uniform fiduciary standard for investment advisers and broker-dealers when they provide personalized investment advice to retail clients.

Having said that, we have emphasized two core concerns. First, we have urged the SEC not to weaken or water down the Advisers Act fiduciary standard. This duty is well established. It has been consistently interpreted for decades by the SEC and the courts. One of the greatest strengths of the Federal standard is its breadth. It provides the highest level of protection for investors while remaining dynamic and relevant in changing business and market conditions.

Second, we note that the range in which broker and adviser activities overlap is actually relatively narrow. Thus, it would be inappropriate for the SEC to import the entire sales-based broker-dealer regime on investment advisers or, vice versa, to impose Advisers Act rules on the nonadvisory activities of broker-dealers.

With respect to the Section 914 report, we support regulation and oversight by the SEC, a single governmental regulator accountable to the Congress and the public that has investor protection as its paramount mission. We strongly oppose the creation of

a private regulator for the advisory profession. Many other organizations agree with this position. We note that several reports, including one by the U.S. Chamber of Commerce, have cataloged drawbacks, costs, and inefficiencies of the private regulatory model and FINRA, in particular. I would also note that other countries with mature markets have completely discarded or are trending away from the private regulatory model.

We have reviewed the discussion draft legislation that would require most investment advisers to belong to a private regulator. We do not believe this is the best approach to enhance adviser oversight.

The draft legislation is clearly based on current laws governing FINRA and would subject thousands of advisory firms, including most small businesses, to broad rulemaking and inspection authority by a private regulator, in all likelihood FINRA. Many concerns have been documented about FINRA, including its lack of accountability, lack of transparency, its questionable track record, excessive costs, and its bias favoring the broker-dealer regulatory model. FINRA's budget and governance are not subject to direct oversight by the SEC or by Congress. It lacks the expertise to regulate investment advisers. It is not subject to statutory safeguards, such as the Freedom of Information Act. It is not required to conduct a cost-benefit analysis before imposing its rules.

On the other hand, the SEC's budget is directly accountable to Congress. It has developed the expertise to regulate investment advisers over many decades; and the SEC is subject to numerous statutory requirements before it can impose its rules, including the consideration of costs and benefits.

As an alternative, we respectfully urge the subcommittee to consider legislation authorizing investment adviser user fees. We would be pleased to assist in this effort, as outlined in our written statement.

Again, thank you for the opportunity to appear today. I would be happy to answer any questions.

[The prepared statement of Mr. Tittsworth can be found on page 229 of the appendix.]

Chairman GARRETT. Great. Thank you very much for your testimony, and thank you to the entire panel for being here for the last hour-and-a-half now.

I recognize myself for the first 5 minutes of questions, and I guess I will begin my questions where I began my opening statement.

In my opening statement I said that it would seem incumbent upon an agency such as the SEC that before they consider and promulgate regulations or rules that—as Mr. Tittsworth was just saying—they do a cost-benefit analysis. And that would indicate then, while you do that, do you actually have a problem that you are trying to solve with the regulations that you are going to eventually promulgate?

My question—and I will throw it out maybe to Ms. Roper first for an answer. But to the entire panel, do we have anything other than what I will say is anecdotal examples? We didn't get it in the SEC study, as we pointed out. But do we have anything other than just the anecdotal examples—hard, factual data to show that the

suitability standard is disserving to those seeking advice from broker-dealers?

Ms. ROPER. First, let me say I agree that the SEC's 913 study does not provide that evidence. In our comment to the agency at the outset of this study, we outlined a number of areas where we thought they could pursue that evidence. It is not there. It is not that you can't get it, but it is not there.

We know that, for example, the single factor that most determines investors' long-term performance is cost. It is not addressed under a suitability standard and is addressed under a fiduciary duty. There is evidence that could be collected and should be collected that would support the rulemaking. The SEC has a study team in place. They say they are going to collect that data. We believe it is a realizable task.

Chairman GARRETT. Would anyone else like to comment on that?

The basic question, is there actual data out there that the SEC should have had or that we should have that can make that come to that conclusion one way or the other? Are there studies or data?

Mr. EHINGER. I don't believe there is data that supports that information. I think that gets to the core of the question of what is the problem we are working to solve. Because in my statement, while there are differences in how broker-dealers and investor advisers are examined and regulated, in my opinion, in my experience, the broker-dealer model is much more robust.

Chairman GARRETT. For anyone else, is there any data that is out there with regard to—not anecdotal—but how the customers actually feel about the service they are getting? Is there any data out there with regard to not just the feeling but actually their level of satisfaction under the current regime, the current methodology that we have right now?

Ms. ROPER. Yes. There is survey data that clearly shows investors are satisfied with the service they receive. If they are not informed, they can't tell you whether they are dealing with a broker or an adviser. They don't know the basic things they would need to know if they were being disserved.

Chairman GARRETT. So, in other words, they don't know that they are being disserved?

Ms. ROPER. Absolutely. If they don't know that another product offers much better benefits than the one they were sold, why should they be dissatisfied? If they don't know they are losing tens of thousands of dollars over the lifetime of an investment because they are paying excess costs, why would they be dissatisfied?

Mr. TITTSWORTH. Mr. Chairman, I would just note that the SEC will have to submit a cost-benefit analysis if it has a rulemaking. I know you and other members of the subcommittee have urged them to do that. And there has been a recent court decision. As I am sure you are aware, they can be taken to court if their cost-benefit analysis is not robust or effective enough.

Chairman GARRETT. And on that last point, just for the whole panel, is there anyone who disagrees with the idea that before the SEC promulgates these regulations, there should be an effective cost-benefit analysis? Does anyone disagree with that?

Mr. TITTSWORTH. No. We agree with that.

Mr. IRWIN. Chairman Garrett, I don't think we need to wait. We can't afford to wait. We, in Pennsylvania, do approximately 300 events in libraries and at fairs and others, talking to investors on the local level. And they need to have the confidence to come back into the markets. We really see that every day.

If we take the position that what they don't know won't hurt them—it is like buying a car. Did you get a good deal or did you not get a good deal? When you find out afterwards you got a bad deal and really feel bad about it, you are paying more every month. That is what we are risking.

Chairman GARRETT. Mr. Ketchum, just a comment with regard to Mr. Tittsworth's comment. Your organization promulgates lots of regulations. Do you do a cost-benefit analysis?

Mr. KETCHUM. We operate from a cost-benefit analysis in a variety of ways. I believe anytime any issues are raised in our comment process, we do an analysis of the cost and the benefits of the rule.

So, unlike the Federal Government, we first have representatives of the industry and industry committees and on our board who have a direct opportunity to raise any concerns from a cost standpoint. We then put out any nonadministrative rule we are proposing, unless it is an emergency, out to all constituents, including members but also to constituents of all sorts, to provide comments before we even provide it to the SEC. Our responsibility at the time we provide it to the SEC is to provide a response to comments, including any concerns with respect to costs at that time. Then, after the SEC evaluates, they come back to us and ask for additional details.

So, yes, I believe anytime anyone in the industry or anywhere else has a concern with respect to cost, we are always required to address this.

Chairman GARRETT. Since my time is up, I will let Mr. Tittsworth have the final word on that.

Mr. TITTSWORTH. I appreciate that, Mr. Chairman.

Just to say briefly, they may consider some costs and benefits at FINRA, but, as a legal matter, it is not required. And if somebody brought a lawsuit, as the U.S. Chamber of Commerce did recently with the SEC, there is no law that would require FINRA rules to have that cost-benefit analysis. And I don't think you would have the same result.

Chairman GARRETT. I thank both gentlemen for their statements.

The gentlelady is recognized for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman.

Ms. Roper, you state in your testimony that the most vocal critics of the SEC Section 913 study have been insurance broker-dealers because their sale of variable annuities would come under the heightened standard of care. Do you believe that variable annuities require a heightened standard of care? And if so, why?

Ms. ROPER. I do believe so, yes. And I am not alone in that. Award-winning financial writer Liz Pulliam Weston has called them the worst retirement investment you can make. They have been called the most oversold, overhyped, least-understood investment products. And it is estimated by one industry observer that

at least $25 billion a year in investor excess costs are siphoned from vulnerable investors to the insurance industry and their sales force through the sale of variable annuities. We believe that an effectively implemented fiduciary duty has more potential to offer in this one area than in virtually any other area subject of broker-dealer conduct.

Ms. WATERS. Thank you very much.

Mr. EHINGER. Congresswoman Waters, may I make a statement, please?

Ms. WATERS. Yes, you may.

Mr. EHINGER. I would just like to add that variable annuities, as Ms. Roper points out, are a substantial and important retirement savings vehicle for millions of Americans and also that the concerns and some of the issues that have been raised over time about some of the sales practices have been very directly and deliberately and I think in a very detailed fashion addressed by FINRA and specifically in rule 2330, giving us in the broker-dealer community the ability to not only know specifically what are the actions, what are the reviews that we should take, but providing that guidance very directly—

Ms. WATERS. Thank you very much.

I want to understand FINRA. I understand that FINRA maintains a large investment portfolio. What do they invest in and how do they control for inherent conflicts of interest that arise from investing with broker-dealers when they regulate broker-dealers? Can you help me understand that?

Mr. KETCHUM. Sure. That is a great question, Ranking Member Waters.

First, we have a substantial investment portfolio, which allows us to defray some of our costs of regulation. Because we formerly had responsibility for the NASDAQ stock market, and through the spinning off of NASDAQ—we do have a substantial investment portfolio as a result of the spin-off of the NASDAQ stock market which our predecessor organization, the NASD, formerly owned.

With respect to the concern of conflicts, we solve it by not investing in broker-dealer securities or, where we do, by doing it only with respect to fixed-income securities where there is an absolute wall provided with respect to anybody with regulatory responsibility with regard to those fixed-income investments and review of those investments.

So, essentially, our investment committee and employees who have no regulatory responsibility are the only ones who are aware if and when we have investments with respect to fixed-income securities.

Ms. WATERS. Could you also comment on the compensation of your 10-person board of directors? According to its most recent financial report, FINRA paid 8 members of this 10-person board of directors more than $1 million each in 2010. Cumulatively, the board members earned more than $4.7 million, up from $10.6 million that the board received in 2009. Could you comment on the procedures that you use to compensate executives and board members?

Mr. KETCHUM. Let me take board members first, and then I will take employees, which I think is the primary focus of your question.

Our board members receive compensation ranging from between $50,000 and $70,000, depending on their committee responsibilities. That compensation is reviewed regularly by our Management Compensation Committee. That is a matter that obviously is a substantially lower compensation than a—

Ms. WATERS. This information that I have is not correct about—in your most recent financial report, you paid 8 members of your 10-person board of directors more than $1 million each, is that incorrect?

Mr. KETCHUM. I believe, Ranking Member Waters, you are referring to our employees, not our board members. None of our board members, with the exception of myself as an employee, received more than $70,000.

Our employees are paid more. I do believe that it is a good idea to have persons with experience and also to ensure that they stay at an organization for longer terms than those at the SEC—even though I am a loyal alumnus—usually manage to stay. We do pay for experience, and we do pay for ability and capability, yes.

From your question, the determination with respect to those compensation levels is done by a Management Compensation Committee composed of only public members, i.e., persons who have no affiliation with the industry. They review our competitors, the various places that our employees leave and go to, or where we track employees in determining what is an appropriate compensation level.

Ms. WATERS. Thank you. I yield back the balance of my time.

Chairman GARRETT. Thank you.

The chairman is recognized.

Chairman BACHUS. Thank you.

In proposing the SRO, one of the bases of that was one of the Democratic members of the SEC, Commissioner Walter, had endorsed that approach as beneficial to—and of course, she was General Counsel of the CFTC, and then she was appointed by President Obama as the acting Chairman of the SEC in January of 2009. And there is some bipartisan support for the SRO.

I would like to just introduce—I am sure those of you who are opposing that, you have looked at her testimony, her position, and that is that the SEC would do a better job on a lot of other responsibilities they had.

Having said that, I understand, Mr. Irwin, you mentioned—and Mr. "Tittsworth"—is that how you pronounce it?

Mr. TITTSWORTH. It is "Tittsworth," believe it or not. I couldn't believe it when my mother told me.

Chairman BACHUS. My name also causes some problems.

But I do understand your concern about who oversees FINRA and also concern State regulators that—in fact, Congress specifically brought State regulators back into regulation because of some failures. I think a lot of us do not want to ignore the States' role. It is very important.

You look at the Stanford case. You had a State regulator, and you also had the SEC. Those were the two regulators in Stanford.

And Madoff, who was the investment adviser for the Ponzi scheme that was operated, which was the SEC's responsibility again. I think we would all acknowledge the SEC and sometimes State regulation has failed.

Now, with Madoff, there was an investment, there was a broker-dealer, but he moved the fraudulent business. The Ponzi scheme was clearly not in what FINRA regulated.

And I do understand—you have talked about accountability and transparency, that FINRA—you are concerned about that. You are concerned about pre-empting your role. You are concerned about—and I do acknowledge—and I would ask Mr. Ketchum maybe, too. And we are going to meet with Mr. Irwin, I think after this hearing.

You have talked about if we do this enhanced oversight of FINRA. And I think if we are able to come to some bipartisan agreement, I think there would have to be some protection for State regulators or roles for State regulators. There would also have to be some enhanced maybe oversight and transparency in the case of FINRA. I think that would be an improvement.

And I would ask Mr. Ketchum or Mr. Irwin if you all want to comment on what I have said. I don't know if that is a question. I usually ask short questions.

Mr. IRWIN. I can assure you, Chairman Baucus, that if Joe Borg, your securities administrator in Alabama, had gotten the Markopolos report, things would have been different.

Chairman BACHUS. I can tell you that wouldn't have happened under Joe Borg in Alabama.

Mr. IRWIN. Absolutely not.

And as to Commissioner Walter's reaching out in an SOS for help, she absolutely is. And I understand that, without sufficient resources, they are really hamstrung and unable to exercise their strong, robust role of oversight over FINRA. It takes a village. There is a role for an SRO.

Mr. Ketchum and I agree on a lot of things. We agree that there is a gap in oversight of a large portion of investment advisers, and Congress has set out to fix that problem with the $25 million to $100 million.

We are prepared, the States are prepared to take on that responsibility. We have asked for it for 5 consecutive years. We have increased the number of exams that we have done. We have come up with a number of strategies to speak to the additional responsibilities that we have. We have a memorandum of understanding that every State has signed, agreeing to do joint examination, to work with each other, to have uniform exam procedures, better risk analysis.

We can do this job. Give us the opportunity to do it, and we will show you that we can.

Chairman BACHUS. Mr. Ketchum and Mr. Tittsworth, if you would like to comment?

Mr. KETCHUM. Chairman Bachus, just a few things to your both thoughtful and complex question.

First, it does take a village to regulate what has been done on the broker-dealer side. I have the highest respect for Mr. Irwin's

program in Pennsylvania. And surely for Joe Borg's program in Alabama.

What has worked on the broker-dealer side is the cooperation and consistent effort with concern for investor protection across both government and SRO resources. What is valuable is supplementing those resources, particularly when they are less; and not all States have the resources that the State of Pennsylvania or the State of Alabama may have to apply to do investment adviser oversight.

Second, I do want to make this absolutely clear, and I know I will save a question from Chairman Garrett by doing this: FINRA takes accountability, just as the SEC has taken accountability, just as any State that has touched it should take accountability, for not finding the Madoff problem. Yes, in our situation, sadly, we did not get a Markopolos complaint. Sadly, Mr. Madoff covered his activity on the money management side by having zero, no records, with respect to the broker-dealer and denying that he engaged in a money management business on the broker-dealer.

That made it hard. Hard is not an excuse for not finding it, and we accept that. We did a study from our board to take a hard look at that, and we have fundamentally revised both our examination and enforcement programs to try to get at the hard cases.

But what is important from a regulatory policy standpoint is that it isn't a good idea to make it hard. If FINRA had responsibility from the standpoint of Madoff as an investment adviser when it finally did regulate it, we would have immediately done a membership interview, we would immediately have done an examination of Madoff, and that was something the SEC did not have the resources to do.

Chairman BACHUS. But I think my question is, would you be willing to accept enhanced oversight by the SEC or by the other government regulators, including the States, in accountability?

Mr. KETCHUM. Yes, we would. We feel like we have substantial oversight from the SEC already. We accept the Boston Consulting Group's suggestions that oversight should be more thorough and more complete.

We recognize that if we did have responsibility for investment advisers on the State side, which is obviously a choice of Congress and not ourselves, that the consultation required and the interaction with respect to State regulators would be absolutely critical because it is State laws that FINRA would be essentially incorporating to supplement the State program.

I would note that never in our wildest imaginations would we ever imagine a situation where a FINRA rule should preempt State regulations. State rules and regulations are critical to investor protection.

Chairman BACHUS. I think in the past, the States have not always had some transparency or access to some of the information. If the committee could bear with me and let him have maybe 30 seconds to respond?

Chairman GARRETT. Sure, Mr. Chairman.

Mr. TITTSWORTH. Thank you, Mr. Chairman.

I agree this is not a partisan issue. I noted that the U.S. Chamber of Commerce issued a recent report talking about FINRA's lack

of accountability. And all regulators have had shortcomings. It is not a job I particularly want to have. But, unfortunately, none of us have found the silver bullet.

I think there is an issue. We have recognized it. The question is, how fast do you address this issue of enhancing investment adviser examinations?

And I thought you said it best, Chairman Garrett, in your opening statement with Madoff. There were failings all the way around on that and I am not sure that is the best case to build this policy around enhancing investment adviser oversight. I think maybe we need to just take a step back and look at the facts and try to figure out the best approach.

Chairman BACHUS. Right. Let me say, Mr. Ketchum, you were not on the job. I understand you have made a lot of reforms, and I applaud the job you are doing. You are doing a very good job. I wasn't trying to point out a failure. Because I think everyone failed, everything failed, and certainly the Congress is not without blame.

Thank you.

Chairman GARRETT. I thank the gentleman.

The gentleman yields back, and we will be a little loose with additional time on this side of the aisle as well. I assume we are just going to go right down the aisle.

The gentleman from California.

Mr. SHERMAN. Believe it or not, I don't have a whole lot of questions, but I do have one for Mr. Healy. Why does the National Association of Insurance and Financial Advisors want FINRA to become the SRO for investment advisers? That will be the first question, and I will have a follow-up.

Mr. HEADLEY. It is Mr. Headley, but that is fine.

Mr. SHERMAN. If I hired staffers based on their handwriting, it would be different. Go ahead.

Mr. HEADLEY. I think it is quite simple. Two-thirds of our NAIFA members are registered representatives through a broker-dealer, and 40 percent of that population are also registered as investment advisers—investment adviser representatives under the corporate RIA of the broker-dealer. Since there is the dually registered representatives, it seems the most effective or efficient and cost-effective method, since we are already examined by FINRA through our broker-dealer compliance areas on an annual basis through an annual face-to-face compliance meeting, that it would be best to not layer on an additional burden or hardship in terms of having an additional examination process.

Mr. SHERMAN. Your members are willing to pay an additional user fee?

Mr. HEADLEY. Again, we think it would be more cost effective if FINRA was named as that self-regulatory organization.

Mr. SHERMAN. Are all of your members already paying a user fee to FINRA? Or this would mean some of them would be paying and others might be paying a bit more?

Mr. HEADLEY. They are paying, obviously, registration fees both to FINRA and, of course, to each of the States in which they are securities registered.

Mr. SHERMAN. Okay. And the SEC has, I think, not been doing all that the SEC would like to do in this area. I assume one of the reasons is they are not collecting enough in user fees or they are not collecting a user fee from your members to do that work directly?

Mr. HEADLEY. Right. Again, the majority of our members are dealing with middle-class investors and Main Street investors and everything else and do not have the assets under management to kind of meet the threshold with SEC registration.

Mr. SHERMAN. I yield back.

Chairman GARRETT. The gentleman from Arizona.

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

In going over the notes here, I had one that looked as if the SEC was suggesting that implementation of these major changes for broker-dealers would not have much in the way of cost changes. Can I solicit a response on that? And why don't we—

Mr. EHINGER. Yes. Thank you.

In my opinion, there would be significant changes. I think you would start with—first of all, not knowing what the rule is, the documentation expectations of interactions with clients, decisions made regarding what was to be invested in or what not—even decisions of what not to do. Investing is a whole different type of scenario in terms of expectations of what the registered representative would need to do. There potentially are additional registration-type fees that could be associated with the business, and the other concern would be the model may need to shift or might potentially shift even as a result of some of the changes being proposed.

Mr. SCHWEIKERT. Ms. Roper, the same sort of question. Do you agree or disagree that we would see the scaling of additional costs here?

Ms. ROPER. There will clearly be additional costs in certain areas. For example, an investment adviser has to provide up-front disclosure about conflicts of interest and material information that brokers don't have to provide. There is a cost with that. Many of the brokers are doing that now for their advisory accounts. But there is an offsetting savings to the investor if the broker has to take costs into account in making their recommendations.

Furthermore, the criticisms about cost ignore the fact that the SEC took those into account in coming up with the proposal that it put on the table. It is not going to eliminate the broker-dealer Investment Adviser Act exclusion. There is no new registration. They have made clear that the broker-dealer business model, commissions, proprietary sales, all of that stays the same. Most of the cost data that has come from the broker-dealers has analyzed a scenario that is simply not on the table.

The SEC has in fact been very sensitive on the issue of costs. I think that is why you have seen groups like FSI and SIFMA at the table in a negotiation about how to implement rather than simply trying to prevent this rulemaking from going forward.

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

Mr. Ketchum, same question.

Mr. KETCHUM. I agree with much of what Ms. Roper said. I think the SEC is focused on costs here. We do believe that a properly implemented fiduciary standard makes a great deal of sense, and we

also believe there should be a very careful analysis of the costs and approach. There will be some costs increased by changes in disclosure requirements and the type of up-front disclosure that Ms. Roper indicates, although FINRA already requires a variety of disclosures with respect to a product-by-product basis consistent with its rules. It is better to do that across-the-board. It is certainly appropriate to make sure that there is a careful cost analysis before making final decisions.

Mr. SCHWEIKERT. Mr. Chairman, to the entire panel—and I said this in my opening statement, when reading through this material, you start to say, okay, what am I missing? Where is my law of unintended consequences? Do I wake up 2 years from now and either with one or two more layers and have I either narrowed consumer choice, have I started to create an environment where my access to information—

Because I have heard a couple of folks say that we have these cost differentials. But, before getting this job, I remember trading stocks for $7 a share, but I also sometimes would sit down with my investment adviser and have to write him a check at the end of the day. I see lots of consumer choice right now and the inherent fear is, does any of this put some of that in peril? I was going to start with Mr. Tittsworth. And tell me, am I engaging in a fear that is inappropriate?

Mr. TITTSWORTH. I can't tell you those are unjustified fears. I guess I would have to say—I am not trying to avoid the question, but I would have to see the SEC actual proposed rulemaking I think before I could intelligently respond to your question.

We certainly don't want to see consumer choice limited by any action on the 913 study. And we make a point in our statement that under the Advisers Act currently, there is a huge broad range of activities that investment advisers, both very small businesses, as well as some very global firms, engage in. I think it accommodates—we certainly don't want to limit consumer choice.

Mr. SCHWEIKERT. Thank you.

Mr. Chairman, my time is up. Thank you, sir.

Chairman GARRETT. The gentleman is recognized.

Mr. HINOJOSA. Thank you, Chairman Garrett.

First, I ask unanimous consent to enter into today's record two documents relevant to today's hearing: one, the petition supporting a fiduciary standard for financial professionals, as outlined in Section 913 of the Dodd-Frank Act; and two, is the petition requesting that the SEC extend the fiduciary standard to broker-dealers.

Chairman GARRETT. Without objection, it is so ordered.

Mr. HINOJOSA. Thank you.

Mr. HINOJOSA. My first question is directed to Mr. Ketchum. Thank you for testifying today.

I would be remiss if I did not acknowledge FINRA's investor education foundation and its solid financial literacy activities which we strongly support. However, I am concerned that FINRA does not provide the kind of transparency necessary to provide investors the type of education they need to protect themselves while operating in the capital markets. How is FINRA qualified to be a self-regulatory organization for investment advisers given this failure to un-

cover the Madoff fraud that wrecked the lives of so many innocent Americans?

Mr. KETCHUM. First, Congressman, thank you for your kind words with respect to our education foundation. We appreciate it.

As I indicated before to Chairman Bachus' question, no regulator can be happy with missing Madoff. And that includes FINRA as well as the SEC as well as State regulators. Certainly it includes FINRA, notwithstanding the fact we did not receive the complaints that Mr. Markopolos lodged, notwithstanding the fact that Mr. Madoff fabricated and created zero records with respect to the money management activity in his broker-dealer and claimed to have no money management activity in the broker-dealer.

Having said that, there were strings we could have pulled. There were approaches we should have taken. We should have had knowledge of discussions out in the industry that raised concerns.

So I absolutely take accountability. I think any regulator should. Though if you eliminated all of the regulators that did not find Mr. Madoff's fraud, you would be out of regulators in the United States.

I think the question, as I say, is not whether any of us did it right with respect to Madoff. We didn't. The question is whether regulation can make it less hard to find serious frauds—put Madoff aside—to find serious Ponzi schemes.

The answer would be, if there was an SRO to supplement government resources, an SRO that would have the ability, as FINRA does, to do management reviews and to do membership reviews before a firm can become a member of FINRA—and any SRO would do the same things—you would increase the likelihood of detecting a Ponzi scheme such as Mr. Madoff's and others. That is why I think the addition—not as a replacement for government, which is absolutely critical for the protection of investors—but the addition of an SRO from a supplementary standpoint is a very valuable thing.

Mr. HINOJOSA. So the argument that we need a smaller Federal Government does not work. I hear my friends on the other side of the aisle that they want a much smaller Federal Government, and you are telling me that we really need more folks regulating.

In looking at the statement by Commissioner Irwin, I would like to ask him a question. Commissioner, you said that the enforcement actions by State security regulators last year represent a 51 percent increase over the number of investigations reported for the previous year. I was amazed at the number of violators.

So, tell me, what are your thoughts on how we can improve the requirements of all of these certified and listed companies to protect investors? The Federal Government's Thrift Savings Program makes available to us detailed information such as fund performance, annual returns on investments, the monthly returns on our investments, and, perhaps provides our constituents access to market information that is detailed but easily understood, and summaries to help our constituents estimate their net worth. Give me some of your thoughts on that.

Mr. IRWIN. Congressman, I think that one of the easiest and best steps that we can take right away is making a fiduciary duty applicable to all investment professionals who are offering investment advice in a personalized nature in a retail setting. The fiduciary

duty that was proposed in Dodd-Frank that we were pushing for at that time was much broader than the one that ultimately was enacted. The one that ultimately was sent to the SEC to study was one that was really very limited. There was no ongoing obligation to supervise accounts after that decision is made.

If we just ask investment advisers and broker-dealers who are giving investment advice to put their clients before themselves, it is not the best advice. It is just a matter of putting, based on what they know, the interest of their customer before themselves. Those customers will automatically be better off.

We live in a time when the kind of returns that people are seeing are very small. You just can't double your money by putting it in, and compounding interest won't do it for you for the rest of your investing career. We really need to provide this.

Fiduciary duty is a very flexible answer. It is based on the facts and circumstances of each situation. It has worked since 1963 when the Supreme Court said in the Capital Gains case—and investment advisers are subject to that Act. We think that we have plenty of history, plenty of case law to build on. Let's do that today.

Mr. HINOJOSA. In closing my questions, at my request, the Office of Financial Education was created at the CFPB. There are numerous financial literacy programs that could help not only high school students but community college students, the university students, and adults.

With that, Mr. Chairman, I yield back.

Chairman GARRETT. The gentleman from New York is recognized.

Mr. GRIMM. I thank the chairman, and thank you to all who testified today. We appreciate it.

Obviously, this is a very difficult matter. We hear from the larger institutions a little bit of a difference of opinion from the smaller, more small-business-oriented institutions, SROs versus SEC, and so on.

But one of the things I want to emphasize—and Ms. Roper, if I can turn to you, you mentioned about the consumer saving thousands of dollars and, over time, tens of thousands of dollars. But there are other factors as well. And I am asking you if you would agree that when a representative—when an adviser or a registered rep is selling a product, there are other things other than just the rate of return that are also looked at. For example, the customer service of the company that you are dealing with and the financial background of that company and the stability and the track record that they may have had for many years, is that not also something that goes into it?

Ms. ROPER. Absolutely. And we have tried to indicate that cost is just one factor that is relevant to that assessment. But it is a factor that shouldn't be ignored. Morningstar not too long ago did research that indicates that cost is the single best predictor of long-term performance and is better than their star ratings, for example. I think you ignore it at your peril or at least at an investor's peril.

But, absolutely, you adopt an approach, much as we do under, say, our best execution standard where you provide guidance regarding a variety of factors that have to be considered. But they

have to be considered, and we can't afford to continue to ignore costs.

Mr. GRIMM. In your recommendations to the SEC, you asked the SEC to look not only at the prior enforcement actions but at cases that could have been brought as well. You went on to suggest the SEC should examine what could be accomplished under an aggressively enforced standard.

I take from that—and based on my background as a former special agent in the FBI, I worked very closely with, back then it was the NASD and with the SEC. And when I look at a lot of what happened—everyone keeps bringing up Bernie Madoff, and I understand that this was such a travesty, the magnitude of his fraud. But I would say the biggest problem we have had is a lack of enforcement, and it is the enforcement that we really need to focus on. And we can promulgate rules until we are blue in the face, but if they are not enforced, they are irrelevant.

Ms. ROPER. Yes, you absolutely need enforcement. And we, of course, are strong supporters of enforcement. But if you don't have the standard to enforce—it is two sides of the same picture. If you can't enforce a best-interest standard because the standard doesn't exist, tough enforcement doesn't get you anywhere. If you have a best-interest standard and you don't enforce it, the best-interest standard doesn't get you anywhere. You need both sides of that equation.

Mr. GRIMM. I agree that we need both. But I think ultimately, we also need to be cognizant of the fact that it is a balance. We have to balance making sure that investors and consumers are protected, while at the same time balancing the fact that our markets and our sectors within the financial services sector are also robust and competitive not only here in the United States but in the global markets that we are in.

That being said, if I could just switch a little bit and ask Mr. Ehinger, can you walk us through the various levels of the regulatory oversight facing a broker-dealer and its registered representative, compared to the investment advisory firm and its registered investment advisers?

Mr. EHINGER. I think one of the best examples, Congressman, to describe that is just my recent experiences with examinations just recently with FINRA and also the SEC. The SEC was in and had conducted an examination both of our investment adviser and our broker-dealer, and shortly thereafter, FINRA was in as well. They were in on their cycle exam within 2 years. The SEC hadn't been in on the investment adviser side for 5 years. And we are a corporate registered investment adviser, so I would think that there would be more attention given to some of the bigger firms.

But just the differences are the detail, the activities, the selection of individual accounts, the reviewing with individual supervisors in our organization about why they chose to approve or not approve a particular product sale that had taken place. That is the level of detail that the FINRA examination had.

With respect to the SEC, while there are very good individuals in all fronts working to do what they can do, there was one individual who was looking at the investment advisory and specifically only focused on advertising, which is, I think, ironically where

there are rules that they can really, really audit to, as opposed to something that is vague and amorphous like fiduciary standard.

Mr. GRIMM. My time has expired. Thank you very much.

Chairman GARRETT. Thank you.

Mr. Lynch is recognized.

Mr. LYNCH. Thank you, Mr. Chairman.

Staying right on that, Mr. Dwyer, your testimony more than suggests, it actually endorses the idea that FINRA would be the body best suited to oversee inspection of investment advisers. I have heard a couple of different people who apparently are in agreement with you, but can you expand on why you think FINRA is a better option than, say, a new and improved SEC or a newly created SRO that is specifically designed and funded for this purpose?

Mr. DWYER. Thank you, Congressman Lynch. That is an important question.

We heard here about problems that have arisen across the spectrum of regulators that have been in place, and I go back to the comments I gave in my oral testimony, that, as we look at what is reasonable, the supervisory needs that we have, I would turn to precedent, first of all; and the SEC has over 70 years of history of overseeing an SRO that in turn provides oversight to the industry; and that, first and foremost, to me sets a track record that makes FINRA an obvious choice.

Also, the reality or the practicalities of what is in place. Today, FINRA has an elaborate structure to do audits of institutions and offices all across the country, they have over 1,000 employees already who are out doing exams across the country, and there is no question in my mind that they are far and away best positioned to take on this task.

The significance of it should not be taken lightly; and I would say that, no matter what the organization, we need to continue to work with them to improve how they protect the customer.

I think one of the things that needs to be called out is who our advisers are. As I represent the Financial Services Institute today, representing over 200,000 independent financial advisers across the country, what that means is that these are local business owners who are providing services in communities all across the country. They are also community leaders. They are also extremely philanthropic.

At the end of the day, when we surveyed our advisories a year ago at LPL Financial, about 86 percent of them told us that their number one source of clients is referrals. It is paramount to them that they are able to work with clients and build confidence with those clients to lead to additional business. They need to operate in an environment where the consumer has confidence and clarity about where they are going to, who they are going to do business with, and how that will be transpired.

Mr. LYNCH. Thank you.

Ms. Roper, if I could ask you, on the fiduciary standard, it seems from your testimony that you agree with the SEC's position of—at least as I see it, the Department of Labor has recommended that we adopt the ERISA standard and apply that to both broker-dealers and advisers. How do you support that? How do you argue in favor of harmonizing both groups under that standard, as opposed

to coming up with a standard that is more exacting or something more—rather than lifting the standard and simply applying something that is more targeted?

Ms. ROPER. We actually have fairly significant concerns about the Department of Labor proposal, although we recognize it as very well intended and think there is a potential to resolve the difficulties.

Mr. LYNCH. Let me say, I may have—it seemed like you were warm to the idea, but you really weren't beating the drum, so to speak. But I could sense there was not clear opposition to that idea in your testimony anyway.

Ms. ROPER. The issue we addressed in our testimony is the fact that the DOL proposal should not be allowed to stop the SEC proposal.

The concerns that we have about the DOL proposal are that it doesn't more closely resemble the SEC proposal, and it is in two different aspects. One, it has a huge seller's exemption in it and threatens to recreate in the retirement plan market precisely the problem the SEC is trying to address here.

Sort of at the other end of the spectrum is that I think the broker-dealer firms are absolutely right when they say, if you apply an absolute ERISA, no conflict of interest, no third-party compensation model in particularly the individual retirement account arena and with the sanctions that exist under ERISA, the broker-dealers are going to exit that business—$2,000-a-year investors are not that enticing a market, and there are not a lot of fee-only financial planners or fee-only advisers who are going to step in and provide those services.

So, yes, we have concerns about the DOL proposal. We are not, by any stretch of the imagination, advocating that it be adopted in the SEC world. Quite the contrary. We would like to see something under the DOL proposal that more closely resembled the SEC. That is primarily an issue with ERISA rather than with the definition itself. And the key issue—one of the key issues is how will they do the prohibited transaction exemptions which seem to have sort of replaced ERISA as the way the law is imposed, and I don't think you can move forward with the proposal until you know the details of what it would look like in practice.

Mr. LYNCH. Okay, that is very reassuring and very helpful.

Thank you. I yield back.

Chairman GARRETT. Thank you.

The gentleman from Florida.

Mr. POSEY. Thank you very much, Mr. Chairman.

Clearly, Madoff was not empowered by a lack of loss. He was empowered by a lack of enforcement, and there is not a single law that would have changed that, that we could adopt now. If we could do it all over again, the only thing that would be needed to stop Madoff was to make some employees do their jobs, which they were unwilling to do.

As another related issue regarding ERISA, there was a company named TRG. It was one of about a dozen that wrote health insurance in 49 States, every State but their own State. No State felt like they were empowered to do anything about it because they were protected by ERISA, protected from State sanctions until fi-

nally Florida did break loose and in cooperation with 13 agencies in other States they went to the culprit State, and it was the first time in history State lines were ever passed to prosecute health insurance fraud, and that was done because the Federal Government did absolutely nothing to enforce the law to those who fell under ERISA and seemingly out of the hands or ability to prosecute by States.

I support fiduciary standards, but they must be clear, they must be unambiguous, and they must not be conflicting. And obviously, I think one agency is sufficient to promulgate such standards, and I think the more agencies you have involved in it, the worse it is going to be on everybody.

And to that point I would like to ask Mr. Headley, since it was in his written testimony he talked about the Department of Labor's fiduciary proposal in addition to the SEC proposal that we have been discussing today. Mr. Headley, I would like to ask you to explain why you believe the Department of Labor's proposal could impact the middle-market investor's access to professional guidance for their retirement plans, if you would be kind enough to do that.

Mr. HEADLEY. Thank you, Mr. Congressman.

First of all, again, on the DOL fiduciary duty, there was no congressional directive to look at this. It clearly conflicts with the SEC's fiduciary duty, what they are proposing for broker-dealers and investment adviser representatives. It clearly is using ERISA to overreach into another section of the Internal Revenue Code as it pertains to IRA account holders and everything, that is differentiated from the employer context. It would require that no Commission-based products could be implemented, requires a level fee model in lieu of that. It could literally shut down the middle-class access to professional advice and for IRA account owners.

I think the two areas that NAIFA members would like to see is that, if they were to go forward, is to simply exclude IRA advice from the rule and, secondly, to exclude any advice under a seller's exemption that is incidental to the sales activity.

Mr. POSEY. Okay, I appreciate your comments.

Would anyone else like to weigh in on that?

Mr. HEADLEY. Thank you.

Mr. POSEY. I am finished before my time, and I yield back. Thank you, Mr. Chairman.

Chairman GARRETT. How about that?

The gentleman from Colorado, I think we are skipping over, I believe, and we go to the gentleman from Colorado. Since he was here, we appreciate your coming.

Mr. PERLMUTTER. Just a couple of things.

Mr. Taft, it was your comments and your written remarks that I want to focus on a little bit.

The rulemaking—going back and looking at 913, obviously in 913, the Congress directed the SEC to go through this rulemaking process. It wasn't something they just went out on a lark to do as I understand the legislation. Yes, sir?

Mr. TAFT. If I could just clarify, it authorized—it directed the SEC to study the issue. It authorized them to act but does not require them to act.

Mr. PERLMUTTER. Thank you, and I think that is a perfect description. We asked them to look at a number of different things, including harm/benefit analysis. Whether they did or they didn't, I am not sure, but in the directions from the Congress, those are clearly included.

But when I really look now at the language, the standard of conduct—because you talk about the rulemaking to articulate the standard would address the following five key components: core principles, articulate the scope of obligations under a uniform fiduciary standard, define personalized investment advice, and then a couple more.

When I look at the standard of conduct as it applies to the Securities Exchange Act of 1934 and then the standard of conduct as it applies to the Investment Act under what we did in Dodd-Frank, they seem to be pretty similar. It says the Commission may promulgate rules to provide that with respect to a broker-dealer when providing personalized investment advice about securities to a retail customer, the standard of conduct for such broker-dealer with respect to such customers shall be the same as the standard of conduct applicable to an investment adviser under Section 211. And then it says, Ms. Roper, the receipt of compensation shall not in and of itself be considered a violation.

One of the things you were talking about is an underwriter—a life underwriter might propose a product that they make more money on, but we said specifically that really doesn't have to be an issue.

Then it goes down to the standard of conduct for the investment adviser. The Commission may promulgate rules for all broker-dealers, investment advisers when providing personalized investment advice about securities to retail customers shall be to act in the best interests of the customer.

Do we even need any rules or is this standard of conduct that we have stated in Dodd-Frank enough, I guess is my question, when we say it has to be in the best interests of the customer?

Mr. TAFT. What Congress—my understanding of congressional intent, what Congress told the SEC they need to do if the SEC decides to write a fiduciary standard is to build a standard the investor protection characteristics of which are no less stringent than those in the Adviser Act, and—

Mr. PERLMUTTER. My question, though, to you—and I agree, that is what it says, "no less stringent." It says—in fact, it says "the same."

Mr. TAFT. Right.

Mr. PERLMUTTER. If you look at the standard of conduct.

Mr. TAFT. Yes, the same.

Mr. PERLMUTTER. It says, "the same." It says, personalized investment advice about securities retail customers in the best interests of the customer with regard to the financial or other interests of the broker-dealer, etc. Do we need any—

Mr. TAFT. Yes, here is what you need: So, today, the standard of care that is a fiduciary standard of care is implicit in the Advisers Act and governs a set of activities that have to do with a customer walking into their adviser and handing over their money to the adviser to manage discretionarily. In other words, they are

ceding control in a fundamental way of the management of those assets to an adviser. And there have been rules and there is case law and there is precedent built up over the years that operationalize that fiduciary standard with respect to the things an investment adviser does for their client.

Okay. What we need going forward, if the SEC decides to apply a similar standard to the activities of broker-dealers who engage in personalized investment advice, we need rules that tell us how to operationalize that same standard to brokerage activities, to which that standard has never applied and for which rules do not exist today. That to me is the single most important thing the SEC would still need to do in writing a new standard.

And back to the many comments of Congressmen, of the committee, it is important to note today that those rules have not been written, and going forward there is a chance to write them the right way, a way that aligns with the current best practices of the industry and which is not disruptive to investor relationships with their advisers. And there is a way to do that the wrong way which disrupts investor's relationships with their advisers, increases costs, reduces access. So right way-wrong way, we are at a fork in the road. The SEC still has the opportunity to go down either path.

Mr. PERLMUTTER. Okay, and my time has expired. Thank you. I could ask the rest of the panel that same question, but thank you.

Chairman GARRETT. The gentleman yields back, and I don't believe—no, we have no one else, at least at this moment. Mr. Green?

Mr. GREEN. Thank you, Mr. Chairmanand I thank the witnesses for appearing today.

For clarity purposes, if you are of the opinion as a witness that we need no additional regulations, would you kindly extend a hand into the air that things are fine as they are, we just need more enforcement? Anyone?

Okay, we have one person who thinks so.

How do you respond, sir, to the contention that enforcement necessitates something meaningful to enforce? I believe that is a fair way of putting it. Ms. Roper, you may have stated it more eloquently than I, but how do you respond to this contention?

Mr. EHINGER. Congressman Green, first of all, I should qualify my statement in terms of, I am not saying there possibly shouldn't be any type of new regulation over time. I am just answering that question with respect to what is being proposed today.

Because I think it needs to be clear, as we stated earlier and, actually, Chairman Garrett said before, what problem are we trying to solve? And, also, do we really understand and have we really done investigation regarding the broker-dealer standards today and how that—

Mr. GREEN. Because my time is limited, permit me to just intercede. And I don't mean to be rude, crude, and unrefined, but let me ask this, please: What would you propose? I do understand now that you don't support what we are doing today, but what would you propose that we do?

Mr. EHINGER. I would propose a couple of different things.

One, I would agree with Mr. Taft that rules, really guidelines, guidance that we can, as broker-dealer organizations, really train and educate and really help our registered reps understand—

Mr. GREEN. If I may, let me intercede again. Please forgive me.

But I have in my hand intelligence from the RAND—a RAND Report indicating that investors could not identify whether their own provider was a broker or investment adviser, and that confusion persists even after the investors were provided with fact sheets on investment advisers and brokers that include a description of their common job titles, legal duties, and typical compensation practices.

Mr. EHINGER. Congressman Green—

Mr. GREEN. You seem to be implying that somehow disclosure will do what is not being done even when people are afforded empirical evidence to examine.

Mr. EHINGER. I think that study—that 2008 RAND study also, and I believe one of my fellow panelists mentioned this as well, also found that investors were satisfied with their financial advisers or consultants or registered representatives in whatever fashion that they engaged.

That confusion is not something I think you solve by changing legal standards. I think confusion is addressed first and foremost by, respectfully, proper disclosures. I think Mr. Ketchum, in one of the rule proposals that FINRA put forward, Rule 1054, is doing that very thing, actually I think in a very forthright and very smart fashion. That is, simple, direct, easy to understand and read disclosures that take advantage of today's technology and allow deeper dives for those who want to know.

Mr. GREEN. I am going to ask at this time that Ms. Roper kindly respond. I can sense that you desire to have a word.

Ms. ROPER. What you have to understand is the RAND study was commissioned at the request of then-Commissioner Glassman at the SEC, because the SEC had already tried the disclosure route. As part of their fee-based brokerage account rule, they had tried to design a disclosure for broker-dealer ads and account statements that would help investors to understand when they were dealing with a broker, an adviser, and what the legal duty was. And they took that disclosure out and, thanks to Commissioner Glassman's insistence that they test it with investors, they did that testing. They found investors didn't understand it. They tried to redesign it. They tested it again.

Disclosure does not work. You cannot solve through disclosure or through investor education a policy that doesn't make sense, and it will never make sense to investors that their financial adviser is a salesperson and their investment adviser is an adviser. You cannot make sense to investors out of the fact that one person offering personalized investment advice has a fiduciary duty to act in their best interests and another person offering the exact same service doesn't. Disclosure can be helpful, but it can't solve a basic regulatory breakdown.

Mr. GREEN. Mr. Ketchum, let me quickly ask you a question. Do you believe that the SEC is overpenalizing and overinvestigating?

Mr. KETCHUM. No. I think the SEC is an agency that—

Mr. GREEN. Since my time is running short, I will accept the "no," and let me just go on to suggest that I have intelligence indicating that the SEC issued about $1 billion in penalties and FINRA fined members about $43 million last year. Similar budgets, similar

issues. How do you cause persons who would have some consternation based upon a belief that FINRA is more lax than the SEC as evidenced by penalties imposed?

Mr. KETCHUM. Much of the SEC number reflects one case with respect to Goldman Sachs, in particular egregious and problematic activity. A variety of others reflect major industry cases from the credit crisis.

We strongly believe that fines should discourage behavior and encourage far superior compliance, but fundamentally fines have to relate to the fact situation and the actions that you are bringing. We think if you look through the cases that we brought with respect to that, I think the fines were stiff, and they were appropriate.

Mr. GREEN. Thank you very much, and I thank the entire panel. Thank you, Mr. Chairman.

Chairman GARRETT. The gentlelady from New York.

Mrs. MCCARTHY OF NEW YORK. Thank you, Mr. Chairman, and thank you for having this important hearing. I think it is very good for all of us to hear the testimony of everybody and to understand what we had done over a year ago.

I am interested in Section 913 because I actually had a pretty large part in getting that in there, so I want to explore that a little bit.

Earlier this year, I, along with about 28 of our New Democrats, as we call ourselves, sent a letter to the Department of Labor, the SEC, and the CFTC on this issue on Section 913. I happen to believe it is important to maintain investment choice, and I believe Congress showed this intent in Section 913 of the Dodd-Frank Act.

I am concerned that the Department of Labor—and we have had hearings here in the Education Committee talking to the Secretary, but I do believe that what—the Department of Labor's board of fiduciary proposal will step on the toes of the SEC and ultimately increase the cost for the investors. That is my concern. I believe, as written, as of now, the selling exception in the DOL fiduciary proposal does not go far enough. In fact, it is counter to Congress' intent and the direction the SEC is likely to take based on the agency's findings.

So, Mr. Taft, I will ask you, and certainly anyone else who wants to go in there, how will the DOL's current proposal and seller's exception impact investors and the market?

Mr. TAFT. I will just give—maybe focus on one area in which we believe the DOL's proposed rules will restrict client access to products, services, and advice and, as has already been alluded to, the issue with the DOL's proposal, which expands the definition of fiduciary, okay, and creates tremendous uncertainty on the part of industry participants as to when and when they won't be fiduciaries. We will default to the worst-case definition in order to defuse liability. And, secondly, it brings to bear upon the broker-dealer model the prohibited transaction elements of ERISA.

In the case of Section 913, the SEC has the ability—I was talking about operationalizing a fiduciary duty through things like disclosure of conflicts and conflict management—to do things to allow brokers to continue to offer proprietary products, to continue to

offer new issues of stocks and bonds, to continue to charge commissions for their services.

Under the ERISA proposal, all those things would be prohibited transactions and would not be allowed. Now, most problematically, they would not be allowed in individual retirement accounts. And I would say all the financial institutions at this table and the industry, the bulk of their accounts, their client accounts are individual retirement accounts. Forty percent of the accounts at our firms are IRAs, and the predominance of those accounts are small when it comes to assets under management, and today the predominance of those accounts receive advice through a commission-based model.

Under the DOL proposal, what would happen—and Barbara Roper alluded to this—is that, given the small size of those accounts and the extreme nature of the liability under the DOL's proposal, broker-dealers will exit that business, will no longer provide those services to those small clients unless they move to a fee-based model which already functions under a fiduciary approach that restricts access to products and services, cannot buy new issues of stocks, cannot buy new issues of bonds, and increases costs by as much as 50 percent on average, so increases costs, restricts access for exactly the kinds of investors that need it the most.

Mrs. MCCARTHY OF NEW YORK. One of the things that I think bothers a number of us is that, going back in last January, the Administration actually put out an Executive Order for the different organizations when they are working on an issue to work together. From the conversations that we have had and many meetings that we have had, I don't think that has happened, and that is why I am not letting this go until we hopefully come to some solution that is fair to our consumers. And I think that is where I am coming from.

Gee, I only have a little bit longer. A short answer.

But, Mr. Irwin, I know, listening to your testimony, we have been concerned about the frequency of examinations and the efficiency of the oversight investment investors. In 2010, I wrote to the NASAA, and they sent me back a very long response. What I am concerned about is anticipating a high volume of firms going from Federal to State regulation as a result of the threshold change within the Dodd-Frank Act. Does NASAA have a comprehensive database available for investors to research the examination enforcement process for each State as well as disciplining actions?

I guess what I am saying is, one of the concerns we had even with going back with predatory lending was that one broker could leave the State, go into another State, and there was no way of checking it. Are we looking at for the States to come together for a database so we have that kind of information?

Mr. IRWIN. Absolutely, Congresswoman McCarthy. We realize that to take on this additional responsibility, it is going to take us continuing to work together as we do. There is a memorandum of understanding among the States that every State has signed in which we are planning on doing these kinds of things. We are streamlining exams, and improving our risk assessment so we can more strategically undertake those exams.

NASAA is prepared to fund joint exams among different States. And, fraud doesn't stop at the border. In Pennsylvania, it goes into Ohio, West Virginia, etc. We are issuing cease and desist orders every 2 weeks for scams that are coming out of California. And we share those orders that we issue with all of the other States. We work together on many, many different levels. We are prepared to take on the additional responsibility.

Mrs. MCCARTHY OF NEW YORK. Would the States also—because most States are having fiscal difficulties, will you be able to handle the increased load, and financially would you be able to do it as the States go forward?

Mr. IRWIN. That is a great question.

Different States are having different experiences. In Pennsylvania, we knew, because of the discussions over Dodd-Frank early on, that we had to meet with our budget secretary and talk to the governor about the possibility that this was going to happen. And I am pleased to report that Governor Corbett in Pennsylvania has given us five additional examiners and additional accounting staff to deal with the more complex kinds of examinations we are going to have to undertake.

Some States are not as fortunate. But the more exams that we do, unfortunately, the more fines emerge. It gives us—and those funds fall back into the States to increase our exams.

We are net revenue generators in a big way for our States. Our budget in Pennsylvania, for example, is about $9 million. We last year gave $30 million back to the Commonwealth. We believe that the resources are there, and they just have to be given to us to be able to undertake our mandate.

Mrs. MCCARTHY OF NEW YORK. Thank you, and I want to thank all the witnesses for taking the time to be with us today.

Mr. Chairman, thank you.

Chairman GARRETT. And I thank you for the question.

I guess you can always find something wrong with an audit, though, right, to generate the fines?

The gentleman from North Carolina is recognized for potentially the final word.

Mr. MILLER OF NORTH CAROLINA. Mr. Chairman, I will forgo questions, but do not get your hopes up that that will become a frequent occurrence.

Chairman GARRETT. Okay. At this time, we will recognize the ranking member for some documents that she wishes—

Ms. WATERS. What did he say?

Chairman GARRETT. He is forgoing questioning. You had some documents?

Ms. WATERS. I ask unanimous consent, Mr. Chairman, to enter several documents into the record: a statement from the Project on Government Oversight; a report from AARP; an article by Mercer Bullard, associate professor of law at the University of Mississippi; a statement from the Financial Planning Coalition; a letter to Congresswoman McCarthy from the North American Securities Administrators Association; and a letter to Secretary Hilda Solis from the New Democrats Coalition.

Chairman GARRETT. Without objection, it is so ordered.

And I also seek unanimous consent with regard to statements from the Independent Insurance Agents & Brokers of America; from the National Association of Independent Broker/Dealers; from Paul Schott Stevens of the Investment Company Institute; from the Financial Services Roundtable; from The American College; from the Managed Funds Association; from The Bond Dealers of America; from the American Council of Life Insurers (ACLI); and I think that is about it.

Without objection, it is so ordered.

With that, I very much thank all the members of the subcommittee for their participation and their questioning and also very much appreciate this diverse panel that we had today and for all of your information and dialogue that we got from you today.

The Chair notes that some members may have additional questions for these witnesses that they may wish to submit in writing. Without objection, the record will remain open for 30 days for members to submit questions to these witnesses and to place their responses in the record.

With that, this meeting is adjourned. Again, thank you.

[Whereupon, at 12:40 p.m., the hearing was adjourned.]

A P P E N D I X

September 13, 2011

OPENING REMARKS OF THE HONORABLE RUBEN HINOJOSA
COMMITTEE ON FINANCIAL SERVICES
SUBCOMMITTEE ON CAPITAL MARKETS
REGULATION OF BROKER-DEALERS AND INVESTMENT ADVISERS
SEPTEMBER 13, 2011

Chairman Garrett, I commend you for holding today's hearing on the regulation and oversight of broker-dealers and investment advisers. As indicated, the hearing will examine two studies mandated by the Dodd-Frank Act: one on the effectiveness of standards of care applicable to broker-dealers and investment advisers; and the other on the need for enhanced examination and enforcement resources for investment advisers.

The hearing will cover additional issues, including the appropriate role and balances for self-regulatory agencies (SROs) such as the Financial Industry Regulatory Authority, or FINRA and legislation that addresses broker dealers and investment advisers and how each is regulated.

As Co-Founder and Co-Chair of the Financial and Economic Literacy Caucus alongside my good friend and colleague Judy Biggert of Illinois, I commend the FINRA Investor Education Foundation for providing more than $63 million in investor education and protection initiatives through grants and targeted projects.
I agree with FINRA that the best form of investor protection comes through education.

However, it is impossible to educate investors if there is not enough transparency in the capital markets and the internal structure and activities of federal agencies, or SROs, their lesser counterparts.

I and many others believe the time has come for Congress to revisit the issues surrounding SROs; update them; and require that SROs, and particularly FINRA, provide transparency in their operations, especially their structure and compensation packages, some of which I've learned are in the millions of dollars, unlike FINRA's federal agency counterparts.

I am attaching two documents: A petition Supporting a Fiduciary Standard for Financial Professionals as Outlined in Section 913 of the Dodd-Frank Act; and, petition requesting that the SEC Extend the Fiduciary Standard to Broker-Dealers.

Again, thank you for holding this hearing today. I look forward to the testimony.

I yield back the remainder of my time.

Statement for the Record
Rep. Blaine Luetkemeyer (MO-09)
"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"
Committee on Financial Services
Subcommittee on Capital Markets and Government Sponsored Enterprises
September 13, 2011

Thank you, Mr. Chairman, for holding this hearing on what is likely one of the most important regulatory issues facing investors today.

As we know, Dodd-Frank requires the U.S. Securities and Exchange Commission (SEC) to extensively study what will likely result in significant changes to the investment adviser and broker-dealer fields. One may express initial concern at the amount of regulation being poured into an already heavily regulated field, but that isn't the most pressing issue facing broker-dealers and advisers today.

In legislation that in some way addressed nearly every financial field in this nation, no mention was made of the "fiduciary" definition in the Employee Retirement Income Security Act (ERISA). Nevertheless, the U.S. Department of Labor's (DOL) Employee Benefits Security Administration took it upon itself to attempt to redefine "fiduciary" and, consequently, dramatically change the way in which Americans receive financial advice. This move wasn't based on data; it wasn't based on an historic case of regulatory failure and consumer abuse. In fact, it seems that this move wasn't based on much beyond an internal mission.

DOL today is crafting a rule that has the potential to result in dramatic costs to investment professionals and consumers. It is working in what many believe is an uncooperative fashion on an effort that may very well end the ability for small-dollar investors, particularly those in our nation's most rural and urban areas, to receive any sort of investment advice. And I believe it is doing so with no coordination with the federal agencies who oversee broker-dealers, investment advisers, swap-dealers, or major swap participants.

The economic recovery this nation so desperately needs is at best stalled. The last thing our government should do is promulgate rules and pass laws that discourage investment. Furthermore, I don't believe this is the time to run out of business small and independent investment professionals who offer important guidance to Americans investing in a brighter future. To unilaterally adopt a rule dealing with a supposed problem (on which there seems to be little to no empirical data providing proof) that will impact thousands of honest, legitimate brokers is both irresponsible and inexcusable.

I would encourage DOL to engage in meaningful dialogue with the SEC, the Internal Revenue Service, the Department of the Treasury, and the Commodity Futures Trading Commission. I would also encourage them to re-propose this rule and base any new rulemaking on the considerable amount of information that has been provided to them.

I appreciate Chairman Garrett's willingness to hold this hearing. It is my hope that together this Congress and this administration can implement laws and regulations to protect investors of all sizes while strengthening, not weakening, the investment adviser and broker-dealer professions.

FINANCIAL SERVICES INSTITUTE

VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

Testimony of
William E. Dwyer, III
Chairman
Financial Services Institute

Before the U.S. House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises

On

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011

Introduction

Good morning, Mr. Chairman and members of the Subcommittee. I am Bill Dwyer, president of national sales and marketing for LPL Financial, and I am pleased to be here today on behalf of the Financial Services Institute (FSI).

We are here today because Congress has a unique opportunity to make sure that all Americans have access to trustworthy financial advisors who can help them save properly for retirement, their children's education and other common financial goals. Guaranteeing this access requires two key steps to shape the regulatory environment:

First, FSI urges Congress to engage in meaningful oversight of the SEC's efforts to formulate and adopt a new uniform fiduciary standard of care for broker-dealers.

Second, and equally important, FSI urges Congress to pass legislation authorizing the SEC to approve a self-regulatory organization (SRO) to oversee the activities of retail investment advisers.

Together, these changes to the current regulatory structure will ensure that all American investors receive the same protections, regardless of whether they do business with a broker-dealer or an investment adviser.

Americans need and want advice from trustworthy professionals. A recent ING Research study confirmed what we already knew to be true: investors who spend time with a financial professional save significantly more, perhaps two to three times more, than their counterparts without the benefit of this advice. The business relationship between investors and financial advisors is based on trust. Its success depends on investors' confidence in the advice these financial professionals offer.

If investors lose access to their trusted advisers, or lose confidence in them, the nation's entire economy will suffer. Nor should investors have to be regulatory experts in order to understand the legal duty owed to them or the extent of regulatory supervision dedicated to their activities. Instead, investors should feel confident that the legal and regulatory protections extended to them do not fluctuate with the registration status of their chosen financial adviser. Any proposal that fosters investor confusion about professional standards or creates the perception or reality of disparate, unevenly enforced rules and supervision will do serious harm not only to our industry, but to the whole economy.

The Dodd-Frank Act has given Congress a unique opportunity to enhance investor protection by exerting meaningful oversight over the SEC's proposals for a fiduciary or "best interest of the client" standard of care for broker-dealers. Clearly financial advisors who provide personalized investment advice should be held to the same standard of conduct no matter what their registration status. However, resolving the standard of care issue is only half of the job now before you. In order to ensure that the Dodd-Frank Act achieves its stated goal of protecting retail investors, we also urge Congress to act on additional legislation that ensures that all Americans have access to competent, affordable financial advice that is subject to uniform regulatory oversight and supervision.

The members of FSI have a unique perspective to offer the Subcommittee on Sections 913 and 914 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), the subsequent studies published by the SEC, and efforts to implement the findings of those studies. FSI members work almost exclusively with retail investors, the individuals and families who use retail investment products to save for retirement, fund their children's educations, and manage their personal wealth. Our members are dual registrants,

licensed as both broker-dealers (B/Ds) and registered investment advisers (RIAs), so we understand how the existing regulatory standards and examination structures differ for these service providers. Last, but perhaps most important, our members rely upon their personal reputations to win and retain business. Since we have this powerful incentive to put client interests first, higher standards and closer oversight will only enhance our clients' trust in us. Therefore, the concerns we detail below relate merely to the means of pursuing these goals.

Formulating and Implementing a New Uniform Fiduciary Standard of Care

Title IX, Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) required the SEC to study the obligations and standards of care for broker-dealers and investment advisers who provide personalized investment advice to retail investors. That study concluded that it would be appropriate to establish a uniform fiduciary standard of care in the best interest of the client.

FSI agrees with this conclusion and supports the adoption of a new uniform fiduciary standard of care. Uniformity is an important goal, as it will ensure that investors receive the same protections no matter whom they choose as their financial advisor. For this reason, we strongly oppose the Department of Labor's attempts to impose an ERISA fiduciary standard of care on all broker-dealers and registered investment advisers who provide personalized investment advice and other services to IRAs, 401(k)s and other ERISA-covered plans. The creation of a second competing and distinctly different fiduciary duty for particular types of client accounts will serve only to exacerbate the existing lack of consistency and transparency in our regulatory system. In addition, the DOL's proposal would have enormous unintended consequences by restricting

access to personalized investment advice to only those who choose to enter into a fee based investment advisory relationship. Clearly this is the wrong direction.

However, a uniform fiduciary standard alone is not enough. It is also essential that the new standard be carefully designed to preserve investor access to personalized investment advice from a broad range of service providers. Because broker-dealers and investment advisers serve different clientele, offer different services and have different cost structures, we join Ranking Member Barney Frank in opposing efforts to harmonize the regulatory requirements by simply applying the Investment Advisers Act of 1940's implied fiduciary duty to broker-dealers. The '40 Act's fiduciary duty standard has been developed through decades of investment adviser fact-specific case law. Thus, applying the '40 Act's standard of care to the unique clientele, services and cost structure of the independent broker-dealer industry would force these providers to guess as to their specific obligations. This would lead to an unacceptable level of regulatory uncertainty for these firms, significant additional costs, and a resulting loss of access to services and support for small investors.

Therefore, FSI supports the rulemaking framework proposed by the Securities Industry and Financial Markets Association (SIFMA), in which the SEC crafts a set of common core principles of fiduciary conduct that serve as the basis for developing RIA- and B/D-specific regulatory requirements.

The simple promulgation of a new uniform fiduciary standard of care is not enough to protect investors, as some have suggested. This view is dangerously naive, and may even pose a threat to investors, if they lose the ability to make meaningful choices among financial advisors. We need a uniform fiduciary standard of care that also allows for investor choice, especially for

small and mid-sized investors who may not need nor want to pay an ongoing fee, but do need ongoing advice and service if they are to meet their financial goals.

We strongly believe that the new uniform fiduciary standard must be designed carefully so as not to disadvantage any segment of the investing public or a particular business model. Because our members' relationships with their clients are uniquely personal, it is essential that the new standard of care recognize the differences between our members' business model and those, for example, of large institutional investment advisory firms. Therefore, we have called on the SEC to ensure that the standard of care is tailored carefully to work for all business models and client relationships, to preserve investors' access to the broadest possible range of choices among financial service providers.

While we believe that sufficient empirical data exists to support a fiduciary standard rulemaking, we ask Congress to ensure that the SEC takes a comprehensive approach to these issues, and to ensure that the SEC works with all interested parties to provide an effective, efficient framework that is flexible enough to last in a changing marketplace, while protecting investors and helping to instill confidence in the nation's capital markets. This comprehensive approach should begin with a rigorous analysis of the current regulatory regime, in order to identify the elements that work well, and those that do not. The analysis should also carefully evaluate the likely consequences of regulatory changes to retail investors, other public investors, and the industry.

As directed by Congress, the SEC's goal should be to improve protection of retail investors, without unnecessary cost increases or reductions in the range of products and services now available. Access to personalized investment advice will only be preserved by controlling the incremental costs associated with the new regulatory standard. Broker-dealers, registered

investment advisers and the financial advisors affiliated with them can manage these costs only if they are provided with clear regulatory guidelines that provide the clarity necessary to achieve compliance. Retail customers currently benefit from a diverse array of business models to choose from when seeking personalized investment advice, and any regulatory changes should recognize and preserve those benefits of investor choice.

Thus we believe the implementation of a new uniform standard of care will require three essential elements that will not only enhance investor protection, but also promote access to financial advice and preserve investor choice. These should apply equally to all financial advisors who offer personalized investment advice to retail customers.

First, **clearly articulated rules of conduct**. These will ensure that independent broker-dealers and independent financial advisors know their specific obligations to their retail customers. This, in turn, will allow our members to ensure compliance and preserve investor access to advice and service, while also enhancing predictability and controlling costs. With the new uniform standard of care in place, regulators should follow existing rulemaking procedures to formulate rules of conduct consistent with this standard of care, to be enforced prospectively. Uncertainty and fear of arbitrary or retrospective enforcement will inhibit our members' ability to serve their clients, expand access to advice and service, or develop efficient solutions to investor needs.

Second, clear SEC guidance on the form and content of **client disclosures**. FSI supports effective disclosures, which are good business as well as good public policy, but please note the distinction between "effective" disclosure and "comprehensive" disclosure. Investor understanding should be our goal. Comprehensive disclosure that results in information overload can be the enemy of effectiveness. Clear, concise disclosures help investors make wise choices

about their broker-dealer or investment adviser, and the products and services being offered. Therefore, we believe disclosures should be written in plain English, consolidated wherever possible, and appropriate to the level of investor involvement. For example, concise point-of-engagement disclosures should focus on information that will affect a typical investor's decision-making process, not on arcane details of interest to a select few or designed solely to avoid liability. Disclosure statements must provide information about costs, but should balance this information with other relevant considerations.

More detailed disclosure information should be made available to customers through broker-dealer websites or brochures offered free of charge to those without Internet access. Since information overload is always a risk, the amount and frequency of mandated post-engagement disclosures should be balanced in order to make these disclosures more meaningful and effective. Finally, the form of client disclosures should be investor focus group-tested to ensure they provide the information investors want and need in a format they can understand. A layered and measured approach to disclosure will enhance customer understanding and help investors make wise choices about their financial advisors.

Finally, **effective regulatory supervision** must accompany clear regulatory guidelines and effective client disclosures. Our current regulatory structure is dangerously flawed, with significant gaps that must be closed. We discuss this element further below.

Developing an Effective Supervisory System for Investment Advisers

Title IX, Section 914 of Dodd-Frank specifically required the Securities and Exchange Commission to review and analyze the need for enhanced examination and enforcement resources for investors. FSI supports Dodd-Frank's objective of improving examination and

enforcement, which seeks to correct a significant regulatory gap that exposes retail investors to possible harm.

The need to address these supervisory issues is grave and immediate. While the SEC and self-regulatory organizations currently examine more than half of the nation's approximately 4,900 registered broker-dealer firms at least once a year, the SEC projects it will examine fewer than 10 percent of the more than 11,000 federally registered investment adviser firms during the fiscal years 2009 and 2010. The percentage of advisers audited is expected to fall to seven percent in 2011. Worst of all, the head of the SEC's examinations program testified in March that "approximately one-third of advisers registered with the SEC have never been examined."

The supervisory disparity between broker-dealers and investment advisers has become much more severe over the past 10 years. Between 1998 and 2002, the SEC examined every retail investment adviser at least once every five years, and made an effort to examine newly registered advisers early in their operations. As the number of RIAs has grown by more than 50% since 2002, the SEC's ability to maintain this schedule has diminished significantly. Except for examinations "for cause" and "sweep" examinations focused on specific risk areas, the examinations they do conduct tend to be limited in scope. Before 2010, the SEC had implemented a risk-based program for selecting RIAs for examination, but suspended this program early last year in favor of an approach that gives examination priority to investment advisers who have been the subject of tips or complaints. The bottom line is that federal regulators simply do not have sufficient personnel or resources to devote to examining these businesses and, as SEC Commissioner Elisse Walter has indicated, this problem will not be resolved through the imposition of user fees.

State supervisory programs are also inadequate. These supervision efforts vary widely, but even the strongest state investment adviser examination program does not provide the same level of oversight broker-dealers receive. The State of Texas, for example, reports that its examiners "try to get to every adviser once every five years." Meanwhile, Colorado, Georgia, Michigan, Minnesota, South Dakota and West Virginia conduct "desktop" regulatory exams of investment adviser firms. These so-called "exams" involve reviewing the contents of the state regulator's registration file for the investment adviser in the comfort of the regulator's own office. Clearly these efforts fall short of reasonable investor expectations for government oversight.

This is not a theoretical dilemma, but a problem with real consequences for retail investors. The State of New York, to cite one example, does not routinely conduct examinations of registered broker-dealers or investment advisers. Bernard Madoff was able to run a massive Ponzi scheme from an office on Third Avenue in New York City, defrauding thousands of institutional and retail investors. The Cohmad Securities Corporation, located within the offices of Madoff's firm, brought additional investors into the scheme. At no time did the New York Investor Protection Bureau ever examine the offices or activities of either Bernard L. Madoff Investment Securities or the Cohmad Securities Corporation.

While the SEC or a state securities regulator might examine an investment adviser, it is much more likely that the only oversight of an adviser's activities comes from an internal compliance officer, who may be the investment adviser himself. We believe it is simply unacceptable to allow a huge segment of the financial services industry to engage in self-supervision. Investors who do business with investment advisers deserve the same supervisory protection as their counterparts who invest through broker-dealers.

The SEC recognized these problems in its study and recommended three possible solutions, all of which would require additional authorization from Congress:

- Authorize the SEC to collect user fees from RIAs to generate revenue necessary to fund examinations;
- Authorize the SEC to approve one or more SROs to examine RIAs; or
- Authorize FINRA to examine dual registrants.

Authorizing FINRA as SRO for Retail Investment Advisers

Since the start of the legislative process that resulted in Dodd-Frank, FSI has urged Congress to adopt legislation that would allow the SEC to close the regulatory gap by approving an SRO for retail investment advisers. If adopted, the legislation proposed by Chairman Bachus would accomplish that goal and bring about significant improvements in investor protection and a balanced playing field for all financial advisors. Therefore, FSI supports the adoption of the draft legislation.

In addition to supporting legislation that would authorize the SEC to approve an SRO to examine and supervise retail investment advisers, we have endorsed FINRA to assume the responsibilty of SRO. This approach is based in both practicality and precedent, with several clear benefits for consumers, the industry, and the economy as a whole.

Experience. The SEC has more than 70 years of experience with SROs and, more specifically, with FINRA and its predecessor organization, the National Association of Securities Dealers. In addition to FINRA, the SEC works with and provides an additional level of oversight to the Municipal Securities Rulemaking Board (MSRB), and the Public Company Accounting Oversight Board (PCAOB). Thus, the SRO model has a long proven track record.

Precedent. Sections 15A and 19 of the Exchange Act provide the basic outline of an SRO governance structure and can be adapted to ensure transparent and publicly accountable regulatory structure for retail investment advisers.

A layered regulatory system. A self-regulatory organization for retail investment advisers should mirror the supervisory system in place for broker-dealers. Under this structure, the SEC would review the SRO's supervisory activities, creating a layered regulatory system to provide two levels of oversight. Both the public and the industry would have input into the rulemaking process, preventing disruptions and unintended adverse consequences. Additionally, assigning supervisory responsibilities to FINRA would allow for consolidated examinations of dual-registered firms, limiting disruption and keeping unnecessary regulatory burden to a minimum.

Ease of implementation. FINRA has experience with both regulatory examinations of financial service providers and the operation of an SRO whose governing body, committees and staff act in the public's best interests. As a private-sector organization, it has greater flexibility to set user fees and hire staff as needed. FINRA already has more than 1,000 examiners on staff. Its private funding structure for broker-dealer examinations can serve as a model for funding the examinations of other entities at no additional cost to the taxpayer. If FINRA lacks necessary expertise, it possesses the resources to hire the needed staff.

A proven track record. FINRA has a solid track record of handling complex regulatory responsibilities and a deep understanding of the overlapping financial services provided by organizations registered as both broker-dealers and retail investment advisers.

Targeting of supervisory priorities. Finally, assigning routine examination responsibilities to FINRA would free up SEC resources to focus on capital market concerns, a

comprehensive regulatory approach to all regulated industries and the supervision of the SRO itself.

Authorizing FINRA to provide that supervisory protection is the best possible approach and will be a win-win for advisers, investors and the SEC. It will create a supervisory system parallel with the one now in place for broker-dealers, leveling the playing field for industry participants, and providing a consistent level of consumer protection to all investors. More regular examinations will boost investor confidence, especially critical in turbulent economic times. Confident investors are not only better for the industry, but better for the economy overall, and critically important at this economic juncture.

Conclusion

Now more than ever, individual investors need to have confidence in the reliability of the investment advice they receive. The members of FSI do everything within their power, every day, to provide thoughtful investment advice to their clients with integrity and transparency. A new uniform fiduciary standard of care and a coordinated system of enhanced supervisory oversight will provide our members' clients with additional measures of confidence, and will ensure that all Americans have access to competent, affordable financial advice, products and services with the highest possible level of consumer protection.

We urge Congress to take appropriate steps to encourage the adoption of this new uniform standard of care, and to authorize the SEC to partner with a self-regulatory organization such as FINRA, in order to provide enhanced oversight for all registered investment advisers.

Main Street investors deserve an efficient, effective and unified system of oversight when it comes to investment advisers and independent broker-dealers – a smarter system that ensures

true consumer protection coupled with access to the best possible independent financial advice. Congress has the opportunity to make that happen, and the members of FSI look forward to working with you toward this goal.

I would be happy to answer any questions the Subcommittee may have.

Background on Independent Broker-Dealers, Independent Financial Advisors and FSI

For more than 30 years, independent broker-dealers and independent financial advisors have brought Wall Street to Main Street, offering comprehensive financial planning services and unbiased, affordable investment advice to millions of individuals, families and businesses large and small. The approximately 201,000 independent financial advisors make up 64% of all practicing registered representatives nationwide, offering services that include financial education, planning, implementation and investment monitoring. While we serve a broad cross-section of clients, our members' typical clients are middle class, Main Street investors – those investing tens or hundreds of thousands of dollars, not millions.

Independent broker-dealers and independent financial advisors also share a number of other business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. The independent business model allows our members to tailor their products and services to support both the small investors opening their first IRAs and the more affluent clients who need more complex wealth management services.

These financial advisors operate as self-employed independent contractors, not as employees of their affiliated broker-dealer firms. They are small business owners with strong ties to their communities. In fact, their standing in their communities is critical to their success, as word-of-mouth and reputation are their primary sources of new clients. Independent financial advisors generally meet their clients in person and provide their services face-to-face or over the

telephone, forming personal, trust-based relationships. Thus, independent financial advisors have a powerful incentive to pursue their clients' investment goals with integrity and transparency, and every reason to want to make sure their clients receive personalized investment advice that is in their best interest.

Since 2004, the Financial Services Institute (FSI) has represented the interests of independent financial service firms and independent financial advisors. Through FSI, these financial professionals work together to promote the independent business model and a regulatory environment that serves all its constituents effectively.

Independent broker-dealers and independent financial advisors formed the Financial Services Institute not only to serve as an advocacy organization, but also to be a forum for improving compliance efforts and promoting our business model. FSI is committed to preserving the crucial role of independent broker-dealers and independent financial advisors in helping Main Street Americans plan for their futures and meet their long-term financial goals. As part of this mission, FSI conducts industry surveys and research, and provides a forum for members to share their best practices in compliance, operations, and marketing. FSI also serves as an advocate in Washington, using the information it collects to help shape a regulatory environment that is fair and balanced and serves all its constituents.

Statement of Ken Ehinger
Chief Executive Officer, M Holdings Securities, Inc.
On behalf of the Association for Advanced Life Underwriting (AALU)

Hearing on Current Regulation and Oversight of Investment Advisers and Broker Dealers

Before the Subcommittee on Capital Markets and Government Sponsored Enterprises
House Financial Services Committee

September 13, 2011

Chairman Garrett, Ranking Member Waters, and Members of the Subcommittee, I am Ken Ehinger, President and Chief Executive Officer of M Holdings Securities, Inc.[1] I am testifying today on behalf of the Association for Advanced Life Underwriting (AALU), of which I am a member and M Financial Group is a strong supporter and partner. AALU appreciates the opportunity to testify before the Subcommittee on Capital Markets at this hearing on the current regulation and oversight of investment advisers and broker-dealers. We appreciate the Subcommittee's focus on the issues discussed in two Securities and Exchange Commission studies required by the Dodd-Frank Wall Street Reform and Consumer Protection Act: the Study required by Section 913 on Investment Advisers and Broker-Dealers,[2] and the Study required by Section 914 on Enhancing Investment Adviser Examinations.[3]

We do not support the SEC Staff recommendation in the Section 913 Study that broker-dealers should be subject to the legal standard of care under the Investment Advisers Act (Advisers Act). As two of the SEC's own Commissioners stated in their dissent to the Study, the SEC has offered no empirical evidence or any data that such a change would improve investor protection and has failed to assess the costs and impact of such a change, as required by Dodd-Frank.[4] We agree with the concerns expressed by the Commissioners that there is a risk that

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[1] As President and CEO of M Securities, Mr. Ehinger oversees all aspects of M Financial Group's Broker/Dealer and Registered Investment Adviser. Mr. Ehinger has a diverse background in the securities and insurance industries that spans more than three decades. Additional biographical information about Mr. Ehinger is attached to this statement.

[2] Study on Investment Advisers and Broker-Dealers (Jan. 21, 2011) [hereinafter *SEC Staff Study*], *available at* http://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[3] Study on Enhancing Investment Adviser Examinations (Jan. 19, 2011) [hereinafter *Section 914 Study*], *available at* http://www.sec.gov/news/studies/2011/914studyfinal.pdf.

[4] We note that the Department of Labor has proposed regulations (Definition of the Term "Fiduciary," 75 Fed. Reg. 65,263 (proposed Oct. 22, 2010) (to be codified at 29 C.F.R. pt. 2510), that would redefine the term "fiduciary" under the Employee Retirement Income Security Act (ERISA). While these proposed regulations have not yet been finalized, they could significantly expand the number of broker-dealers categorized as ERISA fiduciaries and could have a dramatic impact on the provision of investment advice and education to investors, particularly

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implementation of the SEC staff's recommended changes would result in investors having access to fewer products and services and paying more for the services and advice they do receive. The SEC should not proceed with a discretionary rulemaking in this area unless these flaws are remedied and it can objectively justify its recommended actions.

The need for an empirical basis and rigorous cost/benefit analysis in SEC rulemaking is critical, particularly in view of the SEC's recent experiences with rulemaking challenges in the D.C. Circuit Court of Appeals.[5]

I have spent most of my professional career working in businesses that are regulated by the SEC. It is in the interest of all of us who are regulated by the Commission to have a strong and respected regulator to police our markets and instill and enhance investor confidence, which is the foundation for capital formation and savings in the U.S. We understand the full Committee will be holding a hearing on these broader issues two days from now. We want to add our voice to those who are saying that the Commission, with its limited resources, simply has to focus on the most critical issues at hand. Engaging in a rulemaking to change a regulatory system, with respect to which investors – according to a survey commissioned by the SEC itself – have said they are satisfied, is a misplacement of priorities and resources.[6]

We believe a greater priority for the Commission should be to give further attention to problems acknowledged by the Section 914 Study of the lack of an effective inspection cycle for many investment advisers.[7] We support the focus given this matter by Chairmen Bachus,

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those who have varying types of investment accounts with the same institution or service provider (*see* Comment Letter from David J. Stertzer, Chief Executive Officer, Association for Advanced Life Underwriting, Dept. of Labor RIN 1210-AB32, February 3, 2011, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-157.pdf.). In the *SEC Staff Study*, the scope of these regulations in relationship to the SEC's work was not properly assessed, just one practical example of the lack of rigor inherent in the staff's analysis.

[5] Just this past July, the D.C. Circuit rejected the Commission's actions adopting its shareholder access rule. *See* Business Roundtable and Chamber of Commerce v. SEC, No. 10-1305 slip op. (D.C. Cir. Jul. 22, 2011), *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/$file/10-1305-1320103.pdf. According to recent reports, the SEC will not appeal this decision, seemingly acknowledging the Court's judgment about the Commission's lack of rigor in rulemaking.

[6] *See* Angela A. Hung *et al.*, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, RAND Institute for Civil Justice, *available at* http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

[7] According to the Commission's most recent budget justification, the Commission oversees approximately 11,800 investment advisers and 5,400 broker-dealers. The Commission's budget justification states that 44% of all broker-dealers were examined by the Commission or an SRO in FY 2010, and the Commission expects that 45% of all broker-dealers will be examined by the Commission or an SRO in FY 2011 and 46% in FY 2012. Investment advisers are examined far less frequently. In FY 2010, only 9% of investment advisers were examined. The Commission has projected that in FY 2011 and FY 2012, respectively, only 11% and 13% of investment advisers will be examined. *See* U.S. Securities and Exchange Commission: FY 2012

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Garrett, and other Members, who have argued that the self-regulatory organization (SRO) model of supplementing SEC inspections of investment advisers with SRO exams is perhaps the only viable means to address this problem. There is a strong belief that the Financial Industry Regulatory Authority (FINRA) has the experience and capacity to carry out an effective regulatory and examination program for investment adviser examinations, as it currently does for broker-dealers.

Background and AALU's Participation in SEC Staff Study

AALU is a nation-wide organization of 2,000 life insurance agents and professionals who are primarily engaged in sales of life insurance used as part of estate, charitable, retirement, and deferred compensation and employment benefit services. Many of our members have served the same individual clients and their families for decades. Our customers are of primary importance to us and, for that reason, we work closely with them to understand their needs and objectives in connection with the insurance and investment products we are authorized to sell, within the framework of our contracts with carriers and other obligations under all of the laws and regulations to which we are subject.

All of our members are licensed insurance professionals; many are licensed in multiple states. Many of our members own their own insurance agencies, in some cases with multiple offices, and some of these agencies own or are affiliated with registered broker-dealers or investment advisers. Many AALU members are registered representatives of SEC/FINRA-registered broker-dealers and/or are investment adviser representatives of SEC-registered investment advisers. Our members therefore are subject to multiple layers of federal and state regulation and oversight. We believe we have a unique perspective on the effectiveness of regulation and oversight by various regulators, particularly with regard to sales of insurance-related products.

Many life insurance producers offer variable life insurance and variable annuities, in addition to what may be viewed as more traditional life insurance products. These bundled products offer consumers investment choices for their accumulating cash values – the variable element of the product – with separate guarantees from the issuer such as a guaranteed death benefit and lifetime income guarantees, which are important options for customers seeking to address their life insurance protection and retirement needs and which have been recognized as even more important in recent years of market volatility. It is the sale of these products that triggers broker-dealer registration and SEC, FINRA, and state securities regulation and oversight for those producers. Any major changes in SEC regulation of broker-dealers, such as changing current standards for broker-dealers to an investment adviser-type standard, would have a significant impact on these producers and could potentially affect their relationships with, and their ability to serve, their customers, particularly with regard to the range of products offered as well as the costs of those products. For this reason, AALU on August 30, 2010 filed extensive comments with the SEC in connection with its Section 913 Study, in order to educate the

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CONGRESSIONAL JUSTIFICATION - IN BRIEF (Feb. 2011), at 2, 22, *available at* http://www.sec.gov/about/secfy12congbudgjust.pdf.

Commission on the extent of current regulation of insurance producers who sell variable products.[8]

AALU's submission to the SEC explained, for example, that the design of variable life insurance products requires medical and financial underwriting in determining insurable interest that goes beyond the requirements for traditional securities products. The rigor and breadth of applications relating to these products requires an assessment primarily of financial and protection needs. This necessitates an analysis related to death benefit, cash values, tax advantages and costs. In each situation, the issuing insurance company is involved in determining the appropriateness of the product for the customer as it relates to risk selection and general suitability. In addition to the SEC's and FINRA's roles in the registration and sales of these products, state insurance commissions also regulate these products. Insurance producers/registered representatives who sell these products are subject to supervision by an SEC/FINRA-regulated broker-dealer and also subject to the terms of their contract with the issuing insurance company, which is subject to regulation by multiple state insurance regulators. Indeed, the scope and level of regulation is significantly higher for variable life insurance products than for other securities products under current law. However, the SEC Staff seemingly gave little weight to the extensive information provided by AALU and other insurance organizations[9] on the comprehensive and overlapping requirements of state insurance regulation and federal, state and FINRA securities regulation relating to variable products, under which insurance producers operate.

We believe consideration of the multiple layers of regulation and oversight of these variable insurance products, together with their product-specific disclosure and due diligence requirements, should have led the SEC Staff to conclude that no change in standards or further regulation is necessary, or at least to specify why, notwithstanding the current multiple and overlapping regulation of these products, a different, more subjective standard – the standard under the Investment Advisers Act – should be applied. We expressed strong concerns that applying such a standard, in addition to all of the existing regulatory requirements, could result in many insurance producers moving away from variable to fixed insurance products, limiting customer choice and increasing costs. The cost of meeting all regulatory and compliance obligations is already significant for all brokers, but especially insurance producers, due to levels of oversight and requirements that already exist. Our submission expressed our serious misgivings that an unwarranted change in the legal standard that requires increased time and compliance costs could render the delivery of this service too costly for insurance producers and the average customer, resulting in limited access to valuable insurance protection. However, the SEC Staff Study report did not acknowledge the comprehensive and overlapping regulation of insurance professionals.

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[8] *See* Comment Letter from David J. Stertzer, Chief Executive Officer, Association for Advanced Life Underwriting, File No. 4-606, Aug. 30, 2010, *available at* http://www.sec.gov/comments/4-606/4606-2631.pdf.

[9] *See* Comment Letter from American Council of Life Insurers, Association for Advanced Life Underwriting, Financial Services Institute, Insured Retirement Institute, National Association of Insurance and Financial Advisors, and Securities Industry and Financial Markets Association, File No. 4-606, Aug. 30, 2010, *available at* http://www.sec.gov/comments/4-606/4606-2532.pdf.

In addition, without any empirical evidence or data, the SEC Staff Study report dismissed concerns that the proposed regulatory changes would limit choice and access to financial products and services.[10] The report contained numerous statements by the Staff that it was seeking proof from commenters concerning the adverse effects of the proposed rule change, when the burden is, in fact, on the agency recommending the imposition of new regulations to conduct a cost/benefit analysis, which the SEC did not do.

In support of the Staff's position that the impact would be limited, the Staff cited letters from two organizations who have advocated for the rule change. The staff stated that the new standard would only apply to "personalized investment advice" – a term currently undefined but which the Staff made clear it intends to define as virtually any investment suggestions from a broker to a retail customer, including advice not to buy choices presented.[11]

The Staff then argued that concerns about the vagueness of the proposed new standard should be discounted, because the Commission or Staff will provide guidance to assist professionals.[12] Yet, at the same time, the SEC Staff Study report states,

> The Staff is of the view that the existing guidance and precedent under the Advisers Act regarding fiduciary duty, as developed primarily through Commission interpretative pronouncements under the antifraud provisions of the Advisers Act, and through case law and numerous enforcement actions, will continue to apply to investment advisers and be extended to broker-dealers, under the uniform fiduciary standard.[13]

In other words, it is the view of the SEC staff, as expressed in their report, that broker-dealers will be expected to abide by 70 years of Advisers Act precedent, including case law and SEC enforcement actions, in order to discern their responsibilities and legal liabilities under the proposed new standard.[14] The SEC Staff nonetheless said it believes, without providing

[10] *See SEC Staff Study*, *supra* n. 2 at 161-162, simply citing SEC staff views rather than specific supporting data: "The Staff believes that its recommended uniform fiduciary standard recognizes the value of preserving investor choice with respect to the variety of products and services involving the provision of investment advice and how investors may pay for them. . . . The Staff believes that the recommended uniform fiduciary standard would not require that broker-dealers limit, nor would it necessarily result in broker-dealers limiting, the range of products and services they currently offered to retail investors. . . . The Staff believes that . . . the recommended uniform fiduciary standard would in and of itself, not adversely impact [the retail investor] populations' access to financial products and services."

[11] *Id.* at 123-127.

[12] *Id.* at 162.

[13] *Id.* at 111.

[14] The SEC staff appears to be taking a position in contradiction to even the Ranking Member of the House Financial Services Committee, who has supported a uniform fiduciary duty on broker-dealers and advisers. In a May 31, 2011 letter to SEC Chairman Mary Schapiro, Representative Barney Frank stated that "if Congress intended the SEC to simply copy the '40 Act and apply it

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empirical evidence, that retail access to broker-dealer services will not be adversely impacted and asks that broker-dealers defer to the staff to provide appropriate guidance at some point.

Life insurance enables individuals and families from all economic brackets to maintain independence in the face of potential financial catastrophe, helping relieve pressure on burdened public programs. It is unique in guaranteeing the delivery of financial security at precisely the moment it is needed, while contributing significantly to the nation's storehouse of savings and investment capital. As September is "Life Insurance Awareness Month," it is important to note that the life insurance industry, through permanent life insurance and annuities, provides 20% of Americans' long-term savings.[15] Two out of three American families – that's 75 million families – count on the important financial security that life insurance products provide. Unfortunately, despite this broad, positive impact, according to Congress, 68 million still "lack the adequate level of life insurance coverage needed to ensure a secure financial future for their loved ones."[16] We therefore believe any proposed change in regulation that could limit consumer choices and access to insurance products should meet a high burden with respect to the need for the changes. Clearly, the SEC did not meet that burden, nor did it do what Congress specifically asked it to do in conducting the Study.

Failure of the SEC to Conduct an Objective Assessment of Broker-Dealer and Adviser Regulation

During consideration of the legislation that ultimately became Dodd-Frank, SEC Chairman Schapiro made clear her support for a new fiduciary duty for brokers and dealers in a March 9, 2010 letter to former Chairman Dodd, stating, "I urge you to include a provision that would mandate a uniform fiduciary standard of conduct for financial services professionals providing investment advice about securities to investors." The SEC Chairman wanted no discretion left to the SEC, but, instead, asked that Congress mandate the standard. As this Subcommittee is aware, Congress decided otherwise, and the only mandates in Section 913 were: (1) a mandate to the SEC to conduct an objective and comprehensive study; and (2) a mandate to consider the study in writing any new rules relating to the standard of care for brokers, dealers, and investment advisers. The SEC was given discretion, but was not required, to write rules imposing a fiduciary standard, following the study.

Therefore, perhaps, it is not surprising that SEC Staff Study report recommended, with no empirical basis, that the fiduciary duty standard under the Advisers Act be applied to broker-dealers. According to the only two SEC commissioners who had not previously endorsed the imposition of a fiduciary duty, the Staff recommendation was made, "without adequate

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to broker-dealers, it would have simply repealed the broker-dealer exemption – an approach Congress considered but rejected." *Available at* http://www.advisorone.com/advisorone/files/ckeditor/Barney%20Frank%20Letter.pdf.

[15] American Council of Life Insurers calculations of survey data and Federal Reserve Flow of Funds data.

[16] S. Res. 211, 111th Cong. 2009; H. Res. 16, 111th Cong. (as agreed to in Senate on July 5, 2009 and in House on Sept. 29, 2009, respectively).

articulation or substantiation of the problems that would purportedly be addressed via that regulation, without adequate recognition of the risk that its recommendations could adversely impact investors, and with no justification for fundamentally changing the regulatory regime for broker-dealers and investment advisers."[17]

The Staff produced no data to suggest that the Advisers Act regulatory regime is in any way superior to the regulatory regime for broker-dealers under SEC and FINRA rules. By contrast, AALU's comment letter to the SEC pointed out in detail a variety of areas in which the regulatory regime applicable to broker-dealers is far superior to that applicable to investment advisers, including: the level of regulatory oversight and examinations; the legal requirements for internal supervision programs; the specific liability of supervisors, which is designed to assure that they vigorously supervise the activities of those subject to their supervision; the qualification requirements for salespersons/advisers and supervisors; requirements for training and continuing education; and the nature and totality of the regulatory requirements in furthering effective programs of supervision and oversight to protect retail customers.

If the goal of imposing upon financial intermediaries any legal duty – fiduciary or otherwise – is anything other than to create liability for the intermediary, it should be to protect investors through assuring appropriate broker and adviser conduct. Regulation should provide appropriate and effective guideposts. In other words, regulation should provide clear rules of conduct, from which a financial services organization can develop training for its employees, supervision of their conduct, procedures to achieve compliance, and measures by which they can audit their conduct. Regulators then can examine and measure financial services professionals against these rules and assess for compliance. Thus, the regulations should be (1) clear and understandable to the financial professionals to whom they apply; (2) capable of being measured and monitored by supervisory personnel who are held accountable for compliance (and which are, in fact, monitored by supervisory personnel); and (3) capable of being audited and enforced by regulators. This is the model FINRA follows. It is not the Advisers Act model, where the broad, amorphous fiduciary standard of conduct has evolved essentially from case law and SEC enforcement actions.[18]

Investor Confusion Can, and Should Be, Addressed More Effectively

The SEC Staff Study report's recommendation rests its conclusion about the need for a uniform fiduciary duty solely on concerns about investor confusion as to the specific legal duties of brokers, dealers, and investment advisers. The report focuses on a 2008 report by the RAND Institute for Civil Justice (RAND Report)[19] based upon a survey of investor and industry

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[17] *See* Statement by SEC Commissioners Kathleen L. Casey and Troy A. Paredes Regarding Study on Investment Advisers and Broker-Dealers, Jan. 21, 2011, *available at* http://www.sec.gov/news/speech/2011/spch012211klctap.htm.

[18] *See SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963). *See also Transamerica Mortgage Advisers v. Lewis*, 444 U.S. 11, 17 (1979).

[19] *See* Angela A. Hung *et al.*, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, RAND Institute for Civil Justice, *available at* http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

perspectives on the role of broker-dealers and investment advisers. The RAND Report summarized its findings as follows:

> Overall, we found that the industry is very heterogeneous, with firms taking many different forms and offering a multitude of services and products. Partly because of this diversity of business models and services, investors typically fail to distinguish broker-dealers and investment advisers along the lines that federal regulations define.[20]

However, the RAND Report did not identify particular investor harm that occurred as a result of the confusion. Indeed, the RAND Report found:

> Despite their confusion about titles and duties, investors express high levels of satisfaction with the services they receive from their own financial service providers.[21]

AALU members believe our customers fully understand the role in which our members operate. Indeed, if there is any concern about the current level of disclosures, we believe many customers feel buried under the weight of required disclosure and account-related documents. Nonetheless, we support efforts, such as FINRA's Notice 10-54, to develop better and clearer disclosure for customers of broker-dealers.[22] Indeed, we believe the FINRA process offers the potential to give thoughtful consideration to the types of disclosures that investors would find most useful in making investment decisions and to simplify the information most relevant to consumers. For example, FINRA seems to be aiming for a simple document provided at the beginning of a customer relationship, with information about the roles, conflicts and services provided by a broker-dealer.

On this issue, the RAND Report also offers some critical insight. It referenced the "questionable value of disclosures" and reported that a majority of those interviewed by RAND's researchers expressed the view "that disclosures do not help protect or inform the investor, primarily because few investors actually read the disclosures."[23] Not surprisingly, many participants in the survey apparently complained, "[t]he way [disclosures] are written is not easily understandable to the average investor, and the information in disclosures is not sufficient."[24] Of course, we know that both the SEC and FINRA have heard this complaint year after year, over many decades, and yet regulators to date have not written the kind of rules that

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[20] *Id.* at xiv.

[21] *Id.*

[22] *See* FINRA Notice 10-54, *Disclosure of Services, Conflicts and Duties* (Oct. 2010) *available at* http://www.finra.org/Industry/Regulation/Notices/2010/P122361; Comment Letter from David J. Stertzer, Chief Executive Officer, Association for Advanced Life Underwriting, File No. 4-606, Aug. 30, 2010, *available at* http://www.sec.gov/comments/4-606/4606-2631.pdf.

[23] *See* Angela A. Hung *et al.*, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, RAND Institute for Civil Justice, at 19, *available at* http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

[24] *Id.*

would facilitate the type of simple, brief, "plain English" disclosures investors want and need. We believe this underscores the need for FINRA, together with the SEC, to develop and implement investor testing and investor education as part of the process of developing any new disclosure rules in this area.

Studies that (1) reflect investor confusion over legal duties that apply to financial professionals but also (2) show investor satisfaction about their own financial services provider point clearly to the need for more effective disclosures and investor education, not the need for wholesale changes in the legal standards.

In fact, the need for the SEC to gather additional data before considering major changes in SEC regulation of broker-dealers—such as changing current standards for broker-dealers to an investment adviser-type standard—is essential and vital, given current investor choices and behavior. According to a broad-based nationwide study by Oliver Wyman in October 2010, 95% of investing households surveyed utilize commission-based brokerage accounts to meet their needs, while only 5% of households use a fee-based advisory platform.[25]

Need to Address the Investment Adviser Inspection Gap

We believe the SEC, in its advocacy for a uniform fiduciary duty almost to the exclusion of other, more pertinent reforms, has misplaced priorities. The first step in protecting investors has to be to assure they are well informed. They need to be informed about the role in which a financial services professional operates. They should be informed about who regulates them and when they were last inspected by a regulator. They need to understand what their rights are if there is a dispute with the financial services professional. They need to understand conflicts of interest. The SEC should review current disclosures and consider changes where they believe disclosures are lacking as a first step.

Moreover, if investor confusion is to be the basis for new regulation, we submit that few investors understand that if their financial services professional is a registered broker-dealer, it is supervised by the SEC, FINRA, and state securities regulators, and likely is inspected approximately once every two years, but if the investor's financial service professional is a registered investment adviser it may be inspected only once every 10 years, according to the SEC's own budget projections.[26] Broker-dealers also employ significantly more internal resources, programs and procedures to comply with their responsibilities under Commission and FINRA rules, compared to investment advisers – a difference in regulatory requirements we also believe is unknown to most investors, who arguably would express concern if surveyed on this point. The level of internal broker-dealer resources committed to compliance, together with the industry's financial support of FINRA for its oversight of broker-dealers, is a significant multiple of government and private sector resources devoted to compliance on the investment adviser

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[25] Oliver Wyman, "*Standard of Care Harmonization, IMPACT Assessment for SEC* (October, 2010), at 4, *available at* http://www.sifma.org/WorkArea/DownloadAsset.aspx?id=21999.

[26] *See supra* note 7.

side. Yet we have been struck by the fact that neither the SEC nor fiduciary advocates have treated this issue of investor lack of knowledge with the same urgency as their campaign to impose a fiduciary duty on brokers. Commissioner Walter in her dissent to the SEC staff study under Section 914 made a strong case that the SEC's inspection program for investment advisers has significant gaps and that designating an SRO, which presumably would be FINRA, may be the only approach which can solve the problem.

AALU supports Chairman Bachus, Chairman Garrett, and this Subcommittee in focusing on the SEC staff study under Section 914, Enhancing Investment Adviser Inspections. The SEC's focus on a uniform standard of conduct has been a diversion from the need to address the disparity in regulatory oversight and inspections of broker-dealers and investment advisers and investors' expectation gap that registered investment advisers are subject to the most effective oversight. As the Commission is aware, some of the most dramatic failures in recent years on the retail brokerage/adviser side were not a result of the lack of rules governing financial professionals or the lack of a "fiduciary duty" of malefactors, but a failure of regulatory oversight.[27]

No standard of care is effective without a mechanism to monitor and enforce its application. The Commission and other regulators and self-regulatory organizations already devote the clear majority of their oversight and inspection resources to broker-dealers. An investment adviser who is compensated based on assets under management or fees for services and time can be just as likely to make an inappropriate recommendation to garner more assets as any commission-based broker. Devoting limited Commission resources to imposing a uniform standard of conduct for brokers, dealers and investment advisers should be considered only if and when the oversight, inspection, and supervision gap between broker-dealers and investment advisers is sufficiently addressed.

Imposing a broad, vague fiduciary duty on broker-dealers would provide no increase in investor protection

While under certain circumstances (such as when a broker has discretionary authority over a customer's account) a broker may be held to the legal standard of a "fiduciary," we believe Advisers Act regulation or a broad fiduciary duty standard has not provided superior investor protection for customers of investment advisers and would not provide a measurable increase in investor protection for retail customers of broker-dealers. In contrast, a regime for

[27] *See, e.g., SEC Charges Bernard L. Madoff for Multi-Billion Dollar Ponzi Scheme,* SEC Press Release 2008-293, Dec. 11, 2008, *available at* http://www.sec.gov/news/press/2008/2008-293.htm, and the SEC Complaint and Orders referenced therein. *See also SEC Charges R. Allen Stanford, Stanford International Bank for Multi-Billion Dollar Investment Scheme,* SEC Press Release 2009-26, Feb. 17, 2009, *available at* http://www.sec.gov/news/press/2009/2009-26.htm; and the SEC complaint and Litigation Release No. 20901 referenced therein. *See also* David Stout, *Report Details How Madoff's Web Ensnared S.E.C.*, N.Y.TIMES, Sept. 2, 2009, *available at* http://www.nytimes.com/2009/09/03/business/03madoff.htm; Zachary A. Goldfarb, *SEC Suspected R. Allen Stanford of Ponzi Scheme 12 Years Earlier, Report Says*, WASH. POST, Apr. 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604891.html.

advisers that more closely resembles that for brokers and dealers would likely benefit retail customers, in view of the specificity of the rules and the strong examination program resulting from FINRA oversight.

For variable life insurance products sold by licensed insurance agents in particular, which are among the most highly-regulated products sold by the most highly-regulated financial services professionals, nothing under the Advisers Act regulatory scheme compares to the comprehensive and robust customer protections already in place: comprehensive due diligence with respect to the customer's needs and financial capacity; suitability assessment relating to both annuity and investment products; disclosures to customers about the investment product; transaction-by-transaction review and approval by the carrier/issuer; immediate and transaction-by-transaction review of each transaction by a broker-dealers' securities principal; and meaningful and effective oversight by as many as four different levels of regulators (and often involving multiple regulators at the state level). While we do not believe AALU members' clients are confused about the insurance producer's role and any potential conflicts, the SEC does not need to look to the Advisers Act or to a newly-created "best interest" standard under Dodd-Frank to address any confusion, should it be identified. The Commission and FINRA have ample other authority (authority existing both prior to and after enactment of Dodd-Frank) to require additional disclosures by brokers to their customers.

Even beyond highly regulated variable products, as discussed above, the Commission/FINRA regulatory and oversight regime for brokers and dealers – which is highly specific, proactive, capable of being monitored by supervisors (and is, in fact, monitored) and capable of being audited by regulators (and is, in fact, regularly audited by regulators) is superior to current regulation of investment advisers. In fact, we believe investors, if fairly surveyed, would choose a regime which provides specific rules of conduct to guide financial professionals, imposes liability upon supervisors for failing to meet robust supervisory requirements, and provides for periodic and robust regulatory oversight, over a regime in which a financial professional may have a legal "fiduciary" obligation but operates under the assumption that a regulator may audit its activities only once every 10 years. We believe any shift in regulation should be toward moving advisors in the direction of the more specific regulatory regime of broker-dealers to supplement the Commission's current inadequate regime for investment advisers. The comparative benefits of the broker-dealer regulatory and oversight regime over the current regime for investment advisers have been amply demonstrated.[28]

[28] Indeed, the SEC Staff Study report acknowledges the superior nature of broker-dealer regulation in a number of areas, particularly with regard to the lack of SEC substantive review of investment advisers' applications and lack of federal or SRO licensing and educational requirements for persons associated with investment advisers, but states that reforms to bring investment advisers up to the level of broker-dealers in these areas are not feasible at this time due to SEC resource constraints. *SEC Staff Study* report at 136-138.

Imposing an Advisers Act fiduciary duty standard or "best interest" standard could harm investors by reducing customer choice and access to financial services

The concept of "fiduciary duty" addresses the age-old agent monitoring problem (the lack of a principal's control over, and inability to continuously monitor, its agent) by imposing various duties and obligations enforced through the courts. The elements of the duty are principles-based, not rules based, and the duty is, by its very nature, after-the-fact liability creating.[29]

Many of our members operate under the implied fiduciary duty of the Advisers Act and under certain specific rules adopted by the Commission under the Advisers Act. But a general fiduciary standard is inappropriate as applied broadly to sales of securities products where the broker does not hold himself/herself out as an investment adviser and does not exercise discretionary authority. It is particularly inappropriate for bundled, self-contained products like variable life and variable annuities, which come pre-assembled with several investment choices and separate contractual guarantees from the issuer such as guaranteed death benefits and lifetime income guarantees. The range and features of these products makes it difficult to determine which product is "best" and, under a "best interest" standard, almost certainly would lead to increased litigation. Our members have a long history of being able to determine suitability – and we operate under FINRA and state insurance regulators' enhanced suitability standards for these products. However, determining what is "best" would be a highly subjective determination, opening a producer to second-guessing and liability, often years after the sale of a product.

- Is the best product in a rising market the one that is most aggressively allocated to equities? Some would argue that is the case.
- But, could the best product for the client that dies three years into the contract be the one with the highest death benefit?
- In a prolonged depressed equity market, is the product with the best income guarantee the most favorable to the client?

[29] At a May 4, 2010 Senate Judiciary Subcommittee hearing, Professor Larry E. Ribstein, Associate Dean of the University of Illinois College of Law and an expert on fiduciary law, testified that "fiduciary duty is one of the most amorphous concepts in the law" – a concept developed through case law, predominantly at the state level. He stated that imposing such a duty "would result in massive uncertainty" and pointed to the lack of clarity after more than 40 years of litigation over the fiduciary standard in section 36 of the Investment Company Act, as well as the "ill-defined duty for investment advisers." At that same hearing, J.W. Verret, Assistant Professor of Law, George Mason University, testified about the difficulty of applying a fiduciary duty standard: "[U]nder a fiduciary standard and after the fact, it is too tempting to decide whether a decision was fair at the time it was made in light of how the investment ultimately performs." He noted, "[I]n administering fiduciary duty laws, it is nearly impossible to avoid being influenced by the perfect vision of hindsight." *See* transcript of Senate Hearing 111-835, Wall Street Fraud and Fiduciary Duties: Can Jail Time Serve as an Adequate Deterrent for Willful Violations?, *available at* http://judiciary.senate.gov/resources/transcripts/111transcripts.cfm.

- Which is the best product for clients when there are tradeoffs, such as one product with fewer investment choices and lower costs and another with higher charges but a wider range of investment choices?

The SEC Report Staff Study report says nothing about whether the staff considered how its proposed best interest test would apply to these products.

Thus, we believe the imposition of a broad new "best interest" or fiduciary duty standard inevitably will lead to uncertainty and litigation. In our view, this will influence many life insurance producers to withdraw from the sale of these products and reduce investor access to them.

Conclusion

AALU believes the current legal and regulatory standards of care for brokers and advisers are fundamentally sound and recognize the importance of delivering a range of choices to customers based on needs and costs. Well-publicized abuses and failures that led to the recent financial reform effort have not been related to the standards of care for brokers, dealers and advisers. Indeed, where there have been abuses and scandals, they in large part have been due to the failure of vigorous regulatory oversight and enforcement of existing standards, and not any identifiable weaknesses in the standards themselves. This problem will remain regardless of any changes to the standard. As a result, the focus should be on the process of ensuring that the standard appropriate to a defined customer relationship is met.

We also believe the issue of investor confusion is somewhat misdirected. There exist many choices and options in accessing financial services that may be "confusing" to customers without their becoming educated beyond their desire. Yet, these differences in product choices, costs and services are fundamental to a delivery system that allows people across all wealth and income levels to access the benefits of financial services in some form. The solution is not to eliminate potential confusion through homogenization, but to ensure understanding of the standard selected to meet their needs and the role in which a financial professional is serving them. We urge this Subcommittee to focus the SEC on what should be its real priority in protecting retail customers of financial professionals – assuring that investment advisers who hold themselves out as "fiduciaries" to their customers are effectively reviewed, at the same level of scrutiny as broker-dealer applicants, before they enter the business at all, and that they are inspected with the same level of intensity and frequency as broker-dealers.

We greatly appreciate the opportunity to testify in this important hearing. AALU looks forward to continuing to work with this Subcommittee on these critical issues.

Statement of Terry Headley
President, National Association of Insurance and Financial Advisors

House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011

Good morning Chairman Garrett, Ranking Member Waters, and members of the Subcommittee. My name is Terry Headley, and I am the president of the National Association of Insurance and Financial Advisors (NAIFA). For the past 38 years I have been a financial advisor, registered representative and investment adviser representative with the Principal Financial Group. In 1982, I formed Headley Financial Group, a special market development office of Principal located in Omaha, Nebraska, which focuses on the small-to-medium business market, personal markets, and the estate and retirement planning markets. I have spent my career helping "main street" investors achieve their financial goals, and I appreciate the opportunity to appear before you today to share NAIFA's views regarding the regulation and oversight of broker-dealers and investment advisers.

My testimony will focus primarily on two regulatory issues of interest to NAIFA's members: The first concerns a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities and retirement accounts to retail customers. Both the Securities and Exchange Commission (SEC or the Commission) and Department of Labor (DOL) have indicated they will promulgate regulations imposing a single, uniform fiduciary standard of conduct on both broker-dealers and investment advisers. Our primary concern is that such regulations not adversely impact the ability of middle-market investors' to receive personalized investment advice and other important services from their financial advisors. The second issue I will discuss today is NAIFA's belief that the Financial Industry Regulatory Authority (FINRA) should serve as the self-regulatory organization (SRO) to conduct periodic examinations of SEC-registered investment advisers. It is clear to us that this would be the most effective, cost-efficient approach to regulating the examination of investment advisers.

NAIFA Members and their Regulatory Environment

NAIFA comprises more than 600 state and local associations representing the interests of 200,000 members and their associates nationwide. NAIFA members focus their practices on one or more of the following: financial advising and investments, annuities and life insurance, and employee benefits. NAIFA is the nation's largest financial services membership association and seeks to ensure that middle-market investors continue to have access to professional services and advice and have a choice of financial products that meet their financial needs and objectives.

Virtually all NAIFA members sell life insurance. In addition, nearly two-thirds of NAIFA members are licensed as registered representatives of broker-dealers ("Registered Representatives") to sell securities to their clients (primarily mutual funds and/or variable annuities). Of our members who deal in securities, 41% are "dually-registered" as Registered Representatives and investment adviser representatives for their corporate Registered Investment Adviser (RIA). Two-thirds of all NAIFA members, and 93% of our dual-registered members, provide retirement planning services.

Community-based NAIFA members, many of whom are small business owners, provide affordable financial services to middle-market investors. The clear majority of NAIFA members' clients have household incomes of less than $100,000, and a sizable percentage of our members' clients have less than $50,000 invested in the financial markets. NAIFA members who engage in securities activities are subject to significant compliance and regulatory requirements that provide an abundance of ongoing investor protection through vigorous enforcement of various rules imposed by the SEC and FINRA and, in turn, implemented by broker-dealers. Because our members are also licensed insurance professionals, they must also adhere to comprehensive regulations imposed by the various state insurance departments. As a result of these multiple regulatory layers, NAIFA members are among the most comprehensively regulated individuals in the financial services industry. For this reason, we are urging policymakers to consider carefully the impact any new regulations would have on middle-market investors and the NAIFA members who serve them.

I cannot emphasize enough that the investors that NAIFA members serve every day are middle-market investors who rely on the honest, trustworthy guidance of their financial advisors to help manage risk and plan for retirement. Without the personalized advice from financial professionals who have earned their trust over many years of service, these investors would be forced to utilize impersonal, "one-size-fits-all" advice from firms that do not tailor their advice to the specific needs of individual clients. NAIFA members, on the other hand, develop and maintain long-term relationships of trust with their clients. NAIFA members are Middle America and serve Middle America. Because they must take the time to get to know and understand their clients' personal and financial goals, our members are able to offer a broad range of services that middle-market investors truly need and value.

SEC Recommendation to Create a Uniform Fiduciary Standard of Care

Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) required the SEC to conduct a study (the "Study") to gather necessary information to evaluate whether a uniform standard of care would be sound policy. Section 913(c) specified 14 issues the Commission had to consider in conducting the Study, including:

- The effectiveness of existing legal or regulatory standards of care for broker-dealers and investment advisers for providing personalized investment advice and recommendations to retail customers;

- Whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for broker-dealers and investment advisers;

- Whether the existence of different standards of care applicable to broker-dealers and investment advisers is a source of confusion for retail customers regarding the quality of personalized investment advice that retail customers receive;

- The substantive differences in the regulation of broker-dealers and investment advisers, when providing personalized investment advice and recommendations about securities to retail customers;

- The potential impact on retail customers, including the potential impact on access of retail customers to the range of products and services offered by broker-dealers, of imposing upon broker-dealers the investment advisers' standard of care for providing personalized investment advice about securities to retail customers of investment advisers, as interpreted by the SEC and the courts;

- The varying level of services provided by broker-dealers and investment advisers to retail customers and the varying scope and terms of retail customer relationships of broker-dealers and investment advisers with such retail customers;

- The potential impact upon retail customers that could result from potential changes in the regulatory requirements or legal standards of care affecting broker-dealers and investment advisers, including any potential impact on access to personalized investment advice and recommendations about securities; and

- The potential additional costs and expenses to (a) retail customers regarding, and the potential impact on the profitability of, their investment decisions, and (b) broker-dealers and investment advisers resulting from potential changes in the regulatory requirements or legal standards affecting broker-dealers and investment advisers relating to their obligations, including duty of care, to retail customers.

This past January, the SEC staff released that Study, which recommended creating a common fiduciary standard of care for broker-dealers and investment advisers. Significantly, the Study found that investors "generally were satisfied with their financial professionals."[1] The staff recommendation for a uniform fiduciary standard of care is not premised upon investors being *disserved* by the current standards, but rather investors being *confused* by the current standards.[2] NAIFA supports clarification to ensure client understanding of the different rules and business models of investment advisers and broker-dealers; however, any clarification or modification to the standard of care applicable to broker-dealers should not come at the cost of

[1] SEC Staff Study, Study on Investment Advisers and Broker Dealers (Jan. 2011), *available at* http://www.sec.gov/news/studies/2011/913studyfinal.pdf. at pg. V.
[2] *Id.* ("Many retail investors and investor advocates [stated] that retail investors do not understand the differences between investment advisers and broker-dealers or the standards of care applicable to broker-dealers and investment advisers.")

decreasing investors' satisfaction with or access to their financial professionals. Thus, if the SEC is intent on developing a uniform standard of care for both broker-dealers and investment advisers, it is imperative that the SEC must first examine *whether* a uniform standard can be imposed in a manner that does not decrease investors' satisfaction with or access to financial professionals.

In considering the Study's recommendation of a fiduciary standard for broker-dealers, it is important to note that the plain language of section 913 makes clear that any uniform fiduciary duty that is ultimately promulgated by the SEC be "no less stringent than" the general fiduciary duty currently applied to investment advisers, and need not be the *same* standard as is currently applied to investment advisers. In addition, Dodd-Frank appropriately includes exceptions providing that broker-dealer commission compensation and the sales of proprietary products would not automatically violate a possible uniform standard.

Dodd-Frank recognized that broker-dealers provide different professional services and operate under different business models than investment advisers. While broker-dealers primarily sell products to investors and offer routine financial advice incidental to the sale of such products, investment advisers primarily manage portfolios and engage in providing more comprehensive financial advice. Indeed, if Congress intended the SEC to duplicate the Advisers Act standard and apply it to broker-dealers, it could have simply repealed the current broker-dealer exemption found in the Advisers Act– an approach Congress rejected. Any new standard contemplated by Congress or regulators should recognize and adapt to the differences between broker-dealers and registered investment advisers or else risk adverse, unintended consequences – namely, limiting the products and services available to middle-market investors.

Simply applying the existing investment adviser fiduciary standard to broker-dealers would not be appropriate. For one thing, the Advisers Act was not designed to regulate broker-dealer activity. More specifically, it was not designed to apply to the incidental advice broker-dealers and their representatives routinely offer to their clients. Further, the case law regarding investment advisers' fiduciary duty was developed in the context of a business model that is inapplicable to broker-dealers. If the fiduciary duty applicable to investment advisers is imposed on broker-dealers without accounting for the different business models and clientele of each respective profession, the case law—to say nothing of SEC guidance documents—could be misinterpreted and misapplied in a number of ways that would disadvantage the broker-dealer business model with no corresponding benefit to middle-market investors.

There are further adverse, unintended consequences that would result from the application of the current investment adviser fiduciary standard to broker-dealers. Because broker-dealers would be forced to adjust their operations and compliance programs to an additional regulatory framework, fewer clients would ultimately receive professional service and advice. As compliance costs and the potential for liability increases, it would become economically unfeasible for financial professionals to work with less affluent clients.

NAIFA members on average report that approximately 58% of their clients earn less than $100,000 in household income per year, while just 11 percent earn an average of $250,000 per

year.[3] NAIFA members serve these middle-market clients despite substantial regulatory burdens. Broker-dealers and their Registered Representatives today devote considerable time and resources to complying with numerous federal and state regulations. They have an obligation to recommend only those investments and overall financial strategies that are suitable for their clients.[4] The suitability requirements compel a Registered Representative to have an "adequate and reasonable basis" for any recommendation that he or she makes. Whether a recommendation is "reasonable" relates to the specific securities or strategies recommended, and Registered Representatives are further obligated to determine "customer-specific" suitability, taking into account every client's particular financial situation, needs, and other security holdings. NAIFA members have an obligation to investigate and obtain comprehensive information about their clients' unique circumstances in determining the courses of action they recommend.

Thus, a wholesale application of the current Advisers Act duty to broker-dealers would negatively impact product access, product choice, and affordability of customer services for those consumers who are most in need of these services. This concern is borne out by data NAIFA has collected over the past year.[5] An analysis of two surveys—one involving consumers and the other NAIFA members—shows that consumers with household incomes in the middle-market range represent a core client base for NAIFA members. If a universal fiduciary standard of care is imposed, many members would be forced to discontinue providing many of these important services to middle-market clients. As mentioned above, 58% of NAIFA members' clients average less than $100,000 in household income per year. According to the survey, which polled more than 3,300 NAIFA members, most members involved in securities activities are concerned that the additional regulatory requirements and potential legal implications of a fiduciary standard could significantly increase their compliance costs. If costs were to go up by 15 percent, 65 percent of our members said they would need to take actions that would limit their client's access to financial advice. For example:

- 31 percent say they would limit their practice to affluent clients only;
- 20 percent would not offer securities to their clients;
- 14 percent would increase fees for their clients;

Any such results would not be in the best interests of investors, and certainly would not further the regulators' goal of enhancing consumer protections. It is crucial that middle-market investors be able to obtain personalized financial advice so they can plan adequately for their futures. Without their financial advisors, many investors would have nowhere to turn when they need reassurance in a shaky market, assistance in rebalancing their portfolios, or understanding the investment choices available. NAIFA is concerned that the SEC Study unduly discounts the risk that the additional regulatory burdens imposed on financial professionals by the Study's recommendations could result in investors having fewer broker-dealers and investment advisers

[3] Jim Mitchel & Shannon O'Keefe, 2010 NAIFA Survey Report (Nov. 2010) (on file with NAIFA)

[4] The concept of "suitability" appears in specific SRO rules, such as NASD Rule 2310 (updated in FINRA proposed rules 2090 and 2111) and FINRA Rule 2330, and has been interpreted to be an obligation under the antifraud provisions of the federal securities laws.

[5] Jim Mitchel & Shannon O'Keefe, 2010 NAIFA Survey Report (Nov. 2010) (on file with NAIFA)

to choose from, having less access to products and services, and having to pay more for the services they do receive.

In recommending the adoption of a new uniform fiduciary standard, the Study not only discounts the very real possibility of these negative consequences, but does not adequately articulate or substantiate the problems that a uniform fiduciary standard would solve. The Study does not claim that retail investors are systematically being harmed or disadvantaged under the fiduciary or suitability standard, and therefore it lacks a basis to conclude that a uniform standard or harmonization would enhance investor protection. NAIFA supports efforts to determine if problems exist and wants to be part of the dialogue on how best to fix any identified problems. We are however concerned that proceeding down a regulatory path without a stronger empirical and analytical foundation could lead to the unintended consequences described above.

For these reasons, NAIFA urges the members of the Committee to encourage the SEC to more thoroughly consider the impact that an SEC-imposed uniform fiduciary standard would have on middle class Americans' access to sound financial advice. We agree with former Commissioner Casey and Commissioner Paredes that further analysis of investor returns (controlling for risk and investor characteristics) generated under the two existing regulatory regimes would be fruitful, as would a survey of investors to obtain a general overview of the characteristics of investors who invest through a broker-dealer as compared to those who invest on the basis of advice from an investment adviser. Finally, should the Commission impose a uniform fiduciary duty, it must account for the unique attributes of the broker-dealer business model, provide new guidance documents for industry, and be sufficiently clear and comprehensible so broker-dealers can adjust their business practices with minimal disruption. This should include, for example, a clear definition of "personalized investment advice" so broker-dealers (and their customers) adequately understand their legal responsibilities and obligations, as well as clear guidance regarding disclosure that would satisfy the uniform fiduciary standard of guidance. Further, any new disclosure should be informed by investor testing, which is required by Section 912 of Dodd-Frank when the SEC is developing new rules.

Department of Labor Proposed Rule to Redefine "Fiduciary" in Retirement Savings Marketplace

On a separate but related issue, the Department of Labor (DOL) has issued proposed regulations that would expand the definition of "fiduciary" for purposes of ERISA and parallel provisions in the tax code. Under current law, individualized investment advice only makes a person an ERISA fiduciary if there is a mutual understanding between the parties that the advice will also be provided on a regular basis for a fee. The new proposal eliminates the contractual concept of mutual agreement and presumptively makes anyone who gives personalized investment advice, if any affiliate gets paid in connection with the advice, an ERISA fiduciary.

Being an ERISA fiduciary is not the same as the Investment Advisers Act concept of fiduciary. "Best interest of the client" is not enough—advice must be solely in the client's interest. More concretely, a fiduciary and affiliates cannot receive commissions, bonuses, or other forms of variable compensation without special permission from the DOL in the form of a prohibited transaction exemption. These PTE's, as they are called, come with a host of

conditions and regulatory requirements. Thus, ERISA fiduciary status is more restrictive than any uniform fiduciary standard that we expect the SEC might devise. Moreover, the restriction on the receipt of commissions is inconsistent with the provisions of Section 913 of Dodd-Frank, which specifically provides that receipt of a commission by a broker-dealer cannot, in and of itself, violate a fiduciary standard.

Though it is highly restrictive and though Congress has passed no law encouraging the DOL to reexamine a definition that has been in place throughout ERISA's 36-year history, the DOL is proposing to vastly expand the universe of employee benefit plan service providers who will be fiduciaries. Even more radically, they are proposing the definition apply to advice given in the IRA market, even though IRA owners are retail investors not locked into their service providers as employee benefit plan participants are, and IRAs are subject only to tax code requirements; the DOL does not have direct enforcement authority over these accounts. NAIFA is gravely concerned that, without changes, the DOL proposal will not only raise costs and restrict access to retirement savings advice and education, but also wipe out the broker-dealer model of investing in IRAs.

Several weeks ago, in a hearing in the Health, Employment, Labor and Pensions subcommittee of Education and Workforce, Assistant Secretary of Labor Phyllis Borzi stated that the DOL's proposed definition of "fiduciary" would force the retirement savings marketplace to create a new business model, and yet she could not elaborate on what this new model would look like, or what the costs would be to investors and small businesses. She could not quantify the problem that this change is supposed to address. She has repeatedly indicated that revisions to the proposal need to be made, and new PTEs will be required to make it work, yet the DOL has not put these revisions and new PTEs out for public comment. Though there are legitimate reasons for reexamining a 36-year-old regulation to see if it still works in today's marketplace, there is no reason to rush through a radical change without even giving the public an opportunity to comment on the full picture.

The new DOL restrictions on retirement investment advice are also likely to cause serious confusion for investors and advisers potentially faced at the same time with new and inconsistent SEC fiduciary standards. A middle-market investor who calls her Registered Representative for investment suggestions likely will not understand why the adviser can only give specific recommendations for non-retirement accounts; she will likely be confused, frustrated, or even angry if she asks "maybe I should put some of my IRA funds in that investment too?" and the adviser says "I can't answer that." Since the SEC process at least has Congressional authorization, the DOL should wait until the SEC completes its consideration of the fiduciary issue and then reassess whether there are substantial regulatory gaps that would support a change to the ERISA regulations. And at a minimum, the DOL should re-propose a revised rule along with all associated PTEs so the public has the opportunity to assess and comment on the full picture.

FINRA Examination of SEC-Registered Investment Advisers

In response to a directive in section 914 of the Dodd-Frank Act, the SEC earlier this year issued a staff study (the "Adviser Study") about enhancing the investment adviser examination

process. The Adviser Study recognizes that in the past 6 years the number of SEC-registered investment advisers has increased, but the resources dedicated to adviser examinations have decreased. Recognizing this fact, the staff Adviser Study offered three possible solutions for Congress to consider: authorize one or more SROs to examine advisers; impose user-fees on advisers to fund SEC exams; or authorize FINRA to examine dual-registered advisers.

NAIFA supports reasonable examinations to ensure that financial professionals are complying with the law. Statistics have made it very clear that investment adviser examinations are not occurring with sufficient frequency—on average, SEC-registered investment advisers are examined approximately once per decade. NAIFA believes the most efficient, cost-effective answer is to authorize FINRA to conduct all examinations of SEC-registered investment advisers. Because virtually all NAIFA members who are registered investment advisers are already subject to comprehensive broker-dealer regulations as well, authorizing FINRA to examine SEC-registered investment advisers will be the most efficient option for dual-registered NAIFA members.

FINRA is already subject to SEC oversight, and it would clearly be more efficient and effective for FINRA to expand its current, substantial examination capabilities to cover RIAs than it would be to establish new SROs or significantly increase SEC exam programs. According to the Adviser Study, FINRA examined 57 percent of its broker-dealer members in 2008, and it examined 54 percent of its members in 2009.[6] The SEC's Office of Compliance Inspections and Examinations, by contrast, examined 9 percent of investment advisers in 2010, a 29.8% rate of decrease since 2004.[7] With its current budget stretched thin and future appropriations uncertain, adding additional responsibilities to the Commission makes no sense when a perfectly capable entity like FINRA already exists. Moreover, adding to SEC duties would be antithetical to Congressional and Administration efforts to avoid imposing unnecessary regulations on the business community. Authorizing FINRA to conduct all RIA examinations is a common-sense solution to a solvable problem.

Pursuant to a request in Chairman Garrett's invitation letter for this hearing, we have reviewed draft legislation enclosed with the letter which would amend the Investment Advisers Act to establish an application and registration process for "National Investment Advisers Associations" (NIAA). NIAAs would examine investment advisers and, when circumstances warrant, discipline them for violations of SEC and relevant NIAA standards. The draft legislation also provides a framework for the registration and SEC oversight of NIAAs generally similar to that applicable to broker-dealer self-regulatory organizations under section 19 of the Securities and Exchange Act. While NAIFA has not had time to formulate a position on the various parts of the draft, we believe it moves in the right direction and provides a useful basis for further discussion and consideration. We look forward to working with the Subcommittee on this important matter.

Conclusion

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[6] SEC Staff Study, *Study on Investment Advisers and Broker Dealers* (Jan. 2011), *available at* http://www.sec.gov/news/studies/2011/913studyfinal.pdf, at pg. 30.

[7] SEC Staff Study, *Study on Investment Advisers and Broker Dealers* (Jan. 2011), *available at* http://www.sec.gov/news/studies/2011/913studyfinal.pdf, at pg. 14.

At NAIFA we realize that there are many complexities associated with regulating and overseeing broker-dealers and investment advisers. We appreciate the opportunity to share our views with you today on issues that we view as critical to ensuring all investors are both protected and have access to competent financial advice and services. At a time of increased economic uncertainty, investors need access to trustworthy financial professionals they can rely on. We welcome the opportunity to assist you in any way that we can.

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Testimony of Steven D. Irwin

Pennsylvania Securities Commissioner and

Chairman, Federal Legislation Committee

North American Securities Administrators Association, Inc.

Before the

House Subcommittee on Capital Markets and Government Sponsored Enterprises

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011

Good morning Chairman Garrett, Ranking Member Waters, and members of the Committee, I'm Steve Irwin, Commissioner of the Pennsylvania Securities Commission and Chairman of the Federal Legislative Committee of the North American Securities Administrators Association, Inc. ("NASAA"), the association of state and provincial regulators. I am honored to be here today to discuss the appropriate regulatory oversight of broker-dealers and legislative proposals to improve investment adviser oversight.

State securities regulators have protected Main Street investors from fraud for the past 100 years, longer than any other securities regulator. State securities regulators have continued, more than any other regulators, to focus on protecting retail investors. Our primary goal is to act for the protection of investors, especially those who lack the expertise, experience, and resources to protect their own interests.

The securities administrators in your states are responsible for enforcing state securities laws by pursuing cases of suspected investment fraud, conducting investigations of unlawful conduct, licensing firms and investment professionals, registering certain securities offerings, examining broker-dealers and investment advisers, and providing investor education programs and materials to your constituents. Ten of my colleagues are appointed by state Secretaries of State, five fall under the jurisdiction of their states' Attorneys General, some are appointed by their Governors and Cabinet officials, and others, like me, work for independent commissions or boards. Many call us "local cops on the securities beat." In fact, in the last two weeks NASAA released its annual list of the top ten most prevalent scams and frauds in the U.S. We announced that con artists are even using social media sites as a means to defraud investors. I think of my state colleagues at NASAA as a national network of local crime fighters working to protect investors.

Securities regulation is a complementary regime of both state and federal securities laws, and the states work closely together to uncover and prosecute securities law violators.

The Distinguished Enforcement Record of the States

States have been the undisputed leaders in criminal prosecutions of securities violators because we believe in serious penalties for securities-related crimes.

In 2010 alone, state securities regulators conducted more than 7,000 investigations, leading to nearly 3,500 enforcement actions, including more than 1,100 criminal actions. Moreover, in 2010, more than 3,200 licenses of brokers and investment advisers were withdrawn, denied, revoked, suspended or conditioned due to state action.

The enforcement actions performed by state securities regulators last year represent a 51 percent increase over the number of investigations reported for the previous year; however, this impressive record builds upon an already strong foundation of regulation at the state level. Indeed, since 2004, state securities regulators have conducted over 14,100 enforcement actions, and secured convictions for securities laws violators resulting in more than 5,600 years in prison.

Traditionally, state securities regulators have pursued perpetrators at the local level who are trying to defraud "mom and pop" investors in your states, leaving the SEC to focus on larger, more complex fraudulent activities involving the securities market at a national level. States have investigated violations on a national level such as the successful state effort to expose and force Wall Street to correct rampant conflicts of interest among stock analysts. We led all regulators on late trading and market timing in mutual funds. And state securities regulators continue to lead the nationwide effort to address problems related to the offer and sale of auction rate securities, an effort that has resulted in the largest return of funds to investors in history; more than $61 billion.

As regulators, states are guided by the principle that every investor deserves protection and an even break, and has the right to not to be cheated or lied to.

Let me now turn to the first of the several topics of today's hearing.

Section 914: Enhancing the Oversight of SEC Registered Investment Advisers

One of the purposes of the Subcommittee's hearing today is to review the Section 914 study and consider steps to improve the oversight of federally regulated SEC-registered investment advisers. As the Subcommittee is aware, Section 914 of the Dodd-Frank Act directed the SEC to study various options designed to improve the agency's oversight of federally regulated investment advisers.

The SEC produced a comprehensive report. The staff made three recommendations to improve oversight of federally regulated investment advisers: 1) authorize the SEC to impose user-fees on SEC-registered investment advisers to fund their examinations; 2) authorize one or more self regulatory organizations (SROs) to examine, subject to SEC oversight, all SEC-registered investment advisers; and 3) authorize FINRA to examine dual broker-dealer and investment adviser registrants for compliance with the Investment Adviser's Act. It is important to note that the SEC report did not consider, or make recommendations regarding, state regulated investment advisers.

State Regulatory Authority Must be Preserved

Currently, the states are the sole regulators of investment advisers with less than $25,000,000 in assets under management, which upon implementation of Dodd-Frank in mid-2012, will increase to $100,000,000.

Oversight of Investment Advisers Should Remain a Government Responsibility

For reasons that I will detail in my testimony, NASAA vigorously opposes creation of a self regulatory organization, or "SRO," for state regulated investment advisers and their associated persons. Moreover, NASAA reiterates its significant and longstanding concerns regarding any effort to establish a self regulatory organization for investment advisers.

NASAA's primary position regarding investment adviser regulation is that it should continue to be the responsibility of state and federal governments, and that these regulators must adequately carry out their responsibilities. When it comes to regulation of investment advisers, government regulators bring to the table decades of experience unmatched by any entity in existence. We see little benefit in constructing a new layer of bureaucracy, with its incumbent expense. If the goal is strengthening investor protection through improvements to the oversight of SEC regulated investment advisers, then the shortest distance to the goal is to ensure that federal regulators are adequately funded and have the resources to properly oversee investment advisers for the protection of main-street investors. Most importantly, government regulators are answerable to our constituents, and not to a Board of Directors.

Given our experience in working directly with various self regulatory organizations, there are numerous issues that must be addressed and resolved before a SRO for SEC-registered investment advisers should even be considered.

NASAA urges Congress not to enact an SRO model for investment advisers; however, in light of the Chairman's discussion draft, which would authorize the SEC to establish a SRO for advisers, NASAA offers the following comments.

Comments on the Chairman's Draft Legislation

First and foremost, it appears that the Chairman's draft would nationalize the regulation of small and mid-sized investment advisers. This would be a significant mistake that does not benefit mainstream investors, nor promote small business interests.

We appreciate the Chairman's desire to enhance regulation for investment advisers, but as we read the Chairman's discussion draft, it would require the small and mid-sized firms to register with the new investment adviser SRO. Small and mid-size investment advisers are primarily located in one state and shifting the regulation of these advisers to a SRO headquartered in Washington, DC would increase costs without substantially enhancing investor protection. This would subject these small businesses to duplicative regulation and add new and unnecessary costs. The members of the association pay the costs of regulation, and small and mid-size advisers should not pay unnecessary fees.

Securities regulators are the local "cops on the beat" and best positioned to be the primary regulator for these small and midsize firms. We are more likely to be visiting the offices in the small towns and cities across America, than the SEC or a large organization headquartered in New York or Washington, DC. Congress recognized this fact when it restored state authority last year over investment advisers with up to $100,000,000 in assets under management.

Let me further address additional key areas of concern with the present SRO structure.

- **Address Conflicts of Interest and Industry Capture**

The existing securities industry SRO model –as typified by FINRA - is replete with conflicts of interest. Members of the industry serve on the SRO's board and occupy other positions of prominence such as serving on various advisory committees.

Even where there is an independent Board of Directors, SROs remain organizations built on the premise of self-rule and are, as a matter of first principle, accountable to their members, not the investing public. Any SRO that depends on its members as its primary funding source faces a heightened susceptibility to industry capture. If FINRA denies an application, or expels a member in an enforcement matter, FINRA loses money. The Section 914 Report made this very observation when it noted that a SRO funded by its members and containing "industry representatives" in its governance structure could have an enhanced susceptibility to industry capture.

No matter how many safeguards are instituted, a SRO has substantial and inherent conflicts of interest that governmental regulators do not. This is particularly true where industry and investor interests' conflict, as in the case of mandatory pre-dispute arbitration clauses and the disclosure or expungement of prior settlements, judgments and investor claims.

As a membership organization, FINRA answers firstly to its members and not to the investing public. Regardless of safeguards that may be put in place, the conflicts will still exist.

- **Remove Barriers Inhibiting Collaboration Between SROs and Government Regulators**

The sharing of information among state and federal regulators is essential to ensuring that investors are protected. Collaboration and cooperation are required for an effective regulatory system. The SRO model brings with it a barrier to collaboration and cooperation in the form of the "State-Actor Doctrine". The term "State-Actor Doctrine' is often used interchangeably with "Government-Actor Doctrine."

The State-Actor doctrine considers whether the conduct or activities of a private party can be considered a "government action," and thus force private entities to comply with the Constitution's due process provision. Because SRO's are private corporations that do not have subpoena power, member firms are required to "voluntarily" cooperate with SRO investigators and provide testimony and documents to a SRO. This has given rise to claims by FINRA that when it cooperates with governmental regulators, by providing information, testimony, or documents related to its members, it is acting as a quasi-governmental actor, or "state-actor." FINRA uses the "state-actor doctrine" as a basis for non-cooperation with state securities regulators, and consistently cites its desire to avoid being labeled a "state-actor" as an excuse to refuse state regulator's requests for investigatory cooperation.

Unfortunately, to avoid a classification as a "government actor," FINRA has restricted the release of information to the government and has affirmatively taken the position that it is prohibited from cooperation with governmental regulators, including the governmental entity responsible for its oversight. As such, it has become increasingly difficult for the governmental regulators to meaningfully control oversight or investigations over registrants subject to the current SRO model.

NASAA is not alone in its recognition of the need for improved collaboration between SRO's and government regulators, or in its contention that the synergy necessary to such collaboration has in recent years broken down.

Indeed, in its recent report mandated by Section 967 of the Dodd-Frank Act, the Boston Consulting Group noted that the relationship between SRO's and government securities regulators has "become strained," and that *"SROs should...allow regulators access to all*

relevant data without making individual requests. This capability would streamline investigations and enforcements relating to broker-dealers."[1]

Congress should refrain from considering expansion of the SRO model until such time as FINRA correctly interprets the state actor issue, or until the issue is adequately addressed by legislation. Settling the question of whether or not FINRA or any other SRO is or is not a "state-actor" is of vital importance to effective regulation.

FINRA's interpretation of the "state actor" doctrine and its legal strategy, however, have had profound practical consequences that Congress must appreciate. Indeed, FINRA's extreme sensitivity to being labeled a state-actor has in some instances precluded it from engaging in basic and vital types of regulatory coordination and information-sharing with state regulators. NASAA has recently undertaken an effort with FINRA in an effort to remediate this issue, however, the underlying "state-actor" issue remains problematic.

FINRA cannot legitimately claim that the mere sharing of information makes it a state actor. By doing so, FINRA is creating an unnecessary regulatory inefficiency that results in a heavy burden on investor protection.

- **Improve Transparency of SROs**

Collaboration issues aside, the regulatory work performed by SROs lacks transparency. SROs are not subject to the Freedom of Information Act (FOIA) or other similar public records requirements, as are state securities regulators and the SEC. Even where there is public disclosure by SROs regarding members, as in the case of *BrokerCheck*, the SRO has placed limitations and filters on regulatory records that far exceed FOIA provisions, and this results in less public disclosure of information than state securities regulators routinely make publically available. The end result is that important information is withheld by the SRO from the investing public.

Without greater transparency, investors cannot obtain the information they need to make informed decisions. In considering the transparency of SRO's, the Boston Consulting Group echoed this view, stating that *"regulators can benefit from better visibility into the surveillance systems and activities conducted by SROs. Bolstering regulators ability to oversee surveillance systems should improve the quality of audits and inspections conducted on SRO surveillance system."*[2]

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[1] The Boston Consulting Group. "U.S. Securities and Exchange Commission Organizational Study and Reform." p. 65. March 10, 2010. Available at http://www.sec.gov/news/studies/2011/967study.pdf
[2] The Boston Consulting Group. SEC Study. p. 238.

- **Enhance Accountability**

Time and experience have demonstrated that SROs simply cannot match the accountability of government regulators, nor the proximity to and familiarity of state regulators with the investment advisers when considering investor protection and regulatory thoroughness.

The challenge of ensuring accountability of a SRO is linked to the question of whether a SRO is a "state actor." If a SRO's rules are viewed as equivalent to federal securities regulations by not being subject to oversight from state securities regulators, they will displace state laws and rules.

States are understandably sensitive to the prospect of federal preemption. The prospect of federal preemption occurring at the whim of a *private corporation* such as FINRA, acting pursuant to its authority as a federally designated SRO, is, for obvious reasons, contrary to the public interest and to basic tenets of democratic society.

In its analysis, the Boston Consulting Group was forceful and direct in its call for improving SRO accountability, stating that, in view of *"the important role SROs play in the governance of securities markets today, it is critical that the SEC maintain a robust level of oversight over their regulatory operations."*[3] The study went on to say that *"the SEC should develop careful guidelines to SROs for overseeing investment advisers and ensure that those guidelines are followed meticulously."*[4]

Notably, the BCG report placed particular emphasis on the need for more accountability in the relationship between the government and the largest SRO – FINRA. Citing FINRA's ongoing efforts *"to further expand the scope of its regulatory activities,"* the BCG report stated flatly that *"the current level of oversight over FINRA should be enhanced."*[5]

In summary, Investment adviser regulation is a governmental function that should not be delegated to a SRO. Even if Congress adopts a SRO model, state securities regulators and the SEC must be maintained as the primary regulators of investment advisers. FINRA should be answerable to the appropriate government regulators, not the other way around, as both a legal matter and as a matter of fact.

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[3] Id. at 237
[4] Id. at 151
[5] Id. at 135

Section 913: Fiduciary Duty

The second purpose of the subcommittee's hearing today is to consider the question of whether the SEC should utilize the authority provided by the Dodd-Frank Act to promulgate rules that would apply the same duty of care to broker-dealers as to investment advisers.

My NASAA colleagues and I believe that financial professionals who provide investment advice ought to be held to the fiduciary duty currently applicable to investment advisers under the Investment Advisers Act of 1940. We are not alone in this belief. In a 2010 survey of investors, 97 percent of investors said that financial professionals who provide investment advice should put the investor's interest first and disclose upfront any fees, commissions or conflicts of interest that may influence that advice.[6]

The arguments against one fiduciary standard ring hollow. These arguments focus on costs, but the focus should be on what is best for investors.

Any increase in compliance costs, which we believe would be minimal, unless a SRO is imposed into the mix, will be greatly outweighed by the direct benefits to investors. Investors who seek and receive advice about securities expect their interests to come first, and they deserve to have their interests come first, not the interests of brokers, since it is the investors money, and not brokers' money.

For example, the strongest opposition to the fiduciary duty standard has come from insurance agents, who receive a full up-front commission for every variable annuity sale. Expensive variable annuities, for example, would be a lot harder to sell if agents were required to disclose their high commissions upfront. Broker-dealers who provide investment advice should be required to disclose similar conflicts of interest -- for example, when they recommend a high-cost product that generates greater commissions for the salesman when a low-cost product with a smaller commission would serve the investor better or just as well.

The §913 Report Got it Right; Now the Commission Should Act

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[6] See "Survey: Vast Majority of U.S. Investors Support Clear "Fiduciary Standard' for Financial Professionals; Widespread Confusion Seen Linked to Current SEC Rules." The research was commissioned by a coalition including AARP, NASAA, and other financial planning professional trade associations, and was submitted to SEC Chairman Shapiro on September 15, 2011. Available at http://www.sec.gov/comments/4-606/4606-2748.pdf

In January, acting under Dodd-Frank §913(g), the Securities and Exchange Commission issued a report on the harmonization of the duty of care required for broker-dealers and investment advisers who provide investment advice to retail customers.

NASAA was very pleased to see the SEC report recommend a "uniform fiduciary standard" for broker-dealers and investment advisers. Specifically, the SEC study recommended rules that would provide for:

> the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.[7]

The investor has spoken, and the facts have spoken. State securities regulators now encourage the SEC to do the right thing and apply the fiduciary duty of the Investment Advisers Act to those who provide investment advice about securities.

State securities regulators have 100 years of experience and expertise to contribute to a cohesive regulatory system, and we welcome the opportunity to work with other regulators to achieve our common investor protection goals.

The Dodd-Frank Act and the Investment Adviser Switch

As the Committee is aware, Congress recognized the distinguished record of the states in investment adviser oversight when it enacted Section 410 of Dodd-Frank Act, by partially restoring state authority previously removed by Congress in 1996 over mid-sized investment advisers with $25 million to $100 million in assets under management.[8] By the time this provision takes effect in mid-2012, state securities regulators will register and regulate approximately 75% of all registered investment adviser firms.

In the performance of their mission, state securities regulators will continue to utilize the examination and enforcement resources necessary to effectively regulate the investment adviser population subject to state oversight.

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[7] U.S. Securities and Exchange Commission. "Study on Investment Advisors and Broker-Dealers." p. v. January 2011. Available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 410, 124 Stat. 1393-2223 (2010)

State investment adviser examination programs and resources are documented in significant detail in the comprehensive report that NASAA provided to the Securities and Exchange Commission in support of the Act's Section 913 study. I would like to call the Committee's to several of the most significant items today:

Memorandum of Understanding (MOU) for the Sharing of Resources

The need for additional resources is a natural consequence of the partial restoration of our authority and responsibility. Even a highly skilled workforce cannot succeed absent adequate resources. To that end, the fifty states have agreed through a formal MOU to work together and share resources to regulate the expanded state investment adviser population. Pursuant to this MOU, all states will work to ensure that examination resources are augmented, and that schedules are coordinated, to allow for maximum coverage and consistent audits. The MOU also provides for the possibility of joint exams funded by NASAA. The MOU will bridge the gap while and until state regulators acquire any necessary additional resources.

Frequency of Examinations

In recent years, the states have increased the overall frequency of investment adviser examinations. In 2006, states reported 2,054 examinations of investment advisers, while in 2007 and 2008 that number increased to 2,136 and 2,389 examinations respectively. In 2009, state regulators performed 2,378 on-site examinations of investment advisers, not including the countless number of regular desk, registration, and other examinations that states perform every day. As of August 2010, the states had performed 2,463 investment adviser audits, already an increase of the total number of investment adviser examinations compared to the previous years. This upward trend has continued for five consecutive years.

The states stand ready and able to take on these greater examination duties, and state securities administrators have been proactive in their preparation, as further outlined below.

Refinement of Uniform Exam Procedures

Another important step that the states have recently undertaken to prepare for the switch-over has been to accelerate their refinements of uniform examination procedures. These enhanced procedures will strengthen a consistent and high standard of examination at the state level, effectively ensuring that all state examinations – whether conducted in New Jersey or California – ask the same questions of investment advisers.

Utilization of New Risk Analysis Tools

NASAA has developed risk analysis tools that will enable state regulators to rapidly review their investment adviser registrants, and rank the individual risk factors associated with each registrant. These tools will enable states to better evaluate the risks associated with various firms and allocate their examination resources accordingly.

Industry Outreach Campaign

Since the enactment of Dodd-Frank, NASAA members have initiated an aggressive industry outreach campaign to educate the industry about state oversight and to prepare new registrants to help them set up their operations properly in order to avoid noncompliance with the securities laws. The goal of this outreach campaign is to bring the legitimate investment advisers, the state regulators, and NASAA together, prior to the switch-over, so that the switch goes smoothly and to further cement a positive and constructive working relationship with the regulated community. By facilitating a partnership among the states and the many investment advisers who conduct their businesses in a legitimate and professional manner, this initiative will minimize the costs and regulatory burdens on the investment advisers and maximize the time and resources that state regulators can devote to protecting investors.

Thank you, Mr. Chairman and Ranking Member Waters, for the opportunity to appear before the subcommittee today. I will be pleased to answer any questions you may have.

Testimony of

Richard G. Ketchum
Chairman and CEO
Financial Industry Regulatory Authority

Before the Subcommittee on Capital Markets and Government Sponsored Enterprises
Committee on Financial Services

U.S. House of Representatives

September 13, 2011

Chairman Garrett, Ranking Member Waters and Members of the Subcommittee:

I am Richard Ketchum, Chairman and CEO of the Financial Industry Regulatory Authority, or FINRA. On behalf of FINRA, I would like to thank you for the opportunity to testify today.

FINRA

FINRA is the largest independent regulator for all securities firms doing business in the United States. FINRA provides the first line of oversight for broker-dealers, and, through its comprehensive regulatory oversight programs, regulates both the firms and professionals that sell securities in the United States and the U.S. securities markets. FINRA oversees approximately 4,500 brokerage firms, 164,000 branch offices and 633,000 registered securities representatives. FINRA touches virtually every aspect of the securities business—from registering industry participants to examining securities firms; writing rules and enforcing those rules and the federal securities laws; informing and educating the investing public; providing trade reporting and other industry utilities and administering the largest dispute resolution forum for investors and registered firms.

In 2010, FINRA brought 1,310 disciplinary actions, collected fines totaling $42.2 million and ordered the payment of almost $6.2 million in restitution to harmed investors. FINRA expelled 14 firms from the securities industry, barred 288 individuals and suspended 428 from association with FINRA-regulated firms. Last year, FINRA conducted approximately 2,600 cycle examinations and 7,300 cause examinations.

FINRA's activities are overseen by the Securities and Exchange Commission (SEC), which approves all FINRA rules and has oversight authority over FINRA operations.

Evolution of Broker-Dealers and Investment Advisers

In recent years, increasing numbers of retail investors have sought the advice of financial professionals to plan for their retirement, help them through the financial crisis, prepare for their children's college education and meet their other financial goals. These investors have sought the advice of brokers and investment advisers. At one time, the investment adviser and broker-dealer businesses were distinct and separate but today, while the services offered in each channel may differ, the businesses have, in many ways, converged. While broker-dealers and investment advisers are regulated differently, the reality is—as the Rand Corporation said in a study completed for the SEC in 2008—that "trends in the financial service market since the early 1990s have blurred the boundaries between them." Many customers now hold investment adviser and brokerage accounts with the same firm and rely on the same financial professional who is registered as both a broker-dealer and an investment adviser representative.

In fact, there are approximately 2,500 firms that are dually registered as broker-dealers and investment advisers or are broker-dealers with one or more affiliated investment advisers. Beyond that, a vast majority of registered investment adviser representatives also offer brokerage services. Approximately 88 percent of all registered advisory representatives are also registered representatives of a broker-dealer.

This means that firms offer customers a combination of brokerage and advisory services in a product menu, and that, in many cases, financial professionals offer commercially indistinguishable brokerage and investment advisory services to the same customer. This makes it highly unlikely that the customer can distinguish between those services and the differing obligations and protections that are present in advisory and brokerage channels.

Despite this convergence in services, the regulation of investment advisers and broker-dealers remains quite different. The two industries are subject to different standards of conduct and different levels of oversight and enforcement. In light of the rising investor interest in seeking the advice of professionals, one would expect the convergence of the investment advisory and brokerage businesses to continue and even accelerate. This overlap in services has important implications for policy makers and regulators.

Because broker-dealers and investment advisers operate under vastly different levels of oversight due to resource constraints of government regulators, firms offering similar services can arbitrage regulation by choosing a form of registration that offers the least regulatory oversight and minimizes the risk of enforcement if the firm engages in misconduct.

In Dodd-Frank, Congress authorized two studies related to the regulation of broker-dealers and investment advisers that were completed by the SEC in January. The first study examined the differences in the standards of care and other regulations for investment advisers and broker-dealers, and the second reviewed the SEC's frequency of investment adviser examinations and outlook for coverage going forward.

Standard of Care

In its study on Investment Advisers and Broker-Dealers, the SEC staff noted that "certain differences in the regulation of broker-dealers and advisers reflect differences, current, and historical, in their functions, while others may reflect differences in the regulatory regime, particularly when investment advisers and broker-dealers are engaging in the same or substantially similar activity." As an example of the latter, the staff found that the provision of personalized investment advice to retail customers was an area where differences in approach are no longer warranted and recommended establishing a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice to retail customers.

Among the benefits that a uniform fiduciary standard and disclosure requirements may offer, the study noted heightened investor protection and awareness, flexibility to accommodate different existing business models and fee structures, preservation of investor choice and the requirement "that investors receive investment advice that is given in their best interest, under a uniform standard, regardless of the regulatory label (broker-dealer or investment adviser) of the professional providing the advice."

FINRA has been clear in its view that the standard of care in both channels should be a fiduciary standard for the provision of personalized investment advice to retail customers.

We have found under the present broker-dealer regulatory regime that too often we and the SEC have been forced to respond issue by issue, or violation by violation, rather than addressing problems more broadly and prospectively. A fiduciary standard would establish a benchmark for the regulator and the regulated, to help ensure that brokers and investment advisers have consistent obligations through each step of their financial advice, and that the first question they must ask is not whether a product is acceptable but whether it is in the best interests of the customer.

The SEC's study reflects thoughtful analysis, but a number of questions and challenges remain that presumably would need to be addressed in any SEC rulemaking. FINRA believes that extending a fiduciary duty to all professionals providing individualized advice to retail customers should be done in a way that provides interpretative guidance as to the application of such a duty to the variety of broker-dealer business models that currently exist. FINRA has suggested in comments to the SEC that rules to implement such a standard should incorporate common law agency principles and require cogent, plain English disclosure of permissible conflicts at the time of account opening and, where appropriate, at the point of sale. This disclosure should describe clearly how the adviser or broker-dealer will manage those conflicts and prohibit conduct where conflicts are not consistent with acting in the best interest of the customer.

While disclosure alone is insufficient to address fiduciary issues, it is a critical cornerstone to make them work. We need to transition away from account statements that contain too much legalistic language, causing investors to simply ignore them.

It was for that reason that FINRA published a concept proposal late last year requesting comment on a proposed rule that would require firms, at or prior to commencing a business relationship with a retail customer, to provide a written statement that describes the types of accounts and services it provides. Under the proposal, firms would also be required to disclose the conflicts associated with such services.

Through the comment process, we have gathered input from a variety of stakeholders about

what may be the right combination of information to provide investors up front and how best to provide detail from a web-based standpoint.

In FINRA's view, harmonization of the standard of care is an important first step. However, just as critical is a consistent oversight regime to ensure investors are being properly protected. As the SEC's study noted, "to fully protect the interests of retail investors, the Commission should couple the fiduciary duty with effective oversight." The existence of a fiduciary standard alone is not a guarantee against misconduct. The risks to investors can be seen in the types of enforcement actions that have been taken against advisers. As we've seen all too often in the headlines, registered investment advisers have been implicated in Ponzi schemes. Other SEC actions involve a range of abusive behavior—such as trade recommendations that benefited the adviser over clients, misleading advertising, failure to disclose conflicts of interest, misappropriation of client funds, and inappropriate compensation and client referral arrangements. It is clear that compliance with the fiduciary standard must be regularly and vigorously examined and enforced to ensure the protection of investors.

SEC Study on Enhancing Investment Adviser Examinations

The SEC's study on investment adviser exams concludes that the agency "will not have sufficient capacity in the near or long term to conduct effective examinations of registered investment advisers with adequate frequency." The study further acknowledges that new examination responsibilities provided to the agency under Dodd-Frank means that an increase in agency examination staff "is unlikely to keep pace with the growth of registered investment advisers."

In order to address the lack of oversight resources for investment advisers, the SEC's study recommends that Congress consider three possible approaches: 1) authorize the Commission to impose user fees on SEC-registered investment advisers to fund their examinations; 2) authorize one or more SROs to examine, subject to SEC oversight, all SEC-registered investment advisers; or 3) authorize FINRA to examine dual registrants for compliance with the Advisers Act.

The SEC oversees more than 11,000 investment advisers, but in 2010 conducted only 1,083 exams of those firms due to lack of resources. As such, the study notes, "the average registered adviser could expect to be examined less than once every 11 years."

While the SEC examines only about 9 percent of investment advisers each year, 55 percent of broker-dealers are examined each year by the SEC and FINRA. As the SEC's study states, "the Commission's and the Commodity Futures Trading Commission's experiences with SROs support the view that an SRO can augment government oversight programs through more frequent examinations."

The frequency of SEC investment adviser examinations has declined 50 percent since 2004. The study notes that while there may be a short-term percentage increase due to the number of advisers being shifted to state oversight, any potential increase "may be offset by the need to divert examination resources to fulfill new examination obligations that the Commission was given by the Dodd-Frank Act." The SEC study estimated that it would need to double the numbers of examiners to increase the frequency of examinations to even 20 percent.

In a statement issued at the time of the study's release, SEC Commissioner Elisse Walter noted that based on that calculation, the SEC would need to add more than 2,000 examiners to its advisory program to increase the SEC's examination frequency to FINRA's current average for broker-dealers. Commissioner Walter noted that in addition to the 50 percent decrease in the frequency of examinations since 2004, the number of examinations also decreased 30 percent over that time. The Commissioner attributes the decreases in part to the growth in the number of investment advisers (38.5 percent) and in assets under management (58.9 percent) during the same timeframe. Walter explains that while there may be a near-term decrease in the number of advisers subject to Commission oversight due to Dodd-Frank's shifting of some of that population to state regulation, there will be an immediate increase in assets under management "as larger and more complex entities enter the Commission's oversight." She notes that these advisers are "more likely to be assessed as higher-risk advisers, requiring more resources," and highlights the staff estimate that "due to the Dodd-Frank Act, the number of large and complex entities registered with the Commission will increase from 38 percent of all advisers to 58 percent."

FINRA believes the gap in investment adviser oversight is a significant void in the protection of advisory clients and should be addressed as quickly as possible. Providing the SEC authority to designate one or more SROs for investment advisers, subject to SEC oversight, is the most practical and efficient way to address this critical resource and investor protection issue. Chairman Bachus' draft legislation circulated for this hearing would establish that authority and set a framework of requirements for any entity that would be designated as an adviser SRO. These requirements would ensure that the oversight by any such SRO reflect the nature and diversity of the investment adviser industry. We believe the draft is a thoughtful approach to addressing the critical need for increased adviser regulation.

Benefits and Oversight of SROs

Self-regulation in the securities industry has a long and effective history, and both Congress and the SEC have periodically examined and reaffirmed its critical role. In designing the statutory scheme of securities regulation in the 1930s, Congress envisioned that most of the day-to-day responsibilities for market and broker-dealer oversight would be performed by independent regulatory organizations under the SEC's direct supervision.

In the oversight regime for broker-dealers, FINRA supplements the work of the SEC in terms of front-line regulation. Among the functions FINRA provides to that regime are: conducting examinations to ensure compliance with applicable laws and rules; undertaking enforcement and disciplinary proceedings with respect to regulated firms, including barring firms and individuals from the industry; administering registration and disciplinary databases to provide critical information to regulators and the public; and implementing continuing education and training programs. SROs for investment advisers could provide similar benefits to augment government oversight of that industry.

Self-regulatory organizations provide these benefits without significant additional cost to taxpayers, since they are typically funded by fees assessed on regulated entities. Self-regulatory organizations also have more flexibility than their government counterparts to devote and direct resources to large, multiyear technology development efforts that can support a variety of regulatory programs, including those focused on examinations, enforcement, market transparency and licensing qualifications.

One of the most important factors in self-regulation in the U.S. securities markets is that Congress mandated that the SEC conduct ongoing oversight of all self-regulatory organizations it oversees, such as FINRA. The SEC's authority in this regard is wide-ranging. For example, the SEC:

- approves all FINRA rulemaking and seeks public comment on FINRA proposals through notice in the *Federal Register*;
- can add, delete or amend FINRA rules as it deems necessary or appropriate;
- hears appeals of FINRA disciplinary actions, which also may be appealed to the federal courts;
- requires FINRA to keep records and file reports with the Commission, and records are subject at any time to Commission inspection;
- inspects FINRA regulatory programs to ensure that it is fulfilling its regulatory responsibilities and to mandate corrective action as needed;
- may conduct special inspections at any time for any reason;
- can impose limitations on FINRA's operations if it finds deficiencies justifying such action;
- may compel FINRA to act if it determines that FINRA is failing to provide adequate protection to investors; and,
- may suspend or revoke FINRA's registration under the Exchange Act and remove from office or censure any FINRA officer or director.

FINRA believes that any SRO for investment advisers should be subject to the same type of oversight. In this connection, we note that the discussion draft appropriately incorporates similar SEC oversight provisions.

Structuring an SRO Approach to Enhancing Investment Adviser Oversight

The SEC study states that "one or more investment adviser SROs would provide scalable resources that could supplement the Commission's oversight program for investment advisers. An SRO, like OCIE if it had additional resources, could use those resources to conduct earlier examinations of newly-registered investment advisers and more frequent examinations of other registered investment advisers." The SEC also correctly identifies several issues that would need to be addressed if an SRO approach is implemented for investment adviser oversight.

The first relates to the designation standards for SRO applicants and the scope of advisers required to be members of an SRO. If Congress were to grant the SEC authority to designate SROs to augment the oversight of investment advisers, FINRA's view is that all SRO applicants should be subject to designation requirements similar to those set forth for registered securities associations, modified as appropriate to meet the unique circumstances of the investment adviser industry. These standards include, among other things, assuring fair representation of the public interest and the adviser industry in the selection of any SRO's governing body; ensuring that any SRO's rules are designed to prevent fraud and protect investors, consistent with existing law, and do not impose burdens on advisers that are not necessary or appropriate; ensuring that any SRO provides for periodic examinations of members and their associated persons; and providing for equitable allocation of fees. The discussion draft of legislation circulated for this hearing establishes specific criteria for SROs in this manner. While the draft reflects the approach taken for national securities associations in the Exchange Act, it suggests a slightly modified approach for adviser SROs to reflect the industry it would regulate.

Requiring investment advisers to be a member of at least one SRO, as is required of broker-dealers, is highlighted in the SEC study as a key to the success of an SRO approach. However, the study notes that exclusions may be appropriate. It states: "For example, advisers to registered investment companies that are subject to examination under the 1940 Act could be excluded. Or specific exclusions could be provided for investment advisers to private funds (such as hedge funds) or advisers that do not have retail clients." FINRA believes that the focus of any adviser SRO should appropriately be on retail-facing business. As such, FINRA supports the approach taken by the discussion draft that would exempt certain advisers from SRO regulation, such as advisers that primarily serve mutual funds and other qualified institutional buyers.

In terms of the governance structure of potential investment adviser SROs, FINRA believes that public representatives should form a majority of any governing body, and members of the investment advisory industry should be allocated a number of the remaining seats to ensure adequate industry representation. The discussion draft sets out criteria for IA SRO governance in a way that should ensure the independence of any SRO while allowing for representatives of various parts of the adviser industry to be represented on the board of any such organization.

Another significant issue to address is the scope of authority of any investment adviser SRO. The SEC study explains that Congress could provide for an SRO with broad or more limited authority, and notes that one option would be to "grant an SRO limited examination authority over investment advisers, while maintaining the Commission as the sole holder of authority to develop regulatory policy under the Advisers Act. Such an SRO also could have limited rulemaking authority to address matters collateral to the exercise of examination authority (such as authority to require maintenance of records)."

In FINRA's view, the primary regulatory structure for advisers should remain the fiduciary standard incorporated in the Advisers Act and related SEC rulemaking and interpretations. Adviser SROs should have limited rulemaking authority, although the extent of that limited authority should be a matter for Congress and the SEC to determine. Commission approval and oversight of any rule proposals, including SEC public notice and comment, would ensure that any such SRO rules are appropriate for the adviser industry and consistent with the Investment Advisers Act. Any adviser SRO should have authority to examine for, and enforce compliance with, the Investment Advisers Act, the rules under that Act and the SRO's own rules.

The discussion draft addresses this issue in very specific ways. It establishes a high standard for SEC approval of SRO rules in the adviser area and a requirement for consultation with the SEC in developing an examination program for investments advisers. We support this approach.

Before concluding, I want to be very clear—if FINRA becomes an SRO for investment advisers, we would implement regulatory oversight that is tailored to the particular characteristics of the investment adviser business. FINRA would establish a separate entity with separate board and committee governance to oversee any adviser work, and would plan to hire additional staff with expertise and leadership in the adviser area. That said, given our experience operating a nationwide program for examinations and our ability to leverage existing technology and staff resources to support a similar program for investment advisers, we believe we are uniquely positioned to serve as at least part of the solution to this pressing problem. In addition, FINRA's current programs would be enhanced and investors be better protected if we had the authority

to examine the full operations of dually registered firms, where currently we can only see the broker-dealer side of what is typically a fully integrated business.

Conclusion

The SEC and state securities regulators play vital roles in overseeing both broker-dealers and investment advisers, and they should continue to do so. Investor protection demands, however, that more resources are dedicated to regular and vigorous examination and day-to-day oversight of investment advisers. Under SEC oversight and subject to the type of detailed requirements that govern current SROs, investment adviser SROs can help the SEC fill an untenable gap in the protection of investment advisory clients.

FINRA is committed to working closely with other regulators and this Committee as you consider how best to address the lack of examination resources for investment advisers.

Consumer Federation of America

Testimony of Barbara Roper
Director of Investor Protection
Consumer Federation of America

Before The

Capital Markets and Government Sponsored Entities Subcommittee
Financial Services Committee
U.S. House of Representatives

Regarding

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011

Chairman Garrett, Ranking Member Waters and Members of the Subcommittee:

My name is Barbara Roper, and I am Director of Investor Protection for the Consumer Federation of America (CFA). CFA is a non-profit association of approximately 300 national, state and local pro-consumer organizations founded in 1968 to advance the consumer interest through research, advocacy, and education. I appreciate the invitation to appear before you today to discuss an issue that has been the primary focus of my advocacy since I began working for CFA in 1986 – how to improve regulation of the brokers, investment advisers, and financial planners investors rely on for advice and investment services as they save for retirement and other long-term goals.

Improving regulatory oversight of these financial intermediaries is the shared focus of two SEC studies that are the topic of this hearing: the Section 913 study addresses the crucial question of what standard of conduct should apply when brokers provide personalized investment advice to retail investors, while the Section 914 study addresses the question of how best to ensure that adequate resources are devoted to oversight of investment advisers. If your goal is to protect average, unsophisticated investors, nothing is more important than how you regulate these financial intermediaries. Unfortunately, whether your measure is the quality of the regulations or the quality of the regulatory oversight, this is an area badly in need of reform.

These two studies form a foundation on which that regulatory reform can be built. The Section 913 study outlines a proposal for imposing a universal fiduciary duty on brokers and investment advisers when they provide personalized investment advice to retail investors that has won praise from investor advocates, state regulators, adviser groups, and the major broker-dealer trade associations. The Section 914 study documents the need for increased resources for investment adviser oversight and discusses the pros and cons of various approaches Congress could take to provide those resources. Appropriately implemented, the policies advocated in these studies could go a long way toward plugging two significant regulatory gaps that put retail investors at risk. The remainder of my testimony will address each of these two issues in greater depth. I will then sum up by responding to the specific questions posed in the invitation letter.

I. Raising the Standard of Care that Applies When Brokers Act as Advisers

Improving protections for investors in their dealings with investment professionals has been a priority for CFA since I joined the staff in 1986 and we issued our first report on abuses in the fast-growing field of financial planning. Our focus on this issue reflects several factors:

- Investors' lack of sophistication and heavy reliance on recommendations by investment professionals makes them vulnerable to abuse.

- Abusive conduct by investment professionals, both in compliance with and in violation of existing rules, has been a recurrent problem.

- Regulatory standards in this area are notably weak and inconsistent, promoting investor confusion and setting an unreasonably low bar for professional conduct.

There is a positive flip side to these concerns, and that is that strengthening regulatory protections in this one area has the potential to provide dramatic benefits.

The SEC's Section 913 study lays the foundation for a new, pro-investor approach to an old problem. It does so first by documenting a fundamental market failure that has been evident to industry observers for some time.

- Brokers and investment advisers offer similar, and in some cases identical, services to their retail clients, but do so under different regulatory standards and subject to different and sometimes conflicting rules.

- Investors are unable to distinguish brokers from advisers, do not understand the differences in the services they provide, and, in particular, do not understand that they are subject to different regulatory requirements.

- As a result, investors are not able to make an informed selection among the different types of financial intermediaries available to them.

- This problem cannot be eliminated through disclosure or investor education.

That forms the general basis for the study's recommendations on harmonized regulation for brokers and advisers, both with regard to the standard of conduct that applies to their recommendations to retail clients and with regard to other rules that apply to their retail business. However, each point deserves at least brief additional elaboration.

Blurring the Lines between Brokers and Advisers

When Congress adopted the Securities Exchange Act in 1934 and the Investment Advisers Act in 1940, broker-dealers and investment advisers were engaged in related but distinctly different professional activities. Brokers were in the business of effecting transactions on behalf of customers, and investment advisers were in the business of giving advice about investing in securities. Congress therefore carved brokers out of the broad definition of investment adviser that otherwise would have included them, but only so long as they met two criteria: they limited themselves to giving only that advice that was solely incidental to their primary business of effecting transactions on behalf of customers (e.g., buy this, sell that), and they didn't receive any special compensation for that advice. Brokers had to meet both criteria to qualify for the exemption. Both the legislative history and early Commission documents make clear that only a narrow broker-dealer exemption was intended.[1]

By the 1980s, the full service broker-dealer business model was coming under pressure. The deregulation of fixed commissions (and later decimalization) made significant inroads into their profit margins. Meanwhile, they were caught between two growing classes of competitors. On the one hand, discount and online brokers offered cheaper executions for the do-it-yourself investors. On the other hand, financial planners offered more comprehensive and objective

[1] The legislative record and history of the broker-dealer exclusion is described in greater detail in a February 7, 2005 letter to the Commission from CFA Director of Investor Protection Barbara Roper available here.

services for those seeking advice.[2] Full service brokers were forced to adapt in order to survive. They did so, increasingly, by transforming themselves into advisers:

- In the 1980s, they began offering financial planning among their menu of services;
- By the early 1990s, they had begun calling their sales reps financial consultants or financial advisers; and
- At the same time, they began to market their services based primarily on the advice offered.[3]

At each step along the way, the SEC enabled this transformation without reining in brokers' ability to continue to rely on the "solely incidental" exemption from the Advisers Act. Indeed, when the Commission finally defined what was meant by "solely incidental" in 2005, it did so only to define the standard out of existence – creating not the narrow exception intended by Congress but one that covered virtually any service a broker might choose to offer in conjunction with its brokerage services.

Had the Commission appropriately applied the "solely incidental to" standard over the years, brokers could have made a business decision about whether the benefits of offering advisory services justified the costs of regulation under the Advisers Act. However, because the agency gave brokers a free ride to compete as advisers without being regulated as advisers, the brokerage firms were never forced to make that choice. The result is the situation we find ourselves in today, where financial professionals who are indistinguishable to the average investor offer similar or, in some cases identical, investment advisory services to retail investors under two standards of conduct that offer very different levels of investor protection.

<u>Same Conduct, Different Standards</u>

The bulk of the Section 913 study is devoted to describing in extensive detail the different standards and regulatory regimes that apply to brokers and advisers when they offer personalized investment advice to retail customers. The following are among the most significant differences:

- Reflecting their origins as salespeople, brokers are subject to a suitability standard. That standard requires them to make recommendations that are generally appropriate for their customers based on a detailed understanding of the customer's financial situation and needs, but allows them to place their own financial interests ahead of those of their customers in selecting the particular investment products and strategies to recommend.

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[2] The growth of the financial planning profession also served to blur the lines between brokers and advisers, since most financial planners were both investment advisers and registered reps of broker-dealers.
[3] The transformation of the broker-dealer business model is described in greater detail in a January 13, 2000 letter to the Commission from CFA Director of Investor Protection Barbara Roper available here.

- All other investment advisers, including financial planners who combine investment advice and product sales, are subject to a fiduciary duty to act in their customers' best interests that is more appropriate to that advisory role.

- Investment advisers are required to provide up-front disclosure of all material conflicts of interest and to appropriately manage those conflicts. Although their conflicts are typically greater, brokers have no such requirement.

- Investment advisers are subject to restrictions that limit their ability to engage in principal trades. Brokers are not, and indeed principal trading constitutes a significant portion of a broker-dealer's business.[4]

- Brokers are subject to regulatory oversight by an industry self-regulatory organization, FINRA. FINRA supplements oversight by the SEC and states by conducting regular routine inspections and enforcing rules of fair practice. Investment advisers are subject exclusively to state or SEC oversight, depending on the size of the firm as measured by assets under management.[5]

The report describes a number of other lower profile regulatory differences as well. These include differences in such areas as advertising rules, licensing requirements, and continuing education requirements that are the subject of separate harmonization recommendations.[6]

Investor Confusion

If all or even a large majority of investors clearly understood these differences, then the case for harmonizing regulation of brokers and advisers would be less urgent. One could simply trust to investors to factor the regulatory differences into their selection of provider. Indeed, brokers for years argued against tightened regulation of their advisory services on precisely these grounds – that investors understood the difference between brokers and advisers and made their choices accordingly. In recent years, however, the research refuting this argument has become conclusive, to the point that the major broker-dealer trade associations no longer make this claim.[7]

Much of that research is documented in the Section 913 study. Of particular relevance are the findings of the RAND Report, commissioned by the SEC in 2006, which included both a household survey and six focus groups of investors.[8] Both survey respondents and focus group

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[4] This issue, in particular, has been an impediment to efforts to close the loophole that has allowed brokers to escape regulation under the Advisers Act when they act as advisers.
[5] Issues related to SRO oversight are discussed in the section of the testimony that deals with the Section 914 Report and the draft legislation to create and investment adviser SRO.
[6] This testimony will not go into those issues in any detail as concrete proposals in this area have not yet been put on the table. As a general matter, however, we support the notion of adopting uniform standards where the conduct is the same.
[7] To our knowledge, only the insurance broker-dealer trade associations continue to make this now completely discredited argument.
[8] Both the survey and the focus groups included experienced and inexperienced investors, with about twice as many experienced investors included in the sample.

participants reported that they did not understand the differences between investment advisers and broker-dealers and that they found the common job titles used by brokers (e.g., financial advisor, financial consultant) and investment advisers to be too similar and therefore confusing. Focus group participants offered the additional insight that the "we do it all" advertisements added to the confusion. This should hardly be surprising. That is precisely the result the brokerage firms intended when they adopted those titles and that marketing strategy – a strategy that was specifically designed to enable them to compete more effectively with financial planners offering more comprehensive and objective advisory services.

One finding of the RAND Report sheds particular light on the policy responses available to address that investor confusion. In their focus group interviews, RAND found that investor confusion was not simply generic. Most participating investors could not identify whether their own provider was a broker or investment adviser, and that confusion persisted even after the investors were provided with fact sheets on investment advisers and brokers that included a description of their common job titles, legal duties, and typical compensation practices. Moreover, the RAND Report was commissioned after previous efforts by the Commission to address confusion through enhanced disclosure had also failed.[9] The SEC's experience in this area along with the RAND Report findings offer conclusive evidence, in our view, that neither disclosure alone nor disclosure in combination with investor education would be effective in eliminating investor confusion.

Investor Expectations

Survey data demonstrates not only that investors are confused about the differences between broker-dealers and investment advisers, but also that investors expect their financial adviser to act in their best interests. That was the overwhelming conclusion of a survey conducted by ORC International for CFA, AARP, the North American Securities Administrators Association, the Certified Financial Planner Board of Standards, Inc., the Investment Adviser Association, the Financial Planning Association, and the National Association of Personal Financial Advisors. Virtually all (91 percent) of the survey's 2,012 respondents indicated that, if a stockbroker and investment adviser provide the same kind of services, they should have to follow the same investor protection rules. And 97 percent (including 85 percent who agreed strongly) agreed that "when you receive investment advice from a financial professional, the person providing the advice should put your interests ahead of theirs and should have to tell you upfront about any fees or commissions they earn and any conflicts of interest that potentially could influence that advice."

Our survey also found investors confused about the legal obligations of different types of investment services providers. Specifically, survey respondents were as likely to think financial advisors, a title commonly used by brokers for their sales reps, had a fiduciary duty (76 percent) as they were to think financial planners (75 percent) and investment advisers (77 percent) had such a duty. That is consistent with the findings of the RAND Report that investors expected brokers and investment advisers alike to act in their best interests when giving advice. Other

[9] The Commission had proposed to require fee-based brokers to provide disclosures in advertisements and other account documents as a condition of relying on their exception from the Investment Advisers Act. When they tested those disclosures with investors, however, they found they were not effective in conveying the desired information.

surveys over the years have reached similar conclusions. These are, after all, reasonable expectations, since the key characteristic that distinguishes advice from a sales pitch is that it is designed with the recipient's interest in mind.

The Need for Consistent Standards

If, as the survey data overwhelmingly suggests, investors cannot distinguish between brokers and investment advisers (even after the differences are explained to them), if they expect anyone offering advice to act in their best interests, and if disclosures and education cannot clear up their confusion, the case for regulatory reform in this area becomes undeniable to all but the most hardened anti-regulation cynics. But there are additional reasons for regulatory harmonization to be found in the extensive overlap between these two once largely distinct populations. As of October 2010, fully 88 percent of investment adviser representatives were also registered representatives of a FINRA-registered broker-dealer. Given the extent of that overlap among the individuals providing retail advisory services, it makes no sense to apply different standards of conduct to those services. Moreover, the brokerage firms that offer fee-based accounts are already complying with the Advisers Act for those accounts after a court decision overturned the SEC rule exempting them from the Act.[10] This has two implications for policy in this area. On the one hand, it means these firms already have the procedures in place to comply with a fiduciary duty. On the other, it actually makes it more difficult for the customers of these firms to know when they are dealing with a broker and when they are dealing with an adviser, making harmonization of the standards more important, not less.

The SEC's Proposed Approach Regarding the Standard of Conduct for Advice

Based on its findings, the Commission staff reached what we believe is the only logical conclusion: that brokers and investment advisers alike should be subject to a fiduciary duty when they render investment advice to retail customers. As it approached the issue, the Commission had at least three options available to it for imposing a fiduciary duty on brokers when they give investment advice.

- Having created the regulatory discrepancy through its failure to appropriately enforce the brokers' "solely incidental to" exception from the Advisers Act, the Commission could at any time have eliminated the discrepancy by adopting a narrowed definition of solely incidental to that is consistent with the statutory language of the Advisers Act and with clearly documented congressional intent at the time the Advisers Act was adopted. This is the approach that CFA advocated for many years prior to the passage of the Dodd-Frank Act.[11]

[10] In March 2007, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the SEC had exceeded its authority when it created an exemption from the Advisers Act for brokers that charge asset-backed fees. (FPA v. SEC)

[11] For years, CFA urged the Commission to take one of two actions. If brokers had indeed transformed themselves into advisers, as their titles and marketing campaigns suggested, they should lose their solely incidental exclusion from the Advisers Act and be regulated accordingly. If they had not fundamentally changed the nature of their business to be primarily advisory in nature, then the SEC should stop permitting them to misrepresent themselves to investors. This argument fell on deaf ears at a Commission that often over the years appeared more concerned with

- Alternatively, the Commission could have proposed to adopt a fiduciary standard for brokers using the broad grant of authority under Subsection (f) of Section 913, subject only to a requirement that the rules be "necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide)" and consistent with the findings of its Section 913 Report.

- Instead, the Commission has proposed to exercise its authority under Subsection (g) of Section 913 to adopt parallel rules under the '34 Act and the Advisers Act imposing a uniform fiduciary duty on brokers and advisers when they give personalized investment advice about securities to a retail customer.[12] That subsection provides more detailed direction to guide the SEC rulemaking than Subsection (f). It specifies that the standard cannot be weaker than the existing standard for advisers and that the standard for advisers and brokers must be the same. It also makes clear that the receipt of commissions does not by itself violate the fiduciary duty, and that the fiduciary duty does not automatically entail an ongoing duty of care where there is no ongoing advice. Finally, where a broker sells proprietary products or sells from a limited menu of products, it authorizes the Commission to require notice and consent, but it clarifies that the practice is not by itself a violation of the fiduciary duty.

In its Section 913 Report, the staff recommends that the Commission adopt the third approach, with the addition that it will simultaneously address the issue of how best to regulate principal trading under a revised standard. The goal in the latter case is to preserve brokers' ability to engage in principal trading while ensuring that these trades are subject to appropriate investor protections.[13] While we are concerned to see how the Commission will interpret certain aspects of the proposed rulemaking, we believe the staff has recommended the right approach – one that appropriately balances the need for enhanced investor protections with the desire to minimize market disruptions and preserve investor choice.

That balance is reflected in the praise that greeted the Commission's release of its Section 913 study. That praise came not only from long-time advocates of a fiduciary standard, such as CFA, AARP, state securities regulators, and investment adviser groups, but also from the two leading broker-dealer trade associations. SIFMA, for example, specifically praised the agency for recognizing "that any fiduciary standard should not pick business model winners and losers." The Financial Services Institute issued the following favorable comment: "The Study acknowledges the importance of investor choice and access to services. It proposes a means to reduce the costs associated with the proposed regulatory changes and avoids picking winners and losers thereby leaving the choice of provider to investors. These were major concerns for FSI and we are satisfied to see that the Study addresses them."

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protecting the full service broker-dealer business model than with protecting investors. It is very much to the credit of the current leadership of the Commission that they have reversed priorities in this area.

[12] This subsection also permits the Commission to apply the standards to additional non-retail customers, though it is not expected to do so.

[13] We believe this is an achievable goal and have supported the Commission's decision to extend its temporary principal trading rule in order to deal with the issue more comprehensively in the context of a fiduciary rulemaking.

Like us and other long-time supporters of a fiduciary standard, the broker-dealer groups are understandably interested in the details of how the Commission moves forward to implement the proposed standard. We have had an opportunity in recent months to discuss a number of those implementation issues with members of the broker-dealer community – issues such as what does and does not constitute personalized investment advice, how a fiduciary duty would be applied in different contexts, and what role disclosure would play in satisfying a fiduciary standard. While it is unlikely that we will ever get to the point of complete agreement, the differences that divide us are less dramatic than many might expect. SIFMA has, for example, suggested an excellent general definition of personalized investment advice that we support. We and SIFMA have both attempted to identify activities that would fall in our outside the definition of personalized advice, and there are far more points of agreement between those two lists than there are points of disagreement. Indeed, the differences in our approaches are at a level of detail that could appropriately be worked out through negotiations during the rulemaking process. Certainly, they are not of a magnitude to warrant stopping the rulemaking proposal in its tracks.

Criticism of the Commission Proposal

Although the Section 913 Report has garnered widespread praise, it is not without its critics. Some, including two SEC Commissioners, have criticized the study on the grounds that it "does not identify whether retail investors are systematically being harmed or disadvantaged under one regulatory regime as compared to the other" and have argued that, as a result, the Commission "lacks a basis to reasonably conclude that a uniform standard or harmonization would enhance investor protection."[14] Echoing that concern, Chairman Garrett and thirteen other Members wrote in a March 17, 2011 letter to Chairman Schapiro that, "the Commission has not identified and defined clear problems that would justify a rulemaking and does not have a solid basis upon which to move forward."

The Need for More Empirical Data

Obviously, we strongly disagree with that conclusion. The Commission has made a strong case based on investor confusion, clearly documenting that the assumptions underlying the previous regulatory policy were unfounded. But we do agree that the Commission could have done more in its Section 913 Study to document the harm that investors suffer when they put their trust in "financial advisors" who are not required to act in their best interests. Our concern is not that regulatory action is unjustified without it. Rather, we feel it is important for the Commission to arm itself against a possible legal challenge, and the best way to do that is to make a strong economic case for the proposed rulemaking.

In our comment letter to the agency at the outset of the study, we suggested a number of approaches the Commission could take to document investor harm when "advice" is offered

[14] This statement from the dissent by Commissioners Casey and Paredes was quoted in an August 2, 2011 letter from House Financial Services Committee Chairman Spencer Bachus to SEC Chairman Mary Schapiro. A March 17, 2011 letter from Chairman Garrett and Republican members of this Subcommittee made a similar reference to the Casey-Paredes dissent.

under a suitability standard.[15] Under a pressing six-month deadline for completion of the report, and with limited staff resources for conducting the kind of economic analysis called for, the Commission did not heed our suggestions. The Commission has since established a team to collect additional data with an eye toward further documenting the need for a fiduciary rulemaking and analyzing the potential impact of such a rulemaking on the industry.[16] Of course, should the agency move forward, the rulemaking process itself would provide an additional opportunity for the Commission to solicit and analyze data specific to its proposed regulatory approach.

While we believe there is a strong economic argument to be made for raising the standard of care when brokers act as advisers, it is important to acknowledge that gathering economic data to support that case is extremely challenging. First, it is not possible to gain meaningful information from investors through the type of survey Commissioners Casey and Paredes suggest in their dissent since, as previous research has shown, investors cannot reliably identify whether their provider is a broker or investment adviser. Second, unsophisticated investors often do not realize that they have been taken advantage of, since they do not have the sophistication to recognize, for example, that a variable annuity rarely if ever belongs in a tax-advantaged account, that a different annuity than the one they were recommended offers significantly higher guaranteed benefits, or that the mutual fund they purchased has above average costs that are eating into their investment returns. Thus, they are unlikely to report any dissatisfaction even when they are being disserved. Third, much of the conduct that is harmful to investors is legal under a suitability standard and thus not subject to enforcement action or regulatory recordkeeping, making it difficult to gather data on those practices. Finally, potentially the biggest benefit to investors from a fiduciary duty – the sweeping benefits that could result if product sponsors were forced to compete for business based on benefits to the investor rather than by offering more generous compensation to the provider – are impossible to quantify. But it is reasonable to suppose that harnessing market forces to benefit rather than disadvantage investors has the potential to bring about truly revolutionary changes.

Recognizing the difficulty of the task, our comment letter to the Commission nonetheless suggested that the Commission attempt to gather evidence related to three basic points of difference between a fiduciary duty and the suitability standard:

- differences in the quality of advice or product recommendations investors receive from brokers and investment advisers;

- differences in investor complaint levels or arbitration filings with regard to brokers and investment advisers; and

[15] See August 30, 2010 letter from CFA Director of Investor Protection Barbara Roper to SEC Secretary Elizabeth M. Murphy, available here.

[16] Although the Commission requested data from industry on the potential costs of a fiduciary rule, the only marginally substantive data submitted was a report commissioned by SIFMA that did not analyze the approach the Commission has since proposed and thus does not offer valid insights into the likely effect of the Commission's proposed approach. (See, "Standard of Care Harmonization, Impact Assessment for SEC," prepared by Oliver Wyman for SIFMA, October 2010 and CFA's response, available here.)

- whether one standard provides regulators with a better means of holding financial professionals accountable than the other.

While we recognized that it would not be possible for the Commission to produce definitive information, particularly with regard to the quality of recommendations, we felt it would be possible to collect information that would help to document the difference in investor protection provided by the two standards.

In documenting the harm to investors, a key point to focus on is conduct that is permissible under the suitability standard that nonetheless results in harm or lost benefits to the investor. One way to think about this is that a suitability standard essentially allows a broker to recommend the least suitable of the various suitable options, while a fiduciary duty requires the broker to have a reasonable basis for believing his or her recommendation is the best of the available options for that client.[17] One factor a broker would have to look at in making that analysis under a fiduciary duty that is too often ignored under a suitability standard is the cost to the client of the various suitable options. We have long known that even small differences in cost can have a huge long-term impact on investor returns, and recent Morningstar research has reinforced that message, concluding that mutual fund costs are the single best predictor of long-term fund performance.[18] Thus costs, while certainly not the only relevant factor, are clearly an important factor in determining what's best for the client. This cost analysis is particularly important for middle income investors, who cannot afford to pay too much for an investment just so the broker can enjoy a more generous payday.

Although it would be approximate at best, one way to begin to quantify the potential economic benefit of a fiduciary duty would therefore be to analyze the menu of investment options offered by various broker-dealers, identify the range of options that would satisfy a suitability standard under a particular scenario, and determine whether there are significant economic differences for the investor between the "best" and "worst" or highest cost and lowest cost of the suitable options. If there are, then it stands to reason that there would be significant economic benefits for investors from holding brokers to a best interest standard. Mutual funds would be suitable for such an analysis, since they are widely recommended and the costs are highly transparent. Even better would be an analysis of variable annuities, since their often high costs, opaque contract terms, and questionable sales practices make them an area where imposition of a fiduciary duty is likely to bring the greatest benefits. Because the Commission has limited resources with which to conduct this sort of analysis, it may be necessary to look to academics and other outside groups to supplement the record in this area.

False Claims that Middle Market Investors Will Be Harmed

Although the Commission has bent over backward to propose an approach on fiduciary duty that accommodates legitimate industry concerns, and the major broker-dealer groups have

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[17] In making that assessment, the broker doesn't have to consider every product available in the marketplace, but simply those that he or she has available to recommend, as the SEC has made clear it would permit sales from a limited menu of products.

[18] Jeff Brown, "Low-Cost Funds Out Perform High-Cost Options," *The Main Street Newsletter*, August 11, 2010, available here.

acknowledged that fact, the Commission has not succeeded in silencing all its industry critics. Most vocal in opposition have been the insurance broker-dealers, whose sale of variable annuities would come under the heightened standard of care. Award-winning personal finance writer Liz Pulliam Weston has called variable annuities "the worst retirement investment you can make."[19] Another industry commentator has called them "one of the most overhyped, most oversold, and least understood investment products."[20] And one analyst, who each year compares the performance of variable annuities to an alternative approach using low-cost index funds, estimates that variable annuities transfer approximately $25.6 billion a year "of spendable investment returns" from vulnerable investors to the insurance industry and its sales force.[21]

Given the billions of dollars at stake, it is hardly surprising that brokers whose business model is heavily dependent on the sale of variable annuities would fear application of a fiduciary duty to those sales. In making their case that the fiduciary duty proposal would harm Main Street investors by increasing their costs or denying them access to valued products and services, however, the main insurance broker-dealer groups have so far chosen to ignore the actual approach the Commission has proposed. Earlier this year, I wrote to members of this Committee refuting these arguments.[22] Rather than repeat those arguments in detail here, I have included a copy of that letter as an appendix to my testimony. The main point to keep in mind is that these arguments are based on a series of false claims, including that: the suitability standard is a more robust standard than the fiduciary duty,[23] that investors are able to make an informed choice among different types of service provider, that the fiduciary duty would prohibit brokers from charging commissions, that it would force them to charge fees, and that it would therefore force them to serve only wealthy clients. They also make completely unsupported claims about compliance costs that directly conflict with what they say elsewhere about the rigorous procedures their members follow in complying with the suitability standard. They similarly exaggerate the potential increase in legal liability under a fiduciary duty, ignoring the fact that violation of fiduciary duty is already the most common claim brought against brokers in arbitration. Worst, their argument is cynically presented as a defense of middle market investors – the very investors who can least afford to pay the high commissions for substandard performance that the suitability standard all too often allows.

The SEC Approach Offers Investors the Best of Both Worlds

Contrary to these criticisms from the insurance broker-dealers, the Commission's proposed approach to imposing a fiduciary duty on brokers when they offer personalized investment advice to retail customers offers investors the best of both worlds. It preserves their ability to choose from a variety of different business models – to choose on-going account management vs. transactional recommendations, for example, and to pay through fees or to pay through commissions – without having to give up the right to receive recommendations in their

[19] Liz Pulliam Weston, *The Basics: The worst retirement investment you can make*, updated January 2008.
[20] InvestSense, LLC, *Common Sense InvestSense™ … Variable Annuities*, 2002.
[21] Scott Burns, "Variable Annuity Watch, 2008," *AssetBuilder – Registered Investment Adviser*.
[22] See May 9, 2011 letter from CFA Director of Investor Protection Barbara Roper to Chairman Spencer Bachus, Ranking Member Barney Frank, Chairman Scott Garrett, and Ranking Member Maxine Waters, available here.
[23] NAIFA and others make this false claim by conflating the standard of care that applies to advice – suitability vs. fiduciary duty – with the degree of regulatory oversight of brokers and advisers. These are separate issues that require separate solutions.

best interest from those who claim to be acting as their adviser. For these reasons, we strongly support the Commission's recommendation in its Section 913 Study. We believe it has the potential to deliver dramatic and long-overdue benefits to investors who need to make every dollar count in these tough economic times.

II. Improving the Quality of Investment Adviser Oversight

For almost as long as we have been advocating improved regulation of securities salespeople who hold themselves out as advisers, CFA has also been advocating for increased resources for oversight of investment advisers. This problem began to emerge in the late 1980s at a time when both mutual funds and investment advisers serving retail clients were growing at an extremely rapid pace, and agency staffing to oversee these areas was growing slowly if at all. By the early 1990s, the problem had reached crisis proportions, with inspections so infrequent that a small adviser might reasonably expect to set up shop and reach retirement without ever seeing an SEC inspector.[24]

This issue of investment adviser oversight received heightened attention as a result of the unraveling of the Madoff Ponzi scheme in the early days of the financial crisis. This is ironic, since Madoff was a broker-dealer regulated exclusively as a broker-dealer up until just two years before his fraud was uncovered. If the Madoff scandal was an indictment of anything, therefore, it was an indictment of the effectiveness of broker-dealer oversight.[25] That said, the problem of inadequate investment adviser oversight is quite real and the need for a solution is urgent.

Over the years, CFA has supported a variety of approaches to solve this resource problem, including increased appropriations to the SEC, self-funding for the agency to free it from the appropriations process, and user fees on investment advisers to pay for increased oversight. None has been adopted.[26] Instead, Congress chose to "solve" the resource problem by delegating more responsibility to the states, an approach that simply divided up the existing regulatory resources differently without doing anything to address the basic funding short-fall.

While the resource problem ultimately rests with Congress to resolve, Section 914 of the Dodd-Frank Act required the SEC to conduct a study assessing the need for additional resources for investment adviser examinations and options available to Congress to address this issue, including by delegating this responsibility to a self-regulatory organization (SRO). Earlier this year, the SEC issued its Section 914 study.[27] In it, the staff documented a decline in the number and frequency of inspections of registered investment advisers over the past six years and described new challenges the Commission will face as it takes on responsibility for registration and oversight of private fund advisers.

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[24] At the time, SEC staff members estimated that small advisers were on a once every 40 years inspection cycle.
[25] A group of independent FINRA board members, led by Charles Bowsher, has since conducted a very credible examination of FINRA's failure to uncover both the Madoff and the Stanford frauds, and FINRA has reportedly begun to implement the recommendations of that study to improve the quality of its broker-dealer oversight.
[26] User-fee legislation that twice cleared the House with overwhelming bipartisan support in the early 1990s died in the Senate Banking Committee. The funding increases that were provided to the SEC in the wake of the Enron scandal were used to shore up equally pressing funding short-falls in corporate finance and enforcement.
[27] "Study on Enhancing Investment Adviser Examinations," by the staff of the Division of Investment Management of the Securities and Exchange Commission, January 2011. The study is available here.

- The study indicates, for example, that the number of investment advisers registered with the Commission has grown 38.5 percent in the past six years, from 8,581 advisers on October 1, 2004 to 11,888 advisers on September 30, 2010.
- The assets managed by investment advisers registered with the Commission have grown even faster, increasing 58.9 percent, from $24.1 trillion to $38.3 trillion, during the same period.
- During that period, the number of Office of Compliance Inspections and Examinations (OCIE) staff dedicated to examining registered investment advisers decreased 3.6 percent, from 477 staff to 460 staff, falling as low as 425 staff at certain points during the period from September 30, 2007 to September 30, 2008.
- Because of increased funding for the agency from 2008 through 2010, the reduction in OCIE staff dedicated to investment adviser examinations was not as severe as it otherwise would have been.
- As a result, the number of examinations of registered investment advisers conducted each year between 2004 and 2010 decreased 29.8 percent, from 1,543 examinations in 2004 to 1,083 examinations in 2010.
- The percentage of investment advisers examined each year declined accordingly, from 18 percent in 2004 to just 9 percent in 2010, with the number of years on average between examinations rising from 6 to 11.
- Because of changes in Dodd-Frank, the staff predicts a 28.2 percent near-term decrease in federally registered advisers as some smaller advisers migrate to state registration and some previously exempt advisers, such as hedge fund managers, are newly required to register.
- Other obligations under Dodd-Frank, such as new requirements to examine municipal advisers and swap entities, could force the Commission to divert resources from investment adviser examinations if the increased funding provided for in Dodd-Frank is not forthcoming.

As a result of all these factors, we share the study's conclusion that "the Commission likely will not have sufficient capacity in the near or long term to conduct effective examinations of registered investment advisers with adequate frequency" and that "The Commission's examination program requires a source of funding that is adequate to permit the Commission to meet the new challenges it faces and sufficiently stable to prevent adviser examination resources from periodically being outstripped by growth in the number of registered investment advisers."

The study outlines three options for Congress to consider adopting to address this "capacity constraint:"

- imposing user fees on SEC-registered investment advisers to fund their examinations by SEC inspection staff;

- authorizing one or more SROs to examine, subject to SEC oversight, all SEC-registered investment advisers; or

- authorizing FINRA to examine dual registrants for compliance with the Advisers Act.

We believe the user-fee approach outlined in the SEC report offers the best option for funding enhanced inspections in a way that promotes investor protection while minimizing added costs to industry. As a general principle, we believe in funding government agencies to do their jobs rather than farming out those responsibilities to private entities. Moreover, as a government agency, the SEC is more transparent and more accountable than a private regulator is likely to be. Funding increased investment adviser oversight through user fees also has the benefit of being supported by the investment adviser community, at least in part because they believe it would impose lower costs, particularly for small advisers.

Identifying the Issues an SRO Proposal Must Address

In the past, CFA has categorically opposed delegating investment adviser oversight to an SRO, particularly one dominated by broker-dealer interests and particularly if that SRO were given rule-making authority. However, having spent the better part of two decades arguing for various approaches to increase SEC resources for investment adviser oversight with nothing to show for our efforts, we have been forced to reassess our opposition to the SRO approach. Specifically, we have concluded that a properly structured SRO proposal would be a significant improvement over the status quo. Too often, however, the SRO approach is presented as an easy solution by individuals who have not adequately confronted the many thorny issues it presents. The SEC study does an excellent job, in our view, of laying out the issues that would need to be addressed if Congress were to pursue this approach. Only by answering the following questions can Congress develop an SRO proposal that adequately protects investor interests while avoiding imposing undue costs on small advisers.

- How should such an approach be structured in light of the diversity in the investment adviser community?

- How can the risks of industry capture be avoided?

- What would the costs of effective SRO oversight be, and how would they be borne by the many small investment adviser firms?

- What resources would the SEC need in order to provide effective oversight of any such SRO or SROs to which this responsibility might be delegated?

- Should an SRO be an inspection-only SRO, or should it also have broader rule-making authority?

- What entity (or entities) is best suited to this task?

Ultimately, whatever approach Congress chooses to take, we share the view expressed by SEC Commissioner Elisse Walter in her statement on the study, "that the current resource problem is severe, that the problem will only be worse in the future, and that a solution is needed now." We urge you to act to resolve this problem sooner rather than later.

The Draft Investment Adviser SRO Legislation

Late last week, the Subcommittee released a draft bill to create an investment adviser SRO. The legislation, which is closely modeled on the SRO registration requirement for broker-dealers serving retail customers, is obviously a serious attempt to address this issue. The following section of this testimony will provide our initial assessment of that bill in terms of the previously identified principles for effective self-regulation. Given the short time we've had to review the legislation, however, our assessment will of necessity be only preliminary.

- How should such an approach be structured in light of the diversity in the investment adviser community?

The draft legislation deals with this issue at least in part by exempting those investment advisers that primarily serve institutional clients of various types – advisers to mutual funds, hedge funds, and venture capital funds, for example, as well as those where 90 percent or more of the investors are qualified purchasers.[28] Because of the way the exemptions are drafted, using percentage of assets rather than percentage of clients as the basis for the exemption, the legislation could end up exempting a number of advisers with a significant retail investor clientele. The sponsors may therefore want to look at whether this approach would actually have the intended effect of subjecting advisers with largely retail clientele to SRO oversight. The draft legislation also allows for more than one investment adviser SRO. Thus, if fee-only investment advisers or another subset of advisers wanted to form a separate SRO, they would be able to do so, provided they could find a way to do so that was not cost prohibitive.

While this approach of singling out retail-oriented advisers for SRO oversight will make for a more homogenous population of advisers subject to SRO oversight, it may not do much to reduce the resources needed at the SEC to provide effective investment adviser oversight. Under this approach, after all, many of the largest advisers and those with the most complex operations would remain under the SEC's jurisdiction. According to the Section 914 study, these are the advisers whose examinations are the most labor intensive and require the most sophisticated expertise for staff conducting those examinations.

- How can the risks of industry capture be avoided?

The draft bill includes two mechanisms to limit industry capture. It requires, as a condition of recognition as an investment adviser SRO, that the association have rules that "assure a fair representation of the public interest and the investment adviser industry in the

[28] That, at least, is how we read exemption (c), although the drafting is somewhat ambiguous and needs clarification.

selection of its directors and the administration of its affairs." It elaborates on this point by requiring that a majority of the SRO's directors "shall not be associated with any member of the association or any investment adviser or broker-dealer." While it may be appropriate to further clarify who would qualify as an independent board member, the Commission could do so under the bill's grant of rulemaking authority. That Commission oversight, both in approving the registration of an SRO and in overseeing its operations and approving its rules, provides additional protection against industry capture, if effectively implemented and adequately funded. While these provisions help to reduce the risk of industry capture, they do not eliminate entirely a risk that is inherent in the notion of an industry self-regulatory organization.

- What would the costs of effective SRO oversight be, and how would they be borne by the many small investment adviser firms?

The bill seeks to ensure an "equitable allocation of reasonable dues, fees, and other charges." It remains unclear, however, that the SRO approach is a more cost-effective approach to oversight that funding SEC oversight through user fees. This is of particular concern for the many small investment advisers who would be affected by this proposal. Before moving forward with legislation, sponsors should seek to better understand the likely fees these advisers would face and whether those fees would exceed the user fees necessary to fund a more robust SEC oversight program.

- What resources would the SEC need in order to provide effective oversight of any such SRO or SROs to which this responsibility might be delegated?

As we noted above, it is not clear that delegating oversight of smaller, retail-oriented advisers to an SRO would significantly reduce the resources the SEC needs to provide effective investment adviser oversight since the most labor intensive inspections would remain under the SEC's jurisdiction. In addition, as the draft bill makes clear, the SEC would also have extensive responsibilities associated with oversight of the new adviser SRO. That oversight responsibility would be magnified if there were more than one SRO. By creating the potential for a race to the regulatory bottom between associations anxious to attract members, having multiple SROs would necessitate strong Commission oversight to prevent that outcome. It would therefore be a dangerous fallacy for supporters of this approach to assume that it would reduce the pressure on SEC resources significantly if at all.

One anomaly of the proposed approach is that it would put the Commission in charge of overseeing an SRO whose members include state-registered advisers. In order to ensure that SRO and state oversight of these state-registered advisers is consistent, it may be appropriate to provide state regulators with a more formal role in overseeing the agency. We have not had a chance to think through how that could be structured. However, it seems only appropriate that state securities regulators would have some say in ensuring that SRO rules affecting state-registered investment advisers would be consistent with state law.

- Should an SRO be an inspection-only SRO, or should it also have broader rule-making authority?

The sponsors have chosen to give the proposed investment adviser SRO a full range of rulemaking authority, subject to oversight and approval by the Commission. If the bill results in creation of more than one SRO, this would create a potential for inconsistency in the rules – and, under the worst case scenario, a competition between the SROs to attract members by adopting less rigorous rules. This would place a premium on effective SEC oversight of the SRO or SROs to ensure that any rules adopted are strong, reflect the public interest, and are consistent, which would require adequate agency funding to permit that oversight.

- What entity (or entities) is best suited to this task?

The legislation is neutral as to who would serve as the investment adviser SRO, and leaves open the possibility that there might be more than one such entity. While having more than one SRO creates challenges in terms of SEC oversight, the potential for regulatory oversight, and consistency of rules and enforcement, we believe the benefits of this approach outweigh the risks. While it seems certain that FINRA would serve this role for dual registrants, those advisers who are registered exclusively as advisers may prefer to establish an alternative SRO oriented toward their fee-only business model. It would be important to ensure that any such alternative SRO had adequate resources to regulate effectively. The legislation appears to give the Commission adequate authority to ensure that any such entity would have the necessary capacity to perform the required functions.

III. Responses to Questions from the Subcommittee

The invitation to testify from the Subcommittee poses a series of specific questions with regard to these issues. While the above testimony includes a detailed discussion related to certain of those questions, this section of my testimony will provide brief additional responses to each of those questions.

1) Is there sufficient empirical data to support a new standard of care for broker-dealers?

As we discuss in greater detail above, we believe there are a number of reasons the new standard for brokers is justified.

- First, brokers should never have been allowed to transform themselves into advisers without being regulated as advisers. The new standard is needed to rectify a past regulatory failure that permitted brokers to offer investment advice that was more than solely incidental to their role as brokers without subjecting them to regulation under the Advisers Act. The Commission has gone out of its way to propose the least disruptive approach possible to correct that regulatory error.

- Second, there is extensive evidence that investors cannot make an informed choice among investment professionals and expect all financial advisers to act in their best interests. Because investors cannot factor the difference in legal standards into their choice of investment professional, regulators must step in and ensure that all advisers meet the appropriate standard.

- Third, there is a strong economic case for imposing a fiduciary duty on brokers when they provide personalized investment advice to retail investors. While the data is difficult to compile, particularly given the Commission's limited resources for economic analysis, the evidence can be found in harmful conduct that is permissible under the suitability standard that would be prohibited under a fiduciary duty. A focus should be on practices that increase costs to investors or deprive them of benefits.

While the SEC did not include that empirical data in its Section 913 Study, it has since appointed a study team to collect that data. We believe it is proceeding appropriately.

2) Should a rulemaking for a new standard of care for broker-dealers be undertaken at the expense of other statutorily-mandated rulemakings?

Retail investors suffered devastating losses as the collateral damage of a financial crisis that otherwise had little to do with them. They desperately need federal regulators, including the SEC, to adopt tough regulations required under Dodd-Frank to restore the market integrity on which all our financial security depends. But individual investors suffer equally devastating effects every day when they are victimized by a "financial advisor" who preys on their financial naiveté. For the investor whose ability to retire in comfort is put at risk, it doesn't really matter whether the harm was the result of a failure to protect against systemic risks or a failure to protect against predatory brokers. In short, this question poses a false choice based on an artificially created limitation on SEC resources. Investors' need for protection from both types of investment risks shouldn't be sacrificed because Congress has chosen to deprive the Commission of the resources necessary to do its job. That some would force the Commission to make such choices is particularly cynical, since it is within Congress's power to fully fund the SEC at the level authorized under Dodd-Frank without adding a dime to the deficit and while still allowing for a reduction in industry-paid fees. Should the Commission find it necessary to make trade-offs in order to free up the staff resources to proceed with the fiduciary rulemaking, it would be far better for it to do so by delaying its recently announced review of existing regulations, which will eat up agency resources without adding any new investor protections.

3) If a rulemaking on a new standard of care for broker-dealers should be undertaken, what should the new standard of care be?

As we discuss in detail above, we believe the Commission has proposed an approach in its Section 913 Study that simultaneously strengthens investor protections, minimizes the disruption to industry, and maintains investor choice. That approach has won the praise of a wide range of interested parties, including investor advocates, state securities regulators, investment adviser and financial planning groups, and the major broker-dealer trade associations. As such, we believe it is the best approach for the Commission to adopt in pursuing a rulemaking in this area.

4) What potential problems could arise if the Securities and Exchange Commission moves forward with a standard of care rulemaking for broker-dealers in light of the standard rulemaking proposed by the Department of Labor?

While we have concerns about the Department of Labor's proposed fiduciary rulemaking, they are entirely unrelated to the SEC's fiduciary proposal. Indeed, one concern we have with the DOL's proposed definition is that it contains an overly broad seller's exemption that threatens to create precisely the same problem in the pension market that the SEC is trying to fix with its proposed fiduciary duty for brokers acting as advisers. Moreover, the difficulties raised by the DOL proposal are the result of restrictions in the ERISA statute and have nothing to do with the proposed SEC rulemaking. For example, we believe industry concerns are probably justified that brokers might abandon the individual retirement account market if they were subject to ERISA's restrictions on third-party compensation and its tough sanctions for violations. The answer, however, is to ensure that the DOL proposal is implemented in a way that more closely resembles the approach advocated by the SEC. In short, while there may be good reasons to request further clarification from DOL on how it expects to implement its proposal before its rule is finalized, there is absolutely no reason that controversies over the DOL approach should impede progress on the SEC's fiduciary rulemaking.

5) Is increased oversight over investment advisers or a new standard of care for broker-dealers more essential to investor protection?

As we discuss in detail above, we believe both a new standard of care for broker-dealers and increased oversight over investment advisers are needed. And we see no reason why these priorities should be mutually exclusive. If forced to choose a higher priority, however, it would clearly be the new standard of care for brokers providing investment advice. Once the economic harm resulting from "advice" offered under a suitability standard is measured, we believe the resulting excess costs and lost returns will measure in the tens of billions of dollars a year, if not more. In contrast, while we believe examinations can serve an important investor protection function by detecting and deterring fraud, there is actually no evidence that the current system, despite its inadequate resources, is resulting in anything like that level of harm.

The most commonly cited example, the Madoff Ponzi scheme, is simply not pertinent. Madoff was a broker, regulated exclusively as a broker, throughout the vast majority of the fraud. There was no Madoff "investment adviser" until 2006, when the SEC began regulating commission-based discretionary accounts as advisory accounts. So the story line that FINRA and its predecessor NASD missed the fraud because they did not have the necessary authority over Madoff's advisory activities simply does not hold water. The truth is that Madoff lied about what his business consisted of, and the regulatory oversight provided by NASD and FINRA was insufficient to detect that lie. As we noted above, FINRA has since conducted a very credible independent board examination of its failure in the Madoff and Stanford cases and appears to be working to resolve the short-comings in its regulatory oversight uncovered in that investigation.

Meanwhile, the SEC's regulatory failure in the Madoff case had relatively little to do with the inadequacy of its investment adviser oversight, and a great deal to do with failings in its handling of whistleblower complaints. The agency is working to fix the latter problem, which was also addressed in the Dodd-Frank Act. The one exception to the above characterization is that, once the agency required Madoff to register as an investment adviser in 2006, it should have done more to carefully inspect that operation. With greater resources at its disposal, it might have done so, though we can never know for sure.

6) What are the positives and negatives about the options presented in the Section 914 study for increased oversight of investment advisers?

As we noted above, we prefer the user fee approach, which provides a stable and secure funding source to support a vigorous oversight program. This approach is not without its risks, however. One risk of this approach is that Congress would reduce appropriations to off-set any increase from user fees, though legislation could be drafted in a way that would guard against that risk. The biggest negative of this approach is that Congress seems to be dead set against adopting it. The biggest positives of the SRO approach are that it allows for a stable and sufficient source of funding and that it allows for pay levels for SRO employees that are sufficient to attract and retain highly qualified staff. While the SEC has long been successful in attracting qualified staff, it has been less successful in retaining them over the long-term. The biggest risk of the SRO approach is that Congress will not provide adequate resources for the SEC to provide effective oversight of the SRO and to maintain an effective investment adviser oversight program where it retains jurisdiction. Whichever approach Congress chooses to take, it must ensure that it allows for secure and robust funding and strong oversight.

7) What are your comments on the draft legislation to create an investment adviser SRO?

As we have described in greater detail above, we believe the draft bill represents a reasonable approach should Congress choose to move forward with creation of an investment adviser SRO. Before moving forward, however, we urge the sponsors to more carefully assess the potential costs of this approach for the many small investment adviser firms, to get additional input from other members of the investment adviser and financial planning community who would be directly affected by this proposal, and to ensure that this offers the most cost-effective means of enhancing investment adviser oversight.

IV. Conclusion

In a market that appears to have gone mad, investors are more dependent than ever on advice from trusted investment professionals. But neither the standard of care governing investment advice by brokers nor the quality of regulatory oversight of investment advisers provides adequate protections for vulnerable investors. The Section 913 and Section 914 studies mandated by Dodd-Frank provide a strong foundation for a new, more pro-investor approach to regulation of the brokers, investment advisers, and financial planners investors rely on for advice. The reforms they call for are long overdue. We urge Congress to support the Commission in making these reforms a reality without further delay.

Appendix A

Consumer Federation of America

May 9, 2011

The Honorable Spencer Bachus
Chairman
Financial Services Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Barney Frank
Ranking Member
Financial Services Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Scott Garrett
Chairman
Capital Markets and Government
Sponsored Entities Subcommittee
Financial Services Committee
U.S. House of Representatives

The Honorable Maxine Waters
Ranking Member
Capital Markets and Government
Sponsored Entities Subcommittee
Financial Services Committee
U.S. House of Representatives

Dear Chairman Bachus, Ranking Member Frank, Chairman Garrett and Ranking Member Waters:

I am writing on behalf of the Consumer Federation of America (CFA) in response to concerns expressed by some members of this Committee regarding the Securities and Exchange Commission's proposal to impose a fiduciary duty on brokers when they offer personalized investment advice to retail investors. While CFA has long advocated a universal fiduciary duty for personalized investment advice, we understand that Members of Congress are likely to be concerned when they hear claims that imposing a fiduciary duty on brokers could increase costs to middle income and rural investors or cause them to lose access to valued products and services. The SEC proposal, as outlined in the Section 913 study, should lay those fears to rest.

With the release of its Section 913 study, the SEC made clear that it is very sensitive to the need to preserve the broker-dealer business model and, with it, investor access to affordable, transaction-based advice paid for through commissions on product sales. With those concerns in mind, the SEC proposed to impose the fiduciary duty through parallel rules under the '34 Act and the '40 Act, rather than regulating brokers directly under the Advisers Act, and to do so in a way that preserves brokers' ability to charge commissions, sell proprietary products, sell from a limited menu of products, and offer transaction-based advice. While issues remain to be worked out regarding exactly how the fiduciary duty would be applied in various situations, they are precisely the type of issues that are appropriately resolved during the rule-making progress. Moreover, our own discussions with members of the broker-dealer community suggest that these issues are imminently resolvable.

For these reasons, the SEC proposal has engendered a significant, if not unprecedented breadth of support. Most remarkably, the proposal has won praise not just from the traditional advocates of a fiduciary duty – investor advocates, state securities regulators, and investment adviser and financial planning groups – but also from the major broker-dealer groups. In its official statement on the report, for example, SIFMA praised the agency for recognizing "that any fiduciary standard should not pick business model winners and losers." The Financial Services Institute was, if anything, even more positive, noting that the study had addressed its concerns regarding the fiduciary duty proposal by acknowledging "the importance of investor choice and access to services" and proposing "a means to reduce the costs associated with the proposed regulatory changes."

Unfortunately, a relatively small but highly vocal portion of the broker-dealer community continues to attack the SEC proposal on the grounds that it would harm middle income and rural investors. In doing so, as the attached document is intended to show in greater detail, proponents of this view ignore serious short-comings in existing investor protections as well as the significant steps the SEC proposes to take to ensure that the fiduciary duty would be applied in a way that is consistent with the broker-dealer business model. We are concerned that arguments with so little basis in fact appear to be persuading some Members to advocate a go-slow approach on this top investor protection priority for retail investors.

We recognize that some Members share the concern, expressed by SEC Commissioners Casey and Paredes in their dissent, that the SEC has failed to provide sufficient economic justification for moving forward with a rule. We view this argument with mixed sentiments. On the one hand, we believe the SEC report clearly documents a serious market failure in need of a regulatory solution: that brokers and investment advisers offer personalized investment advice under two very different regulatory standards; that investors are unable to make an informed choice between the two types of service providers because they cannot tell them apart and do not realize they are subject to different standards; and that disclosure alone cannot resolve this investor confusion.

On the other hand, we believe there is a powerful economic argument to be made in favor of holding brokers to a fiduciary duty when they give investment advice. Specifically, an effectively enforced fiduciary duty could save investors tens of billions of dollars a year in excess costs and reduced payouts by forcing brokers to make recommendations based on the best interests of the investor rather than their own bottom line. While it may be impossible to precisely quantify this economic benefit, we believe the best way for the SEC to satisfy the demands to provide a stronger economic basis for rulemaking is to document the significant costs that investors bear and the benefits they lose as a result of conduct that is permissible under a suitability standard but unacceptable under a fiduciary duty.

In its study, the SEC has proposed a way to move forward on fiduciary duty that maximizes investor protections while minimizing industry disruption. In doing so, it was won broad support from industry and investor advocates alike. It would be tragic if opposition from a few industry members intent on maintaining the status quo were able to derail that progress.

Despite the self-interested claims of certain industry members, it is the middle income investors who must make every dollar count who are most in need of these enhanced protections.

Respectfully submitted,

Barbara Roper

Barbara Roper
Director of Investor Protection

cc: Members of the Committee

Response to Arguments about Fiduciary Duty "Unintended Consequences"

During congressional consideration of legislative proposals to impose a fiduciary duty on brokers when they give investment advice, a concern was raised that doing so may have the effect of denying middle-income and rural investors access to valued products and services. The Section 913 report mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act and released earlier this year by the Securities and Exchange Commission (SEC) should lay those fears to rest. With its proposal to impose the duty through parallel rules under the Investment Advisers Act and the Securities Exchange Act, the agency has made clear its intention: to apply the fiduciary duty only to brokers' personalized investment advice to retail customers and not to a broader range of brokerage services; to continue to permit brokers to charge commissions for their services; to continue to permit brokers to sell proprietary products and to sell from a limited menu of products; and to develop a workable approach to principal trading consistent with a fiduciary duty.

The approach advocated by the SEC has won strong support from those groups that have long advocated a fiduciary duty: investor advocates, state securities regulators, and investment adviser and financial planning groups. But it has also won praise from leading members of the broker-dealer community. In particular, both of the two major broker-dealer trade associations – SIFMA and the Financial Services Institute – have endorsed the regulatory approach proposed by the SEC. SIFMA, for example, specifically praised the agency for recognizing "that any fiduciary standard should not pick business model winners and losers." FSI issued the following favorable comment: "The Study acknowledges the importance of investor choice and access to services. It proposes a means to reduce the costs associated with the proposed regulatory changes and avoids picking winners and losers thereby leaving the choice of provider to investors. These were major concerns for FSI and we are satisfied to see that the Study addresses them."

Despite this important progress, a relatively small segment of the broker-dealer community, particularly the brokers whose business model depends on the sale of often high-cost variable annuities, continue to argue that imposing a fiduciary duty on brokers would harm Main Street investors by increasing their costs or denying them access to valued products and services.[29] We recognize that Members of Congress are understandably concerned by claims that middle income or rural investors could be harmed by the fiduciary duty proposal, and as such have attempted to analyze the basis for this claim. In doing so, we have found that those expressing this concern fail to recognize or acknowledge serious short-comings in regulatory protections under the existing standard, ignore those aspects of the SEC proposal designed to protect the broker-dealer business model, and fail to provide any facts to support their claims regarding the effect of a fiduciary duty on compliance costs. Given the lack of substantiation offered, and the support for the SEC approach expressed by other members of the broker-dealer community, we can only conclude that these concerns are unfounded.

[29] See, for example, the National Association of Insurance and Financial Advisors (NAIFA) issue brief on this topic and earlier fact sheet on a LIMRA International survey of NAIFA members.

I. Critics ignore serious short-comings in existing regulatory protections.

A basic premise of the argument against extending a fiduciary duty to brokers offering personalized investment advice is that the current system is working well, providing investors with both adequate protection and the ability to choose whether to work with a broker or an adviser. To arrive at that conclusion, however, one would need to ignore, deny, or gloss over serious short-comings in the current system.

A. For example, it has been suggested that the suitability standard governing broker-dealers is a more robust standard than the fiduciary duty. This is factually untrue.

- A fiduciary duty requires extensive up-front disclosures of information important to investor decision-making, particularly with regard to conflicts of interest. Brokers operating under a suitability standard are not subject to comparable disclosure requirements, though their conflicts of interest are typically greater.

- Certain recommendations that satisfy the suitability standard would not be permissible under a fiduciary duty. The following is a simplified example of how this can harm investors.

  A broker operating under a suitability standard and choosing between two variable annuities to recommend would be free to recommend the one that pays him the highest compensation as long as both were considered appropriate investments for the customer. He would not have to disclose that conflict to the customer.

  A broker operating under a fiduciary duty would have to analyze the two options to determine which of the two annuities would be best for the customer, for example by determining which has the features most suited to the client's situation and would offer the highest payout. The broker would then have to recommend that option. In addition, he would have to disclose all material information about the recommendation, including conflicts that could affect his judgment.

  The difference in costs or payouts to the investor can amount to many thousands of dollars, potential returns middle-income investors can ill afford to forego.

- Those who are best able to judge the extent of the investor protections afforded by the two standards – the federal, state, and industry self-regulators who enforce those standards – all have stated repeatedly that the fiduciary duty affords important protections not offered by the suitability standard. All have advocated extending the fiduciary duty to brokers' advisory activities.

B. In addition, it has been suggested that any differences in the two standards don't matter since investors are able to choose whether to work with a broker or investment adviser. However:

- Numerous surveys have shown that investors cannot distinguish between brokers and advisers. The RAND Study found, for example, that focus group participants could not tell whether their own financial professional was a broker or adviser, even after the differences between the two had been explained to them.

- Surveys have also shown both that investors are unaware that brokers and advisers are subject to different standards of conduct when providing investment advice and that they expect advisers to act in their best interests.

- Absent an understanding of these most basic differences, investors cannot make an informed choice of whether to work with a broker or adviser.

- Lacking financial sophistication, investors may be slow to recognize when they are being taken advantage of, if that recognition comes at all.

II. Critics ignore specifics of the SEC proposal when suggesting that the broker-dealer business model would be harmed.

The argument that middle-income investors would be harmed by adoption of a universal fiduciary duty for investment advice is based on the idea that doing so would require a dramatic change in the way brokers operate and charge for their services. This was never a persuasive claim, as investment advisers have adopted a wide variety of practice models consistent with a fiduciary duty, including sale of securities for commissions. Now that the SEC has issued its report clarifying its intent to preserve the ability of brokers to charge commissions, sell proprietary products, sell from a limited menu of products, and offer transaction-based advice, this argument has gone from being unpersuasive to being outright deceptive. The following discussion briefly examines and refutes each component of this argument.

A. Some fiduciary opponents imply that, because most investment advisers typically charge fees, imposition of a fiduciary duty would either prevent brokers from charging commissions or force them to charge fees. Neither is true.

  - The SEC has proposed to rely on Section 913(g) of the Dodd-Frank Act to impose the fiduciary duty on brokers' investment advice. To the degree that there was any doubt about the ability to charge commissions under a fiduciary duty (a questionable claim to begin with since many fiduciary financial planners charge commissions), that subsection makes clear that fees and commissions are equally acceptable forms of compensation.

  - Since the SEC proposal would not require brokers to charge fees, statements that most investors would choose to go without advisory services if their advisor charged up-front fees of $2,500 are completely irrelevant to the question of whether investors would be harmed by imposition of a fiduciary duty.

- Similarly, statements that consumers want to be able to choose whether to pay for advisory services through fees or commissions are also irrelevant, since there is nothing in the SEC proposal that would deny them that choice.

B. Similarly, some fiduciary opponents falsely imply that, because many investment advisers serve wealthy clients, imposition of a fiduciary duty would force brokers to limit the availability of their services to wealthy clients.

- Investment advisers typically offer on-going account management services, comprehensive financial planning, or a combination of the two, services that are more likely to be attractive to wealthier clients and for which they typically set account minimums and charge up-front planning and/or on-going account management fees.

- The SEC proposal and the legislative provision on which it is based recognize the benefit to investors of maintaining the availability of transaction-based advice. Toward this end, it makes clear that there would be no on-going fiduciary duty where there is no on-going advice.

- By preserving the ability of brokers to offer transaction-based advice, the proposal preserves their ability to offer advisory services on terms that are more affordable for middle-income investors.

- At the same time, the proposal would raise the standard that applies to those transaction-based recommendations, ensuring that they serve the best interest of the investor rather than primarily serving the bottom line of the broker.

C. By focusing solely on fees and ignoring commissions, some fiduciary opponents falsely imply that services offered by brokers are more "affordable" than offered by typical investment advisers.

- Fees are not the only costs paid by investors, although they are the most visible. Commissions also impose significant costs on investors by subtracting from the amount that goes toward the investment.

- Consider, for example, variable annuities. These are considered to be among the more expensive investment products marketed to average investors. As a recent *Smart Money* article noted: "Variable annuities are notorious for the fees they charge. Indeed, the average annual expense on variable annuity subaccounts (including fund expenses plus insurance fees) is typically more than a full percentage point more than on the average open-ended mutual fund. Unfortunately, variable annuity fees don't stop there. Many variable annuities act like B shares of mutual funds, paying commission from the ongoing fees; the average contract fee is $30 to $35."[30]

[30] "What's Wrong With Variable Annuities," *Smart Money,* August 1, 2010.

- These costs are exacerbated when brokers are free to recommend the variable annuity (or other investment product) that pays them most, rather than the one that is in the best interest of the investor.

- A fiduciary duty would bring those costs, and the conflicts of interest associated with them, out into the open and require brokers to consider costs to the investor, among other factors, when making their recommendations.

III. Fiduciary opponents have offered no data to substantiate claims about increased costs under a fiduciary duty.

Some fiduciary opponents have suggested that adopting a universal fiduciary duty for investment advice would significantly raise compliance and liability costs for brokers and that this could cause them to stop serving middle-income investors, reduce services to those investors, or raise their costs. We are not aware, however, that those making this claim have offered any hard data to support the contention that compliance and liability costs would increase significantly under a universal fiduciary duty for investment advice. There are a number of reasons to doubt this claim.

A. Some fiduciary opponents have suggested, for example, that compliance costs would increase by as much as 15 percent if a universal fiduciary duty for investment advice were adopted, but they have offered no factual basis to justify this figure.

   - However, these fiduciary opponents simultaneously maintain that they already follow "know-your-customer" procedures adequate to satisfy a fiduciary duty, including: spending a great deal of time getting to know their clients; requiring customers to fill out detailed suitability questionnaires and to provide extensive documentation to support their responses; reviewing this information and considering additional factors to narrow the selection of financial products from the thousands available to a narrower group of financial products that they believe are most appropriate for the client's objectives.

   - If this is an accurate description, there should be little additional compliance cost associated with determining which of those products is best for the customer.

   - Moreover, a LIMRA survey of NAIFA members calls into question these concerns about compliance costs. According to that survey, NAIFA members are more likely to have dropped their broker-dealer registration primarily because of existing compliance burdens (18 percent) than to have dropped their investment adviser registration for the same reason (9 percent). This suggests that the compliance burdens associated with being an investment adviser have proven no more onerous to NAIFA members than regulation as a broker-dealer and indeed that the opposite may be true.

B. Claims about increased liability costs associated with a fiduciary duty are equally unsupported and ignore the legal environment in which brokers currently operate.

- Some fiduciary opponents have suggested that brokers would be exposed to greater liability under a fiduciary duty because fiduciary duty is an inherently "amorphous" or ill-defined standard. But fiduciary duty is no more amorphous a concept than suitability. Both are principles-based, facts-and-circumstances specific standards.

- The SEC proposal makes clear that it intends to provide extensive guidance to assist brokers in implementing the fiduciary duty.

- Brokers already face liability under a fiduciary standard, since violation of fiduciary duty is the leading claim filed by investors in FINRA arbitration, and arbitrators are not required to follow the law in reaching their decisions and thus are free to make awards based on a perceived violation of fiduciary duty.

- Some state courts have also held brokers to a fiduciary standard in circumstances where they determined that there was a relationship of trust and reliance.

IV. Middle-income investors are among those most in need of the protections afforded by a fiduciary duty.

Fiduciary opponents often cite concern over its potential impact on middle income investors who may have only a few thousand dollars a year to invest. While it is true that such investors cannot typically afford the account minimums or management fees charged by many investment advisers, it is equally true that they cannot afford to pay the high commissions charged by many brokers when lower cost options are readily available. The SEC proposal protects the interest of these investors by preserving their access to commission- and transaction-based services while simultaneously ensuring that those services are delivered with the investor's best interests in mind.

sifma

Invested in America

TESTIMONY OF JOHN TAFT
CHAIRMAN, SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION
AND
HEAD OF U.S. WEALTH MANAGEMENT
RBC WEALTH MANAGEMENT

BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON FINANCIAL SERVICES
SUBCOMMITTEE ON CAPITAL MARKETS
AND GOVERNMENT SPONSORED ENTERPRISES

HEARING ON: THE REGULATION AND OVERSIGHT OF
BROKER-DEALERS AND INVESTMENT ADVISERS

SEPTEMBER 13, 2011

Introduction

Chairman Garrett, Ranking Member Waters, and members of the Committee: My name is John Taft. I am the Chairman of the Securities Industry and Financial Markets Association ("**SIFMA**").[1] I am also the Head of U.S. Wealth Management, RBC Wealth Management, which has over 2,000 financial advisers operating in 200 locations in 42 states who serve over 800,000 client accounts. Thank you for the opportunity to testify at this important hearing.

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

Today I will present SIFMA's views:

(i) in support of establishing a uniform fiduciary standard for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers; [2] and

(ii) in support of ensuring uniform examination, oversight and enforcement of the uniform standard.

We believe that a uniform fiduciary standard for brokers and advisers is consistent with current best practices in our industry, and we hope that it will ultimately result in a heightened, industry-wide focus on serving the best interest of our retail customers.

Our support for this objective, however, is predicated upon our collective willingness to achieve it in a manner that protects investors, preserves investor choice, is cost-effective and business model neutral, and avoids regulatory duplication or conflict. We will succeed only if we perform the necessary cost-benefit analysis that supports and compels us to pursue fiduciary rulemaking consistent with these requirements. Further, it is our strong view that the Department of Labor's ("**DOL's**") proposed, expansive, new definition of fiduciary under the Employee Retirement Income Security Act ("**ERISA**"), absent any mandate from Congress, is, among other things, in direct conflict with Section 913 ("**Section 913**") of the Dodd-Frank Wall

[2] SIFMA's position is limited to retail customers, *i.e.*, natural persons who use investment advice for personal, family or household purposes.

Street Reform and Consumer Protection Act ("**Dodd-Frank**"). Absent a re-proposal and subsequent coordination with any Securities and Exchange Commission ("**SEC**") fiduciary proposal, the DOL proposal will directly conflict with the goals of protecting investors and preserving investor choice while avoiding undue increase in costs to investors. In short, while the SEC should methodically and deliberately approach its authority to write a new uniform fiduciary standard of care, the DOL's approach to date has been to charge ahead absent sufficient study and analysis.

Since 2009, SIFMA has publicly expressed support for establishing a uniform fiduciary standard, including in our testimony before Congress on two separate occasions during 2009.[3] Since the enactment of Dodd-Frank, SIFMA has remained equally engaged with the SEC, the Financial Industry Regulatory Authority ("**FINRA**"), and Congress on all aspects of the SEC's authorization to implement Section 913 of Dodd-Frank. SIFMA has created a robust public record on the fiduciary topic that includes several regulatory comment letters, economic and market research, and our proposed framework for rulemaking under Section 913.[4] SIFMA has

[3] *See, e.g., Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. 2-3 (2009) (statement of John Taft, Head of U.S. Wealth Management, RBC Wealth Management on behalf of SIFMA), available at http://financialservices.house.gov/media/file/hearings/111/taft_testimony.pdf; *Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. 21 (2009) (statement of Randolph C. Snook, Executive Vice President, SIFMA), available at http://financialservices.house.gov/media/file/hearings/111/snook.pdf.

[4] *See, e.g.*, SIFMA comment letter to SEC re: Section 913 Study (Aug. 30, 2010), available at http://www.sifma.org/issues/item.aspx?id=22263 ("**SIFMA Section 913 Comment Letter**");

also engaged in numerous meetings and discussions with SEC and FINRA senior staff and leadership on the fiduciary topic.

A. The critical need to pursue a carefully considered and balanced approach.

As we are all keenly aware, Dodd-Frank has placed both the securities industry and securities regulators in unchartered waters, facing an unprecedented number of rulemakings over the coming years. The stakes are high. Poorly crafted regulations could result in unintended consequences that harm economic growth, stifle job creation, and result in capital markets "winners and losers." It is imperative that we get these regulations right.

The fiduciary issue is among our industry's greatest concern in this regard. During the debate on Dodd-Frank, SIFMA consistently asserted that Congress should authorize the SEC to write the new uniform fiduciary standard as opposed to prescriptively legislating it through statute, particularly given the issue's complexity and the varying historical and legal precedents. That said, this is a complex undertaking that must be well thought-out and reflective of both the statute and

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SIFMA economic study prepared by Oliver Wyman re: Section 913 (Oct. 27, 2010), available at http://www.sifma.org/issues/item.aspx?id=21999 ("**Oliver Wyman Study**"); SIFMA letter to SEC re: Oliver Wyman Study (Nov. 17, 2010), available at http://www.sifma.org/issues/item.aspx?id=22336 ("**Oliver Wyman Study Supplemental Letter**"); SIFMA comment letter on FINRA RN 10-54 (Dec. 3, 2010), available at http://www.sifma.org/issues/item.aspx?id=22482; SIFMA comment letter to DOL re: fiduciary rule proposal (Feb. 3, 2011), available at http://www.sifma.org/issues/item.aspx?id=23239; SIFMA letter to SEC re: framework for rulemaking under Section 913 (Jul. 14, 2011), available at http://www.sifma.org/issues/item.aspx?id=8589934675 ("**SIFMA Framework Letter**").

Congressional intent. We believe strongly that Congress explicitly intended for the SEC to craft a uniform fiduciary standard that not only *protects investors*, but also *preserves investor choice and access* to cost-effective financial products and services and is adaptable to the substantially different operating models of broker-dealers and investment advisers. Congress expressly provided the SEC with the statutory tools necessary to achieve these inextricably linked goals.

Specifically, Section 913 of Dodd-Frank requires that the uniform fiduciary standard be "no less stringent than" the general fiduciary duty implied under the Advisers Act, thus granting the SEC the latitude and ability to establish a separate, unique uniform fiduciary standard that is appropriately tailored to the business models of broker-dealers. The plain language of Section 913, together with the legislative history of Dodd-Frank, makes clear that the "no less stringent" language does *not* require the SEC to impose the Advisers Act standard on broker-dealers.[5] As Congressman Barney Frank stated in a recent letter to SEC Chairman Mary Schapiro,

> If Congress intended the SEC to simply copy the [Advisers] Act and apply it to broker-dealers, it would have simply repealed the broker-dealer exemption – an approach Congress considered but rejected. The new standard contemplated by Congress is intended to recognize and appropriately adapt to the differences between broker-dealers and registered investment advisers.[6]

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[5] Letter from Congressman Barney Frank to Chairman Mary Schapiro (May 31, 2011) ("'no less stringent' … was not intended to encourage the SEC to impose the … Advisers Act… standard on broker-dealers…").

[6] *Id.*

A mere overlay of the Investment Advisers Act of 1940 ("**Advisers Act**") onto broker-dealers would negatively affect client choice, product access, and affordability of customer services and, thus, by definition, would *not* be in the best interest of retail customers. Imposing the Advisers Act standard would also be problematic for broker-dealers from a commercial, legal, compliance, and supervisory perspective, thereby undercutting the SEC's stated intent to take a "business model neutral" approach. The Dodd-Frank Act authorizes, the SEC's Section 913 Study[7] supports, and principles of investor protection warrant taking a fresh approach by establishing, through SEC rulemaking under Section 913 of Dodd-Frank, a uniform fiduciary standard for broker-dealers and investment advisers that is separate from that implied under Section 206 of the Advisers Act.

Investment advisers are generally engaged in the business of providing advice about securities for a fee or managing assets on a discretionary basis. Broker-dealers engage in the former activity on occasion (advice about securities), but also provide a broad range of other products and services. Broker-dealers provide, for example, initial and follow-on public offerings and other underwritten offerings, and market fixed-income and affiliated products, all of which contribute to the capital raising, liquidity, best execution, and portfolio balancing functions of our securities markets.

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[7] *See* Commission Study on Investment Advisers and Broker-Dealers, as required by Section 913 (Jan. 2011), available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf ("**SEC Section 913 Study**").

Yet these services, which are beneficial to both individual investors and the economy in general, often carry inherent (though generally accepted and well-managed) conflicts of interest.

The general fiduciary duty implied under the Advisers Act, as developed through case law, regulatory guidance, and other legal precedent, however, provides incompatible and insufficient guidance for broker-dealers on how to manage, disclose, or, where necessary, obtain consents to these conflicts. Again, Congress explicitly recognized this in the statute when it limited the reference of the Advisers Act to sections 206(1) and (2), thereby preserving the ability of brokers to engage in principal transactions on behalf their clients and receive commissions under any new uniform fiduciary standard.

These issues are important because failure of any new uniform standard of care to recognize and adjust for them, while possibly increasing investor protection, will certainly limit investor choice at a far greater cost than we believe was intended by Congress. SIFMA commissioned an economic study by Oliver Wyman in October 2010 that clearly demonstrates this point.[8] This study, which we submitted to the SEC, shows that the vast majority of retail investors prefer commission-based accounts at a lower cost factor. If the new standard is not appropriately crafted to reflect broker-

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[8] *See* Oliver Wyman Study, and Oliver Wyman Study Supplemental Letter. Copies of both documents are being filed together with SIFMA's written testimony.

dealers' business models and investors' needs, it could force the majority of these investors into fee-based managed accounts at a higher cost factor. We do not believe this is what Congress intended or, frankly, what the SEC proposed in their Section 913 Study, but it should be a concern.

In light of these issues, we believe that appropriately robust and rigorous cost-benefit analyses are essential to inform and shape any SEC rulemaking, especially for the type of "sea change" reform envisioned by Section 913. We support the cost-benefit and other empirical analyses that we understand the SEC is currently undertaking on Section 913, as well as any other analyses that may help inform the optimal approach for implementing a uniform fiduciary standard. We are also willing, as an industry, to facilitate such studies or analyses by providing appropriate data, feedback, or other information that would result in the most accurate and meaningful findings and conclusions. In sum, SIFMA stands ready and willing to further engage with the SEC and others to help perform the due diligence and lay the foundation necessary to support fiduciary rulemaking.

B. Establishing a uniform fiduciary duty for broker-dealers and investment advisers.

Consistent with our intent to move forward on the fiduciary front, on July 14, 2011, SIFMA filed a detailed letter with the SEC that offers a framework and

principles for rulemaking under Section 913 of Dodd-Frank.[9] As we explain in our Framework Letter, the guiding principle that underpins the uniform fiduciary standard is to act in the best interest of the customer. The rulemaking to articulate the standard would address the following five key components:

1. Enunciate the core principles of the uniform fiduciary standard;
2. Articulate the scope of obligations under the uniform fiduciary standard;
3. Define "personalized investment advice;"
4. Provide clear guidance regarding disclosure that would satisfy the uniform fiduciary standard; and
5. Preserve principal transactions and proprietary products.

The standard, and its key components, would be articulated through comprehensive SEC rulemaking as a uniform standard of conduct that is "no less stringent than" the general fiduciary duty implied under the Advisers Act.

The SIFMA Framework Letter explains in detail why a wholesale extension to broker-dealers of the case law, regulatory guidance, and other legal precedent under the Advisers Act would result in a host of adverse consequences for retail customers. The SIFMA Framework Letter not only explains what won't work and why, but also offers a simple, straightforward, and integrated solution. Under our framework, the general

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[9] *See* SIFMA Framework Letter. A copy of the SIFMA Framework Letter is also being filed together with SIFMA's written testimony.

fiduciary duty implied under Section 206 of the Advisers Act, which derives from the traditional, generally understood, and accepted common law,[10] would be newly articulated through SEC rulemaking under the Advisers Act, and through parallel, consistent, and equally stringent rulemaking under the Securities Exchange Act of 1934 ("**Exchange Act**"), as contemplated by Section 913.[11]

The fiduciary standard of conduct would apply equally to broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. The SEC would also issue rules and regulatory guidance to provide the structure and detail necessary to enable broker-dealers and investment advisers to apply the uniform fiduciary standard of conduct to their distinct operational models.[12]

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[10] *See SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963) ("...Congress codified the common law 'remedially' [in the Advisers Act] ... to prevent[] fraudulent securities transactions by fiduciaries"). *See also* Restatement of Agency (Third) (agency is the fiduciary relationship that arises when one person (the principal) manifests assent to another person (the agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act). It is critical to note, however, that existing case law regarding the fiduciary duty of investment advisers was developed in the context of a business model which is inapplicable to broker-dealers, and applying such case law in the broker-dealer context could have legal and regulatory consequences that would undermine the broker-dealer business model, with no corresponding benefit to retail customers.

[11] Thus, the uniform fiduciary standard of conduct would conclusively satisfy Dodd-Frank's requirement that the standard be "no less stringent than" the standard implied under Section 206 of the Advisers Act.

[12] Our proposed approach is consistent with that historically followed in agency and trust contexts. The precise contours of the fiduciary obligation are molded to particular fiduciary fields or contexts. Thereafter, common sets of facts are addressed through implementing rules that apply the duties of loyalty and care to those circumstances. "The ... rules simplify application of the fiduciary obligation to cases that fall within their terms, reducing decision

The uniform fiduciary standard of conduct would begin with the core principle mandated by Dodd-Frank that all broker-dealers and investment advisers, when providing personalized investment advice about securities to retail customers, shall "act in the best interest of the customer …."[13] Thus, the principle of "acting in the best interest of the customer" would serve as the bedrock cornerstone of the SEC rules promulgated under the Advisers Act and the Exchange Act.

Existing case law, guidance, and other legal precedent developed under the Advisers Act would continue to apply to investment advisers. Thus, SIFMA does not propose to modify the current Advisers Act standard applicable to the delivery of investment advice to the institutional clients of investment advisers, or the existing legal precedent developed under Section 206 of the Advisers Act. While there would be many parallels, Section 206 legal precedent would *not* apply to broker-dealers, because: (i) broker-dealers provide a different range of products and services and operate under an operational model distinct from that of investment advisers;[14] and (ii) the uniform standard would be separate and distinct from the Advisers Act precedent.

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costs." *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. Law Rev. 1039, 1044-45 (2011).

[13] Section 913(g) of Dodd-Frank.

[14] While broker-dealers and investment advisers may at times provide similar services, there are many substantive differences in the products, services, conflicts, and traditional compensation practices between the two well-established and highly regulated business models.

Advisers Act precedent, therefore, would not apply to broker-dealers under a new, but no less stringent, uniform fiduciary standard of conduct established under the Advisers Act and the Exchange Act.

We believe that our framework for implementing a uniform fiduciary standard is the optimal one. It would protect investors, preserve their choice of – and access to – financial products and services, and would reflect the substantially different business models of broker-dealers and investment advisers. Thus, we continue to urge the SEC to newly articulate a uniform fiduciary standard of conduct, rather than attempting to apply Advisers Act legal precedent to the broker-dealer business model with resulting significant negative effects for investor protection and choice.

C. The problematic DOL rule proposal on who is a fiduciary.

Another area of deep concern to SIFMA is DOL's proposed amendments to its regulations that redefine – and significantly expand – who is considered a fiduciary for retirement plans and their participants under ERISA. The amendments would also affect individual retirement accounts ("**IRAs**") owned by millions of retail investors. The DOL proposal would effectively upend a long-established and well-understood definition that retirement plans and plan service providers have relied upon for over thirty-five years.

The consequences of a broker-dealer being deemed a fiduciary under ERISA include potential prohibitions on engaging in principal transactions, as well as

difficulty receiving fees or commissions. In addition, the expanded definition of fiduciary may cause broker-dealers to limit the advice, recommendations and information they provide to investors regarding their retirement accounts. These consequences would directly translate into a dramatic change in the manner in which products and services are provided to plans, plan participants, and IRA account holders.

The DOL proposal also conflicts with Section 913 of Dodd-Frank. We understand that the staffs of the DOL and SEC intend to work to harmonize the DOL rulemaking with the standard under Section 913. But neither the DOL nor the SEC has articulated how it envisions the two standards would work together, and the DOL continues to move forward without waiting to see what the SEC will propose. Absent regulatory clarity and coordination, brokers and advisers could be subject to multiple and conflicting regimes when dealing with their retail customers, and again, retail customers could suffer reduced choice and higher costs.

The DOL has not yet undertaken a comprehensive cost-benefit analysis in connection with its proposal, and the cost estimates the DOL has made focus on costs to service providers as a result of the amendments – not the costs to investors. As we have stated in our previous comments to the DOL and Congress,[15] we believe that the

[15] *See, e.g.*, Testimony of Kenneth E. Bentsen, EVP, Public Policy and Advocacy, SIFMA, before DOL on the definition of fiduciary (Mar. 1, 2011), available at http://www.sifma.org/issues/item.aspx?id=23700; SIFMA supplemental comment letter to

DOL has greatly underestimated the costs to service providers and, more importantly, has not sufficiently examined the costs of its proposal on retirement plans and IRAs or the effects of the proposal on retirement savings. We believe that this insufficient analysis has led to a proposal that ultimately will harm investors by raising the costs of saving, which would seriously undercut the ability of millions of investors to efficiently save for retirement.

As noted previously, we have submitted several comment letters to this effect to the DOL, and testified before both DOL and Congress on this matter.[16] Based on our extensive discourse with DOL, we strongly believe that the DOL proposal should be withdrawn and re-proposed in a manner that, at a minimum, avoids prospective conflicts with Section 913. Otherwise, we expect that the DOL proposal will likely have a significant negative impact on millions of accountholders.

D. A uniform fiduciary standard necessarily calls for uniform examination, enforcement, and oversight.

To be sure, the challenges are many to implementing smart fiduciary regulations. But we should make every effort to meet those challenges for the benefit

DOL on proposed definition of fiduciary (Apr. 12, 2011), available at http://www.sifma.org/issues/item.aspx?id=24650.

[16] *See, e.g., Id.*; SIFMA comment letter to DOL on proposed definition of fiduciary (Feb. 3, 2011), available at http://www.sifma.org/issues/item.aspx?id=23239; Testimony of Kenneth E. Bentsen, EVP, Public Policy and Advocacy, SIFMA, before a U.S. House Committee on "Redefining Fiduciary" (Jul. 26, 2011), available at http://www.sifma.org/issues/item.aspx?id=8589934878.

of our clients and the integrity of our industry.

So, let us assume that we succeed in:

(i) conducting reasonable cost-benefit analysis to set the foundation for fiduciary rulemaking;

(ii) establishing a uniform fiduciary standard that is business model neutral and protects investors without depriving them of choice of products and services at low cost;

(iii) avoiding an Advisers Act "overlay" on the broker-dealer business model; and

(iv) removing the conflicts between the DOL proposal and Section 913.

Where do we go from there? We think that is one of the central questions raised by Section 914 of Dodd-Frank, which requires the SEC to "review and analyze the need for enhanced examination and enforcement resources for investment advisers."

The SEC's Division of Investment Management ("**IM**") completed their Section 914 Study in January 2011.[17] In the study, IM recommends that Congress consider three approaches: 1) authorize the SEC to impose user fees on investment advisers to fund their examination by the SEC; 2) authorize FINRA to examine dual-

[17] SEC, Division of Investment Management, Study on Enhancing Investment Adviser Examinations, as required by Section 914 (Jan. 2011), available at http://sec.gov/news/studies/2011/914studyfinal.pdf ("**SEC Section 914 Study**"). The Commission has expressed no view regarding the analysis, findings or conclusions in the study.

registrants for compliance with the Advisers Act; and 3) authorize a self-regulatory organization ("**SRO**") to examine investment advisers.

With respect to the first option (SEC examination), we believe that SEC budgetary and resource constraints will continue into the foreseeable future, resulting in a continuing decline in the number and frequency of investment adviser examinations by the SEC. Thus, we do not believe that the SEC is a viable or practical candidate to fill the "examination enhancer" role contemplated by Section 914. With respect to the second option (FINRA examination of dual-registrants), we believe such an approach would be inconsistent with a uniform, harmonized approach to examination and oversight, because it would not provide any enhanced oversight or examination of retail, stand-alone advisory firms. Moreover, this approach could represent a risk to retail investors, as it might encourage even more brokers to flee from the highly-regulated broker-dealer environment – which is subject to rigorous FINRA and SEC oversight – in favor of a once-a-decade check-up by an overworked and underfunded SEC with no FINRA scrutiny whatsoever.

We believe that the third option, the SRO option, is the most practical and prudent approach. As we explain in greater detail in our comment letter to the SEC on Section 914,[18] oversight of broker-dealers is bolstered by the examination and

[18] SIFMA comment letter to SEC re: Section 914 (Jan. 12, 2011), available at http://www.sifma.org/issues/item.aspx?id=22972.

enforcement activities of SROs like FINRA, particularly with respect to conduct directed toward retail customers. Consistent with the establishment of a uniform fiduciary standard, we ought to uniformly hold broker-dealers and investment advisers to that standard by ensuring uniform examination, oversight, and enforcement of the standard. In the case of broker-dealers and independent investment advisers who provide personalized investment advice to retail customers, we believe comparable examination, oversight, and enforcement is most practically and readily achievable through use of an SRO.

At the same time, and as we noted in our comment letter, our SRO recommendation is limited to investment advisers that focus on providing personalized investment advice to retail customers, which present different concerns than do institutional advisers. Thus, we would not support legislation that extends SRO oversight to institutional advisers. Finally, any SRO examination program should be carefully tailored to investment adviser practices and to avoid regulatory duplication or additional oversight costs where not necessary for improving investor protection.

Conclusion

Thank you, Chairman Garrett, Ranking Member Waters, and members of the Subcommittee, for allowing me to present SIFMA's views. SIFMA and its members remain committed to being constructive participants in the process of establishing a uniform fiduciary standard for broker-dealers and investment advisers, and ensuring

uniform examination, oversight, and enforcement of that standard. We stand ready to provide any further assistance requested by this Subcommittee on these critically important topics.

Encl 1

OLIVER WYMAN

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Invested in America

Financial Services

October 2010

Standard of Care Harmonization
Impact Assessment for SEC

Contents

Section 1

Executive summary

Summary findings (1)

- Oliver Wyman collected data from a broad selection of retail brokerage firms to assess the impact of significant changes to the existing standard of care for broker-dealers and investment advisors
  - A total of 17 firms provided data
  - These institutions serve 38.2MM households and manage $6.8TN in client assets
  - The survey captures approximately 33% of households and 25% of retail financial assets in the US
- The primary issue at stake in the SEC 'standard of care' study is how to better protect the investor while preserving choice of relationship, product access, and affordability of advisory services
- The key insight from the survey is that broker-dealers play a critical role in the financial services industry that cannot be easily replicated with alternative services models
- Wholesale adoption of the Investment Advisers Act of 1940 for all brokerage activity is likely to have a negative impact on consumers (particularly smaller investors) across each of the following dimensions
  - Choice
  - Product access
  - Affordability of advisory services

Continued...

Summary findings (2)

Potential impact of rulemaking on retail investors

Choice	▪ Reduced access to the preferred 'investment and advisory model' for retail investors – 95% of households hold commission-based brokerage accounts today – The fee-based advisory platform is far less popular (only 5% of households) – The 'preference' for brokerage accounts is evident across all wealth segments but strongest for smaller investors with less than $250K in assets
Product Access	▪ Reduced access to products distributed primarily through broker-dealers – Municipal and corporate bonds represent ~15% of assets held by retail investors – These products (among others) are generally offered on a 'principal basis' – Restricting principal or proprietary offerings will limit investor access to these products and possibly limit financing options for municipalities or corporates at current pricing
Affordability of Advisory Service	▪ Reduced access to the most affordable investment options – Fee-based services are 23-37 bps more expensive than brokerage[1] – For an investor with $200K in assets, this translates to $460 in additional fees – The cost of shifting to fee-based pricing alone would reduce expected returns by more than $20K over a 20 year horizon (assuming 5% annual returns) ▪ And the indirect costs of additional compliance, disclosure, and surveillance may have an even greater impact on consumers → we estimate that 12-17MM small investors 'at the margin' could lose access to current levels of advisory service if even 2 additional hours of coverage and support is required per client

1. Cost expressed as a percentage of assets under management in basis points (1bp = 0.01%)

Section 2

Methodology and source data

Oliver Wyman collected data from 17 SIFMA member firms to support the impact assessment

Purpose of study

- The impact assessment that follows was designed in response to the SEC request for comment on the upcoming study of the standard of care obligations for broker-dealers and investment advisers
- Oliver Wyman gathered data from 17 SIFMA member firms to provide relevant market data for the SEC study
- The study is intended to help
  - Identify the investor segments most likely to be affected by changes to the standard of care
  - Understand the cost to the consumer (choice, product access, transaction costs) of potential changes
  - Understand the one-time and ongoing costs of compliance for advisory and brokerage firms
  - Estimate the broader market / economic impact of any changes, particularly for capital formation

Note on survey methodology

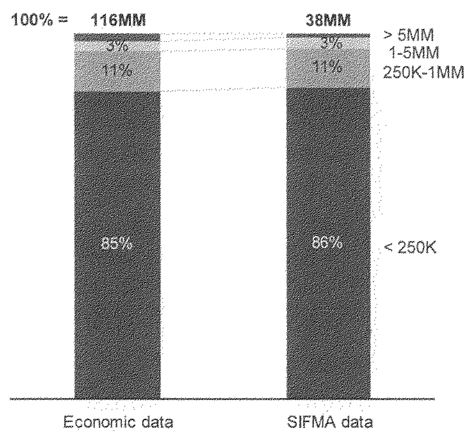
- 17 member firms participated, representing $6.8TN in assets (approximately 27% of total U.S. household financial assets) across 38.2MM households
- To obtain a fairly representative sample of the industry, data on asset management accounts, investor profiles, and cost structure was gathered from a diverse set of brokerage firms

Note on confidentiality

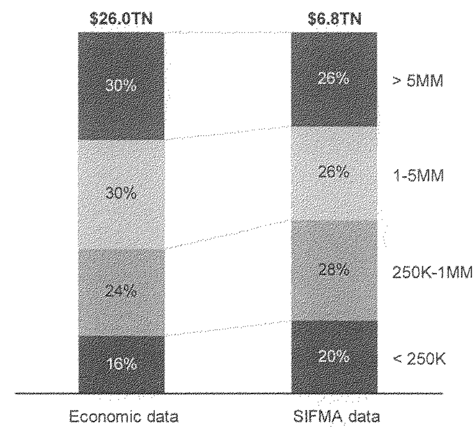
- Due to the highly sensitive nature of firm-specific information, all data is presented in aggregated form

The survey proved to be highly representative of the investor population as a whole, capturing 33% of households and 27% of financial assets

Investors by wealth segment[1]
Number of U.S. households, 2009



Assets by wealth segment
Investable assets, 2009



Note: Economic data includes all investable assets whereas SIFMA data refers to managed assets, SIFMA data skews toward investors with <$1MM in assets

1. Wealth segments based on client assets under management

Source: SIFMA member data, 2007 Federal Reserve Survey of Consumer Finances, Oliver Wyman analysis

Section 3

Background and context

Regulators have wide discretion in establishing a uniform 'standard of care' for the IABD industry

- Regulators have a range of options in establishing a uniform 'standard of care' for broker-dealers and investment advisers in the United States
  - Limited changes to current model
  - A 'standard of care' with disclosure / consent to conflicts that preserves commission-based brokerage
  - Wholesale adoption of the Advisers Act of 1940 for all broker-dealers and investment advisers
- A major shift in the 'standard of care' will impact individual investors in several ways
  - Choice of advisory model
  - Access to investment products
  - Cost of investment and advisory services
- Beyond these direct costs to the consumer, we also anticipate broader economic costs to the industry as a whole
  - Broker-dealers and investment advisory firms will all face one-time and ongoing costs to comply with new fiduciary, disclosure, and surveillance requirements → these may be passed on to investors
  - Potential limitations on product accessibility for retail investors will place constraints on capital formation and issuers' ability to finance at attractive rates

Our analysis will focus on the relative impact of two possible scenarios for harmonization of the standard of care

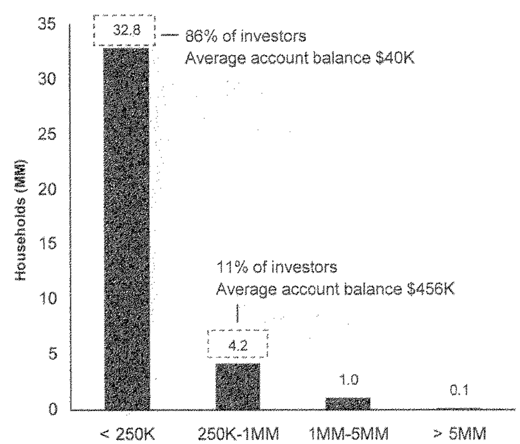
Activity	Rule making scenarios		
	STATUS QUO WITH GREATER DISCLOSURE *Harmonized standards that preserve existing practices but require greater disclosure*	**FIDUCIARY DUTY WITH CONSENT TO CONFLICTS** *Fiduciary standard for advisory activity that preserves commission-based brokerage model*	**ADOPTION OF ADVISERS ACT OF 1940** *Fiduciary standard for advisory activity with fees based on assets under management*
Investment planning	▪ Suitability for resultant securities transactions	▪ Best interest of the client with disclosure / consent to conflicts	▪ Best interest of the client
Asset allocation advice	▪ Suitability for resultant securities transactions	▪ Best interest of the client with disclosure / consent to conflicts	▪ Best interest of the client
Advice on client holdings	▪ Best interest of the client (advisory services) or suitability (brokerage services)	▪ Best interest of the client, at point of sale or ongoing depending on relationship	▪ Best interest of the client
Proprietary product sales	▪ Best interest of the client (advisory services) or suitability (brokerage services)	▪ Best interest of the client with disclosure / consent to conflicts	▪ Not available
Principal transactions	▪ Best interest of the client (advisory services) or suitability (brokerage services)	▪ Best interest of the client with disclosure / consent to conflicts	▪ Trade-by-trade prior consent required
IRA / retirement accounts	▪ Best interest of the client (advisory services) or suitability (brokerage services)	▪ Best interest of the client or solely in the interest of the client, depending on relationship	▪ Solely in the interest of the client
	Baseline for impact analysis		

Section 4

Impact on choice

The vast majority (97%) of the US investor population holds less than $1MM in assets with a broker-dealer or investment adviser

Investor landscape (survey population)
Number of investors by wealth segment[1], 2009



Client assets under management

	< 250K	250K-1MM	1MM-5MM	> 5MM
	$1.3TN	$1.9TN	$1.8TN	$1.8TN

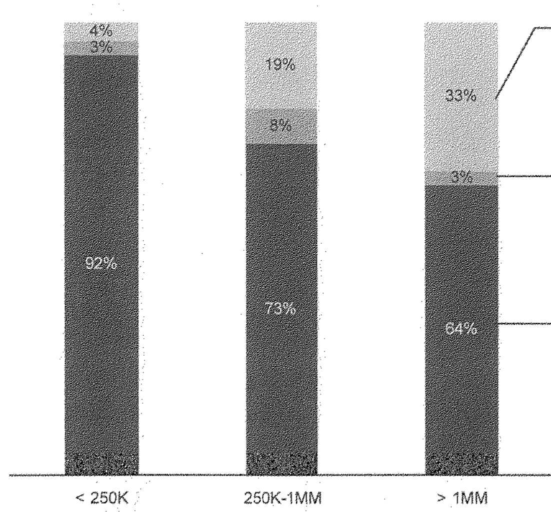
Key observations

- 97% of investors in the survey (37.0MM) hold less than $1MM in assets with broker-dealers or investment advisers
- Despite the heavy skew toward small clients, total assets are evenly distributed across the wealth spectrum ($1.3-1.9TN in all groups)
- Average account balance for investors in the lowest wealth segment is $40K → this is the segment most likely to be affected by a significant increase in costs

1. Wealth segments based on client assets under management
Source: SIFMA member data, 2007 Federal Reserve Survey of Consumer Finances, Oliver Wyman analysis

Across wealth segments, less than 5% of investors use fee-based accounts alone to serve their investment needs

Channel preference (survey population)
Number of households by relationship model, 2009



1 Mix of commission- and fee-based accounts

- As wealth increases, more investors use a hybrid model of fees and commissions-based management

2 Fee-based accounts

- Only 1.3MM investors (4% of total) hold AUM solely under fee-based management
- Fees-only management is the least common channel across all wealth segments

3 Commission-based accounts

- Over 30MM households hold assets solely in commission-based accounts; 27MM of these are from the lowest wealth segment
- Investors in the lowest wealth segment have a much stronger skew towards commissions-only management than any other wealth segment

Source: SIFMA member data, 2007 Federal Reserve Survey of Consumer Finances, Oliver Wyman analysis

The current model offers investors a wide range of advisory service, product access, and pricing options

Key Attributes	Account Types			
	Fee-Based	Fees and Commissions	Commission-Based *Advised*	Commission-Based[1] *Non-Advised*
Share of population	4%	7%	← 88%	→
Advisory needs	▪ Broad, portfolio-based financial planning and investment advice	▪ Broad, portfolio-based financial planning and investment advice plus product-specific advice	▪ Product-specific advice, access to principal products	▪ Uncertain
Investment activity	▪ Combination of active and passive, depending on client needs	▪ Active investment	▪ Combination of active and passive, depending on client choice	▪ Combination of active and passive, depending on client choice
Level of service	▪ Highest → ongoing advice and account surveillance	▪ Highest → ongoing advice and account surveillance	▪ Balanced → point in time advice on specific products	▪ Limited service
Typical holdings	▪ Investable assets only	▪ Investable assets ▪ Cash and equivalents ▪ Concentrated positions with special requirements	▪ Investable assets ▪ Cash and equivalents ▪ Concentrated positions with special requirements	▪ All investable assets ▪ Cash and equivalents
Cost	▪ Highest cost ▪ Range = 67-117 bps[2]	▪ Balanced cost ▪ Range = 43-99 bps[2]	▪ Balanced cost ▪ Range = 38-94 bps[2]	▪ Lowest cost, depending on trading activity
Common investors	▪ Affluent and HNW	▪ Affluent and HNW	▪ All investors	▪ Predominantly lower net worth investors

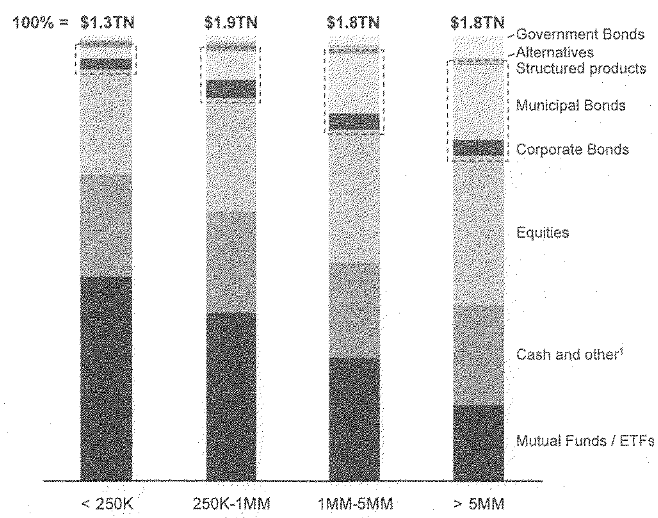
1. Non-advised accounts (e.g. self-directed online) were not targeted in this study but represent a significant subset of commission-based accounts
2. Range dependent on wealth segment (high end of the range reflects pricing for lowest wealth segment)

Section 5

Impact on product access

Direct holdings of individual securities (such as municipal bonds) represent an important element of investment strategy across all wealth segments

Asset allocation (survey population)
Allocation of assets (%) by wealth segment, 2009



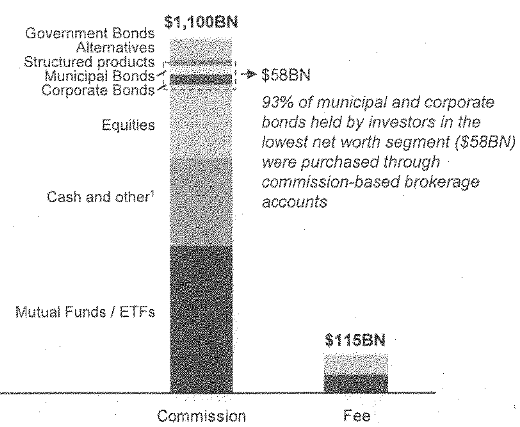
1. Includes cash, currencies, money market funds, etc
Source: SIFMA member data, Oliver Wyman analysis

Key observations

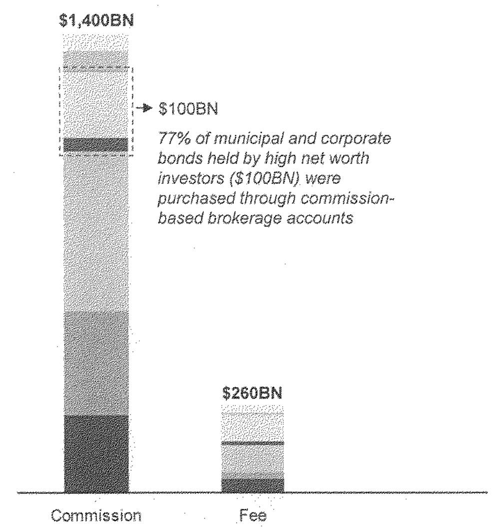
- Investors across all wealth segments have at least 30% of their portfolio in direct holdings of individual securities
- Municipal and corporate bonds offer tax and diversification benefits that investors may be unable to access via funds
- Across all investors, municipal and corporate bonds represent 13% of total wealth and 18% of invested assets (excluding cash)
- Allocations to municipal and corporate bonds range from 7% of investable assets for low net worth accounts to as high as 26% for high net worth accounts

Commission-based brokerage is the primary channel for accessing these products today, especially for investors in the lowest wealth segment

Low Net worth investors (<250K AUM)
Product access by account type[2]



High Net Worth Investors (>5MM AUM)
Product access by account type

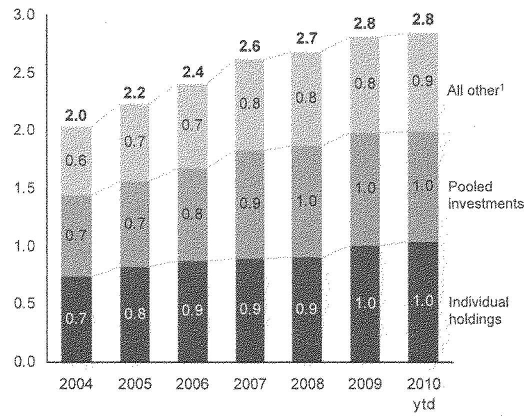


1. Cash and other includes cash, currencies, money market funds, etc.
2. Non-discretionary, commission accounts and discretionary, fee accounts

Source: SIFMA member data, Oliver Wyman analysis

Individual investors hold 70% of municipal debt in the US today, both through direct and pooled investments

Investor demand for Municipal Securities
Holdings of Municipal Securities by segment, $TN



Individual holdings (% of total outstanding)							
Direct	37%	37%	36%	34%	34%	36%	36%
Indirect	34%	33%	34%	36%	36%	35%	34%

1. Other sectors include corporates, financial institutions, broker-dealers, and foreign entities
Source: Federal Reserve

Key observations

- The municipal securities market has grown steadily over the past several years and now provides nearly $3TN in financing for state and local governments
- Municipalities in the U.S. have issued ~$400BN debt annually over the past five years through these instruments
- The market is dominated by individual investors who hold ~ 70% of outstanding debt, split across direct exposures and pooled investments
- Financial institutions are relatively minor players in the space, collectively holding less than 30% of total assets (including broker-dealer inventories)
- A significant shift in the 'standard of care' required for origination and distribution of investments sold on a principal basis (as Munis are) could have a significant market impact along 2 dimensions
  - Access and cost for retail investors
  - Low cost financing for municipalities

Broker-dealers play a key role in the Munis market, providing individual investors with direct and cost effective access to new issuances of these securities

Channels

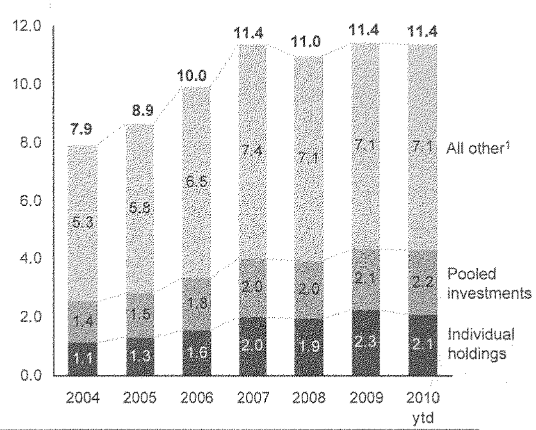
		Retail Investors
Primary market	→	▪ Transaction costs are built into the 'discount' or underwriting fees paid by the issuer ▪ Investors have access to securities with no explicit mark-up during limited retail order periods
Secondary market	→	▪ Securities trade on the secondary market and prices fluctuate to reflect supply and demand ▪ Investors have access to securities through broker-dealers who act as principals and build inventory (mark-up paid by investors)
Pooled investment funds	→	▪ Securities are bought and sold by broker-dealers on behalf of pooled investment funds ▪ Investors pay the funds' asset management / advisory fees in addition to transaction costs / sales loads passed on by the fund

Role of the broker-dealer

- Direct, affordable access to municipal bonds for retail investors via primary and secondary principal trading desks → mutual funds are an alternative channel to Munis but at higher cost as management fees erode returns (~1% management fees vs. 4-5% average yield)

Individual investors are also important participants in the corporate bond market

Investor demand for Corporate and Foreign Bonds
Holdings of Corporate and Foreign Securities by segment, $TN



Individual holdings (% of total outstanding)							
Direct	14%	15%	16%	18%	18%	20%	18%
Indirect	18%	17%	18%	18%	18%	18%	19%

1. Other sectors include corporates, financial institutions, broker-dealers, and foreign entities
Source: Federal Reserve

Key observations

- Corporations and foreign entities rapidly increased issuance of new debt between 2004-2007 and have maintained annual new bond issuance of ~ $11TN since the financial crisis
- Individual investors (via direct holdings or pooled investments) are the largest single class of investor in the corporate and foreign bond market
- Individual investors hold $4.3TN or nearly 40% of outstanding debt today
- In absolute terms, individual investors' share of the corporate securities market is larger than municipal securities
- Capital formation for US corporates is driven in large part by individual investment

Broker-dealers anticipate retail demand for corporate bonds and hold inventory to quickly, efficiently, and cost effectively meet client needs in the secondary market

Channels

Channel		
Primary market	Retail Investors	▪ Predominantly institutional market ▪ Retail investors have little to no access to primary issuance
Secondary market	Retail Investors	▪ Primarily over-the-counter market → broker-dealers provide main point of access for retail investors to these securities ▪ Investors pay upfront mark-ups but no ongoing management fees that are likely to erode returns
Pooled investment funds	Retail Investors	▪ Securities are bought and sold by broker-dealers on behalf of pooled investment funds ▪ Investors pay the funds' asset management / advisory fees in addition to transaction costs / sales loads passed on by the fund

Role of the broker-dealer

- Direct, affordable access to corporate bonds for retail investors via secondary principal trading desks → principal traders anticipate retail demand and build inventory that meets specific investment needs of clients

Section 6

Impact on cost

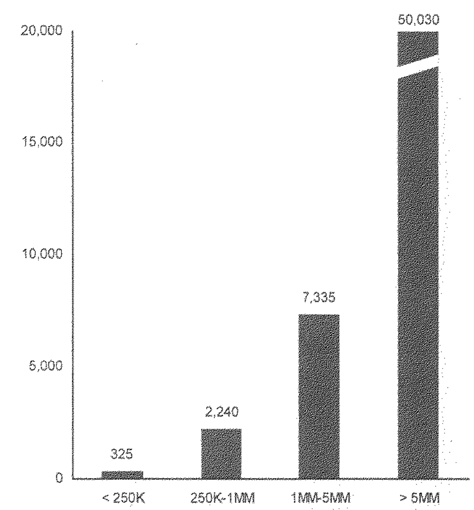
We have profiled three typical investors within each wealth segment to evaluate the potential costs of broad application of the Advisers Act of 1940[1]

A	'Small Investor' with commission-based accounts *77% of all investors*	▪ $200K in assets held exclusively in commission-based accounts ▪ Passive investor with less than 10 trades per year (~50% of investors in <$250K segment) ▪ Pays 94 bps or $1,890 in commissions per year ▪ Holds $132K (68% of assets) in mutual funds and cash / cash equivalents ▪ Significant direct holdings (31% of assets), mainly in equities ▪ Limited investments in alternatives, fixed income, and structured products
B	'Affluent Investor' with commission-based accounts *7% of all investors*	▪ $500K in assets held in commission-based accounts ▪ Active investor with more than 10 trades per year (~75% of investors in $250K-1MM segment) ▪ Pays 53 bps or $2,650 in commissions per year ▪ Holds $292K (59% of assets) in mutual funds and cash / cash equivalents ▪ Holds $117.5K (23% of assets) in equities ▪ Hold $90.5K (18% of assets) in fixed income, structured products and alternatives
C	'High Net Worth Investor' with commission-based accounts *2% of all investors*	▪ $10MM in assets held in commission-based accounts ▪ Active investor with more than 10 trades per year (~75% of investors in >$1MM segment) ▪ Pays 38 bps or $38,000 in commissions per year ▪ Mutual funds and cash / cash equivalents together are $4.1MM (41% of assets) ▪ Equities are largest part of portfolio, with $3.3MM invested (33% of assets) ▪ Fixed income, structured products and alternatives represent $2.6MM (26% of assets)

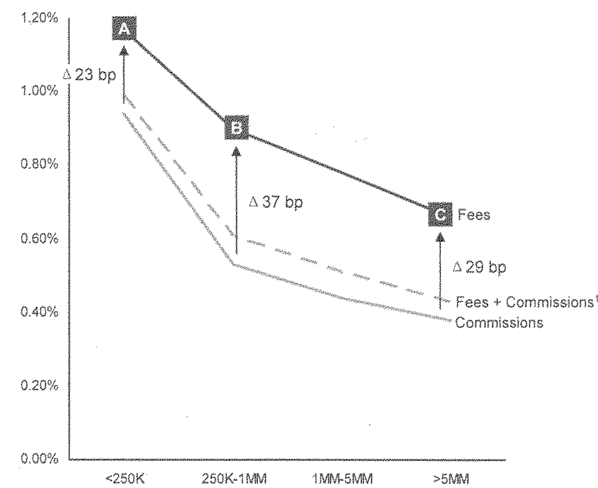
1. Asset allocation based on observed average asset allocation for each wealth segment
Source: SIFMA member data, Oliver Wyman analysis

Commission-based accounts provide the most cost effective option for investors across the wealth spectrum today

Financial cost to consumer
Average annual fees and commissions, 2009



Average annual fees and commissions as % of AUM, 2009

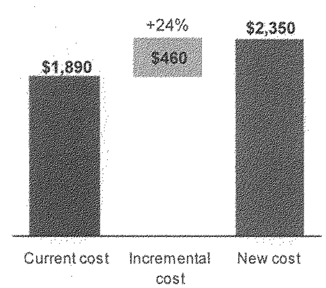


1. Based on existing balance of assets between fee-based and commission-based accounts
Source: SIFMA member data, Oliver Wyman analysis

A broad shift to fee-based advisory would substantially increase costs across all wealth segments

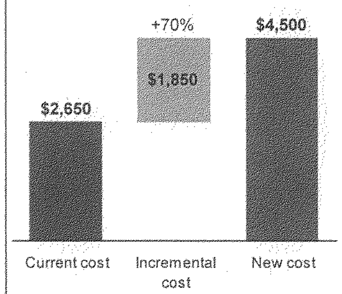
Potential impact on advisory fees and expected returns
Pro forma impact of transition to fee-based accounts at current pricing, annual advisory costs[1]

A Small Investor



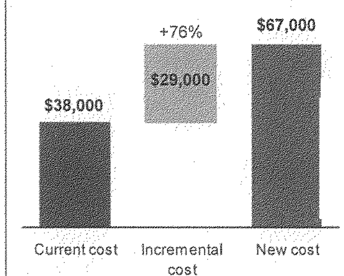
Gross Expected Return[1]	5.00%
- Current Cost	0.94%
Current Expected Return	4.06%
- Incremental Cost	0.23%
New Expected Return	**3.83%**

B Affluent Investor



Gross Expected Return[1]	5.00%
- Current Cost	0.53%
Current Expected Return	4.47%
- Incremental Cost	0.37%
New Expected Return	**4.10%**

C High net worth Investor



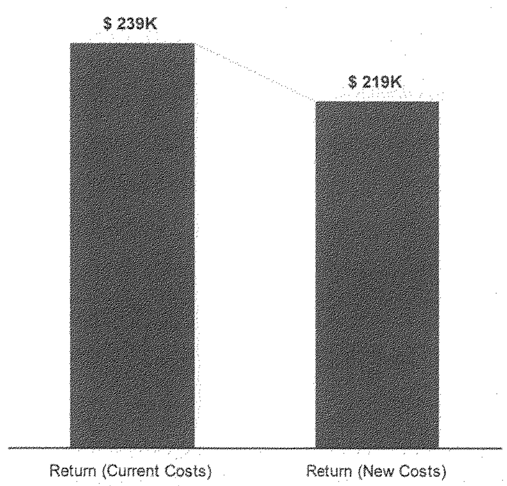
Gross Expected Return[1]	5.00%
- Current Cost	0.38%
Current Expected Return	4.62%
- Incremental Cost	0.29%
New Expected Return	**4.33%**

1. Assumes current pricing for commission- and fee-based accounts hold for all investors
2. Illustrative, not based on observed annual returns

Sources: SIFMA data, Oliver Wyman analysis

The shift to a fee-based model would reduce cumulative returns to 'small investor' (with $200K in assets) by $20K over the next 20 years

Impact of cost on investor returns
Expected investment gains on $200K portfolio, 2010-2030[1]



Key observations

- The average investor in the lowest wealth segment trades relatively infrequently over the course of the year
- As a result, a fee-based cost structure is generally more costly for these 'passive investors' and the incremental costs (+23 bps) erode returns
- For 'small investor,' a fee-based model results in a cumulative reduction in investment gains of $20K over 10 years, roughly 10% of the initial investment
  - 'Small investor' would pay ~ $59K in commissions over the course of 20 years through commission-based brokerage accounts
  - Under a fee-based advisory model, 'small investor' would pay an additional $13K in fees and lose $7K in investment gains as a result of lower principal balances each year

1. Assumes initial investment of $200K in a balanced portfolio reflecting typical, balanced asset allocation for lower net worth investors with <$250K AUM; based on constant annual returns of 5%, not adjusted for inflation; commissions deducted from principal balance starting at year end

However, the costs of complying with and / or demonstrating compliance with the new standard of care will place additional pressure on pricing

Increased activities required by shift in 'standard of care'

- Adviser training
- Increased legal and compliance
- Increased risk management and oversight
- Production and mailing of additional disclosures
- Initial client consultation
  - Review relationship
  - Obtain formal consent for existing strategy
- Investment strategy and plan
  - Evaluate portfolio
  - Assess investment objectives
  - Agree on new investment plan for client
- Documentation of client discussions
- Ongoing account surveillance

Incremental cost of compliance
Annual costs expressed as bps over assets

Additional hours	1	2	3	4	5
Estimated cost	**$200**	**$400**	**$600**	**$800**	**$1,000**
A Small investor ($200K)	10bps	20bps	30bps	40bps	50bps
B Affluent investor ($500K)	4bps	8bps	12bps	16bps	20bps
C HNW investor ($10MM)	2bps	4bps	6bps	8bps	10bps

Focus of analysis on following slides (conservative estimate)

Methodology for calculating hourly rate

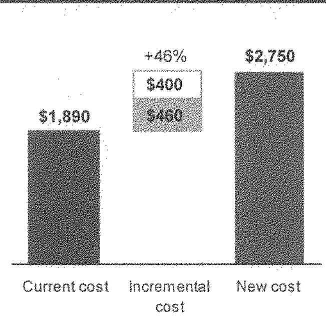
- Median income for investment advisers estimated at $173K[1]
- Adviser compensation represents 42% of fully loaded costs based on SIFMA member data
- Given 2,000 working hours per year, average hourly rate of service is $200 / hour

1. Based on 2010 annual compensation survey by Registered Rep
Source: SIFMA member data, Oliver Wyman analysis

These incremental costs will disproportionately impact investors with smaller investment portfolios

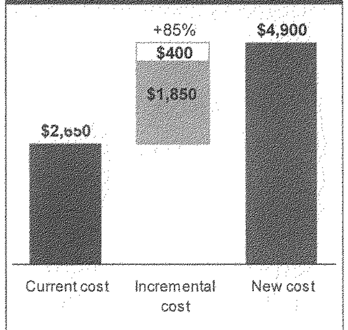
Potential impact on advisory fees and expected returns
Pro forma impact of transition to fee-based accounts at new pricing, annual advisory costs

A Small Investor



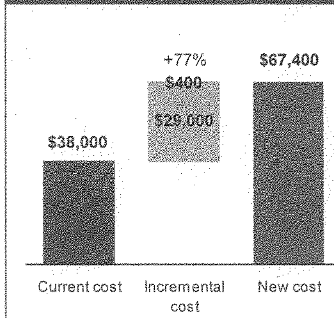
Gross Expected Return[1]	5.00%
- Current Cost	0.94%
Current Expected Return	4.06%
- Incremental Cost	0.43%
New Expected Return	**3.63%**

B Affluent Investor



Gross Expected Return[1]	5.00%
- Current Cost	0.53%
Current Expected Return	4.47%
- Incremental Cost	0.45%
New Expected Return	**4.02%**

C High net worth Investor



Gross Expected Return[1]	5.00%
- Current Cost	0.38%
Current Expected Return	4.62%
- Incremental Cost	0.29%
New Expected Return	**4.33%**

1. Assumes pricing for commission- and fee-based accounts rises to account for additional activity
2. Illustrative, not based on observed annual returns
Sources: SIFMA data, Oliver Wyman analysis

Consumers may also face significant adviser capacity constraints that will limit the availability of service under the new standard of care

Capacity analysis

Current state

Investors with <$250K in commission accounts	28.4MM
Average commissions/investor	$268
Hourly rate for asset management services	$200
Time spent per investor	1.3 hours
Time spent on all investors with <$250K AUM	38.1MM hours
Minimum number of required advisers	19K

Impact of additional service requirements

+ 2 hours per investor

Current utilization levels	70%	80%	90%	100%
Implied capacity (MM hours)	54.4	47.6	42.3	38.1
Implied capacity (total investors, MM)	16.3	14.3	12.7	11.4
Coverage gap (total investors, MM)	12.1	14.2	15.8	17.0
Additional advisers needed	20K	24K	26K	28K

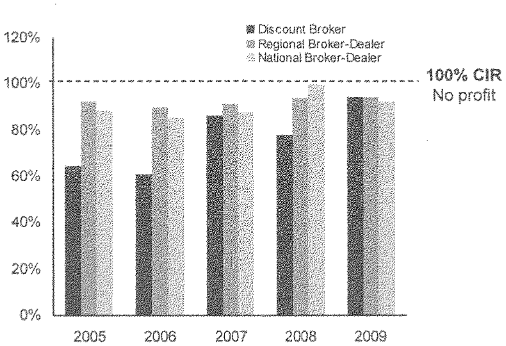
Implications

- Given current resources, we estimate that 40-57% of investors in the lowest wealth segment can be covered if advisers are required to spend 2 additional hours with each investor
- We estimate that 20-28K additional advisers will be needed to serve the 'uncovered' investors in our sample population → our sample population is 33% of US investors, which suggests that 60-84K new advisers may be needed
- Faced with this, the brokerage and investment advisory industry can respond in one of three ways
  - Increase workforce and raise prices
  - Increase workforce and absorb new costs
  - Reduce coverage for lower net worth investors whose 'personalized investment' advisory needs will exceed capacity
- While the autonomy provided by self-directed accounts is desirable for certain investors, market data suggests that investors with advised accounts
  - Make more sophisticated investment decisions
  - Achieve higher average investment returns

Source: SIFMA member data, Oliver Wyman analysis

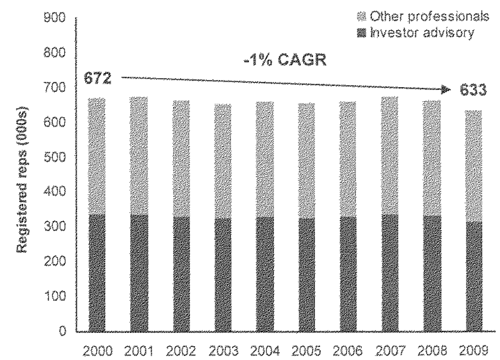
Current economics of the IA/BD industry suggest that investors will need to accept higher costs or turn to alternative service models for investment

Industry profitability
Total costs before tax over total revenues[1]



Operating margins across the industry are thin and have deteriorated since 2005, leaving little room to absorb additional cost

Industry capacity
FINRA registered representatives (000s)[2]



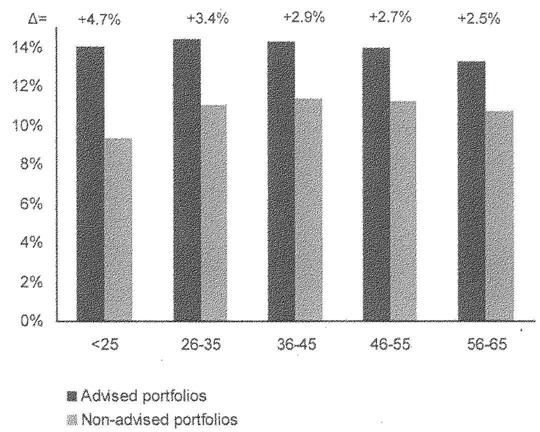
Industry headcount has been flat to negative over the past ten years; the additional capacity required to cover small clients would be difficult to provide (at least in the near term)

1. Public data for companies within the SNL National Broker-Dealer, Regional Broker-Dealer, and Discount Broker indices
2. Figures overstate actual industry capacity (approximately 50-60% of individuals who hold Series 7 licenses do not advise investors, but serve in other capacities e.g. legal, compliance, etc.)

Sources: SNL Financial, FINRA

And several recent studies suggest that investors without access to advisory services may be disadvantaged and fail to realize investment goals

Impact of professional financial advice[1] on portfolio returns
401k returns by age segment, 2006 data



Key observations

- Participants in 401k plans administered by Schwab achieved returns that were 3.3% higher on average if some level of financial advice was provided
- In addition to higher portfolio returns, professional financial advice had an impact on several dimensions
  - Savings rate → 70% of participants who received financial advice doubled their saving rates from an average of 5% to 10% of pre-tax income
  - Portfolio diversification → Participants who received financial advice held positions across 8 asset classes on average vs. self-directed investors who held positions in 3.7
  - Investor confidence → Of participants who received advice, 29% were confident of having adequate funds to retire vs. 16% of investors who did not

1. Use of advisory services for >1 year, 'advisory services' include personalized investment advice online, via phone, or in person
Source: Charles Schwab studies on 401(k) portfolio returns (2007) and impact of professional advisory relationships in 401(k) plans (2010)

Appendix

MiFID Investor Protection

NYC-FMJ001-001

In 2007, the Markets in Financial Instruments Directive (MiFID) made significant provisions for 'investor protection'

MiFID provisions

- Regulation of alternative trading systems
  - Regulation of multi-lateral trading facilities
  - Treatment of systemic internalisers, or principal traders, as mini-exchanges
- Increased pre and post trade transparency for all trading facilities
- Passporting or development of a single market for transactions in financial instruments across a number of European Union member states
- Requirement to enhance corporate governance structures to accommodate an independent compliance function
- Investor protection
  - Appropriate client categorization and client order handling
  - Best execution requirement for all trades on behalf of clients
  - Robust record keeping systems for periodic statements, transaction reporting, and client contracts and agreements

MiFID relative to Advisers Act of 1940

- MiFID provisions covered a narrower range of activities and imposed a less onerous standard of care than the 'best interest' standards that would be required if the Advisers Act were adopted

	MiFID	
	Suitability	Best interest
Investment planning	✓	×
Asset allocation advice	✓	×
Advice on client holdings	✓	×
Proprietary product sales	✓	×
Underwriting	Not covered	
Principal trading	✓	×
IRA / retirement accounts	✓	×

Although less onerous than the 'standard of care' currently under consideration in the US, MiFID studies nonetheless show the impact of similar compliance costs on asset management firms

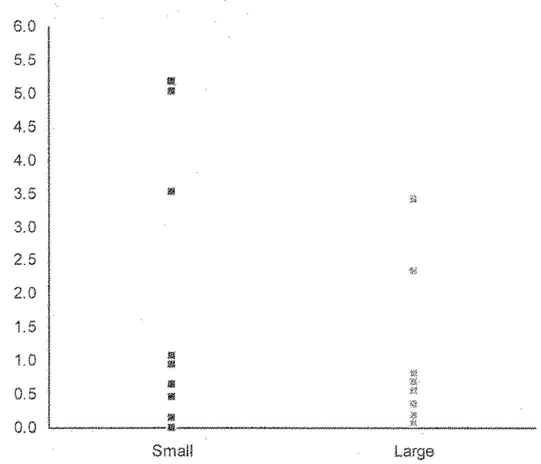
The FSA's impact studies on MiFID identified investor protection provisions as the greatest contributors to compliance costs

	Activity	Objective	Cost Factors	Cost Drivers
Client Acquisition	**Classifying client base**	Categorizing clients according to size of portfolio, # trades, etc.	System/process to capture client data Client data collection	Fixed cost # clients, length of client discussions
	Suitability/ Appropriateness	Understanding needs, objectives, risk profiles, experience and expertise of clients	System/process to capture client data Client data collection Updated risk information on products	Fixed cost # clients, level of existing data # products offered
Client Management	**Consent/ Disclosure**	Disclosing information on suitability, best execution policy, conflicts of interest policy, principal trading, etc.	One time client agreements/contracts Routine disclosure	Response rate, # of clients # clients, frequency of disclosure
	Maintenance of client portfolios	Upholding suitability requirement to maintain AUM in appropriate investments	Monitoring client accounts	# clients, # products offered
Order Execution	**Best execution**	Achieving optimal mix of price, speed and likelihood of execution	Regular reviews of execution venues Disclosure to prove best execution policy	# monitored execution venues # clients, frequency of disclosure
	Conflict of Interest	Identifying/addressing conflicts, actively managing potential issues before they become conflicts	Maintaining Chinese Walls Documentation/database	# departments, level of principal trading # products offered
	Documentation of trades	Demonstrating compliance with suitability and best execution requirements	Electronic/voice storage Paper document storage	# trades, # clients, required level of detail # trades, # clients, required level of detail

Source: Implementing MiFID for Firms and Markets, FSA Consultation Paper 2006

Smaller firms with a large retail client base incurred higher one-off costs of compliance as a percentage of operating costs

One-off compliance costs of MiFID by firm size[1]
One-off costs as a percentage of operating costs, 2007



Determinants of one-off costs

- The study found that client profile is the most important determinant of costs, with retail clients incurring significantly more costs than institutional clients
- The biggest one-off costs arose from investment in IT and revisions of CRM systems to reflect new data points, especially for certain retail segments
- A significant portion of one-off costs were fixed, irrespective of firm size and number of clients
- Impact studies indicated that small firms would be unable to sustain large fixed costs of compliance and exit the industry
- In absolute terms, average one-off costs were ~€1 MM for a small firm and ~€4 MM for a large firm
- There is high variability in the level of one-off costs amongst smaller firms depending upon
  - Extent to which firms serve retail clients
  - Ability of firms to make large upfront investments

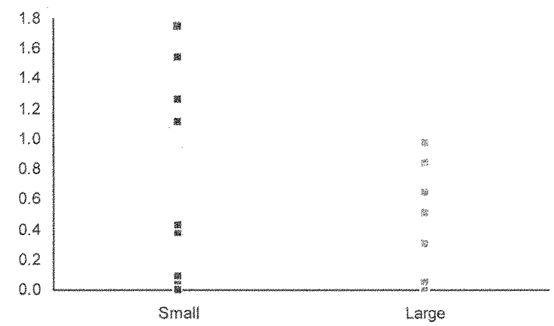
1. Firms with fewer than 100 employees were classified as "Small"
Source: Europe Economics Study, 2007

Due to their inability to make sizeable upfront investments, smaller firms typically also sustained higher ongoing costs of compliance as a percent of operating costs

On-going compliance costs of MiFID
European asset managers by firm size[1], 2007

	Small	Large
Additional staff	70%	18%
Internal reporting	9%	12%
IT	4%	30%
External reporting	12%	17%
Training	2%	7%
Audit	2%	16%

Ongoing compliance costs of MiFID by firm size
Ongoing costs as a percentage of operating costs, 2007



- Whereas larger asset managers complied with MiFID by investing in automated systems, smaller firms increased headcount
- There is a trade-off between one-off and on-going costs, e.g. for smaller firms the option of updating IT systems might have been too expensive, thus on-going costs of sustaining a larger workforce are much higher
- The smallest firms in the study had no specialist compliance functions prior to MiFID, and required significant resources to cover compliance activities

1. Firms with fewer than 100 employees were classified as "Small"
Source: Europe Economics Study, 2007

Encl 2

sifma
Invested in America

November 17, 2010

Via email to: rule-comments@sec.gov and IA-BDStudy@sec.gov

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Study Regarding Obligations of Brokers, Dealers, and Investment Advisers; Exchange Act Release No. 62577; Investment Advisers Act Release No. 3058; File No. 4-606

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (SIFMA)[1] would like to thank you for the opportunity to meet with representatives of the Securities and Exchange Commission (SEC) on November 10th to review our analysis of potential changes to the standard of care for investors served by our member firms.[2] As noted in our previous public statements, SIFMA supports harmonization of broker-dealer and investment adviser regulations for those who provide personalized investment advice to retail investors. We believe this can be accomplished in a way that does not restrict customer choice or product access. We commend the SEC for the depth of review it is undertaking in its current study.

The key findings from our study show that broker-dealers play an important role in retail brokerage, which cannot be easily replicated with alternative service models. Among the findings are:

- 95% of the households served by the firms participating in our survey use commission-based brokerage accounts to meet their investment objectives today;

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] Our study, filed with the SEC on October 27, 2010, is available at http://www.sec.gov/comments/4-606/4606-2824.pdf.

- Access to investment products traditionally offered on a principal basis (corporate and municipal securities) is more common and more affordable through commission-based accounts, particularly for small investors; and

- The realized cost of investment for investors under fee-based advisory accounts is consistently higher (23-27 bps on average) than the commission-based brokerage accounts used by the 38MM+ households covered by our study.

We recognize that the legislation does not prohibit commission-based compensation or other common elements of the broker-dealer service model. Our survey results bear out the relative value of commission-based accounts, particularly for smaller investors. If these same brokerage services had to be provided under the existing provisions of the Investment Advisers Act of 1940, however, it would negatively affect client choice and access to products, such as those now available on a principal basis. Thus, we continue to support a uniform federal fiduciary standard for broker-dealers and investment advisers who provide personalized investment advice to retail clients, yet that new standard must be "operationalized" to reflect the many different business models currently in effect serving investors.

We have drafted this letter to respond to SEC staff requests for additional detail on the methodology used to complete the study, the robustness of the data gathered, and several exhibits contained in the original submission. Accordingly, our response is organized as follows:

- Methodology for impact assessment
- Robustness of data gathered
- Additional data

We are grateful for the opportunity to respond to SEC staff questions and your consideration of the findings from our study.

I. Methodology for impact assessment

SIFMA commissioned Oliver Wyman[3] to analyze the impact of potential changes to the standard of care for investors served by our member firms. Oliver Wyman

[3] With more than 2,900 professionals in over 40 cities around the globe, Oliver Wyman is an international management consulting firm that combines deep industry knowledge with specialized expertise in strategy, operations, risk management, organizational transformation, and leadership

designed a standard template (see appendix 2) that was distributed to ~30 member firms to collect aggregated data on investment activity, asset allocation, and 'realized investment costs' across different client wealth segments and account types. Due to restrictions on disclosure of personal financial data and operational constraints, client-level data was not requested as part of the survey. Oliver Wyman supplemented the aggregated member data with publicly available information in preparing the study.

In total, 17 firms provided SIFMA with sufficient data for analysis. These firms represent a broad cross-section of SIFMA's membership serving retail investors, including global, national and regional full service broker-dealers, bank brokerages, and discount brokers.

II. Robustness of data gathered

The data gathered to support the analysis covered 38.2MM households with $6.8TN invested with member firms. To put these figures in context:

- The 38.2MM households included in the data represent 33% of households in the United States today, according to the most recent survey of consumer finances by the Federal Reserve.[4] However, not all U.S. households hold investment accounts, implying that the true percentage of investors covered by the data is higher than 33%.

- The $6.8TN in client assets captured in the data represents 27% of financial assets held by investors in the United States. A significant share of the financial assets identified by the Federal Reserve includes 'investments' that are not generally held in brokerage or advisory accounts (e.g. pension assets), implying that the true percentage of investor assets covered by the data is higher than 27%.

The objective of this study is to analyze the impact of potential changes to the standard of care for investors served by our member firms – not necessarily to draw conclusions on the broader investor population. This population of 38MM+ households represents

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development. The firm helps clients optimize their businesses, improve their operations and risk profile, and accelerate their organizational performance to seize the most attractive opportunities. Oliver Wyman is part of Marsh & McLennan Companies [NYSE: MMC]. For more information, visit www.oliverwyman.com.

[4] Federal Reserve Board Survey of Consumer Finances 2007

a meaningful share of the US investor population, which should be considered carefully in the SEC study.

To our knowledge, this information set is unique in that it provides a window into the underlying economics of different models for serving retail investors and is exceptional both in its breadth of coverage and its usefulness in comparing realized investment costs across different firms.

III. Additional data

The SEC staff attending the meeting on November 10th also requested additional detail on asset allocation (provided in summary form on page 17 of the original submission). A breakdown of asset allocation across different client wealth segments and account types is provided in appendix 1 below.

Please let us know if we have adequately addressed your questions and requests for additional information, or if there is anything more we may provide that would be helpful to you.

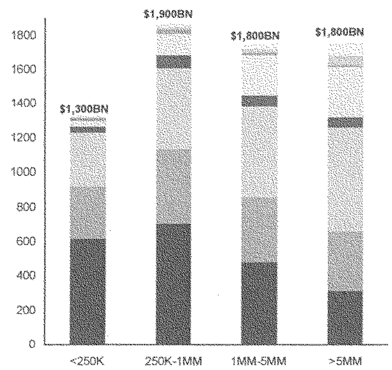
Sincerely yours,

Ira D. Hammerman
Senior Managing Director
and General Counsel

cc: Mary L. Schapiro, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Robert W. Cook, Director, Division of Trading and Markets
Andrew J. Donohue, Director, Division of Investment Management

Appendix 1: asset allocation across wealth segments and account types

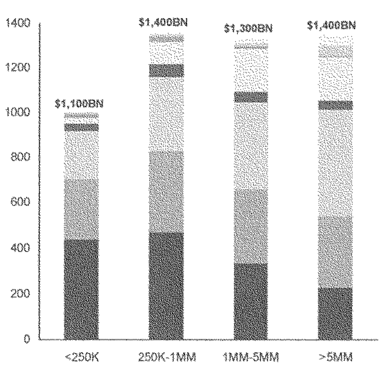
All account types
Asset allocation ($BN) by wealth segment, 2009[1,2]



	<250K	250K-1MM	1MM-5MM	>5MM
Government / Agency Bonds	9	23	35	80
Alternatives	7	14	21	57
Structured Products	18	28	12	7
Municipal Bonds	31	120	238	296
Corporate Bonds	37	76	66	58
Equities	311	478	528	604
Cash / other[3]	306	429	373	346
Mutual Funds / ETFs	614	705	484	313

1. Numbers may not sum to total due to rounding
2. 5 firms representing less than $400BN in assets did not provide asset allocation details by account type and are excluded from analyses on the following charts
3. Includes cash, currencies, money market funds, etc
Source: SIFMA member data, Oliver Wyman analysis

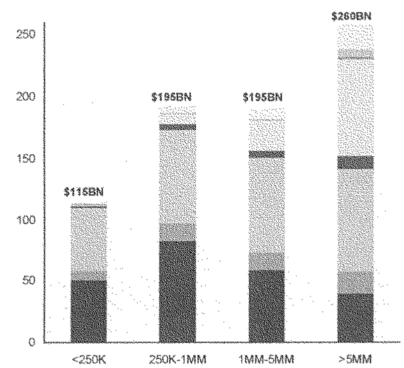
Commission-based, non-discretionary accounts
Asset allocation ($BN) by wealth segment, 2009[1]



	<250K	250K-1MM	1MM-5MM	>5MM
Government / Agency Bonds	7	15	23	51
Alternatives	6	10	17	45
Structured Products	17	25	11	5
Municipal Bonds	28	99	192	195
Corporate Bonds	32	59	51	41
Equities	230	332	386	477
Cash / other[2]	273	359	323	307
Mutual Funds / ETFs	457	468	336	230

1. Numbers may not sum to total due to rounding
2. Includes cash, currencies, money market funds, etc
Source: SIFMA member data, Oliver Wyman analysis

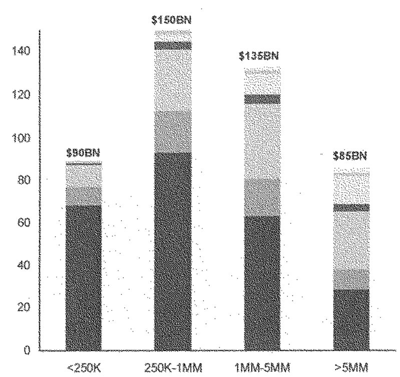
Fee-based, discretionary accounts
Asset allocation ($BN) by wealth segment, 2009[1]



	<250K	250K-1MM	1MM-5MM	>5MM
Government / Agency Bonds	2	6	9	21
Alternatives	<1	1	2	6
Structured Products	<1	<1	<1	2
Municipal Bonds	1	8	23	78
Corporate Bonds	2	5	7	11
Equities	52	75	77	84
Cash / other[2]	7	14	14	18
Mutual Funds / ETFs	51	83	59	40

1. Numbers may not sum to total due to rounding
2. Includes cash, currencies, money market funds, etc
Source: SIFMA member data, Oliver Wyman analysis

Fee-based, non-discretionary accounts
Asset allocation ($BN) by wealth segment, 2009[1]



	<250K	250K-1MM	1MM-5MM	>5MM
Government / Agency Bonds	<1	1	2	3
Alternatives	1	1	2	1
Structured Products	<1	<1	<1	<1
Municipal Bonds	<1	3	9	13
Corporate Bonds	1	4	4	3
Equities	11	28	35	27
Cash / other[2]	8	19	18	10
Mutual Funds / ETFs	69	94	63	29

1. Numbers may not sum to total due to rounding
2. Includes cash, currencies, money market funds, etc
Source: SIFMA member data, Oliver Wyman analysis

Appendix 2: data collection template

Variable inputs for member firms to complete

I. Assets, Revenues, and Costs for all accounts

	Wealth Segment (client assets)			
2009 data	**< 250,000**	**250,000-1MM**	**1MM-5MM**	**>5MM**
Number of households holding accounts (year-end)				
Total fees, commissions, other client-related revenues ($MM)				
Total client assets ($MM) (year-end)				
Asset composition ($MM)				
Equities				
Fixed Income | Corporate Bonds				
Fixed Income | Government and Agency Bonds				
Fixed Income | Municipal Bonds				
Mutual Funds and ETFs				
Structured Products				
Alternatives (Hedge funds, private equity, managed futures)				
Other Products (MM MF's, FCASH, CD's)				

II. Assets, Revenues, and Costs by account type

	Wealth Segment (client assets)			
2009 data	**< 250,000**	**250,000-1MM**	**1MM-5MM**	**>5MM**
Fee-based discretionary accounts				
Number of households holding accounts (year-end)				
Total fees, commissions, other client-related revenues ($MM)				
Total client assets ($MM) (year-end)				
Asset composition				
Equities				
Fixed Income | Corporate Bonds				
Fixed Income | Government and Agency Bonds				
Fixed Income | Municipal Bonds				
Mutual Funds and ETFs				
Structured Products				
Alternatives (Hedge funds, private equity, managed futures)				
Other Products (MM MF's, FCASH, CD's)				
Fee-based non-discretionary accounts				
Commission-based discretionary accounts				
Commission-based non-discretionary accounts				

III. Additional 'client profile' data

	Wealth Segment (client assets)		
2009 data	**< 250,000**	**250,000-1MM**	**1MM-5MM**
Number of clients holding IRA accounts (year-end)			
Fee-based			
Commission-based			
Number of clients holding both fee- and commission-based accounts (year-end)			
Number of clients with concentrated positions >25% of assets in one position (year-end)			
Number of clients executing less than 10 trades in 2009			
Number of clients purchasing shares in IPOs on principal basis in 2009			
Number of clients purchasing Municipal Bonds on principal basis in 2009			

Encl 3

sifma

Invested in America

July 14, 2011

Via E-mail

Mary L. Schapiro, Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Framework for Rulemaking under Section 913 (Fiduciary Duty) of the Dodd-Frank Act; **File No. 4-604**

Dear Chairman Schapiro:

The Securities Industry and Financial Markets Association[1] ("**SIFMA**") appreciates the opportunity to submit the following comments for consideration by the Securities and Exchange Commission (the "**SEC**" or the "**Commission**") as it establishes, pursuant to its plenary authority under Sections 913(f) and (g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**"), a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers.

Throughout the legislative process and debate that preceded the enactment of the Dodd-Frank Act, SIFMA has supported the development of a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers.[2]

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[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] *See, e.g., Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. 2-3 (2009) (statement of John Taft, Head of U.S. Wealth Management, RBC Wealth Management on behalf of SIFMA), *available at* http://financialservices.house.gov/media/file/hearings/111/taft_testimony.pdf; *Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. 21 (2009) (statement of Randolph C. Snook, Executive Vice President, SIFMA), *available at* http://financialservices.house.gov/media/file/hearings/111/snook.pdf.

The purpose of this letter is to offer a framework and principles for rulemaking under Section 913 of the Dodd-Frank Act to help inform the Commission's rulemaking process. We also seek to encourage further deliberation and dialogue about the optimal approach for implementing a uniform fiduciary standard of conduct in accordance with the Dodd-Frank Act that is designed to protect investors, preserve investor choice and access to cost-effective financial products and services, and adapt to the substantially different operating models of broker-dealers and investment advisers.

Consistent with these objectives, we also believe that appropriately robust and rigorous cost-benefit analyses are essential to inform and shape any SEC rulemakings, particularly those that call for the type of "sea change" reform envisioned by Section 913 of the Dodd-Frank Act. Thus, we remain supportive of the current cost-benefit and other empirical analyses that we understand the SEC is currently undertaking on this issue, as well as any other analyses that may help inform the optimal approach for implementing a uniform fiduciary standard of conduct. We also will support, as an industry, such studies or analyses by providing appropriate data, feedback, or other information that would result in the most accurate and meaningful findings and conclusions. Accordingly, we are eager to further engage and communicate with the SEC and others on this important issue.

* * * *

Table of Contents

Executive Summary

SIFMA supports the establishment of a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers.[3] The guiding principle that underpins this uniform standard is to act in the best interest of the customer. The standard should be articulated through comprehensive SEC rulemaking as a uniform standard of conduct that is "no less stringent than" the general fiduciary duty implied under the Investment Advisers Act of 1940 (the "**Advisers Act**").

The SEC's Study on Investment Advisers and Broker-Dealers (the "**Study**")[4] contains a number of thoughtful findings. It does not, however, specify that the contemplated uniform fiduciary standard of conduct for broker-dealers and investment advisers should be separate and distinct from the general fiduciary duty implied under Section 206 of the Advisers Act. Instead, the Study raised the serious concern among our member firms that the SEC may be contemplating an "overlay" on broker-dealers of the existing Advisers Act standard.[5] SIFMA strongly opposes imposing on broker-dealers the existing Advisers Act standard together with its associated case law, guidance, and other legal precedent.

Our members are also concerned that the SEC could take the unnecessarily narrow view that, because Section 913 of the Dodd-Frank Act requires that the uniform fiduciary standard be "no less stringent than" the general fiduciary duty implied under Section 206 of the Advisers Act, the SEC's latitude and ability to establish a separate, unique uniform fiduciary standard is limited. We believe no such limitation exists or was intended under the Dodd-Frank Act. The plain language of Section 913, together with the legislative history of the Dodd-Frank Act, makes clear that the "no less stringent" language does *not* require that the SEC impose the Advisers Act standard on broker-dealers.[6] As Congressman Barney Frank has indicated,

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[3] SIFMA's position is limited to retail customers, i.e., natural persons who use investment advice for personal, family or household purposes. SIFMA does not propose to modify the current Advisers Act standard applicable to the delivery of investment advice to the institutional clients of investment advisers, or the existing case law, guidance or other legal precedent developed under Section 206 of the Advisers Act.

[4] Commission Study on Investment Advisers and Broker-Dealers, as required by Section 913 (Jan. 2011), available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[5] *Id.* at pp. 109 and 111.

[6] Letter from Congressman Barney Frank to Chairman Mary Schapiro at p. 1 (May 31, 2011) (the "**Frank Letter**") ("'no less stringent' ... was not intended to encourage the SEC to impose the ... Advisers Act... standard on broker-dealers...").

> "If Congress intended the SEC to simply copy the [Advisers] Act and apply it to broker-dealers, it would have simply repealed the broker-dealer exemption – an approach Congress considered but rejected. The new standard contemplated by Congress is intended to recognize and appropriately adapt to the differences between broker-dealers and registered investment advisers."[7]

Investment advisers are generally engaged in the business of providing advice about securities for a fee, or managing assets on a discretionary basis. Broker-dealers engage in the former activity on occasion (advice about securities), but also provide a broad range of additional products and services. Broker-dealers provide, for example, initial and follow-on public offerings and other underwritten offerings, and market fixed-income and affiliated products, all of which contribute to the capital raising, liquidity, best execution, and portfolio balancing functions of our securities markets. Yet, these services, which are beneficial to both the economy and individual investors, often carry inherent (though generally accepted and well-managed) conflicts of interest. The general fiduciary duty implied under Section 206 of the Advisers Act, as developed through case law, guidance and other legal precedent, however, provides incompatible and insufficient guidance for broker-dealers on how to manage, disclose, or obtain consents to these conflicts.

In Section II, we explain in detail why a wholesale extension to broker-dealers of the case law, guidance and other legal precedent under Section 206 of the Advisers Act would entail a host of adverse consequences. Most importantly, it would *not* be in the best interest of retail customers, because it would negatively impact choice, product access and affordability of customer services. It would also be problematic for broker-dealers from a commercial, legal, compliance, and supervisory perspective, thereby undercutting the SEC's stated intent to take a "business model neutral" approach. The Dodd-Frank Act authorizes, the SEC Study supports, and investor protection warrants, taking a fresh approach by establishing, through SEC rulemaking under Section 913 of the Dodd-Frank Act, a uniform fiduciary standard of conduct for broker-dealers and investment advisers.

In Section III, we offer, for the first time, a proposed framework and principles to advance the development of a fiduciary standard of conduct through SEC rulemaking under Section 913 of the Dodd-Frank Act. Under our proposed framework, the general fiduciary duty implied under Section 206 of the Advisers Act, which derives from the traditional, generally understood and accepted common law,[8] would be newly articulated through SEC

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[7] *Id.*

[8] *See SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963) ("...Congress codified the common law 'remedially' [in the Advisers Act] ... to prevent[] fraudulent securities transactions by fiduciaries"). *See also* Restatement of Agency (Third) (agency is the fiduciary relationship that arises when one person (the principal) manifests assent to another person (the agent) that the agent shall act on the principal's behalf and subject to the principal's control, and

rulemaking under Section 211 of the Advisers Act and Section 15 of the Securities Exchange Act of 1934 (the "**Exchange Act**").[9] The standard of conduct would apply equally to broker-dealers (through Section 15(k) of the Exchange Act) and investment advisers (through Section 211(g) of the Advisers Act) when providing personalized investment advice about securities to retail customers. The SEC would also issue rules and guidance to provide the detail, structure and guidance necessary to enable broker-dealers and investment advisers to apply the uniform fiduciary standard of conduct to their distinct operational models.[10]

The uniform fiduciary standard of conduct would begin with the core principle mandated by the Dodd-Frank Act that all brokers, dealers and investment advisers, when providing personalized investment advice about securities to retail customers, shall "act in the best interest of the customer ...."[11] The complete phrase reads "act in the best interest of the customer *without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice*" (emphasis added). The italicized language could be interpreted to require firms to operate a conflicts-free business (if read literally and not in conjunction with other Section 913 statutory language that permits disclosure of, and customer agreement to, material conflicts).[12] It also appears to conflict with other Section 913 statutory language that allows commission-based compensation, proprietary products, and a non-continuing fiduciary duty. Based upon our communications with the Commission and their staff, however, we agree with their view that such language should *not* represent an impediment to the SEC establishing a uniform fiduciary standard that is

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the agent manifests assent or otherwise consents so to act). *But see* Section II.B.2, explaining that existing case law regarding the fiduciary duty of investment advisers was developed in the context of a business model which is inapplicable to broker-dealers, and applying such case law in the broker-dealer context could have legal and regulatory consequences that would undermine the broker-dealer business model, with no corresponding benefit to retail customers.

[9] Thus, the uniform fiduciary standard of conduct would conclusively satisfy the Dodd-Frank Act's requirement that the standard be "no less stringent than" the standard implied under Section 206 of the Advisers Act.

[10] Our proposed approach is consistent with that historically followed in agency and trust contexts. The precise contours of the fiduciary obligation are molded to particular fiduciary fields or contexts. Thereafter, common sets of facts are addressed through implementing rules that apply the duties of loyalty and care to those circumstances. "The ... rules simplify application of the fiduciary obligation to cases that fall within their terms, reducing decision costs." *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. Law Rev. 1039, 1044-45 (2011).

[11] Section 913(g) of the Dodd-Frank Act.

[12] *Id.* ("In accordance with [the rules promulgated under the uniform fiduciary standard of conduct], any material conflicts of interest shall be disclosed and may be consented to by the customer.")

sufficiently flexible, fairly balanced, business model neutral and, most importantly, investor protection focused. Accordingly, the principle of "acting in the best interest of the customer" would serve as the bedrock cornerstone of the SEC rules promulgated under Section 211 of the Advisers Act and Section 15 of the Exchange Act.

Existing case law, guidance, and other legal precedent developed under Section 206 of the Advisers Act would continue to apply to investment advisers. While there would be many parallels, this Section 206 precedent would *not* apply to broker-dealers, because: (i) broker-dealers provide a different range of products and services, and operate under an operational model distinct from that of investment advisers;[13] and (ii) Section 206 precedent does not now apply to broker-dealers. Section 206 precedent would therefore not apply in the future to broker-dealers under the uniform fiduciary standard of conduct established under Section 211 of the Advisers Act and Section 15 of the Exchange Act.[14]

Attached as **Appendix 1** is a one-page graphical representation to help visualize the framework we are now proposing. Our framework is built around the following five key components:

1. Enunciate the core principles of the uniform fiduciary standard of conduct.
2. Articulate the scope of obligations under the uniform fiduciary standard of conduct.
3. Define "personalized investment advice".
4. Provide clear guidance regarding disclosure that would satisfy the uniform fiduciary standard of conduct.
5. Preserve principal transactions.

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[13] While broker-dealers and investment advisers may at times provide similar services, there are many substantive differences in the products, services, conflicts, and traditional compensation practices between the two well-established and highly regulated business models. *See, e.g.*, Letter to Elizabeth M. Murphy, SEC, from Ira D. Hammerman, SIFMA (Aug. 30, 2010), *available at* http://www.sec.gov/comments/4-606/4606-2553.pdf ("**SIFMA Section 913 Comment Letter**"); Frank Letter at p. 1.

[14] The express language of Dodd-Frank Act Section 913 appears to support this approach. Section 913 pegs the uniform fiduciary standard to Sections 206(1) and (2) of the Advisers Act, but not to Section 206(3), which restricts principal transactions, or to Section 206(4), which grants the SEC authority to issue rules under Section 206. Thus, it may fairly be said that Congress did not intend for Section 206 rules or other legal precedent to apply to broker-dealers under the uniform fiduciary standard of conduct.

Our proposal is intended to inform the Commission's rulemaking process and encourage further discussion about the optimal approach for implementing a uniform fiduciary standard of conduct. We believe the optimal approach is one that fully protects investors, preserves their choice of and access to financial products and services, and adapts to the substantially different business models of broker-dealers and investment advisers. We believe that our proposal, and call for a uniform fiduciary standard to be established through SEC rulemaking, fully satisfies these criteria and will benefit millions of retail investors for years to come. We are hopeful that the Commission will find this framework constructive and useful to the process going forward.

While not a focus of this letter, SIFMA also generally supports the Study's recommendation that the SEC consider harmonizing other areas of broker-dealer and investment adviser regulation, including advertising, the use of finders and solicitors, supervisory requirements, licensing and registration of firms and associated persons, and books and records, among others. We encourage further deliberation by the SEC regarding these discrete regulatory areas, and we hope to engage the staff in future dialogue on these topics.

I. Introduction

We welcome the Commission's efforts to develop a uniform fiduciary standard for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. As we have previously stated, SIFMA's position is limited to retail customers, i.e., natural persons who use investment advice for personal, family or household purposes, and we do not propose to modify the current Advisers Act standard applicable to the delivery of investment advice to the institutional clients of investment advisers, or the existing case law, guidance or other legal precedent developed under Section 206 of the Advisers Act.

We believe the following key principles should guide the development of the standard:[15]

- The interests of retail customers should be put first. When providing personalized investment advice about securities to retail customers, broker-dealers and investment advisers should deal fairly with these customers, and, at a minimum, appropriately manage conflicts and provide retail customers with full disclosure that is simple and clear and allows retail customers to make an informed decision about a particular product or service.

- Investors should continue to have access to, and choice among, a wide range of products and services. The standard of conduct should allow broker-dealers to

[15] SIFMA Section 913 Comment Letter.

continue to offer products and services that are available today, such as providing retail customers liquidity as principal, proprietary products and advice regarding sophisticated investment strategies. The standard should allow retail customers to choose among various models for compensating their financial services provider.[16]

- The uniform fiduciary standard of conduct should be "business model neutral."

- The SEC should clearly define the standard of conduct and should provide guidance as to how it can be implemented by broker-dealers, tailored to their various business models.

- Where products and services involve material conflicts of interest, broker-dealers and investment advisers should be able to provide disclosures to customers in a pragmatic way to clearly and effectively communicate, and receive the customer's consent to, these conflicts of interest. Similarly, the SEC should provide guidance to clarify whether a customer's affirmative consent is required or not, and if so, at what point it should be obtained.[17]

The Dodd-Frank Act authorizes the Commission to adopt rules to provide that the standard of conduct for all broker-dealers and investment advisers, when providing personalized investment advice about securities to retail customers, is to act in the best interest of the customer. This standard of conduct shall be no less stringent than the fiduciary duty applicable to investment advisers under Sections 206(1) and (2) of the Advisers Act.

As explained in detail in Section II, while we embrace the adoption of a uniform fiduciary standard of conduct, we believe that a wholesale extension to broker-dealers of the general fiduciary duty implied under the Advisers Act is not in the best interests of investors and is problematic for the broker-dealer business model. Instead, we advocate for taking the sum and substance of the general fiduciary duty implied under the Advisers Act and articulating it through SEC rulemaking as the uniform fiduciary standard of conduct – a standard which would:

- apply only to, and be tailored for, those services and activities involving provision of personalized investment advice about securities to retail customers;

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[16] We note that the Dodd-Frank Act provides that the sale of only proprietary or other limited range of products, or the receipt of commission-based compensation, shall not, in and of themselves, violate the uniform fiduciary standard of conduct.

[17] *See* Section III.C.4.b.v. and vi.

- provide for reasonable approaches to managing conflicts;
- provide adequate flexibility to preserve and enhance client choice, product and service innovation, and capital formation; and
- otherwise provide the detail and guidance necessary to enable broker-dealers and investment advisers to apply the standard of conduct to their distinct operational models.

In Section III below, we offer a framework for the uniform fiduciary standard of conduct to inform the Commission's rulemaking process. We believe that this proposed standard of conduct, adapted to the substantially different operating models for broker-dealers and investment advisers, offers the best approach for protecting investors and preserving investor choice and access to cost-effective financial products and services.

II. The Need for a New Articulation of a Uniform Fiduciary Standard of Conduct

A. Overview

In January 2011, the SEC published its Study, which contained a number of thoughtful findings. It did not, however, specify that the contemplated uniform fiduciary standard of conduct for broker-dealers and investment advisers would be separate and distinct from the general fiduciary duty implied under Section 206 of the Advisers Act. Instead, the Study raised serious concern among our member firms that the SEC may be contemplating an "overlay" on broker-dealers of the existing Advisers Act standard, with its associated case law, SEC guidance and other legal precedent.[18]

The wholesale imposition of the Advisers Act fiduciary duty on broker-dealers would be commercially impracticable. In light of the distinct differences between the operating models of investment advisers and broker-dealers,[19] and in order to maintain broker-dealer products and services for investors, SIFMA believes the obligations of broker-dealers when providing personalized investment advice about securities to retail customers under the uniform fiduciary standard of conduct should *not* be governed by the existing rules, case law, guidance or other legal precedent under Section 206 of the Advisers Act.[20]

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[18] Study at pp. 109 and 111.

[19] *See* SIFMA Section 913 Comment Letter.

[20] As explained in the Executive Summary, existing Section 206 legal precedent and guidance would continue to apply to investment advisers.

SIFMA therefore supports a new articulation, through SEC rulemaking, of the general fiduciary duty implied under Section 206 of the Advisers Act as the uniform fiduciary standard of conduct. SIFMA likewise opposes any approach that would extend the existing rules, case law, guidance and other legal precedent under Section 206 of the Advisers Act standard wholesale to broker-dealers.[21]

B. The Adverse Implications of Imposing the Advisers Act on Broker-Dealers

The viability of a uniform standard is predicated upon a new articulation of the standard of conduct for investment advisers and broker-dealers, because wholesale extension of the Advisers Act standard to broker-dealers is unworkable and inconsistent with the purposes of Section 913 of the Dodd-Frank Act, investor protection, and the broker-dealer business model.

1. The Advisers Act was not designed to regulate broker-dealer activity. The Advisers Act was not intended or designed to apply to the incidental advice offered by broker-dealers,[22] and the interpretations that have been given under that Act have not taken into account broker-dealer roles.

In passing the Dodd-Frank Act, Congress could have simply eliminated the broker-dealer exception to the Advisers Act definition of "investment adviser" and applied to both broker-dealers and investment advisers the general fiduciary duty implied under the Advisers Act. Congress affirmatively elected *not* to do so.[23] Thus, Congress recognized that the uniform fiduciary standard should "appropriately adapt to the differences between broker-dealers and registered investment advisers."[24]

2. The case law regarding the fiduciary duty of investment advisers was developed in the context of a business model which is inapplicable to broker-dealers. There are very

[21] *See, e.g.*, SIFMA Section 913 Comment Letter; and SIFMA comment letter on FINRA Regulatory Notice 10-54 (Dec. 2010), available at http://www.sifma.org/Issues/item.aspx?id=22482 ("**SIFMA RN 10-54 Comment Letter**").

[22] The definition of "investment adviser" in the Advisers Act specifically excludes "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." Section 202(a)(11) of the Advisers Act.

[23] *See* Restoring American Financial Stability Act of 2009, S. ___, 111th Cong. § 913 (discussion draft as proposed by Senator Dodd, Chairman, Senate Comm. on Banking, Hous., & Urban Affairs, Nov. 10, 2009), *available at* http://banking.senate.gov/public/_files/AYO09D44_xml.pdf. *See also* Frank Letter at p. 1.

[24] Frank Letter at p. 1.

few federal fiduciary cases brought against investment advisers. A primary reason is that customers cannot sue their advisers for breach of their fiduciary duty under Section 206 of the Advisers Act.[25] The few existing case law precedents apply to a different business model, and speak only in very general, high-level and vague terms about the fiduciary standard and what is required to satisfy it. Yet, if the fiduciary duty applicable to investment advisers is simply overlaid onto broker-dealers, these same precedents could easily be misinterpreted and misapplied – by courts and regulators alike – in any number of ways that would disadvantage and undermine the broker-dealer business model, and without a corresponding benefit to retail customers.[26]

*3. **SEC staff statements regarding the fiduciary duty of investment advisers under the Advisers Act are not readily translatable to broker-dealers.*** Over the years, the SEC staff has issued guidance regarding the fiduciary duty of investment advisers under Section 206 of the Advisers Act. These statements speak far more in terms of entirely avoiding conflicts, rather than appropriately managing them.[27] Accordingly, these statements

[25] *Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11 (1979). In *Transamerica*, the Court found that private plaintiffs can only sue their advisers under Section 215 of the Advisers Act, which provides that contracts made or performed in violation of the Act are void.

[26] In addition, the nationwide body of state case law on whether broker-dealers owe fiduciary duties and the scope of those duties also raises concerns, given that this body of law is so uneven and inconsistent – a point on which courts and commentators overwhelmingly agree. *See, e.g., Patsos v. First Albany Corp.*, 741 N.E.2d 841, 848-51 (Mass. 2001) ("Courts in other States have not been of single mind whether fiduciary duties inhere in every relationship between a stockbroker and his customer."); *Johnson v. John Hancock Funds*, 217 S.W.3d 414, 428 (Tenn. Ct. App. 2006) ("The courts have not been of a single mind whether fiduciary duties inhere in every relationship between a stock broker or investment advisor and his or her client"). *See also* discussion and cases cited in the following five scholarly works: (i) Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 Vill. L. Rev. 701 (2010) ("This sliver of securities law doctrine comprises a bewildering inconsistency of judicial decisions."); (ii) Steven A. Ramirez, *The Professional Obligations of Securities Brokers Under Federal Law: An Antidote for Bubbles?*, 70 U. Cin. L. Rev. 527 (2002) (describing division in state courts regarding fiduciary obligations of broker-dealers); (iii) Cheryl Goss Weiss, *A Review of the Historic Foundations of Broker-Dealer Liability for Breach of Fiduciary Duty*, 23 Iowa J. Corp. L. 65 (1997) ("Courts have often failed to do a careful analysis of the duty, resulting in erroneous, confusing or poorly explained opinions."); (iv) Gregory A. Hicks, *Defining the Scope of Broker and Dealer Duties – Some Problems in Adjudicating the Responsibilities of Securities and Commodities Professionals*, 39 DePaul L. Rev. 709 (1990) (noting the "uncertain significance of the fiduciary label often attached to these [brokers and dealers], and an accompanying uncertainty about the legal duties which the fiduciary label implies"); and (v) Carol R. Goforth, *Stockbrokers Duties to their Customers*, 33 St. Louis U. L.J. 407 (1989) (discussing inconsistent judicial approaches to whether and when fiduciary relationship arises between broker and customer).

[27] *See, e.g.*, Release No. IA-3060, File No. S7-10-00 ("An adviser must … seek to avoid conflicts with its client…."); Information for newly-registered investment advisers, available at

could be interpreted and applied in a manner more proscriptive than the "eliminate or disclose conflicts" approach recommended in the Study.[28] If such guidance were applied to broker-dealers under the uniform fiduciary standard of conduct, it would create legal and compliance uncertainty (described in greater detail below) that would in the worst case prevent, and in the best case disincentivize, broker-dealers from offering many of the beneficial products and services that they currently provide and that retail customers have come to value and rely upon.

4. The inability to gauge compliance with, or legal exposure under, the Advisers Act standard would undermine the broker-dealer business model. The Advisers Act standard does not provide necessary guidance regarding, for example, what disclosures will be adjudged complete and how and when consents must be obtained, when a broker-dealer provides advice involving principal trades, structured products, receipt of commissions and differential loads for different products. Nor does it provide necessary guidance regarding when the fiduciary duty begins and ends, or how it applies in the context of, for example, hybrid accounts or complex investment strategies, such as concentrated positions which may in many instances be at the customer's request.

Absent new rules and guidance – issued under Section 211 of the Advisers Act and Section 15 of the Exchange Act, as authorized by the Dodd-Frank Act – to enable broker-dealers to apply the fiduciary standard to their distinct operational models, broker-dealers cannot adequately supervise or gauge their compliance with the standard, nor can they manage litigation risks. Moreover, as noted above, customers cannot sue their advisers for breach of their fiduciary duty under Section 206 of the Advisers Act.[29] Thus, application of the Advisers Act standard to broker-dealers would subject broker-dealers to the unfair and unharmonized (and likely Congressionally unintended) consequence that retail customers could sue their broker-dealers, but not their investment advisers, for breach of the "uniform" fiduciary standard. Under circumstances where the business and legal risks are unmanageable, broker-dealers will withdraw from offering the affected products and services, which would disserve the interests of retail customers.

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http://sec.gov/divisions/investment/advoverview.htm ("You should not engage in any activity in conflict with the interest of any client..."); *In re Terence Michael Coxon*, Release ID-140 (Apr. 1, 1999) ("A fiduciary must therefore refrain from putting himself in a position of conflict of interest..."); *In re Monetta Financial Services, Inc.*, Release No. ID-162 (Mar. 27, 2000) (same); SEC No-Action Letter, National Deferred Compensation, Inc. (Aug. 31, 1987) ("An adviser may not fulfill its fiduciary obligations if it ... imposes an additional fee on a client for choosing to change his investment").

[28] Study at p. vii.

[29] *Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11 (1979).

5. __Empirical study shows that wholesale application of the Advisers Act duty to broker-dealers would negatively impact choice, product access, and affordability of customer services.__[30]

a. **Choice**. Notwithstanding the Dodd-Frank Act provision stating that commission-based compensation alone would not violate the uniform fiduciary standard, undifferentiated application of existing Advisers Act case law, guidance and other precedents to broker-dealers could result in reduced access to brokerage accounts, given the potential conflicts that could arise from charging commissions. Commission-based brokerage accounts are overwhelmingly the preferred model for retail customers, with only 5% of households preferring the fee-based advisory platform. This is true across all wealth segments, but particularly for smaller investors with less than $250,000 in assets. For smaller investors, or those with more limited trading activity, a commission-based brokerage account is likely to be the more economical choice.

b. **Product access**. Undifferentiated application of existing Advisers Act case law, guidance and other precedents to broker-dealers could result in reduced access to products distributed primarily through broker-dealers. Given their inherent (though generally accepted and well-managed) conflicts, broker-dealers may not be able to continue to act as principal and sell proprietary products, including: sales of underwritten offerings (*e.g.*, IPOs); providing retail customers liquidity through market making and principal trading, including access to fixed-income products (*e.g.*, municipal and corporate bonds, which represent approximately 15% of assets held by retail customers); and sales of proprietary and affiliated products (notwithstanding the Dodd-Frank Act provision stating that such sales alone would not violate the uniform fiduciary standard).

c. **Affordability of advisory services**. Undifferentiated application of existing Advisers Act case law, guidance and other precedents to broker-dealers could result in reduced access of broker-dealer customers to investment options with fee structures adaptable to their needs, as well as the imposition of increased compliance, disclosure and surveillance costs, which would disproportionately impact small investors.

For these reasons, the Advisers Act standard is unworkable for broker-dealers. It would result in unfair treatment of broker-dealers vis-a-vis investment advisers, is inconsistent with the principles of investor protection (and likely Congressional intent), and would result in decreased access to products and services for retail customers. For a uniform

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[30] *See* SIFMA/Oliver Wyman study (Oct. 2010), available at http://www.sifma.org/Issues/item.aspx?id=21999. The SEC has also acknowledged the negative consequences of imposing the requirements of the Advisers Act, which include an adverse impact on retail investor choice of products and services, and how investors pay for those products and services. *See* Study at pp. 139-143.

standard of conduct to work without fundamentally disrupting the broker-dealer business model, it must employ a new articulation of the standard of conduct.

III. The Framework for Rulemaking

A. Overview

We offer below a framework for a newly articulated fiduciary standard of conduct to inform the Commission's rulemaking process. We believe that a standard guided by these principles, adapted to the substantially different operating models for broker-dealers and investment advisers, is the best approach for protecting investors and preserving investor choice and access to cost-effective financial products and services.

B. The Standard

The Commission's rulemaking under Section 913 shall "provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers... shall be to act in the best interest of the customer...." Material conflicts of interest should be disclosed and may be consented to by the customer. Section 913 also provides that the newly articulated standard must be no less stringent than Sections 206(1) and (2) of the Advisers Act, and is not constrained by the principal transactions restrictions of Section 206(3) of the Advisers Act.

As explained in the Executive Summary, under our proposed framework, the general fiduciary duty implied under Section 206, which derives from the traditional, generally understood and accepted common law, would be newly articulated as the uniform standard.[31] Under Section 211 of the Advisers Act and Section 15 of the Exchange Act (as authorized by the Dodd-Frank Act), the SEC would issue rules and guidance to provide the detail, structure and guidance necessary to enable broker-dealers to apply the fiduciary standard to their distinct operational model. In addition, while many parallels would occur, existing Section 206 investment adviser case law, guidance, and other legal precedent would continue to apply to investment advisers, but would *not* likewise apply wholesale to broker-dealers, in recognition that broker-

[31] In the Executive Summary, we noted that our proposed approach is consistent with that historically followed in agency and trust contexts. We also note that it is not unprecedented for a federal regulator to borrow and restate standards applicable to one group of financial services professionals in order to promote clarity and transparency in regulations applicable to a different set of financial services professionals. For example, the Department of Labor ("**DOL**"), rather than requiring bank collective funds to complete SEC Form N-1A, extracted the elements of certain calculations set forth in the Form and incorporated them into a DOL regulation. *See* 29 CFR Part 2550, Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64910 at 64940 (October 20, 2010), available at http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24323.

dealers provide a different range of products and services, and operate under a distinct operational model.

C. Rulemaking Principles to Implement Dodd-Frank Act Section 913

Commission rulemaking to articulate the uniform standard of conduct must provide retail customers with tangible protections and affordable choices, while maintaining sufficient flexibility to accommodate distinct operational models for financial service providers. To facilitate the Commission's rulemaking under Section 913 of the Dodd-Frank Act, we recommend that the following key principles be addressed:[32]

1. ***Enunciate the core principles of the uniform fiduciary standard of conduct.*** SEC rulemaking should clearly enunciate the core principles that underpin the uniform standard applicable to all brokers, dealers, and investment advisers. First, the standard for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers, should be to act in the best interest of the customer.[33] Second, the standard should be no less stringent than the standard applicable to investment advisers under Sections 206(1) and (2) of the Advisers Act.[34] Third, material conflicts of interest should be disclosed and may be consented to by the customer.[35] Finally, consistent with Section 913, unless otherwise agreed with the customer, a broker or dealer or registered representative should not have a continuing duty of care to the customer after providing personalized investment advice about securities.[36]

2. ***Articulate the scope of obligations under the uniform fiduciary standard of conduct.*** SEC rulemaking should articulate the scope of a broker-dealer's obligations under the uniform standard of conduct. For example:

a. **Commencement of the standard of conduct**. The standard of conduct should commence when the customer agreement is signed by the customer (or, if earlier, upon the making of trades based on personalized investment advice about securities) and should apply only when providing personalized investment advice about securities to retail customers. Introductory discussions regarding the *nature of the relationship* would not be subject to the standard of conduct. Broker-dealers and investment advisers may discuss

[32] It is critical that the Commission provide for a reasonable phase-in period for the new rules, to facilitate the transition for broker-dealers and thus for their retail customers.

[33] Derived from the explicit language of Section 913 of the Dodd-Frank Act.

[34] *Id.*

[35] *Id.*

[36] *Id.*

the different types of relationships available with a potential client without the standard of conduct applying to these discussions.

b. **Shape of the standard of conduct**. A broker-dealer's obligations to a retail customer under the standard of conduct should be specified in the customer agreement. The obligations may be crafted to reflect the specific agreement and objectives of the parties. For example, the customer agreement might specify that the broker-dealer's obligations do not extend beyond the particular sale, or might address the broker-dealer's obligations in the case of "hybrid" accounts; or the obligations may appropriately be limited to assets over which the broker-dealer has been given discretionary authority, specific recommendations about securities that are available through the broker-dealer, or such other limitations and disclosures to which the customer agrees.[37]

c. **Application of the standard of conduct to an account**. The uniform fiduciary standard of conduct should apply on an account-by-account basis, when providing personalized investment advice about securities, pursuant to the written customer agreement. Application on an account basis is consistent with they way firms currently enter into agreements with customers, and document customer relationships. Application on an account basis is also consistent with broker-dealers' records requirements to document investment objectives on an account basis.

d. **Inclusion of traditional product sales or compensation**. Traditional types of broker-dealer product sales or compensation arrangements should not be viewed to violate the standard of conduct. For example, the sale of proprietary-only, or other limited range of products, should not violate the standard, as applied to a broker or dealer, provided there is appropriate disclosure to and possibly consent by the customer, and the fiduciary ('best interest of the customer') standard is otherwise satisfied.[38] In addition, receipt of compensation based on commissions or other fees or standard forms of compensation including, without limitation, annual marketing or distribution fees on mutual funds, revenue sharing or shareholder accounting, should not violate the standard of conduct with appropriate customer disclosure.[39]

The SEC might consider "scenario planning" as part of the rulemaking process so that it can comprehensively examine, taking a bottom-up approach, the areas of particular concern to broker-dealers (e.g., advice involving principal trades, structured products,

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[37] There is, of course, a mandatory core to the fiduciary duty that cannot be overridden by agreement. For example, the principal cannot authorize the fiduciary to act in bad faith. The fiduciary must always act in good faith and deal fairly with and for the principal. *See* Sitkoff, 91 B.U. Law Rev. at 1046.

[38] *Id.*

[39] *Id.*

hybrid accounts, complex investment strategies, concentrated positions, and receipt of commissions and differential loads for different products). The SEC should provide the necessary rule-based guidance regarding when the fiduciary duty begins and ends and what disclosures and consents, if any, are necessary to satisfy the duty, and otherwise address how broker-dealers can satisfy the uniform fiduciary standard of conduct under these various scenarios.

3. ***Define "personalized investment advice."*** The standard of conduct applies only "when providing personalized investment advice about securities to retail customers." Thus, SEC rules should define with specificity which business activities fall within, and which remain outside, the scope of "personalized investment advice."[40]

A general definition might provide that "personalized investment advice" about securities means investment recommendations about securities that are provided to address the objectives or needs of a specific retail customer after taking into account the retail customer's specific circumstances.[41]

SEC rules should also provide specific guidance on personalized investment advice. For example, personalized investment advice about securities should include:[42]

- communications to a specific customer recommending that the customer purchase or sell one or more securities;
- communications about securities to one or more targeted customers encouraging the particular customers to purchase or sell a security;
- technology that analyzes a customer's financial or online activity and sends specific investment suggestions that the customer buy or sell a security;[43] and

[40] SEC rules should likewise adequately define the term "retail customer" to appropriately limit the scope of the new standard to, for example, natural persons that do not meet the "Qualified Institutional Buyer," or QIB, threshold.

[41] Derived from p. 125 of the Study.

[42] Derived from p. 124 of the Study.

[43] NASD Notice to Members 01-23, "Online Suitability" ("**NTM 01-23**"). NTM 01-23, however, also cites several examples of electronic applications that would fall outside the definition of "recommendation" and thus, in our view, should also fall outside the definition of personalized investment advice.

- discretionary decisions regarding securities bought, sold, or exchanged by the person or firm exercising investment discretion.

Personalized investment advice about securities should *not* include: [44]

- providing general research and strategy literature;
- discussing general investment and allocation strategies;
- seminar content that is not specific to a customer;
- general marketing and education materials that are not specific to a customer;
- financial planning tools and calculators that use customer information but do not recommend specific securities;
- broker-dealer investing web sites where retail customers use tools to analyze securities to make self-directed investment decisions;
- holding securities, including concentrated positions, or other complex or risky investment strategies, at the customers' request in a nondiscretionary account;
- taking and executing unsolicited customer orders;
- account and customer relationship maintenance (*e.g.*, periodic contact to remind customers to rebalance assets to match allocations previously established, absent efforts to recommend changes to the allocation percentages);
- needs analysis (*e.g.*, meetings to determine customers' current and any new investment objectives and financial needs);
- providing ancillary account features and services (*e.g.*, debit card, cash sweep, and margin lending);
- market making, absent efforts to recommend the traded securities;
- underwriting, absent efforts to recommend the underwritten security;

[44] Derived generally from p. 126 of the Study, and Section 913 of the Dodd-Frank Act.

- referring customers to affiliated or third-party providers of financial or financial related services; or

- use of social media to convey investment strategies to a broad audience.

4. Provide clear guidance regarding disclosure that would satisfy the uniform fiduciary standard of conduct. Adequate disclosure guidance should be in place on or before the date the Section 913 standard of conduct becomes operative. Otherwise, broker-dealers cannot reasonably be expected to comply with or manage liability risks under the uniform fiduciary standard.

Establishment of clear guidelines regarding what disclosure is adequate and reasonable is particularly pressing for broker-dealers, whose activities involve conflicts that have not previously been subject to a "customer best interest" standard of conduct. Without clear guidelines, broker-dealers face the unquantifiable risk of courts and arbitrators second-guessing the adequacy of their disclosure of these conflicts on a post-hoc basis, and ultimately holding them liable as guarantors of their products or services based on inadequate disclosure or consent. This, in turn, creates the very real risk that broker-dealers would withdraw from offering many products and services, many of which are helpful to investors who wish to develop portfolios tailored to their needs and tolerance for risk.

a. ***Prospective guidance on disclosure should incorporate the following principles***:[45]

i. ***Clear disclosure***. Section 913 of the Dodd-Frank Act requires "simple and clear disclosures to investors…."[46] Retail customers will benefit from disclosure that is concise, direct, and in plain English.

ii. ***A layered approach***. Detail can overwhelm key facts. A layered approach to disclosure should be used to provide retail customers with the clearest, most relevant information at the time it is most important to their decision making, and therefore most likely to be read, with greater detail simultaneously made available to the customer if desired. For example, broker-dealers and investment advisers could provide printed materials applicable to all retail customers at the time of account opening, with more detailed disclosures that are relevant to particular transactions available on the internet.

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[45] These principles were also set forth in the SIFMA RN 10-54 Comment Letter.

[46] Section 913(g) of the Dodd-Frank Act.

iii. ***Web-based disclosure***.[47] Web-based disclosure is an effective manner to make immediate information available to many customers at a time that is most relevant to their investment decisions. It is also well adapted to providing layered disclosure that provides supplemental information to customers at the level of detail they desire.[48] Web-based information is also always available, while paper disclosures are easily discarded and easily forgotten. Of course, paper disclosures should be provided to customers that lack effective Internet access or that otherwise so request.

b. ***Specific disclosure guidance would address the following areas***:

i. ***Prospective customers***. Web-based disclosures should accompany web-based marketing materials for prospective customers that have had direct contact with a broker-dealer.

ii. ***Account opening***. Disclosures should include:

- the type of relationships available from the broker-dealer or investment adviser, and the scope of the standard of conduct that would apply to those relationships;
- the services that would be provided as part of the relationships, and information about applicable fees;
- material potential conflicts of interest that apply to these relationships, including conflicts arising from compensation

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[47] SIFMA has been a consistent advocate of the benefits of web-based disclosure for over five years. *See, e.g.*, Letter from George R. Kramer, Vice President and Acting General Counsel, Securities Industry Association, to, Jonathan G. Katz, Secretary, SEC (April 12, 2004) (comments on proposed point of sale disclosure requirements for transactions in certain mutual funds), *available at* http://www.sec.gov/rules/proposed/s70604/sia041204.pdf; Letter from Elizabeth Varley, SIFMA, to Department of Labor (July 24, 2007) (comments on request for information regarding fee and expense disclosures to participants in individual account plans), *available at* http://www.sifma.org/issues/item.aspx?id=232; Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to, Kim Allen, International Organization of Securities Commissions (Oct 2, 2008), *available at* http://www.sifma.org/issues/item.aspx?id=355 (comments on IOSCO's point of sale disclosure issues paper).

[48] For example, where the customer has the ability to effectively access documents furnished in electronic form, a "notice and access" delivery option should be available, whereby the firm posts material on its internet website and sends a notice to the customer that the materials are available online. The SEC successfully followed this approach in the E-proxy rules. See http://www.sec.gov/rules/final/2010/33-9108.pdf.

arrangements, proprietary products, underwritten new issues, types of principal transactions,[49] and customer consents thereto;

- the availability of many products under other fee structures and from other providers;
- disclosure and consents regarding any aggressive or sophisticated investment strategy, including concentrated positions; and
- disclosures of the background of the firm and of its associated persons, building upon existing systems, such as FINRA's BrokerCheck database.

iii. ***Point-of-sale***. If applicable, in appropriate circumstances, disclosures might include: the nature of the product; the nature of the fees involved; and the specific conflicts of interest applicable to that product. The regime should be sufficiently flexible to allow for verbal disclosures with further details made available via confirmation or online information.

iv. ***Disclosure updates***. Updates, if necessary or appropriate, should be permitted through an annual notification that provides a website address where specific changes to a firm's disclosure are highlighted.

v. ***Consents, generally***. Guidance should be provided to clarify when a customer's affirmative consent is required and when it is not.[50] When it is required, the rules should facilitate obtaining customer consent, including, in appropriate circumstances, through global consents granted at account opening. In general, the consent regime should focus particular attention on ensuring that it can be practically implemented and readily integrated into the current broker-dealer operational model.[51]

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[49] In omitting any reference to Section 206(3) of the Advisers Act in the legislative language of Section 913 of the Dodd-Frank Act, the Congressional intent was to preserve for broker-dealers the ability to engage in principal transactions under the uniform standard of conduct. Accordingly, SEC rules should affirmatively provide this relief for broker-dealers. See further discussion on principal transactions in Section III.C.5. *infra*.

[50] Section 913 of the Dodd-Frank Act does not appear to contemplate consent in every instance. *See* Section 913(g)(1) ("...conflicts of interest shall be disclosed and may be consented to by the customer.").

[51] For example, as our industry has long argued, the Advisers Act framework for consent to principal transactions would be unworkable for broker-dealers. See further discussion on principal transactions in Section III.C.5. *infra*.

vi. ***Consents from existing customers.***[52] Guidance should be given that would allow customers with accounts established prior to the effective date of the uniform fiduciary standard to consent to disclosures of conflicts by continuing to accept or use account services after receiving written disclosures.

Because customers often do not provide affirmative responses even to repeated requests from broker-dealers, requiring written consent to conflicts from existing retail customers would risk an interruption of services for these customers until the new account arrangements were in place.

For existing retail customers, consent by continuing to accept or use account services after disclosure should be permitted due to the impracticability of obtaining signatures from all existing retail customers.

5. ***Preserve principal transactions.*** In omitting any reference to Section 206(3) of the Advisers Act in the legislative language of Section 913 of the Dodd-Frank Act, Congress intended to preserve for broker-dealers the ability to engage in principal transactions under the uniform fiduciary standard of conduct. Accordingly, new SEC rules should affirmatively provide this relief for broker-dealers. One possible formulation is as follows:

A broker-dealer may, acting as principal for his own account, sell any security to or purchase any security from a customer, or acting as broker for a person other than such customer, effect any sale or purchase of any security for the account of such customer, if (A) such broker or dealer is not acting as an investment adviser in relation to such transactions; or (B) the customer has consented in writing prospectively authorizing the broker or dealer to act in any such capacity after receiving disclosure of material conflicts of interest that the broker or dealer may have and the compensation or ranges of compensation the broker or dealer may receive in such transactions.[53]

IV. Conclusion

SIFMA supports the Commission as it undertakes to address various, interrelated investor protection concerns. We urge the Commission to newly articulate a uniform fiduciary standard of conduct, rather than attempting to apply Section 206 legal precedent to the broker-dealer business model with significant negative effects for investor protection and choice. By adhering to the principles outlined above, and the additional principles noted in our prior comment letters, the Commission can develop a regulatory structure for the uniform fiduciary standard of conduct that ensures that investors are protected and are able to access the financial services they want and need to achieve their investment goals.

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[52] This point was also made in the SIFMA Section 913 Comment Letter.

[53] Modeled after the language of Section 206(3) of the Advisers Act.

We hope we can continue to serve as a constructive and insightful voice of the securities industry during the course of what we expect will be a significant undertaking and multi-step process.

Sincerely yours,

Ira D. Hammerman
Senior Managing Director
and General Counsel

cc: Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Robert W. Cook, Director, Division of Trading and Markets
Eileen P. Rominger, Director, Division of Investment Management
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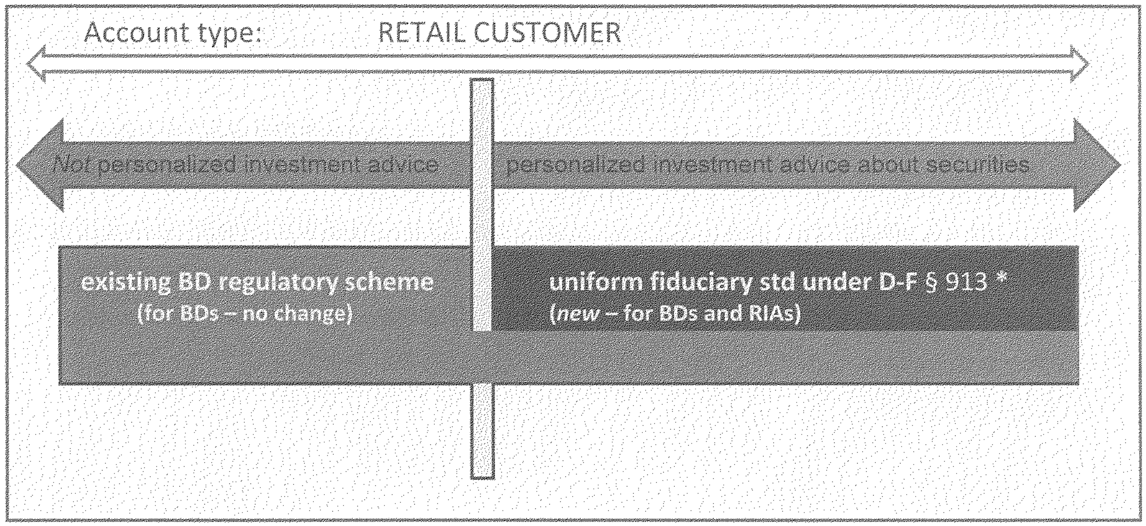
Appendix 1: Framework for Implementing D-F § 913



* The SEC would issue rules & guidance under § 211 of the Advisers Act and § 15 of the Exchange Act to provide the detail & guidance necessary to enable BDs and RIAs to apply the uniform fiduciary standard to their distinct operational models.

The rules would also articulate the general fiduciary duty implied under § 206 of the Advisers Act as the uniform fiduciary standard of conduct to apply equally to BDs and RIAs when providing personalized investment advice about securities to retail customers.

Existing case law & guidance under § 206 would continue to apply to RIAs, but not to BDs, because § 206 does not now, and would not under the uniform fiduciary standard, apply to BDs.

Statement of

David G. Tittsworth
Executive Director and Executive Vice President
Investment Adviser Association

Before the
Subcommittee on Capital Markets and
Government Sponsored Enterprises
Committee on Financial Services
United States House of Representatives

Hearing on Regulation and Oversight of Broker-Dealers and Investment Advisers

September 13, 2011

Executive Summary

Investment advisers manage assets for a wide array of individual and institutional investors. Currently, approximately 11,500 investment advisers are registered with the SEC, collectively managing assets totaling $43.8 trillion for more than 14 million individual and institutional clients. Investment advisers engage in a wide range of advisory activities and investment strategies on behalf of their clients, including constructing securities portfolios pursuant to client directives, recommending a particular asset allocation plan, providing portfolio analysis and evaluation, assisting in selecting and monitoring other advisers, and providing wealth management or financial planning services. In addition to those activities, some of which are more oriented toward individual clients, investment advisers manage assets for mutual funds, hedge funds, private equity funds, pension plans, state and municipal entities, banks, insurance companies, charitable endowments, foundations, and corporations, and serve as sub-advisers to funds offered by other advisers. These activities play a critical role in helping investors, both individually and through pooled investment vehicles, achieve their financial goals.

While investment advisory firms run the gamut from small, local or regional firms to large global financial institutions with varying business models, the overwhelming majority of investment advisory firms are small businesses. Indeed, half of all federally-registered advisers employ fewer than five and more than two-thirds employ fewer than ten non-clerical employees. The legal and regulatory regime for the advisory profession must be sufficiently robust and flexible to address the enormous diversity among advisers. This flexibility is provided for in the Investment Advisers Act of 1940 (Advisers Act), which prescribes a largely principles-based statutory framework governing the conduct of those who provide investment advice.

The core principle underlying the Advisers Act is the fiduciary duty imposed on investment advisers, in whom clients place their trust and confidence. As fiduciaries, investment advisers must act in their clients' best interests at all times, placing their clients' interests above their own. The fiduciary duty thus serves as a bedrock principle of investor protection. The IAA believes that the fiduciary standard of care should apply to the relationship with all clients who receive personalized investment advice about securities, regardless of which financial professional is providing the advice.

Section 913 of the Dodd-Frank Act directed the SEC to conduct a study of the standards of care applicable to investment advisers and broker-dealers. It also authorized the SEC to promulgate rules providing that the standard of conduct for brokers, dealers, and investment advisers when providing personalized advice about securities to retail customers shall be to act in the best interest of the client without regard to the financial or other interest of the broker, dealer, or investment adviser. Section 913 further specified that, if the SEC promulgates such rules, the standard of conduct be no less stringent than the fiduciary duty imposed by the Advisers Act.

After extensive study, the SEC released its Section 913 staff report recommending that it issue rules providing for a uniform fiduciary standard for both advisers and broker-dealers providing personalized advice about securities to retail clients, along with rulemaking or interpretive guidance addressing the components of the standard. We support the SEC staff's recommendation, but would oppose any measures that would weaken or water down the fiduciary standard for advisers in the process.

The Advisers Act fiduciary duty is well-established and has been consistently interpreted and enforced for decades by the SEC and the courts. While we appreciate the desire for specificity by brokers unfamiliar with fiduciary duties, we are concerned that in the process of providing that guidance, the SEC may inadvertently create an inflexible narrowly tailored regime antithetical to the principles-based underpinning of the fiduciary standard. One of the greatest strengths of the fiduciary standard is precisely its breadth – the standard has allowed the regulation of advisers to remain dynamic and relevant in changing business and market conditions.

The IAA has consistently supported this overarching fiduciary duty as a core component of meaningful regulation of the investment advisory profession. However, effective examination of advisers is also a critical component of meaningful oversight. To achieve this goal, we continue to support strongly regulation and oversight by the SEC, a single governmental regulator, fully accountable to Congress and the public, subject to rules mandating transparency, and that places investor protection as its paramount mission.

Dodd-Frank Act Section 914 directed the SEC to conduct a study to review and analyze the need for enhanced examination and enforcement resources of investment advisers. The SEC issued a staff report expressing concern that it will not have sufficient capacity to conduct effective examinations of investment advisers with adequate frequency, and setting forth three options for addressing this concern: (1) imposing user fees on federally-registered investment advisers to fund their examinations by the SEC; (2) authorizing one or more SROs to examine all SEC-registered investment advisers; and (3) authorizing FINRA to examine dual registrants for compliance with the Advisers Act. In its analysis of these options, the report finds the greatest number of advantages, and the least number of disadvantages, with respect to user fees. It also includes a thorough discussion of the problems inherent in designating an SRO for the diverse investment advisory profession. Other reputable reports and studies – including by the Chamber of Commerce, the Government Accountability Office, and an independent consultant retained by the SEC – also catalogue the drawbacks, costs, and inefficiencies of the SRO model.

We strongly oppose an SRO for the advisory profession. The substantial drawbacks to an SRO outweigh any potential benefits. These drawbacks include insufficient transparency, accountability, and oversight by the SEC and Congress, due process issues in disciplinary proceedings, and the absence of any requirement for a cost-benefit analysis for proposed rules. Further, the substantial costs and bureaucracy of an additional, unnecessary layer of SRO regulation and oversight would have a significant adverse impact on small businesses and job creation. For these reasons, we oppose the draft legislation circulated last week that would require investment advisers to become members of an SRO, subject to SRO rules, regulations, and oversight. We particularly oppose extending FINRA's jurisdiction to investment advisers for these reasons and due to its questionable track record and bias favoring the broker-dealer regulatory model.

The SEC, with its 70 years of substantive expertise and experience with the Advisers Act, is in the best position to govern the activities of advisers. We also believe that the costs of user fees would be significantly less than the costs to the industry for SRO oversight because the SRO would need to hire, train, and oversee inspection staff, develop investment adviser expertise, and incur significant start-up costs. Further, as documented in the recent Boston Consulting Group study required under Section 967 of the Dodd-Frank Act, the SEC would still have to expend significant resources to exercise appropriate oversight of the SRO; indeed, this independent study recently concluded that the SEC does not provide sufficient oversight of the SROs currently under its jurisdiction, particularly FINRA.

We believe that the SEC should continue its implementation of reforms designed to streamline and enhance its investment adviser examination program with existing resources. Further, the number of investment advisers under SEC jurisdiction will decrease substantially as a result of provisions in the Dodd-Frank Act. Should the combination of streamlined examinations and re-allocated SEC resources, together with the decrease in the number of advisers, fail to alleviate concerns about the examination program -- and, as an alternative to an SRO - we believe that Congress should consider properly structured user fees. We would be pleased to assist the Subcommittee in drafting such legislation, which should include provisions that: (1) specifically preclude any investment adviser SRO if such fees are imposed; (2) clarify

that such user fees will be dedicated to an increased level of investment adviser examinations (instead of simply being used as substitute funding for the existing level of examinations); and (3) set forth specific reporting requirements and review of any such user fees by Congress and the public.

The user fee approach provides many benefits. User fees would provide stable yet scalable resources to support and strengthen the Commission's examination of investment advisers. The fees collected would be used solely to fund enhancements to the investment adviser examination program, and set a level designed to achieve an acceptable frequency of examinations. This stable source of funding would enable the SEC staff to conduct long-term strategic planning, especially with respect to technological modernization that could enhance its risk assessment and monitoring capabilities. Importantly, the reporting and accountability embedded in the user fee approach would provide substantial transparency and opportunity for congressional oversight and public input.

We look forward to participating fully in the discussion of how best to protect the interests of investors by ensuring effective and efficient oversight of investment advisers and other financial services providers.

Introduction

The Investment Adviser Association (IAA)[1] greatly appreciates the opportunity to appear before the Subcommittee today to discuss the studies mandated by the Dodd-Frank Act on the standards of care applicable to broker-dealers and investment advisers and on the need for enhanced examination resources for investment advisers.

The IAA commends the Subcommittee for convening this hearing. We support appropriate rulemaking by the SEC to ensure that investors receive investment advice that is given in their best interest, regardless whether the advice is provided by an investment adviser or broker-dealer.[2] We also strongly support giving the SEC the tools it needs to conduct an effective investment adviser examination and oversight program.[3] The IAA stands ready to assist the Subcommittee in undertaking the critical task of ensuring robust protection for all investors.

I. The IAA Supports the SEC Staff Recommendation to Apply the Fiduciary Duty Standard to Advisers and Brokers.

Section 913 of the Dodd-Frank Act required the SEC to conduct a study and submit a report to Congress evaluating the current standards of care for broker-dealers and investment advisers providing personalized investment advice and recommendations about securities to

[1] The IAA is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937 as the Investment Counsel Association of America, the IAA's membership consists of more than 500 firms that collectively manage in excess of $10 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit our web site: www.investmentadviser.org.

[2] Letter from David G. Tittsworth, Exec. Dir., IAA, to Elizabeth Murphy, Secretary, SEC re: Study Regarding Obligations of Brokers, Dealers, and Investment Advisers, Rel. No. IA-3058; File No. 4-606 (Aug. 30, 2010) ("IAA Section 913 Letter"), available on our web site under "Comments & Statements."

[3] Letter from David G. Tittsworth, Exec. Dir., IAA, to Elizabeth Murphy, Secretary, SEC, re: SEC Study on Enhancing Investment Adviser Examinations under Section 914 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, (Oct. 19, 2010) ("IAA Section 914 Letter"), available on our web site under "Comments & Statements." *See also Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office Hearing Before the H. Comm. on Fin. Services,* 111th Cong. (Oct. 6, 2009) (statement of David G. Tittsworth, Exec. Dir. and Exec.Vice President, IAA), available on our web site under "Comments and Statements."

retail customers. In the study, the SEC was required to assess whether there are gaps in the relevant law and regulations, evaluate the effectiveness of current standards of care, and consider many other topics such as the potential impact and cost of regulatory changes. Section 913 further authorizes the SEC to promulgate rules to provide that the standard of care for investment advisers and broker-dealers when providing personalized investment advice to retail customers is to act in the best interest of the customer without regard to the financial or other interest of the broker or adviser. The law provides that this standard is to be no less stringent than the fiduciary duty currently applicable to investment advisers under the Advisers Act.

Section 913 includes provisions specifically designed to address broker-dealers' concerns raised during congressional consideration of the Dodd-Frank Act about the application of fiduciary duty to their business practices. Among other things, these provisions confirm that charging commissions and offering proprietary products do not constitute breaches of fiduciary duty. In addition, Section 913 provides that application of the fiduciary duty does not in and of itself require brokers to have a continuing duty to a retail customer after providing investment advice.

The Commission established a cross-divisional staff task force to conduct the study and submitted its final report to Congress on January 22, 2011.[4] After extensive review and consideration of the factors set forth by Congress, the SEC released its staff report recommending that the SEC establish a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice about securities to retail customers that would require advisers and brokers to act in the best interests of their clients. The report recommends that this standard be consistent with, and no less stringent than, the standard applied to investment advisers under the Advisers Act. The report recommends that the Commission engage in rulemaking or guidance addressing the minimum components of the uniform fiduciary standard to provide guidance for brokers unfamiliar with the standard.

[4] Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers (Jan. 21, 2011) ("913 Report").

Importantly, the staff expressed its view that existing guidance and precedent under the Advisers Act regarding fiduciary duty will continue to apply. The staff report made a number of recommendations designed to address brokers' concerns about cost, investor choice, and the scope of the duty. Further, the staff considered but rejected alternatives to the uniform fiduciary standard that would result in imposing the entire investment adviser regulatory regime on broker-dealers. The staff, however, recommended consideration of harmonization of broker-dealer and adviser regulation in certain areas "to the extent that harmonization appears likely to add meaningful investor protection."[5]

SEC Commissioners Casey and Paredes issued a joint dissenting statement to the Section 913 Report expressing their view that the Report did not include sufficient analysis of the potential costs of changes to regulation or adequate discussion of whether there is in fact a problem with the current regulation of broker-dealers and advisers. On March 17, Chairman Garrett and other members of the Capital Markets Subcommittee sent a letter to Chairman Schapiro expressing similar concerns. SEC Chairman Schapiro has stated that she has requested the staff to conduct further analysis of these issues. We appreciate the need for thorough cost-benefit analysis in the rulemaking process and support the SEC's additional efforts in this regard.

1. The Fiduciary Standard of Care Provides More Protection to Investors than the Suitability Standard.

The IAA strongly supports the SEC staff recommendation to apply a fiduciary standard no less stringent than that currently applied to investment advisers to both investment advisers and brokers who provide personalized investment advice about securities to retail clients. The fiduciary duty is the highest standard of care recognized under the law and serves as a bedrock principle of investor protection.

Pursuant to the Advisers Act, as a fiduciary, "an investment adviser must at all times act in its clients' best interests, and its conduct will be measured against a higher standard of conduct

[5] *Id.* at 102.

than that used for mere commercial transactions."[6] In practical terms, fiduciary duty means that, in the course of providing advice to clients, advisers must disclose all material information and conflicts of interest to their clients, including the fees that they charge, how they plan to recommend securities to clients, and any material disciplinary information involving the firms or their investment personnel. Moreover, as fiduciaries, advisers must treat their clients fairly and not favor one client over another, especially if they would somehow benefit from favoring one particular client or type of client. Most important, whenever the interests of investment advisers differ from those of their clients, advisers must explain the conflict to the clients and act to mitigate or eliminate it, ensuring they act in the interests of the client and not for their own benefit.

This well-established standard has been consistently interpreted and applied by the SEC and the courts to require investment advisers to serve their clients with the highest duty of loyalty and duty of care.[7] Among the specific obligations that flow from an adviser's fiduciary duty are: (1) the duty to have an adequate, reasonable basis for its investment advice; (2) the duty to seek best execution for clients' securities transactions where the adviser directs such transactions; (3) the duty to render advice that is suitable to clients' needs, objectives, and financial circumstances; (4) the duty not to subrogate clients' interests to its own; (5) the duty not to use client assets for itself; (6) the duty to maintain client confidentiality; and (7) the duty to make full and fair disclosure to clients of all material facts, particularly regarding conflicts of interest.[8]

[6] Thomas P. Lemke and Gerald T. Lins, *Regulation of Investment Advisers,* at 2:33 (2010); *see also* SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963) ("Capital Gains").

[7] In a seminal decision in 1963, the U.S. Supreme Court held that the Advisers Act imposes a fiduciary duty on investment advisers. The Court found embodied in the Advisers Act an adviser's affirmative duty of utmost good faith and full and fair disclosure of all material facts to its clients as well as an affirmative obligation to employ reasonable care to avoid misleading its clients. Capital Gains, *supra* note 6. These duties of a fiduciary were applied by the SEC and the courts long before the Supreme Court in *Capital Gains* found them to be embodied in the anti-fraud provisions of the Advisers Act. *See, e.g.*, In the Matter of Arleen W. Hughes, Exchange Act Rel. No. 4048 (Feb. 18, 1948).

[8] *See* Amendments to Form ADV, Investment Advisers Act Rel. No. IA-3060, (July 28, 2010); Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients, Investment Advisers Act Rel. No. IA-1406, note 3 (Mar. 16, 1994) ("Suitability Release") (noting duty of full disclosure of conflicts of interest, duty of loyalty, duty of best execution, and duty of care); Applicability of Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment

Broker-dealers that manage assets for clients under discretionary authority or for a fee are already subject to the Advisers Act fiduciary duty.[9] The existing standard of care for broker-dealers that provide non-discretionary advice for a commission, such as making recommendations about securities to brokerage customers, is the suitability standard. Under FINRA Rule 2310, broker-dealers that provide investment advice to retail customers are required to ensure that the advice is "suitable" for the client. In addition, FINRA Rule 2010 requires broker-dealers when dealing with customers to "observe high standards of commercial honor and just and equitable principles of trade." The FINRA rules are essentially standards of fair treatment reflecting a commercial relationship rather than a relationship of trust and confidence.

The broker suitability standard differs significantly from the Advisers Act fiduciary duty. Indeed, the duty to provide suitable investment advice is merely one aspect of the fiduciary duty.[10] For example, brokers under a suitability duty may make recommendations or make investment decisions as long as they are "suitable" for that client under the client's particular circumstances, even if they are not in the best interests of the client. Moreover, even if brokers are motivated to provide particular advice because significant benefits accrue to them (such as receipt of a financial benefit for recommending a particular security), suitability does not require disclosure of such conflicts.

Virtually every regulator, consumer, and industry group that has commented on this issue agrees that the fiduciary standard provides more protection to investors than the suitability

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Advisory Services as a Component of Other Financial Services, Investment Advisers Act Rel. No. IA-1092, (Oct. 16, 1987) (discussing fiduciary duties); *see also* Capital Gains, *supra* note 6.

[9] The SEC has interpreted the exclusion for brokers from investment adviser regulation as not extending to broker-dealers that have discretionary authority over client assets. *See, e.g.,* Opinion of the General Counsel Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940, Investment Advisers Act Rel. No. 2 (Oct. 28, 1940); Certain Broker-Dealers Deemed Not To Be Investment Advisers, Investment Advisers Act Rel. No. 2340 (Jan. 6, 2005); *see also* Letter from Christopher Gilkerson, Charles Schwab & Co., Inc. to Elizabeth Murphy, Secretary, SEC (Aug. 30, 2010).

[10] *See* Suitability Release, *supra* note 7 ("Investment advisers are fiduciaries who owe their clients a series of duties, one of which is the duty to provide only suitable advice").

standard.[11] The SEC, state regulators, consumer advocates, academics, financial commentators, and industry trade groups representing investment advisers, financial planners, investment companies, private fund advisers, and broker-dealers have written in support of extending fiduciary duty to all financial professionals giving advice.[12] Indeed, the major trade association representing broker-dealer firms supports the SEC staff recommendation as well.[13]

A vocal minority of brokers has argued that extending the Advisers Act fiduciary duty to brokers will disrupt business models and reduce investor choice. These arguments are not supported by any facts or evidence. The Advisers Act fiduciary duty has accommodated a broad

[11] During an October 2009 hearing before the House Committee on Financial Services, Rep. Spencer Bachus asked each of the witnesses on the panel on Strengthening Investor Protection whether fiduciary duty or suitability was the higher standard. Each witness responded that fiduciary duty was the higher standard: Denise Voigt Crawford, Texas Securities Commissioner, Securities Administrators Board, on behalf of the North American Securities Administrators Association; Richard Ketchum, Chairman and CEO, Financial Industry Regulatory Authority; Mercer E. Bullard, Founder and President, Fund Democracy, Inc.; John Taft, Head of Wealth Management, RBC Wealth Management, on behalf of the Securities Industry and Financial Markets Association; David G. Tittsworth, Executive Director, IAA; Bruce W. Maisel, Vice President and Managing Counsel, General Counsel's Office, Thrivent Financial for Lutherans, on behalf of the American Council of Life Insurers; *see also* Statement of David G. Tittsworth, Exec. Dir. and Executive Vice President, IAA, *supra* note 3; *Industry Perspectives on the Obama Administration's Financial Regulatory Reform Proposals, Hearing Before the H. Comm. On Fin. Servs.*, 111th Cong. 16 (July 17, 2009) (statement of Paul Schott Stevens, President and CEO, Investment Company Institute); *Enhancing Investor Protection and the Regulation of Securities Markets – Part II, Hearing Before the S. Comm. On Banking, Housing and Urban Affairs*, 111th Cong. 12 (Mar. 26, 2009) (statement of Fred J. Joseph, Colorado Securities, Comm'r and President, North American Securities Administrators Association, Inc.); *Enhancing Investor Protection and the Regulation of Securities Markets – Part II, Hearing before S. Comm. On Banking, Housing and Urban Affairs*, 111th Cong. (Mar. 26, 2009) (statement of Barbara Roper, Consumer Federation of America); Letter from IAA, Consumer Federation of America, Fund Democracy, NASAA, Financial Planning Association, National Association of Personal Financial Advisers, and CFP Board of Standards to the Hon. Barney Frank and the Hon. Spencer Bachus, H. Comm. on Fin. Servs. (July 14, 2009), available on our web site under "Comments and Statements."

[12] *See* 913 Report, *supra*, note 4, at 107*; see also, e.g.*, Jane Bryant Quinn, *Will Brokers Have to Put Your Interest First?*, janebryantquinn.com, (May 6, 2010), *available at http://janebryantquinn.com/2010/05/will-brokers-have-to-put-your-interests-first/;* Tara Siegel Bernard, *Trusted Adviser or Stock Pusher? Finance Bill May Not Settle It*, N.Y. Times, Mar. 3, 2010, *available at http://www.nytimes.com/2010/03/04/your-money/brokerage-and-bank-accounts/04advisers.html;* Paul Sullivan, *Broker? Adviser? And What's the Difference*, N.Y. Times, Feb. 18, 2010, *available http://www.nytimes.com/2010/02/18/your-money/financial-planners/18TRUST.html*; Tara Siegel Bernard, *Struggling Over a Rule for Brokers*, N.Y. Times, Feb. 15, 2010, *available at http://www.nytimes.com/2010/02/16/business/16adviser.html;* Jason Zweig, *The Fight Over Who Will Guard Your Nest Egg*, Wall St. J., Mar. 28, 2009, *available at http://online.wsj.com/article/SB123819596242261401.html.*

[13] *See* Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Mary L. Schapiro, Chairman, SEC, re: Framework for Rulemaking under Section 913 (Fiduciary Duty) of the Dodd-Frank Act (July 14, 2011) ("SIFMA 913 Framework Letter'). *See also SEC Standard of Care Study Recognizes Strengths of Broker-Dealer Regulatory System*, Financial Services Institute Press Rel. (Jan. 24, 2011) (commending SEC staff for addressing FSI concerns regarding fiduciary standard).

spectrum of advisory-related activities and vastly different business models for many decades. One of the strengths of the fiduciary standard is its flexibility to apply to a range of activities and services. Extension of this flexible standard will not result in less investor choice or wholly infeasible requirements on those who choose to provide advice to individual clients.[14] For example, opponents of the fiduciary duty base their claims on the incorrect assumption that brokers would no longer be able to charge commissions or provide advice about proprietary products. That is not the case now under the Advisers Act fiduciary duty, and indeed Section 913 and the SEC staff report confirm that brokers will continue to be able to charge commissions and advise regarding proprietary products under the fiduciary standard.

It is also important to note that the SEC staff's recommendation will not impose the Advisers Act fiduciary duty on all broker-dealer activity. The recommendation narrowly addresses only the provision of personalized investment advice about securities to retail clients. The fiduciary duty would not, for example, apply to market-making or underwriting activities.

2. SEC Should Resist Efforts to Weaken the Advisers Act Fiduciary Duty.

We believe that the key issue is not whether brokers should have a fiduciary duty when giving personalized investment advice about securities to retail clients, but how that duty should be implemented. To that end, we applaud the SEC staff's recommendation that existing guidance and precedent under the Advisers Act fiduciary duty will continue to apply to investment advisers and be extended to broker-dealers, as applicable. The Advisers Act fiduciary duty is well-established, has been consistently interpreted by courts and the SEC for decades, and has worked well in protecting investors.

We strongly disagree with those who assert that the existing case law, guidance and other legal precedent developed under the Advisers Act should not apply to broker-dealers and that an entirely new body of law should be developed – in effect a new standard. These commenters

[14] *See, e.g.* Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Spencer Bachus, Chairman, H. Comm. on Fin. Svcs., et al., (May 9, 2011), available at http://www.consumerfed.org/pdfs/CFA-fiduciary-consequences-letter-5-9-2011.pdf.

argue that, because the fiduciary duty case law was not developed in the context of broker-dealer business models, they are not able to "gauge compliance with, or legal exposure under, the Advisers Act," and believe that existing fiduciary duty precedent would "undermine the broker-dealer model."[15] This assertion is not supported by the facts. Indeed, brokers that provide discretionary advice or advice for a fee, as well as financial planners, have operated under the fiduciary duty for many years. Further, as noted by the SEC staff report, brokers have been subject to fiduciary duty pursuant to state law under various circumstances.[16] We recognize, however, that certain issues unique to the broker-dealer business model, such as principal trading, may need to be addressed under the fiduciary standard. The SEC staff appropriately has indicated its intent to provide guidance regarding these issues. In so doing, it is not necessary to implement a new or different standard that potentially could weaken or alter the fiduciary duties owed by investment advisers or by brokers providing discretionary advice.

Further, preserving the interpretations and precedents under the Advisers Act brings with it the benefit of ensuring that the fiduciary duty applies equally to all investment advisory clients, whether individual or institutional. Section 913 authorizes the SEC to adopt rules for "retail customers or clients (and such other customers or clients as the Commission may by rule provide)." The provision's focus on applying the fiduciary duty to brokers when they give "personalized investment advice to retail customers" should not lead to modification of investment advisers' fiduciary duty applicable to all clients, both retail and institutional. The IAA strongly believes that all investment advisory clients deserve the protections afforded by the Advisers Act fiduciary duty. Different standards of care may result in lowering the current standard with regard to certain advisory clients and result in inconsistent application of the law to similar facts, an outcome we would oppose.

The SEC staff report recommends that the Commission provide guidance addressing the parameters (*e.g.,* definition of personalized investment advice) and components of the fiduciary duty, including identifying specific examples of conflicts of interest to assist brokers unfamiliar

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[15] SIFMA 913 Framework Letter, *supra* note 13.

[16] 913 Report, *supra* note 4, at 54.

with the fiduciary duty. Although we do not take issue with this approach conceptually, we would urge the Commission in so doing not to reduce the obligations that flow from fiduciary duty to a checklist or prescriptive set of narrowly tailored rules.[17] The breadth and flexibility of the fiduciary duty of investment advisers have allowed the regulation of investment advisers to remain dynamic and relevant in changing business and market conditions.[18] Because the duty is a principles-based standard and investment advisers must place the interests of their clients before their own in every circumstance, the overarching fiduciary duty of investment advisers cannot - and should not - be circumscribed by a rule book, no matter how voluminous.

We have offered to work with the SEC to develop strong, sensible regulations that maintain the investor protection of advisers' current fiduciary duty under the Advisers Act and to extend this protection to all retail customers receiving personalized investment advice.

3. <u>Any "Harmonization" of Broker-Dealer and Investment Adviser Regulations Should Recognize that Adviser Regulation Is Specifically Designed for Advisory Activities.</u>

The SEC staff report extensively reviewed the investment adviser and broker-dealer regulatory frameworks and discussed a number of potential areas in which the Commission could consider harmonizing differences in these regimes. The staff took a thoughtful approach in recommending harmonization in both directions – that is, application of certain Advisers Act rules to brokers and application of certain broker rules to advisers. We nevertheless would encourage the Commission to continue to bear in mind that the Advisers Act rules and

[17] *See* Michael Koffler, *Six Degrees of Separation: Principles to Guide the Regulation of Broker-Dealers and Investment Advisers*, 41 Sec. Reg. & Law Rep. 776 (Apr. 27, 2009) ("Given the equitable nature of fiduciary law, it is not tenable to set forth a fiduciary's responsibilities in a detailed manner or to specify a convention to govern their activity. Nor would it be in the public interest to do so. And it certainly would not be consistent with the way fiduciary law has evolved and been interpreted for hundreds of years").

[18] Over the years, the SEC has favored a flexible approach to fiduciary duty. *See, e.g.,* Investment Adviser Codes of Ethics, Investment Advisers Act Rel. No. IA-2256 (July 9, 2004) ("proposal left advisers with substantial flexibility to design individualized codes that would best fit the structure, size and nature of their advisory businesses"); Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Rel. No. IA-2204 (Dec. 17, 2003) ("Commenters agreed with our assessment that funds and advisers are too varied in their operations for the rules to impose of a single set of universally applicable required elements."); Proxy Voting by Investment Advisers, Investment Advisers Act Rel. No. IA-2106 (Jan. 31, 2003) ("Investment advisers registered with us are so varied that a 'one-size-fits-all' approach is unworkable.").

regulations are specifically designed for the provision of investment advice, whereas the broker-dealer regime is designed for different core activities.

Despite the investment advisory profession's wide range of ownership structures, investment strategies, and business models, the core of the profession is portfolio management. Virtually all SEC-registered investment advisers have ongoing discretionary authority to make investment decisions on behalf of their clients. 68% of the more than 11,500 SEC-registered investment advisers are not engaged in any business activity other than giving investment advice. Only 561 SEC-registered investment advisers (4.86 %) are dually registered as broker-dealers.[19] While investment advisers are generally focused solely on managing client assets or financial planning, broker-dealers engage in a wider range of activities, including selling securities, mutual funds, and variable annuities; selling interests in limited offerings or private placements; margin lending; securities lending; taking custody of client funds or securities; executing trades; acting as a market maker, dealer, syndicator or underwriter; acting as a distributor for issuers; and engaging in stock exchange floor activities.

Many of the differences in the regulations governing brokers-dealers and investment advisers appropriately reflect their different business models and the services they provide. For example, different rules apply to disclosure, codes of ethics, proxy voting, contractual requirements, and advertising.[20] Broker-dealer rules derive from the historic role of brokers executing transactions and selling financial products to consumers (thus, the brokerage industry is commonly referred to as the "sell side").[21] Investment adviser rules derive from the historic

[19] In 2011, 87.7% of all investment advisers reported having discretionary authority over client accounts. Indeed, of the $43.8 trillion assets under management reported by SEC-registered advisers in 2011, only $5 trillion were reported as non-discretionary. *See* Investment Adviser Association and National Regulatory Services, *Evolution/Revolution 2011: A Profile of the Investment Advisory Profession* (August 2011) ("*Evolution/Revolution 2011*"), at 4. Data presented are as of May 1, 2011. In addition, approximately 75.6% of advisers provide portfolio management for individuals and/or small business, 63.7% of advisers provide portfolio management for business or institutional clients (other than mutual funds); 41.3% of advisers provide financial planning services; and 31% of advisers assist clients in selecting other advisers. *Id.* at 15.

[20] An exhaustive comparison of the various regulations applicable to broker-dealers and investment advisers when providing investment advice is attached as Appendix A to the IAA Section 913 Letter, *supra* note 2.

[21] Proponents of "harmonization" at times fail to discern basic differences between the sales-based, transaction-oriented brokerage industry and ongoing advisory services provided by the investment advisory profession. *See, e.g.*

role of advisers in providing investment advisory services to clients, including managing client portfolios (thus, the advisory profession is commonly referred to as the "buy side").

Despite major changes in both the brokerage and advisory industries during the past 70 years, there continue to be significant differences between the core activities of most broker-dealers and most investment advisers. The range in which brokers' and advisers' activities overlap is relatively narrow. Accordingly, we believe it would be inappropriate and counterproductive to import the sales-based broker-dealer regime for investment advisers or to impose Advisers Act protections on non-advisory activities of broker-dealers. We have offered to work with the Commission to analyze thoughtfully any areas in which enhancement of investment adviser regulation would provide additional meaningful protections to advisory clients.

II. The IAA Supports Efforts to Strengthen the SEC's Investment Adviser Examination Program.

The IAA has consistently supported meaningful regulation of the investment advisory profession, including an effective examination program. We support the SEC's efforts to strengthen the examination program for investment advisers.[22]

Section 914 of the Dodd-Frank Act required that the SEC conduct a study to review and analyze the need for enhanced examination and enforcement resources for investment advisers. Section 914 required the examination of: (1) the number and frequency of examinations of investment advisers by the SEC over the five years preceding the date of the enactment of the Dodd-Frank Act; (2) the extent to which having Congress authorize the SEC to designate one or

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Madoff Investment Securities Fraud: Regulatory and Oversight Concerns and the Need for Reform, Hearing Before S. Comm. on Banking, Housing and Urban Affairs, 111th Cong. (Jan. 27, 2009) (statement of Stephen Luparello, Interim Chief Executive Officer, FINRA) (the solution is "greater regulatory harmonization – creating a regulatory system that gives retail investors the same protections and rights no matter what *product* they *buy*," including that for every "*transaction*," there be consistent: (1) licensing requirements; (2) advertising requirements; (3) "appropriateness" standards for *products*, and (4) full disclosure for the "*products being sold*.") (emphasis added).

[22] *See, e.g.*, Letter from David G. Tittsworth, Exec. Dir., IAA, to The Hon. Mary L. Schapiro, Chairman, SEC re: SEC Exams of Investment Advisers (July 29, 2009), available on our web site under "Comments and Statements."

more SROs to augment the SEC's oversight of investment advisers would improve the frequency of examinations of investment advisers; and (3) current and potential approaches to examining the investment advisory activities of dually-registered broker-dealers and investment advisers and registered investment advisers that are affiliated with a broker-dealer.

In January, the staff of the SEC delivered the required report to Congress[23] reflecting concern regarding the SEC's capacity to inspect investment advisers and setting forth a range of options for enhancing investment adviser examinations, including: (1) imposing user fees on federally-registered investment advisers to fund their examinations by the SEC; (2) authorizing one or more SROs to examine all SEC-registered investment advisers; and (3) authorizing FINRA to examine dual registrants for compliance with the Advisers Act.[24]

In the report, the SEC staff found that the SEC's oversight capabilities had not kept pace with the recent growth in the investment advisory profession and that, as a result, the frequency of investment adviser examinations has decreased significantly. Although the number of SEC-registered investment advisers is expected to fall significantly due to changes mandated by Dodd-Frank,[25] the report projects that there could be as many as 13,908 registered advisers collectively managing more than $70 trillion by fiscal year 2021. The report further states that even if the SEC hires more examiners, the number of examination staff is unlikely to keep pace with future growth among advisers. Additionally, the staff notes that SEC's new examination obligations under Dodd-Frank will "further strain resources." These concerns form the basis for the staff's recommendation that Congress should consider the user fees and SRO options.

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[23] Staff of the Division of Investment Management of the U.S. Securities and Exchange Commission, Study on Enhancing Investment Adviser Examinations (Jan. 19, 2011) ("914 Report").

[24] Because fewer than 5% of registered investment advisers are members of FINRA, the savings the SEC would derive from delegating Advisers Act examination authority for these advisers to FINRA is limited. Therefore, this third option is acknowledged in the report as a less comprehensive solution and has not drawn wide support.

[25] The SEC staff estimated that after implementation of Title IV of the Dodd-Frank Act (increasing the threshold for federal registration of investment advisers from $25 million to $100 million in assets under management and requiring certain private fund advisers to register with the SEC) the number of registered advisers would drop 28.2% from 11,888 to 8,538. 914 Report, *supra* note 23, at 16-17. We note that these numbers will need to be revised. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Rel. No. IA-3221, at 9 (June 22, 2011) (estimating that 900 more advisers will remain SEC-registered); *Evolution/Revolution 2011, supra* note 19, at 2 (noting decline in number of SEC-registered advisers as of May 1, 2011).

The IAA recognizes that the SEC's examination staff currently does not have the capacity to conduct frequent examinations of investment advisers. As the SEC staff notes, however, in 2012, the investment adviser population will decrease to close to its 2004 levels as a result of Dodd-Frank changes. The staff expects that this decrease could enable more frequent examinations in the near term.[26] Further, we would encourage the SEC staff to re-examine its future projections in light of more recent data. This year – for the first time since 2001 – the umber of SEC-registered investment advisers has decreased, albeit slightly.[27] Given the maturity of the industry, the re-allocation of responsibilities between the SEC and states, and the increasing costs and barriers to entry, the historical annual increase in the number of SEC-registered advisers may not persist.

Further, we support the SEC's ongoing efforts to leverage its existing resources, streamline the examination program, and conduct more "smart" exams. As the staff recognizes, frequency of examinations is only one factor in an effective examination and oversight program.[28] An effective examination program focuses on preventing, detecting, and deterring fraud and other abusive practices rather than on numerical examination targets or technical violations that may not result in investor harm. Key components of an effective examination program include experienced staff with in-depth expertise, detailed information-gathering systems, selection of examination candidates, examination results, and robust risk assessment analysis.

[26] 914 Report, *supra* note 23, at 21.

[27] *Evolution/Revolution 2011*, *supra* note 19, at 2.

[28] 914 Report, *supra* note 23, at 26 n. 46. *See also* 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Christopher Dodd stating with respect to Section 913: "in this review, the paramount issue is effectiveness. If regulatory examinations are frequent or lengthy but fail to identify significant misconduct – for example, examinations of Bernard L. Madoff Investment Securities, LLC – they waste resources and create an illusion of effective regulatory oversight that misleads the public").

The SEC has been taking meaningful steps to enhance the effectiveness of the current oversight program of advisers and the examination staff's expertise in the securities markets[29] including: (1) placing a greater emphasis on fraud detection in addition to identifying potential violations of securities laws; (2) strengthening internal controls to maximize resources; (3) recruiting examiners with specialized skills; and (4) increasing examiner expertise through training.[30] Importantly, the examination staff has moved aggressively to implement reforms and has focused its strategy to "identify the areas of highest risk and deploy [its] examiners against these risks, in order to improve compliance, prevent fraud, monitor risk and inform policy-making."[31] In addition to these initiatives over the last several years, the examination staff will "improve surveillance and risk identification/assessment capabilities and the targeting of exams to areas and firms that present the greatest risk of harm to investors and the markets."[32]

The Commission recently has adopted significant changes to Form ADV (the registration form for advisers) and will soon adopt new Form PF (to gather information about private fund advisers). Both filings will provide the SEC with substantial additional detailed information about advisers' business practices to assist in risk-targeted examinations, enforcement, and oversight of advisers.[33] OCIE has also implemented a new governance structure intended to improve communication and accountability.[34] It has taken steps to better coordinate its broker-

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[29] *See* 914 Report, *supra* note 23 at 15, 28; *The Stanford Ponzi Scheme: Lessons for Protecting Investors from the Next Securities Fraud, Before the H. Sub. on Oversight and Investigations,*, 111th Cong. (May 13, 2011) (testimony of Robert Khuzami, Dir. of SEC Div. of Enforcement, and Carlo di Florio, Dir. of SEC Office of Compliance Inspections and Examinations); *Budget and Management of the U.S. Securities and Exchange Commission; Hearing before the H. Sub. on Capital Markets, Insurance and Government-Sponsored Enterprises*, 112th Cong. (Mar. 10, 2011) (testimony of Carlo di Florio, Dir. of Office of Compliance, Inspections and Examinations, SEC) ("SEC Testimony").

[30] *See, e.g., Examinations by the Securities and Exchange Commission, Office of Compliance Inspections and Examinations*, (Feb. 2011) ("OCIE Examinations"), available at http://www.sec.gov/about/offices/ocie/ocieoverview.pdf.

[31] *See* SEC Testimony, *supra* note 29, at 13.

[32] *See, e.g.,* SEC FY2012 Justification in Brief (Feb. 2011) at 5.

[33] Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Investment Advisers Act Rel. No. IA-3145 (Jan. 26, 2011).

[34] 914 Report, *supra* note 23, at 28.

dealer and investment adviser programs. In addition, the Division of Enforcement has implemented significant changes focused on investment advisers, including enhanced staff training with specialized skills. We applaud these positive steps to strengthen the Commission's enforcement and examination program.

Finally, we encourage the SEC staff to continue to review and assess its allocation of resources. For example, the staff report notes that the number of staff dedicated to examining registered investment advisers and investment companies has fallen from 477 to 460 employees since 2004.[35] It does not explain, however, why more examiners were not allocated to investment adviser examinations, given the high priority the SEC accords this program. Indeed, almost as many examiners (380)[36] were assigned to broker-dealer examinations as adviser exams, even though there are fewer than half as many broker-dealers as advisers and the SEC has delegated broker-dealer examinations to FINRA.

III. Congress Should Consider Imposing User Fees on Advisers In Lieu of an SRO.

Should the combination of streamlined and re-allocated SEC resources discussed above, together with the decrease in the number of advisers fail to alleviate concerns about the examination program, Congress should consider imposing user fees on investment advisers. Such fees would provide resources to strengthen and support the SEC's investment adviser examination program.[37] The fees would be a stable source of funding that is scalable to increases or decreases in the adviser population and could be set at a level designed to achieve the SEC's desired examination frequency and scope.

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[35] *Id.* at 10.

[36] 913 Report, *supra* note 4, at A-15.

[37] 914 Report, *supra* note 23, at 25.

User fees are already an important source of funding for inspections and examinations at many federal agencies.[38] The SEC has previously supported user fees in testimony related to legislation under consideration in 1990. Additionally, investment advisers already pay user fees to support the IARD, the electronic system through which investment advisers make filings with state and federal regulators.[39] The IARD system therefore provides an existing infrastructure to collect user fees at a relatively small marginal cost.

The SEC staff report found that the user fees option would permit OCIE to improve the effectiveness of its examinations through long-term strategic planning that would better use modern technology and its workforce. A stable source of funding would permit use of technology-based solutions that can take years to develop and implement.[40] Stable resources would also provide the examination program with increased flexibility to react to emerging risks associated with advisers and better target staffing and strategic resources as appropriate. The staff observed that retaining responsibility for investment adviser examinations will better enable the staff to understand how the private fund advisers and securities-based derivative instruments now under its jurisdiction fit into the broader markets.[41] Knowledge gained from the investment adviser examination program would greatly assist in gathering the intelligence and expertise critical to the regulatory process. Further, the improvements to the examination program discussed above could be further leveraged with the funding provided by user fees. These benefits would not accrue to the SEC from the SRO model.

[38] The 914 Report notes that "user fees fund inspections of banks conducted by the Office of Comptroller of the Currency, examinations of credit unions by the National Credit Union Administration, inspections of nuclear facilities by the Nuclear Regulatory Commission, inspections of national marine fisheries by the National Oceanic and Atmospheric Administration, and quality examinations of agricultural commodities and processing plants by the Department of Agriculture." *Id.* at 25-26.

[39] *Id.* at 26.

[40] *Id.* at 26-28.

[41] *Id.* at n.47.

Indeed, in its analysis of the various options, the 914 Report finds the greatest number of advantages, and the least number of disadvantages, with regard to user fees.[42] The report observes that "imposing user fees would avoid the difficult scope of authority, membership, governance, and funding issues raised by an SRO…It would avoid the need for the Commission to use resources to staff an expanded SRO examination program."[43] Funding from adviser user fees would give the SEC greater flexibility and would be a less costly option than establishing an SRO.

The report notes that in many ways, user fees may be a smarter, more efficient use of funds.[44] Allowing OCIE to charge user fees would empower it to build on the expertise and infrastructure it has already established.[45] Within the SEC, OCIE examination staff benefit from close working relationships with other SEC legal and policy staff.[46] In contrast, an SRO would be an isolated cost center that would require extra resources and hiring to build even a preliminary infrastructure.

Further, an SRO would still require an increase in the SEC's management and coordination costs in order to oversee the SRO.[47] In fact, the SEC staff expressed concern that the SRO oversight may one day be underfunded because there is no certainty that the level of resources available to the Commission over time will provide for effective oversight.[48] In addition, with the user fee option, "the chance that inconsistencies would emerge in

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[42] *See, e.g., Statement on Study Enhancing Investment Adviser Examinations,* by Commissioner Elisse B. Walter (Jan. 2011) at 7 (noting with disappointment that the "study attributes virtually no disadvantages to the user fee option, but many disadvantages to the SRO and FINRA dual registrant options").

[43] 914 Report, *supra* note 23, at 27.

[44] *See* 914 Report, *supra* note 23, at 27; *see also* IAA Section 914 Letter, *supra* note 23; MFA 914 Letter, *infra* note 50, at 10; *Oversight of the Mutual Fund Industry: Ensuring Market Stability and Investor Confidence, Before the H. Sub. on Capital Markets and Government Sponsored Enterprises,* 112th Cong. (June 24, 2011) (statement of Paul Schott Stevens, President and CEO, Investment Company Institute).

[45] 914 Report, *supra* note 23, at 28, 30.

[46] *Id.* at 28.

[47] 914 Report, *supra* note 23, at 27.

[48] *Id.*at 28.

interpretation or application of the Advisers Act and its rules between a third-party examining body (such as an SRO) and the statute's and rules' primary administrator (the Commission) would be eliminated."[49]

For all of these reasons, the user fee option is far superior to the SRO option. We would be pleased to assist the Subcommittee in drafting legislative language, which should include provisions that: (1) specifically preclude any investment adviser SRO if such fees are imposed; (2) clarify that such user fees will be dedicated to an increased level of investment adviser examinations (instead of simply being used as substitute funding for the existing level of examinations); and (3) set forth specific reporting requirements for the purposes of the review of any such user fees by Congress and the public.

IV. The IAA Strongly Opposes the SRO Option for Investment Advisers.

We strongly oppose an SRO for the advisory profession. Many other organizations, including those principally representing investment advisers, concur. For example, the Managed Funds Association, the Alternative Investment Management Association, the, Certified Financial Planner Board of Standards, Inc., the Financial Planning Association, the National Association of Personal Financial Advisors, the American Institute of Certified Public Accountants, the North American Securities Administrators Association, and the CFA Institute submitted letters to the SEC opposing an SRO for investment advisers.[50]

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[49] *Id.*

[50] *See* Letter from Richard H. Baker, President and CEO, Managed Funds Association, to Elizabeth M. Murphy, Secretary, SEC, (Dec. 16, 2010) ("MFA 914 Letter"); Letter from Barry C. Melancon, President and CEO, American Institute of Certified Public Accountants, to Elizabeth M. Murphy, Secretary, SEC, (Nov. 24, 2010) ("AICPA 914 Letter"); Letter from David Massey, President, North American Securities Administrators Association, Inc., to Elizabeth M. Murphy, Secretary, SEC, 3 (Nov. 22, 2010) ("NASAA 914 Letter"); Letter from Kevin R. Keller, Chief Executive Officer, Certified Financial Planner Board of Standards, Inc., Marvin W. Tuttle Jr., Executive Director, Financial Planning Association, Ellen Turf, Chief Executive Officer, National Association of Personal Financial Advisors to Elizabeth M. Murphy, Secretary, SEC (Dec. 16, 2010); Letter from John D. Rogers, President and Chief Executive Officer, CFA Institute, to Elizabeth M. Murphy, Secretary, SEC (Dec. 3, 2010); Letter from Mary Richardson, Director of Regulatory & Tax Department, Alternative Investment Management Association, to SEC (Jan. 12, 2011) ("AIMA 914 Letter").

A number of other reputable studies and reports have shared these concerns regarding the SRO model, including those from the Government Accountability Office,[51] Boston Consulting Group,[52] and the U.S. Chamber of Commerce.[53] Indeed, the SEC staff report described significant shortcomings involved in the SRO option.[54]

1. There Are Significant Drawbacks to the SRO Option

There are numerous significant drawbacks to imposing an SRO on advisers. The 914 Report discussed many challenges to designing and implementing the SRO option, including questions regarding governance, scope of authority, membership, conflicts of interest, and funding.[55] For example, the report observes that an adviser SRO presents unique governance issues because of the diversity of the industry, in that it will be challenging to ensure that no business model dominates or is given a competitive advantage by the SRO.[56] The staff also notes the concern that an SRO might have access to unique data and could seek to sell related services to members it regulates. With respect to scope, if the SRO concentrates on investment advisers serving retail customers, or is limited in its membership by some other characteristic, many advisers will still be left under the SEC's oversight.[57] Exclusions from mandatory SRO membership would be difficult to craft given the diverse client bases of most advisers. In addition, significant exclusions from coverage could negatively affect the SRO's funding model.

[51] *Private Fund Advisers: Although a Self-Regulatory Organization Could Supplement SEC Oversight, It Would Present Challenges and Trade-Offs*, U.S. Gov't Accountability Office (July 2011) ("GAO Report").

[52] The Boston Consulting Group, Inc., *U.S. Securities and Exchange Commission Organizational Study and Reform*, 65-85 (Mar. 10, 2011) ("BCG Report"), available at http://www.sec.gov/news/studies/2011/967study.pdf.

[53] *U.S. Capital Markets Competitiveness: The Unfinished Agenda*, U.S. Chamber of Commerce (July 19, 2011) ("Chamber of Commerce Report"), available at: htttps://www.uschamber.com/sites/default/files/reports/1107_UnfinishedAgenda_WEB.pdf.

[54] 914 Report, *supra* note 23, at 31-37.

[55] *Id. See also* AICPA 914 Letter, *supra* note 50; NASAA 914 Letter supra note 50, at 3 (citing "collaboration, transparency, accountability, and conflict issues" as well as a recent deterioration in government regulators' ability to oversee and collaborate with existing SROs).

[56] 914 Report, *supra* note 23, at 33-36; *see* MFA 914 Letter, *supra* note 50, at 9.

[57] 914 Report, *supra* note 23, at 35.

If the SEC and an SRO (or multiple SROs) share regulatory authority over advisers, the regime will be vulnerable to regulatory arbitrage and inconsistent interpretations and applications of the Advisers Act.[58]

The report noted that, like any SRO, an SRO for advisers will present the challenge of the conflict of interest inherent in self-regulation and a lack of accountability to the investing public.[59] Finally, delegating responsibility for adviser examinations to an SRO would eliminate the benefit to the SEC of its examination staff serving as a resource for legal, policy, and other SEC staff.[60] The exam staff may gradually lose its expertise and its ability to gain important information about advisers' activities and the markets generally.[61]

A recent GAO report studying a potential SRO for private fund advisers similarly found serious drawbacks to the SRO model, including its potential to "(1) increase the overall cost of regulation by adding another layer of oversight; (2) create conflicts of interest, in part because of the possibility for self-regulation to favor the interests of the industry over the interests of investors and the public; and (3) limit transparency and accountability, as the SRO would be accountable primarily to its members rather than to Congress or the public."[62] In addition, the report noted that the SRO model "expose(s) firms to duplicative examinations and costs."[63]

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[58] *Id.* at 28, 35; *see also* MFA 914 Letter, *supra* note 50, at 8 (noting that an inexperienced SRO could lead to "inconsistent regulation and uncertainty for managers in operating their businesses").

[59] 914 Report, *supra* note 23, at 35; *see also* AICPA 914 Letter, *supra* note 50.

[60] 914 Report, *supra* note 23, at 27-28; *see also* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, SEC, (Oct. 25, 2010) ("ICI 914 Letter") at 4.

[61] 914 Report, *supra* note 23, at 38.

[62] GAO Report, *supra* note 51, at 20.

[63] *Id.*

2. An SRO Would Impose Unnecessary Costs and Burdens on Taxpayers and Small Businesses.

While self-regulation may shift some of the taxpayer-funded regulation costs to industry, appropriate government oversight is required in any SRO structure and thus requires dedication of significant government resources. The 914 Report observes that an SRO would not free all of the resources the SEC currently devotes to investment adviser examinations. "SEC resources would still be required to oversee the operations of any SRO by… conducting oversight examinations of the SRO, considering appeals from sanctions imposed by the SRO, and approving SRO fee and rule changes. Substantial resources of both [the inspection staff and the policy staff] are currently employed to oversee the activities of FINRA."[64] Indeed, much more substantial SEC expenditures are necessary in the future even to oversee effectively the current SROs under its jurisdiction.[65]

Further, most investment advisory firms are small businesses with limited resources.[66] The costs of any SRO are borne by the regulated entities and will obviously impact all investment advisers, including thousands of small advisory firms. The SEC staff report notes that these costs will be substantial. Ultimately, those costs may be passed on to investors. If pricing resistance is such that all of the costs cannot be passed on, they will have a significant impact on job retention and creation in these small businesses -- in which human resources account for the vast portion of the cost structure.

The IAA believes that it would be more cost effective to use the industry's funds that would be spent on an SRO to bolster the SEC's oversight efforts, for example through the user fees option discussed in the 914 Report.[67] Because user fees likely are a less expensive option

[64] 914 Report, *supra* note 23, at 30.

[65] BCG Report, *supra* note 52, at 39-41.

[66] *Evolution/Revolution 2011, supra* note 19, at 2 (stating that half (49.8%) of all federally registered advisers have fewer than 5 non-clerical employees and more than 90% of all federally registered investment adviser firms have fewer than 50 non-clerical employees).

[67] *See* IAA Section 914 Letter, *supra* note 3; AICPA 914 Letter, *supra* note 50.

than an SRO, they will have a less severe effect on small businesses and the costs passed on to investors.

3. The SRO Model is Not Effective or Efficient.

We also submit that the effectiveness of the SRO model has not been demonstrated.[68] When SROs have pursued major cases or sought fundamental changes, they typically have been following investigations by others (*e.g.*, SEC, state attorneys general, media reports, *etc.*). As the 914 Report noted, major financial jurisdictions outside the U.S. do not rely on SROs for advisers.[69] For example, in the late 1990's, the U.K. government transferred SRO regulatory powers to the FSA due to the complexities and inefficiencies of the U.K. SRO system.[70] For these and other reasons, the idea of establishing one or more SROs for investment advisers has been raised and rejected a number of times over the past 45 years.[71]

Most recently, in a study required by Section 967 of the Dodd-Frank Act, the Boston Consulting Group found numerous problems in the SEC's relationship with SROs including inadequate oversight of the SROs and a lack of standards to measure SRO effectiveness.[72] The

[68] *See, e.g.,* Letter from Mari-Anne Pisarri, Pickard & Djinis LLP, to Elizabeth M. Murphy, Secretary, SEC (Jan. 12, 2011) ("Pickard and Djinis 914 Letter") available at: http://sec.gov/comments/df-title-ix/enhancing-ia-examinations/enhancingiaexaminations-36.pdf. During the Dodd-Frank Act debates, some called for the MSRB to be merged into the SEC due to its ineffectiveness. *See* Andrew Ackerman, *MSRB Won't Amend Rule G-37,* Bond Buyer, April 7, 2009 (noting that in testimony before the Senate Banking Committee, former SEC chairman Arthur Levitt said "that self regulation through the MSRB does not work and that it should be folded into the SEC."); *see also Legislative Proposals to Improve the Efficiency and Oversight of Municipal Finance, Hearing Before the H. Comm. On Fin. Servs.,* 111th Cong. (May 21, 2009) (statement of Keith D. Curry, Past Pres., Nat'l Ass'n of Indep. Pub. Fin. Advisors); *Enhancing Investor Protection and the Regulation of Securities Markets; Hearing Before the S. Comm. On Banking, Housing & Urban Affairs,* 111th Cong. 7 (Mar. 10, 2009) (statement of Thomas Doe, founder and CEO of Municipal Market Advisors) ("End the MSRB as an SRO").

[69] 914 Report, *supra* note 23, at 32 (citing AIMA 914 Letter). *See also* IAA Section 914 Letter, *supra* note 3, at 2.

[70] Even the chairman of the Securities and Investments Board, the most important of the SROs, "acknowledged that self-regulation had failed in the U.K. and seemed unable to restore investor confidence." *Enhancing Investor Protection and the Regulation of Securities Markets, Hearing Before the S. Comm. on Banking, Housing & Urban Affairs,* 111th Cong. 35-36 (Mar. 10, 2009) (statement of Prof. John C. Coffee, Jr., Columbia Univ. Law School).

[71] 914 Report, *supra* note 23, at 29.

[72] BCG Report, *supra* note 52.

Boston Consulting Group found that "[g]iven the role of SROs in the regulatory framework, it is vital that the SEC develop both a clear set of standards for how SROs are to regulate and a means for assessing whether SROs are complying with those standards... To strengthen its oversight of SROs, however, there are additional actions that can be taken; each will strengthen the SEC's oversight of SROs:

- Enhance SRO disclosures regarding their regulatory operations
- Institute metrics to monitor SROs and minimum standards for their regulatory activities
- Enhance FINRA oversight."[73]

The BCG Report observed that SROs are not accountable to the SEC and that the agency and SROs are not coordinating effectively.[74] The report noted that were the SEC to be funded adequately, rather than expanding the role of SROs, "there are strong arguments and global precedents to consolidate more regulatory activities from SROs into the national regulator. This will reduce real and/or perceived conflicts of interest that SROs may have, ensure greater control and visibility into market information for the SEC, and clarify the governance of securities regulation."[75]

In addition, the SEC has not been able to fully leverage and oversee SROs due to certain legal issues. For example, FINRA has been reluctant to share examination and other information with the SEC, asserting that under the "state actor" doctrine, such sharing could cause FINRA to be deemed a government actor for various purposes, including the constitutional rights of defendants in enforcement actions. Further, the SEC's ability to review SRO rules is limited in scope to assessing consistency with the Exchange Act.[76]

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[73] *Id.* at 134.

[74] *Id.* at 65-67, 237-238 ("Given the important role SROs play in the governance of securities markets today, it is critical that the SEC maintain a robust level of oversight over their regulatory operations.").

[75] *Id.* at 150.

[76] *Id.* at 65.

4. The SEC is in the Best Position to Regulate Advisers.

We believe that the SEC has the necessary expertise and experience to continue to be the primary regulator of the investment advisory profession. For decades, the SEC has dealt extensively with disclosure requirements and the Advisers Act fiduciary standard – the bedrock principles underlying investment adviser regulation. Given the great diversity among advisory firms – from small financial planners to private fund advisers using complex investment strategies to global asset managers with operations worldwide – expertise and experience regarding the investment adviser industry and regulation is critical in regulating and overseeing the profession.

No other organization has expertise in investment adviser regulation and oversight. As SEC Commissioner Aguilar has indicated, the SEC is "the only entity with experience overseeing investment advisers, an industry governed by the Advisers Act, which is based on a principles-based regime. By contrast, broker-dealer SROs primarily regulate through the use of very detailed, specific sets of rules and are not well versed in the oversight of principles-based regulation."[77]

Moreover, the SEC, as a single, governmental regulator – operating without confusion of overlapping regulation, regulators and "stovepipes" – is directly accountable to Congress and the public.

5. An SRO Would Result in Unnecessary Duplication of Regulations.

The current regulatory framework for investment advisers is robust and protects investors. There is no evidence that a second layer of regulation imposed by an SRO is needed. Investment advisers are comprehensively regulated through the rules and requirements promulgated by the SEC and are subject to inspections and oversight by the agency. As

[77] *SEC's Oversight of the Adviser Industry Bolsters Investor Protection*, by Comm'n Luis A. Aguilar, SEC (May 7, 2009), available at http://sec.gov/news/speech/2009/spch050709laa.htm; *see also* IAA Section 914 Letter, *supra* note 3.

discussed above, the overarching fiduciary duty requires investment advisers to act in their clients' best interest and disclose all material facts and conflicts of interest.

In addition, all SEC-registered investment advisers are required to submit a very detailed registration (Form ADV, Part 1) and update it at least annually and promptly for material changes.[78] Advisers are also required to provide clients with a brochure and brochure supplement (Form ADV, Part 2). The brochures are filed with the SEC and are publicly available. The brochure and brochure supplement provide extensive information regarding each investment adviser.[79] Advisers are required to disclose detailed information about their firms, including: the educational and business background of each person who determines provides advice to clients; the adviser's basic fee schedule (including how fees are charged and whether such fees are negotiable); types of investments and methods of securities analysis used; how the adviser reviews client accounts; the adviser's other business activities; material financial arrangements the adviser has with a wide variety of entities; certain referral arrangements; and numerous other disclosures that describe activities that may pose potential conflicts of interest with the adviser's clients, including specific disclosures relating to trading and brokerage practices. Form ADV, Part 2 requires advisers to prepare a plain English brochure and brochure supplement explaining many of these disclosures in a narrative format.[80] In addition, the SEC will soon require advisers to private funds to disclose extensive information about their holdings, counterparty exposures, and leverage on the new Form PF.

Investment advisers also are subject to a variety of requirements relating to insider trading, proxy voting, books and records, custody, privacy, best execution, business continuity, advertising, and referral arrangements.[81] Importantly, the assets managed by investment advisers

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[78] *See* Investment Advisers Act of 1940 § 203, 15 U.S.C. § 80b-3; Rules and Regulations, Investment Advisers Act of 1940, 17 C.F.R. § 275.203–1 (2010).

[79] *See Investment Adviser Public Disclosure Web Site:* www.adviserinfo.sec.gov.

[80] *See* Amendments to Form ADV, Investment Advisers Rel. No. IA-3060 (July 28, 2010).

[81] *See, e.g.*, Rules and Regulations, Investment Advisers Act of 1940, 17 C.F.R. §§ 275.204-1, 275.204-2, 275.206(4)-1, 275.206(4)-2, 275.206(4)-3, 275.206(4)-6, 275.206(4)-7 (2010), Regulation S-P, 17 C.F.R. § 248.1 *et. seq.*

must be held at registered broker-dealers or banks. Investment advisers must adopt written codes of ethics, which must set forth standards of conduct expected of advisory personnel and address conflicts that arise from personal trading by advisory personnel.[82] Advisers also must adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, review the policies and procedures at least annually to determine the adequacy and effectiveness of their implementation, and designate a chief compliance officer responsible for administering the policies and procedures.[83] Under these rules, advisers have the flexibility to tailor their policies and procedures to the nature of their business and clientele.

This regulatory framework is appropriate to the nature, scope, and risks of the investment advisory business. No additional layer of regulation is warranted. Further, the SRO-style command-and-control requirements that seek to impose a one-size-fits-all solution for various legal and regulatory issues do not lend themselves to this widely divergent community of advisers.[84]

6. The IAA Opposes Designation of FINRA as an SRO for Advisers.

We particularly oppose extending FINRA's jurisdiction to investment advisers. FINRA – a self-described "non-governmental regulator" with 3,000 employees and an annual budget of almost $1 billion – was designed and developed to oversee broker-dealer activity.[85] Nonetheless, it has repeatedly indicated its desire to exercise oversight and regulation of investment advisers.[86] The IAA strongly opposes extending FINRA's jurisdiction to investment

[82] 17 C.F.R. § 275.204A-1 (2010).

[83] 17 C.F.R. § 275.206(4)-7 (2010).

[84] *See, e.g.,* ICI 914 Letter, *supra* note 60, at 2; IAA 914 Letter, *supra* note 3; AICPA 914 Letter, *supra* note 50.

[85] *See* FINRA, 2010 Year in Review and Annual Financial Report (June 2011) available at: http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p123836.pdf ("FINRA 2010 Report").

[86] *See, e.g., Capital Markets Regulatory Reform: Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. (Oct. 6, 2009).

advisers due its lack of adviser expertise, lack of accountability, lack of transparency, excessive costs,[87] and questionable track record.[88]

Further, designation of FINRA as the adviser SRO would raise conflicts of interest with potential adverse competitive implications for advisers.[89] As noted above, brokers are the "sell side" of the securities industry, while advisers are the "buy side." The potential for conflict is demonstrated by FINRA's explicit advocacy of extending the broker-dealer regulatory framework to advisers.[90] Conflicts may arise in that broker-dealers engage in arms-length transactions with investment advisers in various capacities, including as service providers, counterparties, market makers, and syndicators and underwriters. An association representing

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[87] *See* FINRA, Report of the Amerivet Demand Committee of the Financial Industry Regulatory Authority, Inc. 86 (Sept. 13, 2010), *available at* http://www.finra.org/web/groups/corporate/@corp/documents/corporate/p122217.pdf (FINRA benchmarks its senior management compensation based on levels in the financial services industry and states that "non-profit organizations and governmental agencies were inadequate comparables for compensation purposes"). As disclosed in FINRA's 2010 Annual Report, salary and bonuses for FINRA's top executives average $1,057,787. *See* FINRA 2010 Annual Report, *supra* note 85.

[88] *See, e.g.,* Letter from Project on Government Oversight (POGO) to Congress calling for increased oversight of financial self-regulators (Feb. 23, 2010), *available at* http://www.pogo.org/pogo-files/letters/financial-oversight/er-fra-20100223-2.html. *See also* FINRA Report of the 2009 Special Review Committee on FINRA's Examination Program in Light of the Stanford and Madoff Schemes (Sept. 2009) at 5, *available at* http://www.finra.org/web/groups/corporate/@corp/documents/corporate/p120078.pdf ("FINRA examiners did come across several facts worthy of inquiry associated with the Madoff scheme that, with the benefit of hindsight, should have been pursued."); *The Madoff Investment Securities Fraud: Regulatory and Oversight Concerns and the Need for Reform: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs,* 111th Cong. (Jan. 27, 2009) (testimony of John C. Coffee, Jr., professor at Colum. Univ. Law School) (noting that Madoff's advisory activity was within the NASD's and FINRA's jurisdiction); *SRO Regulation in the Dodd-Frank Era,* by Stewart D. Aaron, Elissa J. Preheim, and William Miller, Arnold & Porter LLP, published in Law360 (April 11, 2011) ("public perceptions about the effectiveness of self-regulation were not helped by events such as FINRA's failure to detect Lehman Brothers' controversial Repo 105 accounting, or FINRA declaration of Bear Stearns' capital adequacy on the very day Bear Stearns collapsed"); Pickard & Djinis 914 Letter, *supra* note 68 ("there is no question that the NASD/FINRA had both the authority and the responsibility to investigate Madoff's fraudulent conduct").

[89] *Alleged Stanford Financial Group Fraud: Regulatory and Oversight Concerns and the Need for Reform, Hearing Before the S. Comm. on Banking, Housing and Urban Affairs* 111th Cong. (August 17, 2009) (statement of Prof. Onnig H. Dombalagian, Tulane University) ("[t]he conflicts of interest between the brokerage industry and the investment advisory industry… are too great for FINRA to exercise a meaningful role in the oversight of investment advisers").

[90] *See* Letter from FINRA to SEC re: File Number 4-606 Study Regarding Obligations of Brokers, Dealers and Investment Advisers (Aug. 25, 2010). *See also* Letters from FINRA to SEC re: *Certain Broker-Dealers Deemed Not to Be Investment Advisers,* Rel. No. 34-50980; File No. S7-25-99 (Feb. 11, 2005 and Apr. 4, 2005).

private fund advisers has observed that these competing relationships "would present challenges to an SRO responsible for overseeing these types of firms fairly and equitably."[91]

FINRA's lack of accountability makes it particularly ill-suited to extend its reach to investment advisers. The BCG Report repeatedly stated that SROs are not accountable to the SEC and that the agency and SROs were not coordinating effectively.[92] In this regard, it stated that FINRA "merits particular attention given its size and scope." For example, the report observes that "FINRA conducts extensive risk assessment activities in support of its examinations," but does not share its analysis with the SEC.[93]

Similarly, the recent U.S. Chamber of Commerce report entitled "*U.S. Capital Markets Competitiveness: The Unfinished Agenda,*" released on July 19, 2011, focused on the lack of accountability by certain nongovernmental policymakers with significant and growing influence, most notably including FINRA:

> "Despite their tremendous influence over the workings of the capital markets, these organizations are generally subject to few or none of the traditional checks and balances that constrain government agencies. This means they are devoid of or substantially lack critical elements of governance and operational transparency, substantive and procedural standards for decision making, and meaningful due process mechanisms that allow market participants to object to their determinations."[94]

The U.S. Chamber of Commerce report observes that these organizations are not bound by the congressional appropriations process or other comparable checks on their power. According to the report, FINRA's members no longer have a meaningful role in establishing its

[91] MFA 914 Letter, *supra* note 50, at 10.

[92] BCG Report, *supra* note 52, at 65-67, 237-238.

[93] *Id.* at 67.

[94] Chamber of Commerce Report, *supra* note 53, at 5.

policies and priorities, and the organization is not moving toward greater transparency and accountability. The report states that "[t]ransparency into FINRA's governance, compensation, and budgeting practices is extremely limited and superficial. Furthermore, FINRA is not subject to the Freedom of Information Act or the APA, nor is it required to conduct a cost-benefit analysis when it engages in rulemaking or exercises its policy-making functions."[95] Unlike the SEC, FINRA is not subject to the Government in the Sunshine Act and its board of directors does not hold open meetings. On the other hand, FINRA claims that it is a governmental or quasi-governmental regulator when it suits its interests, such as claiming sovereign immunity when sued. Similarly, FINRA is not accountable to any entity with respect to its budget – neither to Congress nor to the SEC.

These shortcomings reflect that FINRA's organizational structure is, in some respects, the worst of both worlds: it is not fully accountable to the members that fund it, nor is it accountable to Congress or the public as a government entity.

V. The IAA Opposes Discussion Draft Legislation That Would Require Advisers to be Members of an SRO.

For the reasons discussed above, we oppose the draft legislation circulated last week that would require both federally- and state-registered investment advisers to be members of a registered national investment adviser association – *i.e.* an SRO. Regulation and oversight of investment advisers should not be outsourced to an quasi-government entity that is not accountable to Congress or the public, and is not subject to requirements related to the Administrative Procedures Act, the public records laws, due process, the Freedom of Information Act, the requirement to conduct cost-benefit analysis, and other critical protections.

Further, there is simply no compelling reason to outsource oversight of investment advisers to either a new or any existing entity that has no expertise with the investment adviser industry or its regulatory framework. We believe that the SEC is the most efficient and effective

[95] *Id.* at 23.

regulator of SEC-registered investment advisers. Where resources are an issue, our members are prepared to provide the SEC with resources specifically designated to investment adviser oversight.

We are not aware of any analysis or empirical data demonstrating the need for this legislation or that the costs of the legislation would outweigh the benefits. This draft legislation would disproportionately target thousands of small businesses that serve small and mid-size investors with the costs and burdens of a duplicative and unnecessary layer of regulation and bureaucracy. The substantial costs of this over-regulation on these small businesses will adversely impact job creation, and, if the costs are passed on to investors, negatively affect retirement savings and investment.

We also believe that the draft legislation's disparate treatment of investment advisers with different types of clientele would lead to inconsistent standards for advisers engaging in the same types of activities. Indeed, the draft legislation could result in regulatory arbitrage as firms restructure their businesses and/or dismiss retail and small business clients to avoid SRO over-regulation. And, as noted above, the SEC is facing challenges in overseeing the SROs already under its purview. These challenges would be magnified not only by the extension of SRO jurisdiction to SEC-registered advisers but also to the thousands of state-registered advisers which the SEC does not regulate.[96] As a result, this proposal likely would not address the SEC resource concerns underlying the issues Congress raised for consideration in the 914 Report.[97] Indeed, the draft legislation may result in a double layer of expenditures – investment advisers would be required to pay substantial fees to an SRO for regulation and the SEC would have to re-allocate substantial funds to take on extensive additional oversight responsibilities for the SRO, as contemplated by numerous provisions of the draft legislation.

[96] *See* 914 Report, *supra* note 23, at 34 ("it would be difficult for the Commission to oversee an SRO that enforced different state regulatory requirements").

[97] Indeed, NASAA estimates that after investment advisers with less than $100 million switch to state registration in early 2012, there will be approximately 19,000 state-registered advisers. *See State Securities Regulators Report on Regulatory Effectiveness and Resources with respect to Broker-dealers and Investment Advisers*, submitted in response to SEC request for comments on Section 913 study (Sept. 24, 2010).

We would be pleased to provide the Subcommittee with additional information as we continue to study the recently released discussion draft.

Conclusion

The IAA supports the SEC staff's recommendation that it use the authority provided it by the Dodd-Frank Act to ensure that retail investors are protected by the same fiduciary standard of care whether they go to an investment adviser or a broker-dealer for investment advice. The IAA further supports appropriate measures to ensure that the SEC conducts a strong and effective examination program of investment advisers. We strongly oppose establishment of an SRO for investment advisers and urge the Subcommittee to instead consider the user fee approach.

We appreciate the opportunity to share our views with the Subcommittee. We look forward to working with Congress and the SEC on these important issues.

THE AMERICAN COLLEGE
THE LEADER IN FINANCIAL SERVICES EDUCATION

Statement Regarding Regulatory Oversight of Broker-Dealers and Investment Advisers

Subcommittee on Capital Markets and Government Sponsored Enterprises
House Financial Services Committee

September 13, 2011

The American College appreciates the opportunity to submit this written statement regarding the oversight of broker-dealers and investment advisers. We thank Representative Garrett, Representative Waters, and the other members of the Subcommittee for conducting this hearing and allowing us to share a few thoughts with you on this important subject.

The American College, a non-profit academic institution with an 84-year heritage and the highest level of accreditation, has a unique, educator's view of the financial services landscape. We work with banks, insurance companies, broker-dealers, financial planning firms, and independent advisers to raise the professionalism of our students and, by extension, the financial services industry as a whole. We are keenly aware of how the education we provide ultimately impacts the financial security of individuals, families, and businesses throughout the country.

Since our founding in 1927 by Dr. Solomon S. Huebner of the Wharton School, more than 160,000 professionals have earned graduate degrees or financial services designations from The American College. Along with other top credentials and two accredited master's degrees, we confer the prestigious CLU® for insurance professionals, have educated more advisors for CFP® certification than any other institution, and offer the ChFC® for advanced financial planners.

We are concerned that proposals from the SEC to extend a fiduciary standard of care to broker-dealers will backfire, hitting lower- and middle-income investors the hardest. The work has not been done to quantify the ultimate cost of expanding the fiduciary standard to broker-dealers as the SEC intends. The SEC staff study was not able to determine how this approach will impact investors in terms of higher expenses and reduced access to valuable products and services. Many families and individuals do not have the assets necessary to move to a fee-for-service model and cannot afford to pay $2,500 for a stand-alone financial plan before any investments or insurance products are purchased. While regulators are not proposing that a fee-based model be mandated for broker-dealers – and Dodd-Frank specifically states that such a change is not required in the context of a broader fiduciary standard – it may be the practical, unintended result of the SEC's new regulations. In fact, senior executives at brokerage firms have already observed an increasing number of broker-dealers moving to a fee-

based model to get ahead of any changes the SEC may propose. The same risks to smaller investors hold true for the DOL's recent initiative to rewrite 36-year-old rules defining fiduciary status under ERISA for retirement plans: the middle-income IRA investor could be the one who's most damaged by their well-intentioned, if misguided, changes in regulations.

The SEC and the DOL must have persuasive answers to two key questions before they act: (1) what consumer harm is being done under the current standards of care that will be ameliorated by broader application of a fiduciary duty; and (2) what will the ultimate cost be to consumers in terms of expense, product limitations, or reduced access to advice? There is no clear evidence of what problem the SEC is attempting to solve with their proposed change. While there may be some level of consumer confusion about various business models, that issue could be addressed in a much simpler fashion. Our fear is that the SEC's suggested standard-of-care adjustments and the related compliance complexity and costs will drive broker-dealers to target higher-income markets, focusing on clients who are the most economically viable under the new model to the exclusion of lower- and middle-income investors. The SEC should be responsible for demonstrating convincingly why this will not be the case prior to taking any action to broaden applicability of the fiduciary standard.

The "best interest" fiduciary standard the SEC is considering for broker-dealers would be very difficult to enforce. The vast majority of successful financial professionals work with transparency and diligence to serve the best interest of their clients. Any other approach would make it impossible to recruit and retain clients and gain referrals to grow a long-term, successful practice. While serving a client's best interest may be a simple concept philosophically, it can actually be quite complex to regulate. How would the concept work, for example, with variable insurance products? Suppose the market proves to be exceptionally turbulent and declines significantly. In hindsight, would a policy sold in a client's "best interest" have been one with the most guarantees and minimal market exposure? What if the reverse happens and we see a vigorous bull market. Wouldn't a client have been better off with broader exposure to equities? Who will determine "best interest," and over what timeframe: Two quarters? Two years? Ten years? Variable products, with their insurance and investment components, are already more highly regulated than many other offerings regulators oversee, and yet the burdensome impact to these very products are often not considered when the SEC pursues rulemaking activity. Clearly any adverse effect to these products must be included in the SEC's comprehensive cost-benefit analysis prior to taking any action on a broader fiduciary standard.

Suitability, the strict rules-based standard broker-dealers must adhere to now, may actually protect consumers more effectively than a vague, principles-based standard. Experts do not all agree that a principles-based, fiduciary approach will protect consumers more effectively than the current rules-based, "suitability" standard broker-dealers must use. Rules-based enforcement focuses on controls "before the fact." Allowable behaviors are clear before a recommendation is made to a retail investor. Principles-based enforcement – the fiduciary approach – focuses on controls "after the fact." Essentially, it's up to regulators to know a violation after they've seen it, and sometimes quite long after the consumer harm has occurred. While broker-dealers are currently subject to inspection every two years for their compliance with specific rules, investment advisers, on the other hand, are inspected on average every decade,

allowing a Bernie Madoff to escape detection for years. One third of investment advisers, according to the SEC, have never been inspected. Discussion of any change in the standard of care for broker-dealers must be linked to the issue of inadequate enforcement under the current adviser model.

Your committee has the right focus in addressing the disparity in enforcement between broker-dealers and investment advisers. In fact, a FINRA enforcement model applicable to investment advisers may do more than a standard-of-care change for broker-dealers to protect consumers. There must be rules, standards of practice, and metrics in place for effective, efficient enforcement. FINRA has the scale and scope to raise the bar for investment adviser inspections quickly, following a similar approach to what that organization has done for broker-dealers and creating the best of both worlds for consumers. Properly enforcing both standards, while protecting consumer choice, will be an ideal outcome.

The SEC must do its homework prior to taking an action that could harm lower- and middle-income investors. While some investors may have the assets to benefit from a fee-based arrangement, it is vital to protect business model choices for the rest of the investing public. Unless and until the SEC can clearly demonstrate what harm is being done under the current broker-dealer approach and fully articulate the costs of abandoning an option consumers clearly value, there should be no contemplation of expanding the fiduciary standard. Instead, moving investment adviser examinations and enforcement closer to the rigor and frequency applied to broker-dealers could be a productive area of meaningful, consumer-oriented reform.

Thank you for the opportunity to comment on these issues impacting the investing public. The professors, staff, and management of The American College are available to help you in any way that we can in your important work.

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Statement for the Record

House Financial Services Committee, Subcommittee on Capital Markets and Government Sponsored Enterprises

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011
10:00 a.m.
Rayburn 2128

1. Policy Position on Sec. 914, Study on Enhancing Investment Advisor Examinations, *Dodd-Frank Wall Street Reform and Consumer Protection Act*
2. ACLI Statement, "Redefining 'Fiduciary': Assessing the Impact of the Department of Labor's Proposal on Workers and Retiree," for the House Education and Workforce Committee, Subcommittee on Health, Employment, Labor and Pensions on July 26, 2011.
   a. ACLI Comment Letter to the Department of Labor, February 3, 2011
   b. ACLI Statement for the Department of Labor Hearing, March 1, 2011
   c. ACLI Additional Comments in Response to Hearing Questions, April 12, 2011

ACLI Policy Position

Policy Position on Sec. 914, Study on Enhancing Investment Advisor Examinations,
Dodd-Frank Wall Street Reform and Consumer Protection Act

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Position on Investment Adviser SRO (September 9, 2011)

1. We believe that any response by Congress to the "Study on Enhancing Investment Adviser Examinations," prepared by the staff of the Securities and Exchange Commission (SEC) under Section 914 of Dodd Frank, must consider and advance the objectives of Section 913 and the SEC's related charge to create consistent standards of care for IAs and BDs when providing personalized investment advice to retail customers and to promote the harmonization of the broker-dealer and investment adviser regulatory regimes, including through investment adviser examinations and oversight.

2. If Congress determines that in order to enhance the ongoing examination and oversight of investment advisers by the SEC and to promote harmonization of the investment adviser regulatory regime, it is necessary to authorize the SEC to impose "user fees" on investment advisers registered with the Securities and Exchange Commission pursuant to Sections 203 and 203A of the Investment Advisers Act, the ACLI would support such authorization, subject to further discussion and comment on the method of calculation of these "user fees".

3. If Congress determines that in order to enhance the ongoing examination and oversight of investment advisers, it is necessary to authorize the creation and registration of a self-regulatory organization to examine, subject to the SEC's supervision, investment advisers, the ACLI would support a <u>single</u> self-regulatory organization (SRO)that would have limited examination authority over those investment advisers who, in accordance with Sections 203 and 203A of the Investment Advisers Act, provide personalized investment advice about securities directly to retail customers, provided that the SEC remains the sole holder of authority to develop regulatory policy under the Investment Advisers Act.

   (a) ACLI would support the SRO having limited rulemaking authority to address matters collateral to the exercise of examination authority (such as authority to require maintenance of records).

   (b) ACLI would only support giving the SRO examination or other authority over those investment advisers providing personalized investment advice directly to retail customers. It is ACLI's position that the authority to examine and regulate other investment advisers must remain with the SEC and, if necessary, that the examination and oversight of other investment advisers would be appropriately funded through "user fees", subject to further discussion and comment about the method of calculation of such fees.

   (c) ACLI would support giving the SRO examination or other authority over all investment advisers providing personalized investment advice about securities directly to retail customers, regardless of whether such investment advisers are registered with the state or the SEC. This position is based on the following facts:

      i. The pending "switch" (currently effective July 21, 2011) of approximately 4100 SEC registered investment advisers with between $25 and $100 million in assets under management to state registration created by Section 410(2)(A) of the Dodd Frank Act, would bring a total of

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Position on Investment Adviser SRO (September 9, 2011)

approximately19,000 investment advisers under state-only regulation, most of whom will provide personalized investment advice directly to retail customers pursuant to advisory contracts.

ii. This "switch" will bi-furcate the regulation, examination and oversight of investment advisers and their associated persons providing personalized investment advice between the 50 states, the District of Columbia and the Securities and Exchange Commission.[1]

iii. According to the "State Securities Regulators Report on Regulatory Effectiveness and Resources with Respect to Broker-Dealers and Investment Advisers", only 40 states have field examiner units with multiple full-time staff members dedicated to performing routine examinations of those states' registered investment advisers.[2] The 7,000 or so remaining investment advisers with more than $100 million in assets under management, and their associated persons will be regulated by the SEC, even though many of these firms and their associated persons also provide personalized investment advice directly to retail customers.

iv. Although the SEC Staff's "Study on Investment Advisers and Broker-Dealers" acknowledges the impending "switch", the brief, 600 word, discussion of "state regulation of investment advisers intended to protect clients" provides no insight as to how the SEC will be able to enforce a uniform standard of care for all investment advisers providing personalized investment advice directly to retail customers in accordance with Section 913 of Dodd-Frank and regulations promulgated thereunder in a bi-furcated regulatory regime.

v. It is not clear how the SEC and states will address the inevitable customer confusion and disparate enforcement and examination of the standards of care that will vary between state and federally registered investment advisers providing personalized investment advice about securities to retail customers.

(d) ACLI would support the following legislative changes to implement the creation and registration of a single SRO, subject to SEC supervision, to examine investment advisers engaged in providing personalized investment advice about securities to retail investors:

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1 *See* SEC *Study on Enhancing Investment Adviser Examinations* at iii, and footnote 31.

2 *See State Securities Regulators Report on Regulatory Effectiveness and Resources with Respect to Broker-Dealers and Investment Advisers* at 12.

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Position on Investment Adviser SRO (September 9, 2011)

i. Amending the Investment Advisers Act to authorize the creation of and registration with the SEC of a SRO for investment advisers who, in accordance with Sections 203 and 203A of the Investment Advisers Act, provide personalized investment advice about securities directly to retail investors , regardless of whether such IAs are registered with the state or the SEC.

ii. Amending Section 203 of the Investment Advisers Act to provide that "It shall be unlawful for any investment adviser to provide personalized investment advice about securities directly to retail investors, unless such investment adviser is a member of a self regulatory organization registered with the Commission under the appropriate provisions [to be crafted] of the Investment Advisers Act."

iii. Authorizing the Commission to exercise its discretion in exempting from registration with the SRO, certain investment advisers, including but not limited to, those investment advisers deemed not to be providing personalized investment advice about securities directly to retail customers.[3]

iv. Nothing herein is designed or intended to interfere with the authority of state regulators or the SEC to examine or enforce compliance with otherwise applicable laws and regulations, including Sections 203 and 203A of the Investment Advisers Act.

4. It is ACLI's position that any steps Congress may determine to take and any rules the SEC may promulgate thereunder should not impact the regulation, examination or oversight of broker-dealers or their associated persons registered under the Securities Exchange Act of 1934 or their operations under exemptions from the definition of "investment adviser," including for advice solely incidental to the sale of securities under Section 202(a)(11)(c) , even if such broker-dealers or their associated persons are engaged in providing personalized investment advice directly to retail customers under Section 913 of Dodd Frank and regulations promulgated thereunder.

Contact For Further Information*: Carl B. Wilkerson, Vice-President & Chief Counsel-Securities & Litigation, American Council of Life Insurers; 101 Constitution Ave., NW, Suite 700, Washington, DC 20001; (202) 624-2118 or carlwilkerson@acli.com .*

[3] Examples of such investment advisers might include those who (i) provide personalized investment advice about securities to retail investors solely as managers in separately managed account programs that are sponsored by other investment advisers that are registered with the SRO or (ii) incidental to their business of providing investment advice to non-retail clients, provide personalized investment advice about securities solely to retail investors that are "qualified purchasers" within the meaning of Section 2(a)(51) of the Investment Company Act of 1940 or are "accredited investors" within the meaning of Regulation D under the Securities Act of 1933.

ACLI Statements on Fiduciary Duty

ACLI Statement, "Redefining 'Fiduciary': Assessing the Impact of the Department of Labor's Proposal on Workers and Retiree," for the House Education and Workforce Committee, Subcommittee on Health, Employment, Labor and Pensions on July 26, 2011.

Attachments:

1. ACLI Comment Letter to the Department of Labor, February 3, 2011
2. ACLI Statement for the Department of Labor Hearing, March 1, 2011
3. ACLI Additional Comments in Response to Hearing Questions, April 12, 2011

American Council of Life Insurers (ACLI) Statement for the Record
"Redefining 'Fiduciary': Assessing the Impact of the Department of Labor's Proposal on Workers and Retirees."
House Education and Workforce Committee, Subcommittee on Health, Employment, Labor and Pensions
United States Congress
July 26, 2011

The American Council of Life Insurers (ACLI) commends this subcommittee for holding this hearing on the Department of Labor's (DoL) proposed rule on the definition of "fiduciary" for purposes of offering investment advice. We applaud Chairman Phil Roe (R-TN) and Ranking Member Rob Andrews (D-NJ) for holding this hearing to receive testimony from the Assistant Secretary of the Employee Benefit Security Administration, DoL, Phyllis Borzi, and various stakeholders on the impact this proposal would have on individuals saving for retirement and small businesses ability to provide investment education to their plan participants. Members on this subcommittee from both parties have already urged DoL to re-propose the rule to address a substantial number of revisions that need to be made to it to ensure the rule does not negatively impact these savers or businesses. We thank these members for their efforts and urge them to reach out to the Administration to share these concerns.

The American Council of Life Insurers is a national trade organization with over 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and investment products and services to qualified retirement plans, including defined benefit pension, 401(k), 403(b) and 457 arrangements and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies' also are employer sponsors of retirement plans for their employees.

Consistent with the comments submitted by stakeholders and concerns raised by Members of Congress, we have urged the DoL to re-propose the rule so that stakeholders have an opportunity to review and comment on the DoL revisions to address these comments and concerns. A re- proposal will provide an opportunity to ensure that plan sponsors, plan participants and IRA owners continue to have affordable access to investment education and investment choices. We have urged the DoL to address prohibited transaction exemptions (PTEs) in conjunction with its development of a new rule. Lastly, we also urge the DoL to re-propose the rule so that stakeholders will be able to review and provide comment on DoL's economic analysis of the impact the proposal would have on IRA holders, plans and plan participants.

Background

On October 22, 2010, the DoL proposed a new rule to expand the definition of fiduciary with respect to the provision of investment advice. The proposed rule broadens the definition, for example, by removing the "regular" and "primary" basis conditions

necessary for advice to be considered fiduciary advice. The DoL received over 200 public comment letters in response to the proposal. On March 1st and 2nd, DOL held hearings on the proposal and heard from 39 panelists. Thereafter, DOL received 65 additional public comment letters. At that time, DOL noted its intent to issue a final rule by the end of the year.

There have been over 25 bipartisan, bicameral letters sent to the Administration outlining Members of Congress concerns about the impact the proposal would have on their constituents. These letters represent over 80 Members. Most notably, the Chairman and Ranking Member of the following Committees have sent letters to the agency heads expressing their concern about the proposal: Senate HELP, House Education and Workforce, Senate Banking, House Financial Services, Senate Agriculture, House Agriculture, Senate Finance and the House Ways and Means Committee.

DoL Should Re-propose the Rule so that Stakeholders Can Have an Opportunity to Review How It Plans to Address Comments and Concerns Raised

We recognize the DoL's authority to review its rules, especially in light of the responsibilities individuals have to plan for their retirement. We also appreciate the DoL's willingness to listen to stakeholders concerns about the proposal. However, the rule's expansion of who would be considered a fiduciary will interfere with employers and their management of plans and investment sales and distribution practices that are customary in the marketplace, well understood, and commonly relied upon by financial services providers, plans and participants alike. We are concerned that these changes will result in plans, plan participants, and IRA owners having less access to investment information and investment choices. We want to make sure that this result does not occur. We have offered comments to the DoL that seek to preserve the DoL's enforcement objective and avoid unnecessary disruption and negative impacts to plans, participants and individuals. Despite these efforts, we are unsure of whether and, if so, how the DoL will address these comments, and therefore seek to review its efforts once again to make sure the rule does not negatively impact individuals or small businesses.

Additionally, the DoL has acknowledged that it will need to revise a number of existing prohibited transaction exemptions (PTEs) which financial providers currently rely upon. ACLI has asked the DoL to issue a new proposal together with any proposed changes to or confirmations of exemptive relief. ACLI believes it is important to review and comment on these together. Absent a re-proposal, these revisions will be presented in conjunction with a final rule which may or may not address the concerns raised by ACLI, other organizations and companies. Stakeholders need an opportunity to review any proposed PTEs in conjunction with a proposed rule and provide comment as to whether they are workable within the newly revised rule.

DoL Should Re-propose the Rule so that Stakeholders Can Review and Provide Comment on DoL's New Economic Analysis

Assistant Secretary Borzi has recently announced that she will include a complete economic analysis on the impact of the rule on IRA holders, plans and plan participants in the final rule. Unfortunately, if issued as a final rule, stakeholders would not be able to comment upon the DoL's analysis. Given the rule's potential impact, such regulatory action should not occur without stakeholder review and comment.

A recent report issued by Oliver Wyman outlined the tremendous negative impact this proposed rule would have on IRA owners, especially those with smaller balances. Nearly 40% of IRAs in the study sample had less than $10,000 in their accounts. 98% of investor accounts with less than $25,000 were in brokerage relationships. This proposed rule would lead IRA providers to offer these small account owners either a higher fee-based advisory account or a no service account in order to comply with the proposal. Many low to middle income IRA owners would not be able to afford the estimated 75 – 195% increase in cost to pay for the advisory account. The DoL failed to include a similar analysis in its proposal, and needs to fully consider such analysis before initiating a rulemaking.

As an addenda to this statement, ACLI has attached a copy of its initial comment letter on this issue to the DoL dated February 3, 2011, its statement that it provided at DoL's public hearing on March 1, 2011, and additional comments in response to hearing questions dated April 12, 2011.

We look forward to working with this subcommittee, the larger committee, and DoL to address the concerns raised in this statement and to ensure Americans have abundant access to investment education and appropriate investment advice.

See attached addenda

ACLI Comment Letter to DOL February 3, 2011
ACLI Statement for the DOL Hearing March 1, 2011
ACLI Additional Comments in Response to Hearing Questions April 12, 2011

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Mailed Electronically

February 3, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Attention: Definition of Fiduciary Proposed Rule (RIN 1210-AB32)

Greetings:

On behalf of the American Council of Life Insurers ("ACLI"), we are writing to comment on the proposed rule promulgated under Section 3(21)(A)(ii) of the Employee Retirement Income Security Act ("ERISA"), which was published at 75 Fed. Reg. 65263 (October 22, 2010) ("Proposed Rule" or "Rule"). The Proposed Rule would dramatically enlarge the universe of persons who owe duties of undivided loyalty to ERISA plans and to whom the prohibited transaction restrictions of ERISA and the Internal Revenue Code would apply[1], by re-defining and substantially broadening the concept of rendering "investment advice for a fee" within the meaning of ERISA Section 3(21)(a)(ii).

The American Council of Life Insurers is a national trade organization with more than 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension, 401(k) and 403(b) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

[1] Although not covered under Title I of ERISA, individual retirement accounts and annuities ("IRAs") fall within the scope of the prohibited transaction excise tax provisions of Code Section 4975. The Proposed Rule would similarly enlarge the universe of persons defined as fiduciaries for purposes of applying Section 4975 to transactions involving IRAs.

ACLI appreciates the Department's concern that under some circumstances the current rule impinges the Department's ability to bring enforcement actions in situations that are clearly abusive. We share the Department's interest in seeing that plans and participants who seek out and are promised advice that is impartial and disinterested ultimately receive advice that adheres to the rigorous standards imposed by ERISA. At the same time, we are concerned that the Proposed Rule's pursuit of this objective interferes with investment sales and distribution practices that are customary in the marketplace, well understood, and commonly relied upon by financial services providers, plans and participants alike. We are concerned that these changes will result in plans, plan participants, and IRA owners having less access to investment information. Our comments seek to preserve the Department's enforcement objective while avoiding unnecessary disruption and negative impacts to plans, participants and individuals.

Persons engaged in the sale and distribution of investment product and services need to have confidence that ordinary course sales recommendations will not, in hindsight, be subjected to a fiduciary standard that disallows the payment of sales commissions and other traditional forms of distribution-related compensation. Please note that regulatory efforts are underway by the Securities and Exchange Commission ("SEC") regarding the standard of care under the securities laws for broker-dealers and investment advisers that provide investment advice about securities to retail customers. On January 21, 2011, the SEC issued a study on broker-dealers and investment advisers. We are reviewing this study which may lead to additional comments on the Proposed Rule. We urge the Department to provide the public sufficient opportunity to consider the SEC's regulatory efforts and offer additional comments on the Proposed Rule.

Parties engaged in transactions with ERISA plans and IRAs need clear, unambiguous rules by which to determine their duties and obligations in order for the marketplace to function efficiently and to ensure that plans, plan participants and IRA owners continue to have a broad range of investment products and services available to them, including investment advice and educational services. We offer these comments to assist in the development of such rules.

1. Recommendations Made by Sellers

Firms seeking to sell investments and investment products to plans and plan participants should be able to both (1) promote their products and recommend them to prospective purchasers,[2] and (2) benefit financially from the successful sale of those products. Without a financial interest, economic activity is stifled and opportunities for buyers and sellers to meet and transact are lost.

Sales activities naturally include recommendations to purchase and invest in products and services offered by the seller. For that reason, the seller's limitation provided by paragraph (c)(2)(i) (the "seller's limitation") recognizes financial institutions such as life insurers and their sales representatives should not be categorized as fiduciaries under ERISA or Code section 4975(e)(3)(B) when they are engaged in selling activities and are clear that they are acting in a sales capacity. The seller's limitation is a critical component of the Department's Proposed Rule.

Sales Activites. We believe it is absolutely critical to make sure that the wording of the seller's limitation be sufficiently inclusive to encompass the full scope of ordinary course selling and distribution activity. As written, the wording of the seller's limitation, which describes sellers and their agents, raises some uncertainties about the availability of the seller's limitation for other distribution channels, such as independent insurance agents, insurance affiliated and unaffiliated broker-dealers and registered investment advisers that offer life insurer products, whether exclusively or as one of many other products from a variety of different product manufacturers.

[2] Subject, of course, to any limitations on marketing and promotional practices imposed on sales of financial products generally.

Impartial, not "Adverse." Our membership is deeply troubled by the wording of the paragraph requiring that the recipient of the advice know or have a basis for knowing that the interests of the selling firm and its distributors are "adverse" to the interests of the plan and its participants. While the seller of a financial product has a financial interest in the outcome of a transaction, we think it is inappropriate to describe that financial interest as necessarily entailing broad adversity of interest. As responsible providers, we have an interest in seeing that our customers are well served, are happy with our products and services, and that our customers found those products and services useful to the attainment of their financial goals.

The process whereby purchasers and sellers bargain for and agree upon the terms of a proposed transaction is fundamental to the efficient operation of a market transaction. Adversity of interests exists in the area of price negotiation, where the seller of a product or service has an interest in maximizing profit and the purchaser has in interest in minimizing cost.

We believe the seller's limitation needs to parse this key distinction. It should make the point that a seller of an investment or an investment product has a financial interest in the transaction it is recommending and, if applicable, that less costly versions of an investment product may be available. So long as purchasers are provided with that information, they will have the requisite basis for evaluating the recommended transaction in light of the seller's financial interest, and will be in a position to understand that the selling firm's recommendation is not impartial.

Illustrate with Examples. The rule should provide an example or examples of circumstances in which a person would reasonably demonstrate that the recipient of information knows that a recommendation is being made by someone in a capacity as a seller. For example, a written representation would suffice if it clearly notes that the person is a seller of products and services, that the person and, if applicable, its affiliates, will receive compensation in the event the plan, plan fiduciary or participant/individual selects the product and services, and that such compensation may vary depending upon which product is purchased or which investments under a product or products are selected. This type of representation would provide a clear indication to the plan, plan fiduciary or participant/individual that the person is a non-impartial seller of products and services. It would also address the Department's stated concern about undisclosed conflicts of interest. Again, ACLI urges the Department to adopt a rule that leaves the nature of the relationship unambiguous to all parties.

Ongoing Sales Relationship. The Department should clarify that the seller's limitation covers all aspects of both an initial sale and the subsequent ongoing relationship between a plan, plan fiduciary or individual and an investment provider or any agent, broker, and/or registered investment adviser involved with the sale of the investment provider's products and services. This would include information and recommendations regarding the use of a product, e.g., advice regarding the choice of investments available under a product's menu of investments. It is common for defined contribution plans to request of potential investment providers a sample menu of investments from among a provider's available investments which, in the opinion of the provider, best match the plan's current investment options. There should be no expectation that any such recommendation is impartial or that the plan seeks advice upon which it will rely for its investment decisions. The nature of this relationship should not change after a sale. A product provider, agent, broker, and/or registered investment adviser may continue to make recommendations regarding products and services. There should be no expectation that these recommendations differ in nature following the initial sale.

2. Representations of ERISA Fiduciary Status Should be Written

In its preamble, the Department expresses the belief that explicitly claiming ERISA fiduciary status, orally or in writing, enhances the adviser's influence and forms a basis for the advice recipient's expectation that the advice rendered will be impartial. The Proposed Rule reflects that view by applying fiduciary status to all persons affording those acknowledgments and disallowing the availability of the paragraph (c)(2)(i) seller's limitation to such persons.

We are concerned about the potential proof issues inherent in claims that an adviser provided oral representations of fiduciary status. Advisers may be hard put to dispute erroneous or otherwise fictitious claims by plans that oral assurances of fiduciary status were provided. At the same time we think prudence dictates that where a plan, plan participant or individual seeks out impartial, disinterested advice delivered in a manner consistent with ERISA's fiduciary standard of conduct, then the plan, plan participant or individual should obtain the appropriate acknowledgment in writing in order to secure the acknowledgement in a permanent form.

For these reasons, we strongly suggest that paragraph (c)(1)(ii)(A) be modified to apply only to persons who represent or acknowledge *in writing* (electronic or otherwise) that they are acting as a fiduciary within the meaning of ERISA with respect to the advice they are providing to the person or persons for whom they are so acting. This concept is consistent with the recently promulgated section 408(b)(2) regulations which require that a service provider acting in a fiduciary capacity acknowledge such in writing.

3. Separately Consider a Rule for Individual Retirement Arrangements

ACLI requests that the Department take additional time to study the IRA and Keogh/one-participant plan markets and carefully consider the economic impact of the Proposed Rule on both individuals and providers of products and services. We ask the Department to consider IRAs and these Keogh plans apart from the scope of a final rule for time to consider the IRA and Keogh market place, changes in its regulatory environment, the economic impact of a change to the current rules to the non-ERISA marketplace, a meaningful investment education safe harbor tailored to this marketplace, and to clarify the application of existing exemptions and/or issued new exemptions tailored to this marketplace. We believe that this would be similar to the Department's decision to separately consider welfare benefit plans under the recently issued 408(b)(2) regulations. The Department has held hearings and is close to issuing newly proposed regulations governing fee disclosure for welfare benefit plans. We urge the Department to consider a similar approach for IRAs and Keogh plans.

Unlike employer sponsored 401(k) plans that generally provide a limited number of investment options selected by a plan fiduciary, IRAs and Keogh plans offer individuals a practically unlimited number of options. Brokers and registered investment advisers who prefer to offer a wide range of options find it impossible to create a level sales compensation structure. Because that universe of investments is virtually unlimited, it is nearly impossible to design a computer model to take into the account every possible option. The rights of IRA owners are protected by way of their individual agreements and direct relationships with financial institutions.

Seller's limitation. We believe that the Department should confirm that the seller's limitation applies to IRAs. It is common for advisors and agents to engage clients and prospective client on their particular goals and objectives to better understand their product and service needs. Based on these conversations, an advisor might explain the pros and cons of various investment vehicles including variable annuities, mutual funds, brokerage accounts, banking products, fixed annuities, alternative investments and several types of advisory accounts. Within each of these types of securities and

property, advisors/agents can usually recommend several different specific securities that may have different features. It is extremely difficult to design different product types so that the product pays the advisor the same compensation regardless of the investment allocation within the product. It is virtually impossible to do so across product types. For instance, compensation charged for executing a stock trade will differ from compensation received for selling a variable annuity. Absent a seller's limitation, it would be next to impossible to provide recommendations as to products and services because generally fees are not level.

For example, a broker may receive 50 bps if the individual invests in Product A (a large cap growth fund), 25 bps if the individual invests in Product B (a bond fund) or 0 bps if the individual invests in Product C (a money market account). For an individual with $10,000 in her account, a recommendation to put all assets into Product A would result in compensation of $50. A recommendation to use two products, 60% to Product A and 40% to Product B would result in compensation of $40. If the seller's limitation is too narrow, a broker may avoid making a recommendation, thereby leaving the individual without any professional assistance. The individual could instead pay a fee-only advisor (typically $500) to get the recommendations that may well be identical to the recommendations the broker would otherwise have provided at a far lower cost. The economics of small plans and small accounts make it so that the only advice available is often the incidental advice provided by brokers. Absent a broad seller's limitation, the average individual may receive no advice at all.

Other Limitations – The limitations provided at Section 2510.3-21(c)(2)(ii) should be available to IRAs. The Proposed Rule carves out from the definition specific acts related to the dissemination of investment information and defined contribution plan "platforms." However, these carve outs are limited to individual account plans as defined in ERISA §3(34). ACLI urges the Department to explicitly extend these carve outs to include IRAs.

Insurers issue variable IRAs (IRC § 408(b) Individual Retirement Annuities) that invest in insurance company separate accounts. These accounts may offer a variety of investment options in different asset classes to address a range of possible investment objectives or asset allocations of different annuity owners all within a single separate account. The limited number of the funds in the separate account is similar to the "platform" of funds available to a defined contribution plan participant. The principal of the "platform" limitations described in 2510.3-21(c)(2)(ii)(B) & (C) should be equally applicable to IRAs.

Regarding education, the Department has provided considerable guidance regarding the line between activities that would result in fiduciary investment advice as opposed to activities that would be deemed non-fiduciary investment education. The Proposed Rule specifically references Interpretive Bulletin 96-1 (29 CFR 2509.96-1) to preserve this guidance for ERISA individual account plans, but does not provide a limitation for these activities to IRAs. Interpretive Bulletin 96-1 assumes that the investment education being provided relates to an ERISA individual account plan with a limited number of investment options. It addresses asset allocation models, but does not address the range of choices available for IRAs or Keogh plans such as annuity products, mutual funds, REITs, brokerage accounts, or an advisory wrap program to name just a few. Information that models the use of these various arrangements by hypothetical individuals should be viewed as "investment education" rather than investment advice.

Furthermore, the educational activities that apply to individual account plans are even more important with regard to IRAs. As indicated above, the investment options available to IRA owners could almost be limitless, as compared to employer sponsored plans which generally have limited options. The typical IRA owner needs help in picking the investment options needed to achieve their retirement goals

and the concepts of IB 96-1 are therefore very important to IRA owners. We request that prior to issuing a final rule applicable to the IRA and Keogh plan marketplace, the Department issue a Field Bulletin that addresses investment education in IRAs and Keogh plans and make it clear that the "education limitation" applies to model information regarding the use of these various types of investment arrangements and asset allocation models for IRAs and Keogh plans.

Consumer Impacts - ACLI is extremely concerned that the Rule, if adopted as proposed, will negatively impact the very people the Department seeks to protect. We believe that the Rule may lead to less choice, reduced access and increased costs for products and services. Compensation structures vary by investment products for a variety of reasons, for example, to account for the increased time needed to explain a product that is not well understood or more complex than another. Sales agents must be able to address the needs of their customers. The Rule must permit this or, we fear, there will be fewer opportunities for IRA customers to learn about and consider a range of products and services.

We are not aware of a computer model that would advise an individual as to choices among different IRA product types. If typical sales activities, including recommendations regarding one or more IRA products under varied compensation structures, are not permitted by the final rule, IRA customers may find that advice is only available under a "wrap program." Under these arrangements, a set fee, either on a dollar or percentage formula basis, is paid for advice on the assets within the arrangement. Wrap programs are generally not available to individuals with small accounts. In many instances, wrap programs are more expensive than commission-based accounts, yet may be appropriate for certain IRA account holders. However, they are not necessarily as suitable a choice for other IRA account holders, such as buy and hold investors. Guaranteed lifetime income products are a "buy and hold" investment on which an ongoing wrap fee would not be a good fit. As annuities are sold on a commission basis, they are generally not available under a wrap program.

Individuals should not be limited in making IRA rollover decisions. A provider should be able to sell and an individual should be able to purchase an IRA insurance product even when the provider's products are used to fund the plan from which a rollover will be made. Fiduciary status should not be applied in a way that would restrict the options available to the participant seeking to purchase a rollover product. As we noted in section 1 above, so long as it is clear that the provider seeks to sell products, the seller's limitation in the Proposed Rule must apply here.

4. Recommendations to Take Distributions Not Investment Advice

The Department has requested comment on whether and to what extent the final rule should define "investment advice" to include recommendations related to the taking of a plan distribution. A decision by the participant to effect a distribution cannot be assumed to be an investment decision with respect to the plan as the Department noted in Advisory Opinion 2005-23A. A recommendation regarding whether to take a distribution from a plan might include advice which results in a new investment outside the plan (e.g., "you should rollover your benefit to your new employer's plan) or on what such distribution should be spent (e.g., "you may be eligible to take a hardship distribution to cover our repair to your home"), but it should not be construed to be advice "with respect to any moneys or other property of the plan."[3] While a plan may need to liquidate various investments to make the distribution, liquidation of plan assets is merely incidental to the primary transaction which is a distribution from the plan. In addition, a distribution will not necessarily result in a liquidation of assets if the plan distributes cash or other investments in-kind, i.e., no change in investment. To the extent that a recommendation to effect a distribution is also accompanied by specific advice regarding the plan's investments (e.g., to liquidate certain plan investments but retain others), the provision of such

[3] ERISA §3(21)(A)(ii)

investment advice would be subject to the Proposed Rule. However, a recommendation regarding whether to contribute to or take a distribution from a plan is not investment advice and should not be considered investment advice regardless of the fiduciary status of the financial professional making the contribution or distribution recommendation.

Fiduciary Responsibilities can be Limited by Agreement. In the preamble, the Department cited Advisory Opinion 2005-23A and noted its position that a recommendation to a participant to take a distribution does not constitute investment advice within the meaning of the regulation. We urge the Department to use the preamble to the final regulation to clarify an important issue raised by question 2 of the advisory opinion, i.e., the extent to which responses by a party who is "already a fiduciary" to participant questions regarding distributions are the exercise of discretionary authority regarding management of the plan which is subject to ERISA fiduciary restrictions. Specifically, we ask the Department to clarify that responding to a participant's question regarding plan distribution is not subject to fiduciary standards merely because the party responding to the question or its affiliate provides fiduciary services under a written agreement with the plan that are separate and unrelated to participant distributions. Such a clarification would be consistent with the understanding that fiduciary responsibilities can be limited by agreement and that no party is an all-purpose fiduciary merely because it or its affiliate has entered into an agreement to perform specific fiduciary services. More specifically, ERISA uses a functional definition of fiduciary. Therefore a person is only a fiduciary to the extent the person performs a specific fiduciary function. For example, an agent is a fiduciary due to an arrangement to provide plan participants with investment advice regarding designated plan investments. If that agent recommends that a participant take a distribution from the plan, this action is separate and apart from the scope of the fiduciary's duties under the arrangement. We urge the Department to confirm this functional definition of fiduciary and clarify that activities such as a recommendation to contribute to a plan or take a distribution from the plan, whether directly or via an IRA roll-over, do not fall within the scope of a fiduciary's duties merely because the person is a fiduciary for other purposes, e.g., participant level investment advice. We also urge the Department to confirm that the seller's limitation is available to persons recommending IRA arrangements to a plan participant or individual to receive a rollover from a plan or another IRA.

5. Status as RIA Alone Should Not Give Rise to Fiduciary Duty

Absent the application of the limitations in paragraph (2), section 2510.3-21(c)(1)(ii)(C) of the Proposed Rule provides that all registered investment advisors ("RIA") are ERISA fiduciaries. ACLI believes that this provision is both unnecessary and unworkable. We find the provision unnecessary as paragraph (D) of that subsection already includes any person that provides advice or makes recommendations to plans and plan participants as described. The provision is unworkable as its application in conjunction with the affiliate rule leads to fiduciary status even when no advice or recommendations have been made to the plan or plan participants.

Should the final rule include the provisions of section 2510.3-21(c)(1)(ii)(C), ACLI requests that the rule limit the application of the affiliate provision to only those instances in which an affiliate engages in actions or has authority with respect to the plan that is sufficient to cause a reasonable plan fiduciary to believe it is receiving fiduciary-level investment advice. Under the Proposed Rule, the mere affiliation with an RIA would result in fiduciary status. Specifically, the Proposed Rule says that a person may attain this status "directly or indirectly (e.g., through or together with any affiliate)." Affiliation with an RIA should not trigger ERISA fiduciary status unless the RIA is providing advice services to the plan. If the RIA is not providing advice services to the plan, the affiliate should be able to rely on the multi-factor test in section 2510.3-21(c)(1)(ii)(D) of the Proposed Rule in determining its fiduciary status.

Similarly, affiliation with, or even direct status as, an ERISA fiduciary other than by providing investment advice should not trigger the presumption that a person is an investment advice fiduciary unless such status would give plans and participants a reasonable expectation of impartial investment advice and the person is in a position to influence investment decisions. Thus, for example, status as an ERISA fiduciary for a limited purpose unrelated to investment decisions (e.g., directed trustee, investment manager of a "plan asset" investment vehicle in which a plan invests such as an insurance company separate account or collective trust), either directly or through an affiliate, should not trigger the presumption of investment advice fiduciary status because the fiduciary's limited status alone would not give rise to a reasonable expectation that the fiduciary should provide impartial investment advice and does not put the fiduciary in a position to influence investment decisions. To impose investment advice fiduciary status on these persons solely because of these other limited and unrelated functions would be contrary to the functional nature of fiduciary status under ERISA, which generally only imposes fiduciary responsibility on persons to the extent of their fiduciary activities with respect to the plan.

ACLI understands that the language assigning fiduciary status through an affiliate relationship is in the existing rule today so it may seem reasonable to continue this concept in the Proposed Rule. However, the difference between the existing rule and the Proposed Rule is that the existing rule is primarily focused on activity, not status. For example, under the current rule, the mere affiliation of a person with an RIA or a directed trustee would not trigger fiduciary status. Instead, the affiliate would have to engage in actions or have authority with respect to the plan that is sufficient to cause a reasonable plan fiduciary to believe it is receiving fiduciary-level investment advice. Because the Proposed Rule would presume fiduciary status based on status alone in some cases, extending that presumption based solely on the status of an affiliate is inappropriate.

6. Reasonable Expectations for Fiduciary Status

The Department should revise section 2510.3-21(c)(1)(ii)(D) to provide greater clarity as to which arrangements lead to fiduciary status. ACLI believes that fiduciary status should not apply when advice merely "may be considered." The current rule provides that a person will be a fiduciary when the person and the plan agree that the advice "will serve as a primary basis" for investment decisions with respect to plan assets. ACLI believes that this is reasonable and in keeping with the intent of ERISA. The fiduciary standards of ERISA should only apply when the parties reasonably expect that the advice given and received will serve as a basis for a decision. That reasonable expectation should be evidenced by a written agreement between the parties or a written disclosure from the provider. Due to the nature of such a relationship, this advice should be subject to the fiduciary duties and responsibilities of ERISA. However, the Proposed Rule would subject such duties and responsibilities to persons whose advice or opinions hold no such import. A plan may solicit advice from a number of persons without engaging any one to serve as an advisor. When a plan's interest in the advice is cursory at best, there is clearly not a relationship which would warrant the extension of ERISA obligations to the advisor.

7. Platform Provider Limitation

The Department should provide greater clarity on the "platform provider" limitation in section 2510.3-21(c)(2)(ii)(B) as it pertains to "individualization" in the context of the sales, marketing and retention activities of platform providers. In particular, we believe the platform provider limitation should be clear that platform providers are not providing investment advice for a fee when they suggest to plans sample menus, or otherwise, when the platform provider (1) does not hold itself out as a plan fiduciary, (2) discloses that its recommendations are not intended to be impartial advice, and (3) discloses that it has a financial interest in the transaction, which may include indirect compensation paid to the platform provider or its affiliates from investment fund complexes.

This is important to platform providers because in the ordinary course of selecting a platform provider, or determining whether to continue a contract with a platform provider, plan sponsors often require, either through a formal request for proposal or by means of an informal request by an intermediary acting for the plan such as a broker or consultant, that a platform provider supply a sample menu of investment funds (e.g., a subset of funds available from the provider's investment platform) for consideration by the plan sponsor and its advisers. Platform providers that fail to respond to such requests are often excluded from the sales opportunity, or fail to retain an existing plan customer.

In some cases, such requests may be accompanied by certain criteria or parameters supplied by the plan sponsor or its intermediary, to guide the platform provider such as the plan's investment policy, fund performance history requirements, Morningstar classifications and other similar criteria. Often, however, the plan sponsor's (or its intermediary's) request may be simply that the platform provider supply a suggested list of funds from the provider's platform that are substantially identical or closely comparable to the plan's existing designated investment funds.

In responding to these requests, platform providers engage in non-fiduciary sales activity. Platform providers strive to suggest sample menus that are consistent with the goals and objectives communicated to the platform provider by the plan sponsor, and consistent with the economic needs of the platform provider's non-fiduciary business model. Therefore, similar to the activity described in the seller's limitation at section 2510.3-21(c)(2)(i), the platform provider will typically attempt to respond to these requests by suggesting a sample menu or suggested list of funds that both (1) attempts to reasonably satisfy any criteria accompanying the request and (2) meets the platform provider's target revenue needs. Accordingly, we believe it is important that the limitation in section 2510.3-21(c)(2)(ii)(B) be clarified to include these types of sales activities.

8. Investment Product Offerings are not Investment Advice

The Department should clarify in a final rule or its preamble that the development and offer of an investment product with a limited investment menu, e.g., a bond fund, a stock fund and a balanced fund, is not a provision of investment advice. Investment providers such as insurers should have the flexibility to offer a range of products with varied investment menus.

9. Confirm Status of Existing Exemptions

The last time a new fiduciary standard was created to govern sales of products by brokers and other investment advisers, the Department responded immediately issuing a number of exemptions applicable to broker-dealer activity to protect certain activities. Creating a bright-line test to determine who is an advice fiduciary is a laudable goal. However, the bright-line test should not end at the determination of who is a fiduciary, but rather extend to the determination as to whether such advice creates a prohibited transaction when the broker or other financial professional receives fully disclosed direct or indirect compensation from such sale or service.

It is difficult to assess the impact of the Proposed Rule without a clear understanding of whether prior exemptions would continue to apply and whether new exemptions are contemplated. The Department has provided a broad exemption for the sale of annuities (PTE 84-24). We would appreciate the Department's confirmation that this exemption is still available and would cover sales of affiliated and unaffiliated annuities as well as any compensation, direct or indirect, received by an affiliated insurance company, affiliated money managers of variable annuity subaccounts, and any revenue sharing paid to the broker. Further, we seek the Department's confirmation that if the requirements of PTE 84-24 are met that the exemption covers the provision of investment advice. The Department should also confirm the status of exemptions such as PTE 75-1 and 86-128. In particular, it should

confirm that these exemptions apply to the provision of investment advice. Product providers, agents and brokers need to know that these exemptions still apply, and cover advisory programs which meet the requirements of the exemption.

Finally, the Department has issued Advisory Opinions to investment providers that also provide investment advice to ERISA plan participants on whether the receipt of compensation under the arrangements in question result in prohibited transactions. In both Advisory Opinion 97-15A (the "Frost" letter) and Advisory Opinion 2001-09A ("the SunAmerica" letter), the Department concluded that, based upon the facts, the receipt of compensation described under these arrangements did not result in a prohibited transaction under ERISA §406(b). ACLI members agree with the Department's conclusions in these Opinions. We ask that Department continue to support these conclusions and leave no doubt as to the status of these Opinions under a final rule.

10. Valuations are not Investment Advice

ACLI requests that the Department remove the provision of appraisal services from the rule. ERISA section 3(21)(A)(ii) provides that a person is a fiduciary if he or she "renders investment advice for a fee..." The determination of the current price of an asset is not "investment advice," i.e., it is not a recommendation to purchase or sell property or securities nor an opinion regarding the merits or value of investing in such property or security. The Department elaborated on the matter shortly after it issued the current rule in Advisory Opinion 76-65A, clarifying that the provision of valuation services is not "investment advice." The Department noted, absent an opinion as to the relative merits of purchasing a particular asset as opposed to some other asset or assets, the valuation of securities is neither investment advice, nor advice as to the value of securities.

There are good reasons for not treating appraisal services as investment advice. When a plan fiduciary directly engages an appraiser to obtain current prices on property or securities that are under consideration for purchase or sale or for assets already held by the plan, the fiduciary must act prudently in selecting and monitoring the appraiser. A plan's service arrangement with an appraiser is subject to the provisions of ERISA §408(b)(2). As for the Department's concerns regarding undisclosed conflicts of interests, the interim final rule under ERISA §408(b)(2) makes clear that to satisfy the prohibited transaction exemption under ERISA §408(b)(2), an appraiser who provides services for indirect compensation must disclose to the fiduciary any and all indirect compensation it expects to receive for services rendered to the plan. Thus, with respect to appraisals, there already is a plan fiduciary to ensure that appraisal activities are performed under an arrangement and in a manner that protects the interests of the plan and its participants and beneficiaries.

Extending fiduciary status to appraisers under this Proposed Rule would, at the very least, substantially raise the costs of what are already objective independent valuations for no discernible purpose. For appraisal work performed for insurance company separate accounts, it would make such appraisers fiduciaries to all ERISA covered plans that invest in these separate accounts. In general, these appraisers would have no direct relationship with or knowledge of these ERISA plans. ACLI members expect many appraisers to avoid ERISA plans and investment vehicles in which plans invest altogether if this Proposed Rule take effect. In that event, there would be severe market disruption for both plans seeking to invest in separate accounts and other non-publicly traded securities. At best, we anticipate fewer appraisers and increased valuation fees due to the reduction in the number of willing appraisers and the need for willing appraisers to insure against potential law suits, all of which are costs that will ultimately be borne by plans and their participants.

If the Department extends the definition to include appraisal services, we note that the limitation on the application of the Proposed Rule at (c)(2)(iii) raises two key concerns. First, the scope of

the exclusion for "general reports...provided for purposes of compliance with the reporting and disclosure requirements" is too narrow. It is common for insurers to prepare and provide reports and statements more frequently than ERISA's minimum reporting requirements. For example, it is common to provide access to daily online account values to plan participants. It is also common for interim reports to be prepared for a plan's investment committee. Second, and more importantly to insurers, the rule's exclusion for reports on assets for which there is "not a generally recognized market" is quite problematic.

Both a plan's equity investment in an insurer's separate account (units of the separate account) and an undivided interest in the separate account's investment in other vehicles (e.g., units of the separate accounts investments in real estate funds, hedge funds, private equity funds) are "plan assets." Accordingly, any party passing along information to the separate account investment manager (the insurer or its affiliate) on the value of the separate account's investment in the underlying investment vehicles (units in the underlying fund) or on assets of that vehicle that are used in computing unit values of that vehicle is potentially a fiduciary under the Proposed Rule because it is giving advice on the value of securities or other property owned or to be purchased by a plan. This would be true whether the underlying investment vehicle invests in publicly offered securities or in non-public assets (with values determined by appraisal). The parties swept into the fiduciary definition include investment managers of underlying investment vehicles, custodians or sub-custodians and appraisers.

Many insurers offer real estate separate accounts and hire appraisers to determine the values of separate account holdings. Those values are used for client reporting purposes and to set unit values used for a plan's purchase or sale of separate account units. The Proposed Rule would impose fiduciary status and liability on real estate appraisers to separate accounts in which ERISA plans invest. By valuing the underlying properties of a real estate fund, an appraiser would be advising the real estate fund manager on the value of fund units, an ERISA "plan asset," because the appraisal is for an underlying asset of the insurer's separate account.

Units of a non-registered separate account are not publicly offered securities. This is true even when the underlying assets of the separate accounts are registered securities. Under the Proposed Rule, establishing separate account unit values would be a fiduciary act of "advice," leading an insurer to become a fiduciary for purposes of the valuation. Insurers typically hire sub-custodians who have no direct contact with any plan investor to handle recordkeeping as well as the calculation of separate account unit values. The Proposed Rule would make these sub-custodians ERISA fiduciaries.

The Department should not use this proposed rule to attempt to extend the definition of fiduciary under ERISA 3(21)(A)(ii) to persons providing appraisal services because such services do not constitute the rendering of investment advice. This portion of the proposal along with the "limitation" in the Proposed Rule at (c)(2)(iii) should be dropped. If the Department finds it necessary to study valuation issues more broadly, ACLI suggests that Department issue a Request for Information.

11. Effective Date

ACLI believes that an effective date of at least one year following the publication of a final rule is necessary and reasonable. The Proposed Rule states that final rule would be effective 180 days following publication. As indicated in our comments above, the implications of the new rule would require significant changes. Our members will need sufficient time to fully understand and address a new regulatory regime, particularly given that any violations would result in a prohibited transaction. Should the Rule be implemented as proposed, in addition to time required for compliance review, there may be significant changes required to information technology infrastructure, sales processes and compensation arrangements and other agreements.

*****

On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Sincerely yours,

Walter C. Welsh
Executive Vice President,
Taxes & Retirement Security

James H. Szostek
Vice President,
Taxes & Retirement Security

Shannon Salinas
Counsel
Taxes & Retirement Security

ACLI
Financial Security. For Life.

TESTIMONY OF
TOM ROBERT
ON BEHALF OF
THE AMERICAN COUNCIL OF LIFE INSURERS
BEFORE THE
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
U.S. DEPARTMENT OF LABOR

HEARING ON
DEFINITION OF FIDUCIARY – INVESTMENT ADVICE

TUESDAY, MARCH 1, 2011

Introduction

Good morning. My name is Tom Roberts and I am Chief Counsel at ING Insurance U.S., testifying on behalf of the American Council of Life Insurers. ACLI member companies represent more than 90% of the assets and premiums of the US life insurance and annuity industry, and offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a nonqualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

We appreciate this opportunity to offer our views of the proposed rule with the Department. ACLI submitted written comments describing eleven key concerns. Today, I focus on three of them: the importance of the seller's limitation; our suggestions to ensure all interested parties clearly understand when advice is subject to ERISA; and our concerns regarding the proposed rule's applicability to IRAs and the need for further inquiry on the nature of these programs and the products and services offered to support them.

The Proposed Rule would dramatically enlarge the universe of persons who owe duties of undivided loyalty to ERISA plans and to whom the prohibited transaction restrictions of ERISA and the Internal Revenue Code would apply. It substantially broadens the concept of rendering "investment advice for a fee."

ACLI appreciates the Department's concern that under some circumstances the current rule impinges the Department's ability to bring enforcement actions in situations that are clearly abusive. We share the Department's interest in seeing that plans and participants who seek out and are promised advice that is impartial ultimately receive advice that adheres to the rigorous standards imposed by ERISA. At the same time, we are concerned that the Proposed Rule's pursuit of this objective interferes with investment sales and distribution practices that are customary in the marketplace, well understood, and commonly relied upon by financial services providers, plans and participants alike. We are concerned that these changes will result in plans, plan participants, and IRA owners having less access to investment information and or increased costs. Our comments seek to preserve the Department's enforcement objective while avoiding unnecessary disruption and negative impacts to plans, participants and individuals.

Seller's Limitation on fiduciary status

In the preamble to the proposed rule, the Department notes that, in the context of selling to a purchaser, communications with the purchaser may involve advice or recommendations and that such communications ordinarily should not result in fiduciary status. This point is critical to the development of a workable rule. Persons engaged in the sale and distribution of investment product and services need to have confidence that ordinary course sales recommendations will not, in hindsight, be subjected to a fiduciary standard that disallows the payment of sales commissions and other traditional forms of distribution-related compensation. Parties engaged in transactions with ERISA plans and IRAs need clear, unambiguous rules by which to determine their duties and obligations.

Financial institutions such as life insurers and their sales representatives should not be treated as fiduciaries under ERISA when they are engaged in selling activities and are clear that they are acting in a sales capacity.

As written, the wording of the seller's limitation, which describes sellers and their agents, raises some uncertainties about the availability of the seller's limitation for other distribution channels, such as independent insurance agents, insurance affiliated and unaffiliated broker-

dealers and registered investment advisers that offer life insurer products, whether exclusively or as one of many other products from a variety of different product manufacturers. These parties must be covered by the limitation.

The seller's limitation is only available when the recipient of the advice knows or has a basis for knowing that the interests of the selling firm and its distributors are "adverse" to the interests of the plan and its participants. We think that the word "adverse" is not right word to explain that a seller is not impartial. While the seller of a financial product has a financial interest in the outcome of a transaction, we think it is inappropriate to describe that financial interest as necessarily entailing broad adversity of interest. As responsible providers, we have an interest in seeing that our customers are well served, are happy with our products and services, and that our customers find them useful to the attainment of their financial goals.

We believe the seller's limitation should make the point that a seller of an investment or an investment product has a financial interest in the transaction it is recommending. So long as purchasers are provided with that information, they will have the requisite basis for evaluating the recommended transaction in light of the seller's financial interest, and will be in a position to understand that the selling firm's recommendation is not impartial.

The rule should provide an example or examples of circumstances in which a person reasonably demonstrates that the recipient of information knows that a recommendation is being made by a "seller." For example, a written representation would suffice if it clearly notes that the person is a seller of products and services, that the person and, if applicable, its affiliates, will receive compensation for the selection of the product and services, and that such compensation may vary depending upon which product is purchased or which investments under a product or products are selected. This type of representation would provide a clear indication to the plan, plan fiduciary or participant that the person is a non-impartial seller of products and services. It would also address the Department's stated concern about undisclosed conflicts of interest.

The Department should clarify that the seller's limitation covers all aspects of both an initial sale and the subsequent ongoing relationship between a plan, plan fiduciary or individual and an investment provider or any agent, broker, and/or registered investment adviser involved with the sale of the investment provider's products and services. This would include information and recommendations regarding the use of a product, for example, advice regarding the choice of investments available under a product's menu of investments. It is common for defined contribution plans to request of potential investment providers a sample menu of investments from among a provider's available investments which, in the opinion of the provider, best match the plan's current investment options. There should be no expectation that any such recommendation is impartial or that the plan seeks advice upon which it will rely for its investment decisions. The nature of this relationship should not change after a sale. A product provider, agent, broker, and/or registered investment adviser may continue to make recommendations regarding products and services. There should be no expectation that these recommendations differ in nature following the initial sale.

Written Representations

In its preamble, the Department expresses the belief that explicitly claiming ERISA fiduciary status, orally or in writing, enhances the adviser's influence and forms a basis for the advice recipient's expectation that the advice rendered will be impartial. The Proposed Rule reflects that view by applying fiduciary status to all persons affording those acknowledgments and disallowing the availability of the seller's limitation to such persons.

We think prudence dictates that where a plan, plan participant or individual seeks out impartial, disinterested advice delivered in a manner consistent with ERISA's fiduciary standard of conduct, then the plan, plan participant or individual should obtain the appropriate acknowledgment in writing in order to secure the acknowledgement in a permanent form. We are concerned about the potential proof issues inherent in claims that an adviser provided oral representations of fiduciary status. Advisers may be hard put to dispute erroneous or otherwise fictitious claims that oral assurances of fiduciary status were provided.

For these reasons, we request that the rule be modified to apply only to persons who represent or acknowledge *in writing,* electronic or otherwise, that they are acting as a fiduciary within the meaning of ERISA with respect to the advice they are providing to the person or persons for whom they are so acting. This concept is consistent with the recently promulgated section 408(b)(2) regulations that require that a service provider acting in a fiduciary capacity acknowledge such in writing.

Separately Consider Rule for IRAs

ACLI requests that the Department take additional time to study the IRA and self-employed plan markets and carefully consider the economic impact of the Proposed Rule on both individuals and providers of products and services. The Department is separately considering welfare benefit plans under the recently issued 408(b)(2) regulations. We ask the Department to do likewise for IRAs and self-employed plans and hold them apart from the scope of a final rule. The Department should take time to consider the IRA and Keogh market place, and the economic impact a change to the current rules would have on this retail marketplace.

In addition, the Department should consider changes in the regulatory environment affecting retail products. In particular, there are regulatory efforts are underway by the Securities and Exchange Commission regarding the standard of care under the securities laws for broker-dealers and investment advisers that provide personalized investment advice about securities to retail customers. On January 21, 2011, the SEC issued a study on broker-dealers and investment advisers. It is important that the SEC and DOL efforts lead to rules that are complimentary in nature. We urge the Department to provide the public sufficient opportunity to consider the SEC's regulatory efforts and offer additional comments on the Proposed Rule.

The Department should consider a meaningful investment education safe harbor tailored to this marketplace. The Department should also clarify the application of existing exemptions and/or issued new exemptions tailored to this marketplace.

As we read the proposed regulation, the seller's limitation applies to IRAs. It is common for advisors and agents to engage customers and prospective customers on their particular goals and objectives to better understand their product and service needs. Based on these conversations, an advisor might explain the pros and cons of various investment vehicles including variable annuities, mutual funds, brokerage accounts, banking products, fixed annuities, alternative investments and several types of advisory accounts. Within each of these types of securities and property, advisors/agents can usually recommend several different specific securities that may have different features. The compensation paid by product and service will vary. For instance, compensation charged for executing a stock trade will differ from compensation received for selling an annuity. The seller's limitation, with an appropriate indication of the seller's interest, makes it possible to recommend products and services to customers.

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I want to thank the Department again for holding this hearing, and for inviting ACLI to testify. I am happy to answer any questions you may have.

//ACLI
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Mailed Electronically

April 12, 2011

Office of Regulations and Interpretations
Attn: Public Hearing on Definition of Fiduciary
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC, 20210

Subject: Public Hearing on Definition of Fiduciary

Greetings:

On behalf of the American Council of Life Insurers[1] ("ACLI"), we write to you today on the proposed rule promulgated under Section 3(21)(A)(ii) of the Employee Retirement Income Security Act ("ERISA"), which was published at 75 Fed. Reg. 65263 (October 22, 2010) ("Proposed Rule" or "Rule") and to offer a response to questions raised at the March 1st hearing by DOL staff to our witness Thomas Roberts.

Clarification of Seller's Limitation

In our February 3rd comment letter and in our testimony, we asked that the proposal be modified to provide examples of circumstances that would reasonably demonstrate that the recipient of information knows that a recommendation is being made by a "seller." One example would be a representation that:

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[1] The American Council of Life Insurers is a national trade organization with more than 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension, 401(k) and 403(b) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

The person is a seller of products and services, that the person and, if applicable, its affiliates, will receive compensation in the event the plan, plan fiduciary or participant/individual selects the products and services, and that such compensation may vary depending upon which product is purchased or which investments under a product or products are selected.

The proposed regulation provides that the seller's limitation is not applicable to a person "who represents or acknowledges that it is an ERISA Fiduciary." Our letter states that this constraint on the seller's limitation should only apply if the seller has represented or acknowledged in writing (electronic or otherwise) that it was a fiduciary.

During our testimony it was suggested that the seller's limitation might be protected by some form of disclosure stating that the seller was not an ERISA Fiduciary. Such a disclosure could be added to the representation (described above) that the "person is a seller . . . ."

In addition to examples, the rule could include one or more safe harbor model notices. For example:

I, (Name), am a representative of (Agency/Company). I would like to be of assistance to you. Before we proceed, I need to be clear with you that my firm and I may have a financial interest in the sale of any product or transaction that we might recommend to you. Our financial incentive to recommend a particular product or investment may vary by asset class, investment choices or product type, or according to the particular investments available within a given asset class or product type. My firm and I do not agree to act as your ERISA fiduciary investment advice provider. An ERISA fiduciary is not permitted to take its own financial interests into account when making a recommendation.

In certain circumstances, it may be appropriate to bifurcate this disclosure to make clear that, while the selling firm does not agree to serve as an ERISA fiduciary investment advice provider in connection with recommendations made by the particular representative making the disclosure, it may agree to serve as an ERISA fiduciary investment advice provider in connection with recommendations made outside of the scope of the relationship between the representative and the plan, plan fiduciary or participant/individual to whom the disclosure is made. In such cases, the disclosure should be revised to remove all references to the selling firm and add the following:

I also need to be clear with you that my firm may have a financial interest in the sale of any product or transaction that I might recommend to you and my firm does not agree to act as your ERISA fiduciary investment advisor in connection with any of my recommendations.

This type of representation would provide a clear indication to the plan, plan fiduciary or participant that the person is a non-impartial seller of products and services. It would also address the Department's stated concern about undisclosed conflicts of interest.

As you are aware, regulatory efforts are underway by the Securities and Exchange Commission ("SEC") regarding the standard of care for broker-dealers and investment advisers that provide investment advice about securities to retail customers. Depending upon the SEC's actions, there may be a need to expand this "seller's" disclosure to describe the seller's status and obligations under federal securities law including whether the seller is a fiduciary under federal securities law.

Finally, the Department should clarify that, for purposes of the seller's limitation, the "recipient" of advice or recommendations may be the plan, the plan's sponsor or other plan fiduciary, plan participant, plan beneficiary or an individual (*in the case of an individual retirement arrangement*).

Proposed Rule and Exemptive Relief

In light of the substantive comment letters and testimony at the hearing, we expect that the Department will make a number of useful revisions to the Proposed Rule. With substantive revisions, the Department should provide the public with an opportunity to review and comment on the next iteration of the rule before a final rule is promulgated. The current Proposed Rule would dramatically enlarge the universe of persons who owe duties of undivided loyalty to ERISA plans and to whom the prohibited transaction restrictions of ERISA and the Internal Revenue Code would apply, by re-defining and substantially broadening the concept of rendering "investment advice for a fee" within the meaning of ERISA Section 3(21)(a)(ii).

At the hearing, we were asked about compensation disclosure and noted that the Prohibited Transaction Exemption 84-24 requires such disclosure. We note this exchange to emphasize the need for the Department to confirm the status of current exemptions and solicit public input on whether amendments are needed to existing exemptions and/or whether new exemptions are in order.

We ask that the Department issue a new proposal together with any proposed changes to or confirmations of exemptive relief. We believe it is important to review and comment on these together. We remain committed to offering comments that seek to preserve the Department's enforcement objective while avoiding unnecessary disruption and negative impacts to plans, participants and individuals.

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On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Sincerely yours,

Walter C. Welsh
Executive Vice President,
Taxes & Retirement Security

James H. Szostek
Vice President,
Taxes & Retirement Security

Shannon Salinas
Counsel
Taxes & Retirement Security

Association of Institutional INVESTORS

Statement of
The Association of Institutional INVESTORS

House Committee on Financial Services,
Subcommittee on Capital Markets and Government Sponsored Enterprises

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011

Chairman Garrett and Ranking Member Waters,

Thank you for the opportunity to submit a written statement for the record related to the hearing on investment adviser oversight held on September 13, 2011. The Association of Institutional INVESTORS (the "Association") believes that the debate over creating the appropriate level of oversight of broker-dealers and investment advisers is critical to the future of our markets and we continue to work closely with the Commissioners and staff of the Securities and Exchange Commission ("SEC") to ensure that the right level of oversight is provided in order to protect investors. We appreciate the chance to provide Congress with our perspective and our proposals related to these important issues.

The Association includes some of the oldest, largest, and most trusted investment advisers in the United States. Our clients are primarily institutional investment entities that serve the interests of individual investors through public and private pension plans, foundations, and registered investment companies. Collectively, our member firms manage ERISA pension, 401(k), mutual fund, and personal investments on behalf of more than 100 million American workers and retirees. Our clients rely on us to prudently manage participants' retirements, savings, and investments. They depend on our members to help them provide for their retirements, to have funds available to educate their family members, to meet other obligations, and to support their financial aspirations. This reliance is built, in part; upon the fiduciary duty each of our members has to these organizations and individuals to put their interests first. Put simply, it is not our money. We recognize the significance of our duties and the important role our markets play, and our statement is intended to reflect not just the concerns of the Association, but also the interests of those we ultimately serve.

The Association recognizes that our firms and our markets can only fulfill their highest purpose when supported by prudent regulation and strong investor protections, providing a level playing field for all participants. As stated in our comment letter submitted to the SEC (attached hereto), the Association believes that the establishment of a self-regulatory organization ("SRO"), on its own, would not enhance the effectiveness of the Commission's ability to oversee and examine investment advisers. If, however, Congress determines that an SRO is needed to oversee certain investment advisers, the Association supports the approach taken in Chairman Bachus' discussion draft of the Investment Adviser Oversight Act of 2011 (the "Bachus Draft"). The Bachus Draft distinguishes between investment advisers who predominantly provide investment advice to sophisticated investors and advisers who provide personalized investment advice to non-accredited investors.

Association of Institutional INVESTORS

The Investment Advisers Act and the SEC's rules promulgated thereunder are largely a principles-based regulatory regime that provides flexibility to managing client/adviser relationships all within the requirements of fiduciary principles. This regulatory framework has provided institutional clients and their investment advisers with the flexibility necessary to best serve institutional clients. This flexibility is rarely available under a retail-oriented SRO structure. Our institutional clients are typically fiduciaries themselves, supported by significant resources and guided by extensive statutory and regulatory responsibilities. By excluding investment advisers who predominantly advise institutional clients from SRO oversight, the Bachus Draft preserves the existing principles-based oversight of institutional advisers by the SEC to the benefit of institutional clients, while creating a separate regulatory authority to oversee retail focused advisers whose clients may benefit from the prescriptive rules typical of a SRO.

The relationship between an adviser and its institutional clients differs in material respects from the relationship between an adviser and retail clients. Unlike retail investors, institutional clients exert significantly greater influence over how the adviser manages the assets and closely monitor the adviser's operations and performance. For example, institutions typically negotiate fees at arms length. They also often dictate the terms of the investment guidelines and insert contractual terms to protect their interests. Many institutions use external consultants and Requests for Proposals to help select their investment advisers. Further, institutions either directly or through consultants perform both pre-agreement due diligence and periodic inquiries to oversee how their assets are managed, demanding higher levels of customized reporting from advisers to ensure that their objectives and guidelines are being followed. Institutions also generally select their own independent custodians. Institutional clients generally require their asset managers to obtain annual internal control studies—such as a SAS-70. These internal control studies review the adviser's processes and controls around the adviser's key operating processes to assess whether the processes and controls are appropriately designed to accomplish their purpose, such as the fair allocation of investment opportunities among accounts, and are operating effectively. These control mechanisms provide institutional clients with enhanced protection from improper conduct by an adviser.

Many advocates for an SRO justify the prescriptive rule system typical of an SRO by arguing that the average retail investor is not able to enforce and monitor fiduciary principles as applied to the individual's account and that specific rules provide protections more effectively. While prescriptive regulation may be more effective in establishing the exact scope of an adviser's responsibilities, which may be helpful in the retail context, such rules are not helpful for institutional investors. In light of the advantages that institutional clients have in forming and monitoring their relationships with advisers, as described above, forcing a system of prescriptive rules into the relationship between institutional clients and advisers destroys flexibility and offers little additional protection. Further, forcing a prescriptive regulatory approach on institutional investors adds costs that would ultimately be passed on to the investor and with no corresponding benefit.

The Association supports the Bachus Draft and we believe that a few changes could strengthen the legislation. First, the term "client" should be defined to mean entities with whom the investment adviser has entered into a written investment management agreement. This clarification is needed because many investment advisers to institutional clients do not have a relationship to the investors who invest through the institutional client, e.g., a pension plan. Second, we suggest that the 90%

Association of Institutional INVESTORS

threshold be conformed to the Dodd Frank Act's revenue threshold to define which entities are financial institutions, 85% or more. Third, the $25 million threshold included in the exemption to Section (b)(1)(c) is also too high and may inadvertently cover investment advisers the legislation is not targeting. Lastly, the Association recommends that limited purpose broker dealers affiliated with exempt institutional advisers continue to carry registrations with FINRA but that examination responsibility be retained by the Commission. There are efficiencies for both the Commission and the registrants achieved by consolidating in one examination the management of funds and partnerships and their distribution.

The Association believes that the population of investment advisers that will continue to be regulated by the SEC will be sufficiently reduced and that the SEC should have sufficient resources to appropriately examine and supervise them. In this context, we believe the SEC should consider the third party reviewed internal audit control studies that many institutional advisers currently obtain, or the lack thereof, in allocating their examination resources.

The Association has been working with industry participants and the large audit firms to improve internal control testing for institutional investment advisers to provide institutional clients with a review better suited to their needs. We hope that this work may eventually produce a more comprehensive testing framework that meets the common needs of the advisory firms, our institutional clients, and our clients' service providers, consultants and auditors. In addition, we are hopeful that such improved standards could provide a cost effective tool to assist regulators in determining where to focus scarce resources.

We support the Bachus Draft framework because it appropriately treats institutional advisers differently from retail advisers and offers each group a regulatory framework suited to their business models. The resulting system would provide robust oversight and maximize investor protections without overly burdening institutional advisers or their clients. We look forward to working with the Committee Members on these important issues.

Association of Institutional INVESTORS™

Exhibit I

The Association's Comment Letter on Sections 913 and 914 of the Dodd-Frank Act

Institutional INVESTORS

December 24, 2010

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Sections 913 and 914 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Ms. Murphy:

Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") requires the Securities and Exchange Commission (the "Commission") to evaluate the effectiveness of the current standards of care applicable to brokers, dealers, investment advisers and their respective associated persons when providing personalized investment advice and recommendations to retail customers. Section 914 of the Act requires the Commission to analyze the need for enhanced examination and enforcement resources for investment advisers and to determine the extent to which having Congress authorize the Commission to designate one or more self regulatory organizations ("SROs") to augment the Commission's efforts in overseeing investment advisers would improve the frequency of examinations of investment advisers.

Members of the Association of Institutional Investors ("Institutional Investors")[1] discussed Sections 913 and 914 with Commission staff at a meeting held on October 25, 2010. At that meeting, members of Institutional Investors expressed their view that the same fiduciary standard that applies to investment advisers when managing all categories of client accounts should apply to brokers when providing personalized investment advice to retail customers. Further, with respect to Section 914, members were strongly of the view that the effectiveness of the Commission's ability to oversee and examine investment advisers would not be enhanced by the establishment of an SRO.

Institutional Investors continues to believe that the Commission should retain exclusive oversight of all registered investment advisers. Institutional Investors is pleased to provide the Commission with its views concerning regulation of investment advisers, should the Commission conclude, for resource or other reasons, that Congress should authorize an SRO for advisers. In such event, Institutional Investors urges the Commission to distinguish between investment advisers who predominantly provide investment advice to accredited investors (an "institutional adviser") and advisers who provide personalized investment advice to non-accredited investors (a "retail adviser").

[1] Institutional Investors is an association of some of the largest and oldest investment advisers in the United States who primarily provide services to institutional clients, such as registered investment companies, public and private pension plans, and foundations.

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December 22, 2010
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Institutional Investors believes that the Commission should retain exclusive examination authority over institutional advisers. For purposes of our proposal, Institutional Investors recommends that: (1) "accredited investor" be defined as it is currently defined in Regulation D under the Securities Act of 1933 (17CFR §230.501); (2) "institutional adviser" be defined as a registered investment adviser, whose annual gross revenues earned from providing advisory services to accredited investors represent 85% or more of the annual gross revenues earned from providing advisory services to all clients of the registered investment adviser;[2] and (3) "retail adviser" be defined as any registered investment adviser who is not an institutional adviser.

Institutional Investors believes that the distinction between institutional advisers and retail advisers should be drawn at the entity level in order to avoid duplication of regulatory oversight. The examination program for financial advisers should recognize the fundamental differences between accredited investors and non-accredited investors and between the activities of institutional advisers and retail advisers by not forcing a single examination process on all advisers with attendant consequences to such different classes of clients and activities.

Institutional Investors requests that the Commission provide clarification on the scope of services which would be classified as "personalized investment advice to retail clients" under Section 913 of the Act for the purpose of determining which advisers should be classified as "institutional advisers." In keeping with the above definition, Institutional Investors believes that an adviser's activities related to the manufacture and management of pooled investment products (such as mutual funds) should be considered institutional in nature for the purposes of the institutional adviser definition above, even if the ultimate purchasers of those products may be non-accredited investors. In addition, Institutional Investors believes that to the extent that an adviser supplies investment research or model strategies to other advisers for such advisers' use with end clients, but does not have investment discretion or direct contact with the non-accredited customer, such activities should be considered institutional in nature, and should not be categorized as providing "personalized investment advice to retail clients" for the purpose of determining whether the adviser should be considered an institutional adviser.

Many institutional advisers are affiliated with a limited purpose broker dealer whose business activities are limited to supporting the sale of shares of registered investment companies or private funds that are sponsored by the institutional adviser. Those services include the distribution of shares of those funds either to other broker dealers (who in turn sell the shares to the end investor), or to institutional investors or broker dealers to be included in their "wrap account" offerings. The hallmark of the sales activities of representatives of limited purpose brokers is that they are sales to institutional investors. Institutional Investors requests the Commission to consider whether the limited nature of such broker dealer activities, and the integrated activities of such broker dealers with the business of institutional advisers, warrant a separate regulatory structure from that applicable to full service broker dealers or broker dealers that engage with retail customers and whether the regulation and examination of such limited purpose broker dealers should be consolidated with the regulation and oversight of institutional advisers.

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[2] The proposed definitions of institutional advisers and limited purpose broker use the same standards used in Section 102(a) (6) of the Act to define "predominantly engaged."

The Act and the federal securities laws differentiate between the levels of protection provided to accredited investors versus non-accredited investors. Accredited investors are allowed to invest in various investment products, such as unregistered investment companies, 144A offerings, and privately placed securities that are simply off-limits to retail investors. Certain accredited investors are permitted to agree to performance-based fee structures that are unavailable to retail investors. Permitting accredited investors the freedom to invest in these products is appropriate because accredited investors are able to understand complex financial matters and assess risks far better than the typical retail investor.

In our experience, accredited investors are more proactive and self-reliant in overseeing the institutional advisers they hire. Almost all registered investment companies have independent boards and counsel, and most clients of institutional advisers either have their own staff or consultants that perform extensive due diligence on the institutional adviser's investment process and business operations and receive regular detailed reports on the performance of their portfolio.

Non-accredited investors are not similarly equipped. The relationship between a non-accredited investor and a retail adviser is better suited to prescriptive-rule based regulation than the relationship between an accredited investor and an institutional adviser.

We are concerned that if an SRO is created using FINRA as a model, it will not provide the flexibility needed by accredited investors because the rules based system that is applied to broker-dealers is ill-suited for the institutional market. A rules-based system reduces freedom of choice by requiring the same treatment of clients regardless of differences clients and facts and circumstances. This model was designed to protect less sophisticated clients that are unable to make well-informed decisions on complicated financial products. It sacrifices choice for an acceptable conduct standard. It is more reasonable for less sophisticated clients than it is for institutional clients. The Commission's staff has recognized how the facts and circumstances surrounding an adviser's relationship with a client will inform whether the contract terms between them are acceptable.[3][4] That same recognition should lead the Commission to different regulatory structures based on the classes of customers the Commission is seeking to protect.

Additionally, many institutional advisers include registered investment companies among their clients, either on a direct advisory or sub-advisory basis. As noted above, the regulation of registered investment companies is intertwined with the regulation of their advisers. If the Commission retains its examination authority over registered investment companies, it will be very inefficient to separate this retained examination authority from the examination of institutional advisers and risk inconsistent interpretations of the Investment Company Act of 1940 (the "40 Act").

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[3] Heitman Capital Management, LLC, SEC No-Action Letter (pub. avail. February 12, 2007).

[4] The European Union's Markets in Financial Instruments Directive ("MIFID") similarly distinguishes between various categories of clients. Under MIFID there are two main categories of clients—retail and professional—to allow for the tailoring of regulatory requirements according to the knowledge and experience of clients. Professional clients are considered to possess the experience, knowledge and expertise to make their own investment decisions and assess the risks inherent in their decisions. (Financial Services Authority, Implementing MIFID's Client Categorisation Requirements (August 2006)).

Ms. Elizabeth M. Murphy
December 22, 2010
Page 4

By limiting the reach of an adviser SRO to only retail advisers who provide personalized investment advice to retail clients, the Commission will avoid many of the drawbacks that a SRO poses to the institutional market. [5]

An SRO style prescriptive rule book is ill suited to the institutional market. By exempting institutional advisers the Commission will preserve the principles-based regulatory structure for institutional advisers and their clients, and thereby permit the institutional adviser and its client to manage the relationship as best suits their needs. Exempting institutional advisers from a SRO will also reduce the risk of inconsistent interpretations and application of the '40 Act to those advisers that advise registered investment companies.

Second, by diverting oversight of retail advisers to a SRO, the number of advisers to be examined by the Commission will be greatly reduced. The Commission should have adequate resources to examine and supervise the remaining institutional advisers subject to their jurisdiction.

Third, the Commission's other important responsibilities, including maintaining fair, orderly, and efficient markets, will be better served if the Commission retains examination responsibility over institutional advisers. Institutional advisers play a unique role in the market. How they manage assets is influenced by regulatory oversight and interpretation of complex, and at times, ambiguous laws and regulations. We believe the agency that is charged with the responsibility of maintaining fair, orderly and efficient markets should have the benefit of the knowledge it acquires through its oversight of institutional advisers and the ability to influence institutional advisers through the examination process.

In 1965, the Commission implemented a Securities and Exchange Commission Only ("SECO") program relating to the regulation of broker dealers that traded only in over-the-counter derivatives ("OTC"). The Commission eliminated the program in 1983 concluding that a direct regulatory program was not the best use of the Commission's resources. The SECO program is not analogous to the continued regulatory oversight of institutional advisers here advocated for by Institutional Investors.

First, SECO was developed as an alternative to compulsory membership in a SRO at a time when certain classes of broker dealers were first becoming subject to such regulation. To implement SECO, the Commission needed to develop a regulatory program to take on SRO responsibility. Here, the Commission has been responsible for examining institutional advisers for 70 years. A SRO for institutional advisers would disrupt this 70 years of experience and practice. Unlike broker-dealers,

[5] By way of background, the SRO system that was put into place to govern broker-dealers represented an incremental change to a system that predated the federal securities laws. As the former Director of the Commission's Office of Compliance Inspections and Examinations, Lori Richards, noted in 2000, "[t]he Securities Exchange Act of 1934 created the SEC and codified the existing self-regulatory system for broker-dealers. The SROs retained primary authority to regulate their members. Former Commission Chairman and later Supreme Court Justice William O. Douglas famously described the SEC's oversight role as akin to keeping a "shotgun, so to speak, behind the door, loaded, well-oiled, cleaned, and ready for use but with the hope it would never have to be used." (Self-Regulation in the New Era (Remarks by Lori Richards, Director, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission), NRS Fall 2000 Compliance Conference, Scottsdale, Arizona, September 11, 2000).

investment advisers were never members of an SRO. Therefore, requiring investment advisers to be subject to an SRO would amount to an unnatural graft on the existing regulatory structure.

Additionally, the SECO program involved different oversight programs based on trading activity rather than differences in the types of relationships that institutional and retail clients have with their advisers. Mandating a SRO for institutional clients will force changes onto those relationships in ways that the elimination of the SECO program did not. Finally, Institutional Investors' proposal will greatly reduce the number of advisers subject to the Commission's examination, thereby reducing the needed resources and enhancing the Commission's oversight of the advisers that remain exclusively subject to Commission examination.

Institutional Investors does not support the creation of a SRO for investment advisers, but if one is to be appointed Institutional Investors urges the Commission to recognize the fundamental ways in which the activities of institutional advisers differ from those of retail advisers. Institutional Investors urges the Commission to acknowledge those differences by retaining exclusive regulatory and examination authority over institutional advisers. Representatives of Institutional Investors would be pleased to meet with Commission staff to further discuss this proposal.

Very truly yours,

John Gidman, on behalf of
Institutional Investors

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STATEMENT OF WILLIAM DALY
SENIOR VICE PRESIDENT
GOVERNMENT RELATIONS
BOND DEALERS OF AMERICA

SUBMITTED FOR THE RECORD BEFORE THE HOUSE FINANCIAL SERVICES SUBCOMMITTEE ON CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES

Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight

2128 Rayburn House Office Building

Tuesday, September 13, 2011

Chairman Garrett, Ranking Member Waters and members of the Capital Markets and Government Sponsored Enterprises Subcommittee:

Thank you for the opportunity to submit for this statement from the Bond Dealers of America the record.

The Bond Dealers of America ("the BDA") is the only trade association exclusively focused on U.S. fixed income markets and represents middle-market brokers and dealers who are headquartered in cities all over the country, doing business throughout the United States coast to coast. Our members are the "Main Street" firms, not the Wall Street firms. They help communities around the country finance their schools, roads and bridges. They also provide liquidity for the investors in those communities.

We do not see a need to impose a so-called "fiduciary" standard on the relationship between broker-dealers and their clients. Broker-dealers are subject to strict standards of conduct that in many ways provide more protection to our clients than the vague fiduciary standard. No one, including the staff of the Securities and Exchange Commission in their report earlier this year, has pointed to any specific difference in these standards of conduct that would benefit investors.

The BDA opposes the imposition of a fiduciary standard on broker-dealers because it will expose broker-dealers to the risk of litigation and increased liability. This exposure will cause broker dealers to restrict their activities and will result in less liquidity for investors. In fact, the term "fiduciary" does not appear in either the statute or regulations. It is a court-imposed standard.

Moreover, a fiduciary standard is not what investor want or need.

The Securities and Exchange Commission and others have repeatedly expressed concern that investors do not understand the difference between the "suitability" standard required of broker-dealers versus the "fiduciary" standard required of registered investment advisors.

A recent study by J.D. Powers and Associates, however, casts new light on investor concerns. The study found investors indeed are confused about the fiduciary and suitability standards but are more concerned about receiving clear information, especially about fees and investment performance.

There's no dispute that information provided by dealers and investment advisors should be true and accurate. The information must include whatever is material to an investor's decision and match the investor's financial situation and risk tolerance. Further, investors should understand the different roles played by broker-dealers and investment advisors. All of that is required today of both broker-dealers and investment - advisors.

Last January, the SEC highlighted two key differences between the standards applied to broker-dealers on the one hand and investment advisors on the other. The first was the timing and required disclosure of conflicts of interest. This is easily resolved. The second, and more fundamental difference, though, is the burdensome and time consuming process imposed on advisors who act as a principal when buying and selling securities from clients.

Investment advisors generally do not encounter this problem because they usually do not act as principal. Broker-dealers, on the other hand, often act as principal, providing better liquidity to their clients. Applying the fiduciary standard to dealers could restrict this critical flow of capital by making the activity overly burdensome.

There is also the practical impossibility of applying the fiduciary standard to dealers. "Fiduciary" is a vague legal concept meaning someone is supposed to act in someone else's best interest. It is actually not mentioned in the statute or the regulations governing investment advisors.

So just what does "fiduciary" mean when a broker-dealer has been engaged by a client to buy or sell securities from that client? In these transactions, the dealer is by definition a counterparty. The problem is even thornier when the dealer is acting as an intermediary between two parties, a buyer and a seller, and both are the broker-dealer's clients. How can the broker-dealer owe a fiduciary responsibility to both?

Fundamentally, the dealer's role is incompatible with being a fiduciary. That does not mean that dealers can do whatever they want. They are bound by rules of fair dealing, best execution and other obligations that ensure they cannot take advantage of their clients.

If the SEC were to apply the "fiduciary" standard to broker-dealers, they would have to take into account the risk that if a client loses money on an investment, the client will sue and a court will impose a settlement.

Broker-dealers are already exposed to that risk today but, as a fiduciary, the risk would be immeasurably increased. Dealers would respond by offering clients less or charging

more, resulting in fewer choices, lower liquidity and higher costs for investors.

Investors need clear communication. They also need choice and liquidity. The SEC should not take steps that reduce investor choice or liquidity or increase investor costs.

Earlier this year Congressman Barney Frank wrote to SEC Chairman Mary Shapiro that Congress had looked at applying the fiduciary standard to broker-dealers and rejected it. He cited two specific sections of the Investment Advisor Act that effectively already apply to dealers — one that says don't defraud your clients and the other that says don't lie to them.

Congressman Frank further said if Congress had intended to copy the Investment Act and apply it to dealers, it would have done so. He believes there should be a new standard for dealers and not the old Investment Act standard. The Bond Dealers of America agree.

The new rules should be practical and clear. Vague labels like "fiduciary" will only confuse investors. The rules should focus on specific disclosure of the role and obligations of dealers and take into account there is not any substantial difference between the regulatory obligations of dealers and investment advisors, only differences in the timing and content of disclosures.

Dealers should not be labeled fiduciaries, because that term does not recognize the differences between dealers and investment advisors. The use of this entirely inappropriate term will surely bring about harmful, unintended consequences.

Finally, the new rules should not impose cumbersome requirements on dealers for buying and selling securities for

clients. The approach won't work and would not recognize the fundamental differences between dealers and investment advisors.

Instead, regulators should consider what investors want: clear information about their investment choices and the role of their investment professionals. If there are deficiencies in what dealers are disclosing to their clients, we should fix that and not impose an impractical new standard.

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

PROTECTING AMERICANS' RETIREMENT SAVINGS

STATEMENT FOR THE RECORD

On

The U.S. House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises hearing entitled:

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011

The Financial Services Roundtable[1] ("Roundtable" or "we") appreciate the opportunity to provide our views on a matter of high importance for Americans who are saving for their retirements. The Roundtable believes that providing these opportunities for all Americans to plan and save for their retirement years is important because savings increase domestic investment, encourage economic growth, and result in higher wages, financial freedom, and a better standard of living. We believe that most Americans should approach retirement with a comprehensive strategy that incorporates a number of retirement vehicles. Consumer education about retirement savings products can help consumers make sound investment decisions and provide opportunities for them to maximize their retirement savings. Further gains can be achieved through better use of investment advice, and by promoting policies that provide for more diversified, dynamic asset allocation, and exploration of new and innovative methods to help individuals make better investment decisions.

The Need for a Uniform Approach

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Section 913 of the Dodd-Frank Act generally charged the Securities and Exchange Commission with studying the obligations of broker-dealers and investment advisers (the "Report").[2] Among other things, the Dodd-Frank Act required the Commission to evaluate the effectiveness of existing legal or regulatory standards of care for securities professionals (brokers, dealers, investment advisers, *etc.*) who provide personalized investment advice and recommendations about securities to retail customers. In its review of standards of care for securities professionals, the Commission also was required to evaluate whether existing legal or regulatory standards have "gaps, shortcomings, or overlaps" in the protection of retail customers. The Commission submitted its Report to Congress on January 22, 2011.[3]

In its Report, the Staff recommended that the Commission promulgate a uniform fiduciary standard of conduct for broker-dealers and investment advisers who provide personalized investment advice about securities to retail customers and such other customers as the Commission determines.[4] In accordance with Section 913, the

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1 The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $ $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

2 Pub. Law No. 111-203, § 913(f), 124 Stat. 1376, 1828 (July 21, 2010).

3 SEC. & EXCH. COMM'N, *Study on Investment Advisers and Broker-Dealers: As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011) (the "Report"). The Commission did not express any view concerning the Staff's analysis, findings or conclusions.

4 *See id.* at 109-10.

Staff recommended that the Commission define the standard of care as a duty "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice."[5] As part of its rulemaking, the Staff further recommended that the Commission address not only the components of a uniform fiduciary standard (*i.e.*, the duties of loyalty and care), but that it also provide guidance on specific scenarios to assist broker-dealers in transitioning to the new standard.

In the interim, the Department of Labor proposed to re-define the definition of the term *fiduciary*[6] for purposes of Title I of ERISA[7] (the "Proposal"). Many of the issues we expect the Commission to address in its uniform fiduciary standard (*e.g.*, proprietary trading, compensation, and sales of proprietary products) also would impact financial services firms and professionals who would be deemed *fiduciaries* for purposes of ERISA. Accordingly, it is critical that the Department and the Commission work together to develop a practical approach that not only provides appropriate protections for investors, but also preserves each investor's ability to choose its service provider(s) and accommodates a range of business models.

The Roundtable is a long-standing supporter of harmonizing regulations applicable to broker-dealers and investment advisers who provide personalized investment advice and recommendations about securities to retail customers. We also support legal and regulatory protections for retail investors and capital markets.

Consistent with Congress's interest in developing a uniform standard of care, we believe that these worthy goals can be achieved without subjecting broker-dealers and investment advisers to costly, duplicative, and overlapping regulatory régimes that create confusion among investors, and do not recognize or allow for differences in the business models, services, and products provided by a range of financial services firms and professionals. The Roundtable also is concerned that the Department's proposal would impose a uniform duty of care on a subset of the financial services industry that would further increase investor confusion about the standard of care owed to them by their financial professionals, and impose an additional unnecessary—and expensive—layer of regulation on financial services firms and professionals.

We also note the differing approaches to potential conflicts of interest by the Department and the Commission. The Department generally prohibits potential conflicting interests, unless an exemption is available for the service provider's activities. However, the Commission's regulations may allow broker-dealers and

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[5] *Id.* at vi.

[6] DEPT. OF LABOR, *Definition of the Term "Fiduciary,"* 75 FR 65263 [RIN: 1210—AB32] (Oct. 22, 2010) (the "Proposing Release").

[7] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

investment advisers to manage potential conflicting interests by full disclosure to the customer and obtaining the customer's written consent to those potential conflicts.[8]

The two agencies are going down parallel tracks to address the same issues in sharply divergent ways. The Department is expanding the definition of fiduciary while preserving rules that would prohibit standard compensation practices in the broker-dealer industry. As proposed, disclosures of such practices could not cure a conflict of interest, although disclosure is a key element of the Commission's regulation of investment advisers and broker-dealers.

Accordingly, the Roundtable urges the Department to withdraw its rulemaking and to work collaboratively with the Commission (and other financial and banking regulators) to develop a harmonized definition of "fiduciary" and concomitant regulatory régime for all market participants, but particularly for those overlapping activities related to individual retirement accounts ("IRAs") and small business retirement plans.[9]

Notwithstanding the Roundtable's request that the Department withdraw its current version of the proposed definition of *fiduciary*, our Members fully support the Department's initiative to modernize the regulation and provide definitive guidance for the financial services and retirement planning industry to ensure that plan participants and beneficiaries have clear and concise information.

The Department's Proposed New Definition of *Fiduciary*

As proposed, a service provider would become a *fiduciary* if it provides *investment advice* or *recommendations* to an employee benefit plan, and *receives any compensation* (direct or indirect fees, *etc.*) for that advice or those recommendations.[10] Any service provider who provides *advice* on the *value or*

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[8] *See, e.g.*, Rules 206(3)-2 and 206(3)-3T under the Investment Advisers Act of 1940.

[9] The Roundtable further notes that a broker-dealer that is deemed to be a fiduciary becomes subject to a minimum net worth standard under of the Internal Revenue Code that operates independently of the minimum net capital requirement for broker-dealers specified by Rule 15c3-1(a) under the Securities Exchange Act of 1934. *Compare* 26 C.F.R. § 1.408–2(e)(5)(ii)(B) (imposing a net worth requirement of the greater of $100,000, or four percent of the value of all of the assets held in fiduciary accounts); *with* 17 C.F.R. § 240.15c3-1(a)(1)(ii) (requiring broker-dealers that calculate net capital under the alternative method to maintain net capital of not less than the greater of $250,000 or two percent of aggregate debit items computed in accordance Rule 15c3-3A, 17 C.F.R. § 24015c3-3A). Accordingly, we urge that the DOL and the SEC not work not only together to address these issues, but also confer with the Internal Revenue Service to address and avoid overlapping and inconsistent regulations.

[10] *See*, § 2510.3–21(c) Definition of *Fiduciary*, 75 FR at 65277. In another significant change, a service provider also would become a fiduciary if it provided any advice or recommendations to any plan participant or beneficiary. *See* Proposing Release, 75 FR at 65266 (citing Proposed rule 3-21(c)(1)(i)(B)). As a consequence, plan participants and beneficiaries could avail themselves of a private right of action under

investment of ERISA plan assets,[11] or who provides *advice* on the *management of plan assets* also would become a fiduciary.[12]

In an important change from the current rule originally promulgated in 1975,[13] the Proposal would not require that the parties (plan sponsor, participants or beneficiaries and the financial services provider) to reach a mutual understanding to establish a fiduciary relationship.[14] Nor would the Proposal require that the advice "be provided on a regular basis."[15] Finally, the Proposal also would expand the *fiduciary*-definition to individual retirement accounts ("IRAs"), which to this point have not been generally covered by ERISA.[16]

> *The Department's current definition of investment advice for purposes of determining one's fiduciary status is practically identical to the federal securities law definition of "investment adviser."*

The Department's current rule shares many similarities with the definition of "investment adviser" in section 202(a)(11) of the Investment Advisers Act of 1940:[17]

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation

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ERISA section 502(a)(2) against any plan fiduciary who breaches "responsibilities, obligations, or duties" arising under Title I of ERISA. *See* Proposing Release, 75 FR at 65273, n.32.

[11] Proposed rule 3-21(c)(1)(i)(A)(1).

[12] Proposed rule 3-21(c)(1)(i)(A)(3). *See* Proposing Release, 75 FR at 65266 (managing securities or other property also includes exercising rights appurtenant to particular securities, such as voting proxies).

[13] *Definition of "Fiduciary,"* 29 C.F.R. § 2510.3-21, 40 FR 50842 (Oct. 31, 2975) (establishing a "five-part test" to determine whether an ERISA service provider is a fiduciary because it renders "investment advice" to an ERISA plan). The elements of the current five-part test focus on whether an advisor who does not have discretionary authority or control over an ERISA plan's assets: (1) Provides *advice* concerning the *value* of—or makes *recommendations* as to the *advisability* of investing in, purchasing, or selling—securities or other property; (2) on a *regular basis*; (3) pursuant to *a mutual agreement*, arrangement or understanding with the plan or plan fiduciary that (4) the *advice* will serve as a *primary basis for investment decisions* concerning plan assets; and that (5) the *advice* will be *individualized* based on the *particular needs of the plan. See Definition of "Fiduciary,"* 29 C.F.R. § 2510.3-21(c) (2010).

[14] Proposing Release, 75 FR at 65267 ("The proposal also does not require that the parties have a mutual understanding that the advice will serve as a primary basis for plan investment decisions.").

[15] *See* Proposing Release, 75 FR at 65267 (distinguishing the Proposal from the provisions of current rule 3-21(c)(1)(ii)(B) [29 C.F.R. § 2510.3-21(c)(1)(ii)(B) (2010)]).

[16] *See* Proposed rule 3-21(c)(4) [29 C.F.R. § 2510.3-21(c)(4)]; Proposing Release, 75 FR at 65269 (applying the proposed definition of *fiduciary* to "any plan described in Code section 4975(e)(1), regardless of whether such plan is an employee benefit plan"). Section 4975(e)(1) includes individual retirement accounts within the meaning of section 408(a) of the Internal Revenue Code [26 U.S.C. § 408(a) (2010)].

[17] 15 U.S.C. § 80b-1 *et seq.* (2010).

> and as part of a regular business, issues or promulgates analyses or reports concerning securities.[18]

It is apparent that the Department does not understand the very capital markets it now seeks to regulate with the Proposal. For example, the staff wants to apply the definition of *investment adviser* under the Advisers Act in its regulations under ERISA independently of how the Commission would define the very term it promulgated under the Advisers Act. And yet the Commission is the statutorily-authorized regulator of the nation's capital markets, and the brokers, dealers, investment advisers, investment companies, and other registered market participants.

> *The Proposed definition poses several interpretative and practical challenges that are likely to reduce significantly the availability of retirement advice for American consumers.*

The meaning of *investment advice or recommendations* is so broad that the Proposal will cover many persons and entities that do not offer *investment advice* or *recommendations*. For example, a person who *appraises* or provides any *valuation* of an ERISA benefit plan's assets would become a *fiduciary* to the plan.[19] A custodial bank that merely reports the valuation provided by third-party pricing services of the plan's real estate, venture capital interests, swaps, or other *hard-to-value assets* on periodic plan statements or in performance measurement reports also would become a *fiduciary*. The Proposal also would bring within the ambit of ERISA fiduciary status:

- Any bank or securities firm that holds assets "as trustee" for an IRA.
- Computer programmers who write software code for asset allocation models or other financial strategies.
- Call Center employees who inform ERISA plan participants and beneficiaries of their alternatives upon retirement, resignation, layoffs, marriage, birth of a child, *etc.*[20]

By increasing substantially the categories of service providers who would be deemed *fiduciaries* for purposes of ERISA, the Department's Proposal would directly

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[18] 15 U.S.C. § 80b-2(11) (2010).

[19] *See* Proposed paragraph (c)(1)(i)(A)(1) of rule 2510.3-21. The Department stated the proposed definition would include "appraisals and fairness opinions." Proposing Release, *supra* note 7 at 65265. *Appraisers*—like external auditors—are required to be *independent* of the parties seeking an appraisal. Under the current definition of fiduciary, it would not be possible for a person who is the ERISA plan's fiduciary to also provide "appraisals" or "valuations" of assets held in any ERISA plan for which it also acts as the plan's fiduciary. Moreover, a requirement that the appraiser be independent of the ERISA plan would avoid "the fox minding the chicken coop" risk to ERISA plan participants and beneficiaries. However, by re-defining appraisers as "plan fiduciaries," the Proposal would engraft a patent conflict of interest onto any valuation or appraisal conducted by the plan fiduciary.

[20] This information would be extracted from the ERISA benefit plan disclosure documents that are distributed to all plan participants and beneficiaries.

increase the cost of providing retirement services and thereby decrease the availability of retirement planning options for all Americans.[21] The Department's Proposal also would lead to a "[r]educed choice of investment professional, level of investment guidance, and investment products."[22]

The Department's economic and cost-benefit analyses provide inadequate justification for wholesale revisions to the current definition of *fiduciary*.

Despite 35 years of experience with the *current definition of fiduciary*,[23] the Department's economic and cost-benefit analyses provide inadequate justification for its wholesale revisions to the current definition. The Department did not evaluate the *economic impact on small business* owners and small plan sponsors, who are unlikely to absorb the *potentially substantial increase in costs* arising from the expanded definition of *fiduciary*. This oversight is particularly troublesome in today's recessionary economic environment.

The Department now uses the results of a January 2011 GOVERNMENT ACCOUNTABILITY OFFICE *Study on 401(k) Plans*[24] to justify a rule it proposed three months earlier—in October 2010. The Department did not conduct *any* study or survey—or provide *any data*—on the *projected impact or effect on IRA owners* or IRA service providers before it proposed this *substantial change*. Nor did the Department provide any objective, quantifiable data to support its conclusion "that the proposed regulation's benefits would justify its costs."[25]

The Department's stated rationale for its Proposal is to pursue *bad actors* (*i.e.*, pension consultants and appraisers) who allegedly have provided substandard services and who failed to recognize or disclose conflicts of interest.[26] If this is the goal, then

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[21] *See* Oliver Wyman, Inc., OLIVER WYMAN REPORT: ASSESSMENT OF THE IMPACT OF THE DEPARTMENT OF LABOR'S PROPOSED "FIDUCIARY" DEFINITION RULE ON IRA CONSUMERS at 19-20 (Apr. 12, 2011) (the "OLIVER WYMAN REPORT"). The OLIVER WYMAN REPORT is based on aggregate proprietary data furnished by "[twelve] financial services firms that offer services to retail investors." *Id.* at 1. These firms "represent over 19 million IRA holders who hold $1.79 trillion in assets through 25.3 million IRA accounts [or roughly forty percent (40%) of IRAs in the United States and forty percent (40%) of IRA assets]." *Id.*

[22] *Id.* at 19.

[23] 40 FR 50842 (Oct. 31, 1975). *See also*, Mercer Bullard, *DOL's Fiduciary Proposal Misses the Mark* (June 14, 2011) ("It is unfair to the industry because it disregards decades of administrative law and practice under ERISA. It is bad for investors because it strips them of fiduciary protections when they are needed most.").

[24] GOVERNMENTAL ACCOUNTABILITY OFFICE, *401(k) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest*, GAO-11-119 (Jan. 28, 2011).

[25] Proposing Release, *supra* note [ ] at [page number].

[26] Proposing Release, *supra* note 7 at 65271 (citing a Securities and Exchange Commission staff report that found a majority of the 24 pension consultants examined in 2002-2003 "had business relationships with broker-dealers that raised a number of concerns about potential harm to pension plans"); SEC. & EXCH. COMM'N, *Staff Report Concerning Examinations of Select Pension Consultants* (May 16, 2005); GAO, *Private*

the Department should more narrowly tailor the proposed changes to reach those particular bad actors.

Moreover, the Department should *collaborate* with the Securities and Exchange Commission, Commodity Futures Trading Commission, Municipal Securities Rulemaking Board, FINRA, the Office of the Comptroller of the Currency, and other financial regulators to address gaps it perceives in oversight of broker-dealers, banks, trust companies, and similar service providers who already are subject to significant regulation.

The Department also should consider whether other regulations (including those enforced by financial or banking regulators) already provide adequate safeguards. For example, the Department's recent disclosure regulations will require pension consultants to disclose all direct and indirect compensation they receive before entering into a service arrangement with a plan.[27]

The *effects* of the Department's *collaboration* with financial and banking regulators to implement a regulatory régime that provides clarity and certainty *for investors and markets* should be *transparent*. *Conflicting rules create confusion for investors*, increase costs to service providers, and lessen the availability of retirement services overall.

Conclusion

We support the Department's initiatives to better protect plan participants and beneficiaries, and investors in IRAs and other retirement accounts. The Roundtable believes that the conflicting perspectives on broker-dealer compensation further support our view that the Department and the Commission should work closely together to address the definition of "fiduciary" as it is proposed to apply to broker-dealers and investment advisers—irrespective of whether the activity is one regulated by ERISA or by federal securities laws.

Given that Congress specifically charged the Commission to study the regulation of broker-dealers and investment advisers and to engage in rulemaking necessary to address any gaps or shortcomings in their regulation,[28] we believe that

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Pensions: Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans, GAO-09-503T, Testimony Before the Subcommittee on Health, Employment, Labor and Pensions, Education and Labor Committee, House of Representatives at 4 (Mar. 24, 2009) (noting that 13 of the 24 pension consultants examined by the Securities and Exchange Commission's staff "had failed to disclose significant ongoing conflicts of interest to their pension fund clients").

[27] DEPT. OF LABOR, Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule [RIN: 1210—AB07], 75 FR 64910 at 64937 (Oct. 20, 2010).

[28] *See* Section 913 of the Dodd-Frank Act.

the Commission, and not the Department, should be the lead-agency charged with promulgating any regulations that potentially could change in a fundamental way the manner in which broker-dealers and their registered representatives are compensated. We believe that regulatory changes in this area should reflect the findings of the section 913 study, and warrant a collaborative approach by the Department, the Commission, and other financial regulators in light of the complexity of the issues, the potential far reaching scope and implications of the rulemakings by the Department and the Commission, and the risk of inconsistent and overlapping regulation.

Since the Department and the Commission are at the threshold of introducing momentous changes to the regulation of entities deemed to be fiduciaries under ERISA as well as federal securities laws, the Roundtable believes it is imperative that the Department withdraw its proposed rulemaking so that the Department and the Commission can work together to harmonize the regulation of fiduciaries that are subject to ERISA and the federal securities laws.

The Roundtable thanks the the Chairman, the Ranking Member, and the Subcommittee for the opportunity to provide the views of its Members on the adverse impact of the Department's proposed re-definition of the term *fiduciary*. We stand ready to work with you, and with the Department, the Commission, and other financial regulators to develop regulatory responses that protect our customers and markets, and allow us to provide a full-range of investment products and services to our customers.

Independent Insurance Agent®

STATEMENT
ON BEHALF OF THE
INDEPENDENT INSURANCE AGENTS & BROKERS OF AMERICA

BEFORE THE

COMMITTEE ON FINANCIAL SERVICES
SUBCOMMITTEE ON CAPITAL MARKETS
AND GOVERNMENT SPONSORED
ENTERPRISES

UNITED STATES HOUSE OF REPRESENTATIVES

September 13, 2011

IIABA is the largest association of insurance agents and brokers in the United States and we appreciate having the opportunity to comment on the regulatory oversight of broker-dealers and legislative proposals to improve investment advisor oversight. A significant number of our members offer investment and securities-related insurance products and would be adversely affected by the establishment of a universal fiduciary standard of care.

IIABA strongly opposes the establishment of a fiduciary standard of care for registered representatives who offer financial products. Such a significant revision to the current regulatory structure is unwarranted, and the increased burdens on financial providers and adverse consequences for consumers certainly outweigh any measurable accompanying benefits. This seemingly innocuous and unremarkable change will have serious repercussions that have not been fully examined by policymakers or regulators, and the indiscriminate and wholesale application of this standard has not been adequately defended and justified by its proponents.

Imposing such a standard would force broker-dealers and their registered representatives to recommend the absolute "best" option to their customers, but identifying the ideal product among many different alternatives is not as simplistic, straightforward, and clear-cut as some mistakenly believe. Any such determination is inherently subjective (especially given the wide range of variables that can be considered in making such a determination), and one person's conclusion concerning the best available option for a particular consumer will naturally differ from others. In addition, the preferred option at the time a recommendation is offered may not seem so appealing or attractive in hindsight if it does not meet anticipated expectations or is outperformed over time by a competing product. Creating a universal fiduciary standard – which is vague and ambiguous by its very nature – merely adds unnecessary uncertainty to securities transactions and increases the likelihood of second-guessing and litigation when a particular transaction is retrospectively scrutinized years after the initial recommendation is made.

Altering the existing standard will also reduce the universe of qualified professionals willing to offer knowledgeable assistance and investment services (often at no direct expense to the buyer). This government-imposed weakening of industry competition will ultimately harm consumers. Many broker-dealers and registered representatives, including the main street businesses represented by IIABA, will simply cease their securities-related operations given the uncertainty associated with such an amorphous and subjective standard, higher compliance and insurance costs, and well-founded fears about increased liability exposure. A sizable number of IIABA's members are able to review and service the investment, insurance, and other financial needs of their customers on a holistic basis today, but a change in the standard of care will force many to narrow their emphasis and instead operate only in limited niches or sector- specific silos. With fewer advisers serving the financial needs of the general public, far fewer consumers will have the opportunity to access the variety of financial products and quality of personalized financial assistance available to other more affluent Americans. Many middle class Americans – especially those unwilling or unable to pay upfront fees for guidance – will effectively lose access to competent financial guidance and certain investment products and services.

Broker-dealers and registered representatives already adhere to a rigorous and strictly-enforced standard of care and may only offer or recommend products that are suitable for a customer based on that person's needs, objectives, and financial situation. Before a recommendation can be made, a financial provider must acquire and analyze important information about the client and determine which investments are suitable in light of those facts. Recommendations concerning certain products trigger even greater regulatory requirements under current law, and transactions involving the purchase or exchange of deferred variable annuities, for example, highlight how precise and prescriptive these existing mandates can be. A strong regulatory regime with meaningful market conduct, supervisory, record-keeping, and other mandates is already in place, and appropriate and potent remedies exist for those who are the victims of improper or unlawful acts. Anomalies and examples of improper marketplace behavior will occur in rare instances, but strong regulation and enforcement of existing requirements is the proper and more effective response. Altering the standard of care is not a panacea that will eliminate bad actors and bad behavior, and it is important to remember that some of the most noteworthy and notorious financial crimes in U.S. history have been committed by registered investment advisers (including Bernard Madoff) who were required to adhere to the same standard of care that some wish to extend across the board.

Those who propose the establishment of a one-size-fits-all fiduciary standard presume that the interests of financial providers and customers regularly conflict and that providers act in their own self-interest to the detriment of customers as a matter of practice, but there is no evidence to support such a conclusion. The truth is that consumers have unprecedented access to a wide array of financial products and are extremely well-served in the current environment. Brokers and registered representatives proudly serve the needs of their customers, and the fierce competition on the ground floor of the marketplace keeps providers responsive and accountable. In nearly every aspect of the securities marketplace and certainly in main street America, the existence of effective competition deters improper conduct and self-interested behavior.

IIABA thanks the subcommittee for holding this very important hearing. The high quality of recommendations made by broker-dealers and their registered representatives will not improve as a result of a change in the standard of care, and taking such a drastic step will reduce competition and have severe consequences for countless main street businesses and the consumers who rely on these qualified and accountable providers for their financial needs. Many Americans will lose the ability to turn to a trusted voice in their local communities for assistance with their investment and planning needs if the anticipated changes to the standard of care take effect.

Statement for the Record of Paul Schott Stevens
President and CEO of the Investment Company Institute

Hearing on "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

Subcommittee on Capital Markets and Government Sponsored Enterprises
Committee on Financial Services

United States House of Representatives

September 13, 2011

My name is Paul Schott Stevens. I am President and CEO of the Investment Company Institute, the national association of U.S.-registered investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs) (collectively, "registered funds").[1] I very much appreciate the opportunity to submit this statement in connection with the Subcommittee's hearing on the regulation and oversight of broker-dealers and investment advisers.

The fund industry has a significant interest in the subject of this hearing. Investors in more than 30 million U.S. households own registered funds purchased through or with the help of financial professionals such as broker-dealers and investment advisers.[2] The strength of the regulatory regime that applies to those financial professionals, the standard of care applicable to each, and the effectiveness of the system of oversight are issues of great importance to these millions of investors.

This statement describes ICI's positions on three issues: (1) the appropriate standard of care applicable to broker-dealers when providing personalized investment advice about securities to retail customers, which was the subject of the study mandated by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"); (2) ways to provide enhanced examination resources for investment advisers, which was the subject of the study mandated by Section 914 of the Dodd-Frank Act; and (3) the need for improved product-neutral point-of-sale disclosure by financial intermediaries of all types.

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[1] ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of registered funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $12.9 trillion and serve over 90 million shareholders.

[2] *See 2011 Investment Company Fact Book*, available at http://www.icifactbook.org, at Chapter 6, Figures 6.1 and 6.7.

Section 913 and Fiduciary Duties

The SEC staff delivered its study mandated by Section 913 to Congress in January.[3] It recommended, among other things, that the SEC exercise its discretionary rulemaking authority to implement a uniform fiduciary standard of conduct for broker-dealers and investment advisers when they are providing personalized investment advice about securities to retail investors. Importantly, the study recommended that the uniform standard of conduct be "no less stringent" than the fiduciary duty that applies to investment advisers today. Our positions on the recommendations in the 913 Study and the timing of implementing rulemaking are set forth below.

Recommendations in the 913 Study

ICI agrees with the basic recommendations in the 913 Study. We, too, believe that the SEC should establish a fiduciary standard for broker-dealers that provide personalized advice or recommendations about securities to retail customers. When acting in this capacity, a broker-dealer is performing substantially the same function as an adviser, and the legal distinctions between the two are often unclear and largely irrelevant to investors.[4] And if the conduct is substantially the same, the same standard should apply. In both contexts, the customer deserves a strong, fiduciary standard of care that puts his or her interests above those of the intermediary. As SEC Chairman Mary L. Schapiro recently stated, it is "difficult to justify why there should be different rules and standards of conduct for the two roles—especially when the same or substantially similar services are being provided. Investment professionals' first duty must be to their clients."[5]

We also agree with the 913 Study's recommended approach to implementation—namely, that the SEC would adopt rules establishing the new uniform fiduciary standard for advisers and broker-dealers as an "overlay" to supplement, and not supplant, the existing investment adviser and broker-dealer regimes. We support that approach because it would preserve the strong fiduciary standard that applies to investment advisers, along with existing precedent, while applying the same high standard to both advisers and brokers when they are providing substantially similar services to retail clients.

In crafting such rules, the SEC must take care to apply the fiduciary standard to broker-dealers in a way that will not chill legitimate practices. For example, broker-dealers should be permitted, consistent with a fiduciary duty, to:

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[3] Staff of the Division of Investment Management of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers* (January 2011), available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf ("913 Study").

[4] *See* LRN-RAND Center for Corporate Ethics, Law, and Governance, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* (March 2008).

[5] Mary L. Schapiro, Chairman of the U.S. Securities and Exchange Commission, Testimony on "Enhanced Oversight After the Financial Crisis: The Wall Street Reform Act at One Year" Before the United States Senate Committee on Banking, Housing and Urban Affairs (July 21, 2011), available at http://www.sec.gov/news/testimony/2011/ts072111mls.htm#P39_10026.

- Maintain a commission-based business that does not involve the provision of personalized advice. Simply selling an investment product should not be a fiduciary act.
- Limit the scope, nature, and anticipated duration of the relationship with the customer. An adviser's fiduciary duty is not unlimited in scope; a broker's should not be either.
- Sell proprietary investment products. Both advisers and brokers must be able to disclose any material limitations on the range of investment products about which they advise clients, and whether similar products are available outside that range.
- Offer the use of financial calculators or similar investment tools for general informational purposes without, in most instances, taking on fiduciary status (although we recognize that the use of these types of tools may, in some circumstances, entail the provision of personalized advice).
- Execute unsolicited trades without taking on fiduciary status.
- Service orphaned accounts without taking on fiduciary status.
- Engage in trading as principal, subject to appropriate limitations, disclosure, and customer consent.

We recognize that this last point on principal trading is one of the more difficult areas that the SEC will need to address through its rulemaking. There is the potential for self-dealing when any fiduciary—whether a broker-dealer or adviser—acts as principal in transactions with customers. The SEC must address this potential conflict, but also must recognize that dealer activities like trading as principal have the potential to benefit customers through enhanced liquidity, expanded investment choices, and better execution of trades. As a model, the SEC could look to Section 206(3) of the Investment Advisers Act of 1940 ("Advisers Act"), which governs principal and agency-cross trades between advisers and their clients.[6] It should recognize, however, that imposing all of the requirements of that section, including trade-by-trade disclosure and customer consent, may not be warranted for broker-dealers, particularly given demonstrated difficulties that advisers have faced in complying with this regime.[7]

There is one final element of the 913 Study that we would like to highlight for the Subcommittee. In several places, the 913 Study states that the SEC staff has taken the position that a

[6] Section 206(3) makes it unlawful for an adviser, acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to the transaction. *See* pages 24–27 of the 913 Study for a more complete description of Section 206(3).

[7] We would encourage the SEC to use this opportunity also to revisit its interpretations under Section 206(3) for registered investment advisers.

person's receipt of transaction-based compensation (i.e., commissions) is a hallmark of broker-dealer activity, and that investment advisers receiving transaction-based compensation would need to consider whether they are obligated to register as broker-dealers under Section 15 of the Securities Exchange Act of 1934.[8] As the standard of care for broker-dealers and advisers is harmonized, the label applied to the type of compensation they receive should no longer be relevant. Advisers and broker-dealers providing personalized investment advice or recommendations should equally be permitted to receive—and share—both asset-based fees and commissions.

Rulemaking Necessary to Implement the 913 Study's Recommendations

The Subcommittee has asked witnesses for their views on whether the SEC should move forward with this rulemaking, and, more specifically, whether SEC action could create potential problems in light of the standard of care rulemaking proposed by the Department of Labor. We believe it is important for the SEC to move forward with this rulemaking. It has a number of initiatives on its agenda that are related to the sale of fund shares, including changes to the rule governing distribution fees (Rule 12b-1) and point-of-sale disclosure (discussed below). In order to address most thoughtfully the entire range of distribution-related issues facing it, we believe the SEC first ought to resolve the debate over the appropriate standard of care applicable to broker-dealers, and then address point-of-sale disclosure, confirmation disclosure, and Rule 12b-1.

With respect to DOL's rulemaking, it is important to understand that DOL and the SEC proceed from different statutory frameworks. While there are similarities in ERISA and the securities laws about the general obligations that attach to fiduciaries, there are also important differences. For example, an ERISA fiduciary is subject to strict prohibited transaction rules that apply only to ERISA fiduciaries. Because of these rules, compensation arrangements that are common and legal from the SEC's perspective could become illegal, absent an exemption, if a person or firm is deemed an ERISA fiduciary.

The separate debates at DOL and the SEC need not pose a regulatory conflict. Indeed, in both contexts, the Institute supports assuring that individual investors are protected by an appropriate legal duty *when receiving personalized investment advice*, as long as that duty is crafted such that it does not chill legitimate practices and investors do not lose access to the investment products and services that meet their needs. That said, the ongoing debates are an example of the potential for regulatory hodgepodge, and it is important that neither regulator act in a vacuum.

[8] *See* 913 Study at n.164, Section II.B.2, and n.514. The SEC elsewhere has sought comment on whether the opposite is also true—whether a broker-dealer's receipt of ongoing compensation such as 12b-1 fees might require it to register as an investment adviser. *See Mutual Fund Distribution Fees; Confirmations*, SEC Release Nos. 33-9128; 34-62544; IC-29367 (July 21, 2010), at 124–25.

The Future of Adviser Oversight

ICI and its members strongly support a vigilant and effective examination program for investment advisers. The trust that over 90 million investors place in registered funds is in no small part due to the rigorous regime under which funds and their advisers operate. As required by Section 914 of the Dodd-Frank Act, earlier this year the SEC staff undertook a study considering the need to enhance investment adviser examinations.[9] The staff concluded that "the Commission likely will not have sufficient capacity in the near or long term to conduct effective examinations of registered investment advisers with adequate frequency."[10] The study recommended that Congress consider several potential options to strengthen the SEC's examination program. We provide our perspectives on these options below.

The SEC Should Remain the Primary Regulator for Investment Advisers to Registered Funds and Their Affiliates

We believe it is imperative that the SEC continue to serve as the primary regulator for investment advisers that advise registered funds, in light of the size and importance of these funds. In addition to being regulated under the Advisers Act, advisers to registered funds must comply with the Investment Company Act of 1940 ("Investment Company Act") and its rules, which—along with a robust body of formal and informal staff guidance—create a comprehensive framework governing all aspects of the registered fund business. Consistent with this, in its examinations of registered fund complexes, the SEC staff typically reviews not only the registered funds, but all of their service providers, including advisers, principal underwriters, administrators, and transfer agents. In addition, the SEC's examination staff and its rulemaking staff have a close working relationship that fosters the application of existing rules and the development of new ones. The SEC benefits from having its examination staff "on the ground" and reporting back on potential concerns or rulemaking suggestions, while SEC examiners benefit from the guidance of the rulemaking staff and knowledge of its policies and objectives.[11] While not immune from problems, this regulatory framework has proven to be extraordinarily successful in safeguarding the interests of some 90 million investors while also allowing for the growth of a competitive and innovative industry that today boasts nearly $13.6 trillion in assets

[9] Staff of the Division of Investment Management of the U.S. Securities and Exchange Commission, ***Study on Enhancing Investment Adviser Examinations*** (January 2011), available at http://www.sec.gov/news/studies/2011/914studyfinal.pdf ("914 Study").

[10] *Id.* at 3.

[11] Indeed, Section 965 of the Dodd-Frank Act requires compliance examiners to be placed in the Divisions of Investment Management and Trading and Markets, likely to further facilitate this important relationship.

under management.[12] It also has provided the SEC with 70 years' worth of irreplaceable institutional knowledge, experience, and continuity.

We appreciate that the SEC has concerns about whether its resources are, or in the future will be, sufficient to allow it to fulfill adequately its regulatory obligations to oversee all registered investment advisers under its jurisdiction. We believe this is a particular risk with respect to smaller investment advisers due to the "risk-based" approach the SEC staff takes when allocating examination resources. Under this risk-based approach, the staff focuses its examination resources on those advisers that, among other things, have greater assets under management, and thus could harm more investors in the event of poor internal controls or malfeasance.[13] As a result, registered fund complexes tend to have more frequent examinations than smaller advisory firms. We believe that efforts to reform the examination program should focus primarily on efforts to fill this gap in oversight. We believe these concerns could be addressed by either of two primary options the SEC staff presented in the 914 Study.[14]

SROs for Registered Investment Advisers

One option the SEC staff recommended that Congress consider is authorizing one or more self-regulatory organizations (SROs) to examine SEC-registered investment advisers, subject to SEC oversight. We previously have expressed some concerns with delegation of SEC oversight of all registered investment advisers to one or more SROs,[15] but in recognition of the importance of ensuring that smaller, retail-facing advisers are subject to meaningful oversight, have given much thought to a middle ground. In our view, requiring registered funds and their affiliates to remain subject to SEC oversight,[16] with other registered investment advisers to be overseen by an SRO, provides a reasonable

[12] Source: ICI data. As of June 30, 2011, mutual funds had $12.228 trillion in assets, ETFs had $1,077.3 trillion in assets, and closed-end funds had $241 billion in assets. As of December 31, 2010 (the most recent data available), UITs had $50.1 billion in assets.

[13] *See, e.g.,* United States Securities and Exchange Commission, 2004-2009 Strategic Plan, at 32, available at http://www.sec.gov/about/secstratplan0409.pdf ("The SEC will fully implement a risk-based methodology for selecting and setting examination and inspection cycles for investment advisers and funds. Larger or higher risk entities will be examined more frequently to ensure that the agency quickly identifies problems before they affect large pools of savings."); *see also* Remarks at the IA Watch Annual IA Compliance Best Practices Seminar by Carlo V. di Florio, Director, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission (March 21, 2011), available at http://www.sec.gov/news/speech/2011/spch032111cvd.htm.

[14] We believe that the third option discussed in the 914 Study, that of having an SRO with responsibility only for "dually registered" entities (those registered as both advisers and broker-dealers), has less merit. Many financial services complexes have one or more advisers that are dually registered, and other advisers that are not. Under this approach, advisers within the same complex would be subject to differing regulatory oversight and interpretations.

[15] *See* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated October 25, 2010, available at http://www.sec.gov/comments/df-title-ix/enhancing-ia-examinations/enhancingiaexaminations-6.pdf.

[16] As discussed below, there may be other entities that similarly should remain with the SEC.

way to fill the gap in oversight, while preserving the robust examination program the SEC currently follows for registered funds and their affiliates.

This option must be carefully designed to avoid duplicative regulation. This could be accomplished, in part, by ensuring that fund advisers and other institutional advisers that already are subject to substantial SEC regulation, along with their affiliates, remain under SEC oversight. In addition to fund advisers, institutional advisers that could remain subject to SEC examination might include those that advise private funds, ERISA plans, collective trust funds, endowments, foundations, non-U.S. clients, and other institutional clients. Under this option, we would recommend that if 90 percent or more of the assets under management of a registered investment adviser were attributable to such institutional clients, the adviser would remain subject to SEC oversight. In addition, we would recommend that other registered investment advisers under common control with the adviser remain subject to SEC oversight, in order to avoid the inconsistencies that would result if commonly controlled advisers were subject to examination by two different regulators. For example, advisory complexes frequently use one trading desk for all their affiliates' trading activity, and often have common compliance policies, procedures and personnel. Having advisers potentially subject to different interpretations that could affect these and other areas likely would create confusion and the potential for inadvertent compliance violations. Having the SEC continue to focus on this segment of the advisory industry would preserve its institutional knowledge for those firms currently receiving examination attention. An SRO would have responsibility for those entities that rarely, if ever, receive a regulator visit.

Imposing User Fees on SEC-Registered Investment Advisers

Another option the SEC staff outlined would involve requiring SEC-registered investment advisers to pay user fees to the SEC to fund the cost of their examinations. We believe this also may be a viable option to address the SEC's resource concerns. Under this approach, all registered investment advisers would remain subject to examination by their primary regulator, the SEC. User fees could be assessed based on objective factors, established by SEC rulemaking, such as the number and types of clients an investment adviser has and the amount of its assets under management.

This regime must, however, distinguish between those entities that currently pay fees for their regulation and those that do not. For fund complexes, the calculation of assets under management should exclude assets managed in registered funds. These funds already pay asset-based registration fees pursuant to the Investment Company Act. We note that the existing examination process for registered fund complexes which includes, as discussed above, a review of a fund's advisers and other service providers, is already far more rigorous than that of other products and services offered by registered investment advisers. We are not aware of any recent criticism of the SEC in this respect.

We would be pleased to work with the Subcommittee to further develop either of these concepts, particularly as they might apply to registered funds.

"Point-of-Sale" and Other Disclosure Initiatives Relating to Potential Intermediary Conflicts

Although we understand that today's hearing will focus on the studies mandated by Sections 913 and 914, we would encourage the Subcommittee to consider a broader, related issue—the pressing need for better product-neutral "point-of-sale" disclosure by both broker-dealers and investment advisers.

The SEC is studying new point-of-sale disclosure rules pursuant to mandates in the Dodd-Frank Act.[17] At the same time, FINRA is considering imposing new revenue sharing disclosure rules on broker-dealers that sell registered funds,[18] while also contemplating a broader conflicts disclosure document that brokers could provide customers at the beginning of their relationship.[19] While we strongly support many of these initiatives in concept, we question those that single out registered funds.

ICI has long supported enhanced disclosure to help investors assess and evaluate a broker's recommendations.[20] Certain compensation structures have the potential to influence financial intermediaries' recommendations to their clients, such as by creating incentives to inappropriately favor some products over others. To enable investors to assess these incentives and make better informed investment decisions, we believe financial intermediaries should be required to provide relevant disclosure for all retail investment products they sell, including variable annuity contracts and separate accounts. From an investor perspective, the need for this type of disclosure is neither intermediary-specific nor product-specific. It is equally important for both broker-dealers and investment advisers, and equally important for all retail investment products—not just registered funds.[21]

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[17] The Section 913 Study recommended that the SEC "facilitate the provision of uniform, simple and clear disclosures to retail customers about the terms of their relationships with broker-dealers and investment advisers, including any material conflicts of interest" and "consider the utility and feasibility of a summary disclosure document containing key information on a firm's services, fees, and conflicts and the scope of its services." In addition, Section 917 of the Dodd-Frank Act requires the SEC to conduct a study regarding financial literacy among investors. The Section specifically requires the SEC to identify, among other things: (1) "methods to improve the timing, content, and format of disclosure to investors with respect to financial intermediaries"; (2) "the most useful and understandable relevant information that retail investors need to make informed financial decisions before engaging a financial intermediary or purchasing an investment product or service that is typically sold to retail investors"; and (3) "methods to increase the transparency of expenses and conflicts of interests in transactions involving investment services and products." A report is due to Congress by July 2012.

[18] *See* FINRA Notice of Filing of Proposed Rule Change and Amendment No. 1 to Adopt NASD Rule 2830 as FINRA 2341 (Investment Company Securities) in the Consolidated FINRA Rulebook, 76 Fed. Reg. 26779 (May 9, 2011). Although this particular proposal has since been withdrawn, we believe it nevertheless evidences FINRA's continued interest in pursuing this rulemaking.

[19] *See* Disclosure of Services, Conflicts and Duties, FINRA Regulatory Notice No. 10-54 (October 2010).

[20] *See, e.g.*, Testimony of Paul Schott Stevens, President and CEO, Investment Company Institute, Before the U.S. House of Representatives Subcommittee on Capital Markets and Government Sponsored Enterprises on "Oversight of the Mutual Fund Industry: Ensuring Market Stability and Investor Confidence" (June 24, 2011), available at http://www.ici.org/pdf/11_house_mf_oversight_tmny.pdf; and Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, SEC, dated May 31, 2011, available at http://www.ici.org/pdf/25232.pdf.

[21] *See, e.g.*, Testimony of Paul Schott Stevens, President and CEO, Investment Company Institute, Before the U.S. House of Representatives Committee on Financial Services on "Industry Perspectives on the Obama Administration's Financial

We recognize that developing such disclosure is a substantial undertaking, and requires careful consideration of a number of issues. For example, regulators must understand how disclosures could be made most efficiently and with minimal disruptions to the sales process. To the extent that disclosures may be made orally to investors transacting over the telephone, mechanisms for tracking compliance must be considered. The appropriate substance of the disclosure, possibly including information about broker compensation and conflicts of interest, must also be determined.

We are pleased that the Dodd-Frank Act directed the SEC to consider these issues through the studies in Sections 913 and 917. We also support the product-neutral approach of Section 919 of the Act, which expressly affirms the SEC's authority to require broker-dealers to provide information to retail investors with respect to *any* product or service the investor may purchase.

We urge Congress to continue to view broker disclosure as a critical need for retail investors across *all* products, and to discourage regulatory initiatives that would single out registered funds. Requiring point-of-sale disclosures only prior to selling registered funds would create incentives for broker-dealers and other intermediaries to sell products not subject to the same requirement, even when those products are potentially less suitable or do not offer the same level of regulatory protection and other benefits for investors. As former NASD Chairman Robert Glauber said, "[a]n investor should be sold a security because it's right for him or her, not because it's easier to sell than something else."[22]

Conclusion

We appreciate the opportunity to share our views with the Subcommittee, and we look forward to working with Congress and regulators as they seek to address these many important issues in the best possible way for the millions of American investors who rely on registered funds to achieve their investing goals.

Regulatory Reform Proposals" (July 17, 2009), available at http://www.ici.org/govaffairs/testimony/09_reg_reform_jul_tmny.

[22] *See* Remarks by Robert Glauber, Chairman, NASD, at the Investment Company Institute's 2006 General Membership Meeting (May 18, 2006), available at http://www.finra.org/PressRoom/SpeechesTestimony/RobertR.Glauber/p016642. Similarly, in the context of Rule 12b-1, Barbara Roper of the Consumer Federation of America stated that by considering fee disclosures as "a mutual fund issue, instead of a broker compensation issue, sort of more holistically, you run the risk that you make mutual funds less attractive to sell. And I think that would be a very bad thing." *See* Remarks by Barbara Roper, Director of Investor Protection, Consumer Federation of America, at the Securities and Exchange Commission's 12b-1 Roundtable, Unofficial Transcript, p. 196, available at http://www.sec.gov/news/openmeetings/2007/12b1transcript-061907.pdf.

MANAGED FUNDS ASSOCIATION

WRITTEN STATEMENT

OF

RICHARD H. BAKER
PRESIDENT AND CHIEF EXECUTIVE OFFICER

MANAGED FUNDS ASSOCIATION

For the Hearing
Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight

BEFORE THE

SUBCOMMITTEE ON CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES
COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 13, 2011

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WRITTEN STATEMENT OF MANAGED FUNDS ASSOCIATION

Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight
September 13, 2011

Managed Funds Association ("MFA") is pleased to provide this statement in connection with the House Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises' hearing, "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight," held on September 13, 2011. MFA represents the majority of the world's largest hedge funds and is the primary advocate for sound business practices and industry growth for professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. MFA's members manage a substantial portion of the approximately $2 trillion invested in absolute return strategies around the world.

MFA's members are among the most sophisticated institutional investors and play an important role in our financial system. They are active participants in the commodity, securities and over-the-counter derivatives markets. They provide liquidity and price discovery to capital markets, capital to companies seeking to grow or improve their businesses, and important investment options to investors seeking to increase portfolio returns with less risk, such as pension funds trying to meet their future obligations to plan beneficiaries. MFA members engage in a variety of investment strategies across many different asset classes. The growth and diversification of investment funds have strengthened U.S. capital markets and provided investors with the means to diversify their investments, thereby reducing overall portfolio investment risk. As investors, MFA members help dampen market volatility by providing liquidity and pricing efficiency across many markets. Each of these functions is critical to the orderly operation of our capital markets and our financial system as a whole.

MFA members favor smart, effective regulation of securities markets generally, and have a strong interest in thoughtful and efficient regulation of hedge fund managers. MFA provided its views to policy makers during the deliberations leading to enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), and MFA is actively engaged in working with regulators as they undertake rulemakings to implement the Act. MFA supports many of the regulatory reforms in the Dodd-Frank Act that are designed to enhance oversight of private fund managers and strengthen our capital markets, including the mandatory registration of unregistered managers of private pools of capital, a framework for the oversight of systemic risk that includes reporting of information to regulators by market participants, and reducing systemic risk and enhancing transparency by transitioning eligible over-the-counter derivatives ("OTC") markets to central clearing.

MFA strongly supports the approach taken in the Dodd-Frank Act to subject managers of private pools of capital to oversight by the SEC as investment advisers under

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the Investment Advisers Act of 1940 (the "Advisers Act"). A significant proportion of our members are already registered as investment advisers with the SEC, and we anticipate that most of our members will be registered with the SEC as of March 30, 2012, the effective date of registration. We offer these comments on the future oversight of the private fund manager industry in light of our extensive experience with the regulatory framework for investment advisers and the SEC inspection and examination process.

Section 914 of the Dodd-Frank Act requires the SEC to study its examination program for investment advisers and the extent to which the establishment of a self-regulatory organization ("SRO") would improve the frequency of investment adviser examinations. The SEC staff report under Section 914, "Study on Enhancing Investment Adviser Examinations (the "Study")," assesses its examination program and recommends, among other things, that Congress consider authorizing one or more SROs to examine SEC-registered investment advisers. We appreciate the thoughtful and balanced approach taken in the Study in evaluating the SEC's examination program and the potential consequences of an SRO for investment advisers, and we have carefully considered its recommendations.

Based on our experience, we strongly believe that the existing framework of SEC regulation of private fund managers, as enhanced in a number of respects by the Dodd-Frank Act and regulatory implementation of the Act, is effective in fulfilling the SEC's mission to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation. As further described in our comments below, an SRO would lack experience in regulating private fund managers, create inconsistent regulation, face difficult conflicts of interest, and ultimately diminish the quality of regulatory oversight of the private fund industry. For these reasons, during the deliberations prior to the enactment of the Dodd-Frank Act, policy makers did not consider, and industry participants did not suggest, that an SRO would be a reasonable alternative to private fund manager registration with, and regulation by, the SEC.

MFA members are private fund managers that provide investment advice to pooled vehicles that are limited to investments from sophisticated individuals and institutional investors. Our comments relate only to the regulation of private fund managers, and do not address the need for, costs of, or benefits from a potential SRO for other types of investment advisers. Below are our views on what we believe are the key considerations of the appropriate regulatory framework for private fund managers.

THE SEC HAS EXTENSIVE AUTHORITY OVER PRIVATE FUND MANAGERS

Private fund managers are subject to comprehensive, long-standing federal securities laws and regulatory oversight by the SEC. The SEC regulates private fund managers as investors, like other market participants, under the Securities Act of 1933

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("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), and as investment advisers managing assets of client under the Advisers Act. In broad terms, this statutory framework, as enhanced by the Dodd-Frank Act and regulatory implementation of the Act, subjects private fund managers to oversight with respect to their trading and investment activities, their effects on markets and financial stability, and their management of client assets. In its entirety, this framework applies to all areas of a private fund manager's business, and leaves no gaps in oversight.

The Dodd-Frank Act has substantially enhanced the SEC's authority in many of these areas, and as a result the SEC will have extensive knowledge of the private fund industry, and will continue to be responsible for implementing and enforcing rules across all aspects of managers' businesses. We believe this framework for regulating hedge fund managers is effective and should be maintained.

Securities and Derivatives Trading Activities

Private fund managers, like other investors, are subject to extensive rules governing trading activities that involve securities. Such rules include, for example, prohibitions on insider trading, restrictions on short selling, disclosure requirements, and limitations on the purchase and sale of unregistered securities. More generally, the SEC has broad authority to investigate and punish any type of manipulative trading activity involving securities. Pursuant to Rule 10b-5 under the Exchange Act, market participants are prohibited from using any device or scheme to defraud, from making any untrue statement of a material fact, or from engaging in any fraudulent act, practice, or course of business. The SEC regularly enforces the prohibitions in Rule 10b-5 against investors of all types that engage in inappropriate conduct, including private fund managers.

In addition to these long-standing rules governing transactions in securities, the Dodd-Frank Act creates a new, comprehensive regulatory regime for investing activities involving OTC derivatives. Prior to the Dodd-Frank Act, OTC derivatives were generally not subject to the type of direct regulatory oversight applicable to transactions in securities. Title VII of the Act establishes an extensive new framework for the regulation of OTC derivatives. The rules to be adopted by the SEC and CFTC under Title VII will, among other things: (i) require certain standardized transactions to be cleared and exchange-traded; (ii) require "swap dealers" and "major swap participants" to register with the SEC or CFTC, and subject them to specific obligations; (iii) impose initial and variation margin requirements on both cleared and uncleared transactions; and (iv) provide for substantial incremental transparency, including transaction reporting, to market participants and regulators. Many private fund managers, like other investors, transact in OTC derivatives as part of their investment strategy, and together these new rules will implement a broad framework of CFTC and SEC oversight of these activities.

Private Fund Manager Reporting to the SEC

As a result of the Dodd-Frank Act, the SEC will have the authority to collect even more extensive information about private funds. Notably, the SEC and CFTC have

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proposed a reporting form for private fund managers, Form PF, that would be used by the Financial Stability Oversight Council (the "Council") for systemic risk assessment. The Form would require SEC-registered private fund managers to submit an extensive amount of highly sensitive, proprietary information about their businesses and the funds they manage, including information about their portfolios, use of leverage, counterparty relationships, and collateral practices. The SEC must keep such information confidential and only share the data outside of members of the Council in limited circumstances, so that as a result the SEC will serve as the primary repository of a significant amount of information about private fund managers.

The SEC has indicated that it will use this information to strengthen its inspection and examination functions and to inform its various rulemakings related to private fund managers. This extensive reporting framework, together with other provisions of the Dodd-Frank Act that extend the SEC's authority, will further enhance and expand SEC oversight of private fund managers.

Management of Client Assets and Investor Protection

Finally, private fund managers are subject to SEC regulation as investment advisers under the Advisers Act, which applies broadly to an advisory firm's investment activities and relationship with clients. The responsibilities imposed by Advisers Act registration and regulation entail significant disclosure and compliance requirements, including:

- Providing publicly available disclosure to the SEC regarding, among other things, the adviser's business, its clients, its financial industry affiliations, and its control persons;

- Providing detailed disclosure to clients regarding, among other things, investment strategies and products, education and business background for adviser personnel that determine investment advice for clients, and compensation arrangements;

- Maintaining books and records relevant to the adviser's business;

- Being subject to periodic inspections and examinations by SEC staff;

- Adopting and implementing written compliance policies and procedures and appointing a chief compliance officer who has responsibility for administering those policies and procedures;

- Adopting and implementing a written code of ethics that is designed to prevent insider trading, sets standards of conduct for employees reflecting the adviser's fiduciary obligations to its clients, imposes certain personal trading limitations and personal trading reports for certain key employees of the adviser; and

- Adopting and implementing written proxy voting policies.

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Significantly, the Dodd-Frank Act maintains the Advisers Act as the primary framework for the regulation of private fund managers. We strongly agree with this approach and believe that the Advisers Act, as enhanced by SEC staff interpretations and guidance, is an effective, comprehensive framework for regulating the advisory activities of private fund managers. As noted above, the Act not only continues to subject the private fund industry to SEC oversight under the Advisers Act, it expands the Adviser Act's application to private fund managers by requiring certain unregistered managers to register with the SEC.

In addition, the SEC has recently enhanced its oversight of private fund managers through its implementation of the Dodd-Frank Act and rulemakings under the Advisers Act by, among other things:

- Adopting requirements for private fund advisers to publicly disclose information about funds they manage on Part 1 of Form ADV, the investment adviser registration form, including: (i) organizational information and the fund's identification number; (ii) the exemption from the Investment Company Act of 1940 upon which the fund relies; (iii) the type of private fund; (iv) the gross asset value of the fund; (v) the minimum amount required to be invested, number of beneficial owners, and percentage of the fund owned by certain types of investors; (vi) information designed to identify any potential conflicts of interest; and (vii) information about the fund's auditors, prime brokers, custodians, administrators, and marketers.

- Adopting additional disclosure on Part 2 of Form ADV that requires a registered adviser to provide detailed, narrative information about its advisory business, including: (i) fees and other compensation; (ii) investment strategies and risks; (iii) disciplinary events involving the firm and its personnel; (iv) brokerage practices; and (v) the nature of any conflicts of interest and how it addresses such conflicts. Advisers must now publicly disclose this information.

- Adopting a rule under the Advisers Act that strengthens safeguards for the custody of assets by requiring a registered investment adviser to maintain client assets with a qualified custodian and providing for independent verification of such assets.

- Proposing Form PF, which would require private fund managers registered with the SEC to regularly report extensive information about their funds' operations and investment activities. Large hedge fund managers would report on Form PF detailed portfolio and other information, such as: (i) the market value of financial instruments held by the fund organized by asset class, on a short and long basis; (ii) the monthly turnover rate of the adviser's aggregate portfolios; (iii) a geographic breakdown of investments; (iv) collateral practices of significant counterparties; (v) exposure of the fund to central clearing counterparties; (vi) risk management calculations; (vii) financing information; and (viii) information

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concerning investors and liquidity terms, including requirements for withdrawals and exemptions.

As a result of this regulatory framework, the SEC has been given an effective array of tools for regulating private fund managers. Given the breadth and depth of the SEC's regulatory and enforcement mission regarding private fund managers, we believe the SEC should remain as the regulator of private fund managers.

SEC Investment Adviser Examinations

The SEC continues to strengthen its inspection and examination program for investment advisers, including private fund managers. Recent changes to Form ADV, as described above, will allow the SEC to gather more detailed information from private fund managers. These enhancements to the reporting obligations of managers should significantly improve the ability of the SEC's Office of Compliance Inspections and Examinations ("OCIE") to gather information, and lead to a more effective risk-based assessment process. MFA has worked cooperatively with OCIE in recent years to provide education and other professional development opportunities to examination staff to enhance their knowledge of the industry and its practices. MFA also periodically updates sound practices for industry members and hosts educational events, often with regulators' participation, to promote best practices and robust compliance. These enhancements to OCIE's examination approach and capabilities will improve the quality and of examinations of registered investment advisers, including private fund managers.

In addition to improved quality of inspections and examinations, the Dodd-Frank Act will allow OCIE to conduct more frequent examinations of larger investment advisers by requiring smaller advisers, generally those with less than $100 million in assets under management, to de-register from the SEC and register instead with appropriate state regulators. The SEC staff estimates that the impact of the Dodd-Frank Act provisions will have a net effect of reducing the number of SEC-registered advisers from the current 11,500 to approximately 9,750 advisers, and only a minority of those remaining will be advisers to private funds. We note that by delegating certain examination functions to an association of investment advisers the "Investment Adviser Oversight Act of 2011" would likely enable the SEC to conduct more frequent examinations of other registered, non-retail investment advisers.

AN SRO WOULD LACK THE EXPERIENCE AND INDUSTRY PERSPECTIVE NECESSARY TO OVERSEE PRIVATE FUND MANAGERS

In addition to the concern that an SRO for private fund managers only would serve to carry out a function that is already being performed with increasing efficacy by the SEC, an SRO could diminish the quality of regulation of private fund managers.

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An effective private fund industry SRO must have extensive knowledge of the industry, and experience in interpreting and applying the Advisers Act and its rules to private fund managers. We are not aware of any organization with these necessary competencies, and we are concerned that an SRO's lack of experience in overseeing private fund managers could lead to inconsistent regulation and uncertainty for managers in operating their businesses. In particular, the nature of the Advisers Act as a principles-based statute would present difficult challenges to a new SRO, or an SRO that instead has experience in administering a rules-based regulatory framework.

An SRO for private fund managers would have difficulty hiring experienced personnel to quickly acquire the necessary expertise. The private fund industry is small in comparison to other types of financial firms, and individual private fund managers typically rely on small staffs. As a result, the pool of personnel experienced with the operations and legal requirements of hedge fund managers is quite limited. Despite the small size of the industry, an SRO would need to be of sufficient size and scale to effectively oversee the industry, and we are concerned that an SRO would have difficulty establishing and maintaining such a staff.

An SRO Would Subject Investment Advisory Firms to Inconsistent Oversight

The investment advisory industry is made up of extremely diverse firms, including independent advisers, financial planners, traditional asset management firms, wealth managers, large financial institutions, small advisers, private fund managers, mutual fund advisers, pension consultants and others. Under the Advisers Act, each of these types of investment advisory firms is currently subject to consistent regulation by the SEC. Creating an SRO exclusively for one type of investment advisory firm, such as private fund managers, would seem to undermine the intent of the Advisers Act by creating separate, and potentially inconsistent, oversight of investment advisers.

Moreover, the creation of an SRO for private fund managers could subject a single advisory firm, such as a private fund manager or a traditional asset management firm that manages private funds in addition to other types of accounts, to two different regulatory frameworks. We are concerned that these results would create uncertainty, and could have the unintended consequence of leading to an uneven playing field among advisory firms.

An SRO Would Face Inherent Conflicts of Interest in Overseeing Private Fund Managers and other SRO Members

An SRO overseeing both private fund managers and other types of firms would face difficult conflicts of interest in overseeing all of its members fairly and equitably. Private fund managers are active participants throughout the securities markets, and interact with other financial firms in numerous capacities, including engaging them as service providers to funds they manage, entering into counterparty arrangements with them, and competing with them for investment opportunities. These natural and healthy

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relationships would create challenges for an SRO to oversee private fund managers and other types of firms in an impartial manner.

An example of the type of interactions that could give rise to potential conflicts of interest for an SRO is the relationships between private fund managers and broker-dealer firms. In implementing their investment strategies, hedge fund managers engage broker-dealer firms to serve as prime brokers and counterparties to funds. As prime brokers, broker-dealers provide a number of important services to hedge funds, including custody of assets, clearing of securities transactions, securities lending, financing and reporting. As counterparties, broker-dealers enter into arrangements with hedge funds in which they agree to make or receive payments to or from the fund based on certain market factors, such as the performance of an underlying asset.

While counterparty arrangements take various forms, depending on the type of financial transaction, each arrangement is an arm's length transaction between a fund manager and a broker-dealer in which the interests of the two parties are generally not aligned. The features of prime brokerage and counterparty arrangements are complex, and hedge fund managers and broker-dealers generally negotiate their terms. The overlapping and sometimes competing interests between managers and broker-dealers created by these arrangements would present challenges to an SRO responsible for overseeing these types of firms fairly and equitably. We appreciate that existing SROs seek to address these types of concerns through their governance process and other methods, however, we believe that oversight of private fund managers would lead to inherent structural difficulties in the operation of an SRO.

An SRO Could Create Uncertainty for Managers and Reduce Accountability

The current regulatory framework ensures that a single entity has authority for rulemaking, examinations and inspections, and enforcement with respect to private fund managers and other investment advisers. The creation of an SRO would upset this structure, and potentially create regulatory uncertainty and reduce accountability.

A structure in which an SRO was given authority to inspect and examine private fund managers, and the SEC retained policy making authority, for example, would add an extra layer of regulation for managers to comply with the Advisers Act. This dual regulatory structure would raise the risk of managers being confused as to how to comply with guidance from both entities, and could also lead to inconsistent policies. If instead, an SRO were provided with broad inspection and policy making authority over private fund managers, the SEC would no longer have direct oversight responsibility for private fund managers. We believe that to avoid either of these results, it is important for an independent, governmental agency to be accountable for such oversight.

STANDARD OF CONDUCT FOR INVESTMENT ADVISERS, BROKERS AND DEALERS TO RETAIL CUSTOMERS

Section 913 of the Dodd-Frank Act requires the SEC to study the effectiveness of existing legal or regulatory standards of care for providing personalized investment advice and recommendations about securities to retail customers. The SEC staff report under Section 913, "Study on Investment Advisers and Broker-Dealers," recommends that the SEC implement a uniform fiduciary standard of conduct for brokers, dealers and investment advisers when providing personalized investment advice about securities to retail customers that would require these entities to act in the best interest of the customer without regard to financial or other interests.

MFA members are private fund managers that provide investment advice to pooled vehicles that are limited to investments from sophisticated individuals and institutional investors. Accordingly, MFA members generally do not provide personalized investment advice to retail customers, and therefore would not be subject to the uniform fiduciary standard of conduct set out in Section 913 of the Act and recommended by the SEC staff.

Instead, private fund managers, as investment advisers, should continue to be subject to the longstanding, expansive fiduciary duty under the Advisers Act. Under federal law established by the U.S. Supreme Court, investment advisers have a fiduciary duty to their clients, and in meeting their duty, fiduciaries must act according to the highest standard of conduct. In its landmark interpretation of the Advisers Act, the U.S. Supreme Court confirmed that, as fiduciaries, investment advisers have a duty to "exercise the utmost good faith in dealings with clients."[1] The SEC has broadly interpreted the scope of an adviser's fiduciary duty under Section 206 to apply to all aspects of an adviser's management of client assets. We strongly support this heightened standard of conduct for investment advisers, and recommend that it remain the foundation of an adviser's obligations to its clients.

We believe that the uniform fiduciary standard of conduct in Section 913 is consistent with the existing fiduciary duty of investment advisers by requiring that brokers, dealers and investment advisers act in the best interest of customers when providing investment advice. We encourage the SEC in any rulemaking to implement such a uniform fiduciary standard of conduct to make clear that such a standard would be in keeping with the existing fiduciary duty standard, which has functioned effectively for many years, and is an integral part of how investment advisers conduct their business.

[1] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191 (1963).

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Conclusion

Hedge funds, as sophisticated institutional investors, have important market functions, in that they provide liquidity and price discovery to capital markets, capital to companies to allow them to grow or turn around their businesses, and sophisticated risk management to investors such as pension funds, to allow those pensions to meet their future obligations to plan beneficiaries. MFA and its members are in favor of smart regulation that ensures market stability, protects investors, and facilitates capital formation. In our view, the existing framework of SEC regulation of private fund managers, as enhanced by the Dodd-Frank Act and regulatory implementation of the Act, is most effective in fulfilling the SEC's mission. We would be pleased to provide policy makers with any additional information that would be helpful about the private fund industry as they consider these important issues.

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NAIBD
National Association of Independent Broker/Dealers

To: All Members of the House Financial Services Committee of the House of Representatives
From: Lisa Roth, Chairman of the Member Advocacy Committee
Past Chair of the National Association of Independent Broker Dealers
CEO/CCO Keystone Capital Corporation
Re: The Proposed "Investment Advisor Oversight Act of 2011"
Date: September 12, 2011

Dear Representatives,

NAIBD strongly supports the legislation being proposed by Representative Bachus to the House Financial Services Committee. We urge the committee to vote in favor of this effort to level the regulatory landscape between broker/dealers and investment advisers.

The significant gap between investment adviser and broker/dealer regulation is no secret in the industry. It must be closed for the protection of investors, and to restore integrity to our industry.

For decades, NAIBD members like me have been registered with FINRA and with the SEC and/or states as an investment adviser. As such, as a broker/dealer, I have been subject to licensing and registration, continuing education, net capital, financial and internal audit, supervisory controls and countless other regulations. I have been the subject of routine inspections by FINRA and annual financial audits. From 1999 to 2008 I was a regulatory compliance consultant to hundreds of firms, both broker/dealers and investment advisers. I experienced first-hand the significant efforts and expense broker/dealers bear to comply, and by comparison, the thin set of requirements for investment advisers, including the significant gap between the inspection program.

To give you a sense of the scope of a broker/dealer exam, I can describe my firm's most recent inspection. Two FINRA examiners performed an inspection of my small firm (10 employees) over the course of five full days on site, with follow-up by the district office spanning the following 60 days. My consulting clients' experiences are proportionate, with inspections lasting weeks to months. While I believe that FINRA's inspection program must be better tailored to risk, and would certainly benefit by enhanced efficiencies, I can attest to its rigor including the qualifications, preparation and ambition of the examiners.

By comparison, a state or SEC onsite investment adviser is a rarity. I am acquainted with dozens of investment advisers who have not experienced an onsite inspection by a state or SEC examiner for their entire career. This fact is broadly known in the industry, and we assure you that many brokers and broker/dealers transition from

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FINRA to investment adviser registration for the sole purpose of escaping regulation and examination.

We support the testimony you will hear from the Financial Services institute and from Rick Ketchum of FINRA, and we encourage you to consider FINRA's capabilities beyond its examination programs. In particular, we encourage you to familiarize yourselves with FINRA's Gateway, where broker/dealers regularly submit their firm principals and contact information, advertising, complaints, electronic storage and other important disclosures to the regulator. The implementation of required participation in this facility alone across the universe of investment advisers could provide immediate centralized oversight (and important protections to investors) without significant cost to the advisers, to the regulator, or to those firms, like mine, which are dually registered.

Our support of FINRA as the single regulator for broker/dealers and investment advisers is based on FINRA's established 'bench strength' of field examiners, its sophisticated technical infrastructure, including the Central Registration Depository and, its Gateway reporting system for registrants. We believe that FINRA could readily facilitate centralized reporting of individuals and firms for further distribution of important facts and information to the public, which would provide immediate and significant benefit to investors while closing the current regulatory gap.

Please consider expansion of the Bachus amendment to include ALL investment advisers for the most favorable impact on investor protections and our regulatory regimes.

Respectfully,

Lisa Roth
CEO, CCO Keystone Capital Corporation
Member Advocacy Chair, NAIBD
619-283-3107

AALU

Leadership for Advanced Life Underwriting

AALU Responses: Hearing Entitled "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight

Question for the AALU, FSI, SIFMA, NAIFA:

In July, the U.S. Court of Appeals for the D.C. Circuit vacated the SEC's proxy access rule because the Commission failed "adequately to consider the rule's effect upon efficiency, competition and capital formation" in violation of the Administrative Procedures Act. Do you believe the SEC has performed a comprehensive and appropriate cost-benefit analysis and met its burden of proof that there is harm to investors from the current broker-dealer regulatory regime that warrant a change to the standard of care?

Response from the AALU:

No. The decision by the D.C. Circuit Court of Appeals regarding Exchange Act Rule 14a-11 was a telling indication of what has become an unfortunate trend at the SEC—a consistent lack of rigorous economic and cost-benefit analysis to support its proposed rules. We believe that the Court was justified in its questioning of the Commission's analysis. The Court concluded that the SEC had "once again" improperly assessed the economic implications of a proposed rule[1]. Now, with respect to broker-dealer and investment adviser standard of conduct regulations, we believe that the SEC is engaged in the same limited analysis and "opportunistic framing" that has been criticized by the D.C. Circuit on multiple occasions in recent years.

For example, the SEC's principal justification for the need to impose a uniform fiduciary standard on broker-dealers and investment advisers has been a 2008 report by the RAND Corporation, which was commissioned by the SEC. As the SEC cited in its study conducted pursuant to §913 of the Dodd-Frank Act on investment adviser and broker-dealer standard of conduct regulations, the RAND report concluded that investors had some confusion about the roles and duties of various financial professionals[2]. The SEC argues that this confusion among investors demonstrates the need for a uniform fiduciary standard for personalized investment advice about securities. We find the SEC's reliance on this report to be insufficient. The SEC failed to incorporate in its analysis that this same report showed overwhelmingly that investors are satisfied with their own financial services providers. Furthermore, in a 2010 survey of investors conducted by Oliver Wyman, 95% of responding investor households reported that

[1] According to the Court, "[T]he Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters. For these and other reasons, its decision to apply the rule to investment companies was...arbitrary." *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1149 (D.C. Cir. 2011).

[2] *See* Study on Investment Advisers and Broker-Dealers (Jan. 21, 2011) at 99 (hereinafter, *Staff Study*), *available at* http://www.sec.gov/news/studies/2011/913studyfinal.pdf.

they have chosen to invest their assets in commission-based brokerage accounts[3]. Considered collectively, these data suggest that—given overall levels of investor satisfaction and the preference for the broker-dealer business model—if regulatory changes are in fact necessary, those changes should be targeted to address specific problems that have been objectively identified in the marketplace, i.e., the potential need to combat investor confusion with clear and concise disclosures. What these data do not suggest, however, is that fundamental change to the broker-dealer regulatory regime through a uniform fiduciary standard has been justified or should be pursued absent that objective justification.

It should also be noted that the Commission has been criticized by the D.C. Circuit in previous rulemaking exercises for relying on insufficient data derived from various "unpersuasive" studies: "[i]n view of the admittedly (and at best) 'mixed' empirical evidence [in two studies relied upon by the SEC]...we think the Commission has not sufficiently supported its conclusion."[4] SEC Chairman Mary Schapiro has publically commented that the Commission has asked a team of economists from the Division of Risk, Strategy, and Financial Innovation to study empirical data pertaining to existing standard of conduct regulations as well as the economic impact of modifying those regulations. The omission of this analysis in the SEC's study pursuant to §913 should not be overlooked, but we nonetheless believe that the SEC's commitment to conduct such analysis is a positive development. We also believe that any findings by the Commission's economic team should be publically released in advance of—not in conjunction with—the publication of a proposed rule, as that data will shape what such a proposal, if proven necessary through objective analysis, should look like. In addition, the public should have an opportunity to review and comment on that analysis.

We note that many of our concerns regarding the lack of an evidentiary foundation for new standard of conduct regulations were also identified by SEC Commissioners Kathleen Casey and Troy Paredes in their joint statement following the release of the study pursuant to §913. In their statement, the Commissioners observed:

> [W]ithout good data on investor demographics and preferences, the Commission cannot adequately weigh the potential costs to investors due to the creation of a new standard and the ensuing changes in the business models of both broker-dealers and investment advisers...In our view, the collection and analysis of empirical data – particularly data relevant to evaluating the impact of regulation – is essential for the Commission not only to determine whether rulemaking is appropriate but also to develop appropriate rules should the Commission choose to go forward.[5]

We agree with the statements of Commissioners Casey and Paredes and also believe that the SEC staff used a flawed approach in examining the costs and benefits of their recommendation to impose a uniform fiduciary standard. Namely, the staff implied that because

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[3] Oliver Wyman, *Standard of Care Harmonization, IMPACT Assessment for SEC* (October, 2010), at 4, *available at* http://www.sifma.org/WorkArea/DownloadAsset.aspx?id=21999.

[4] *Bus. Roundtable* at 1151.

[5] Kathleen L. Casey and Troy A. Paredes, Statement Regarding Study on Investment Advisers and Broker-Dealers (Jan. 21, 2011), at 2-3, *available at* http://www.sec.gov/news/speech/2011/spch012211klctap.htm.

quantifiable cost data regarding the imposition of a uniform fiduciary duty was generally not produced by commenters, that cost implications would not be meaningfully addressed by the SEC staff[6]. Yet it is the responsibility of the Commission to produce the data that shows the specific costs and benefits of any proposed regulatory changes before proceeding with new rules.

Lastly, as was conceded at the September 13 hearing before the Capital Markets and Government Sponsored Enterprises Subcommittee, even supporters of an "expeditious" uniform fiduciary standard rulemaking acknowledged that there is no factual evidence that investors seeking advice from broker-dealers are being harmed under the existing regulatory regime in a manner that would require broad changes to the broker-dealer regulatory structure.[7] We encourage the Commission to demonstrate that such evidence exists before a rulemaking under §913 is considered.

Question for all the witnesses:

The SEC staff report suggests that it is not likely that many broker-dealers would "implement major changes to their businesses in response to the imposition of a uniform fiduciary standard..." Do you agree? If not, can you describe the impact that this rule could have on your business?

We do not agree. The SEC staff report evaluated a number of practical outcomes that could arise as a result of changes to the broker-dealer regulatory regime through new standard of conduct regulations. The Commission staff indicated that it is "less likely" that broker-dealers would implement major changes to their businesses under the staff's recommendation as opposed to under the elimination of the broker-dealer exemption from the Investment Advisers Act[8]. However—despite the staff's conclusion—we anticipate potentially significant changes under the staff's recommendation to apply a uniform standard of conduct that is "no less stringent" than §§206(1) and (2) of the Investment Advisers Act.

The imposition of a uniform fiduciary standard—particularly a broad, loosely defined, principles-based standard—will risk significant after-the-fact liability for life insurance agents engaged in the sale of variable life insurance and annuity products. As you may know, these individuals are among the most highly regulated professionals selling some of the most highly supervised products in the financial services sector. There is a tremendous amount of point of sale due diligence that must be conducted by the agent—including a comprehensive needs analysis and obtaining detailed information from the client for medical and financial underwriting purposes. These requirements—which are overseen by FINRA, the SEC, State

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[6] The Staff notes that "[t]o the extent commenters provided information about costs, their thoughts are addressed [in the following section]." By implication, if specific information about costs was not provided, despite the raising of cost concerns by several commenters, it would not be addressed by staff—regardless of their mandates under §913(c)(13) of the Dodd-Frank Act. *See Staff Study* at 145.

[7] Cite specifically to Roper testimony U.S. Congress. House Committee on Financial Services. Subcommittee on Capital Markets and Government Sponsored Enterprises. "Holds Hearing on Regulation and Oversight of Broker-Dealers and Investment Advisers." (Date: 9/13/11). Text from: *CQ Congressional Transcripts.* Available from: Congressional Quarterly; Accessed 9/15/11.

[8] *See Staff Study* at 156.

insurance departments, and individual insurance carriers—create a high bar for the placement of these products at the point of sale. Given the unique nature of life insurance products, the imposition of an amorphous standard that creates an after-the-fact liability would only complicate the already complex and highly regulated process of providing invaluable life insurance protection for retail consumers. In the process, we fear that investors will not be provided with increased legal protection, but that the heightened *ex post facto* liability associated with providing these services will result in higher compliance costs, and by extension, diminished access to professional advice and products for investors.

In addition to these overarching liability concerns, broker-dealers will have a variety of specific challenges in complying with the standard that the staff recommends. Broker-dealers—unlike registered investment advisers regulated by the SEC pursuant to the Advisers Act—are required by FINRA to maintain a comprehensive supervisory program that includes a written supervisory manual, qualified principals who are assigned to supervise each specific area of a firm's operations, and each of its personnel and offices in the conduct of the broker-dealer firm's business. Under the staff's recommendation, broker-dealers will be forced to re-educate their firms and registered representatives; develop new documentation programs and client acknowledgements; and potentially convert firms and registered representatives to fee-only RIA firms or RIAs if the compliance burdens are too great under their existing operation.

In sum, we believe that a substantial rule change such as this will have significant repercussions for broker-dealers, despite the provisions in §913 that were designed to preserve the broker-dealer business model. Moreover, we are concerned that the imposition of a uniform fiduciary standard will not only serve to increase costs and liabilities for broker-dealers, but will also present considerable difficulties in the implementation of compliance procedures because of the lack of clarity inherent in the standard and because of the possibility—based on indications made by the SEC staff[9]—that broker-dealers will be forced to derive guidance from 70 years of Advisers Act case law and SEC enforcement actions. It is our view that the SEC can only address the practical implications of imposing a uniform fiduciary standard by properly and prospectively evaluating the costs and benefits, as well as the economic impact, associated with imposing such a rule.

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[9] "The Staff is of the view that the existing guidance and precedent under the Advisers Act regarding fiduciary duty, as developed primarily through Commission interpretive pronouncements under the antifraud provisions of the Advisers Act, and through case law and numerous enforcement actions, will continue to apply to investment advisers and *be extended to broker-dealers*, as applicable, under the uniform fiduciary standard." (Emphasis Added) *Staff Study* at 111.

Date: October 14, 2011
To: Terrie Allison, Editor - Committee on Financial Services
From: Terry Headley, President – National Association of Insurance and Financial Advisors
Subject: Responses to Hensarling Questions for the Record and Transcript Corrections

Hearing Date: September 13, 2011
Committee: Subcommittee on Capital Markets and Government Sponsored Enterprises
Hearing Name: "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

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(1) Question for all the witnesses:
The SEC staff report suggests that it is not likely that many broker-dealers would "implement major changes to their businesses in response to the imposition of a uniform fiduciary standard..." Do you agree? If not, can you describe the impact that this rule could have on your business?

NAIFA has concerns with the SEC staff report statement that it is not likely that many broker-dealers would "implement major changes to their businesses in response to the imposition of a uniform fiduciary standard." Nearly two-thirds of NAIFA members are Registered Representatives of their corporate broker-dealers and approximately one-third of NAIFA members are also Investment Adviser Representatives for their corporate Registered Investment Advisers.[1] Therefore our perspective is borne out of our members' personal experience and expectations of how corporate compliance departments will interpret a fiduciary rule; and thus we are concerned about the *practical* impact of a harmonized fiduciary standard on NAIFA members who work directly with middle-market clients.

NAIFA is concerned that a universal fiduciary standard of care for broker-dealers and investment advisers who provide personalized investment advice to retail customers will result in an amorphous and ambiguous "best interest" standard. We are concerned that a "best interest" standard applied to recommendations made in connection with the sale of a specific security will set in motion unrealistic investor expectations of investment performance, product availability, and qualitative advice.

The definitional challenge of what is "best" and what it will mean for a securities seller to comply with such a subjective standard could lead to increased compliance paperwork and procedures for NAIFA members who already report significant compliance responsibilities and costs of doing business. According to a 2010 NAIFA commissioned LIMRA Survey, the typical NAIFA member already incurs considerable costs in compliance and securities examinations. For those subject to compliance, members spend an average of 514 hours a year, plus 12 hours per year on examinations. Direct costs average $8,878 a year: $264 in exam expenses, $569 in broker-dealer and/or registered investment adviser fees, and $8,044 in staff expenses for compliance.[2] If a fiduciary standard of care is imposed, most members believe compliance costs would increase due to the additional time and staff expenses incurred to adhere to the standard.

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[1] Jim Mitchel & Shannon O'Keefe, 2010 NAIFA Survey Report (Nov. 2010) , *available at* http://www.naifa.org/ServingMainStreetInvestors/

[2] *Id.*

A new fiduciary "best interest" standard will likely require more forms for client engagement and for record-keeping. Under the current suitability standard as enforced by my broker-dealer, I am held to a comprehensive series of obligations required by FINRA's "know your customer" rule which requires that I obtain specific personal and financial information from my clients (i.e. age, tax status, time line horizon to retirement, existing investments and assets) to ensure that any recommendations that I make are appropriate for their needs and circumstances. I am required to keep extensive records regarding my client engagements, my staff must be finger-printed, all incoming mail can only be opened by associated persons, all receipts of funds and certificates must be carefully documented, I must maintain notes and locations of all meetings, all written communications with clients must be approved by my broker-dealer, and all marketing materials – including the content on my business cards and my website content -- must be pre-approved by my broker-dealer. Therefore the suitability standard is robust and rigorous, rules-based, and objective in its application and enforcement. In contrast, a fiduciary standard is process-oriented, principles-based, and subjective. The subjective nature of a fiduciary standard could raise my potential liability and thus my costs to mitigate that liability. Those costs could come in the form of being forced to adjust my business to work with fewer clients, and to meet my expenses those clients will need to have greater amounts to invest so that I will receive greater compensation per client, and/or the cost of my errors and omissions coverage could significantly increase and I will be forced to charge more for my services.

(2) Question for AALU, FSI, SIFMA, NAIFA:
In July, the U.S. Court of Appeals for the DC Circuit vacated the SEC's proxy access rule because the Commission failed "adequately to consider the rule's effect upon efficiency, competition and capital formation" in violation of the Administrative Procedures Act. Do you believe the SEC has performed a comprehensive and appropriate cost-benefit analysis and met its burden of proof that there is harm to investors from the current broker-dealers regulatory regime that warrant a change to the standard of care?

NAIFA does not believe that the SEC Staff's January 2011 Study on Investment Advisers and Broker-Dealers (the Study), required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, has (i) adequately demonstrated the existence of tangible harm to investors from the current broker-dealer regulatory regime or (ii) considered the potential adverse impact that the Study's recommendations would have on mid-market investors to justify implementation of the SEC staff's recommendations contained in the study.

In the Study, the SEC staff recommended that the SEC establish a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice about securities to retail customers that is no less stringent than the standard currently applied to investment advisers under the 1940 Investment Advisers Act. The staff's recommendations also included "suggestions for considering harmonization of the broker-dealer and investment adviser regulatory regimes, with a view toward enhancing their effectiveness in the retail marketplace." The Study states that the recommendations are designed to both increase investor protection and reduce investor confusion.

As justification for its recommendations, the Study notes that "[b]roker-dealers and investment advisers are regulated extensively, but the regulatory regimes differ, and broker-dealers and investment advisers are subject to different standards under federal law when providing investment advice about securities. Retail investors generally are not aware of these differences or their legal implications. Many investors are also confused by the different standards of care that apply to

investment advisers and broker-dealers. That investor confusion has been a source of concern for regulators and Congress." The Study further notes that both comment letters submitted by investors and studies sponsored by the SEC support its conclusion that investors are confused about the duties and obligations of investment advisers and broker/dealers, although these studies also showed that investors were generally satisfied with their financial advisers.

Although the Study discusses the different regulatory regimes and standards of care applicable to broker-dealers and investment advisers and points out that there is some degree of investor confusion over these differing standards, it is important to note that the Study does not address the central issue of whether investors are being harmed by the alleged confusion or by the existence of separate regulatory structures and standards for broker-dealers and investment advisers.

NAIFA agrees with the comments made by SEC Commissioner Paredes and former-Commissioner Casey in the Statement they issued following the release of the Study, in which they objected to the release of the Study to the Congress on the grounds that the Study did not fulfill the statutory mandate of section 913 of the Dodd Frank Act. Their statement notes that "[T]he Study's pervasive shortcoming is that it fails to adequately justify its recommendation that the Commission embark on fundamentally changing the regulatory regime for broker-dealers and investment advisers providing personalized investment advice to retail investors. The Study recommends the adoption of a new uniform fiduciary duty standard and harmonization of two disparate regulatory regimes. *But it does so without adequate articulation or substantiation of the problems that would purportedly be addressed via that regulation. Indeed, the Study does not identify whether retail investors are systematically being harmed or disadvantaged under one regulatory regime as compared to the other* and, therefore, the Study lacks a basis to reasonably conclude that a uniform standard or harmonization would enhance investor protection." (Italics added)

With respect to the specific issue of the potential impact on investors of the allegations of investor confusion discussed in the Study, NAIFA is concerned that while the Study notes the existence of investor confusion, the Study *does not* address the issues of whether any harm to investors is occurring as a result or of whether the implementation of the Study's recommendations will resolve such confusion or even possibly exacerbate it. The Study does not claim that retail investors are systematically being harmed or disadvantaged under either the fiduciary or suitability standard, and therefore it lacks a basis to conclude that a uniform standard or harmonization would enhance investor protection. NAIFA's concerns are shared by Commissioner Paredes and former-Commissioner Casey who said in their January 21, 2011 Statement: "[A] basic premise of the Study's recommendation to impose a uniform fiduciary duty on broker-dealers and investment advisers is concern that investors are confused about the differences between a broker-dealer and an investment adviser and the duties owed by each. Such confusion is a serious matter. *However, the practical consequences resulting from that confusion for those very investors have not been sufficiently studied or documented*. Moreover, the Study does not address the possibility that the Study's own recommendations will not resolve or eliminate investor confusion and may in fact create new sources of confusion. "(Italics added).

NAIFA is also concerned that the SEC staff did not adequately consider the potential adverse impact that implementation of the recommendations contained in the Study could have on mid-market investors. While NAIFA believes the staff's failure to adequately consider the potential impact of its recommendations on investors falls squarely within the U.S. Court of Appeals' ruling in the *Business Roundtable and Chamber of Commerce* case referenced in Rep. Hensarling's second question, NAIFA also believes that separate and apart from that decision it is imperative that the SEC staff thoroughly

consider whether its recommendations would cause harm to the very investors the SEC is charged with protecting.

Community-based NAIFA members, many of whom are small business owners, provide affordable financial services to middle-market investors. According to the LIMRA study commissioned by NAIFA, approximately 58% of NAIFA members' clients have household incomes of less than $100,000, and a sizable percentage of our members' clients have less than $50,000 invested in the financial markets. The investors that NAIFA members serve every day rely on the honest, trustworthy guidance of their financial advisors to help manage risk and plan for retirement. Without the personalized advice from financial professionals who have earned their trust over many years of service, these investors would be forced to utilize impersonal, "one-size-fits-all" advice from firms that do not tailor their advice to the specific needs of individual clients.

If a uniform fiduciary standard was implemented, broker-dealers would be forced to adjust their operations and compliance programs to an additional regulatory framework. As compliance costs and the potential for liability increases, it would become economically unfeasible for financial professionals to work with less affluent clients, and fewer investors would ultimately receive professional service and advice. Thus, the application of a uniform fiduciary standard to broker-dealers would negatively impact product access, product choice, and affordability of customer services for those consumers who are most in need of these services.

This concern is borne out by data found in the LIMRA study referenced above. An analysis of two surveys conducted by LIMRA—one involving consumers and the other NAIFA members—shows that if a universal fiduciary standard of care is imposed, many NAIFA members would be forced to discontinue providing many important services to middle-market clients, who are a core client group for NAIFA members. According to the NAIFA member survey, which polled more than 3,300 NAIFA members, most members involved in securities activities are concerned that the additional regulatory requirements and potential legal implications of a fiduciary standard could significantly increase their compliance costs. If costs were to go up by 15 percent, 65 percent of our members said they would need to take actions that would limit their client's access to financial advice. For example:

- 31 percent say they would limit their practice to affluent clients only;
- 20 percent would not offer securities to their clients; and
- 14 percent would increase fees for their clients (Close to half (41 percent) of members say that "few or "very few" of their clients could take on the added costs)

Any of these results would not be in the best interests of mid-market investors, and certainly would not further the regulators' goal of enhancing consumer protections. It is crucial that middle-market investors be able to obtain personalized financial advice so they can plan adequately for their futures. Without their financial advisors, many investors would have nowhere to turn when they need reassurance in a shaky market, assistance in rebalancing their portfolios, or understanding the investment choices available. NAIFA is concerned that the SEC Study unduly discounts the risk that the additional regulatory burdens imposed on financial professionals by the Study's recommendations could result in investors having fewer financial advisers to choose from, having less access to products and services, and having to pay more for the services they do receive.

Commissioner Paredes and former-Commissioner Casey expressed these same concerns in the statement they filed concerning the Study, noting that "the Study, in our view, does not appropriately

account for the potential overall cost of the recommended regulatory actions for broker-dealers, investment advisers, and retail investors. The Study unduly discounts the risk that, as a result of the regulatory burdens imposed by the recommendations on financial professionals, investors may have fewer broker-dealers and investment advisers to choose from, may have access to fewer products and services, and may have to pay more for the services and advice they do receive. Any such results are not in the best interests of investors; nor do they serve to protect them." Their statement concluded that "The Study should be viewed as a starting point for further research and consideration, rather than as forming the primary basis for rulemaking. Before the Commission proposes rules in this area, more rigorous analysis - rooted in economics and data - is needed to avoid unintended consequences."

NAIFA fully agrees with the views of Commissioner Paredes and former-Commissioner Casey.

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Attachment (Transcript Corrections)

For more information, please contact:

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Response for the Record to Representative Hensarling of Texas:

Mr. Hensarling.

The SEC staff report suggests that it is not likely that many broker-dealers would "implement major changes to their businesses in response to the imposition of a uniform fiduciary standard…" Do you agree? If not, can you describe the impact that this rule could have on your business?

Mr. Irwin.

The SEC staff conducted a very thorough study, as it was required to do by Section 913. In the performance of the study, the SEC staff considered extensive commentary, including data from the industry and the public and 3,500 comment letters. The SEC staff met with representatives of investors, broker-dealers, investment advisers, other representatives of the financial services industry, academics, state securities regulators, and the Financial Industry Regulatory Authority ("FINRA"), which serves as a self-regulatory organization ("SRO") for broker-dealers.

My view, Congressman, is that the SEC study's recommendations and conclusions are generally sound and well considered. The presence of a fiduciary duty will not necessarily impose additional administrative or other burdens on business operations in the form of excessive rules. Those offering investment advice in this context, however, will have to be mindful of their obligation to place the interests of their clients first. In the long run, this change will enhance prospective clients' faith in seeking their guidance, and ultimately result in more retail investors seeking their services.

Capital Markets and Government Sponsored Enterprises
Hearing entitled "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"
Tuesday, September 13, 2011
10:00 AM in *2128 Rayburn HOB*

Rep. Jeb Hensarling (R-TX) Questions for the Record

Question for all the witnesses:

The SEC staff report suggests that it is not likely that many broker-dealers would "implement major changes to their businesses in response to the imposition of a uniform fiduciary standard ..." Do you agree? If not, can you describe the impact that this rule could this have on your business?

FINRA Response:

As noted in my written testimony, FINRA has been clear in its view that the standard of care in both channels should be a fiduciary standard for the provision of personalized investment advice to retail customers.

The SEC's Section 913 study reflects thoughtful analysis, but a number of questions and challenges remain that presumably would need to be addressed in any SEC rulemaking. FINRA believes that extending a fiduciary duty to all professionals providing individualized advice to retail customers should be done in a way that provides interpretative guidance as to the application of such a duty to the variety of broker-dealer business models that currently exist. FINRA has suggested in comments to the SEC that rules to implement such a standard should incorporate common law agency principles and require cogent, plain English disclosure of permissible conflicts at the time of account opening and, where appropriate, at the point of sale. This disclosure should describe clearly how the adviser or broker-dealer will manage those conflicts and prohibit conduct where conflicts are not consistent with acting in the best interest of the customer. If implemented in this fashion, we agree with the SEC's conclusion that it is not likely that many broker-dealers would be required to implement major changes in their business.

Question for FINRA witness, Mr. Ketchum:

Many of the checks and balances that apply to federal regulatory agencies like the Administrative Procedures Act and the Freedom of Information Act do not apply to SROs, even though they are delegated similar authority and may regulate the same businesses and enforce the same laws as government agencies.

As Congress considers creating a new SRO for Investment Advisers, should Congress update the checks and balances of SROs to ensure that those entities operating with

delegated government authority are subject to the same or similar checks and balances as federal regulatory agencies? Why or why not?

FINRA Response:

A major difference with respect to FINRA or other self-regulatory organizations is that we are subject to comprehensive oversight by the SEC including review and approval of FINRA proposed rules. There are already a number of procedures designed to alert external parties to our rulemaking agenda, provide opportunities for comment and input and to provide oversight of SRO regulatory activities. While these measures are fairly comprehensive in scope, as I responded to Chairman Bachus, FINRA is open to enhanced oversight by the SEC. Of course, FINRA is also subject to ongoing Congressional oversight by its House and Senate Committees of jurisdiction, as well as a recurring GAO review of the SEC's oversight as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

In nearly all cases, FINRA publishes proposed rules and concepts for rules for public comment prior to submitting a proposal to the SEC. We then post all comments received and provide them, along with our responses to any material comments made, including concerns regarding any cost burdens imposed, to the SEC with the proposed rule filing. As a result, the vast majority of our rules undergo two rounds of public comment – one through FINRA and one through the SEC's publication of our rule proposals in the Federal Register.

Rulemaking typically involves consultation with FINRA standing committees, which are comprised of industry representatives. While FINRA staff may and does bring proposals to the Board notwithstanding contrary committee views, those comments are noted to the Board.

The SEC must approve all FINRA rulemaking, and can add, delete or amend FINRA rules as the Commission deems necessary or appropriate. The SEC must make specific findings that the proposed rule is consistent with the Exchange Act and must analyze material comments regarding the proposal.

As discussed above, prior to its Board meetings, FINRA posts on its website rulemaking items that will be discussed by the Directors. Immediately following the meeting, an update of the discussion is also posted.

One of the most important factors in the success of self-regulation in the U.S. securities markets is that Congress mandated that the Securities and Exchange Commission conduct comprehensive ongoing oversight of independent regulators such as FINRA. For example, the Commission:

- Approves all FINRA rulemaking. As part of that approval process, the Commission seeks public comment on FINRA proposals through notice in the Federal Register. Thus, FINRA rulemaking is fully transparent;

- Can add, delete or amend FINRA rules on the Commission's own volition as it deems necessary or appropriate;

- Reviews all FINRA disciplinary actions, which also may be appealed to the Commission and the federal courts;

- Requires FINRA to keep records and file reports with the Commission. These records are subject at any time to Commission inspection;

- Inspects FINRA regularly to ensure that it is fulfilling its regulatory responsibilities and to mandate corrective action as needed. Routine inspections assess FINRA enforcement, arbitration, and member examination programs at regular intervals. These inspections assess FINRA's surveillance systems and the adequacy of FINRA's policies and procedures. The Commission also reviews case files to determine whether FINRA staff is handling cases and investigations in compliance with its policies and procedures. The Commission also may conduct special inspections at any time for any reason;

- Can impose limitations on FINRA's operations if it finds deficiencies justifying such action;

- Can compel FINRA to act if it determines that FINRA is failing to provide adequate protection to investors; and

- Has the authority to suspend or revoke FINRA's registration under the Exchange Act and remove from office or censure any FINRA officer or director.

2. **Question for all the witnesses from Representative Hensarling** – The SEC staff report suggests that it is not likely that many broker-dealers would "implement major changes to their businesses in response to the imposition of a uniform fiduciary standard …" Do you agree? If not, can you describe the impact that this rule could have on your business?

This question takes the quote from the Section 913 Study out of context in a way that appears to misrepresent its meaning. The full quote is as follows:

> The Staff believes it is less likely that many broker-dealers would implement major changes to their businesses in response to the imposition of the uniform fiduciary standard recommended in this Study than they would in response to the elimination of the broker-dealer exclusion [from the Investment Advisers Act], as discussed above in sub-Section B. The Staff believes this is because the adoption of a uniform fiduciary standard would not represent as fundamental a change for broker-dealers as would the elimination of the broker-dealer exclusion.

We doubt you would find any broker-dealers who would disagree with that statement when viewed in context. Indeed, members of the brokerage industry strongly opposed the draft Senate financial reform bill, which would have eliminated the broker-dealer exclusion from the Advisers Act. The support of SIFMA and FSI have voiced for the proposed approach in the Section 913 Study is based on their belief that the outlined approach would require less dramatic changes to their members' business operations, particularly if the SEC simultaneously adjusts its rules on principal trading as it has suggested it plans to do. Indeed, those who criticize the agency for not focusing enough on potential costs to industry tend to ignore the extent to which the agency has been driven by concern for costs in developing its proposed approach.

If the SEC adopts the approach it has proposed in Section 913, a few things are clear: it won't require brokers to charge fees or preclude them from charging commissions; it won't prevent them from selling proprietary products or selling from a limited menu of products; and it won't prevent them from giving one-time, transaction-based advice. We believe all of those practices could be accommodated under the Investment Advisers Act – as they have been for years for many financial planners – but the reliance on Subsection (g) of Section 913 eliminates any ambiguity on these points. It is unfortunate that certain members of the industry – particularly the brokers whose business is dependent on the sale of over-priced variable annuities – have ignored these facts in justifying their opposition to the fiduciary rule proposal.

If the SEC moves forward with a fiduciary rulemaking, some change in industry practice is both inevitable and desirable. Otherwise the rule would not be needed. Two of the most important:

- Brokers will presumably be required to provide potential customers with up-front disclosures similar to those provided by investment advisers. These would cover a variety of factors relevant to the selection of a financial adviser, including a description of the services offered, costs and method of compensation, and conflicts of interest associated with that business model. Investors would as a result be better able to make an

informed choice among advisers, and the broker-dealer business model would flourish or fail based on its appeal to investors.

- Brokers would be required to make recommendations that they reasonably believe are in the best interests of their customers. As they are already required to engage in extensive review of client information to determine suitability, little would likely change in that regard. But, under a fiduciary standard, they would have to use the information gathered to determine which of the options they have available to sell is best for the customer. For some brokers, this will require little if any change in their current practices. For others, where the heightened standard is most needed, the change could force a dramatic reevaluation of their typical recommendations.

Ultimately, how extensive the required changes are will depend in large part on the nature of the broker-dealer's business and the extent to which they already seek to put customer interests first. The more investor-friendly a firm's current practices, the less dramatic the required changes will be.

Assuming the SEC gets the details right, the outcome should be a rule that enhances investor protections while preserving investor choice and minimizing unnecessary industry disruption. We won't be able to assess that until the Commission puts a concrete proposal on the table. That is why we believe the Commission should move forward expeditiously with a proposed rule, while providing ample time for public comment and seeking additional input on the costs and benefits of the proposed approach during the rulemaking process.

Capital Markets and Government Sponsored Enterprises
Hearing entitled "Ensuring Appropriate Regulatory Oversight of Broker-Dealer and Legislative Proposals to Improve Investment Adviser Oversight"
Tuesday, September 13, 2011, 10:00AM in 2128 Rayburn HOB

Hensarling Questions for the Record

Question for all the witnesses: *The SEC staff report suggests that it is not likely that many broker-dealers would "implement major changes to their businesses in response to the imposition of a uniform fiduciary standard..." Do you agree? If not, can you describe the impact that this rule could have on your business?*

SIFMA RESPONSE: We appreciate the opportunity to address this critical issue in the debate over how to best implement a uniform fiduciary standard. The SEC Study on Investment Advisers and Broker-Dealers, as required by Section 913 (Jan. 2011), available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf, does not detail how the SEC would implement the new standard. It is exceedingly difficult to predict or assess the impact on the broker-dealer business model of a uniform fiduciary standard unless and until we know the details of the approach the SEC plans to take, and the details of the cost-benefit analysis that the SEC performed in concluding that its prospective approach is the right one. Regardless, as we explained in our written statement to the Subcommittee (see http://www.sifma.org/issues/item.aspx?id=8589935390 at pp. 6-8), we believe that a mere overlay of the Investment Advisers Act of 1940 ("**Advisers Act**") onto broker-dealers would most definitely require broker-dealers to implement major changes to their business model, thereby undermining the SEC's stated intent to take a "business model neutral" approach. Such an approach would also negatively affect client choice, product access, and the affordability of customer services and, thus, by definition, would *not* be in the best interest of retail customers.

Question for AALU, FSI, SIFMA, NAIFA: *In July the U.S. Court of Appeals for the DC Circuit vacated the SEC's proxy access rule because the Commission failed "adequately to consider the rule's effect upon efficiency, competition and capital formation" in violation of the Administrative Procedures Act. Do you believe the SEC has performed a comprehensive and appropriate cost-benefit analysis and met its burden of proof that there is harm to investors from the current broker-dealer regulatory regime that warrants a change to the standard of care?*

SIFMA RESPONSE: We believe that appropriately robust and rigorous cost-benefit analyses are essential to inform and shape any SEC rulemaking under Dodd-Frank Section 913. We understand that the SEC is currently undertaking cost-benefit and other empirical analyses on Section 913. We support those efforts, and are also willing as an industry to facilitate such analyses by providing appropriate data, feedback and other information. In this case, regardless of whether the SEC could or would need to make a showing of "harm to investors," we believe the SEC's cost-benefit analysis could well find that the existing regulatory regime for brokers and advisers causes investor confusion, and is incongruous in that it provides for different standards of care for the identical services (i.e., the provision of personalized investment advice about securities to retail customers). We believe the SEC's cost-benefit analysis could also find that a uniform fiduciary standard would help avoid investor confusion; enhance efficiency,

clarity, and transparency for regulators and regulated firms alike; and increase the overall quality of service to investors, and could be implemented in a manner that is business model neutral and does not impose unreasonable costs. These findings, among others, could form the basis for a recommendation to move forward with SEC rulemaking under Section 913.

Response of Witness David G. Tittsworth, Executive Director of the Investment Adviser Association, to the Question Submitted by Rep. Hensarling at the September 13, 2011 Capital Markets Subcommittee Hearing "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight."

Section 913 includes provisions specifically designed to address broker-dealers' concerns raised during congressional consideration of the Dodd-Frank Act about the application of fiduciary duty to their business practices. Among other things, these provisions confirm that charging commissions and offering proprietary products do not constitute breaches of fiduciary duty. In addition, Section 913 provides that application of the fiduciary duty does not in and of itself require brokers to have a continuing duty to a retail customer after providing investment advice.

A vocal minority of brokers has argued that extending the Advisers Act fiduciary duty to brokers will disrupt business models and reduce investor choice. These arguments are not supported by any facts or evidence. The Advisers Act fiduciary duty has accommodated a broad spectrum of advisory-related activities and vastly different business models for many decades. One of the strengths of the fiduciary standard is its flexibility to apply to a range of activities and services. Extension of this flexible standard will not result in less investor choice or wholly infeasible requirements on those who choose to provide advice to individual clients. For example, opponents of the fiduciary duty base their claims on the incorrect assumption that brokers would no longer be able to charge commissions or provide advice about proprietary products. That is not the case now under the Advisers Act fiduciary duty, and indeed Section 913 and the SEC staff report confirm that brokers will continue to be able to charge commissions and advice regarding proprietary products under the fiduciary standard.

It is important to note that the SEC staff's recommendation will not impose the Advisers Act fiduciary duty on all broker-dealer activity or broadly overlay the Advisers Act regulatory regime on brokers. The recommendation narrowly addresses only the provision of personalized investment advice about securities to retail clients. The fiduciary duty would not, for example, apply to market-making or underwriting activities. Although changes to brokers-dealers' compliance procedures will be required to ensure compliance with the fiduciary standard, it will have little impact on their various business models and practices.

Association of
Institutional
INVESTORS

Statement of
The Association of Institutional INVESTORS

House Committee on Financial Services,
Subcommittee on Capital Markets and Government Sponsored Enterprises

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers
and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011

Chairman Garrett and Ranking Member Waters,

Thank you for the opportunity to submit a written statement for the record related to the hearing on investment adviser oversight held on September 13, 2011. The Association of Institutional INVESTORS (the "Association") believes that the debate over creating the appropriate level of oversight of broker-dealers and investment advisers is critical to the future of our markets and we continue to work closely with the Commissioners and staff of the Securities and Exchange Commission ("SEC") to ensure that the right level of oversight is provided in order to protect investors. We appreciate the chance to provide Congress with our perspective and our proposals related to these important issues.

The Association includes some of the oldest, largest, and most trusted investment advisers in the United States. Our clients are primarily institutional investment entities that serve the interests of individual investors through public and private pension plans, foundations, and registered investment companies. Collectively, our member firms manage ERISA pension, 401(k), mutual fund, and personal investments on behalf of more than 100 million American workers and retirees. Our clients rely on us to prudently manage participants' retirements, savings, and investments. They depend on our members to help them provide for their retirements, to have funds available to educate their family members, to meet other obligations, and to support their financial aspirations. This reliance is built, in part; upon the fiduciary duty each of our members has to these organizations and individuals to put their interests first. Put simply, it is not our money. We recognize the significance of our duties and the important role our markets play, and our statement is intended to reflect not just the concerns of the Association, but also the interests of those we ultimately serve.

The Association recognizes that our firms and our markets can only fulfill their highest purpose when supported by prudent regulation and strong investor protections, providing a level playing field for all participants. As stated in our comment letter submitted to the SEC (attached hereto), the Association believes that the establishment of a self-regulatory organization ("SRO"), on its own, would not enhance the effectiveness of the Commission's ability to oversee and examine investment advisers. If, however, Congress determines that an SRO is needed to oversee certain investment advisers, the Association supports the approach taken in Chairman Bachus' discussion draft of the Investment Adviser Oversight Act of 2011 (the "Bachus Draft"). The Bachus Draft distinguishes between investment advisers who predominantly provide investment advice to sophisticated investors and advisers who provide personalized investment advice to non-accredited investors.

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The Investment Advisers Act and the SEC's rules promulgated thereunder are largely a principles-based regulatory regime that provides flexibility to managing client/adviser relationships all within the requirements of fiduciary principles. This regulatory framework has provided institutional clients and their investment advisers with the flexibility necessary to best serve institutional clients. This flexibility is rarely available under a retail-oriented SRO structure. Our institutional clients are typically fiduciaries themselves, supported by significant resources and guided by extensive statutory and regulatory responsibilities. By excluding investment advisers who predominantly advise institutional clients from SRO oversight, the Bachus Draft preserves the existing principles-based oversight of institutional advisers by the SEC to the benefit of institutional clients, while creating a separate regulatory authority to oversee retail focused advisers whose clients may benefit from the prescriptive rules typical of a SRO.

The relationship between an adviser and its institutional clients differs in material respects from the relationship between an adviser and retail clients. Unlike retail investors, institutional clients exert significantly greater influence over how the adviser manages the assets and closely monitor the adviser's operations and performance. For example, institutions typically negotiate fees at arms length. They also often dictate the terms of the investment guidelines and insert contractual terms to protect their interests. Many institutions use external consultants and Requests for Proposals to help select their investment advisers. Further, institutions either directly or through consultants perform both pre-agreement due diligence and periodic inquiries to oversee how their assets are managed, demanding higher levels of customized reporting from advisers to ensure that their objectives and guidelines are being followed. Institutions also generally select their own independent custodians. Institutional clients generally require their asset managers to obtain annual internal control studies—such as a SAS-70. These internal control studies review the adviser's processes and controls around the adviser's key operating processes to assess whether the processes and controls are appropriately designed to accomplish their purpose, such as the fair allocation of investment opportunities among accounts, and are operating effectively. These control mechanisms provide institutional clients with enhanced protection from improper conduct by an adviser.

Many advocates for an SRO justify the prescriptive rule system typical of an SRO by arguing that the average retail investor is not able to enforce and monitor fiduciary principles as applied to the individual's account and that specific rules provide protections more effectively. While prescriptive regulation may be more effective in establishing the exact scope of an adviser's responsibilities, which may be helpful in the retail context, such rules are not helpful for institutional investors. In light of the advantages that institutional clients have in forming and monitoring their relationships with advisers, as described above, forcing a system of prescriptive rules into the relationship between institutional clients and advisers destroys flexibility and offers little additional protection. Further, forcing a prescriptive regulatory approach on institutional investors adds costs that would ultimately be passed on to the investor and with no corresponding benefit.

The Association supports the Bachus Draft and we believe that a few changes could strengthen the legislation. First, the term "client" should be defined to mean entities with whom the investment adviser has entered into a written investment management agreement. This clarification is needed because many investment advisers to institutional clients do not have a relationship to the investors who invest through the institutional client, e.g., a pension plan. Second, we suggest that the 90%

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threshold be conformed to the Dodd Frank Act's revenue threshold to define which entities are financial institutions, 85% or more. Third, the $25 million threshold included in the exemption to Section (b)(1)(c) is also too high and may inadvertently cover investment advisers the legislation is not targeting. Lastly, the Association recommends that limited purpose broker dealers affiliated with exempt institutional advisers continue to carry registrations with FINRA but that examination responsibility be retained by the Commission. There are efficiencies for both the Commission and the registrants achieved by consolidating in one examination the management of funds and partnerships and their distribution.

The Association believes that the population of investment advisers that will continue to be regulated by the SEC will be sufficiently reduced and that the SEC should have sufficient resources to appropriately examine and supervise them. In this context, we believe the SEC should consider the third party reviewed internal audit control studies that many institutional advisers currently obtain, or the lack thereof, in allocating their examination resources.

The Association has been working with industry participants and the large audit firms to improve internal control testing for institutional investment advisers to provide institutional clients with a review better suited to their needs. We hope that this work may eventually produce a more comprehensive testing framework that meets the common needs of the advisory firms, our institutional clients, and our clients' service providers, consultants and auditors. In addition, we are hopeful that such improved standards could provide a cost effective tool to assist regulators in determining where to focus scarce resources.

We support the Bachus Draft framework because it appropriately treats institutional advisers differently from retail advisers and offers each group a regulatory framework suited to their business models. The resulting system would provide robust oversight and maximize investor protections without overly burdening institutional advisers or their clients. We look forward to working with the Committee Members on these important issues.

Exhibit I

The Association's Comment Letter on Sections 913 and 914 of the Dodd-Frank Act

Institutional INVESTORS

December 24, 2010

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Sections 913 and 914 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Ms. Murphy:

Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") requires the Securities and Exchange Commission (the "Commission") to evaluate the effectiveness of the current standards of care applicable to brokers, dealers, investment advisers and their respective associated persons when providing personalized investment advice and recommendations to retail customers. Section 914 of the Act requires the Commission to analyze the need for enhanced examination and enforcement resources for investment advisers and to determine the extent to which having Congress authorize the Commission to designate one or more self regulatory organizations ("SROs") to augment the Commission's efforts in overseeing investment advisers would improve the frequency of examinations of investment advisers.

Members of the Association of Institutional Investors ("Institutional Investors")[1] discussed Sections 913 and 914 with Commission staff at a meeting held on October 25, 2010. At that meeting, members of Institutional Investors expressed their view that the same fiduciary standard that applies to investment advisers when managing all categories of client accounts should apply to brokers when providing personalized investment advice to retail customers. Further, with respect to Section 914, members were strongly of the view that the effectiveness of the Commission's ability to oversee and examine investment advisers would not be enhanced by the establishment of an SRO.

Institutional Investors continues to believe that the Commission should retain exclusive oversight of all registered investment advisers. Institutional Investors is pleased to provide the Commission with its views concerning regulation of investment advisers, should the Commission conclude, for resource or other reasons, that Congress should authorize an SRO for advisers. In such event, Institutional Investors urges the Commission to distinguish between investment advisers who predominantly provide investment advice to accredited investors (an "institutional adviser") and advisers who provide personalized investment advice to non-accredited investors (a "retail adviser").

[1] Institutional Investors is an association of some of the largest and oldest investment advisers in the United States who primarily provide services to institutional clients, such as registered investment companies, public and private pension plans, and foundations.

Institutional Investors believes that the Commission should retain exclusive examination authority over institutional advisers. For purposes of our proposal, Institutional Investors recommends that: (1) "accredited investor" be defined as it is currently defined in Regulation D under the Securities Act of 1933 (17CFR §230.501); (2) "institutional adviser" be defined as a registered investment adviser, whose annual gross revenues earned from providing advisory services to accredited investors represent 85% or more of the annual gross revenues earned from providing advisory services to all clients of the registered investment adviser;[2] and (3) "retail adviser" be defined as any registered investment adviser who is not an institutional adviser.

Institutional Investors believes that the distinction between institutional advisers and retail advisers should be drawn at the entity level in order to avoid duplication of regulatory oversight. The examination program for financial advisers should recognize the fundamental differences between accredited investors and non-accredited investors and between the activities of institutional advisers and retail advisers by not forcing a single examination process on all advisers with attendant consequences to such different classes of clients and activities.

Institutional Investors requests that the Commission provide clarification on the scope of services which would be classified as "personalized investment advice to retail clients" under Section 913 of the Act for the purpose of determining which advisers should be classified as "institutional advisers." In keeping with the above definition, Institutional Investors believes that an adviser's activities related to the manufacture and management of pooled investment products (such as mutual funds) should be considered institutional in nature for the purposes of the institutional adviser definition above, even if the ultimate purchasers of those products may be non-accredited investors. In addition, Institutional Investors believes that to the extent that an adviser supplies investment research or model strategies to other advisers for such advisers' use with end clients, but does not have investment discretion or direct contact with the non-accredited customer, such activities should be considered institutional in nature, and should not be categorized as providing "personalized investment advice to retail clients" for the purpose of determining whether the adviser should be considered an institutional adviser.

Many institutional advisers are affiliated with a limited purpose broker dealer whose business activities are limited to supporting the sale of shares of registered investment companies or private funds that are sponsored by the institutional adviser. Those services include the distribution of shares of those funds either to other broker dealers (who in turn sell the shares to the end investor), or to institutional investors or broker dealers to be included in their "wrap account" offerings. The hallmark of the sales activities of representatives of limited purpose brokers is that they are sales to institutional investors. Institutional Investors requests the Commission to consider whether the limited nature of such broker dealer activities, and the integrated activities of such broker dealers with the business of institutional advisers, warrant a separate regulatory structure from that applicable to full service broker dealers or broker dealers that engage with retail customers and whether the regulation and examination of such limited purpose broker dealers should be consolidated with the regulation and oversight of institutional advisers.

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[2] The proposed definitions of institutional advisers and limited purpose broker use the same standards used in Section 102(a) (6) of the Act to define "predominantly engaged."

The Act and the federal securities laws differentiate between the levels of protection provided to accredited investors versus non-accredited investors. Accredited investors are allowed to invest in various investment products, such as unregistered investment companies, 144A offerings, and privately placed securities that are simply off-limits to retail investors. Certain accredited investors are permitted to agree to performance-based fee structures that are unavailable to retail investors. Permitting accredited investors the freedom to invest in these products is appropriate because accredited investors are able to understand complex financial matters and assess risks far better than the typical retail investor.

In our experience, accredited investors are more proactive and self-reliant in overseeing the institutional advisers they hire. Almost all registered investment companies have independent boards and counsel, and most clients of institutional advisers either have their own staff or consultants that perform extensive due diligence on the institutional adviser's investment process and business operations and receive regular detailed reports on the performance of their portfolio.

Non-accredited investors are not similarly equipped. The relationship between a non-accredited investor and a retail adviser is better suited to prescriptive-rule based regulation than the relationship between an accredited investor and an institutional adviser.

We are concerned that if an SRO is created using FINRA as a model, it will not provide the flexibility needed by accredited investors because the rules based system that is applied to broker-dealers is ill-suited for the institutional market. A rules-based system reduces freedom of choice by requiring the same treatment of clients regardless of differences clients and facts and circumstances. This model was designed to protect less sophisticated clients that are unable to make well-informed decisions on complicated financial products. It sacrifices choice for an acceptable conduct standard. It is more reasonable for less sophisticated clients than it is for institutional clients. The Commission's staff has recognized how the facts and circumstances surrounding an adviser's relationship with a client will inform whether the contract terms between them are acceptable.[3 4] That same recognition should lead the Commission to different regulatory structures based on the classes of customers the Commission is seeking to protect.

Additionally, many institutional advisers include registered investment companies among their clients, either on a direct advisory or sub-advisory basis. As noted above, the regulation of registered investment companies is intertwined with the regulation of their advisers. If the Commission retains its examination authority over registered investment companies, it will be very inefficient to separate this retained examination authority from the examination of institutional advisers and risk inconsistent interpretations of the Investment Company Act of 1940 (the "40 Act").

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[3] Heitman Capital Management, LLC, SEC No-Action Letter (pub. avail. February 12, 2007).

[4] The European Union's Markets in Financial Instruments Directive ("MIFID") similarly distinguishes between various categories of clients. Under MIFID there are two main categories of clients—retail and professional—to allow for the tailoring of regulatory requirements according to the knowledge and experience of clients. Professional clients are considered to possess the experience, knowledge and expertise to make their own investment decisions and assess the risks inherent in their decisions. (Financial Services Authority, Implementing MIFID's Client Categorisation Requirements (August 2006)).

By limiting the reach of an adviser SRO to only retail advisers who provide personalized investment advice to retail clients, the Commission will avoid many of the drawbacks that a SRO poses to the institutional market. [5]

An SRO style prescriptive rule book is ill suited to the institutional market. By exempting institutional advisers the Commission will preserve the principles-based regulatory structure for institutional advisers and their clients, and thereby permit the institutional adviser and its client to manage the relationship as best suits their needs. Exempting institutional advisers from a SRO will also reduce the risk of inconsistent interpretations and application of the '40 Act to those advisers that advise registered investment companies.

Second, by diverting oversight of retail advisers to a SRO, the number of advisers to be examined by the Commission will be greatly reduced. The Commission should have adequate resources to examine and supervise the remaining institutional advisers subject to their jurisdiction.

Third, the Commission's other important responsibilities, including maintaining fair, orderly, and efficient markets, will be better served if the Commission retains examination responsibility over institutional advisers. Institutional advisers play a unique role in the market. How they manage assets is influenced by regulatory oversight and interpretation of complex, and at times, ambiguous laws and regulations. We believe the agency that is charged with the responsibility of maintaining fair, orderly and efficient markets should have the benefit of the knowledge it acquires through its oversight of institutional advisers and the ability to influence institutional advisers through the examination process.

In 1965, the Commission implemented a Securities and Exchange Commission Only ("SECO") program relating to the regulation of broker dealers that traded only in over-the-counter derivatives ("OTC"). The Commission eliminated the program in 1983 concluding that a direct regulatory program was not the best use of the Commission's resources. The SECO program is not analogous to the continued regulatory oversight of institutional advisers here advocated for by Institutional Investors.

First, SECO was developed as an alternative to compulsory membership in a SRO at a time when certain classes of broker dealers were first becoming subject to such regulation. To implement SECO, the Commission needed to develop a regulatory program to take on SRO responsibility. Here, the Commission has been responsible for examining institutional advisers for 70 years. A SRO for institutional advisers would disrupt this 70 years of experience and practice. Unlike broker-dealers,

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[5] By way of background, the SRO system that was put into place to govern broker-dealers represented an incremental change to a system that predated the federal securities laws. As the former Director of the Commission's Office of Compliance Inspections and Examinations, Lori Richards, noted in 2000, "[t]he Securities Exchange Act of 1934 created the SEC and codified the existing self-regulatory system for broker-dealers. The SROs retained primary authority to regulate their members. Former Commission Chairman and later Supreme Court Justice William O. Douglas famously described the SEC's oversight role as akin to keeping a "shotgun, so to speak, behind the door, loaded, well-oiled, cleaned, and ready for use but with the hope it would never have to be used." (Self-Regulation in the New Era (Remarks by Lori Richards, Director, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission), NRS Fall 2000 Compliance Conference, Scottsdale, Arizona, September 11, 2000).

investment advisers were never members of an SRO. Therefore, requiring investment advisers to be subject to an SRO would amount to an unnatural graft on the existing regulatory structure.

Additionally, the SECO program involved different oversight programs based on trading activity rather than differences in the types of relationships that institutional and retail clients have with their advisers. Mandating a SRO for institutional clients will force changes onto those relationships in ways that the elimination of the SECO program did not. Finally, Institutional Investors' proposal will greatly reduce the number of advisers subject to the Commission's examination, thereby reducing the needed resources and enhancing the Commission's oversight of the advisers that remain exclusively subject to Commission examination.

Institutional Investors does not support the creation of a SRO for investment advisers, but if one is to be appointed Institutional Investors urges the Commission to recognize the fundamental ways in which the activities of institutional advisers differ from those of retail advisers. Institutional Investors urges the Commission to acknowledge those differences by retaining exclusive regulatory and examination authority over institutional advisers. Representatives of Institutional Investors would be pleased to meet with Commission staff to further discuss this proposal.

Very truly yours,

John Gidman, on behalf of
Institutional Investors

FINANCIAL PLANNING COALITION

September 12, 2011

Representative Scott Garrett
Chairman
Capital Markets and Government Sponsored Enterprises Subcommittee
House of Representatives
Washington, DC 20549

Re: Supporting a Fiduciary Standard for Financial Professionals as Outlined in Section 913 of the Dodd-Frank Act

Dear Chairman Garrett:

In advance of the Capital Markets and Government Sponsored Enterprises Subcommittee hearing on "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight," the Financial Planning Coalition (the Coalition) is pleased to send you a petition signed by more than 5,400 financial planning professionals urging the Securities and Exchange Commission (SEC) to apply a fiduciary standard to anyone providing personalized investment advice to retail clients. The Coalition, which consists of Certified Financial Planner Board of Standards, Inc. (CFP Board), the Financial Planning Association (FPA), and the National Association of Personal Financial Advisors (NAPFA), represents financial planning professionals across the country with diverse business and compensation models who are committed to acting in the best interest of their clients.

The Coalition appreciates the opportunity to present you with a petition signed by thousands of financial professionals showing their strong support of a fiduciary standard for advice provided to retail investors. We are deeply concerned that current regulations governing the delivery of personalized investment advice are insufficient to protect investors. A recent study conducted by the Coalition, the Consumer Federation of America, and other groups confirmed that investors remain confused about the advice they receive.[1]

- Retail investors do not understand the regulatory differences between broker-dealers and investment advisers, or the standards of care that apply to each.
- Most American investors mistakenly believe stockbrokers and insurance agents are required to act in the best interest of their clients.

[1] Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, Denise Voigt Crawford, President, North American Securities Administrators Association, David G. Tittsworth, Executive Director, Investment Adviser Association, Kevin R. Keller, CEO, CFP Board, Marvin W. Tuttle, Jr., Executive Director/CEO, FPA, Ellen Turf, CEO, NAPFA, and David P. Sloane, Senior Vice President, Government Relations and Advocacy, AARP, to the Honorable Mary L. Schapiro, Chairman, SEC (Sept. 15, 2010), *available at* http://sec.gov/comments/4-606/4606-2748.pdf.

- Retail investors overwhelmingly believe that all financial professionals who give personalized investment advice should be required to act in the best interest of their clients and disclose conflicts of interest.

For these and other reasons, the Coalition has advocated that the SEC use the authority granted under section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to establish a strong and uniform fiduciary standard of conduct for broker-dealers and investment advisers that is no less stringent than that under the Investment Advisers Act of 1940.

The Coalition urges the Committee to support moving forward with this important rulemaking. The text of Coalition's petition is below:

> **Fiduciary Standard for Financial Professionals**
> We, the undersigned, believe a fiduciary standard should apply to anyone providing personalized investment advice to retail clients.
>
> Following a fiduciary standard is simple: it includes providing clients with advice that is in their best interest without regard to compensation or other interests. Full disclosure of all material conflicts of interest is essential, regardless of how the advisor is compensated.
>
> Most consumers assume their financial services providers are already required to provide advice that is in their best interest. Unfortunately, this is not the case. As a financial service provider, I can choose to operate under different regulatory structures, each with different standards and requirements for how I treat my clients. Some require me to put my clients' financial interests ahead of my own, some do not. But there is no easy way for consumers to distinguish.
>
> In a report issued in January 2011, the SEC recommended that the fiduciary standard be extended to all professionals providing personalized investment advice. Requiring financial professionals to act under the fiduciary standard is a common sense way to greatly increase consumer financial protection.
>
> As a financial service provider, I believe that those who provide personalized investment advice to retail clients should be required to act in their clients' best interests. I urge the SEC to enact a rule implementing a fiduciary standard so millions of American consumers can be guaranteed that the financial advice they're getting is in their best interests.

The Financial Planning Coalition and thousands of financial planners across the nation believe that those who provide personalized investment advice to retail clients should be held to a fiduciary standard. Requiring financial professionals to act in their clients' best interests should help restore the confidence of millions of American investors in the securities markets and facilitate the needed return to the markets as the economy continues to recover.

We appreciate this opportunity to provide you and the members of the Subcommittee with our petition and signatures as you focus on this important issue in during the upcoming hearing. If you have any questions about the petition or the Financial Planning Coalition, please contact Marilyn Mohrman-Gillis, Managing Director, Public Policy and Communications, CFP Board, via telephone at (202) 379-2235 or via e-mail at mmohrman-gillis@cfpboard.org; Dan Barry, Managing Director of Government Relations and Public Policy, FPA, via telephone at (202) 449-6343 or via e-mail at dan.barry@FPAnet.org; or Karen Nystrom, Manager of Public Policy and Advocacy, NAPFA, via telephone at (847) 483-5182 or via e-mail at nystromk@napfa.org.

Respectfully submitted,

Kevin R. Keller
Chief Executive Officer
CFP Board

Marvin W. Tuttle, Jr.
Executive Director/CEO
FPA

Ellen Turf
Chief Executive Officer
NAPFA

CFP BOARD
CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

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FINANCIAL PLANNING ASSOCIATION
The Heart of Financial Planning

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cc:
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Maxine Waters, CA, Ranking Member
Peter T. King, NY
Edward R. Royce, CA
Frank D. Lucas, OK
Donald A. Manzullo, IL
Judy Biggert, IL
Jeb Hensarling, TX
Randy Neugebauer, TX
John Campbell, CA
Thaddeus G. McCotter, MI
Kevin McCarthy, CA
Steve Pearce, NM
Bill Posey, FL
Michael G. Fitzpatrick, PA
Nan A. S. Hayworth, NY
Robert Hurt, VA
Michael G. Grimm, NY
Steve Stivers, OH
Robert J. Dold, IL
Gary L. Ackerman, NY
Brad Sherman, CA
Rubén Hinojosa, TX
Stephen F. Lynch, MA
Brad Miller, NC
Carolyn B. Maloney, NY
Gwen Moore, WI
Ed Perlmutter, CO
Joe Donnelly, IN

André Carson, IN
James A. Himes, CT
Gary C. Peters, MI
Al Green, TX
Keith Ellison, MN

Financial Planning Coalition Petition:

FINANCIAL
PLANNING
COALITION

To: Securities and Exchange Commission
Subject: SEC: Extend the Fiduciary Standard to Broker-Dealers

Dear Securities and Exchange Commission Chairman Schapiro and Commissioners:

We, the undersigned, believe a fiduciary standard should apply to anyone providing personalized investment advice to retail clients.

Following a fiduciary standard is simple: it includes providing clients with advice that is in their best interest without regard to compensation or other interests. Full disclosure of all material conflicts of interest is essential, regardless of how the advisor is compensated.

Most consumers assume their financial services providers are already required to provide advice that is in their best interest. Unfortunately, this is not the case. As a financial service provider, I can choose to operate under different regulatory structures, each with different standards and requirements for how I treat my clients. Some require me to put my clients' financial interests ahead of my own, some do not. But there is no easy way for consumers to distinguish.

In a report issued in January 2011, the SEC recommended that the fiduciary standard be extended to all professionals providing personalized investment advice. Requiring financial professionals to act under the fiduciary standard is a common sense way to greatly increase consumer financial protection.

As a financial service provider, I believe that those who provide personalized investment advice to retail clients should be required to act in their clients' best interests. I urge the SEC to enact a rule implementing a fiduciary standard so millions of American consumers can be guaranteed that the financial advice they're getting is in their best interests.

Visit the Financial Planning Coalition at www.financialplanningcoalition.com

Petition Signatures:

Name	City and State	Date
A, BRUCE CARRI	CONCORD, NH	04/25/11
A. DALE ZINN		06/10/11
A. Perry Hubbs II, MBA, CFPÂ®	Tarpon Springs, FL	05/03/11
A. Wayne Cranfill CFP(r)		06/15/11
A. Webster Hewitt		06/02/11
Aaron Coates	Goshen, IN	05/26/11
Aaron Jackson, CFP		06/02/11
Aaron Kolkman	St Louis Park, MN	05/27/11
Abigail Kovach	Lafayette, CO	05/26/11
Adam Cornwell		06/15/11
Adam Mosbach		06/02/11
Adam Obrecht	Waukee, IA	05/04/11
Adam Schwallier	Grand Rapids, MI	04/25/11
Adil Masani		06/11/11
Afolabi Odejimi	Phoenix, AZ	04/25/11
Ajamu C. Loving, Ph.D.		06/15/11
Akio L. Bley, CFP(r)		06/11/11
Al Whalen		06/12/11
ALAN HEWITT CFP EA	PALMDALE, CA	05/04/11
Alan Adducci	Naperville, IL	04/25/11
Alan Brennecke		06/10/11
Alan Campbell	Lancaster, PA	04/26/11
Alan De Michele	Croton on Hudson, NY	04/25/11
alan friedberg	bedford, NH	04/25/11
Alan Gammel	Tacoma, WA	05/03/11
alan goldfarb	dallas, TX	04/25/11
Alan Goodstein	encino, CA	04/25/11
Alan H. Cohn CFP	Hauppauge, NY	04/25/11
Alan Haggard	San Diego, CA	04/27/11
Alan J. Baron		06/01/11
Alan Lee	Mill Valley, CA	05/05/11
Alan MacFarlane	Minneapolis, MN	05/01/11
Alan McKnight	Duluth, GA	05/26/11
Alan Moore	Rapid City, SD	04/25/11
Alan Myers	Lexington, NC	06/26/11
Alan Rupp		06/02/11
Alan Schapire	Media, PA	04/25/11
Alan Segal	Raleigh, NC	05/19/11

Alan Smith	Eureka, MO	05/03/11
Alan T. Matsuda		06/11/11
alan tucker	hoffman estates, IL	04/25/11
alan whitby	miami, FL	05/03/11
alan zevin	neshanic station, NJ	05/06/11
Albert Gelsthorpe	Needham, MA	05/31/11
Albert Mah	Como,	04/27/11
Alberta Jones	Asbury Park, NJ	05/08/11
Alberto Zarraluqui	Sarasota, FL	04/25/11
Alex Gonzalez		06/09/11
Alex Myers	Westmin, MD	04/26/11
alexander feick	denver, CO	05/31/11
Alexander H. Sickert		06/15/11
Alexander Hernandez		06/13/11
Alexander Kimura	Torrance, CA	05/05/11
Alexander Navarro	Key Biscayne, FL	04/25/11
Alexander Zeltser	Lutherville, MD	04/25/11
Alfred Olsen	Spokane, WA	05/05/11
Alfredo Ocasio	Howard Beach, NY	04/25/11
Alfredo Perez	Rincon, PR	04/26/11
Alicia Guevara	Buenos Aires,	04/27/11
Alicia Ivancovich		06/10/11
Allan Moskowitz	San Pablo, CA	04/25/11
ALLEN ALBRECHT	MIAMI LAKES, FL	07/13/11
Allen Bronton	Crystal Lake, IL	06/27/11
Allen Davis	Hadley, MA	04/25/11
Allen Hughes	Salt Lake City, UT	05/04/11
Allen Purkiss	Ridgefield, CT	05/04/11
Allen W. Marshall III		06/10/11
alvaro a castellanos		06/01/11
Alvin Rogers	Little Rock, AR	05/04/11
Alvin Gebhart	Fallbrook, CA	04/25/11
Alyson Hardin		06/02/11
Alyson Ross	Mechanicsville, VA	04/25/11
Amanda Alexander	San Diego, CA	04/26/11
Amanda M., CFP		06/13/11
Amanda Medrow Myers	Duluth, GA	05/04/11
Amanda Rock	Lancaster, PA	04/25/11
Amporn Leininger	San Francisco, CA	07/01/11
Amy Barrett	Lake Geneva, WI	04/25/11

Amy Harrison	Rochelle Park, NJ	05/04/11
Amy House		06/06/11
Amy Irvine	Corning, NY	05/19/11
Amy Jo Lauber		06/02/11
Amy Libertoski	Weston, WI	04/25/11
amy mcIlvaine	bellingham, WA	04/25/11
Amy Mullen	Poulsbo, WA	04/25/11
Amy Wolken	Sierra Vista, AZ	04/25/11
Anders Lundegard	Viernna, VA	04/25/11
Andre Rabie	New York, NY	06/04/11
Andrea McNamara	Boston, MA	04/25/11
Andrea Winterer		06/01/11
Andreas ehlebracht	miami, FL	04/25/11
Andreia Capelo	Funchal,	04/28/11
andres flores	miramar, FL	04/25/11
Andrew Barkley	Cleveland, OH	04/25/11
Andrew Brown	Conyers, GA	04/26/11
Andrew Chou, CFP	Century City, CA	05/18/11
Andrew Clark	norwich, NY	05/03/11
Andrew Del Beato	Newtown Square, PA	04/25/11
Andrew Gardener	Houston, TX	05/05/11
Andrew Husmann, CPA, CFP		06/10/11
Andrew Jones	Charlotte, NC	04/26/11
Andrew Maimona	Stow, OH	05/03/11
Andrew Moyer	Solon, OH	04/25/11
Andrew Ramsey	Woodstock, GA	04/26/11
Andrew S Marulis		06/01/11
Andrew S. Weissman		06/10/11
Andrew Thurlow	Henderson, NV	05/05/11
Andrew Wallace, CFPÂ®	Seymour, TN	06/27/11
Andrew Wheeler	Duluth, MN	04/25/11
Andrew Zawada		06/01/11
andy berg	atlanta, GA	05/04/11
Andy Claybrook	Franklin, TN	04/28/11
Andy Hedrick	San ntonio, TX	05/18/11
Andy Kark		06/01/11
Andy Sinsigalli		06/02/11
Andy Tiede	Sioux Falls, SD	05/09/11
ANDY WOOD		06/15/11
Angela Creech		06/10/11

Angela Kiefer	Wayzata, MN	06/02/11
Angelica Vrondos	Clearwater, FL	05/03/11
Anindita Dhar	Edison,, NJ	04/25/11
Anja Luesink	New York, NY	05/04/11
Ann D. Felldin		06/11/11
Ann d. Jevne		06/04/11
Ann Harrod	Keswick, VA	04/29/11
Ann Holland		06/01/11
Ann Pendley	Evansville, IN	05/09/11
Anna Maria Waechter	Marstons Mill, MA	05/18/11
Anne Gamache	Holland, MI	05/03/11
Anne Niesen	San Mateo, CA	04/27/11
Anne O'Brien	North Brookfield, MA	04/25/11
Anne Santos	Houston, TX	05/09/11
Anne Ward	Minneapolis, MN	04/25/11
Anne Zvirblis	Renton, WA	04/25/11
Anneta Chapman		06/01/11
Annette Simon	Bethesda, MD	04/25/11
Annie Spearman	Encino, CA	05/04/11
Anonymous	Mosheim, TN	04/28/11
Anonymous		06/24/11
Anonymous		06/10/11
Anonymous		06/10/11
Anonymous		06/10/11
Anonymous		05/31/11
Anthony Cottone		06/02/11
Anthony D Konecny		06/13/11
Anthony Davis		06/13/11
Anthony Delauney	Durham, NC	05/18/11
Anthony Ferreira	San Diego, CA	06/24/11
Anthony G. Schiano		06/02/11
Anthony J. Losh		06/07/11
Anthony Konecny	Columubus, OH	04/27/11
Anthony Krance	Green Bay, WI	04/25/11
Anthony Luckhardt	Cincinnati, OH	04/26/11
Anthony Mancuso	Batavia, NY	04/25/11
Anthony Rossetti	Winter Park, FL	04/25/11
Anthony Spatafore	Jericho, NY	04/25/11
Anthony Steuer	Alameda, CA	04/28/11
ANTON BAYER	San Jose, CA	04/26/11

Antonio Vilallonga	Miami, FL	05/18/11
Anwesha Basu		06/03/11
Aprill Shepherd	Lexington, KY	05/04/11
Archibald Hoxton	Shepherdstown, WV	05/22/11
Ariadne Horstman	Palo Alto, CA	05/07/11
Arlin Bornschlegl	Rochester, MN	05/18/11
Arlyn Nelson	Kirkland, WA	05/18/11
Armand Prestidge		06/01/11
Art Spiller	Pearland, TX	05/04/11
Arthur Albin	Portage, MI	04/25/11
Arthur Ambarik		06/17/11
Arthur J Canter		06/02/11
Arthur S. Rothschild	Milwaukee, WI	05/09/11
Artie Green	Sunnyvale, CA	04/25/11
Ashley C. Dyer		06/10/11
Ashley Murphy	San Francisco, CA	05/05/11
Attah-jundwe Obiajulu, CFP, CLU,		06/11/11
Atul C. Dubal		06/01/11
Audre' Suzanne Robertson, CFPÂ®		06/22/11
Audrey Coleman		06/10/11
Audrey Jones	Casselberry, FL	04/25/11
Audry Batiste		06/10/11
Augustus Abel	Powell, OH	05/18/11
Austin Chinn	San Jose, CA	04/26/11
Austin Farrar	Falmouth, ME	04/26/11
Austin G Robertson Jr	Shreveport, LA	04/25/11
Avi Pai		06/01/11
Aziz Hamidi	Tampa, FL	04/25/11
B. Kenneth Townsend	Columbus, GA	05/04/11
Barbara Bruen	Fort Collins, CO	04/25/11
Barbara Coffey	Silverdale, WA	04/25/11
Barbara Comer	Manchester Center, VT	04/25/11
Barbara Fleeman		06/01/11
Barbara Fried	Glen Ellyn, IL	05/04/11
Barbara Gawdzik	Oak Park, IL	04/26/11
Barbara Gilliard	Mill Valley, CA	04/25/11
Barbara Healy	Scottsdale,, AZ	05/04/11
Barbara Hein	Clive, IA	05/06/11
Barbara J Andre, CPA		06/10/11
Barbara J Davis		06/11/11

Barbara J. Bowden	Merrillville, IN	06/24/11
Barbara McCormack	Atlantra, GA	04/25/11
Barbara McMahon	Kansas City, MO	04/25/11
BARBARA R. FLEMING		06/14/11
Barbara Ristow, CFP(r)	Charleston, SC	04/25/11
Barbara Schelhorn		06/10/11
Barbara Wallis	Upper St. Clair, PA	04/27/11
Barclay carriar	St Cloud, MN	05/05/11
Barron Gray	McKinney, TX	05/06/11
Barry Corkern	Little Rock, AR	06/23/11
barry cui		06/02/11
Barry DeMaio		07/02/11
Barry Flagg	Tampa, FL	04/25/11
Barry Freedman	Fort Myers, FL	05/04/11
Barry J. Ellison		06/06/11
Barry Katz	Plantation, FL	05/31/11
Barry Kohler	Portland, ME	04/25/11
barry korb	Potomac, MD	04/25/11
Barry Mulholland		06/13/11
barry o'shea	Colo Springs, CO	05/03/11
Barry Shelley	West Chester, OH	04/26/11
Barry Swanson, CFP		06/10/11
Bart Gadlage		06/08/11
Basil Herzstein	Rockville, MD	04/25/11
Becky Connery	Downers Grove, IL	05/31/11
Bedda D'Angelo	Durham, NC	04/26/11
Ben Birken		06/11/11
Ben Gurwitz	San Antonio, TX	04/25/11
Ben Joyce	San Francisco, CA	04/25/11
Ben Pettigrew		06/10/11
Ben Wheeler	Minneapolis, MN	04/25/11
Benjamin A Tobias		06/01/11
Benjamin brandt		06/06/11
Benjamin Koehlinger	Signal Hill, CA	04/25/11
Benjamin Maynard, CFA, CFP(r)	New Orleans, MA	05/18/11
Benjamin Messinger	Kennewick, WA	04/26/11
Benjamin Strange	Kaiserslautern,	05/05/11
Bennett Aikin	Bridgeville, PA	06/29/11
Bennett Gordon	Hollywood, FL	04/25/11
Bernard Bowhuis		06/02/11

Bernard Downing		06/16/11
Bernard J. Bandish, Jr.		06/02/11
Bernard Kiely	Morristown, NJ	04/25/11
Bernard Mack		06/10/11
Bert Whitehead	Birmingham, MI	05/04/11
Beth Hearn		06/10/11
Beth Pickenpaugh	Columbus, OH	05/05/11
Beth Sparks	Lancaster, OK	04/25/11
Beth W Dominguez, CFP(r), CPA		06/03/11
Betsey Archer	Roseville, CA	04/25/11
Betty Hedrick	Mercer Island, WA	04/25/11
Betty J Neal, CFP		06/02/11
Betty Loftus	Goldl River, CA	04/25/11
Beverly Bowers	Phoenix, AZ	04/25/11
Beverly Fogle	Vancouver, WA	04/25/11
Beverly Tanner	Mill valley, CA	05/04/11
Bill Schretter	Lebanon, OH	04/27/11
Bill Carlson		06/10/11
Bill Dickens		06/13/11
Bill Dix	Raleigh, NC	04/25/11
Bill DuBose	McLean, VA	04/25/11
Bill Kearney		06/01/11
Bill Marley		06/16/11
Bill Penland Jr		06/15/11
Bill Russo, CFP	Solon, OH	04/25/11
Bill S Childers		06/02/11
Bill Simpson	Portsmouth, NH	05/05/11
Bill Staton	Charlotte, NC	04/25/11
Bill Winterberg	Dallas, TX	04/27/11
Bill Zaika		06/10/11
Billie G. Houk, CFP*, LUTCF		06/13/11
Billy Williams	Mobile, AL	04/25/11
BJ WILLSON	RENO, NV	05/03/11
Blaine Aikin	Pittsburgh, PA	04/26/11
Blaine Dunn	Winchester, VA	05/31/11
Blaise Stevens, MBA, CFPÂ®		06/02/11
Blythe M. Doane		06/11/11
Bob Ericson	Los Gatos, CA	04/25/11
Bob Garey	Tampa, FL	05/05/11
Bob Hjort		06/02/11

Bob Tankesley		06/10/11
Bobbie Munroe	Atlanta, GA	05/03/11
Bonnie Hill		06/10/11
Brad Araki		06/10/11
Brad Baumann	Calabasas, CA	05/09/11
Brad Blackburn		06/10/11
Brad Foy		06/15/11
Brad heaps		06/01/11
Brad Kucharo		06/20/11
Brad Ledwith		06/01/11
Brad Michels	Floyds Knobs, IN	04/25/11
Brad Nicholson	Jackson, CA	04/25/11
Bradford A. Gann		06/01/11
Bradford Umbarger		06/01/11
Bradley Allen	Poulsbo, WA	04/25/11
bradley baer	Fair Oaks, CA	05/03/11
Bradley Berger	University Place, WA	04/27/11
Bradley Bronk		06/01/11
Bradley Burnfield		06/01/11
Bradley Graham	St. Louis, MO	04/26/11
Bradley Stephenson	San Clemente, CA	04/25/11
Brady Siegrist	Greenwood Village, CO	05/04/11
Bragg Comer	Rockwall, TX	04/25/11
Brandan Pratt		06/10/11
Brandon Wood	Saint Anthony, MN	05/25/11
Brandon Jenkins		06/02/11
Brandon Kane		06/10/11
Brandon Traister	Sicklerville, NJ	08/20/11
Brant Donis	St. Louis, MO	05/23/11
Brenda Baier	Indianapolis, IN	05/03/11
Brenda Janikowski	Casper, WY	05/23/11
Brenda Ramsey		06/12/11
Brent A. Lindell		06/02/11
Brent Boraas		06/10/11
Brent Bowman		06/13/11
Brent D. Bergin		06/01/11
Brent Dickerson	Amarillo, TX	04/25/11
Brent Ericksen		06/10/11
Brent Eugenides	Groton, CT	04/25/11
Brent Fields	St. Charles, IL	04/25/11

Brent Graham	Baton Rouge, LA	05/18/11
Brent Hamilton		06/14/11
Brent Horvath	Cleveland, OH	05/06/11
Brent Jepson	Caribou, ME	04/26/11
Brent K. Sandino, CFP		06/02/11
Brent Kessel	Pacific Palisades, CA	05/17/11
Brent Perry	Indianapolis, IN	05/04/11
Brent Thummel	Derby, KS	04/25/11
Brent Walker	Indianapolis, IN	05/18/11
Brett Carleton	Houston, TX	04/26/11
Brett Coffman	Fort Mill, SC	04/26/11
Brett Horowitz	Coral Gables, FL	04/25/11
Brett Tushingham		06/10/11
Brian Niemann	Cumberland, WI	04/25/11
brian stertzer	hilton head island, SC	04/25/11
Brian Bishop	Hudson, OH	04/25/11
Brian Bovard	Atlanta, GA	04/25/11
Brian C Lock		06/10/11
Brian Carlton	Forest, VA	04/27/11
Brian Clarke		06/01/11
Brian Cochran		06/01/11
Brian Dietz	Cape Elizabeth, ME	05/20/11
brian doughney		06/01/11
Brian Emery	Long Beach, NY	04/25/11
Brian Fenn	Charlotte, NC	05/06/11
Brian Fricke	Winter Springs, FL	05/04/11
Brian J. Breen		06/10/11
Brian Kurrus	Vienna, VA	05/03/11
Brian L. Rucks		06/10/11
Brian Lippe		06/02/11
Brian Lottman		06/10/11
Brian M. Hill		06/10/11
Brian McDaid	Montvale, NJ	05/18/11
Brian McKenna	Bennington, VT	05/09/11
Brian Mills		06/01/11
Brian Oettinger		06/10/11
Brian Peterson		06/10/11
Brian Riley		06/10/11
Brian Roehl	Troy, MI	05/04/11
Brian Rolfe		06/02/11

Brian Sava		06/01/11
Brian Scanlon	Wilton, CT	04/26/11
Brian Schmehil	Oakbrook Terrace, IL	05/10/11
Brian Sells	Denver, CO	04/25/11
Brian Sohn		06/01/11
Brian stafford	Mount pleasant, SC	04/25/11
Brian Standefer	Houston, TX	04/25/11
Brian Stephens	Houston, TX	05/25/11
Brian Sullivan		06/02/11
Brian Sutliff	Columbus, OH	05/04/11
Brian Tamasi		06/22/11
Brian V	Calgary	04/27/11
Brian Wegrzyn	Mount Prospect, IL	05/04/11
Brian Weir		06/20/11
Brian Wong	Los Angeles, CA	04/26/11
Briggs Price		06/02/11
Brigid Mulroy	Bingham Farms, MI	04/25/11
Brigid Nurnberg	Franklin, MA	04/26/11
Brint Detwiler	Phoenixville, PA	04/25/11
Britt Bazemore	Albany, GA	05/11/11
Brittany Brower	Montgomery, IL	05/04/11
Bronwyn Shone	Hercules, CA	05/03/11
Brooke Henderson	Oklahoma City, OK	05/05/11
Brooks C. Sackett		06/10/11
Brown Kitchens	Atlanta, GA	04/25/11
Bruce Barton, CFP CFA	San Jose, CA	05/05/11
Bruce Berno	Cincinnati, OH	05/06/11
Bruce Bracco		06/02/11
Bruce Butterfield	El Dorado, AR	04/25/11
Bruce Campbell	Huntersville, NC	05/03/11
Bruce Coldsmith	Mobile, AL	04/26/11
Bruce Dzieza		06/01/11
Bruce E. Holdridge		06/01/11
Bruce Galvin	Seattle, WA	04/25/11
Bruce Glor		06/13/11
Bruce Graev	Marco Island, FL	04/25/11
Bruce Haydu	Oakhurst, NJ	04/25/11
Bruce Heling	Brookfield, WI	05/05/11
Bruce Hydier		06/01/11
Bruce J. Berno, CFP		06/10/11

Bruce Jentner	Akron, OH	04/25/11
Bruce Krohn		06/01/11
Bruce Miller	Portland, OR	06/24/11
Bruce Pretzinger	Pasadena, CA	05/18/11
BRUCE ROBSON	SALISBURY, MD	05/18/11
Bruce Ruud	New Braunfels, TX	04/26/11
Bruce Tucker	Sparta, NJ	04/26/11
Bruce Wiener	Potomac, MD	04/27/11
BRUCE WISE	Kingwood, TX	04/25/11
Bryan Beatty	Vienna, VA	04/26/11
Bryan Cheeseman		06/02/11
Bryan Graczyk	Saginaw, MI	05/05/11
Bryan J Connolly		06/15/11
Bryan K BURRIS	Morrison, CO	05/03/11
Bryan K Poirier, CFP		06/11/11
Bryan Karsner	Odenton, MD	04/26/11
Bryan Kettel		06/01/11
Bryan Lee	Plano, TX	04/25/11
Bryan McSweeney		06/10/11
Bryan P. Fay		06/14/11
Bryan Smalley	Whitehouse Station, NJ	05/08/11
Bryan Snowden	Granbury, TX	04/29/11
Bryant Andrus	Phoenix, AZ	06/01/11
Bryant Engebretson	Bellingham, WA	05/05/11
Bryson McKinney		06/13/11
Bud Heintz	Phoenix, AZ	05/03/11
Bugra Bakan	Mill Valley, CA	04/25/11
Burt Williamson		06/20/11
Buz Livingston	Santa Rosa Beach, FL	04/25/11
Byrke Sestok	Mamaroneck, NY	05/09/11
C G	Macon, GA	05/04/11
C. Bryan Wood	Marietta, GA	04/25/11
C. Michael Luck		06/10/11
Caleb Brown	Tallahassee, FL	04/26/11
Calvin Guyer, CFP(R)		06/01/11
Cameron M. Thornton, CFP		06/02/11
Camilla Neri	San Jose, CA	05/03/11
Camilo Pardo		06/06/11
Candace Kaplan	Bethesda, MD	04/25/11
Carin Roman	Palatine, IL	05/04/11

Carl Andrew Millard	Tryon, NC	04/25/11
Carl E Barber, CFP		07/18/11
Carl Linde	Renton, WA	04/26/11
Carl Trevisan	Alexandria, VA	05/06/11
Carl W Benedict		06/10/11
Carla Stohlmann		06/02/11
carlee trent	springfield, OH	04/28/11
carlos dominguez		06/10/11
carlos leon	Aurora, IL	04/30/11
Carlton Brown		06/02/11
Carmen Aiken	Chicago, IL	05/04/11
Carmine D'Avino	New York, NY	05/26/11
Carol Harlow	Miami, FL	04/25/11
Carol Appel	los Angeles, CA	04/25/11
Carol Burton	Westport, CT	04/25/11
Carol Dixon	Longmont, CO	04/28/11
Carol Doerr	St Petersburg, FL	05/18/11
Carol Foster	Highlands Ranch, CO	05/03/11
Carol Friedhoff	Dublin, OH	05/05/11
Carol Grosvenor	Los Angeles, CA	04/27/11
Carol Johnson		06/02/11
Carol K Lampe	Pittsburgh, PA	04/25/11
carol Lee Roberts	Joppa, MD	05/31/11
Carol Lewis	centennial, CO	04/25/11
Carol Pankros	Palatine, IL	05/04/11
Carol Remy	Greensboro, NC	04/26/11
Carol Ringrose Alexander	Oklahoma City, OK	05/18/11
Carol S. Craigie		06/02/11
Carol Smith	Darien, IL	04/28/11
Carol Van Bruggen		06/01/11
Carolanne Chavanne	Torrance, CA	04/25/11
carole hagen	warrenton, OR	05/08/11
Carole Zhou		06/10/11
Caroline Doerflinger	Bronx, NY	05/10/11
Carolyn Edwards		06/02/11
Carolyn Larsen-Wieber	Raleigh, NC	05/31/11
Carolyn McClanahan	Jacksonville, FL	04/25/11
Carolyn Tomlinson	Moorpark, CA	06/17/11
Carolyn Walder	National Harbor, MD	05/31/11
Carolynn Tomin	Naples, FL	05/31/11

Carrie Houchins-Witt, CFP		06/10/11
Cary J. Cowan		06/10/11
Cassandra Shawn Anderson, CFA,	San Mateo, CA	04/25/11
Cassi Vanderpool		06/06/11
cate murray	Langley Park, Durham,	05/20/11
Catherine Birmingham Weigel	Concord, MA	05/31/11
Catherine Conheady	Rush, NY	04/26/11
Catherine Gearig	Rochester Hills, MI	04/27/11
Catherine Green	Chesapeake, VA	05/03/11
Catherine Latto	Charleston, SC	04/25/11
Catherine R Smith	Anchorage, AK	05/04/11
Catherine Seeber		06/12/11
Catherine Straub	Anchorage, AK	04/25/11
Cathie Reisler		06/02/11
Cathy Daigle		06/10/11
Cathy Pareto	Coral Gables, FL	04/25/11
Cecily Welch		06/10/11
Cedric Alexander	Marina del Rey, CA	05/03/11
Celeste Whisenant		06/12/11
Celia Baehr	Mobile, AL	05/05/11
Celia Mueller		06/01/11
Cesar A Casas		06/14/11
Chad Davis		06/10/11
Chad Jones	Fort Collins, CO	04/26/11
Chad Norfolk	Columbia, MD	05/03/11
Chad Parmenter		06/01/11
Chad Peterson		06/01/11
Chad Sander	Evansville, IN	05/31/11
Chad Smith		06/07/11
Chad Stevens	indianapolis, IN	04/25/11
Chad Teders		06/01/11
Chad Tillery		06/10/11
Chadderdon O'Brien		06/10/11
Chanley Christman		06/10/11
chanyoung moon		06/12/11
Char Larsen	Shawano, WI	05/18/11
Charissa Spach	Calabasas, CA	05/05/11
Charleen S. Barnes		06/10/11
Charlene Guess	ATHENS, TX	05/03/11
Charles Becker	White Hall, AR	04/28/11

Charles Bianchi	Fredericksburg, VA	04/26/11
Charles C. Justice		06/10/11
Charles Capasso	Mount Pleasant, SC	04/26/11
Charles Carroll	Portland, OR	04/25/11
Charles D. Miller	Chicago, IL	05/03/11
Charles D. Dodds Jr.		06/10/11
Charles F Jenks Jr	Stuart, FL	05/04/11
Charles Frazier	Suwanee, GA	04/25/11
Charles Geraci	The Woodlands, TX	06/24/11
Charles Grimm		06/01/11
Charles Haines	Birm, AL	04/26/11
Charles Jakober	Aberdeen, SD	04/25/11
Charles Johnson	Newburyport, MA	05/04/11
Charles Jones	Mobile, AL	04/25/11
Charles Kingsley Perkins		06/01/11
Charles Lesko, Jr.	Binghamton, NY	05/12/11
Charles M. Lloyd		06/06/11
Charles Massie	Fort Myers, FL	05/11/11
Charles McCarn	Birmingham, AL	04/25/11
Charles McGee	Newport News, VA	05/04/11
Charles Moore	Matthews, NC	04/27/11
Charles Noegel		06/06/11
Charles O Overbey Jr		06/12/11
Charles O'Connor	Torrance, CA	05/10/11
Charles Parker	Houston, TX	05/31/11
Charles Prudhomme	Portag, MI	04/26/11
Charles R Jones		06/16/11
Charles Roberson	Westwood, NJ	05/04/11
Charles Russo	Westlake Village, CA	04/25/11
Charles Sandmel		06/02/11
Charles Sauberan	Orchard Park, NY	04/26/11
Charles Stanley	Hamilton, NJ	05/05/11
Charles Steege	Doylestown, PA	04/25/11
Charles T. Neff		06/10/11
Charles Terry	Charlotte, NC	04/25/11
Charles Terry	Birmingham, AL	05/18/11
Charles Tompkins	Seattle, WA	05/05/11
Charles Trent	Charlotte, NC	04/25/11
Charles Valenzuela		06/02/11
Charles Vaughan	Cincinnati, OH	04/26/11

Charles W Cairnes Jr CPA CFP		06/07/11
Charles W. Hayes	Coronado, CA	05/04/11
Charles Wilfong		06/01/11
Charles Yost	Norwalk, CT	04/25/11
Charles, CFP(r) Steege	Doylestown, PA	05/04/11
Charlie Fitzgerald	Maitland, FL	04/26/11
Charlotte Adama	Amarillo, TX	05/03/11
Charlotte A. Pakan		07/11/11
Chase Armer	Sacramento, CA	05/03/11
Chase Cranford		06/10/11
Chase Mouchet	Savannah, GA	06/03/11
Cherril L. Brown		06/10/11
Chery Smith	Rutherfordton, NC	05/03/11
Cheryl Chapis	Bristol, CT	05/01/11
Cheryl Curran	Seattle, WA	04/27/11
Cheryl Krueger	Schaumburg, IL	04/25/11
Cheryl Sherrard	Charlotte, NC	05/31/11
Cheryl Sommese	Londonderry, NH	05/01/11
Cheryl Sparks	Lynnwood, WA	04/25/11
Chip Hasty		06/11/11
Chris Lott	Dallas, TX	05/03/11
Chris Wrench	Raleigh, NC	04/26/11
Chris Baker	Eaton, OH	09/04/11
Chris Battreall, CFP		06/01/11
Chris Beard, CFP		07/15/11
Chris Berg		06/01/11
Chris Butler	Vancouver, WA	04/26/11
Chris DeShano		06/02/11
Chris Garcia	Plano, TX	05/03/11
Chris Genzler		06/29/11
Chris Kleman		06/01/11
Chris Klinetob		06/12/11
Chris Koerber, CFP		06/10/11
Chris Korte		06/11/11
chris mcfadden	helotes, TX	04/25/11
Chris Miller	Muncie, IN	04/25/11
Chris Olsgard		06/02/11
Chris Parker		06/10/11
Chris Rand	San Diego, CA	05/30/11
Chris riffle		06/10/11

Chris Rowley	Houston, TX	05/05/11
Chris S. Barthel, CFP, ChFC		06/14/11
Chris Sadkowski	Beverly, MA	05/04/11
Chris Scotchler	Bothell, WA	05/04/11
Chris Toadvine	Maitland, FL	04/25/11
Chris White	Terrace Park, OH	06/02/11
CHrisitina Worley, CPA/PFS,CFP	West Palm Beach, FL	05/03/11
Christian Hertl		06/13/11
Christian Jeeves		06/02/11
Christiane Tomasi		06/02/11
Christina D'Amore	Laguna Hills, CA	04/25/11
Christine Armstrong	Green Bay, WI	04/25/11
Christine Berberich	West Chester, PA	05/03/11
Christine Carleton	Cincinnati, OH	04/25/11
Christine Carlin	Tucson, AZ	05/04/11
christine Crawford	San Francisco, CA	05/05/11
Christine Falvello	Sugarloaf, PA	05/04/11
Christine Lemond	Toms River, NJ	05/27/11
Christine McLynn	Charlotte, NC	04/25/11
Christine Messmer	Collegeville, PA	04/26/11
Christine Parker		06/22/11
Christine Thomas	Naperville, IL	04/25/11
Christopher Olsen	Lodi, CA	04/25/11
Christopher Thomas	Vienna, VA	04/25/11
Christopher A Howard		06/10/11
Christopher Brown	Rockville, MD	05/19/11
Christopher Chouinard, CFPÂ®	Waltham, MA	04/25/11
Christopher Collins		06/02/11
Christopher COnner	Gainesville, FL	04/26/11
Christopher Cooper	Texarkana, TX	04/25/11
Christopher Criswell		06/10/11
Christopher Currin	Dallas, TX	04/27/11
Christopher Demarest		06/02/11
Christopher Dykstra	Edwardsville, IL	04/25/11
christopher edwards	houston, TX	05/06/11
Christopher Gandia		06/02/11
Christopher H. Bronson, CFP(r)		06/15/11
Christopher Helwig		06/15/11
Christopher Judge	Croton on Hudson, NY	05/18/11
Christopher Keegan		06/02/11

Christopher Knox	Plantation, FL	05/08/11
Christopher Kuehne	Pound Ridge, NY	05/04/11
Christopher L. Cleland		06/10/11
Christopher Martinez		06/01/11
Christopher Occhuizzo	Danbury, CT	04/25/11
Christopher P. Blakely		06/02/11
Christopher Quinley		06/01/11
Christopher Riley	Wilmington, NC	05/03/11
Christopher Schaefer	Kensington, MD	04/25/11
Christopher W. Lowe, CFPÂ®		06/11/11
Christopher Wells	Madison, MS	04/25/11
Christy Barilotti	Philadelphia, PA	04/25/11
Chuck Carrick		06/10/11
Chuck Rutenberg	Fot Collins, CO	04/26/11
Chuck Weber	Shawnee, KS	05/18/11
Chyrle Pinkerton	Garden City, ID	05/31/11
Ciciily Maton	Chicago, IL	04/26/11
Cinda Jones, CFP		06/12/11
Cindi Berdar	Spokane Valley, WA	05/03/11
Cindi Hill	San Dieog, CA	05/04/11
Cindy Brower	Chicago, IL	04/27/11
Cindy Burke	Warrenton, MO	05/04/11
Cindy Golub	Mamaroneck, NY	05/19/11
Cindy Kester	Seattle, WA	04/28/11
Cindy Malzan	West Seneca, NY	04/25/11
Cindy Phelan	Atlanta, GA	04/25/11
Cindy Reninger		06/20/11
Cindy Storm Fischer		06/02/11
Clare Wherley	Berkeley Heights, NJ	05/31/11
Clarissa Alesevich	Reno, NV	04/25/11
Clark Blackman II	Kingwood, TX	04/28/11
Clark Jolley	Valencia, CA	05/05/11
Clark Permann	Yakima, WA	04/25/11
Clarke Forsyth	Provo, UT	04/25/11
Clarke Hedrick	Commack, NY	04/25/11
Claudia Fitch	San Francisco, CA	05/03/11
CLAUDIA RUOTI	NEWPORT, RI	05/06/11
Claudie Johnson		06/27/11
Clayton Janson	Phoenix, AZ	04/25/11
Cleveland Gantt, CFP		06/12/11

Cliff O'Conner	Norcross, GA	05/04/11
Clifford Weddington	N. Charleston, SC	04/25/11
Clifford Deck	Cranston, RI	05/18/11
Clifford J Camarda	Orange Park, FL	04/25/11
Clifford R Raynor		06/07/11
Clifford Straub	Middletown, CT	04/26/11
Clifford Webster	Boston, MA	05/03/11
Clint Adams	Dallas, TX	04/25/11
Clyde G. Hohenstein, CFP		06/02/11
Clyde Hohenstein	Vienna, VA	04/26/11
cole Campbell		06/01/11
Coleen Peters		06/01/11
Colin Geiger		06/10/11
Colleen Kirton	Jersey City, NJ	06/24/11
Colleen Farley	Greenville, RI	04/25/11
Colleen Hallinan	San Mateo, CA	04/25/11
Colleen Johnson	Madison, WI	04/25/11
Colleen M. Giffin		06/03/11
Colleen O'Donnell, CFP		06/15/11
Colleen Soares	Napa, CA	05/18/11
Colleen Theuerkauf	Farmington Hills, MI	05/05/11
Colman Pierzchala	York, SC	05/03/11
Connie Brezik	Casper, WY	05/04/11
Connie Greenspon Nadrowski	Longwood, FL	05/05/11
Conrad A Roskelley	Chandler, AZ	05/04/11
Constance A Stone, CFP		06/06/11
Constance Herrstrom	Princeton, NJ	05/05/11
Courtenay Shipley	Nashville, TN	06/27/11
Coy Hewett	Midlothian, VA	04/25/11
Craig Caldwell	Sacramento, CA	04/25/11
Craig Carnick	Colorado Springs, CO	04/25/11
Craig Cross	Long Beach, CA	05/07/11
Craig D. Laday		06/10/11
Craig Franzke		06/02/11
Craig Hawkins		06/01/11
Craig Martin	San Jose, CA	04/25/11
Craig Miller	Austin, TX	04/25/11
Craig Morgan	San Antonio, TX	04/25/11
Craig Narum		06/10/11
Craig Richart	Chicago, IL	05/18/11

Craig Schmith	Durham, NC	04/25/11
Cristina Guglielmetti, CFP (R)		07/12/11
Curt DiGiacomo		06/02/11
Curt Morrow	Columbus, OH	04/25/11
Curt R. Christensen		06/10/11
Curt S. Heinz		06/15/11
Curt Weil	Palo Alto, CA	04/26/11
Curtis D. Harris		06/01/11
Curtis Hearn		06/10/11
Curtis Lawrence	Lake Oswego, OR	04/25/11
Curtis Reed		06/02/11
Curtis Willardson	Provo, UT	04/25/11
Cyndi Mears	Chicago, IL	04/25/11
Cynthia B. Savage		06/21/11
Cynthia Barnett		06/10/11
Cynthia Fusillo	New Providence, NJ	06/01/11
cynthia g green	lansing, MI	04/26/11
Cynthia M Trombly		06/10/11
Cynthia Taradash	Whitefield, NH	04/27/11
Cynthia Turoski	East Greenbush, NY	04/28/11
Cynthia Zickel	Radnor, PA	04/26/11
D. Alfred Jones	Eau Claire, WI	05/31/11
Dale Costello		06/02/11
Dale Hearn		06/10/11
Dale Perry	Adrian, MI	05/04/11
Dale Rains		06/10/11
dale robinson	Dearborn, MI	04/25/11
Dale Sailors	Laramie, WY	04/25/11
Dale Woodward	Anaheim, CA	05/14/11
Dallas Coffman	Wakefield, MA	04/25/11
Dan Bussone	Cincinnati, OH	04/26/11
Dan Candura	Braintree, MA	04/25/11
Dan Darchuck	Monterey, CA	04/25/11
Dan Federman	Washington, DC	06/24/11
Dan Gensler		06/11/11
Dan Hagler	Bedford, NH	04/26/11
Dan Heitzman	Marshfield, MA	04/25/11
Dan Moisand	Melbourne, FL	05/09/11
Dan Reese	Jackson, MI	05/18/11
Dan Serra		06/07/11

Dana Albright		06/01/11
Dana Anspach	Scottsdale, AZ	05/04/11
Dana Menard	Maple Grove, MN	05/18/11
Dana Sippel	Mclean, VA	04/25/11
Dana Troske		06/15/11
Dana Wong	Plano, TX	05/06/11
Danelle Jenetayeva	New York, NY	05/05/11
Daniel B. Fitzgerald		06/03/11
Daniel Beatty	Oakland, CA	04/25/11
Daniel Beauchemin	Nashua, NH	05/03/11
Daniel Boyce	Southfield, MI	04/25/11
Daniel Bunting	Virginia Beach, VA	04/26/11
Daniel C. Fisher		06/14/11
Daniel Chamberlin	Helena, MT	05/19/11
Daniel Charron	Scottsbluff, NE	05/04/11
Daniel Davis	St. Louis, MO	04/25/11
Daniel DeSimone, CFP	Wilton, CT	04/25/11
Daniel Drake	Dallas, TX	05/03/11
Daniel Drappo	Black River, NY	04/26/11
Daniel Dubay		06/10/11
Daniel Dwyer	Oakland Gardens, NY	04/25/11
Daniel E Jobe		06/01/11
Daniel Elie	Miami, FL	05/19/11
Daniel Forbes	Providence, RI	04/25/11
Daniel G. Quible		06/13/11
Daniel Getsch	Maplewood, MN	04/26/11
Daniel Gibson	Madison, WI	04/26/11
Daniel Grover	Waxhaw, NC	05/04/11
Daniel Hunteman	Wauwatosa, WI	04/25/11
DANIEL J ASPENLEITER CFPÂ®		06/03/11
Daniel J. Roundtree, CFP		06/01/11
Daniel Johnson	Fort Collins, CO	04/28/11
Daniel Leonard, CFP		06/02/11
DANIEL MACDONALD	BRONXVILLE, NY	05/03/11
Daniel Mantell	Needham, MA	05/05/11
Daniel McLeod	Fairhope, AL	05/04/11
Daniel Meyerovitz		06/01/11
Daniel N. Mathews, CFP(R)		06/10/11
Daniel O'Leary	Olympia, WA	05/03/11
Daniel Osgood	San Diego, CA	04/25/11

Daniel P. Lash, CFPÂ®, AIFÂ®		06/14/11
Daniel Prosser	Chesterfield, MO	05/03/11
Daniel R. De Jong		06/03/11
Daniel Roberts, MSFS	Tustin, CA	04/25/11
DANIEL Roe	COLUMBUS, OH	05/05/11
Daniel S Huston		06/13/11
Daniel S. Miller		06/01/11
Daniel S. Russell		06/10/11
Daniel Speer	Charlotte, NC	04/26/11
Daniel Stobba	Franklin, WI	04/27/11
Daniel Taylor	San Carlos, CA	04/25/11
Daniel Weeks	Overland Park, KS	04/25/11
Daniel Yasharel		06/02/11
Danielle Daley		06/10/11
Danielle Howard	Basalt, CO	04/26/11
Danny Matthews	Flowood, MS	05/03/11
Darcy Jones	St Pete Beach, FL	05/04/11
Darin Luze	Fort Collins, CO	04/25/11
Darin Martinelli	San Leandro, CA	04/25/11
Darin R Shebesta		06/10/11
darius dirzinskas	london,	04/29/11
Darleen Gilmore	Austin, TX	04/25/11
Darrell Claridge		06/10/11
Darren Kalb	San Diego, CA	04/25/11
Daryl Ellis	Baton Rouge, LA	04/25/11
Daryl Goughnour	Burnsville, MN	05/31/11
Daryl Kim Miller	Redmond, WA	04/25/11
Daryoosh Khalilolollahi		07/18/11
dave bahnick	Center Valley, PA	04/26/11
Dave Forbes	Colorado Springs, CO	05/31/11
Dave Livran		06/06/11
Dave Martula	Hadley, MA	05/04/11
Dave Samuels	San Jose, CA	04/26/11
Dave Williams		06/14/11
Dave Yeske	San Francisco, CA	04/25/11
David Barker	Bridgton, ME	04/26/11
David Burnham	Miami, FL	05/04/11
David Little	Royersford, PA	04/25/11
David Nienaber	Cincinnati, OH	04/25/11
David O'Brien	Midlothian, VA	04/25/11

David Rae	la, CA	04/25/11
David Simmons	Tucson, AZ	05/04/11
David Austin	Miami, FL	07/14/11
DAVID BAILEY	Stokesdale, NC	04/26/11
David Beck	Cupertino, CA	04/25/11
david becker		06/12/11
David Berdow	Narberth, PA	04/25/11
david bobrowsky	walnut creek, CA	04/25/11
David Bonebrake, CFP(R)	Eugene, OR	04/25/11
David Boyle	Shaker Heights, OH	04/25/11
David Breuer	Elkhart, IN	04/25/11
David Brock	Annapolis, MD	07/26/11
david bugen	new vernon, NJ	04/25/11
David Buskirk		06/01/11
David C Whitmore, Jr		06/01/11
David C. Lewis,		06/13/11
David C. Mills		06/13/11
David Carboni	Hamden, CT	04/25/11
David Clarken		06/02/11
David Coult		06/11/11
David Cowles	San Francisco, CA	05/18/11
David Cyrs	Rockford, IL	05/19/11
David Darmour		06/01/11
David De Rhodo		06/13/11
David Demming	Aurora, OH	05/18/11
David Demming Jr	Chagrin Falls, OH	04/25/11
David DeWolf	Culver City, CA	04/26/11
DAVID DUTTENHOFER	laguna beach, CA	05/19/11
David Eggleston	Jacksonville, FL	04/26/11
David Evans	Dallas, TX	04/26/11
David Fedor	West Springfield, MA	04/25/11
David Feldman	Parsippany, NJ	04/25/11
David Firth	Palo Alto, CA	04/27/11
David Flanders, CPA/PFS, CFP(r)	Bel Air, MD	04/25/11
David Fuhrman, CFA, CFP	Roseland, NJ	06/24/11
DAVID G ELLIOTT	BURIEN, WA	04/25/11
David Garrison	Lee's Summit, MO	05/03/11
David Goldberg		06/16/11
David Gurnee	Granger, IN	05/03/11
david halfaker	Tampa, FL	04/25/11

David Hamra	Tucson, AZ	04/25/11
David Hansch, CFP	Dana Point, CA	05/03/11
David Harbeitner	Eldersburg, MD	05/31/11
David Heide		06/01/11
David Hensley	Spencer, IN	05/03/11
David Hergert	Houston, TX	05/05/11
David Hill	The Woodlands, TX	04/25/11
david hodges	chattanooga, TN	05/02/11
David Holan	Chicago, IL	05/03/11
David Hollands	Plano, TX	05/03/11
David Hoyer		06/15/11
David Hultstrom	Woodstock, GA	04/25/11
David Hunter	Asheville, NC	04/25/11
David J. Drucker		06/10/11
David J. Keosaian		06/14/11
David J. Oestreicher, CPA/PFS, MBA,		06/13/11
David J. Strutzel		06/01/11
David Jacobs	Kailua, HI	04/25/11
David Jazo	Phoenix, AZ	05/24/11
David Joe	Scottsdale, AZ	04/25/11
David K Binns-Loveman		06/06/11
David Kozlowski	Midlothian, VA	05/04/11
David Kuebelbeck		06/01/11
David LaMay	Old Saybrook, CT	04/25/11
David Lesnick		06/06/11
david lindau	el paso, TX	05/03/11
David Lobacz	Olney, IL	05/04/11
David M. Curles		06/10/11
David M. Nelson		06/02/11
David Mayes	Hampton Falls, NH	05/04/11
David McKee	Centreville, VA	05/06/11
David McPherson	Falmouth, MA	04/25/11
David Mertz	Irvine, CA	05/19/11
david mickley	madison, PA	04/26/11
David Morgan	Oak Brook, IL	05/04/11
David Munn	Maumee, OH	05/06/11
David Murdock	Los Angeles, CA	04/25/11
David Mysliwiec	Albany, NY	05/06/11
David Niggel		06/14/11
david nobles	Fayetteville, NC	05/18/11

David O'Block		06/06/11
David Odiorne	Ashburn, VA	05/03/11
David Otto	Katonah, NY	04/25/11
David P. Meglay		06/11/11
David Pace		06/10/11
David Pacer		06/13/11
David Patterson	Waterford, MI	04/26/11
David Pedley	Northfield, IL	04/26/11
david Poole	bwood, SC	05/03/11
David R Cohen	Houston, TX	04/25/11
David R. Price		06/03/11
David Rhodes	Nekoosa, WI	05/03/11
David Robinson		06/14/11
david rosenthal	scottsdale, AZ	04/27/11
David Roskoph	Gig Harbor, WA	05/03/11
David Rousse	hammond, LA	04/25/11
David Sadler		06/16/11
David Schreiber	Arlington, MA	04/25/11
David Scott Fisheer		06/13/11
David Sheehan	Ashburn, VA	04/25/11
David Shen		06/10/11
David Silverberg		06/02/11
David Smith		06/02/11
David Smith	Camarillo, CA	04/25/11
David Stallard	Park City, UT	04/25/11
David Stewart		06/14/11
David Stone	Pickerington, OH	04/27/11
David Stott	Verona, WI	05/18/11
David Strege	West Des Moines, IA	05/06/11
David Suess	Addison, TX	04/25/11
David T Maddux		06/10/11
David T. Lumley, CFA, CFP(R)		06/02/11
David Teel	Sugar Land, TX	05/03/11
David Thomas	Madisonville, KY	04/26/11
David Umstead	Manchester, MA	06/25/11
David W Rommelmann		06/02/11
David W. Swapp		06/13/11
David Walz	Oak Park, IL	04/27/11
david ward	alpharetta, GA	04/25/11
david waters	philadelphia, PA	04/25/11

David Wayne Garrett CPA, CFP		06/10/11
David Welch	Wellesley, MA	05/06/11
David White	Clemmons, NC	04/25/11
David Wiley	Minneapolis, MN	04/26/11
David Wilke		06/11/11
David Wilson		06/01/11
David winslow		07/11/11
David Worthington		06/01/11
David Yarn	Gaithersburg, MD	05/04/11
David Zolt	Lakewood, OH	05/31/11
David Zuckerman	Los Angeles, CA	04/25/11
Davita Alford-Cooper	Columbia, MD	05/06/11
Dawn Donato		06/02/11
Dawn Edwards	chicago, IL	04/29/11
Dawn M Kirchner		06/10/11
Dawn Starks	Asheville, NC	04/26/11
Dayne Wendling		06/10/11
Dean Boebinger	Houston, TX	05/05/11
Dean Cherpitel	Overland Park, KS	05/06/11
Dean Dawson		06/10/11
Dean Harman	The Woodlands, TX	04/25/11
Dean Suzuki		06/10/11
Deana Arnett	Manassas, VA	04/25/11
DeAnne Mathis		06/13/11
Debbie Freeman	Lincoln, CA	04/25/11
Debbie Grose	Arbuckle, CA	04/25/11
Debbie Heap		06/11/11
Debbie Pursey		06/13/11
Deborah Bell	Abilene, TX	06/27/11
Deborah Gdisis	Wichita, KS	04/26/11
Deborah Heim	Great Falls, MT	04/27/11
Deborah Hoskins	Colorado Springs, CO	05/31/11
Deborah J. Fritsche		06/05/11
Deborah Lane		06/02/11
Deborah Levenson	Needham, MA	04/26/11
Deborah Maher	Katonah, NY	04/25/11
Deborah Posada		06/06/11
Deborah R. Blankenship		06/10/11
Deborah Rivosa	New Providence, NJ	05/26/11
Deborah Tayloe	New Bern, NC	05/20/11

deborah thomas	portland,, OR	04/26/11
Debra C. Kriebel		06/10/11
Debra Gallant	Gaithersburg, MD	04/25/11
Debra Gauthier	Miami, FL	07/13/11
Debra Neiman	watertown, MA	05/09/11
Dee Balliett	Winter Park, FL	05/31/11
Dee-Ann Fox	New York, NY	05/05/11
Deena Katz	Lubbock, TX	04/25/11
Deidra Fulton	Plano, TX	05/22/11
Delia Fernandez	Los Alamitos, CA	05/31/11
Delores Remo	Mechanicsville, VA	04/25/11
dena minning	treasure island, FL	04/26/11
Denis Higgins	Boston, MA	05/03/11
Denise Lant		06/20/11
Denise Smith	Salt Lake City, UT	05/04/11
DENISE WILCOX	HENDERSON, NV	05/18/11
Dennis Gogarty	Washington, DC	04/25/11
Dennis Holzwarth	Dallas, TX	04/25/11
DENNIS A. CASTIGLIA	BUFFALO, NY	04/25/11
Dennis Bush	Gig Harbor, WA	04/25/11
Dennis Donahue	East Hartford, CT	05/18/11
Dennis Dow, CFP		06/11/11
Dennis Eichinger	Grand Junction, CO	05/03/11
Dennis F. Mahoney, M.S.,		06/13/11
dennis felcher	hollywood, FL	04/25/11
Dennis Foegen	Tulsa, OK	04/25/11
Dennis Gero	Northampton, MA	04/25/11
Dennis Hebert, CLU ChFC MSFS	Liverpool, NY	04/27/11
Dennis Koch	Crookston, MN	05/04/11
dennis L. Stacy CFP		06/15/11
Dennis M. West		06/10/11
Dennis Meade	Chicago, IL	05/24/11
Dennis Menard	Longwood, FL	05/01/11
Dennis Muehlenbach		06/01/11
Dennis N. Mainard		06/02/11
Dennis Suckstorf	Sykesville, MD	04/27/11
Derek Packett	Nesconset, NY	04/26/11
Derek Hicks	Minneapolis, MN	04/26/11
Derek Lenington	Portland, OR	05/19/11
Derek Munchow		06/01/11

Derek Pantele	Newport Beach, CA	05/05/11
Derek R. Stanley, CFP		06/02/11
Derek Vaughn	Plano, TX	05/05/11
Derrick Johnson	Grand Forks, ND	04/25/11
Devonee Kershner		06/02/11
Diahann Lassus	Berkeley Heights, NJ	05/03/11
Diana Bacon		06/15/11
Diana G Simpson, MBA, CFP		06/14/11
Diana L Holmes		06/01/11
Diana Simpson	Trussville, AL	04/25/11
Diane MacPhee	Manahawkin, NJ	05/31/11
Diane Armstrong	Columbus, OH	05/18/11
diane haneklau		06/02/11
Diane Jaworski-Faulhaber	Castro Valley, CA	05/18/11
Diane Maloney	Plainfield, IL	04/25/11
Diane Rosen	Foxboro, MA	04/25/11
Diane Sher	St Louis, MO	04/29/11
Dianne H Webster		06/02/11
Dick Lee	Grand Rapids, MI	04/27/11
Dicran Haidostian		06/01/11
Dieter Ramaekers		06/10/11
Dieter Scherer	Stevensville, MD	05/09/11
Dinesh Sharma		06/08/11
Dipal Patel		06/15/11
Dirk Huybrechts	Los Angeles, CA	05/04/11
Dixie Powell	Vero Beach, FL	04/25/11
Dolf Dunn	Huntersville, NC	04/25/11
Don Camphausen	Rochester, NY	04/25/11
Don Atherton		06/10/11
Don Clark	Overland Park, KS	04/25/11
Don Mahlen	Webster, SD	04/25/11
Don Seese	St. Louis, MO	05/03/11
Don St. Clair	Roseville, CA	04/25/11
Don Stalker	Riverside, CA	04/25/11
don stamas	charlotte, NC	05/18/11
Don Stringfield	Macon, GA	04/25/11
Don Tharp	Hudson, OH	05/06/11
Don Whalen	Alpharetta, GA	05/31/11
Don Wilson	Tucker, GA	04/25/11
Don Wilson	Jefferson City, MO	05/18/11

Donald Brown	Winston-Salem, NC	04/25/11
Donald Loveless	billings, MT	04/25/11
Donald A Woo		06/10/11
Donald A. DeBernardi, Jr.		06/01/11
Donald Acker	Sioux City, IA	04/25/11
Donald Ackley	Williamsburg, VA	04/26/11
Donald Arnold	Baltimore, MD	04/26/11
Donald Askey	Newburyport, MA	04/25/11
Donald Baxter	Wichita, KS	04/25/11
Donald Burns	Fairport, NY	05/05/11
DONALD DeMUTH	MECHANICSBURG, PA	05/31/11
Donald Duncan	Downers Grove, IL	05/14/11
Donald E Lewis	Lawrenceburg, KY	04/25/11
Donald E. Jones		06/02/11
Donald Gross	Lancaster, PA	06/27/11
Donald H Angel		06/03/11
Donald Hausle		06/02/11
Donald M Karpick		06/01/11
Donald MacKay	Frankfort, IL	05/06/11
Donald Musnicki	wtertown, NY	06/21/11
Donald Nestor	Maitland, FL	05/06/11
donald nicholson	wilmington, DE	05/04/11
Donald P. Lord		06/01/11
Donald Penn	Lafayette, IN	05/06/11
Donald Purtill	Highland Hts, OH	05/04/11
Donald Riggs	Santa Ana, CA	04/25/11
Donald Sibbitt	Campbell, CA	05/03/11
Donald Wheeler	Duxbury, MA	05/04/11
Donald Wulf	Napa, CA	05/04/11
Donald Wylin	Indianapolis, IN	04/25/11
Donna Cygan	Albuquerque, NM	05/04/11
Donna F. Cuvar-Mariotti		06/02/11
Donna Gordon	Birmingham, AL	05/31/11
Donna J. Kane		06/12/11
DONNA MOCK	MEDFORD, OR	04/28/11
Donna R. Chapel		06/02/11
Donna Wood	Haymarket, VA	05/03/11
Donnie Davis	Tulsa, OK	05/09/11
Doreen J Haller		06/10/11
Dori Daknis		07/03/11

Dorothy cada	loveland, CO	05/04/11
Dorothy Cole	Merrimack, NH	05/04/11
Dorothy Strackbein		06/02/11
Doug Vaughn	DeWitt, MI	04/25/11
Doug De Groote		06/01/11
Doug Everett	Portland, OR	05/03/11
Doug Heimforth	Boise, ID	04/27/11
DOUG LEMON	RICHLAND, MS	05/18/11
Doug Loftus	Cincinnati, OH	04/25/11
Doug Naegele	Lubbock, TX	04/25/11
Doug Vaughn		06/01/11
Douglas Voisard	Grand Rapids, MI	05/19/11
Douglas Boring	Granite Bay, CA	05/06/11
Douglas Borstel	Signal Hill, CA	05/05/11
douglas brooks		06/10/11
Douglas Darmstaetter	Lancaster, PA	04/28/11
Douglas DeGain	Rochester Hills, MI	05/03/11
Douglas Granger		06/11/11
Douglas Hanke	Tampa, FL	05/04/11
Douglas Hockersmith	Bellevue, WA	04/25/11
Douglas Lyons		06/10/11
Douglas M. King		06/15/11
Douglas Molstad	Warren, NJ	04/26/11
Douglas Parrish	Mamaroneck, NY	04/25/11
Douglas Pease	Carmel Valley, CA	04/25/11
Douglas R Mavilia		06/02/11
Douglas Roberts		06/02/11
Douglas Robinson	Bel Air, MD	05/31/11
Douglas Taylor	Torrance, CA	05/31/11
Douglas Thorpe	Parkersburg, WV	05/03/11
Douglas W. DeGain, CFP		06/06/11
Douglas Wm. Elliott, CFP(R)		06/06/11
Dr Ronald D Miller CFP AIFA		06/14/11
Dr. Gregg Dimkoff		06/13/11
Drew Biehler	Midlothian, VA	04/25/11
Drew Harper		06/01/11
Drew Malkin	rocky hill, CT	04/25/11
Dudley Barnes	Clarksdale, MS	04/26/11
Duffy G Elliott		06/02/11
Dustin Granger		06/10/11

Dustin L Bench		06/10/11
Dustin L. Furrey		06/01/11
Dustin R Granger		06/06/11
Dwain Gump	Coloraod Springs, CO	05/19/11
Dwayne Adams		06/10/11
Dwayne Snyder	Nazareth, PA	04/25/11
Dwayne Warrick	Prescott, AZ	05/03/11
Dwight A. Lydic		06/11/11
Dwight Edwards	Santee, CA	05/05/11
Dwight Erskine CFP		06/10/11
Dwight Mikulis	Columbia, MD	04/25/11
Dwight Pittenger		06/10/11
Dylan Ross	Hightstown, NJ	04/25/11
E Lori Smith	Pottsville, PA	04/25/11
E. Gail Ramos		06/02/11
E. Robert Branch III, CFP ChFC	Ormond Beach, FL	04/26/11
E. Vance Grange	Smithfield, UT	05/04/11
Earl Jefferson	Plano, TX	04/25/11
Earl R. Sims		06/15/11
Earl Weedon	Addison, TX	04/25/11
Eban Barnett		06/02/11
ed delorenzo	hackensack, NJ	05/18/11
Ed Green	West Des Moines, IA	04/25/11
Ed Mink		06/02/11
Edmund Ricker	Portland, ME	04/25/11
Edna Thompsen	Houston, TX	04/25/11
Edward Brennan		06/02/11
Edward Camp		06/02/11
Edward Carson	Simpsonville, SC	05/05/11
Edward Costello		06/02/11
Edward F. (Ned) Nagle II		06/02/11
Edward Fatla		06/08/11
Edward Fulbright	Durham, NC	05/05/11
Edward Gjertsen II	Glenview, IL	06/10/11
Edward Goldstein		06/01/11
Edward Holy	Willowbrook, IL	04/25/11
Edward J. Mockler, CFP		06/10/11
Edward Johnson	Glendale, CA	05/13/11
Edward Kohlhepp	Doylestown, PA	04/26/11
Edward Mora		06/02/11

Edward Muse	Raleigh, NC	05/03/11
edward n smolar		06/01/11
Edward Roth	Pettisville, OH	05/18/11
Edward Skalamera	Berwyn, PA	04/26/11
Edward Stuart	Short Hills, NJ	04/25/11
Edward Williams	Brunswick, GA	04/25/11
EDWARD ZABLOSKI	OCEAN BLUFF, MA	05/03/11
Edwin Drake	Madison, WI	04/25/11
Edwin R. Baldrige III		06/10/11
Egon Menker		06/02/11
Eileen J. Trott	Rochester, NY	04/25/11
Eileen Novak	Omaha, NE	05/24/11
Elaine Bedel		06/10/11
Elaine Collins	Libertyville, IL	04/26/11
ELAINE KIERNAN	Santa Cruz, CA	04/25/11
Elaine Potash	Greenwich, CT	04/25/11
Eleanor Blayney	McLean, VA	05/03/11
Elena Zee		07/15/11
Elihu Woolfson	Brandon, FL	04/26/11
Elissa Buie	Vienna, VA	04/25/11
Elizabeth A. Bailey, CFP		06/11/11
Elizabeth Baer	Lansing, MI	05/24/11
Elizabeth Barrett	Rochester, NY	04/25/11
Elizabeth Bivings	Boston, MA	06/21/11
Elizabeth Cox	REDDING, CT	04/26/11
Elizabeth deSousa		06/30/11
elizabeth harty	atlanta, GA	05/18/11
Elizabeth Jetton		06/03/11
Elizabeth Kaye McBee	Tulsa, OK	04/25/11
Elizabeth L. Rabbitt		06/10/11
Elizabeth Pavin	Darien, IL	05/04/11
Elizabeth Shabaker	Phoenix, AZ	04/26/11
Elizabeth Whitteberry		06/02/11
Elizabeth Wu		06/10/11
Ellen DeNelsky		06/02/11
Ellen E Hull		06/10/11
ELLEN H. OPPRECHT		06/02/11
Ellen J Webber		06/10/11
Ellen Siegel	Miami, FL	04/26/11
Ellen Siegel, CFP		06/01/11

Ellen Timberlake	Arlington, TX	04/25/11
Elliott Ring,		06/10/11
Elliott S Collins		06/05/11
Emily Beshlian	La Vista, NE	04/25/11
Enoch Chung		06/01/11
Enrique Aguilar	San Antonio, TX	04/25/11
Eric Swanson	Camarillo, CA	04/25/11
Eric A. Nordseth		06/01/11
Eric Bruck, CFP		06/14/11
Eric Cumley, CFP		06/01/11
Eric Flett		06/13/11
Eric Garrard		06/02/11
Eric Golberg	San Jose, CA	04/25/11
Eric Hess	McLean, VA	05/03/11
Eric Hutchinson	Little Rock, AR	05/09/11
Eric Kies	Moline, IL	04/25/11
Eric Korbitz	Elm Grove, WI	04/26/11
Eric LaBay	Broomfield, CO	05/03/11
Eric Lans	Muskegon, MI	04/26/11
Eric McClain	Vestavia, AL	04/25/11
Eric Moen		06/01/11
Eric Mote	Cedar Rapids, IA	04/25/11
Eric Nelson		06/10/11
Eric Rabbanian	Austin, TX	05/19/11
Eric Shaffer		06/01/11
Eric Simons		06/10/11
Eric Smith	Seattle, WA	04/25/11
Eric Steiner	St. Louis, MO	04/27/11
Eric Stokes		06/01/11
Eric Wasson		06/01/11
Eric Weiss	Tolland, CT	04/26/11
Erik Christman		06/01/11
Erik Daniels	Roswll, GA	04/25/11
Erik M Lindgren, CFP ChFC		06/01/11
Erik Melville		06/01/11
Erik Milam, CFPÂ®, RLPÂ®		06/16/11
Erik Streeter	Salem, MA	05/01/11
Erik Wolfers	Piedmont, CA	04/25/11
Erin Campbell	Raleigh, NC	05/31/11
Erin Freize, CFP		06/02/11

Erin Ladwig	West Bend, WI	04/25/11
Erin Linnihan		06/10/11
Ethan Pepper	Campbell, CA	05/04/11
Ethan Bonar	Dalas, TX	04/26/11
Eugene Fambrough	San Juan Capistrano, CA	04/26/11
Eugene Nazelrod	Towson, MD	04/25/11
Eugene Schnell	Castle Rock, CO	05/03/11
Eugene Smith		06/01/11
Eugene von Mosch	Duluth, MN	04/30/11
Eva Wilde	Bloomingdale, IL	05/03/11
Evan Bedel		06/05/11
Evan C. Barrett, CFPÂ®		06/10/11
Evan Peterson	Round Rock, TX	04/25/11
Evan Russell, CFPtm	Portland, OR	04/25/11
Eve Kaplan	Berkeley Heights, NJ	05/04/11
Evelyn MacIntyre	Bloomfield Hills, MI	04/26/11
Evelyn Zohlen	Huntington Beach, CA	04/28/11
Everette B. Orr		06/10/11
F Dennis De Stefano	Kihei Maui, HI	04/25/11
F Carl Walter	Beachwood, OH	04/26/11
F William Evanhoe	Redding, CA	04/25/11
F. James Ginnane		06/12/11
Fabio Santos		06/09/11
Faith Xenos	Coral Gables, FL	05/05/11
Farah Winkler		06/01/11
Faron Daugs	Libertyville, IL	04/27/11
Faye Kathryn Doria		06/03/11
Faye Sanders CFP		06/02/11
Fern Alix LaRocca CFP EA	Mountain View, CA	04/25/11
Ferris Ahn	McLean, VA	04/25/11
Ford Barrett	Wenatchee, WA	05/05/11
Frances Goldman	Washington, DC	04/26/11
Frances Merryman		06/10/11
Francesca Banci	Woodbuty, NY	05/06/11
Francis Kredit	Fullerton, CA	04/25/11
Francis P Garvan	Rye, NH	04/26/11
Francis Sellers	S.Yarmouth, MA	04/25/11
Francis St.Onge, CFP		06/10/11
Frank Allen	Ponte Vedra Beach, FL	04/28/11
Frank Arnall	Winter Park, FL	05/03/11

Frank B. Robards, III		06/10/11
Frank Bartolone	Park Ridge, IL	04/25/11
Frank Boucher	Reston, VA	04/25/11
Frank Brannon	Atlanta, GA	04/25/11
Frank Cagnetti	Montrose, CO	05/04/11
Frank Garrick	Kenilworth, NJ	05/26/11
Frank Geremia		06/14/11
Frank Kelly	Little Rock, AR	04/27/11
Frank Lehane	Fullerton, CA	04/25/11
frank lupul	saratoga spgs, NY	05/05/11
Frank Marrone		06/10/11
Frank Mlynarczyk		06/02/11
Frank Nelson	White Plains, MD	04/27/11
Frank Patzke	Palatine, IL	04/25/11
Frank Ruffing	Arlington, VA	05/04/11
Franklin Mohri		06/10/11
Franklin Williamson	Durham, NC	04/25/11
Fred Amrein	Wynnewood, PA	05/04/11
Fred Fisher	Santa Barbara, CA	04/26/11
Fred Holmes	gulfport, MS	04/25/11
Fred J Wilson		06/03/11
Fred Soule	Murray Hill, NJ	05/29/11
Frederic Rizzo	Chicago, IL	05/03/11
Frederic Flower	Annapolis, MD	04/26/11
Frederic Gottschalk, CFA	Scottsdale,, AZ	06/24/11
Frederic Rizzo		06/02/11
Frederick Brooks	Solana Beach, CA	04/25/11
Frederick Miller	Waltham, MA	04/27/11
Frederick R Parcells		06/14/11
Fredric Goodman		06/10/11
Fredrick Livingston	Alpharetta, GA	04/25/11
G Charles Mishler	Wichita, KS	04/25/11
G. Joseph Votava, Jr.	Rochester, NY	04/25/11
G. Ray Cauthen Jr CPA CFP		06/03/11
Gabe Stepanic	Cary, NC	04/25/11
Gabriel Rosko	Blairstown, NJ	06/24/11
Gaetan Scalzo		06/01/11
Gail A. Hicks		06/11/11
Gail Parker	Portland, OR	04/25/11
Gale Johnston		06/10/11

Gali sherman		06/10/11
garth williams	Los Altos, CA	04/26/11
Gary Kolodziejczyk, Sr.	Syracuse, NY	04/25/11
Gary Svatek	Fairfield, CA	04/25/11
Gary Tilley	Kingsport, TN	05/04/11
GARY A. FOCHESTO		06/10/11
Gary A. Morris		06/15/11
gary alfonso		06/16/11
Gary B Dunco		07/26/11
Gary Bowyer	Park Ridge, IL	05/04/11
Gary Calmes		06/07/11
Gary D. Burger		06/15/11
Gary Deardorff	Glendale, AZ	04/27/11
Gary DeLorenzo	Huntington, NY	04/25/11
Gary Domm	Germantown, TN	04/25/11
Gary Glanz	Plantation, FL	06/24/11
Gary Gray		06/01/11
Gary Greenbaum	Tucson, AZ	04/25/11
Gary Hager	Piscataway, NJ	04/25/11
Gary Hess	Harrisonburg, VA	05/05/11
Gary Horowitz	Deerfield Beach, FL	05/03/11
Gary Houle		07/02/11
Gary Johnston	Princeton, NJ	05/03/11
Gary l Twing		06/10/11
Gary L. Popkes		06/02/11
Gary Love	ROckford, IL	04/25/11
Gary Morris	Dallas, TX	05/01/11
Gary N. Krikorian , CPA, CFP		06/13/11
Gary Orkin	Berkeley, CA	04/25/11
Gary Parks	Olney, MD	05/04/11
Gary Pittsford	Indianapolis, IN	04/25/11
gary r gauthier		06/13/11
Gary Rennie	Irvine, CA	05/05/11
Gary Sidder	Littleton, CO	05/03/11
Gary T. Moss Jr.		06/15/11
Gary Vawter		06/13/11
Gary Vig	Eden Prairie, MN	05/18/11
Gary W Dicus		06/01/11
Gary Ward	Brentwood, TN	05/03/11
Gayle Colman	Carlisle, MA	04/25/11

Gayle I Delfs		06/03/11
Gene Balliett	Winter Park, FL	05/31/11
Gene Diederich	Clayton, MO	04/26/11
Gene Faddis	Ambler, PA	04/25/11
Gene Root		06/01/11
Geoffrey Kanner	North Haven, CT	04/25/11
Geordie Crossan	Westlake Village, CA	05/05/11
George Mowrey	Youngstown, OH	04/25/11
GEORGE OSHIRO	Diamond Bar, CA	04/25/11
George Bentley		06/15/11
George Bernet	Needham, MA	04/25/11
George Durham	Falls Church, VA	04/25/11
George Englert		06/01/11
George G Ross CPA PFS CFPÂ®		06/10/11
George Hall		06/10/11
George Kinder	Littleton, MA	05/17/11
George Koeltl	Valhalla, NY	05/19/11
George Loomis	Minneapolis, MN	04/25/11
George Luciani	Yardley, PA	04/25/11
George M Dimitriu		06/02/11
George Middleton	Vancouver, WA	04/25/11
George Pierce	Lexington, KY	05/19/11
George Poole	New York, NY	04/25/11
George Squires	Salt Lake City, UT	05/05/11
George Syata	Overland Park, KS	04/26/11
George W Martin III		06/10/11
George Warner	Rowlett, TX	04/26/11
George Waters	Brewster, NY	05/05/11
Georgeanna Fischetti	Chicago, IL	04/26/11
Georgette Frazer, CPA, CFPÂ®	Marshfield, WI	05/18/11
Gerald Craig		06/16/11
Gerald Gasber	Folsom, CA	05/04/11
Gerald Gortner		06/10/11
Gerald Kasper	Cary, NC	04/29/11
Gerald Klump	Madison, WI	04/25/11
Gerald LaMalfa	Branchburg, NJ	04/25/11
Gerald M. Schwartz, CFP(r)		06/10/11
Gerald Minnis	Louisville, KY	06/27/11
Gerald P Motl		06/01/11
Gerald Summers	West Chester, OH	05/03/11

Gerald Tyson	Fitchburg, WI	04/25/11
Geraldine "Carrie" Jones	Jacksonville, FL	04/26/11
Gerard Barrasso	Smithtown, NY	05/04/11
Gerard Stellwagen	Venice, FL	05/03/11
Gerard Thompson		06/14/11
Gerry Ahern, CFP		06/17/11
Gerry Finnegan	Lincoln, NE	05/19/11
Gifford Lehman	Carmel, CA	04/25/11
Gilbert Armour	San Diego, CA	04/25/11
Gilbert Bradley Fries	Irvine, CA	05/06/11
Giles Almond	Charlotte, NC	04/25/11
Glen Adams	Napa, CA	04/26/11
Glen Larsen		06/01/11
Glen Merritt		06/02/11
Glen Wright	Idaho Falls, ID	04/26/11
Glenda Bianchi	Dallas, TX	04/27/11
Glenn Cook	Athens, GA	04/26/11
Glenn Downing	Miami., FL	04/26/11
Glenn E. Murphy		06/03/11
glenn large	downingtown, PA	04/25/11
Glenn Smith	Los Gatos, CA	04/25/11
Glenn Tetley		06/10/11
Glenn Woody	Costa Mesa, CA	04/25/11
Gloria J. Patterson		06/02/11
Gloria Monroe	Grants Pass, OR	05/02/11
Gordon Carpenter	Centennial, CO	04/25/11
Gordon Bennett	Winchester, MA	05/04/11
Gordon Peay	Playa del Rey, CA	04/25/11
Gordon S. Shearer Jr., CFP		06/17/11
Gordon Sherard		06/10/11
Grant Blindbury		06/03/11
Gray Goudeau	Metairie, LA	05/03/11
Greg Aitkens	Mission Viejo, CA	05/03/11
Greg Damron	Salt Lake City, UT	04/25/11
Greg Doran		06/10/11
Greg Hinkson	Troy, MI	04/25/11
greg johnson	Newark, DE	05/18/11
Greg Kimura	Sherwood, OR	04/25/11
Greg Kyde	Boulder, CO	05/03/11
Greg Palmer		06/10/11

Greg Pearce	Annapolis, MD	04/25/11
Greg Perram		06/10/11
Greg Stark	Scottsdale, AZ	04/25/11
Greg Walthorn	Bath, MI	04/25/11
Greg Werlinich	Rye Brook, NY	04/25/11
Greg Yahn		06/09/11
Gregg Clarke	Larkspur, CA	04/26/11
gregg fortune	west bloomfield, MI	04/25/11
Gregg J. Timura		06/06/11
Gregory Galecki	Ft Wayne, IN	05/31/11
Gregory Ostrowski	Annapolis, MD	05/03/11
Gregory Fasig	Loveland, OH	04/26/11
Gregory Fetters	Lake Placid, NY	05/04/11
Gregory Fong	Torrance, CA	04/25/11
Gregory Helser	San Francisco, CA	05/05/11
Gregory Herman-Giddens	Chapel Hill, NC	04/25/11
Gregory Johnston	Peoria, IL	05/31/11
Gregory Katzman	Chicago, IL	05/05/11
Gregory Lawrence	Windham, NH	04/25/11
gregory lucas	Sacramento, CA	04/25/11
Gregory M Visconti CFP		06/02/11
Gregory Makowski	Totowa, NJ	05/04/11
Gregory Morse	Los Angeles, CA	05/03/11
Gregory Richardson	Rockville, MD	04/25/11
Gregory Schaffer		06/01/11
Gregory Schill, CFP		06/02/11
Gregory Scrydloff		06/10/11
gregory stapp	olympia, WA	05/31/11
Gregory W. Williams	Salt Lake City, UT	04/26/11
Gregory Wittland	Quincy, IL	04/26/11
Gregory Yahn	Greensboro, NC	05/05/11
Gregory Zimmer	Hopewell Jct, NY	04/25/11
Gretchen Mahaffey	Louisville, KY	04/25/11
Grgeory M Visconti CFP		06/02/11
Gtant Blasdell		06/10/11
Gustav Krantz	Chillicothe, IL	06/14/11
Gwen Gepfert		06/01/11
H. A. Kallio	Santee, SC	04/25/11
H. Dudley Wade, CFP(r)		06/13/11
H. GLEN BURNS		06/17/11

H. Lindsey Torbett, CPA, CFP		06/10/11
H. Robert Bradley, CFP (TM)	Rochester, NY	04/25/11
Haider Sharifi		06/10/11
Haiping Chen	San Jose, CA	05/31/11
Hali London	Bethesda, MD	05/03/11
Hank Mulvihill	Richardson, TX	04/25/11
Hap Cole		06/10/11
Harlan Storey	North Canton, OH	05/04/11
Harold Bacheller		06/10/11
Harold Evensky	Coral Gables, FL	04/25/11
Harold Richardson	Stoneham, MA	04/25/11
Harold Rogers	Jacksonville, FL	04/25/11
Harold Sasnowitz	Binghamton, NY	05/05/11
HAROLD W BROMBERG		06/30/11
Harriet Brackey	Miami, FL	05/17/11
Harris Creech	Solon, OH	04/25/11
Harry McCullough	Lafayette Hill, PA	04/25/11
Harry Nathan McCall		06/02/11
harry rivenburgh		06/01/11
Harvey Koenig		06/13/11
Harvey Maclary		06/15/11
Harvey Ziegler	Glencoe, MO	04/26/11
Haynes Kendall	San Juan Capistrano, CA	05/03/11
Heather A. Brountas		06/02/11
Heather Robison	Bartlesville, OK	04/25/11
Heidi Mulling	Roswell, GA	04/25/11
Helen Modly	Warrenton, VA	04/25/11
helen rouzanov	Lynnwood, WA	04/25/11
Helen Wunderlich	Evansville, WI	04/25/11
Helga Cuthbert	Decatur, GA	05/19/11
Henry Bragg	Houston, TX	05/04/11
Henry Davidson, CFP		06/10/11
Henry Davis	Knoxville, TN	04/26/11
Henry H. Godbee III	Little Rock, AR, AR	04/26/11
Henry Hanau	New York, NY	04/25/11
Henry Spil, CPA, CFP		06/10/11
Henry Watson	Pittsford, NY	05/03/11
herb keyser	nevada City, CA	05/18/11
Herb Montgomery		06/01/11
Herbert Fulton	Georgetown, TX	06/13/11

Herbert Hughes	Danville, CA	05/12/11
herbert kim	beaverton, OR	05/19/11
Hillel Katzeff	San Diego, CA	05/03/11
hldy richelson	blue bell, PA	05/04/11
Holland Duell	Sheridan, WY	05/18/11
Holly Carroccio		06/02/11
Holly Gallagher	Grawn, MI	04/25/11
Holly Sansing	Pasadena, TX	05/04/11
Holly Whittle	Bellingham, WA	05/04/11
Howard C. Young, CFP		06/10/11
Howard Kuehl	Henrico, VA	05/03/11
howard lim	Chino Hills, CA	05/06/11
Howard Nellhaus		06/06/11
Howard Pressman		06/20/11
Howard Townsend	Bonsall, CA	05/03/11
Howard W Chan		06/10/11
Hratch Panosian		06/02/11
Hubert Ross	Niceville, FL	04/25/11
Hugh B. Phillips		06/14/11
Hugh Cannon	St. Louis, MO	04/27/11
Hugh Cole	Raleigh, NC	06/01/11
Hugh Parks	Memphis, TN	04/25/11
Hyrum Smith	Blacksburg, VA	05/31/11
Ian Harris	Houston, TX	05/10/11
IIDA EPSTEIN	EAST MEADOW, NY	05/18/11
ines vasquez	caracas,	04/25/11
Inge Bacon	Sturgeon Bay, WI	06/13/11
Ingrid Price	Grt Manchester,	04/28/11
Ione Cockrell	columbia, SC	05/06/11
Ira Zito		06/02/11
Irene Garand	Sturbridge, MA	05/06/11
Irene Kanai	Arlington Hts, IL	04/25/11
Irene Kramer	Atlanta, GA	04/25/11
IRENE VILONALABONNE	Fontana, WI	05/03/11
Iris Dayoub	Savannah, GA	05/04/11
Ishmael Williams	Jacksonville, FL	05/19/11
israel Guitian		06/01/11
Isreal Miller	Dallas, TX	04/25/11
Ivan G Kerr	Walnut Creet, CA	04/25/11
Ivan L White		06/01/11

Ivana Liberatore	McMurray, PA	04/27/11
Ivy Emerick	Zionsville, IN	05/04/11
J David Lewis	Knoxvillle, TN	04/25/11
J Jeffrey Lambert	Folsom, CA	05/05/11
J Lynch	Des Moines, IA	04/25/11
J Parker Mitchell		06/01/11
J Randall Hoidahl		06/02/11
J Timothy Cumming	Leesburg, FL	04/25/11
J. Brent Beene	Morristown, NJ	04/25/11
J. Donald Bird	West Conshohocken, PA	04/26/11
J. Gregory Kudlick		06/10/11
J. Jerri Hewett	Duluth, GA	05/04/11
J. Joseph Roman	Moorestown, NJ	05/04/11
J. Michael Eldridge		06/14/11
J. Michael Whitehead		06/10/11
J. Michael Witaszek		06/15/11
J. Richard Joyner		06/15/11
Jac A Cerney, CFA, CFP		06/02/11
Jace Brooks	Suwanee, GA	04/25/11
Jack B. Mace, CFP, CLU, ChFC		06/01/11
Jack C. Harmon II, CFP, CIMA		06/13/11
Jack Dugan	San Diego, CA	04/25/11
Jack Flynn	Concord, MA	05/17/11
Jack Ford	Roseville, CA	04/25/11
Jack Frost		06/01/11
Jack Jackson	Saint Petersburg, FL	04/25/11
Jack Riashi	Grosse Pointe Woods, MI	04/25/11
Jack White	St. Charles, MO	04/25/11
Jacob Kuebler	Urbana, IL	05/31/11
Jacqueline Thornhill		06/10/11
Jacquelyn Nasca	APO, AE	04/25/11
Jacqui Friedrich	Asheville, NC	05/18/11
Jai T. Doshi		06/10/11
Jaime Hinojosa	Pleasant Hill, CA	04/26/11
Jaime M. Rojkind, CFP		06/01/11
Jaimee Hansen	Lake Oswego, OR	04/25/11
Jake Jacklich	Virginia Beach, VA	04/29/11
James Hogan	Lombard, IL	05/05/11
James Pasztor	Aurora, CO	05/31/11
James Ahlschwede	Denver, CO	05/06/11

James Anderson	Danville, IL	05/04/11
james ashby	Magnolia, AR	05/03/11
James B. Sleyster		06/10/11
James Baker	Helotes, TX	04/25/11
James Barnash	Northbrook, IL	05/09/11
James Bell	Oakland, CA	04/25/11
James Blakey		06/10/11
james blazejewski		06/07/11
James Bova	Ridgefield, CT	04/25/11
James Bray	Seattle, WA	05/04/11
James Brown	Durham, NC	04/28/11
James Bukowsky	Houston, MO	05/08/11
James C. Horlacher		06/06/11
James C. Sexton III, CFP		06/01/11
James Carbone Jr.	Virginia Beach, VA	06/01/11
James Carr	Jacksonville, FL	05/18/11
James Christie	Bedminster, NJ	06/01/11
James Conrad	Birmingham, AL	05/04/11
James Corbeau		06/11/11
James Cornfeld	Clayton, MO	04/25/11
James Curran	Menlo Park, CA	04/26/11
James D Hallett		06/02/11
James D Vaughan III		06/10/11
James Dew	Scottsdale, AZ	04/25/11
James Donicht	Big Canoe, GA	05/04/11
James E. Van Meter		06/01/11
James E. Wilson		06/12/11
James F. Epperson	Baton Rouge, LA	04/26/11
James F. Seramba		06/15/11
James Fallon	Cornelius, NC	05/03/11
James G Hofmann		06/13/11
James Gallo	New Providence, NJ	05/18/11
James Glover		06/01/11
James H Sanders		06/02/11
James H White		06/02/11
James Hachadorian	altamonte sprgs, FL	05/04/11
James Hankinson	Augusta, GA	04/25/11
James HOPSON	PLano, TX	04/27/11
James Houston	Lewisville, TX	05/18/11
James Hoveland	Souderton, PA	04/26/11

James Huller	Fort Wayne, IN	06/24/11
James Ison	Marathon, WI	04/26/11
James J. Mammarella, Jr.		06/02/11
James Johnson	Folsom, CA	04/25/11
James Jung		06/10/11
James K Rockford		06/02/11
James Kaufmann	Holbrook, NY	04/25/11
James Keith Cox		06/02/11
James Klima	Columbia, MD	04/25/11
James LeBlanc	Sahuarita, AZ	04/25/11
James Lee		06/14/11
James Lee	Vienna, VA	05/03/11
James Ludwick	Odenton, MD	04/25/11
james m nordlund	Fargo, ND	04/29/11
JAMES M WESOLOWSKI		06/02/11
James M. Thompson, CFP	Arlington, MA	05/05/11
James M. Bell CFPÂ®		06/01/11
James M. Chapman CFP		06/04/11
James M. Dunphy		06/01/11
James M. Knaus, CFP		06/01/11
James Mabbutt	Roseville, CA	04/25/11
James Maher		06/10/11
James McCurdy	Houston, TX	05/05/11
James McGehee	Charlotte, NC	05/18/11
James Mclaughlin	Media, PA	04/26/11
James Morrison	Gallipolis, OH	04/26/11
James Nathan Matheson		06/16/11
James Noble	Wayne, NJ	05/19/11
James Norvell		06/01/11
james okeefe	coto de caza, CA	04/25/11
James Owen	Easton, PA	04/25/11
James P. Sandstrom		06/10/11
JAMES PARENTI	El Dorado Hills, CA	05/04/11
James Pearman	Salem, VA	04/25/11
James Perry	Fort myers, FL	05/07/11
James R. Armagost		06/01/11
James R. Sholder		06/15/11
James R. Waters		06/01/11
James Reardon	Topeka, KS	05/06/11
James Reding	St. Louis, MO	05/31/11

James Reilly	Mprristown, NJ	04/25/11
James Robinson	Apharetta, GA	04/25/11
James Ryan		06/12/11
James Ryan		06/12/11
James S. Agostini		06/10/11
James S. Miller	Wilmington, DE	04/25/11
James Sawyer	Salem, OR	05/03/11
James Schwartz	Scottsdale, AZ	04/25/11
James seagrave	Middlefield, CT	05/22/11
James Seramba	Greensboro, NC	04/25/11
James Shumway	Orem, UT	05/04/11
James Simm	Baton Rouge, LA	05/03/11
James Snelling	Houston, TX	05/04/11
James Stehr	Alameda, CA	05/18/11
James Stewart	Gaithersburg, MD	05/04/11
James Stoner Holk	Monterey, CA	06/24/11
james titus	Foster City, CA	04/25/11
James W Trippel		06/10/11
James W. Watkins, III		08/16/11
James W. Zeberlein. JR. CFP		06/13/11
james walker	charlotte, NC	04/25/11
James Walker	janesville, WI	05/15/11
James Warner		06/16/11
James Watkins	Snellville, GA	05/06/11
JAMES WATSON	Marietta, OH	04/26/11
James Watt	Fort Colloins, CO	04/25/11
James Weafer	Owensboro, KY	04/25/11
James Weeks	Littleton, CO	04/27/11
James Wilbur	Redmond, WA	05/03/11
JAMES WISE	STOCKTON, CA	05/03/11
James Wood	St. Louis, MO	04/25/11
James Wright	Macomb, MI	04/26/11
James Zeberlein	SLC, UT	05/04/11
James Zegers	Albany, NY	04/25/11
Jamie Horneman	Hazel Crest, IL	05/25/11
Jamie Milne	West Danville, VT	05/31/11
Jamie Scotland		06/02/11
Jan Gerards		06/10/11
Jana Davis	Manhattan Beach, CA	05/20/11
Jana Shoulders	Tulsa, OK	05/04/11

Jan-David Jansen	Lake Oswego, OR	04/26/11
Jane Alma Massie EA CFPÂ®		06/10/11
Jane Beule	Redwood City, CA	05/04/11
Jane Newton		06/13/11
Jane Rose	Philadelphia, NJ	06/24/11
Jane Volden	Newton, MA	04/26/11
Janet Rhodes Friedman	Concord, MA	05/04/11
Janet Hroncich	Fairfax, VA	05/06/11
Janet Petran	Itasca, IL	04/25/11
Janet Stanzak	Bloomington, MN	04/26/11
Janet Tighe	Boston, MA	05/03/11
Janet Tyler Johnson	Blanchardville, WI	04/25/11
Janet Utech	Minneapolis, MN	04/25/11
Janice A. Ginsburg		06/15/11
Janice Dreese	Bloomsburg, PA	04/25/11
Janice F. Del Toro		06/13/11
Janice Swenor		06/10/11
Janis C Shibata		06/10/11
Jared Sweitzer	Phoenix, AZ	05/18/11
Jared W. Merchant		06/02/11
Jas Arandia		06/16/11
Jason Loveless	Dallas, TX	04/25/11
Jason Archambault	PROVIDENCE, RI	04/26/11
Jason Baker	Charlotte, NC	04/29/11
Jason Cole	Leawood, KS	05/05/11
Jason Folsom	Davenport, IA	05/18/11
Jason Frazier	Memphis, TN	05/03/11
Jason Good	Edina, MN	05/07/11
Jason Gray	Houston, TX	05/03/11
Jason Hoofnagle		06/10/11
Jason Johnson		06/14/11
Jason Kamler		06/02/11
Jason Kirke, CFP(r)		06/10/11
Jason Labrum	Carlsbad, CA	05/04/11
Jason Landers	Huntsville, AL	05/04/11
jason lewis	denver, CO	04/25/11
Jason Martin		06/17/11
Jason Moore	Bloomfield Hills, MI	04/27/11
Jason Palmer		06/10/11
Jason R. Muench		06/07/11

Jason R. Newcomb, CFP(R)		06/01/11
Jason Scharp	Huntington Beach, CA	04/25/11
Jason Simac		06/10/11
Jason Smith	Hood River, OR	05/18/11
Jason Vestal	Fort Lauderdale, FL	05/03/11
Jason Wheeler	Wilmington, NC	04/25/11
Jason White	Safety Harbor, FL	04/26/11
Jay Desai		06/10/11
Jay F Mastilak		06/14/11
Jay Frank	Delafield, WI	04/27/11
Jay Hutchins	Lebanon, NH	04/25/11
Jay L Fuller	St Louis, MO	04/25/11
Jay Leader		06/10/11
Jay Penney	Scottsdale, AZ	05/05/11
Jayden Thome	Miami, FL	04/29/11
Jayne Ferrante	Fresno, CA	04/25/11
JD (Joe) Irlanda		06/06/11
Jean Mote	Cedar Rapids, IA	05/04/11
Jean Keener	Keller, TX	05/19/11
Jean McAllister	Scotch Plains, NJ	05/26/11
Jeanette Gruber	Peoria Hts, IL	04/26/11
Jeanne Rabe	Greensboro, NC	04/26/11
Jeanne Weaver	Mahwah, NJ	05/23/11
Jeannette Jones	Cincinnati, OH	05/03/11
Jeannine Stecklair	New Smyrna Beach, FL	04/25/11
Jeff Segerstrom	Mondovi, WI	05/04/11
Jeff Auwinger		06/10/11
Jeff Bergsbaken		06/01/11
Jeff Bogue	Wells, ME	04/26/11
Jeff Burrow	Modesto, CA	04/25/11
Jeff Camarda, CFP, ChFC, CFA, CLU	Orange Parl, FL	04/25/11
Jeff Euting	Simsbury, CT	04/25/11
Jeff Fang	Los Angeles, CA	05/20/11
Jeff Fortune		06/02/11
Jeff Gale		06/02/11
Jeff Hall	Knoxville, TN	04/28/11
Jeff Huizenga	Mackinaw, IL	05/09/11
Jeff Klauenberg		06/02/11
Jeff Kostis	Vernon Hills, IL	05/05/11
Jeff Maas		06/01/11

Jeff Muhle		06/01/11
Jeff Ogle	Littleton, CO	04/25/11
Jeff Rall Jr		06/19/11
Jeff Schmeltekopf	Fort Worth, TX	04/25/11
jeff seymour	cary, NC	05/04/11
Jeff Vistica	Carlsbad, CA	04/25/11
Jeff Witten	Columbia, MO	04/26/11
Jefferson Adcock	Brentwood, TN	05/05/11
Jefferson Correia	Woburn, MA	05/06/11
Jeffery Hwang	Greensboro, NC	05/05/11
Jeffery Nauta		06/02/11
Jeffery Scot Uselton		06/13/11
Jeffrey Bogaard	Murray, UT	05/06/11
Jeffrey Hough	Rochester, NY	06/24/11
Jeffrey Abadie	San Francisco, CA	05/03/11
Jeffrey Armstrong	Restion, VA	04/25/11
Jeffrey Augustine	Newton, MA	04/25/11
Jeffrey Biggar	Cleveland Heights, OH	04/25/11
Jeffrey Blowers	Brooklyn Park, MN	04/25/11
Jeffrey Botz		06/10/11
Jeffrey Bright	Portage, MI	04/27/11
Jeffrey Broadhurst	Lansdale, PA	04/25/11
Jeffrey Carlson	Columbia, MD	05/04/11
Jeffrey D McClenning		06/07/11
Jeffrey Daniher	Cincinnati, OH	04/25/11
Jeffrey Godshall	Souderton, PA	04/26/11
Jeffrey H. Massey, CFPÂ®		06/13/11
Jeffrey Hagerty	Branchburg, NJ	05/18/11
Jeffrey J. Pearce		06/02/11
Jeffrey Kohls	Springfield, MO	04/25/11
Jeffrey Kuklinski	Mequon, WI	05/03/11
Jeffrey L Halbreich		06/01/11
Jeffrey L. Harris, MBA, CFP	Brooklyn, NY	05/03/11
Jeffrey L. Kaylor	Irvine, CA	04/25/11
Jeffrey MacDonald	Greenville, DE	05/04/11
Jeffrey Massey	Linconln, RI	05/07/11
Jeffrey Mehler	Essex, CT	05/04/11
Jeffrey Morrison		06/01/11
Jeffrey Puglia		06/20/11
Jeffrey S Price		06/10/11

Jeffrey S. Bankert		06/13/11
Jeffrey Schaefer	Centennial, CO	04/26/11
Jeffrey Sloan	Scottsdale, AZ	04/25/11
Jeffrey Stouffer	Herndon, VA	05/05/11
Jeffrey West	Wellesley, MA	04/25/11
Jeffrey Woolf	NewYork, NY	05/06/11
Jeffrey Yamada	Eugene, OR	05/19/11
Jennefer Walsh	Golden, CO	05/12/11
Jennifer Baty		06/19/11
Jennifer Cray	Palo Alto, CA	04/25/11
Jennifer Hall	Greeneville, TN	05/01/11
Jennifer Lazarus	Durham, NC	05/05/11
Jennifer Lotta	Rochester, NY	05/04/11
Jennifer Murray	Morristown, NJ	05/04/11
Jennifer Nicasio		06/10/11
Jennifer Noah	Augusta, GA	05/04/11
Jennifer Pittsley		06/02/11
Jennifer Preston	Austin, TX	04/25/11
Jennifer Quigley	McLean, VA	04/27/11
Jennifer Ragborg	Burnsville, MN	04/26/11
Jennifer Ryan		06/02/11
Jennifer S. Rossettini		06/14/11
Jennifer Sanchez	Naperville, IL	05/03/11
Jennifer Simes	Rutland, MA	04/25/11
Jennifer Smiljanich		06/02/11
Jennifer Weinland		06/11/11
Jeremiah Erickson	Colorado Springs, CO	06/24/11
Jeremiah Wyatt II	Cornelius, NC	04/26/11
jeremy armagost		06/13/11
Jeremy David		06/01/11
Jeremy Heller		06/02/11
Jeremy Kovacevich		06/01/11
Jeremy McCurdy	Highland Village, TX	05/18/11
Jeremy R George		06/02/11
Jeremy Welther	Madison, NJ	05/19/11
Jeri Davidson	Huntersville, NC	05/03/11
Jerod Fenton	Valley Center, CA	05/03/11
Jerold Wright		06/13/11
Jerome Celmer Jr.		06/01/11
Jerome Jezuit		06/10/11

Jerome Miller	Gaithersburg, MD	05/03/11
jerrod colston		06/22/11
Jerrold Slutzky	Land O Lakes, FL	04/25/11
Jerry Boisseau	Toms River, NJ	05/27/11
Jerry Brock Klich		06/15/11
Jerry Broussard	Kaplan, LA	04/29/11
Jerry Carden	Troy, AL	05/06/11
Jerry F. Kralik, CFP		06/02/11
Jerry mallonee	dallas, TX	04/25/11
Jerry Murphy		06/01/11
Jerry Neal	Novato, CA	04/25/11
Jerry Searight		06/02/11
Jerry Seibert	Springfield, IL	05/06/11
Jerry Sheby	Long Beach, CA	05/03/11
Jerry W. Fuhrmann		06/13/11
Jerry Webb	Naperville, IL	04/25/11
Jess Kutch	Washington, DC	04/26/11
Jesse Crews	Jacksonville, FL	04/25/11
Jesse Gossett	Kentfield, CA	05/03/11
Jesse Longoria	El Paso, TX	06/27/11
Jessica Andrus	Tolleson, AZ	06/01/11
Jessica Bokhart	Indianapolis, IN	05/09/11
Jessica Greenway	Seattle, WA	05/04/11
Jessica Howe	Portland, OR	05/05/11
Jessica Plattner	Brookline, MA	05/31/11
Jessica Standifer		06/11/11
Jill Boynton	Newington, NH	05/05/11
Jill Hollander	Corte Madera, CA	05/05/11
Jill Pietrusinski	OFallon, IL	05/05/11
Jim Birks		06/10/11
Jim Blankenship	New Berlin, IL	05/04/11
Jim Boulay	Omaha, NE	05/03/11
Jim Burton	Boulder, CO	04/26/11
Jim Davis	Columbus, OH	05/04/11
Jim F. Baugh		06/14/11
Jim Frazin	San Francisco, CA	04/26/11
Jim Gagnon Jr.		06/10/11
Jim Kenehan	Tempe, AZ	06/25/11
Jim Laneve	Lynchburg, VA	04/26/11
Jim M. Stewart		06/13/11

Jim MacKay		06/02/11
Jim McGurren		06/01/11
Jim Mock	Medford, OR	04/27/11
Jim Nelson	Valdosta, GA	04/25/11
Jim Oliver	San Antonio, TX	06/27/11
Jim O'Shea	Houston, TX	05/04/11
Jim Salerno	Madison, WI	04/26/11
Jim Stewart	Covina, CA	05/03/11
Jim Trull	Cary, NC	04/25/11
JIM VERMILLION	Chicago, IL	05/03/11
Jim Yurashak		06/10/11
Jimmy Kull	Austin, TX	04/26/11
Jo Ann Numbers, EA, CFP		06/11/11
Joan H. Peurifoy, CFP		06/01/11
Joan Olson	frankfort, IL	05/06/11
Joan Peurifoy	Dallas, TX	05/03/11
Joan Rossi	Minneapolis, MN	04/25/11
Joan Sharp	Wilmington, DE	05/04/11
JoAnn May	Riverside, IL	04/26/11
Joann White		06/01/11
Joanne Amorosi, CFP		06/02/11
Joanne Marion	Yorktown Heights, NY	04/25/11
Joanne Snider	Bayside, NY	04/26/11
Jocelyn D. Wright		06/15/11
Jocelyn Holzwarth	Las Vegas, NV	05/09/11
Jocelyn Wright	Elkins Park, PA	04/26/11
Jody D'Agostini		06/01/11
Jody Duncan	Portland, OR	05/31/11
Joe Campisi	Fairview Village, PA	04/26/11
Joe B Gemmill, CFP		06/01/11
Joe Bonaccorsy		06/17/11
Joe Brockman		06/02/11
Joe Campisi		06/15/11
Joe Downs	Sarasota, FL	04/25/11
Joe Fulmer		06/03/11
Joe Kelly		06/02/11
Joe McCartney	Redmond, WA	04/25/11
Joe Pires		06/01/11
Joe Pitzl	Saint Paul, MN	04/26/11
Joe Wells		06/01/11

Joe Yard	Maple Grove, MN	04/26/11
Joel Bickmore	St Simons Island, GA	05/03/11
Joel Bird		06/10/11
Joel Corush	Crystal Lake, IL	04/27/11
Joel Larsen	Davis, CA	04/26/11
Joel Radakovitz	Machesney Park, IL	05/04/11
Joel Schaffer	Wilmette, IL	04/26/11
Joel Shaps	Los Altos, CA	04/27/11
Joel Vander Meyden		06/11/11
Johanna McMichael	Wilton Manors, FL	05/06/11
JOHANNA TURNER	MAYFIELD, KY	05/05/11
John		06/10/11
John Berry	Mineral Wells, TX	05/18/11
John Carrig	Boca Raton, FL	05/19/11
John LeBlanc	Winthrop, MA	05/04/11
john mcdonough	murrysville, PA	06/24/11
John Vucicevic	panama City beach, FL	04/25/11
John A Ungerman		06/15/11
John A. Epeneter		06/01/11
John Adams		06/11/11
John Barrios		07/20/11
John Barrios	Collierville, TN	04/25/11
John Bender	McLean, VA	04/25/11
John Bergerson	SaltLake City, UT	05/04/11
John Bernards	Alexandria, VA	05/04/11
John Bird	Salt Lake City, UT	05/31/11
John Bradley Reid, CFPÂ®		06/10/11
John Brown	Fairhope, AL	05/04/11
John Bruce Morrill Jr		06/01/11
John Bubula	Park Ridge, IL	05/03/11
John Burns	San Francisco, CA, CA	04/25/11
John Bysko	Old Lyme, CT	05/18/11
John C Girvin, CFP		06/02/11
John C, Pawlik	New Providence, NJ	06/06/11
John Carberry	Pittsburgh, PA	04/25/11
John Carey	Mount Pleasant, SC	05/31/11
john carty-campbell	canton, GA	05/04/11
John Ceparano	Lecanto, FL	04/26/11
John Checki	Plano, TX	04/25/11
John Ciszewski		06/10/11

John Classe		06/10/11
John Clawson, CFPÂ®	Winchester, VA	04/25/11
John Cooke	Newport Beach, CA	04/25/11
John Crosby	Middletown, NJ	06/01/11
John D. Cozzuol,CFP		06/01/11
John Dragonas	Richmond, VA	05/05/11
John Dragstrem	Wheaton, IL	05/06/11
John Driscoll	North Andover, MA	04/27/11
john eckel	simsbury, CT	04/25/11
John Ellison	Fairfax, VA	05/31/11
John Espinosa	Miami, FL	07/13/11
John Evans	Erie, PA	04/25/11
John Everson	Martinsburg, WV	05/04/11
John F McLaughlin III		06/02/11
John F. Donovan		06/20/11
John F. Landers		06/17/11
John Farina	Washington, DC	04/25/11
John Ferguson		06/03/11
John Fiege	Onancock, VA	04/26/11
John Frederick	Rolling Meadows, IL	05/04/11
John Frerichs	Gainesville, VA	05/14/11
John Frisch	Woodbridge, VA	05/06/11
John G. Meitner		06/02/11
John Gattringer	Seaford, NY	04/27/11
John George	The Villages, FL	05/23/11
John Goddard	Seattle, WA	05/04/11
John Going	Houston, TX	04/25/11
John Goott		06/13/11
John Grear	Asheville, NC	06/18/11
John Groth	Cleveland, OH	05/03/11
John Gustavson	Minneapolis, MN	04/26/11
John Gutfranski	Houston, TX	04/25/11
John H. Wellfare, CFP(R)		06/16/11
John Harms	Newport Beach, CA	04/25/11
John Harris		06/13/11
John Hauserman		06/02/11
John Haynes, CLU, CHFC, LIC	Williamston, MI	06/27/11
John Hearn	Huntersville, NC	04/25/11
John Henry Decker		06/10/11
John Herron	Duluth, MN	04/25/11

John Hillman		06/01/11
John Hinrichs	Bellaire, TX	04/25/11
John Hochschwender	Phjiladelphia, PA	05/09/11
John Holmes Smith IV		06/13/11
john j hanna		06/01/11
John J ONeill		06/12/11
John Jackson	Simi Valley, CA	06/17/11
John Jay Hurford	San Francisco, CA	04/25/11
John Jenkins	San Diego, CA	04/25/11
John Kamola	Santa Rosa, CA	04/25/11
John Kostic	Newport Beach, CA	05/05/11
John Kvale	Dallas, TX	04/26/11
John LaBriola	Newport Beach, CA	05/03/11
John Lame	Cincinnati, OH	05/04/11
John LeMieux	Falmouth, ME	04/25/11
John Leonard	Douglas, MI	04/25/11
John Leonardi	Erie, PA	05/08/11
John Liechty	Goshen, IN	04/25/11
John Little	Virginia Beach, VA	04/25/11
John Lowry	Mexico, MO	05/18/11
John M FitzPatrick	Morris Plans, NJ	05/18/11
John M Mousel		06/14/11
John M. Coughlin Jr.		06/10/11
John M. Driggers		06/01/11
john male		06/10/11
John Malzone	Newtown, PA	05/03/11
John Mangione	williston, VT	04/26/11
John MazakA		06/01/11
John McElhenny		06/02/11
john mcmillen	Atlanta, GA	04/25/11
John Micetich		06/10/11
John Michael Wilburn		06/10/11
John Morris		06/10/11
John N Greenfield		06/11/11
John Napolitano	Braintree, MA	04/26/11
John Neff CFP, ChFC		06/10/11
john o allen jr		06/16/11
JOHN OMALLEY CFP		06/02/11
John ONeill	Marlton, NJ	07/16/11
John O'Reilly	carlsbad, CA	06/24/11

John Orlando		06/01/11
John P Kirk		06/10/11
John P. Krusac III		06/01/11
John P. Witty		06/15/11
John Palmer	Falls Church, VA	04/25/11
John Phillips	Memphis, TN	05/03/11
John Plaza	San Jose, CA	04/28/11
John Porter	Portage, MI	04/25/11
John Power	Walpole, MA	04/26/11
John Pulver	Burbank, CA	04/25/11
JOHN R FISHER		06/01/11
John R Noonan, III, CFP(R)		06/06/11
john r sabol		06/02/11
John R. Feeney		06/01/11
John R. Philpott		06/11/11
John Raaf	Portland, OR	04/25/11
John Raleigh	Sarasota, FL	04/25/11
john ratchford		06/02/11
John Rea	Yardley, PA	05/06/11
John Rees		06/16/11
John Richardson	Waynesville, NC	04/25/11
John Ritter	Cincinnati, OH	05/03/11
John Rumbold	Irvine, CA	04/26/11
John Russell	Plano, TX	04/25/11
John Russell	Lubbock, TX	05/18/11
John S Riggle		06/21/11
John S. Davis, CFP	Elmhurst, IL	05/19/11
John S. Ohmer, CFP		06/10/11
John S. Philips CFP, CFA, CMB		06/10/11
John Shannahan	Simi Valley, CA	04/25/11
John Sharp	Sarasota, FL	04/25/11
John Shay Jr	Hagerstown, MD	04/26/11
John Sleesman	Durham, NC	05/06/11
John Smartt	Knoxville, TN	05/04/11
John Smith		06/10/11
John Smith	San Diego, CA	04/25/11
John Steigerwald		06/15/11
John Stewart	Mansfield, OH	05/02/11
John Stiglich	Joliet, IL	05/05/11
john suh		06/01/11

John Sullivan	Palatine, IL	04/25/11
John Szkaradek	Miami, FL	07/13/11
John T. Souther, CFA, CFP, AIF		06/12/11
John Tabb		06/10/11
John Thomann	Liberty, MO	04/25/11
John Trevor	Providence, RI	04/26/11
John Tufts	Madison, WI	05/04/11
John Venne		06/01/11
John W Vires		06/10/11
John Webbert	Glen Arm, MD	04/26/11
John Williams	Leominster, MA	05/18/11
John Wimbiscus		06/10/11
John Wolfe	Portage, MI	05/04/11
John Wolff	Leesburg, VA	05/18/11
John Yagla, CFP		06/13/11
JOHN YUKAWA	Deerfield, IL	05/04/11
Johnathan Finley	Sugar Land, TX	04/25/11
Johnne Syverson	West Des Moines, IA	04/25/11
Johnny Hector		06/02/11
Johnny Roland	Pleasanton, CA	05/04/11
Jon Aldrich	Rockford, IL	05/04/11
Jon Beyrer	San Diego, CA	05/31/11
Jon Bicknell	Waltham, MA	04/25/11
Jon Emmet Shuler	Spartanburg, SC	04/25/11
Jon Guerra	San Antonio, TX	05/04/11
Jon King	Dripping Springs, TX	04/25/11
Jon Spinac	New York, NY	07/07/11
Jon Ten Haagen	Huntington, NY	04/25/11
Jonahan Brandt	Eugene, OR	05/23/11
Jonathan Lawson	Nashville, TN	04/25/11
Jonathan A. Moyer		06/10/11
Jonathan Andre		06/01/11
Jonathan Castle	Jacksonville, FL	04/25/11
Jonathan Cohen	Bath, MI	05/03/11
Jonathan Donnaway	Durango, CO	04/25/11
Jonathan J Edwards		06/01/11
Jonathan Leidy	San Rafael, CA	05/04/11
Jonathan Liang	Minneapolis, MN	04/25/11
Jonathan Meaney		06/13/11
Jonathan Phelan	Marine City, MI	05/04/11

Jonathan satovsky		06/01/11
Jonathan Sowa	Franklin, TN	05/25/11
Jonathan Stoller	Aspen, CO	05/01/11
Jonathan T. Guyton, CFP(r)		06/08/11
jonathan thorp	Ft. Worth, TX	04/27/11
Jonathan Torrens	Fairlawn, OH	04/25/11
Jonathan Wride		06/01/11
Jordan Long		06/15/11
Jorge A. Amy		06/11/11
Jorge Padilla	Miami, FL	05/05/11
Jose C Campos, JD, MA, MS, CFP		06/10/11
Joseph Hollen	Reno, NV	05/20/11
Joseph Saskiewicz	Holland, PA	04/25/11
Joseph A. Cipparone		06/02/11
Joseph A. DiGangi		06/10/11
Joseph Alfonso		06/01/11
Joseph Codrick	Greensburg, PA	04/25/11
Joseph D Stone III		06/10/11
Joseph DeBonis		06/02/11
Joseph Descant	Alexandria, LA	04/29/11
Joseph D'Orazio	Falls Church, VA	04/25/11
Joseph E. Kolb		06/02/11
Joseph F. Tarantino	Clifton, NJ	04/26/11
Joseph Favorito		06/02/11
Joseph Fernandez	Tampa, FL	04/25/11
Joseph Giangiulio	Dallas, TX	05/03/11
Joseph Grella		06/22/11
Joseph Griffard		06/02/11
Joseph H. Cutchin, III (Jay)		06/10/11
Joseph Hebert		06/14/11
Joseph Hersch	New York, NY	05/03/11
JOSEPH HUSTON	THE WOODLANDS, TX	04/25/11
Joseph Kasper		06/01/11
Joseph Kopczynski	Albuquerque, NM	04/26/11
Joseph Kristovich		06/02/11
Joseph L. Bernheimer		06/01/11
Joseph Lander	Farmington, CT	04/25/11
JOSEPH LEUCHTMANN	SAINT LOUIS MO, AL	05/05/11
Joseph Livesay	Meridian, ID	04/25/11
JOSEPH MUHLBERGER	Albuquerque, NM	05/27/11

Joseph Murtagh	Matthews, NC	04/26/11
Joseph P Halpin		06/15/11
Joseph P. Garrison		06/15/11
Joseph Patton	Easton, PA	04/26/11
Joseph R Bonfiglio, CFP(r)		06/10/11
Joseph R. Knecht		06/10/11
Joseph Richmond	Cincinnati, OH	05/04/11
Joseph Salvati	Boston, MA	05/03/11
Joseph Savio	Marlton, NJ	04/25/11
Joseph Smith	Evanston, IL	05/04/11
Joseph Sreshta	Houston, TX	04/25/11
Joseph Steiniger	Poughkeepsie, NY	04/25/11
Joseph Thomson	Houston, TX	05/31/11
JOSEPH VALZ	ST PETERSBURG, FL	04/25/11
Joseph VanDyke	Grand Rapids, MI	04/25/11
Joseph Vu		06/10/11
Joseph W. Fleischman, CFP		06/02/11
Joseph Wismann	Louisville, KY	04/25/11
Josette Hewitt, CFP EA		06/05/11
Josh Giminez	Columbus, OH	06/18/11
Josh Itzoe		06/10/11
Josh Miller	Loveland, CO	04/25/11
Josh Webskowski	Rockford, MN	04/28/11
Joshua L. Freitas		06/02/11
Joshua Nelson		06/01/11
Joshua S. Levine		06/01/11
Joshua Schefers	Alameda, CA	04/26/11
Joshua Slocum	Birmingham, AL	04/26/11
Joshua Wolberg	Eden Prairie, MN	04/25/11
Joslyn G. Ewart		06/10/11
Joy Kirsch		06/16/11
Joy Sweet		06/11/11
Joyce Ann Rolfes		06/01/11
joyce chandler	stafford springs, CT	05/04/11
Joyce K Lapp	Cumberland, MD	04/25/11
Joyce Rolfes	Phoenix, AZ	04/26/11
Joyce Schnur		07/15/11
Joyce Streithorst	Baldwin, NY	05/04/11
Joyce Thomson	Murrysville, PA	05/06/11
Juanita Causey, CFP		06/10/11

Jubin Keyvan	Coral Springs, FL	04/26/11
Judi Hernandez	W Bloomfield, MI	04/27/11
Judith Abel	Basel,	04/28/11
Judith Froehling		06/01/11
Judith Gerthart	Camarillo, CA	04/26/11
Judith Heltzel	Salem, OR	05/03/11
Judith Illana Weisman		06/13/11
Judith L Paulson		06/10/11
Judith Sanborn	Winter Park, FL	05/03/11
Judy Gong		06/10/11
Judy Hagar	San Diego, CA	04/25/11
Judy Lullo	Houston, TX	05/09/11
Judy Stewart	Carlsbad, CA	05/04/11
Judy Wetzel	Wayne, PA	05/18/11
Juerg Ciceri	Long Beach, CA	05/03/11
Julianne mazurek	Scotts Valley, CA	05/06/11
Julie Bynum		06/10/11
Julie Goldsmith		06/06/11
Julie Kern		06/01/11
Julie Schatz	Menlo Park, CA	04/25/11
Juliet Botescu		06/15/11
June Schroeder	Elm Grove, WI	04/25/11
Justin Farris	Dallas, TX	04/26/11
Justin Wheeler	Overland Park, KS	05/03/11
Justin Castelli		06/01/11
Justin Goodbread	Knoxville, TN	05/18/11
Justin Martello		06/01/11
Justin Nichols	Manhattan, KS	04/25/11
Justin Sinnott		06/01/11
Justin Smith, CFA, CFP		06/20/11
Justin Travers Roudiez		07/13/11
Justin Victor	Forest, VA	06/01/11
Justine DeVito Tenney		06/01/11
Justus Morgan	Racine, WI	04/25/11
Kallene West, CFPÂ®		06/13/11
Kaltheen Parks		06/10/11
Kalvin Sid	San Mateo, CA	05/05/11
Kara Duckworth		06/10/11
Kara V. Elbert		06/01/11
Karen McGarvey	East Alton,, IL	05/04/11

Karen Clark		06/14/11
Karen Cox	Melbourne, FL	04/25/11
Karen Dumont	Broadview Heights, OH	05/18/11
KAREN ELISE KILBRIDE	PORTLAND, ME	05/19/11
Karen F. Folk, Ph.D., CFP(r)		06/07/11
Karen Hendrickson	Milwaukee, WI	04/25/11
Karen McIntyre	Chalfont, PA	04/26/11
Karen Miller		06/01/11
Karen Norman	Troy, MI	04/25/11
Karen Numi	O'Fallon, IL	05/06/11
Karen Nystrom	Northbook, IL	05/31/11
Karen Powell	Atlanta, GA	04/26/11
Karen Purvis	San Diego, CA	04/25/11
Karen Ramsey	seattle, WA	05/05/11
Karen Wawrzaszek		06/10/11
Karen Winslow	Portland, ME	04/25/11
Karl A. Mundt		06/02/11
Karl Anderson		06/02/11
Karl Ashliman	St. George, UT	05/10/11
Karl Dunajcik	Chesterfield, MO	04/25/11
Karl Harrop	Jackson, MS	04/25/11
Karl Hicks	Riverside, CA	04/25/11
Karl Koppy		06/11/11
Karl W. Blovet		06/01/11
Karla McAvoy	Lafayette, CA	04/26/11
Karron Wages	Maumelle, AR	05/06/11
Kate Gregory	Huntington Beach, CA	05/03/11
Kate Hewell	laguna Beach, CA	04/25/11
Katharina R. Gschwend		06/24/11
Katherine Donaldson		06/02/11
Katherine E. Kraeblen		06/10/11
Katherine Roberts		06/02/11
Katherine Rubin		06/28/11
Kathleen Adams	Manhattan Beach, CA	04/25/11
Kathleen B. Leipprandt		06/10/11
Kathleen Dollard	Harvard, MA	05/04/11
Kathleen Godfrey	Latham, NY	05/17/11
kathleen Grace-Schoeppl	Boca Raton, FL	04/25/11
Kathleen Kee	Portland, OR	04/26/11
Kathleen Lenover	Denver, CO	05/03/11

Kathleen Lyon	Pittsford, NY	04/25/11
Kathleen M Colpitts		06/01/11
Kathleen M Murray		06/14/11
Kathleen Muldoon		06/02/11
Kathleen Parrish	Moline, IL	06/10/11
Kathleen Piaggesi	Scarsdale, NY	04/25/11
Kathleen Plummer	Rose Valley, PA	05/31/11
Kathleen S. Bowen, CFP, CLU, ChFC		06/10/11
Kathleen Small	Glendora, NJ	04/25/11
Kathleen Stewart		06/14/11
Kathleen Tax	Manassas, VA	05/07/11
Kathryn Norris	Avon, CT	05/04/11
Kathryn Bickford	Naples, FL	05/18/11
Kathryn H Larson		06/13/11
Kathryn Lund	Westford, MA	05/04/11
Kathryn Noel	Bloomington, MN	05/09/11
Kathy Koloze	Dallas, TX	04/25/11
Kathy Stanley	Charlotte, NC	04/25/11
Katie Mettler	Honolulu, HI	05/06/11
katrina goodwin	hyattsville, MD	05/01/11
Katrina K. Hayes		06/28/11
Kay Drache	St. Louis Park, MN	04/26/11
Kay F. Byrum, CFP		06/01/11
Kay H. Kamin		06/10/11
Kay Knuth	Appleton, WI	04/26/11
Kay Kramer	EDINA, MN	05/06/11
Kayla Koeber	Leeds, UT	04/25/11
Kayse Kress		06/02/11
Kazuyo Deguchi	Campbell, CA	04/26/11
Kedric Rutz	Smyrna, TN	05/25/11
Keith Donnell	Melrose Park, PA	05/12/11
Keith Dougherty		06/03/11
Keith H Newman, CFP		06/16/11
Keith Henderson	Springfield, VA	04/25/11
Keith Kirk	Germantown, TN	05/18/11
Keith Loveland	Minneapolis, MN	06/11/11
Keith Merson		06/01/11
Keith Pelkey		06/10/11
Keith Southwick	Northville, MI	04/27/11
Keith T Hamilton		06/11/11

Kelley Hook		06/10/11
Kelly A SHikany		06/01/11
Kelly Brewer	Dallas, TX	05/02/11
Kelly Graves		06/15/11
Kelly Newberry	Savannah, GA	04/25/11
Kelly Renner	Augusta, GA	04/25/11
Kelly Shikany	Michigan City, IN	04/25/11
Kelly Stanley	Chicago, IL	05/05/11
Ken Diehl	Gaithersburg, MD	05/04/11
Ken Boone	Dixon, IL	04/25/11
Ken Buell		06/01/11
Ken Hanes	Lafayette, LA	04/25/11
Ken Haycraft		06/10/11
Ken Perine		06/01/11
Ken Weingarten	Lawrenceville, NJ	04/25/11
Kendall Maddox	Birmingham, AL	05/05/11
Kendall Borchardt	Johns Creek, GA	04/25/11
Kenneth Bogert	Brick, NJ	04/25/11
kenneth a gatto		06/07/11
Kenneth A. Norman		06/17/11
Kenneth Bell		06/01/11
Kenneth Dean		06/14/11
Kenneth F. Robinson, CFP(TM)		06/07/11
Kenneth Frenke	Arden, NC	05/04/11
Kenneth Gott	San Francisco, CA	04/25/11
Kenneth Gross	Thousand Oaks, CA	05/31/11
Kenneth J Hajdik		06/08/11
Kenneth J. Graci, CFP		06/11/11
kenneth knoppik	boca raton, FL	05/02/11
Kenneth L Decker		06/22/11
Kenneth Levy	Charlotte, NC	04/26/11
Kenneth Marlow	Clearwater, FL	05/03/11
Kenneth Moore	Greenville, SC	06/26/11
Kenneth Okuno	Pasadena, CA	04/25/11
Kenneth Olson	Manteca, CA	05/04/11
Kenneth R. Solow		06/10/11
Kenneth Rapp	Mechanicsburg, PA	04/26/11
Kenneth Rase		06/10/11
Kenneth Robinson	Cleveland, OH	04/25/11
KENNETH RUHRUP	CLEARWATER, FL	04/25/11

KENNETH SMALL	Nperville, IL	05/04/11
Kenneth Stuckert		06/03/11
Kenneth Turner		06/01/11
Kennethia Cochran		06/10/11
Kenny B. Bauer		06/15/11
Kent Wilson	Salt Lake City, UT	05/04/11
Kent Grealish	Daly City, CA	05/20/11
Kerry Cowan		06/16/11
Kerry Niece	Independence, MO	05/10/11
Ketan Mehta	Reston, VA	05/20/11
Kevin B. Morton		06/01/11
Kevin Brosious	Allentown, PA	04/26/11
Kevin D Maher		06/11/11
Kevin Dick	Tiffin, OH	05/05/11
Kevin Ellis	Milwaukee, WI	04/26/11
Kevin Engbers		06/10/11
Kevin Haggard	Louisville, KY	06/06/11
Kevin Handford		06/28/11
Kevin Hogan	Eden Prairie, MN	05/02/11
kevin judge		06/10/11
Kevin Knobloch	Baton Rouge, LA	05/01/11
Kevin Kraus	Marietta, GA	04/25/11
Kevin Lewis		06/14/11
Kevin Loser	Reston, VA	05/31/11
Kevin M. McCoy II		06/01/11
Kevin McCulley	Boulder, CO	05/03/11
Kevin Moree	Vero Bch, FL	05/03/11
Kevin Nevin	Naples, FL	05/17/11
Kevin O'Reilly	Phoenix, AZ	05/31/11
Kevin Paulsen	EVANSTON, IL	04/25/11
Kevin Pinto		06/13/11
Kevin R Besore		06/16/11
Kevin Swan		06/15/11
Kevin Thompson	Omaha, NE	05/05/11
Kevin Yeoman	northfield, IL	04/25/11
Kevin Young	Davis, CA	05/04/11
Kevin Zywna, CFP	Virginia Beach, VA	04/26/11
Kim McNeil	Salt Lake City, UT	05/31/11
Kim Feeney Zollo	Wakefield, MA	04/25/11
Kim Klawitter	Hartland, WI	05/05/11

Kim Morton	Scottsale, AZ	05/04/11
Kim O'Connor	N. Saanich,	04/28/11
Kimberly Bridges	Scottsdale, AZ	04/26/11
Kimberly F. Perreira		06/02/11
Kimberly Maez	Castle Rock, CO	04/25/11
King Hurlock	Hunt Valley, MD	04/26/11
Kipley Lytel	Santa Barbara, CA	05/04/11
Kirby Jacobson		06/02/11
Kirby Kleinsmith		06/02/11
Kirk Kinder	Bel Air, MD	05/31/11
Kirk Loerwald	Little Elm, TX	05/03/11
Kirk Walton		06/01/11
Kirsten Hollander		06/06/11
Kirstin Hark	Chesapeake, VA	05/06/11
Kisha Linayao	Palo Alto, CA	04/25/11
Klaudio Negric	Rijeka,	04/27/11
Knut Rostad	Falls Church, VA	04/26/11
Kol Birke	Waltham, MA	04/27/11
kristen davies	Chicago, IL	04/27/11
Kristen Davis Rhyne		06/15/11
Kristen Lanning	Lincoln, IL	05/09/11
Kristin W. Reed	Bennington, VT	04/26/11
Kristopher D. Johnson, CFP(r)		06/02/11
Kristy DeBuhr		06/10/11
Kristy Larm	Salt Lake City, UT	05/31/11
Kurt Angstadt		06/10/11
Kurt Bogseth	Urbandale, IA	05/05/11
Kurt Box	Houston, TX	04/26/11
Kurt Langenwalter	Alexandria, VA	05/03/11
Kurt W Whitesell		06/10/11
Kurt W. Mattson, CFPÂ®	Atlanta, GA	04/25/11
Kylan Lamont		06/15/11
Kyle Burris	Morrison, CO	04/25/11
Kyle Findlay	Huntsville, AL	05/05/11
Kyle Hurt	Englewood, CO	04/25/11
Kyle Kuehner	New Prague, MN	05/03/11
Kyn Dellinger	San Mateo, CA	04/25/11
Kyra Morris	Mt Pleasant, SC	05/03/11
L BRIAN MCCABE	FOUNTAIN HILLS, AZ	05/03/11
LADON COPELIN		06/01/11

Laiping Yuen		06/01/11
LaKhaun McKinley		06/02/11
Lamont Change	River Forest, IL	04/29/11
Lance Jones, CFP		06/23/11
Landy A Fleming		06/10/11
Lannie Travis	West Helena, AR	04/29/11
larry cooper	san antonio, TX	06/24/11
Larry Berger	Medicine Lake, MN	05/04/11
Larry C. Belcher, CPA/CFP		06/10/11
Larry D Flanagan		06/10/11
Larry E Nolt		06/02/11
Larry Eisenzimer	Las Vegas, NV	04/25/11
Larry Esparza		06/06/11
Larry K Fox		06/03/11
Larry Kearse	Winston-Salem, NC	05/05/11
Larry L Hyatt CPF(r) CIMA(r)		06/10/11
Larry Mulcock		06/10/11
Larry Olsen	Davis, CA	05/03/11
Larry Peterson	Suite 102B, UT	04/25/11
Larry Phillips		06/11/11
Larry Pierce	La Crosse, WI	04/26/11
Larry R Glaze, CFP, CPA		06/01/11
Larry R. Awbrey	Edmond, OK	05/06/11
Larry R. Brown Jr.		06/10/11
larry schneider	linwood, NJ	04/25/11
Larry Soukup	Salida, CO	05/04/11
Larry Tuohino	Costa Mesa, CA	04/26/11
Lars Landrie	Bellevue, WA	04/25/11
Laura Abbott DeCarolis	Monroeville, PA	04/26/11
Laura Barry		06/02/11
Laura Cordell		06/15/11
Laura Granger	Landenberg, PA	05/18/11
Laura J. LaTourette		06/14/11
Laura Jacobs	Campbell, CA	04/25/11
Laura James	Birmingham, AL	05/05/11
Laura LaTourette	Dahlonega, GA	05/05/11
Laura Leavitt	Southport, CA	04/25/11
Laura Medigovich		06/10/11
Laura Rowley	Houston, TX	05/06/11
Laura Seymour	Bloomington, MN	05/20/11

Laura Seymour, CFP		06/13/11
Laura Sundquist	Simsbury, CT	05/04/11
Lauren Klein	Newport Beach, CA	04/25/11
Lauren Lindsay		06/01/11
Lauren Lindsay	Houston, TX	05/04/11
Lauren Locker	Little Falls, NJ	05/31/11
Lauren Prince	New York, NY	04/25/11
Lauren Sigman	Denver, CO	05/18/11
Laurence A. Myers		06/02/11
Laurence E. Greeley	Wilton, CT	05/04/11
Laurence Lof	Tucson, AZ	04/25/11
Laurie Lang		06/01/11
Lawrence		06/01/11
Lawrence Hoffman	Columbus, GA	05/18/11
Lawrence A Hoof		06/01/11
Lawrence Barnard	Thompson's Station, TN	04/27/11
Lawrence Blai		06/10/11
Lawrence Botzman	Somerset, KY	04/25/11
Lawrence Brethauer	Saginaw, MI	04/25/11
Lawrence DiPietro	Tallahassee, FL	05/04/11
Lawrence H Friedrichs	mesa, AZ	04/25/11
Lawrence M Wood	Colorado Springs, CO	05/18/11
Lawrence Rutherford	Tustin, CA	04/25/11
Lawrence Rutledge	Orlando, FL	05/03/11
Lawrence Sprung		06/01/11
Lawrence Stevens	Hendersonville, NC	05/18/11
Lawrence W. Pelland, CFP		06/10/11
Lawrence Westcott	Jupiter, FL	04/25/11
Layton John	Indianapolis, IN	04/26/11
Lazetta Braxton	Chicago, IL	05/06/11
Leal Deddens	Fairfax, VA	04/25/11
LeAnn Lenander	Minneapolis, MN	05/06/11
Lebbeus Woods	Indianapolis, IN	05/18/11
LeCount R. Davis, Sr.	Potomac, MD	05/05/11
Lee Baker	Tucker, GA	04/26/11
Lee Brooks	Roanoke, VA	04/26/11
Lee Cooper	Tucson, AZ	05/03/11
Lee Giobbie		06/07/11
Lee Harris		06/10/11
Lee Hyatt	St Louis Park, MN	04/25/11

LEE RIEGLER	TROY, MI	05/08/11
Lee Robinson		06/01/11
Lee Slater		06/01/11
LeeAnn Brown	Vashon, WA	04/25/11
Leigh A. Muller		06/10/11
Leigh Hlohinec		06/10/11
Leisa Brown	Arlington Heights, IL	05/04/11
Len Fettig	Rogers, AR	04/26/11
Len Nassi	Hollywood, FL	04/25/11
Lenard Cohen	Gaithersburg, MD	05/03/11
Lennard van der Feltz		06/11/11
Lenton Jenkins Jr		06/21/11
Leon James	Aliso Viejo, CA	05/05/11
Leon LaBrecque		06/10/11
Leon Rousso	Ventura, CA	04/25/11
Leona Lau		06/10/11
Leonard Rea II	Fiskdale, MA	04/29/11
Leonard T.A. Hirst II	Westport, MA	04/25/11
Leota Goodney		06/02/11
Les Szarka, CFP, ChFC	North Olmsted, OH	04/26/11
Lesley Brey	Honolulu, HI	04/26/11
Lesley Day		06/14/11
Lesley Kilcullin	Town & Country, MO	05/10/11
Lesley Nystrom	Roseville, MN	05/06/11
Leslie Couper	Falmouth, ME	05/18/11
Leslie Beck		06/13/11
Leslie Corcoran	Stuart, FL	04/26/11
Leslie Myers	Denver, CO	05/09/11
Leslie Strebel	Ithaca, NY	06/27/11
Lester Halstead	Parowan, UT	04/25/11
lester noisom	Miami, FL	04/25/11
Levin Manabat	Portland, OR	05/03/11
Lewis Bair	Berkeley Heights, NJ	05/03/11
Lewis Blythe		06/10/11
Lewis Gridley	San Francisco, CA	04/25/11
Liane Warcup	Geneva, IL	04/25/11
Lili Vasileff	Greenwich, CT	05/31/11
Lillian Deslandes	Miami, FL	05/07/11
Lily Poy	Fairfax, VA	05/04/11
Linda Erickson	Greensboro, NC	05/03/11

Linda Crouse	Portland, OR	05/06/11
Linda D Stursberg, CFP, EA, ATA		06/10/11
Linda English	Falls Church, VA	04/25/11
Linda gadkowski	centerville, MA	05/03/11
Linda Homsey	Winchester, MA	04/25/11
Linda Knight		06/01/11
Linda Knott	Laconia, NH	04/25/11
Linda Kuehn	Atlanta, GA	04/26/11
Linda L Newell		06/13/11
Linda Malone	Bedford, NH	05/03/11
Linda Nihoul		06/10/11
Linda Snook	Indian Rocks Beach, FL	04/25/11
Linda Stratton		06/09/11
Linda Underwood	Crete, NE	05/18/11
Lindenberg Samuel	Harrisburg, PA	05/07/11
Lindsay Elwood	Athens, GA	04/25/11
Lindsi Pantuso	dallas, TX	04/27/11
Lisa A Mason		06/02/11
Lisa A. Malick		06/17/11
Lisa Andrews	Madison, WI	05/05/11
Lisa Archer	Louisville, KY	04/25/11
Lisa Banning	Mission Viejo, CA	04/27/11
Lisa Boyer	Arcola, IL	04/25/11
Lisa Dickholtz	Northbrook, IL	04/28/11
Lisa Foster	Hamilton, OH	04/25/11
Lisa Fox	Austin, TX	04/25/11
Lisa Hatcher Byles	Richmond, VA	04/25/11
Lisa J.B. Peterson, CFP(R)		06/02/11
Lisa Koehl	Brooklyn, CT	04/28/11
Lisa Lagorio	San Ramon, CA	04/26/11
Lisa McKnight	New Providence, NJ	06/01/11
Lisa Roche-Berlage		06/15/11
Lisa Saxton	San Diego, CA	04/25/11
Lisa Woodside	Scottsdale, AZ	05/04/11
Lizz Schneider	Plover, WI	06/06/11
Lloyd Clark	San Antonio, TX	06/22/11
Lloyd Howell	Redlands, CA	04/25/11
Lloyd Yamada	Cupertino, CA	04/25/11
Loic LeMener	Dallas, TX	04/25/11
Lois Anthonisen		06/03/11

Lois G Richardson		06/08/11
Lois Grove Jeffery (Bobbi)		06/13/11
Lois Isbell	Midland, TX	04/25/11
Lois Richardson	Pasadena, CA	05/08/11
Lon Merritt	New Hartford, NY	05/06/11
Lonnie Brooks	Jacksonville, FL	04/25/11
Lonny P Jochim		06/12/11
Lora Murphy	Milwaukee, WI	04/25/11
Lora Rommel	Laguna Hills, CA	04/26/11
Lorelie Rogers	Rochester, NY	04/25/11
Loren Rex		06/10/11
Loretta Nolan, CFP (R)	Old Greenwich, CT	05/04/11
Lori A Davis		06/10/11
Lori J Miller	Itasca, IL	04/26/11
Lori Kegler	San Pedro, CA	04/28/11
Lorraine Salvo	Morristown, NJ	05/09/11
Lou Speed	Ringwood, NJ	04/25/11
Louis Baeriswyl		06/12/11
Louis Balogh	Havelock, NC	04/26/11
Louis Lopez	La Jolla, CA	04/25/11
Louis Mann	Mount Laurel, NJ	04/25/11
Louis Schwarz	Bethesda, MD	04/25/11
louis scipione	fair lawn, NJ	04/25/11
Louise Bryant		06/01/11
Louise Cole, CFP		06/02/11
Louise Schroeder	Stillwater, OK	05/20/11
Lucas Bucl, CFP(r)		06/02/11
Lucinda Richey	Parkville, MO	04/25/11
Lucy Barnett	Denver, CO	06/24/11
Luis J. Soto Jr.		06/06/11
Luis R DaCosta		06/10/11
Luke Dean	Wayne, NJ	05/17/11
Luke Xiong	FENTON, MI	05/04/11
luther dearborn	northbrook, IL	04/26/11
Lydia Palmin	Oakland, CA	04/25/11
Lydia Sheckels	Philadelphia, PA	05/04/11
Lyle Fogel	Crawfordsville, IN	05/04/11
Lyman Black	Savannah, GA	04/26/11
Lynda Alvarez	Chicago, IL	04/30/11
Lynn Ballou		06/06/11

Lynn E. Barnes		06/30/11
Lynn E. Fedor		07/06/11
Lynn Mander	West Chester, PA	05/04/11
Lynn Miori	Victoria, TX	04/27/11
Lynn Zoller	Sarasota, FL	04/26/11
Lynne Strynchuk	Melbourne, FL	05/31/11
M H	Racine, WI	04/25/11
M Patric Mascorro		06/01/11
M Wayne Neff, CFP		06/20/11
M. David Gracy Jr.		06/01/11
M. Wayne Neff	Lewisberry, PA	04/26/11
Maarten Rietveld	bethesda, MD	04/25/11
Madeline Giordano	New York, NY	04/25/11
Madeline NAVARRO	Brighton, MI	04/25/11
Madeline Noveck	New York, NY	04/25/11
madelyn anusbigian	shrewsbury, MA	04/25/11
Madelyn Mallory	Oakland, CA	04/25/11
MAHESH DESAI	HOUSTON, TX	04/27/11
Mahmud Jetha		06/10/11
Malachi Sturlin		06/01/11
Malissia Johnson	Brentwood, TN	04/26/11
Mamdoh "Mark" Abas, CFP	Laguna Beach, Ca 92651, CA	05/03/11
Mamie Liu		06/10/11
Mandy Sessler	Southlake, TX	05/19/11
Marc Agel	Glenmont, NY	05/18/11
Marc Berman	Norton, MA	05/04/11
Marc Cohn		06/10/11
Marc Fragola	South Burlington, VT	05/18/11
Marc Gitlitz	Highlands Ranch, CO	05/21/11
Marc Kadomatsu	Portland, OR	04/26/11
Marc Kowalski		06/01/11
Marc Kreuser	Newark, NY	04/25/11
Marc Levy	Mt Pleasant, SC	04/25/11
Marc Roland	Solana Beach, CA	04/25/11
Marc Schindler	Bellaire, TX	04/25/11
Marc Shaffer	Overland Park, KS	04/25/11
MARC WEAVER		06/11/11
Marcus B. Walker		06/02/11
Marcus Hamilton	Roseland, NJ	05/18/11
Marcus S Conrad, CFP		06/03/11

Margaret Carbonell Smith	Tualatin, OR	04/25/11
Margaret Doviak	Norman, OK	04/25/11
margaret eddy	San Diego, CA	05/31/11
Margaret Guenther	Atlanta, GA	05/03/11
Margaret R. McDowell	Miramar Beach, FL	05/31/11
Margery Schiller	Brandon, FL	04/26/11
Margie Carpenter	Chagrin Falls, OH	04/28/11
MARGIE KRAUSE,CFP		06/10/11
Margie Mullen	Los Angeles, CA	05/04/11
Margot Dorn	San Diego, CA	04/25/11
Marguerita Cheng		06/10/11
MARI Lloyd	Gilbert, AZ	05/03/11
Maria Consuelo Tarazona		06/10/11
Maria Elena De Zarraga		06/02/11
Maria F.	Verona,	04/28/11
Maria L. Saldana		06/10/11
Maria Lagomasino	Palm Beach Gardens, FL	04/29/11
Maria Stoney		06/15/11
Maria Tyler	Miami, FL	05/04/11
Marianne Commorato	Clearwater, FL	04/26/11
marianne merriman	golden valley, MN	05/18/11
Marie Booker	Seattle, WA	04/25/11
Marie Isabel Laurion	Vienna, VA	04/25/11
Marie W Liu		06/10/11
Mariel McGehee	Tulsa, OK	05/03/11
Marilyn Carman		06/13/11
Marilyn de Guehery	New Haven, CT	06/24/11
Marilyn Dimitroff	Bloomfield Hills, MI	04/25/11
Marilyn Morrissey		06/02/11
Mario Hernandez	Walnut Creek, CA	04/25/11
Marissa Beyer	Macedonia, OH	05/06/11
Marjorie Bennett	Princeville, HI	05/04/11
Marjorie Burnett	Arlington, VA	05/31/11
Mark Baker	Crest Hill, IL	05/06/11
Mark A Doran		06/10/11
Mark A. Badami		06/10/11
Mark Antonich	Charlotte, NC	05/13/11
Mark Atherton	Reston, VA	04/25/11
Mark B Jackson		06/10/11
Mark Beaver	Atlanta, GA	04/25/11

Mark Bell	Chicago, IL	05/07/11
Mark Berg	Wheaton, IL	04/25/11
Mark Boginsky	Livingston, NJ	04/25/11
Mark Boyer		06/02/11
Mark Brown		06/03/11
Mark Brown	Naperville, IL	04/25/11
Mark Butterworth		06/10/11
Mark C. Sutherland		06/11/11
Mark Cade	Indianapolis, IN	04/26/11
Mark Caldwell	Bastrop, TX	05/18/11
Mark Cannon	Richardson, TX	04/25/11
MARK CAVASINO		06/01/11
mark cavasino	wethersfield, CT	04/25/11
Mark Coffey	Bexley, OH	05/04/11
Mark DiGiovanni	Grayson, GA	05/18/11
Mark Duder	Eden Prairie, MN	04/25/11
Mark Dutram	Ft. Walton Beach, FL	04/25/11
Mark E. Schweighart		06/02/11
Mark Ferris	Madison, CT	04/25/11
MARK FEUCHT	Fond du Lac, WI	05/03/11
Mark Finke	Kirkwood, MO	05/03/11
Mark Gelbman		06/06/11
Mark Gilbert	Naperville, IL	05/31/11
Mark Goetz	Adrian, MI	05/18/11
Mark Griffith	Winter Garden, FL	05/18/11
Mark Hansen	Lebanon, NH	04/25/11
Mark Heath, CFP		06/11/11
Mark Heffernan	Clayton, MO	05/18/11
Mark Holmertz		06/14/11
Mark Howe		07/08/11
Mark Isenberg	New Hope, MN	05/18/11
Mark J Newfield		06/02/11
Mark Jacobs		06/02/11
Mark Jarecki		06/01/11
Mark Jensen	Santa Fe, NM	04/25/11
Mark Kangas	Pepper Pike, OH	04/25/11
Mark Kelly	Duxbury, MA	05/03/11
Mark Kronemer		06/01/11
Mark La Spisa	South Barrington, IL	04/26/11
Mark Lazar, CFP		06/01/11

Mark Logan	Bellingham, WA	04/25/11
Mark Loop	Orlando, FL	04/25/11
Mark Manges	Lakewood Ranch, FL	05/19/11
Mark McCauley	Charlottesville, VA	05/11/11
Mark McGahee	Suffolk, VA	05/04/11
Mark Miller	Ft. Mitchell, KY	05/03/11
Mark Muschick, CPA, CFP	Chesterfield, MO	05/14/11
Mark Peterson	seattle, WA	05/03/11
Mark Phillips	Irvine, CA	05/06/11
Mark Pogreba		06/14/11
Mark Porter		06/10/11
Mark Prendergast	Huntington Beach, CA	05/07/11
Mark Presky		06/10/11
Mark Richards		06/16/11
Mark Rioboli	Wayne, PA	05/09/11
Mark Royer	Modesto, CA	04/25/11
mark rylance	newport beach, CA	05/04/11
Mark S Limmer		06/10/11
MARK S PESAVENTO		06/14/11
Mark S. Banner		06/10/11
Mark Schaefer		06/10/11
Mark Seivert	Merced, CA	04/25/11
Mark Siekierski	Beloit, WI	05/18/11
Mark Sievers	Fairfield, CA	04/29/11
Mark Stancato	Jersey City, NJ	04/25/11
Mark Stein	Scottsdale, AZ	04/25/11
Mark Stempel	Tucson, AZ	04/25/11
Mark Stinson	Columbia, MD	06/03/11
Mark Sudol	Las Vegas, NV	04/25/11
Mark T Youngs		06/10/11
Mark Teachout	Lansing, MI	04/25/11
Mark Vander Linden	Little Chute, WI	04/25/11
Mark Vitek, CPA, CFP	Raleigh, NC	04/25/11
Mark Vlasic		06/14/11
Mark W. Breneman		06/10/11
Mark Weber	Great Falls, VA	05/06/11
Mark Winston	Alpharetta, GA	05/06/11
Mark Wolfe	Erie, PA	05/18/11
Marla C. Horwitz		06/10/11
Marlene Stewart	Portland, OR	04/26/11

Marlin F. Schmidt		06/14/11
Marsha Rhodes		06/10/11
Marshall Gunn	Jacksonville, FL	05/03/11
Martha Kapouch	West Hartford, CT	05/04/11
Martha B Pierce		06/11/11
Martha J Schilling	Dresher, PA	05/19/11
Martha Moore Hobson		06/14/11
Martha O'Brien	Atlanta, GA	05/06/11
Marti Bott	Colorado Springs, CO	06/01/11
Martin Richwine, III	Madison, NC	05/04/11
MARTIN BEARD	tucson, AZ	05/01/11
Martin Durbin	Cleburne, TX	05/26/11
Martin Hopkins	Annapolis, MD	06/01/11
Martin J. Kubik		06/13/11
Martin Klotovich	Bozeman, MT	04/25/11
Martin Knight	Centreville, MD	04/25/11
Martin Kurtz	Moline, IL	05/19/11
Martin Pulvers	Mountain View, CA	05/04/11
Martin Rosenthal	Pembroke Pines, FL	05/18/11
Martin V Higgins		06/15/11
Martin Weisberg	Akron, OH	04/27/11
Marty Reid	Lincolnton, NC	05/19/11
Marv Tuttle	Centennial, CO	04/28/11
MARVIN K DEGRAAFF		06/06/11
marvin king	richardson, TX	04/25/11
marvin silva	Honolulu, HI	05/06/11
Mary Beseke	Minneapolis, MN	04/25/11
Mary B Kusske	burnsville, MN	05/07/11
mary baldwin	Melbourne, FL	05/05/11
Mary Beth Neeley	Jacksonville, FL	05/06/11
Mary Bradford	Tallahassee, FL	04/25/11
MARY BROWN	COLUMBUS, IN	04/25/11
Mary C Saylor	Royal Oak, MI	04/25/11
Mary Cardello	Chapel Hill, NC	05/04/11
Mary Caruso	Northbridge, MA	05/05/11
Mary Dean	San Diego, CA	05/04/11
Mary Dee Dickerson, Ph.D., CFP*		06/01/11
Mary Deshong-Kinkelaar	Akron, OH	04/25/11
Mary Dolansky		06/02/11
Mary E. Schuh		06/01/11

Mary Elizabeth Lehane	Oakdale, NY	04/26/11
Mary Harrus		06/10/11
Mary J. Anna		06/01/11
Mary Jo Lyons	Mooresville, NC	04/25/11
Mary L Gibson		06/01/11
Mary Malgoire	Bethesda, MD	06/01/11
Mary Mar	Laguna Hilla, CA	05/05/11
Mary Patricia O'Malley		06/01/11
Mary R. Alpers		06/06/11
MARY RINALDI	Houston, TX	04/25/11
Mary S. Brock		06/11/11
Mary Sherrill Ware		06/10/11
Mary Shrode	Spokane, WA	04/25/11
Mary Spansky		06/10/11
MARY SULLIVAN	Pasadena, CA	05/12/11
Mary Zamboni	East Aurora, NY	04/25/11
MaryFaye Godwin	Hillsborough, NC	05/05/11
Matt and Stacy McMillan	Santa Cruz, CA	04/27/11
Matt Belardes, CFP(R)		06/10/11
Matt Brennan	Reston, VA	04/26/11
Matt Buchanan		06/14/11
Matt Hull	STILLWATER, OK	05/06/11
Matt Krull	Sandy, UT	05/04/11
Matt Wagner	St. Louis, MO	04/25/11
Matthew Anderson		06/14/11
Matthew Bell	San Antonio, TX	04/25/11
Matthew Borland		06/02/11
Matthew Brenneman	Wilmington, NC	04/25/11
Matthew Crane		06/15/11
Matthew Daugavietis	Campbell, CA	04/25/11
Matthew Etzler	Red Bluff, CA	06/27/11
Matthew Fannin		06/10/11
matthew glova	Raleigh, NC	04/25/11
Matthew Hartman	Clayton, MO	05/05/11
Matthew J Everson		07/25/11
Matthew Johnson	Greensboro, NC	05/19/11
Matthew Kempf	Bellevue, WA	05/06/11
Matthew Kempf, CFP(r)		06/07/11
Matthew Kuhn		06/10/11
Matthew Megorden		06/13/11

Matthew P Boyle		06/06/11
Matthew P. Kubicek		06/16/11
Matthew R. Smith		06/02/11
Matthew Reynolds	Northfield, NJ	06/10/11
Matthew Shaffer	Westerville, OH	04/25/11
Matthew Sliwa	waltham, MA	04/25/11
Matthew Stroup	Paramus, NJ	05/03/11
Matthew Veenker	Highlands Ranch, CO	04/25/11
Matthew W Harris		06/01/11
Maureen Demers		06/02/11
Maureen North	Shortsville, NY	04/28/11
Maureen Verduyn		06/04/11
Max El Tawil	Spring Branch, TX	05/03/11
MAY CHEUNG	MIAMI, FL	04/26/11
Maynard Keller	Roanoke, VA	04/25/11
Melanie Arena	Seattle, WA	04/25/11
Melinda L. Baran		06/10/11
Melinda Warren	Okla. City, OK	05/09/11
Melisa R. Creel, CFP(R)		06/14/11
Melissa Dixon	Fort Collins, CO	04/28/11
melissa hoyer	boulder, CO	05/06/11
Melissa Huml		06/13/11
Melissa J. Stein		06/02/11
Melissa Liu	Atlanta, GA	04/25/11
Melissa Wise	Benbrook, TX	05/04/11
Melody Townsend	Mt. Sterling, KY	05/13/11
Meredith Rice	Houston, TX	04/25/11
Meres lee Moffitt		06/03/11
Meridee Maynard	Milwaukee, WI	04/27/11
Micah Porter		06/13/11
Michael Bacigalupi	Prescott, AZ	05/03/11
Michael Branham, CFP(r)	Edina, MN	06/06/11
Michael Rudy	Ypsilanti, MI	05/05/11
Michael A. Aquino		06/01/11
MICHAEL A. DARANY		06/01/11
Michael A. Durante		06/01/11
Michael A. Gemelli, CFP		06/10/11
Michael A. Mlinac		06/15/11
Michael A. Robertson,CFPÂ®		06/15/11
Michael Anderson	Portland, OR	04/27/11

michael b. anzel		06/16/11
michael balderson	spokane, WA	04/25/11
Michael Battaglia		06/02/11
Michael Bernard		06/10/11
Michael Bird	Kingsport, TN	05/09/11
Michael Bishop	Minneapolis, MN	04/26/11
Michael Brandeberry		06/12/11
Michael Broadhurst	Portsmouth, VA	05/03/11
Michael Burdick	Tucson, AZ	05/04/11
Michael Buroker	Fishers, IN	04/25/11
Michael Byman		06/02/11
Michael C Creasman		06/15/11
michael c valdez		06/01/11
Michael Cahill		06/10/11
Michael Calzolano	Libertyville, IL	04/25/11
Michael Carney	Runnemede, NJ	04/26/11
Michael Cassidy	Minneapolis, MN	04/25/11
Michael Clancy	Conshohocken, PA	04/25/11
michael cooper	NY, NY	04/25/11
Michael Cordrey	Sacramento, CA	04/25/11
Michael Creasman	Asheville, NC	04/28/11
Michael Cregge	Mililani, HI	04/26/11
Michael Crews		06/10/11
Michael Cruce	Anderson, SC	04/25/11
Michael Dann	Baldwin City, KS	04/25/11
michael delehanty	princeton, NJ	04/25/11
Michael Di Lullo	Amherst, NY	04/27/11
Michael DiVito	Erie, PA	05/04/11
Michael Duckworth		06/10/11
Michael Dunbar	Tacoma, WA	05/18/11
Michael E Raidt		06/02/11
Michael E. Williams		06/10/11
Michael Edwards		06/10/11
Michael Eric Sales		06/02/11
Michael Evans	Tyler, TX	04/25/11
Michael Feinstein		06/01/11
Michael Feldman	Wayne, PA	04/25/11
Michael Fischer	Phoenix, AZ	04/25/11
Michael Flynn		06/10/11
Michael Furois	Phoenix, AZ	05/05/11

MICHAEL G. GRINNELL		06/12/11
Michael G. Sisney		06/02/11
Michael Gerhard	Aurora, IL	04/26/11
Michael Godfrey	Setauket, NY	04/25/11
Michael Gorman	Petaluma, CA	05/04/11
michael greenspon	Englewood, CO	05/19/11
MICHAEL GRINNELL	VIENNA, VA	04/25/11
Michael Hansen	Walnut Creek, CA	04/25/11
Michael Hanson	Camarillo, CA	04/25/11
Michael Helffrich	Minneapolis, MN	05/03/11
Michael Higgins		06/03/11
Michael Hollars	Sunnyvale, CA	04/25/11
Michael Holt	Campbell, CA	05/06/11
Michael Irving	Lakewood, CO	04/25/11
Michael J Greve		06/02/11
Michael J Pilato		06/10/11
Michael J. Anderson		06/17/11
Michael J. Crum		06/01/11
Michael J. Hickey		06/02/11
Michael Jacques	Green Bay, WI	05/03/11
Michael Jones	Louisville, KY	04/27/11
Michael K.Ruhland		06/10/11
michael kalscheur	indianapolis, IN	07/10/11
Michael Kennedy	Elmhurst, IL	04/25/11
Michael Kertes		06/01/11
Michael Klimis	Palm Harbor, FL	04/26/11
Michael Knight		07/12/11
Michael Krol	pittsburgh, PA	04/25/11
Michael Limbacher	Bridgeville, PA	06/15/11
Michael Ling	Boise, ID	04/25/11
Michael M Hoffman		06/10/11
Michael Macke		06/06/11
Michael Mader	Plantation, FL	05/18/11
Michael Malinowski	Garden City, NY	04/26/11
Michael Maye	Berkeley Hts, NJ	05/31/11
Michael McDermott	King of Prussia, PA	04/25/11
Michael Meyers	Naperville, IL	05/05/11
Michael Miller	Mansfield, TX	04/25/11
Michael Miller	Greenville, SC	05/03/11
Michael Mitchell CFP	Shelby, NC	05/04/11

Michael Molloy		06/02/11
Michael Moss	Mentor, OH	05/06/11
Michael Mulhern	Columbus, OH	05/06/11
Michael Murphy	Blaine, MN	05/03/11
Michael P. Burns CFP		06/02/11
Michael P. Lawrence		06/02/11
Michael P. Stanton		06/01/11
Michael Pablo	San Francisco, CA	04/25/11
Michael Pace	Seattle, WA	04/25/11
Michael Paregian	Wilmington, DE	05/03/11
Michael Patterson	Greenville, SC	04/25/11
Michael Patton		06/01/11
Michael Peck	Boulder, CO	04/25/11
Michael Peterson	Chambersburg, PA	04/25/11
Michael Price		06/10/11
michael provenz		06/10/11
Michael R Schmidt	Acworth, GA	05/05/11
Michael R. Jones		06/10/11
Michael Radakovich	Portland, OR	05/03/11
Michael Rivas	New Orleans, LA	06/22/11
Michael Rodriguez	San Antonio, TX	05/03/11
Michael Searcy	Overland Park, KS	04/25/11
Michael Sharpton	Columbia, TN	04/26/11
Michael Shovein	Eagan, MN	04/25/11
Michael Simmons	Greenwood Village, CO	05/18/11
Michael Skehan	Indianapolis, IN	04/25/11
Michael Smith	Atlanta, GA	04/26/11
Michael Snowdon	Greenwood Village, CO	04/25/11
Michael Steele	Hiawatha, IA	06/24/11
Michael Stern	Beverly Hills, CA	04/28/11
Michael Stratton	Pendleton, OR	05/19/11
Michael T Carey		06/12/11
Michael Thurston		06/02/11
Michael Tiberg	Santa Ana, CA	05/05/11
Michael Tsiaklides	Saint Louis, MO	05/04/11
Michael Tumer	Davis, CA	04/25/11
Michael Vieceli	Skokie, IL	04/25/11
Michael Wali		06/03/11
Michael Walther	Deerfield, IL	04/25/11
Michael Weber		06/10/11

Michael Williams	Clearwater, FL	05/06/11
Michael Wilson	Orland, IN	04/25/11
Michel Dunham	Oklahoma City, OK	04/26/11
Michele Gensel		06/10/11
Michele Mercer	Casa Grande, AZ	04/30/11
Michele Randall	Racine, WI	05/03/11
Michele V. Stutts		06/17/11
Michelle A Fait		06/01/11
Michelle Carney	Birmingham, AL	05/10/11
Michelle Goldstein	Dallas, TX	05/05/11
Michelle Harrison	Boston, MA	05/04/11
Michelle Maton	Chicago, IL	04/26/11
Michelle Stroh	Columbus, OH	04/25/11
Michelle Webb	Pitman, NJ	07/24/11
Mick Stefan	Centennial, CO	05/03/11
Micky Reeves		06/15/11
Miguel Horvath		06/03/11
MIKE		06/11/11
Mike Antone	Sacaton, AZ	04/25/11
MIKE BABIN	NEW ORLEANS, LA	04/25/11
Mike Castillo	Vergennes, VT	04/26/11
Mike DiSalvo	Columbus, OH	05/06/11
Mike Durant	Belmont, MA	05/04/11
Mike Hanson	Peoria, IL	05/11/11
Mike Ingaglio, CFP		06/01/11
Mike Katto	Troy, MI	04/25/11
Mike Krise		06/01/11
Mike Lewis	Guntersville, AL	05/03/11
MIke Lockwood		06/10/11
Mike Masur	Winter Park, FL	04/25/11
Mike McFeeley	Lutherville, MD	04/25/11
Mike Nicolini	Elkhart, IN	05/03/11
Mike Nozzarella	Newport Beach, CA	04/25/11
Mike Russo		06/13/11
Mike Sedlak		06/01/11
Mike Tiddy	Charlotte, NC	04/25/11
Miles C. Cramer		06/01/11
Milton Lefton	Chicago, IL	04/25/11
Mitch Marsden	Madison, AL	05/05/11
Mitchel Shapirp	Baltimore, MD	04/25/11

MITCHEL ST. BENEDICT	Mandeville, LA	05/05/11
Mitchell Houston	Highland, IN	04/26/11
Mitchell Keil	Fountain Valley, CA	06/24/11
Mitchell L. Helton		06/21/11
Mitchell Owens	Severna Park, MD	04/26/11
Mitchell Smyth		06/20/11
Mitchell Welsch	Bryn Mawr, PA	05/29/11
Molly McCarthy	Dallas, TX	04/26/11
Molly Steele		06/21/11
Mona Edwards		06/02/11
Monica Narvaez	El Paso, TX	04/25/11
Monte C Ferguson		06/15/11
Monte Ferguson	Fort Worth, TX	04/25/11
Monte Luzadder	Glenview, IL	05/03/11
Morrie Reiff		06/10/11
Muhamed Rehan Abid	Islamabad,	05/22/11
Murray Hougen	San Diego, CA	04/25/11
Myra Kingsbury	South Siouc City, NE	04/25/11
Myrna Mitchell	Rapid City, SD	04/25/11
Myron Weiss	Plano, TX	04/25/11
Nancy Bryant	Towson, MD	05/04/11
Nancy A Ferriss		06/14/11
Nancy Anglyn	Roswell, GA	05/31/11
Nancy Bell	Glen Ellyn, IL	04/25/11
Nancy Dienes	Seattle, WA	05/31/11
Nancy Ferriss	St. Louis, MO	05/18/11
Nancy Groff	Baltimore, MD	05/16/11
Nancy J. Bernaldo	Monterey, CA	05/26/11
Nancy J. Schmertz		06/02/11
Nancy L. McCready		06/01/11
Nancy Ladd	Oak Lawn, IL	04/27/11
Nancy Loveland	Phoenix, AZ	04/25/11
Nancy Magee	Shillington, PA	04/25/11
Nancy Nelson	Olympia, WA	05/01/11
Nancy P Mercado		06/14/11
Nancy Schott		06/10/11
Nancy Wojcik	Evanston, IL	05/31/11
Nanette Heggie		06/13/11
Naomi Scrivener	Hewitt, TX	05/04/11
naresh		06/10/11

Nari Kannan	Prospect, KY	04/26/11
Nate Wenner	Minneapolis, MN	04/25/11
Nathan Boomershine		07/15/11
Nathan Brown Jr	Valdosta, GA	05/05/11
Nathan Fiser	Lenexa, KS	04/25/11
Nathan Goldberg	west bloomfield, MI	04/25/11
Nathan Ricks	Bellevue, WA	04/26/11
Nathaniel Klitzing	O'Fallon, IL	05/06/11
Nathaniel Ritchison	San Diego, CA	04/25/11
Neal Nolan	Asheville, NC	05/05/11
Neal Pierce	bridgeton, NJ	05/04/11
Neal Solomon	Gloversville, NY	04/25/11
Neal Van Zutphen	Scottsdale, AZ	04/25/11
ned burns	rockford, IL	05/18/11
Neil brown		06/10/11
Neil Collins	Melrose, MA	05/04/11
Neil Dinndorf		06/01/11
Neil Hokanson		06/15/11
Neil Paur	Santa Ana, CA	05/06/11
Neil Riordan	Timonium, MD	04/25/11
Neil Sanders		06/02/11
Neil Teubel	Morristown, NJ	04/25/11
Nelva A. Bledsoe		06/10/11
Nestor Godinez	Santa Ana, CA	04/26/11
Nicholas A. Nicolette		06/10/11
Nicholas Burke	Fox Lake, IL	05/03/11
Nicholas D'Ambrosio		06/01/11
Nicholas F. Nauta		06/10/11
Nicholas G. Psaki, III		06/02/11
Nicholas J Valenti Jr	Valdosta, GA	04/25/11
Nicholas Miller		06/10/11
Nicholas Murphy	Raleigh, NC	04/25/11
Nicholas Prangner		06/10/11
Nick Arellano		06/10/11
Nick Strainic	Denver, CO	04/25/11
Nick Toadvine	Lakeland, FL	05/18/11
Nicole Weber	Pasadena, MD	04/28/11
Nina Grove	San Francisco, CA	05/15/11
Noah Jacobson	Petaluma, CA	04/26/11
Noel Edwards	Jonesboro, GA	05/03/11

Norbert Oses	Norcross, GA	05/04/11
Norm Miller	Evansville, IN	04/25/11
Norman Farr	Fort Worth, TX	05/04/11
Norman K. Stewart		06/10/11
Norman Miller CLU ChCF CASL		06/02/11
Norry Jensen		07/30/11
Nowell Loop	Dallas, TX	04/25/11
O John Bedell	Hollister, CA	05/19/11
Oliver Tutt	Providence, RI	04/25/11
Ora Citron	Alamo, CA	04/25/11
Orlando Flowers		06/10/11
Orville McCumber	Las Vegas, NV	04/25/11
Owen Hill	Incline Village, NV	05/04/11
P. Alan Loss	Lancaster, PA	04/26/11
P. Mitchell Clark Jr, CFP		06/02/11
Page Howell	Cranbury, NJ	04/25/11
Paige Guinn	Houston, TX	04/25/11
Pam Poldiak	Salem, VA	05/04/11
Pamela Baumbach	Newark, DE	05/31/11
Pamela F. Clinard		06/02/11
Pamela Groft	West Reading, PA	04/27/11
Pamela Heimdal	Lakeville, MN	05/05/11
Pamela L. Hesselgrave		06/11/11
Pamela Lee		06/10/11
PAMELA R VILLARREAL		06/01/11
Pamela S. Marshall, CFP		06/10/11
Pamela Sandy		06/13/11
Pamela Settlage	Potomac, MD	05/03/11
Pamela Thomas	Idaho Springs, CO	05/05/11
Pamela Zschoche	Overland Park, KS	04/25/11
Pamylle Greinke	Peconic, NY	04/28/11
Partha Iyengar	mumbai,	04/28/11
Pat Cain		06/02/11
Pat O'Brien		06/10/11
Pat Raskob,CFP,EA,ATA	tucson, AZ	04/27/11
pat srebnick		06/02/11
Patrice Cresci	San Mateo, CA	05/03/11
Patricia Sokolowski	Burlington, VT	04/25/11
Patricia Besselman	Metairie, LA	04/25/11
patricia blazejewski		06/10/11

Patricia Brennan	Holland, PA	05/05/11
Patricia Conway	St. Louis, MO	04/25/11
Patricia D. Herbst	Morristown, NJ	05/24/11
Patricia Goodman	Edmond, OK	05/04/11
Patricia Gottier	New York, NY	04/25/11
Patricia Hordis		06/15/11
Patricia J. Gundling		06/15/11
Patricia Kambourian	Tucson, AZ	04/27/11
Patricia Kummer	Highlands Ranch, CO	05/18/11
Patricia McCormick	Old Bridge, NJ	05/31/11
Patricia O'Brien	Redondo Beach, CA	04/25/11
Patricia Patterson	San Diego, CA	05/18/11
Patricia Sawyers		06/01/11
Patricia Shrader		06/12/11
Patricia Sperduto	Marlton, NJ	05/09/11
Patrick Hinton	Boston, MA	05/23/11
Patrick Valenty	Las vegas, NV	04/26/11
Patrick Bourbon	Chicago, IL	05/31/11
Patrick Brault	La Crosse, WI	05/02/11
Patrick Devine	Houston, TX	04/26/11
Patrick Flanagan	Point Pleasant, NJ	05/03/11
Patrick H. Doyle, JD		06/14/11
Patrick Healey		06/02/11
Patrick Hinchey	Stockbridge, GA	05/03/11
Patrick Lee	Pasadena, MD	04/26/11
Patrick M. McAleer		06/14/11
Patrick Meyer	Richmond, VA	05/04/11
Patrick OGorman	Atlanta, GA	05/04/11
Patrick P. Hollywood		06/13/11
Patrick Rudy		06/02/11
Patrick Valenty	Las Vegas, NV	05/05/11
Paul Caswell	Medford, OR	04/25/11
paul nastasi	Eldersburg, MD	05/04/11
Paul A. Kania		06/14/11
Paul Baumbach		06/02/11
Paul Beck	Upper Saddle River, NJ	05/26/11
Paul Bednarski	Irvine, CA	04/25/11
Paul Bennett Miller		06/15/11
Paul Block	La Crosse, WI	04/26/11
Paul C. Koenig Jr.		06/10/11

Paul Camhi		06/10/11
Paul Ciccarelli	Naples, FL	04/25/11
Paul Cooper		06/10/11
Paul D. Soroka		06/28/11
Paul Doherty	Newton, MA	04/25/11
Paul Donahue	Indianapolis, IN	05/04/11
Paul Evans	Annapolis, MD	04/26/11
PAUL F. MAURIN		06/02/11
Paul Finocchiaro	Tampa, FL	04/25/11
Paul Frank Castellon		06/02/11
Paul Games	Newburyport, MA	04/25/11
Paul Gardner	Austin, TX	05/23/11
Paul Goyette	Nashua, NH	04/27/11
Paul Greenleaf	Round Rock, TX	05/04/11
Paul H. Auslander		06/10/11
Paul Heising	Torrance,, CA	04/25/11
Paul J Wannemacher		06/02/11
Paul Jarvis		06/16/11
Paul Klehr		06/02/11
Paul Kraklan	St Clair, MI	04/26/11
Paul Lemon	Durango, CO	04/26/11
Paul Levin	Cherry Hill, NJ	05/03/11
Paul Manganelli		06/10/11
Paul McCormack	Beachwood, OH	04/25/11
paul mcgovern	braintree, MA	05/04/11
PAUL MORLEY	Fork, MD	04/26/11
Paul Moyer	Findlay, OH	04/25/11
Paul Nelson		06/06/11
Paul Nervig	Colorado Springs, CO	04/25/11
Paul P. Ziegler		06/11/11
Paul Palmer	Houston, TX	04/27/11
Paul Perino Jr, CFP(r)		06/10/11
Paul Petrone	Briarcliff Manor, NY	05/03/11
Paul R. Harrison, MBA, CFP(r), CPA-		06/03/11
Paul Scherf	Menlo Park, CA	05/03/11
Paul Sidney Elliott		06/11/11
PAUL SIDNEY ELLIOTT		06/12/11
Paul Staib	Highlands Ranch, CO	05/03/11
Paul Steven Patterson		06/15/11
Paul Stovall	Lebanon, TN	05/25/11

Paul Troyer	Richmond, TX	04/26/11
Paul Walters	Rancho Santa Margarita, CA	04/26/11
Paul Weinstein, CFP		06/02/11
Paul White	Gainesville, VA	04/25/11
Paul Wildeck	Amesville, OH	04/25/11
Paul Yancy	Kiel, WI	04/26/11
Paula de Vos	Carmel, CA	05/03/11
Paula Hendrickson	Denver, CO	04/25/11
Paula Hogan	Milwaukee, WI	05/25/11
Paula M Taylor		06/06/11
Paula Nanagle	Doylestown, PA	04/26/11
Paula Wiiken	Petaluma, CA	06/01/11
Pauline Johnson		06/11/11
Pedro G. Mendive, Jr CFP	Miami, FL	04/25/11
peggy bowers		06/02/11
Peggy Cabaniss	Lafayette, CA	04/26/11
Peggy Frye	Madison, VA	05/04/11
Peggy Kessinger	Beaverton, OR	05/31/11
Peggy Ruhlin	Columbus, OH	05/31/11
Peggy Sherman	College Station, TX	04/25/11
Peggy Willis		06/12/11
Pei-Yung Song	Califon, NJ	05/04/11
Penn Rettig CFP(r), CFS, MBA		06/11/11
Penny Gordon	Key Largo, FL	04/25/11
Penny Marchand	Tucson, AZ	04/25/11
Perry Kotval	San Mateo, CA	04/26/11
Perry Vasquez	Arvada, CO	04/27/11
Pete Dixon		06/30/11
Pete Egan	Centennial, CO	04/26/11
Peter Dold	San Diego, CA	04/27/11
Peter Brucato	Averill Park, NY	04/27/11
Peter Bush	Baton Rouge, LA	04/30/11
Peter C. Van Der Voorn		06/10/11
Peter Cline	Kirkland, WA	04/25/11
peter contino	Windsor, CO	04/25/11
Peter D'Amico	Bala Cynwyd, PA	05/04/11
Peter Graves	Minnetonka, MN	04/26/11
Peter J Miller, CFP		06/16/11
Peter J. Tomassi		06/01/11
Peter James Lingane, EA, CFP(r)	Lafayette, CA	04/26/11

Peter Liang	Pasadena, CA	04/26/11
Peter Melsness	Rochester, MN	04/25/11
Peter Melsness	Rochester, MN	05/31/11
PETER MILLER	Charlotte, NC	04/25/11
Peter Neely		06/14/11
Peter Palion	East Meadow, NY	04/27/11
Peter Regan	Houston, TX	04/25/11
Peter Rhee		06/02/11
Peter Ruma, Jr.	Toledo, OH	04/26/11
Peter Twining	Ipswich, MA	04/25/11
Peter W DeGiralamo	Westfield, NJ	05/04/11
Phil Hogg	South Haven, MI	04/25/11
Phil Weisberg	Rochester, NY	04/25/11
philip bailey	pinehurst, NC	05/05/11
Philip Carrasco		06/02/11
Philip Floyd	Plano, TX	04/25/11
Philip J. Messuri, MS, CFP, Lt Col		06/14/11
Philip Johnson	Tempe, AZ	05/03/11
Philip Lang		06/13/11
Philip Lee	Boston, MA	05/31/11
Philip Mattera	New York, NY	04/25/11
philip palazzolo		06/10/11
Philip R. Cofman		06/01/11
Philip Richman		06/13/11
Philip Royal	Pittsboro, NC	04/25/11
Philip Sher	Newton, MA	04/25/11
Philip Watson	Franklin, TN	04/25/11
Phillip Cook	Manhattan Beach, CA	04/25/11
Phillip Anderson	Granite Bay, CA	05/05/11
Phillip C. Mickel		06/02/11
Phillip Couture		06/13/11
Phillip Del Nero	Jamesville, NY	04/26/11
Phuong N. Quach		06/15/11
Phyllis Jo Kubey	New York, NY	04/26/11
Phyllis Keller	Victoria, TX	04/27/11
PLACIDO BLANCO	CORAL GABLES, FL	04/25/11
pradeep tempalli		06/01/11
Prashant Ravani		06/06/11
Preston P. Forman		06/10/11
Preston Schumacher		06/01/11

Priscilla Florence	Evanston, IL	05/23/11
Quintin Mullins	Boston, VA	04/27/11
R P	Alpharetta, GA	04/25/11
R P	Virginia Beach, VA	04/25/11
R. Pasha Horiuchi		06/01/11
R. Thomas Martell CFP, EA		06/01/11
R. William Blasdale		06/01/11
Rachael Neil	Pleasanton, CA	04/25/11
Rachel Bunch		06/13/11
Rachel Bush	Dallas, TX	04/26/11
Radford Brogden		06/10/11
Raj Prashad	Ozone Park, NY	05/04/11
Ralph Bincarowsky	Erie, PA	04/25/11
Ralph Latza	San Rafael, CA	05/05/11
RALPH MARTIN	PHOENIX, AZ	04/25/11
Ralph Orr		06/16/11
Ralph S. Peyton		06/01/11
Ralph Ujano		06/13/11
Ram Kolluri		06/04/11
Rand A. Borresen		06/01/11
Randal Cokeley		06/14/11
Randall Cooper	Tampa, FL	05/03/11
Randall Gerard	Lenexa, KS	04/25/11
Randall Manley	Alamo, CA	04/25/11
Randall Peterson	Bakersfield, CA	04/25/11
Randall Wall	Oak Harbor, WA	04/25/11
Randolph Elder, CFP	Loomis, CA	06/24/11
Randolph Christensen	Nipomo, CA	05/04/11
Randolph Elder, CFP		06/15/11
Randy Bliss, CFP		06/10/11
Randy Boggs		06/10/11
Randy Braidfoot		06/01/11
Randy Clayton	Topeka, KS	04/25/11
Randy E. Gantt, CFP		06/10/11
Randy G. McQueen, CLU, ChFC,		06/13/11
Randy Gonsoulin		06/01/11
Randy Roebuck		06/16/11
randy siegel		06/10/11
Randy Waesche	Metairie, LA	04/25/11
Raoul Rodriguez, CFPÂ®		06/10/11

Raquel Hinman	Boulder, CO	05/09/11
Ray Johnson		06/02/11
Ray Kulbeda		06/13/11
RAY SCHIEFFER		06/01/11
Raymond Benjamin	Augusta, GA	04/25/11
Raymond Alvarez		06/11/11
Raymond Brown	Westlake, OH	04/25/11
Raymond Eng		06/02/11
Raymond Gadbois	Piedmont, CA	05/25/11
Raymond Heidel, MS	North East, MD	04/25/11
Raymond Van Gelder	Indianapolis, IN	05/03/11
Rebecca Garrett-ferguson		06/10/11
Rebecca Halma	Wentworth, SD	04/26/11
Rebecca Preston	Providence, RI	05/04/11
Reed Fraasa	Kinnelon, NJ	04/26/11
Reginald Jensen	San Jose, CA	04/25/11
Reid Hartsfield		06/14/11
Rena Noe	Lafayette, IN	05/18/11
RenÃ©e Judycki, CFPÂ®		06/13/11
REX FITCH JR	VIRGINIA BEACH, VA	04/26/11
Rex Seymour		06/02/11
Rhonda Heineman, CFPÂ®	Omaha, NE	04/25/11
Ricardo Ulivi	Orange, CA	05/04/11
Rich Jacobson	Napa, CA	04/26/11
Richard Janke	Sandy, UT	04/26/11
Richard St. John	Roswell,, GA	04/25/11
Richard A Connell		06/10/11
richard a. hall		06/15/11
Richard Albright	Blue Bell, PA	04/26/11
Richard B Wagner		06/13/11
Richard Barrier	Mount Pleasant, NC	05/06/11
Richard Bloom, CFP		06/10/11
Richard Bulger	Vestal, NY	04/25/11
Richard C Hildebrand, CFP		06/06/11
Richard Clark	Wilmington, DE	04/27/11
Richard Colarossi	Islandia, NY	04/25/11
Richard Coles	LEXINGTON, KY	05/06/11
richard collins	maynard, MA	04/26/11
Richard Costner	Lakewood, CO	04/25/11
Richard Cox	Chattanooga, TN	04/25/11

Richard D Barrier		06/16/11
Richard DeChaineau	Aiea, HI	04/25/11
Richard DeRafelo	Media, PA	04/25/11
Richard DeRafelo, Jr		06/14/11
richard dixon	edenton, NC	04/25/11
richard durso		06/02/11
Richard E. Weaver		06/11/11
Richard Ehrlich		06/01/11
Richard Engel	Manchester Center, VT	04/26/11
Richard Erwin	Plano, TX	04/25/11
Richard Fates	Ipswich, MA	08/15/11
Richard Feight	East Lansing, MI	04/25/11
Richard Fine	Jamaica Plain, MA	05/31/11
Richard Flohr	Nashville, TN	05/04/11
Richard G Griessmeyer, CFP, CMFC,		06/11/11
Richard G. Albright		06/15/11
Richard Gardner	Stafford, VA	05/03/11
Richard Graham	San Antoino, TX	04/25/11
Richard Hall	Sandia Park, NM	04/25/11
Richard Hand	Spring City, PA	04/25/11
Richard Harris	Va. Beach, VA	05/04/11
Richard Havican	Wilbraham, MA	04/26/11
Richard Hetherington	Carlsbad, CA	04/25/11
Richard Hogan		06/10/11
Richard Holdway		06/03/11
Richard Hurth	Crestwood, IL	05/03/11
Richard J. Busillo		06/02/11
Richard J. Knebel		06/02/11
richard Jackson	Memphis, TN	05/04/11
Richard Jeffery	Kamuela, HI	04/25/11
Richard Jones	Orem, UT	04/25/11
Richard Joyner	Dallas, TX	04/25/11
Richard K. Gradel		06/01/11
Richard Kreitman		06/10/11
Richard Krentz	Valley Cottage, NY	04/25/11
Richard L. Brackett		06/27/11
Richard Leonard	Mountain Vieew, CA	04/26/11
Richard Lesan	McLean, VA	05/16/11
Richard M. DeCrosta		06/06/11
Richard M. Sligh		06/02/11

RICHARD MAYS	Brandon, MS	04/25/11
Richard McCormick	Three Rivers, MA	05/05/11
RICHARD MIKULA	ELM GROVE, WI	04/26/11
Richard Rogers	Greenwood Village, CO	04/25/11
Richard Roman	Novato, CA	04/26/11
Richard Saint-Laurent	Beverly, MA	06/24/11
Richard Salmen	Olathe, KS	05/13/11
Richard Schoenfeld	Chevy Chase, MD	05/04/11
Richard Schwed	Poughkeepsie, NY	05/03/11
Richard Seaver	Indianapolis, IN	05/04/11
Richard Sementa	Morgantown, WV	05/04/11
Richard Sprong	Weatherford, OK	04/25/11
Richard Steele	Bellingham, WA	04/25/11
Richard Thompson		06/15/11
Richard Todd Stone		06/10/11
Richard Van Der Noord	Greer, SC	04/26/11
Richard Van Zyl	Grand Island, NE	04/25/11
Richard Vodra	McLean, VA	04/26/11
Richard W Pierson		06/10/11
Richard W. Stout III		06/13/11
Richard Wagner	Denver, CO	04/29/11
Richard Weiss	Mahopac, NY	05/18/11
richard whitton	portland, OR	04/25/11
Richard Wojcik	Burlington, MA	04/25/11
Rick Epple	Wayzata, MN	05/04/11
Rick Getman		06/02/11
Rick Keller		06/10/11
Rick Mangan		06/01/11
Rick Mayes	Carlsbad, CA	05/04/11
Rick Mayo		06/02/11
Rick Morehouse	Scottsbluff, NE	04/25/11
Rick Ray	Columbus, OH	04/26/11
Rick Raybin	Redwood City, CA	06/24/11
Rick Salmeron		06/02/11
Rick Shapiro	W. Hartford, CT	04/25/11
Rick V Huff		06/23/11
Rickard Martin	Pepper Pike, OH	05/06/11
Rob Garner	Lafayette, CA	05/04/11
Rob Lyman	Palo Alto, CA	05/04/11
Rob Typher, CFP		06/10/11

Robby Harfst	Ashland, OR	06/24/11
Robert Blanke	Fletcher, NC	04/25/11
Robert Morella	Lafayette, LA	05/31/11
Robert A Bye		06/01/11
Robert A. Finnigan, CFP		06/13/11
Robert A. McCullough		06/15/11
Robert Abbott	Bellevue, WA	05/31/11
Robert B. Ayres	Naples, FL	05/04/11
Robert B. Pring	St. Peters, MO	05/18/11
Robert B. Wood, III		06/07/11
Robert Beswick, CFP, ChFC, C.L.U.		06/01/11
Robert Billstein, Jr.		06/02/11
Robert Bjur	Bainbridge Island,, WA	04/25/11
Robert Bolen	Franklin, TN	04/26/11
robert bortz, jr	oconomowoc, WI	05/03/11
Robert Braun		06/11/11
Robert Brooks	Hubertus, WI	04/25/11
Robert Butera	Auburn, CA	04/26/11
Robert C. Crane		06/10/11
Robert Callahan CPA/PFS, CFP	Woodbury, MN	04/28/11
Robert Cameron	Gilbert, AZ	04/25/11
Robert Cassel	Columbia, MD	05/03/11
Robert Choiniere	Wexford, PA	05/04/11
Robert Clark	Severna Park, MD	04/25/11
Robert Corno		06/10/11
Robert D. Abrams		06/15/11
Robert D. Petrik		06/01/11
Robert Dwyer	Houston, TX	04/25/11
Robert E Ashton		06/01/11
Robert E. Loucks		06/02/11
Robert Eckert	Dallas, TX	04/25/11
Robert Eddy	San Diego, CA	05/31/11
Robert Eldred	Antioch, CA	04/26/11
Robert Farnell	Boulder, CO	04/25/11
Robert Finke	Aptos, CA	05/06/11
Robert Florian	Getzville, NY	04/29/11
Robert Goellner		06/10/11
Robert Graves	Glendora, CA	04/25/11
Robert Greenberg	Irvine, CA	05/31/11
Robert Hamilton	Columbus, OH	05/18/11

Robert Hamlin	Virginai Beach, VA	05/14/11
Robert Hampton	Houston, TX	04/28/11
Robert Harris	Culleoka, TN	05/26/11
Robert Hayden		06/06/11
Robert Henderson Jr		06/01/11
Robert Henry		06/01/11
Robert Herold	Rochelle Park, NJ	05/26/11
Robert Hines	St. Louis, MO	04/25/11
Robert Hintz	Lake Forest, CA	04/25/11
robert holland, cfp		06/15/11
Robert Horowitz	Huntington, NY	04/25/11
Robert Imparato		06/10/11
Robert J. Boram, CFP, ChFC		06/02/11
Robert J. McDermott	New Milford, CT	04/25/11
Robert J. walmsley		06/10/11
Robert Jackson	Scottsdale, AZ	04/25/11
Robert Jewell	Ithaca, NY	05/06/11
Robert Johnson	Huntsville, AL	04/25/11
Robert Kant		06/10/11
Robert keats	phoenix, Az, AZ	04/25/11
Robert Kleinman	Port Washington, NY	04/25/11
Robert Kline	Endwell, NY	04/26/11
Robert Kretz		06/02/11
Robert L Clyde		06/15/11
Robert L. Holland Jr., CFP(R)	Littleton, CO	05/05/11
ROBERT L. BROOD		06/02/11
Robert L. Seymour, CFP		06/10/11
Robert Langway	Southborough, MA	04/27/11
Robert Leonhard	Columbus, OH	05/11/11
Robert Livingston	Allentown, PA	04/25/11
Robert Loveman	Boulder, CO	04/25/11
Robert M P Moore		06/10/11
Robert Machado	Rancho Mirage, CA	05/05/11
Robert Maeder	Groton, MA	05/05/11
Robert Maloney	Holderness, NH	05/04/11
Robert Martino		06/13/11
Robert McLaughlin	Birmingham, AL	04/25/11
Robert Meade	Lewes, DE	04/27/11
Robert Michael Kelley		06/13/11
Robert Miller	Indianapolis, IN	04/25/11

Robert Monin	Williamsville, NY	05/18/11
robert moring	charlotte, NC	05/03/11
Robert Newell	West Hills, CA	04/25/11
Robert Oliver	Ann Arbor, MI	05/19/11
Robert P Moser		06/10/11
Robert P. Saunders	Bird Island, MN	05/03/11
Robert Panian	Redmond, WA	05/03/11
Robert Patterson	Dallas, TX	04/25/11
Robert Pennartz	Wilmington, DE	04/25/11
Robert Ponton	Virginia Beach, VA	04/25/11
Robert Powell		06/10/11
Robert Rafano	South River, NJ	04/26/11
Robert Reed		06/07/11
Robert Riccardi	Cincinnati, OH	06/02/11
Robert Richards Jr.		06/14/11
Robert Rogers	Minneapolis, MN	04/25/11
Robert Ryan	Wakefield, MA	04/25/11
Robert S Bjekich		06/01/11
Robert S Donato	Thiells, NY	04/25/11
Robert S. Krim	Little Silver, NJ	04/25/11
Robert S. Pennartz		06/16/11
Robert Schumann	Buena Vista, CO	05/09/11
Robert Sizemore	Fort Myers, FL	05/03/11
robert sullivan	los altos, CA	04/25/11
Robert Sweat		06/01/11
Robert T Adams		06/03/11
ROBERT TIMINERI	Sausalito, CA	04/25/11
ROBERT TOPPING	WILLIAMSBURG, VA	05/03/11
Robert Tull Jr	Chesapeake, VA	05/31/11
Robert Tyler	Merced, CA	06/09/11
Robert Ungerer	Centereach, NY	05/06/11
Robert Veres		06/18/11
Robert Wacker	San Luis Obispo, CA	05/04/11
Robert Walsh	Red Bank, NJ	05/04/11
Robert Wander	New York, NY	06/09/11
Robert West	Annapolis, MD	04/25/11
Robert White	Pleasant Hill, MO	05/03/11
Robert Wilgos	Newtown, PA	05/05/11
Robert Wills	Lockport, NY	05/04/11
Robert Wilson	Claycomo, MO	04/25/11

Robert Wilson Jr	Haverhill, MA	04/25/11
Roberta Cole	Edina, MN	04/25/11
Roberta Goldbaugh	Doraville, GA	04/26/11
Roberta Welsh	Laguna Woods,, CA	04/25/11
Roberto Calzadilla		06/01/11
Roberto Torres	Miami, FL	04/25/11
Robin Kivett	Webb City, MO	05/01/11
Robin L. Russo		06/14/11
Robin Riendl	Anchorage, AK	04/25/11
Robin Sherwood	New Canaan, CT	05/05/11
Robin Wolfgram	San Jose, CA	05/30/11
Robin Wucher WIllis	Unit 901, FL	04/25/11
Robinson Moncure	Raleigh, NC	05/06/11
Robyn Bahlinger	Laguna Hills, CA	04/25/11
Rod Evans	San Diego, CA	05/19/11
Rodney Mac Intyre	Blooming Glen, PA	05/03/11
Rodrigo Oliva		06/01/11
Roger B. Merrick		06/13/11
Roger D. Dunson Sr.		06/21/11
Roger Gibson	Wexford, PA	04/26/11
Roger Harmon	Roswell, GA	04/27/11
Roger Ho		06/10/11
Roger Hoenes	Springfield, MO	04/25/11
Roger I. Bair, III		06/13/11
Roger Kruse	Coon Rapids, MN	05/03/11
Roger Scott	Seattle, WA	04/25/11
Roger Simard	Scottsdale, AZ	04/26/11
Roger Smith	Sacramento, CA	05/03/11
Roger Streit	Roseland, NJ	05/19/11
Roger Willroth	Ames, IA	05/05/11
Rogers Penfield, CFP (R)		06/02/11
Roland Sample	Clarksville, TN	05/03/11
Rolf Trautsch	Pacific Grove, CA	05/18/11
Ron Ashley		06/20/11
Ron Barry		06/03/11
Ron Beaton	Paducah, KY	04/25/11
Ron Davis	Roanoke, VA	05/30/11
Ron Dickinson		06/01/11
Ronald Hurst	Raytown, MO	05/03/11
Ronald A Mosocco		06/12/11

Ronald A Sampson		06/01/11
Ronald A. Matsui, CIMA, CFP,		06/02/11
Ronald B Stricker		06/10/11
Ronald Bare	Atglen, PA	04/26/11
Ronald Colson	Lakewood, CO	04/27/11
Ronald Evans	Hopkins, MN	04/26/11
Ronald Gould	Toledo, OH	04/25/11
Ronald Iannucci	Woodbury, CT	04/26/11
ronald j rich		06/02/11
Ronald J. O'Dowd		06/02/11
Ronald L. Nicholson		06/02/11
ronald lederkramer	los angeles, CA	04/25/11
Ronald P. Majewski		06/01/11
Ronald Roccaforte	Groves, TX	05/18/11
Ronald Roge	Bohemia, NY	04/26/11
Ronald Silich		06/11/11
Ronald Simmer	Ferndale, WA	05/31/11
Ronald Tamayo	Maitland, FL	05/04/11
Ronald Wall	La Crosse, WI	05/05/11
ronit rogoszinski		06/01/11
Ronlad W. Humenny		06/10/11
Rorik Larson	Orland Park, IL	05/04/11
Rory Vander Heyden, CFP	Clayton, CA	04/26/11
Rosa Kohler		06/15/11
Rosanne Arthur	Santa Rosa, CA	04/25/11
Rosanne Roge	Bohemia, NY	04/26/11
Rose Swanger		06/01/11
Roseann Bove	Medford, NJ	05/04/11
Roselyn Wilkinson	Pittsburgh, PA	05/12/11
Rosilyn Overton	Lords Valley, PA	04/26/11
Ross Mongiardo	Garden City, NY	05/03/11
Roxanne Fleszar	Gloucester, MA	04/26/11
Roxanne Witmer	Willow Street, PA	04/27/11
Roy Ames	Broken Arrow, OK	04/25/11
Roy Ballentine		06/01/11
Roy Diliberto	Fort Myers, FL	05/14/11
Roy Gibson	Lakewood, CO	04/25/11
Roy Weisert		06/13/11
Royal Jaros		06/02/11
Royal Lunsford, Jr.	Spring, TX	05/18/11

Rozanna Patane	York Harbor, ME	05/04/11
RUBIK BABAIANS		06/09/11
Rubina Hossain		06/06/11
Russell Strand	Bethesda, MD	04/25/11
Russell Blahetka	Cupertino, CA	04/25/11
Russell Bosworth	New York, NY	04/25/11
Russell Campbell	Chicago, IL	05/18/11
Russell Hall	Fullerton, CA	04/25/11
Russell Hall	Wichita, KS	05/18/11
Russell Lowry	Windsor, CT	04/26/11
Russell Mansfield		06/10/11
Ruth Chady	Belleville, IL	04/25/11
Ruth Delaney		06/02/11
Ryan Bradley	Greenbelt, MD	04/28/11
Ryan Campbell		07/21/11
Ryan Darwish	Eugene, OR	05/04/11
Ryan Drake	Richmond, VA	05/06/11
Ryan Glover	Greensboro, NC	04/25/11
Ryan Klekar	Cincinnati, OH	04/25/11
Ryan M. Smith		06/06/11
Ryan McClung	Portland, OR	05/02/11
Ryan Olds	Cleveland, OH	04/27/11
Ryan Patterson	Houston, TX	04/25/11
Ryan R Morrissey		06/07/11
Ryan Tomkinson		06/13/11
Sabrina Evenosky	Havertown, PA	05/05/11
Sabrina Peterson	Anchorage, AK	04/26/11
Sal Ferradas	Miami, FL	07/14/11
Sallie Mullins Thompson	New York, NY	05/06/11
Sally J Kelley		06/01/11
Sally Long	Herenando, FL	04/26/11
SALLY MURRAY	BATAVIA, IL	04/28/11
Sam Martin		06/10/11
Sam McPherson		06/02/11
Samantha Craig Vient	Huntignton Beach, CA	05/04/11
Samantha Macchia	Columbus, OH	04/26/11
Samir Alame	Elmhurst, IL	05/04/11
Sammy Tally	Bedford, TX	05/04/11
Samuel J. Flaherty		06/02/11
Samuel Varano	Charleston, SC	04/26/11

Sandeep Madhavan		06/10/11
Sandra Borrowdale		06/02/11
Sandra Cleveland		08/15/11
Sandra K. Pierce, CPA, CFP		06/01/11
Sandra L. Anderson		06/15/11
Sandra Masick	Binghamton, NY	05/06/11
Sandra Reynolds	Westport, MA	04/26/11
Sandra Riccio	Albany, NY	04/25/11
Sandy Porter	Decatur, GA	05/31/11
Sara Geber	los gatos, ca, CA	04/25/11
Sarah Fuller		06/10/11
Sarah Phillips-Frangioni	sarasota, FL	04/26/11
sarah rieger	spokane, WA	04/25/11
Sarah Young Fisher	Lancaster, PA	04/26/11
Sathya Chey	Long Beach, CA	04/25/11
Scot Fairchild, CFP		06/01/11
Scot Hanson	Shoreview, MN	04/25/11
Scot N Pardo		06/11/11
Scott A, Pietras		06/17/11
Scott Adams		06/10/11
Scott Barbee	Cincinnati, OH	04/26/11
Scott Batchelor		06/15/11
Scott Cawood	Winston-Salem, NC	04/25/11
Scott Cheney, CFPÂ®, CLUÂ®,		06/02/11
Scott Cole		07/27/11
Scott Davis		06/02/11
Scott Draper	Gold River, CA	04/25/11
Scott Dye	Snoqualmie, WA	04/25/11
Scott E Marshall		06/15/11
Scott Ferguson	Indianapolis, IN	05/19/11
Scott Harding	Denver, CO	04/25/11
Scott Houser	Roswell, GA	05/04/11
Scott Kays	Atlanta, GA	05/03/11
Scott L. Goodling, CFPÂ®		06/11/11
Scott M. Bechtold		06/14/11
Scott McCaffery	Warren, NJ	04/25/11
Scott McDuffie	Atlanta, GA	05/18/11
Scott Michalek		06/16/11
scott oeth	Edina, MN	05/18/11
Scott Pope		06/10/11

Scott R Lewis		06/25/11
Scott Rainville	Goldsboro, NC	04/25/11
Scott Robinson		06/01/11
Scott Sheffield	Bellevue, WA, WA	04/25/11
Scott Spann	Mt Pleasant, SC	04/26/11
Scott Sprague	San Ramon, CA	04/26/11
Scott Stratton	Dallas, TX	04/26/11
Scott Swisher		06/17/11
Scott Vineberg	Scottsdale, AZ	04/27/11
Scott Walker	Arlington, VA	05/03/11
Scott Winkler	Norcross, GA	05/04/11
Scott Worley	Sinking Spring, PA	05/05/11
Sean Condon		06/01/11
Sean Eldred		06/03/11
sean pearson		06/10/11
Sean Phillips	Dallas, TX	04/25/11
Sean Shannon		06/10/11
Seok Jo	Woodland Hills, CA	04/25/11
SERGE R . PINARD	LAKE SUCCESS, NY	04/25/11
Seth Whicker		06/11/11
Shabri Moore	Frederick, MD	04/25/11
Shane Alsworth		06/10/11
Shane McCormick	Media, PA	05/18/11
Shane Stewart	Salt Lake City, UT	04/25/11
shannon bennett		06/10/11
Sharla Rountree	Lakewood, CO	04/25/11
SHARON A KOWALESKY		06/10/11
Sharon M Dufresne		06/14/11
Sharon Tallman	Cincinnati, OH	04/25/11
Shaun Agle		06/01/11
Shaun Eddy	Columbia, MD	04/26/11
Shaun Kiser	Russell, KY	05/18/11
Shawn Ballinger		06/01/11
Shawn Brunner		06/01/11
Shawn Connolly		06/01/11
Shawn D Taylor		06/01/11
Shawn M Benedict		06/10/11
Shawn Tydlaska		06/10/11
Sheena Hanson	Appleton, WI	04/25/11
Sheila Handrick	Madison, WI	04/25/11

Sheila Miller	Anchorage, AK	04/26/11
Shel Brandenburger, CFP	San Mateo, CA	04/25/11
Sheldon Fishman	Tucson, AZ	04/25/11
Sheldon Harber	St, Louis, MO	04/25/11
Sheri Bistreich, CFP		06/14/11
sheri kendall	indianapolis, IN	05/18/11
Sherif Awad	Federal Way, WA	04/25/11
Sherman E. Strobeck		06/15/11
Sherri Butala Fusaro	Russellville, AR	05/04/11
Sherry McKinney		06/15/11
SHERRY MIRTS	Red Oak, IA	05/03/11
Sherry West	Indian Wells, CA	04/25/11
Sheryl Clark	Tucson, AZ	05/10/11
Sheryl Garrett	Eureka Springs, AR	04/26/11
Shirley Aumack	Hazlet, NJ	05/26/11
Shirley White-Stevens	Allen, TX	04/25/11
Shon Flaharty	Clearwater, FL	04/26/11
Sidney Blum	Evanston, IL	04/25/11
Simler Batcheler	Allison Park, PA	04/25/11
Simon Hassan	Auckland,	05/21/11
Skip Fleming		06/01/11
Skip Schweiss	Denver, CO	04/25/11
Sophie Kaluziak	Oak Park, IL	05/31/11
Spencer Betts		06/10/11
Stacey Gibble Barrick	Camp Hill, PA	05/04/11
Stacie Neussendorfer	Omaha, NE	04/25/11
Stacy Bakri		06/10/11
Stan Klukowski	West Hartford, CT	05/04/11
Stan Norkiewicz	West Chester, PA	04/26/11
Stanley J. Lichwala, CFPÂ®		06/10/11
stanley nieminski	South Barrington Il, IL	04/25/11
Stefan Williams	Ross, CA	05/04/11
Stephan Hess	Harrisonburg, VA	04/25/11
Stephanie Harris		06/01/11
Stephanie Lee		06/13/11
Stephanie Poorman		06/16/11
Stephanie Smith	Chapel Hill, NC	06/27/11
Stephanie W. McCullough		06/15/11
Stephen Garrett	Birmingham, AL	04/28/11
Stephen A. Calderara		06/01/11

Stephen B Walsh, CFP		06/13/11
Stephen Barnes	Phoenix, AZ	04/25/11
Stephen Bingham	Arlington, VA	05/03/11
Stephen Clark	Johns Creek, GA	05/04/11
Stephen Close	Las Vegas, NV	04/26/11
Stephen Csenge	Clearwater, FL	04/25/11
Stephen Donella Sr.	Holmes Beach, FL	04/26/11
Stephen Doucette	Wellesley, MA	04/25/11
Stephen Dunne	Portland, OR	05/05/11
Stephen Ellisor, CFPÂ®	McLean, VA	05/04/11
Stephen Ferro	Scotch Plains, NJ	05/05/11
Stephen Forrest	Windsor Heights, IA	05/03/11
Stephen Gorman	Hingham, MA	04/25/11
Stephen Grimmie		06/24/11
Stephen H. Schiller, CPA, CFP		06/01/11
Stephen H. Smith		06/02/11
Stephen Haidt	Mobile, AL	05/04/11
Stephen High	Nashville, TN	04/25/11
Stephen J. Cribley		06/02/11
Stephen J. Farrar		06/11/11
Stephen J. Lee	Columbia, MD	05/18/11
STEPHEN KIRKENDALL	Vancouver, WA	04/25/11
Stephen Lovell	Walnut Creek, CA	04/25/11
Stephen Murdock		06/10/11
Stephen Nykamp	Pleasanton, CA	05/18/11
Stephen Overstreet	Winter Springs, FL	04/25/11
Stephen P. Byrne, CFP		06/14/11
Stephen P. Lain		06/15/11
STEPHEN SIEGEL	BALTIMORE, MD	04/25/11
Sterling Neblett		06/10/11
Steve Athanassie	New Port Richey, FL	04/25/11
Steve Gilbertson	Edina, MN	05/06/11
Steve Bell, CFP	Livermora, CA	05/04/11
Steve Billings		06/10/11
Steve Bove	Oldsmar, FL	05/04/11
Steve Curran	Gastonia, NC	04/25/11
Steve Doster	San Diego, CA	04/25/11
Steve Hansen	San Diego, CA	04/26/11
Steve Johnson, CFPÂ®	Palo Alto, CA	05/04/11
Steve Kuklinski		06/21/11

Steve Martin	Fort Collins, CO	05/31/11
Steve Myler, CFP		06/01/11
Steve Pollock	Collingswood, NJ	05/04/11
Steve Raymond		06/13/11
Steve reents		06/14/11
Steve Siders	Roswell, GA	04/25/11
Steve Sivak		06/10/11
Steve Spong		06/02/11
Steve Stanganelli	Amesbury, MA	04/27/11
Steve Sutherland	West Linn, OR	04/25/11
Steve Templeton	coraopolis, PA	05/04/11
Steve Teranishi	Merced, CA	05/11/11
Steve Tibbitts	Allegan, MI	05/18/11
Steve Williams	Los Alamitos, CA	05/19/11
Steve Wisdom		06/01/11
Steve Wolfe	Vancouver, WA	05/05/11
Steven Ames	Annapolis, MD	04/25/11
Steven Elwell	Amherst, NY	04/25/11
Steven Johnson	Novato, CA	04/25/11
Steven Seegmiller	Westlake Village, CA	05/18/11
Steven B Goldstein		06/27/11
Steven Barnes	Bakersfield, CA	04/26/11
Steven Bliss	Grand Blanc, MI	05/06/11
Steven Brown	Cincinnati, OH	04/26/11
Steven C. Collie		06/10/11
Steven Copeland	Bronxville, NY	05/31/11
Steven D Lorenz	Lakeville, MN	05/03/11
Steven Farrington	La Mesa, CA	05/18/11
Steven Gensler CFPÂ®, MBA,		06/16/11
Steven Goldberg	Silver Spring, MD	06/24/11
Steven Goldman		06/10/11
steven hansen	pine river, MN	04/25/11
Steven J Depner		06/01/11
Steven Jacobsmeier	Norwood, MA	05/05/11
Steven Johnson	West Olive, MI	04/25/11
Steven Johnston		06/10/11
steven kaye	warren, NJ	05/10/11
Steven L. Dick, CFP, ChFC		06/01/11
Steven Larsen		06/01/11
Steven Lorio		06/10/11

Steven M. Ryan		06/02/11
Steven Margulin	Albuquerque, NM	05/05/11
Steven Mattaini	Saint Paul, MN	04/26/11
Steven Merkel	Bonita Springs, FL	04/25/11
Steven Milvet	Medina, OH	04/26/11
Steven Orr	Victoria, TX	05/05/11
Steven Penn		06/01/11
Steven Quinn		06/01/11
Steven Reed	Littleton, CO	05/03/11
Steven Reents	Alpharetta, GA	04/25/11
Steven Rosenberg	West palm Beach, FL	04/27/11
Steven S. Martin		06/02/11
Steven S. Volpe, CFP		06/15/11
Steven Schippel		06/01/11
Steven Silber		06/10/11
Steven Starnes		06/06/11
Steven T. Hess		06/01/11
steven testino	palisades park, NJ	04/25/11
Steven Tresnan		06/10/11
Steven Van Wie	Ponte Vedra Beach, FL	05/04/11
Steven Vitanza	Voorhees, NJ	05/26/11
Steven W. Smith		06/01/11
Steven Wertime	Falls Church, VA	04/25/11
Steven Weydert	Irvine, CA	05/04/11
STEVEN WIGHTMAN	LEXINGTON, MA	05/11/11
Steven Williamson	Midlothian, VA	04/26/11
Steven Young	Brixry, MO	05/04/11
Steven Young	Cleveland, OH	05/18/11
Steven Zimmerman	Apple Valley, MN	05/09/11
Stewart koesten	overland park, KS	04/25/11
Stratford Kiger	Charlotte, NC	05/09/11
Stuart Clymer	Stratford, CT	04/25/11
Stuart Coats	Louisville, KY	05/21/11
Stuart McHenry	Waldorf, MD	05/03/11
Stuart Ng	Burbank, CA	04/25/11
Subhash Desai		06/02/11
Sudhir agrawal	Germantown, TN	04/25/11
Sue Ferdig	San Jose, CA	05/03/11
Sun Shim	Albany, CA	05/03/11
Sunny Tang	Houston, TX	04/26/11

Susan Herendeen	Pittsford, NY	04/25/11
Susan B. Hart, CFPÂ®		06/02/11
Susan Butler		06/01/11
Susan Carr	Perrysburg, OH	04/26/11
Susan D. Smith		06/01/11
Susan Freed	Chevy Chase, MD	05/04/11
Susan Fuhrman Holin		06/15/11
Susan J Lopez		06/13/11
Susan J. Rede		06/10/11
Susan John	Wolfeboro, NH	04/25/11
Susan Lerner	San Diego, CA	04/25/11
Susan Lombardo		06/13/11
Susan Manrodt		06/02/11
Susan S Liu		06/10/11
Susan Spraker	Maitland, FL	05/31/11
Susan Steiner	Cincinnati, OH	05/06/11
Susan Strasbaugh	Colorado Springs, CO	06/01/11
susan williams	maryville, TN	04/26/11
Susan Y. Marvin		06/02/11
Susie Johnston	Greenwood Village, CO	04/25/11
Suzanne Banzet	winston-Salem, NC	05/18/11
Suzanne Himes	Knoxville, TN	05/06/11
Suzanne Low	Bonita Springs, FL	04/25/11
Suzanne Miller	Atlanta, GA	04/25/11
Suzanne Seay, CFP		06/11/11
Suzanne Uhl-Melanson	Waterville, ME	05/18/11
Suzanne Wheeler	Tulsa,, OK	05/04/11
Sylvia Chin		06/01/11
Sylvia Fitzgerald	San Diego, CA	04/25/11
T M LaBrie	Englewood, CO	07/10/11
T Perry		06/02/11
T. Taylor Payne	Evansville, IN	04/25/11
Tam Tran-Minh	Westlake, TX	05/05/11
Tamara Julien	Fort Collins, CO	04/25/11
Tamara Morse	Port Ludlow, WA	05/03/11
Tamara Shelabarger	Roswell, GA	05/04/11
Tammera Prouty	Mount Vernon, WA	04/27/11
Tara Sanders	Ormond BEach, FL	05/04/11
Tara Scottino		06/13/11
Taylor Clement	Southern Pines, NC	05/04/11

Taylor Easley		06/10/11
Ted Sanders	Woodstock, GA	05/03/11
Ted Jackson	Tuscaloosa, AL	04/26/11
Ted Nation		06/17/11
Ted Ruiz		06/19/11
Ted Sadar		06/01/11
Ted Saneholtz	Columbus, OH	04/25/11
Teodoro Ruiz Jr.		06/02/11
Teresa Bousky	Chicago, IL	05/18/11
Teresa Christensen	Louisville, KY	05/23/11
Teresa Darnielle Morse	Huntley, MT	05/06/11
Teresa Parker	Riverside, CA	04/25/11
terese demonbrun	new york, NY	05/03/11
Teri Tidwell		06/17/11
Teri Tornroos	Marietta, GA	04/25/11
TERRENCE GAVAN		06/02/11
Terrence Tait, CFP		06/15/11
Terry Balding	Sun Prairie, WI	04/25/11
Terry Bradford		06/11/11
Terry Devine		06/14/11
Terry Duncan	San Mateo, CA	05/07/11
Terry Ford	Woodstock, GA	04/25/11
Terry Gravely	Beverly Hills, CA	05/01/11
Terry J Beebe CFP	Bayfield, CO	04/25/11
Terry Luk, CFP, EA		06/07/11
Terry Marynchak	Washington, PA	04/25/11
Terry Nelson, CFP MS	Roseville, MN	04/25/11
Terry Phillips	West Lafayette, IN	05/04/11
Terry Swehla	Modesto, CA	04/25/11
Thaddeus Phelps		06/02/11
Thatcher Brown	New York, NY	04/26/11
Thea Glazer	San Diego, CA	05/03/11
Theo Block	princeton, NJ	05/05/11
Theodore Athans	Chino Hills, CA	05/05/11
Theodore Haley		06/13/11
Theodore Roman	El Cajon, CA	05/04/11
Therese Martin	Elk Grove Village, IL	04/26/11
Thomas Chadwick	Gastonia, NC	04/30/11
Thomas Saunders	Longwood, FL	05/12/11
Thomas Schneberger	Bradenton, FL	05/07/11

Thomas A Grose		06/03/11
Thomas A. Singletary		06/08/11
Thomas A.Schultz		06/10/11
Thomas Adair	Chicago, IL	04/25/11
Thomas Anderson	Glencoe, MN	04/25/11
Thomas B. Conway JD CFP		06/10/11
Thomas B. Sherman		06/10/11
Thomas Baird	Houston, TX	04/26/11
Thomas Bennett	Benicia, CA	05/05/11
Thomas Bonorden	Olney, MD	04/25/11
Thomas Britt	Old Lyme, CT	04/25/11
Thomas Burke		06/11/11
Thomas C. Schwab, CFPÂ®		06/01/11
Thomas Carreras		06/11/11
Thomas Carroll	Cincinnati, OH	04/25/11
Thomas Conway	Rockville, MD	05/31/11
Thomas Doyle	Charlestown, RI	05/04/11
Thomas E Gerhart		06/01/11
Thomas E. Westrick		06/10/11
Thomas Elliott	Pensacola, FL	05/04/11
Thomas F. Bauman		06/02/11
Thomas Fenn	Chapel Hill, NC	05/05/11
Thomas Fitzpatrick	Torrance, CA	06/05/11
Thomas Geraghty	Fair Lawn, NJ	04/25/11
Thomas Goodwin	Brookings, OR	05/04/11
Thomas Grzymala	Keswick, VA	04/26/11
Thomas H Lawrence, III		06/10/11
Thomas Hardy	Ann Arbor, MI	04/25/11
Thomas Hartman	S.Pomfret, VT	04/27/11
Thomas Horton	W Bloomfield, MI	05/20/11
thomas howard	streamwood, IL	05/14/11
Thomas Karp	St. Paul, MN	05/03/11
Thomas Krahe	Manistee, MI	04/25/11
Thomas Lamar Smith	Gadsden, AL	05/18/11
Thomas McAllister	Carmel, IN	04/25/11
Thomas McCandless	Eastchester, NY	04/28/11
Thomas Morrison	Wheaton, IL	04/25/11
Thomas Myers	Redwood City, CA	04/25/11
Thomas Nowak	Grayslake, IL	04/25/11
thomas panos		06/02/11

Thomas Pemberton	Charlotte, NC	04/25/11
Thomas Pritchett	Tifton, GA	04/27/11
Thomas R. Sommer		06/10/11
Thomas Rabaut	Auburn Hills, MI	04/25/11
Thomas Rogers	South Portland, ME	04/25/11
Thomas Rose	Glen Ellyn, IL	04/26/11
Thomas S Bigelow	Wolfeboro, NH	04/25/11
Thomas Scott Clark	Simpsonville, SC	04/25/11
Thomas Space	Gilford, NH	04/27/11
Thomas Steeley	Bethesda, MD	04/25/11
Thomas T. Jaeger		06/01/11
Thomas Tesar	Clayton, MO	04/25/11
Thomas Torp		06/10/11
Thomas Valore	San Jose, CA	04/25/11
Thomas W Headlee		06/02/11
thomas w mooney jr		06/02/11
Thomas W. Lind		06/10/11
Thomas White	sunnyside, WA	04/25/11
Thomas Wilcox	Medfield, MA	04/27/11
THOUGHTFUL CFP		06/02/11
Tiffany Ballard	Ridgeland, MS	05/10/11
Tiffany Owens	Kansas City, MO	05/03/11
Tim Curran		06/16/11
TIM HA	ROANOKE, VA	04/26/11
Tim Kober	Portland, OR	05/04/11
Tim Madison		06/10/11
TIM MATTESON		06/01/11
Tim Maurer	Hunt Valley, MD	04/25/11
Tim Neuenschwander	McFarland, WI	04/25/11
Tim Sobolewski		06/10/11
Tim Voegele	Greenwood, IN	04/26/11
Tim Wilson	Allen, TX	04/29/11
timothy atkinson	garden city, NY	04/25/11
Timothy Blevins	Riverside, CA	05/03/11
Timothy Breitfelder		06/11/11
Timothy Brown	Eden Prairie, MN	05/31/11
Timothy Corcoran	Fort Washington, PA	06/27/11
Timothy Custer	Frederick, MD	04/25/11
Timothy G Long		06/10/11
Timothy Grout	Cincinnati, OH	04/25/11

Timothy Hammond	Phoenix, AZ	05/03/11
Timothy Hawkins	Ankeny, IA	05/18/11
Timothy Hayes	Pittsford, NY	05/04/11
Timothy Holt	Glendale, AZ	04/25/11
timothy hummel	casselberry, FL	04/25/11
Timothy J. Holsworth		06/11/11
Timothy Jones	Fairfax, VA	04/25/11
Timothy Knotts	Red Bank, NJ	04/25/11
Timothy L McDonough		06/10/11
Timothy Moffitt		06/08/11
Timothy Montague	Columbus, OH	05/06/11
Timothy Murray	CHANTILLY, VA	04/25/11
Timothy Nickas		06/12/11
Timothy Roth	Maumee, OH	04/26/11
Timothy Shirk	New Berlin, WI	04/25/11
Timothy Traub	Orleans, MA	04/25/11
Timothy Watters	Paramus, NJ	04/25/11
Timothy Wyman	Southfield, MI	04/26/11
Tina Cirillo		06/10/11
Tina Wells Lee, CFP		06/15/11
Tobin Jenkins	Lexington, KY	04/25/11
Tobin Johnson	Edina, MN	04/26/11
Todd		06/10/11
Todd A. Marotta		06/16/11
Todd Black	Cummign, GA	05/04/11
Todd Calamita		06/15/11
Todd D. Knapp		06/10/11
Todd Douma	Phoenix, AZ	04/25/11
Todd Eastman		06/10/11
Todd Macke	Fort Myers, FL	05/04/11
Todd McClain	Troy, MI	05/03/11
Todd Nash, CFP, CPA, EA		06/01/11
Todd P. Saunders		06/11/11
Todd Sivak	Delafield, WI	04/25/11
Todd Smith	Alpharetta, GA	04/25/11
Todd Stanard		06/25/11
Todd Stueve	Coon Rapids, MN	05/09/11
Todd Turner	Nashville, TN	05/25/11
Todd White	Redwood City, CA	05/04/11
Toi Salter	chicago, IL	04/25/11

Tom Spray-Fry	Lutherville, MD	04/25/11
Tom Alf	Mendota Heights, MN, MN	04/26/11
Tom Berry		06/03/11
Tom Bonvissuto	Parkton, MD	04/25/11
Tom Curti	Cincinnati, OH	05/18/11
tom davison	Columbus, OH	05/31/11
tom demarois	Sacramento, CA	05/18/11
Tom E. Ricks, CFP(R)		06/16/11
Tom G. Parks, Jr. CFP		06/10/11
Tom Gerhart	lebanon, PA	05/18/11
Tom Grose	Golden Valley, MN	04/25/11
Tom Halvorson		06/24/11
Tom Hebrank	Marietta, GA	04/25/11
Tom Morrison		06/10/11
Tom Nelson	Superior, CO	05/03/11
Tom Pilch	Plymouth, MI	04/26/11
Tom Ricks	Dallas, TX	04/25/11
Tom Roberts	Sarasota, FL	04/27/11
Tom Storrie	Chapel Hill, NC	04/25/11
Tom Tye	Danville, KY	04/29/11
Tom Vislisel	East Dundee, IL	05/04/11
Tommy Lackey	Greensboro, GA	04/25/11
Tony Carter	Tampa, FL	04/30/11
Tracey Borgardts		06/01/11
Tracy Burke		06/14/11
Tracy J. Dostal		06/10/11
Tracy Sherwood	Clarence, NY	05/20/11
Tracy Stalkfleet. Ortez		06/16/11
Travis Buck	Burnsville, MN	04/26/11
Travis Holmstrom	San Antonio, TX	04/25/11
Travis James		06/01/11
travis moser		06/10/11
Travis Owen	Phoenix, AZ	07/09/11
Travis Teague		06/13/11
Travis Webb		06/02/11
Trevor Harris		06/14/11
Trevor K. Kern		08/09/11
Trevor Whitley	Fort Myers, FL	06/17/11
Trish Gehring	South Bend, IN	04/26/11
Troy E. Jones		06/07/11

Troy Hutchinson	Roswell, GA	05/06/11
Troy Sapp		06/01/11
Troy Von Haefen		08/03/11
Tu Bui	Irvine, CA	05/03/11
Tucker coughlen	baytown, TX	06/24/11
Tyrone Phillippi	Dayton, OH	06/24/11
Tyson C. Lewis		06/01/11
V Raymond Ferrara	Clearwater, FL	04/25/11
Valentino Sabuco, CFP, AEP		06/02/11
valerie antonioli	Greenwood Village, CO	05/03/11
Valerie M. Johnson		06/02/11
Valerie Peck, MBA, CFPÂ®	San Diego, CA	04/25/11
Vance Boucher	Palm Desert, CA	05/03/11
Vance Brandt	Minnetonka, MN	04/26/11
Vaughn Heydel		06/10/11
Vernon Wong	Honolulu, HI	04/25/11
Vicki Schultz	Reno, NV	04/26/11
Vicki Van Horn, CFP(R)		06/10/11
Victor A. Philleo		06/10/11
Victor Belonis		06/01/11
Victor Jones	Torrance, CA	04/25/11
Victor Jones, CFP(R)	Vacaville, CA	04/25/11
Victor Kormeier	Houston, TX	04/25/11
Victoria D. Watt		06/10/11
Victoria Roberts	Lakewood Ranch, FL	04/25/11
VIJAIANAND	houston, TX	05/06/11
Vikram Kohli		06/01/11
Vince Nubel		06/14/11
Vincent Schiavi	Wilmington, DE	05/04/11
Vincent Barbera	Eagleville, PA	04/26/11
Vincent Crivello	San Jose, CA	05/05/11
Vincent Franks		06/06/11
Vincent Palumbo	Warwick, RI	04/27/11
VINCENT SCHIAVI	wilmington, DE	05/31/11
Vincent W Valentine		06/10/11
Vincent Whelan	Fresno, CA	05/12/11
Vinson Willits		06/13/11
Viola C Sanvordenker	Citrus Heights, CA	06/28/11
Virgil A. Folden III	Fredericksburg, VA	04/26/11
Virgil A. Folden, III	Fredericksburg, VA	05/06/11

Virginia Bruce	Des Moines, WA	04/25/11
Virginia Clay		06/01/11
Vivian Honeycutt	Chesapeake, VA	04/25/11
W Ben Keel III CFP ChFC CLU	Katy, TX	05/06/11
W John Dulmage	Londonderry, NH	04/25/11
W. Douglas O'Rear		06/16/11
Wales Phipps	Gainesville, FL	04/25/11
Wallace Campbell	Santa Fe, NM	04/26/11
Wallace Fry		06/10/11
walt williams	temple terrace, FL	05/03/11
Walter Burns	N Palm Beach, FL	04/25/11
Walter Duvall	Newport, OR	04/25/11
Walter Klisiwecz	Albany, NY	04/25/11
Walter Reinsdorf		06/14/11
Walter Towner CFP		06/11/11
Ward W. Van Skiver		06/10/11
Warland Griffith III	Miami, FL	04/25/11
Warren J Dankert		06/12/11
Warren MacKenzie	Toronto,	04/25/11
Warren McIntyre	Troy, MI	04/25/11
warren schumacher		06/10/11
Warren Wall		06/01/11
Wayne Alan Williams		06/01/11
Wayne Blanchard	CASSELBERRY, FL	05/19/11
Wayne brunck	Bergenfield, NJ	04/25/11
Wayne Chodkowski		06/02/11
Wayne Farlow	Westminster, CO	04/25/11
Wayne Henry	Holden, MO	04/25/11
Wayne Locke	New Milford, CT	04/25/11
wayne maslyk	sandusky, OH	05/04/11
Wayne Pirmann	Auburn Hills, MI	05/03/11
Wayne Titus	Plymouth, MI	05/31/11
Weiwei Jin	Virginia Beach, VA	04/25/11
Wendell Brown, CFP		06/01/11
Wendell Stewart	Windham, NH	04/25/11
Wendy B Namack		06/01/11
Wendy H Rowley		06/14/11
Wendy Korman		06/10/11
Wendy Markey	Gulf Breeze, FL	04/25/11
Wendy Weaver	Bethesda, MD	05/04/11

Wesley E Godwin Jr		06/02/11
Wesley M. Boyce		06/10/11
Wesley Previant		06/10/11
wha sam kong		06/11/11
whayne porter	louisville, KY	04/27/11
Whitner W. Hankinson		06/02/11
Whitney Merrill	Clifton Park, NY	04/25/11
Will Archer	Blacksburg, VA	04/27/11
Will Rogers	Evans, GA	04/26/11
Will Welborn	Nashville, TN	05/25/11
William Hagen	Katy, TX	04/25/11
William Nichols	San Antonio, TX	05/05/11
William Smith	Grafton, MA	04/26/11
William Wixon	Maple Grove, MN	04/26/11
William Armes	Long Beach, CA	04/25/11
William Aubrey Morrow		06/01/11
william b anderson	canterbury, NH	05/04/11
William B Kirby		06/02/11
William Baker	Lafayette, LA	05/18/11
William Beamer	San Diego, CA	04/25/11
William Beecher	Great Falls, MT	04/25/11
William Bengen	Chula Vista, CA	05/04/11
William Bonito	The Woodlands, TX	04/26/11
William Breitweiser	Pittsburgh, PA	05/04/11
William Brewer	Dallas, TX	04/26/11
William Callahan	Omaha, NE	06/24/11
William Cameron	Barboursville, VA	04/25/11
William Christy	Philadelphia, PA	05/06/11
William Coffeen	Roswell, GA	05/18/11
William Corley	Citrus Heights, CA	04/27/11
William Cuthbertson	San Juan Capistrano, CA	04/30/11
William D Lee		06/16/11
William D. McInerney		06/01/11
William D. Rice	Victor, NY	05/18/11
William D. Ross, CFA	Columbus, GA	04/25/11
William Dix	Raleigh, NC	06/25/11
William Dorriety	Daphne, AL	05/04/11
William Duff	Monrovia, CA	05/31/11
William Duncan	Henderson, NV	05/05/11
William Dunn	Stockton, NJ	04/25/11

William Egan iii cfp clu	Avon, NJ	04/25/11
william ertel	Charlotte, NC	05/03/11
William F. Keats		06/01/11
William Fortner	San Ramon, CA	04/25/11
William Fred Hancock	Union City, TN	04/25/11
William Frederick	East Amherst, NY	04/26/11
William G. James		06/15/11
William Gloer	San Diego, CA	05/22/11
William Golab	Nashville, TN	05/25/11
William Greulich	Floral Park, NY	04/25/11
william h cantrell		06/10/11
William H Walters III, CFP		06/13/11
William H. Bryan		06/01/11
William H. Keffer		06/11/11
William H. Ring		06/10/11
William Hammond	Charlotte, NC	04/25/11
William Harris	Duxbury, MA	05/18/11
William Hart	Jacksonville, FL	04/26/11
William Heath	Houston, TX	04/25/11
william hohmann	Jacksonville, FL	04/26/11
William Hufnell	Annapolis, MD	06/01/11
William J. Lagos Jr.		06/16/11
William James	Iselin, NJ	05/18/11
William Jerome	Ballston Lake, NY	04/26/11
William Jessup	Tuscaloosa, AL	04/25/11
William k hall		06/11/11
William Kantner	Chadds Ford, PA	04/25/11
William Kirby	Reno, NV	04/26/11
William Koontz	Cincinnati, OH	04/26/11
William Krempa, CFP, CFS		06/16/11
William L. Ralston, III		06/06/11
William LeFavor		06/02/11
William Leuby	Columbus, OH	05/04/11
William lewis	Lincoln, NE	05/03/11
William Loucks		06/01/11
William McCahill	Watchung, NJ	05/03/11
William McKee	Charleston, WV	04/25/11
William McLarty	Mobile, AL	04/25/11
William Milam	Naperville, IL	04/25/11
William Miller	Peoria, IL	05/04/11

William Milton	Mt. Pleasant, SC	04/29/11
william mullin	paoli, PA	04/25/11
William Newell	Hopkinton, MA	04/25/11
William Nugent	Saraspta, FL	05/19/11
William O'Leary	Lancaster, PA	04/25/11
William Oswald	Watertown, WI	04/25/11
William Palmer	Greenwood Village, CO	04/25/11
William Pfadt	Indianapolis, IN	05/17/11
William Pitney	Foster City, CA	04/25/11
William Prentice II, AWMA, CFP		06/08/11
William Prewitt	Charleston, SC	04/25/11
William Puishys CFP	Brookfield, MA	05/03/11
William R. Tennant		06/14/11
William R. Walters		06/10/11
William Reeve		06/10/11
William Reynolds	Windsor, CO	04/25/11
William Rodau	Nekoosa, WI	05/04/11
William Sempolinski	Sharon, MA	04/25/11
William Simonette	Mankato, MN	05/04/11
William Sommers	Brookfield, WI	05/03/11
William Starnes	Hockessin, DE	05/04/11
William T Mullen	Park City, UT	04/25/11
William Uebele	Carmel, IN	04/25/11
William Verhagen	Bloomington, IN	05/18/11
William W. Spence CFP		06/15/11
William Wallace		06/11/11
william waters		06/10/11
William Whidden, CFP	White Salmon, WA	04/25/11
William Woloszyn		06/02/11
William Wood		06/12/11
Willis Ashby	Greenwood Village, CO	04/25/11
Wm. Hall	bertram, TX	06/14/11
Yale Lewis		06/12/11
Yanping Ming	Princeton, NJ	04/25/11
Yasiu Kruszynski	Chicago, IL	04/28/11
Ying Huang	Chicago, IL	05/31/11
Youssef Fareed	Nashville, TN	05/18/11
Yvonne Dean, CFP(r), FIC		06/02/11
Zachary Clark	Louisville, KY	06/01/11
Zachary O'Keeffe	Columbus, OH	04/25/11

Zane Torgrude	Middleton, WI	04/26/11
Zhen Liu	Harrison, NJ	05/03/11
Zoe Marcia Benditt		06/01/11

CFA **Consumer Federation of America**

<u>Responses to Questions for the Record for Barbara Roper, Director of Investor Protection, Consumer Federation of America</u>

Hearing entitled "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011

1. **Question for Barbara Roper from Representative Schweikert** – In your testimony, you are highly critical of variable annuities, calling these products the "worst requirement investment you can make." If annuities are such a poor investment, then why is it that economists from across the spectrum have promoted the idea of adding annuities to existing retirement plans for purposes of generating guaranteed lifetime income, and that the Obama Administration has gone so far as to advance the notion of *requiring* annuitization of retirement plans to achieve this goal?

This question conflates two related but ultimately separate issues – the potential benefits of annuitization and the significant short-comings of one type of annuity product, variable annuities. As such, however, it gets to the heart of why we need a fiduciary standard for brokers, since the problems with variable annuities have relatively little to do with the basic concept behind the product and a great deal to do with sales standards that permit the sale of high-cost, poorly structured variable annuities that fail to deliver the benefits of annuitization in a cost-effective manner.

Annuitization refers to the conversion of capital into a steady stream of income. There are several benefits to annuitization. Chief among these is the protection it can offer against both longevity risk – the risk that the investor will outlive his or her income sources – and the risk that investments an individual relies on for income in retirement will lose value. It is presumably because of these potential benefits, particularly for lower and middle-income Americans, that the Obama Administration has sought comment on "whether it would be appropriate for them to take future steps to facilitate access to, and use of, lifetime income or other arrangements designed to provide a stream of income after retirement," and why many economists also support greater use of annuitization either within or at the point of withdrawal from retirement plans. Whether any such policies prove beneficial will depend on the Administration's ability to find a way to deliver the benefits of annuitization without subjecting retirement plan participants to the excessive costs

and other short-comings of some of the existing products designed to provide that income stream.

Which brings us to variable annuities. Variable annuities are just one of a variety of products designed to provide a dependable stream of income in retirement. Their main selling point over other types of annuities is their potential, at least in theory, to counteract the inflation risk that accompanies many other forms of annuitization. As I indicated in my testimony, however, this particular type of annuity has been widely and heavily criticized by independent analysts, including award-winning financial writer Liz Pulliam Weston, who called them "The Worst Retirement Investment You Can Make." Pulliam Weston's criticism focused on the "high fees, low flexibility and 'horrendous' tax treatment" typically associated with these products. Some of those flaws – lack of flexibility and tax treatment – are inherent to the product, and could in certain circumstances be outweighed by other benefits. But excessive fees are imposed by product sponsors seeking to profit at the expense of unsophisticated investors, offer no countervailing benefits, and in some cases are so high as to completely negate the theoretical protection against inflation risk. Other variable annuity critics have focused on the substandard investment options available within some variable annuities and on the mind-numbing complexity and lack of transparency in these products, all of which are features that, like excessive costs, represent an anti-investor choice by product sponsors rather than an inevitable feature of the product itself.

Why do so many variable annuities fall so far short of their theoretical potential? The existence of high quality variable annuity offerings suggests it is not a problem inherent to the product's design. Rather, a key reason is that they are sold to overly trusting investors under a suitability standard that allows brokers to make recommendations based on their own interests rather than those of their customers. If brokers were required to act in the best interests of their customers, then insurance companies offering variable annuities would be forced to compete based on factors that benefit customers or risk losing market share. By harnessing market forces to benefit investors, we could bring about changes in variable annuities that would help to ensure that they deliver more of the benefits of annuitization without the significant pitfalls that currently undermine their value to investors. While that market-changing potential of a fiduciary duty is impossible to quantify precisely, it is both real and significant and is one of the key reasons free market supporters should support a fiduciary duty for brokers.

AARP Public Policy Institute

Protecting Investors— Establishing the SEC Fiduciary Duty Standard

Mercer Bullard
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University of Mississippi School of Law

AARP

Protecting Investors—Establishing the SEC Fiduciary Duty Standard

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AARP's Public Policy Institute informs and stimulates public debate on the issues we face as we age. Through research, analysis and dialogue with the nation's leading experts, PPI promotes development of sound, creative policies to address our common need for economic security, health care, and quality of life.

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Introduction

Many broker-dealers are not subject to a fiduciary duty when they provide personalized investment advice to their clients. Instead, they are only required to make suitable investment recommendations. While the duty to make suitable recommendations prohibits many abusive practices, it does not require, as a fiduciary duty would, broker-dealers or their representatives to give advice that is in the best interest of their clients. A fiduciary duty would also require broker-dealers and their representatives to disclose their conflicts of interest, including how they are compensated. The higher fiduciary standard of care could make a substantial difference in the retirement security of individual investors over the course of a lifetime of investing, because investors would receive better advice under the fiduciary standard.

The Dodd-Frank Wall Street Reform and Consumer Protection Act specifically authorizes the Securities and Exchange Commission to adopt a rule imposing a fiduciary duty on broker-dealers and their representatives when they provide personalized investment advice to certain investors. How such a rule is structured will determine whether investors receive an adequate level of protection. Factors that will affect the level of investor protection afforded by the rule include (1) the scope of investment advice covered by the rule; (2) how it regulates conflicts of interest, especially in connection with compensation arrangements; (3) what additional disclosure is required for broker-dealers; and (4) how the fiduciary duty will apply to principal transactions between broker-dealers and their clients.

The Fiduciary Duty at a Crossroad

This report comes at the crossroad of a long-standing public policy debate. Broker-dealers regularly provide investment advice, but not all broker-dealers who provide investment advice are subject to the federal fiduciary duty that applies under the Investment Advisers Act of 1940 (Advisers Act). This anomaly has led to calls to regulate broker-dealers under the Advisers Act, or at least to impose a fiduciary duty on broker-dealers when they provide investment advice. Historically, the brokerage industry has opposed imposing a fiduciary duty on broker-dealers that are not subject to the act.

In connection with broad legislative reform of financial services, Congress addressed this issue by granting the Securities and Exchange Commission (SEC or Commission) express authority under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank or Dodd-Frank Act) to establish fiduciary standards of conduct for broker-dealers that provide personalized investment advice. Section 913 also required the SEC to conduct a study of broker-dealer and investment adviser regulation, which was released in January 2011 (Section 913 Study). Based on the SEC staff's recommendations in the study, the SEC is likely to engage in "fiduciary" rulemaking under Section 913 by imposing a fiduciary duty on broker-dealers when they provide personalized investment advice. This report discusses what form that rulemaking may take.

Fiduciary Duty Is Important to Investors

Perhaps the most pertinent question for fiduciary rulemaking is, What difference would a fiduciary duty make for consumers? The extent to which a federal fiduciary duty should be imposed on broker-dealers that provide investment advice should depend on the net benefits

that the duty would create for their customers. Many abuses in the financial services industry are already covered by broker-dealer regulation, which begs the question of what a federal fiduciary duty would accomplish that existing regulation does not. The ultimate measure of any fiduciary rulemaking will be the additional value that it creates for America's investors.

One answer to this question is that the law has long found that the fiduciary duty adds value in many business contexts. In particular, it is well established in the common law that persons who provide professional services (e.g., lawyers, accountants, and doctors) are required to act in the best interest of their clients. Professional relationships involve the kind of highly technical knowledge that makes it more difficult for consumers to evaluate the services they are receiving. They also engender the kind of relationships of trust and confidence in which customers are less likely to exercise the caution normally present in more impersonal relationships. By holding investment professionals to a higher standard of conduct than the that applied in arms-length transactions, the fiduciary duty increases the likelihood that advisory clients will receive advice that enhances their financial security and maximizes net social welfare.[1]

The law has long held that investment advisory relationships involve the kind of technical knowledge and trust and confidence that warrant imposing a fiduciary duty, the importance of which is heightened for older investors.[2] People over 50 have less time to make up for losses, and retired investors are less likely to be able to find a paying job to offset financial reversals. As people age, their resistance to abusive sales practices may decline; conversely, their appeal to fraudsters as targets may increase.

Older investors therefore are at greater risk under fraud-based standards where a *caveat emptor* defense that the victim chose the inappropriate investment can be sufficient to defeat a claim. This defense often fails where the fiduciary duty affirmatively requires that the adviser act in the best interest of the client. It is therefore with respect to vulnerable investors that the fiduciary duty is likely to have the greatest effect, because it is designed to protect investors who may be less able to protect their own interests. This vulnerability is greatest when broker-dealers' and investment advisers' compensation depends not on the quality of their services or the performance of the products that they recommend, but on the product the client purchases. The fiduciary duty requires avoidance of such conflicts of interest and full disclosure of conflicts when avoidance is not practicable.

Antifraud rules may be sufficient to address most, but not all, misconduct. The value of the fiduciary duty lies in the conduct that should be prohibited and that only the fiduciary duty prohibits, that is, conduct that is not prohibited by antifraud rules. Imposing a fiduciary duty on persons who provide retail investment advice is no panacea,[3] but it does not need to be. It is simply good policy that will enhance Americans' financial security.

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[1] See, generally, Tamar Frankel, "Fiduciary Duties as Default Rules," *Oregon Law Review* 74 (1995): 1209.

[2] Some states have adopted rules that are specific to seniors regarding sales practices and professional designations.

[3] *See* Arthur Postal, "What Did the Fiduciary Standard Do to Stop Madoff?" *National Underwriter* (Feb. 23, 2010), http://www.lifeandhealthinsurancenews.com/News/2010/2/Pages/NAIFA-What-Did-The-Fiduciary-Standard-Do-To-Stop-Madoff.aspx?k=madoff.

Fiduciary Duty: Historical Context

Many broker-dealers are not subject to the fiduciary duty under the Advisers Act because they are excluded from the act's definition of "investment adviser." The exclusion is available to broker-dealers whose investment advice is solely incidental to their brokerage services and who receive no special compensation for advice. Commissions are not considered to be "special compensation," but asset-based fees are, which means that fee-based brokerage programs are subject to the act.

During the past decade, opposition to the inconsistent standards applied to investment advice provided by broker-dealers and investment advisers coalesced. Consumer and financial planner groups lobbied for a uniform fiduciary standard for all investment advisory relationships.[4] SEC Chairman Mary Schapiro announced her support for a fiduciary standard for broker-dealers that provided investment advice, and the Financial Industry Regulatory Authority (FINRA) reversed its earlier opposition to the fiduciary standard.

In 2009, the Treasury Department released a report that endorsed "establishing a fiduciary duty for broker-dealers offering investment advice."[5] The department emphasized the need to—

> empower [the SEC] to examine and ban forms of compensation that encourage intermediaries to put investors into products that are profitable to the intermediary, but are not in investors' best interest.[6]

The report formed the basis of the broad-based legislative review of financial services regulation that culminated in the Dodd-Frank Act. Congress did not expressly establish a fiduciary duty for broker-dealers in the act, but required the SEC to study broker-dealer and investment adviser regulation and authorized it to adopt fiduciary rules based on its findings. Section 913(g) of the act also authorized the SEC to—

> examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.

The Section 913 Report specifically recommends that the SEC "prohibit certain conflicts,"[7] which should be a central part of the SEC's fiduciary rulemaking.

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4 See, e.g., Letter from Financial Planning Coalition to Conferees (June 23, 2010) (copy on file with author); *Statement of CFA Director of Investor Protection Barbara Roper In Support of House Fiduciary Duty Provision*, Consumer Federation of America (June 15, 2010), http://www.consumerfed.org/elements/www.consumerfed.org/file/Roper_Statement_fiduciary_duty_press_conference.pdf.

5 *Financial Regulatory Reform: A New Foundation*, Department of the Treasury, (June 17, 2009), p. 15, http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf.

6 Ibid., p. 71.

7 Section 913 Study, p. vii.

The Federal Regulation of Investment Advisers

Investment Advisers Act of 1940

Investment advisers are regulated primarily under the Investment Advisers Act of 1940. The Advisers Act generally regulates persons who are "investment advisers" under the act, which are defined to include—

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.[8]

The SEC has interpreted the phrases "for compensation" and "advising others" so broadly[9] that core services provided by most retail broker-dealers fall within the definition of investment advice under the act. The bulk of broker-dealers' activities therefore would be subject to the act if they could not rely on the broker exclusion.[10]

The Broker Exclusion

The Advisers Act provides an exclusion from the act's definition of "investment adviser" (and thereby a complete exemption from the Act) for any broker or dealer—

> whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor.[11]

The SEC takes the position that discretionary accounts are not "solely incidental" and that asset-based fees (i.e., a percentage of assets under management) constitute "special compensation." Many broker-dealers and their affiliates are registered investment advisers because they charge asset-based fees, exercise discretion over customer accounts, or otherwise engage in activities that make the broker exclusion unavailable. They must register under the act and are subject to the act's fiduciary duty. Broker-dealers that charge only commissions and do not exercise discretion of customer accounts generally can rely on the exclusion. This latter category would be the group most affected by fiduciary rulemaking under Section 913.

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[8] Advisers Act Section 202(a)(11).

[9] See *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services,* SEC Release No. IA-1092 (Oct. 8, 1987).

[10] Section 913 required that the SEC consider repeal of the broker exclusion as a means of applying the fiduciary duty to broker-dealers. The Section 913 Study recommended against repealing the exclusion, and this alternative is not discussed further in this report. See Section 913 Study, p. 140.

[11] Advisers Act Section 202(a)(11)(C).

Antifraud Provisions and the Fiduciary Duty

Many of the substantive conduct requirements under the Advisers Act arise from the antifraud provisions of Section 206 of the act. Sections 206(1) and (2) generally make it unlawful for an investment adviser—

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

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.[12]

A substantial body of law has developed under these provisions, including the fiduciary duty that the Supreme Court has found that they create.[13]

The Federal Regulation of Broker-Dealers

Although the focus of broker-dealer regulation is transactional services, rather than advisory services, its coverage of advisory services is considerable. The existing regulation of broker-dealers' advisory activities necessitates that any fiduciary rulemaking build on this existing structure of advisory regulation. This is not to say that fiduciary rulemaking must accommodate broker-dealers' existing business models. Rather, fiduciary rulemaking must accommodate the way in which broker-dealers' business models already incorporate existing, quasi-fiduciary regulation of their advisory activities.

The following discussion briefly sets forth the basic structure of broker-dealer regulation and addresses some of the ways in which it applies to broker-dealers' advisory activities.

The Securities Exchange Act of 1934

The Securities Exchange Act of 1934 is the primary source of regulation for broker-dealers in the United States. It generally requires that persons who act as "brokers" or dealers,"[14] among other requirements, comply with net capital rules, market structure rules, and special trading restrictions; and register and file reports with SEC.

[12] See also Advisers Act Sections 206(3) (restricting transactions involving advisory clients in which the adviser is acting as a broker or principal on the other side of the transaction) and 206(4) (prohibiting fraud and deceit in violation of rules adopted by the SEC pursuant to Section 206(4)). Under its Section 206(4) rulemaking authority, the SEC has adopted rules relating to advertisements, custody, disclosure of financial and disciplinary information, and cash payments to solicitors.

[13] See *SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, passim* (1963). In *Capital Gains*, the Court granted a preliminary injunction requiring an investment adviser to disclose its purchases of securities prior to recommending the same securities in an investment newsletter. The Court has held that there is no private right of action under Section 206; see *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 1 (1979), which has left much of the development of the law under Sections 206(1) and (2) to public enforcement proceedings.

[14] The Exchange Act defines "brokers" as persons who are "engaged in the business of effecting transactions in securities for others," and "dealers" as persons who are "engaged in the business of buying and selling securities for [their] own account[s]." Exchange Act Sections 3(a)(4) and (5).

Broker-dealers are also subject to the Exchange Act's general antifraud provisions. Section 10(b) authorizes the SEC to adopt rules prohibiting fraudulent practices, and Rule 10b-5 under that provision prohibits such practices. Rule 10b-5 is very similar to the general antifraud provisions under the Advisers Act.[15]

FINRA Oversight and Rules

Virtually all broker-dealers are effectively required to become members of FINRA, which imposes its own set of rules. The Exchange Act requires that FINRA rules be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," and "to protect investors and the public interest . . . ."[16] In addition, FINRA's rules must provide for appropriate discipline of members who violate the Exchange Act or rules thereunder, or FINRA rules.

FINRA does not have the authority to enforce the provisions of the Advisers Act or rules thereunder,[17] although it can and does engage in direct and indirect regulation of its members' advisory activities through its Exchange Act authority. The clearest example of FINRA's direct regulation of its members' advisory activities is the suitability rule.

The Suitability Rule

Brokers are subject to a suitability obligation in National Association of Securities Dealers (NASD) Rule 2310, which provides that, when recommending a transaction, a broker must—

> have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.[18]

Before making the recommendation, a broker-dealer generally must have made "reasonable efforts to obtain information" concerning the customer's financial and tax

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[15] One difference is that Rule 10b-5 expressly prohibits material misstatements and omissions, while Advisers Act Section 206 does not. In *Capital Gains*, the Supreme Court essentially held that the prohibition against material misstatements and omissions was incorporated into Section 206 by implication. A second difference is that a violation of Section 206 can be negligence-based, whereas Rule 10b-5 has a scienter (intent) requirement.

[16] See Exchange Act Section 15A(b)(6).

[17] See Letter from Office of the General Counsel, Securities and Exchange Commission to the Financial Planning Association (Aug. 27, 2009).

[18] FINRA is in the process of consolidating the rulebooks of the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE). Until the process is complete, some rules, like NASD 2310, are still referred to by their NASD or NYSE numbers. Sales of variable annuities are particularly prone to abusive practices. FINRA Rule 2330 accordingly imposes heightened suitability requirements on such sales.

status, investment objectives, and other information reasonably necessary for making the recommendation.[19]

The suitability rule is undeniably a form of regulation of investment advisory activities. The rule is, like the fiduciary duty, an inherently principles-based rule that is triggered by investment advice ("recommendations").[20] However, the suitability standard is materially lower than a fiduciary standard. There is no obligation under the suitability rule to have reasonable grounds to believe that a recommendation is in the best interest of the customer. If a security recommended by a broker-dealer is suitable for a customer, but a different security would be a better choice for the customer, there is no obligation to recommend the other security. The broker-dealer is free to recommend the security that pays the broker-dealer the highest compensation, as long as it is suitable, and the broker-dealer is not necessarily obligated even to disclose the conflict of interest that the differential compensation represents.

Broker-Dealers' Fiduciary Duties with Respect to Advisory Activities

The direct and indirect regulation of broker-dealers' investment advisory activities under the Exchange Act and FINRA rules could not be said to rise to the level of a federal fiduciary duty, but broker-dealers can be subject to a fiduciary duty with respect to their advisory activities under other, nonfederal sources of law. In private claims, for example, courts have frequently found that a broker has a fiduciary duty under state law, depending on the particular facts and circumstances.[21] The most common claim brought in FINRA arbitration is a violation of a fiduciary duty. In some cases, even the antifraud provisions of the Exchange Act have been deemed to create a fiduciary duty.[22]

Broker-Dealer Compliance under a New Federal Fiduciary Duty

A number of factors indicate that, for many broker-dealers, the effect of a new federal fiduciary duty on their compliance systems will be small. Broker-dealers already are frequently held to a fiduciary duty with respect to their advisory activities; they are already subject to extensive, principles-based regulation of their broker-dealer and advisory activities; and many of them already are subject to the Advisers Act's fiduciary duty. Effective broker-dealer compliance systems therefore must be designed to manage fiduciary responsibilities under the existing regulatory regime.

Thus, to a large extent broker-dealers' compliance systems are already designed to manage precisely the compliance concerns that a federal fiduciary duty creates. The new fiduciary duty will bring an additional, limited set of activities—namely, nondiscretionary investment advice for which only commissions are charged—under existing compliance systems. Although these activities will incur short-term transition costs, the application

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[19] NASD Rule 2310(b). This requirement supplements a general rule regarding the maintaining of specified account information under NASD Rule 3110 and rules promulgated under the Exchange Act.

[20] See *E. F. Hutton & Co., Inc.*, Exchange Act Rel. No. 25887 (1988) (FINRA rules "embod[y] basic fiduciary responsibilities").

[21] See, e.g., *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981).

[22] See, e.g., *Geman v. SEC*, 334 F.3d 1183 (10th Cir. 2003).

of a uniform fiduciary duty to many broker-dealers may be more likely to *reduce* compliance costs in the long term because the currently bifurcated regulatory approach to retail advice will be simplified under a single, federal fiduciary umbrella.

If fiduciary rulemaking is conducted as part of the broader harmonization of broker-dealer and investment adviser regulation recommended by the SEC staff, many broker-dealers should realize further net reductions in compliance costs. The harmonization of parallel requirements under the Exchange and Advisers Acts with respect to advertising, supervision, registration, arbitration, solicitors, customer communications, and books and records, for example, should reduce overall regulatory burdens to a far greater extent than the additional costs that may be associated with the narrow expansion of broker-dealers' substantive duties under a new uniform fiduciary standard.

Dodd-Frank Section 913

Fiduciary Rulemaking

Section 913 grants the SEC authority to adopt rules governing broker-dealers' conduct under three provisions. Paragraph (f) of Section 913 empowers the SEC to adopt rules to "address" the standards of care that apply to brokers, dealers and investment advisers in "providing personalized investment advice about securities to such retail customers." This open-ended authority is subject only to the condition that the SEC "consider the findings conclusions, and recommendations of the study" required under paragraph (b).

Paragraph (g) includes two provisions that authorize fiduciary rulemaking, respectively, under the Advisers Act and the Exchange Act. These provisions are subject to a number of conditions that will constrain the SEC's fiduciary rulemaking authority.

The Advisers Act authority provides that, with respect to personalized investment advice that brokers provide to retail customers (and nonretail customers as determined by the SEC)—

1. The standard of conduct for broker-dealers under the rules shall be to "act in the best interest of the customer."
2. The broker-dealer must act "without regard to the financial or other interest of the broker . . . providing the advice."
3. Under the rules, "any material conflicts of interest shall be disclosed and may be consented to by the customer."
4. The standard of conduct under the rules must be "no less stringent than the standard applicable to investment advisers under section 206(1) and (2) of [the Advisers Act]."

The foregoing rulemaking conditions operate as a kind of floor below which fiduciary rules may not fall. Conversely, the Advisers Act authority also places a *ceiling* on the reach of the rules in two respects:

1. A "customer" under the rules may not include an investor in a "private fund."
2. "[T]he receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation" of the standard of conduct under the rules.

Section 913(g) Exchange Act authority provides that the fiduciary standard shall be the "same as the standard of conduct applicable to an investment adviser" under the Advisers Act rulemaking. This requirement effectively necessitates that Exchange Act rulemaking satisfy all of the provisos discussed immediately above. It also includes two additional provisos:

1. The "best interest" standard shall not, by itself, require a broker "to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities."

2. A broker's "sale of only proprietary or other limited range of products . . . shall not, in and of itself, be considered a violation" of the "best interest" standard.

Harmonization

Section 913(h) includes a requirement that the SEC seek to "harmonize" the enforcement of rules applicable to broker-dealers and investment advisers when they provide personalized, retail investment advice. The harmonization provisions further evince Congress's expectation that the same standard of conduct will be applied to broker-dealers and investment advisers with respect to personalized investment advice.

The SEC staff embraced this directive in its Section 913 Study. The study presents detailed recommendations regarding areas in which the SEC should consider harmonizing broker-dealer and investment adviser regulation. As discussed below, some recommendations contemplate raising the standards applicable to broker-dealers to reflect a higher adviser standard (e.g., more extensive disclosure in a brochure similar to that provided to clients by advisers). Other recommendations would extend more detailed, FINRA-like standards to advisers.[23]

Approaches to Fiduciary Rulemaking

The question of how the SEC may approach fiduciary rulemaking under Dodd-Frank Section 913 can be usefully divided between two categories. First, the SEC is likely to establish some form of "best interest of the customer" standard that applies to personalized, retail investment advice and incorporates certain minimum terms that Section 913 requires fiduciary rulemaking to reflect. A draft of what such a rulemaking might comprise is provided in appendix A of this report. The draft rules in appendix A would provide a minimum "best interest" standard and formal basis for specific conduct rules.

Second, Section 913 at least implicitly authorizes rules that establish specific, substantive standards of conduct. The Section 913 Study identifies the conduct areas that are most likely to be subject to such rulemaking. These include the fiduciary duty as applied to the disclosure, restriction, and prohibition of conflicts of interest; principal transactions between broker-dealers and their advisory customers; and the requisite minimum basis for investment recommendations.

[23] See Section 913 Study, pp. 130–39.

Principles-Based Fiduciary Rulemaking

The Uniform Fiduciary Standard

As discussed above, Section 913 of Dodd-Frank grants the SEC the authority to impose fiduciary rules on broker-dealers subject to the following conditions:

- Neutrality as to (*i.e.*, no bias regarding) the menu of options offered, the compensation structure applied, and the continuous nature of the advice;
- Uniformity in content and application to broker-dealers and investment advisers;
- A "best interest" standard that (a) is at least as stringent as that applied under Advisers Act Sections 206(1) and (2), (b) requires disclosure of material conflicts of interest and customer consent thereto, and (c) requires that advice be provided without regard the broker-dealer's interests; and
- Exemption of certain investors in private funds.

This baseline set of rulemaking guidelines would afford the SEC broad discretion in determining how to apply a fiduciary duty to broker-dealers that provide personalized, retail investment advice.

The Section 913 Study recommends that the SEC adopt principles-based rules along these lines.[24] This recommendation, while lacking specifics, supports stand-alone, principles-based rules, the promulgation of which would not depend on concurrent rulemaking regarding specific areas of conduct.[25] Initially, the SEC should adopt a rule similar to the draft rules in appendix A that incorporate the essential elements of such a principles-based approach and establish a foundation for further rulemaking.

Personalized Investment Advice

One potentially contentious issue regarding fiduciary rulemaking is how the SEC will define the "personalized investment advice" that would be subject to the uniform fiduciary duty. Section 913's use of the term "personalized investment advice" normally would be interpreted consistently with the Advisers Act. The term has a long history and common usage under the Advisers Act and no history or common usage under the Exchange Act, as noted in the Section 913 Study.[26] The amendment to the Exchange Act that authorizes the imposition of a fiduciary duty is derivative; that is, it expressly adopts the standard applied under the Advisers Act, which further supports interpreting the term "personalized investment advice" under that act.

[24] Ibid., p. 109.

[25] However, two SEC Commissioners objected that the study did not provide adequate empirical support for the recommended uniform fiduciary duty, an argument since echoed by some members of Congress. There is a significant risk that fiduciary rulemaking will be subject to a legal challenge on the ground that the SEC did not conduct an adequate cost-benefit analysis, especially in light of the recent, successful challenge to the SEC's proxy access rule on this basis. *Business Roundtable v. SEC*, No. 10-1305 (D.C. Cir. July 22, 2011).

[26] See Section 913 Study, pp. 123–24.

Excluding some forms of retail investment advice provided by broker-dealers from the uniform fiduciary duty by limiting the scope of "personalized investment advice" would contradict Section 913's harmonization purpose. As stated in the Section 913 Study, "[t]he implementation of a uniform standard of conduct would be most effective only if the standard is applied uniformly."[27]

However, the study states that "personalized investment advice" would not necessarily include all "actions or communications that would be investment advice about securities under the Advisers Act."[28] Thus, the staff is receptive to arguments that some forms of personalized investment advice under the Advisers Act may nonetheless be excluded from personalized investment advice under Section 913 and therefore exempt from the uniform fiduciary duty.[29] Subjecting broker-dealers and investment advisers that provide identical advisory services to different legal standards because of a narrow interpretation of "personalized investment advice" would undermine Congress's intent to harmonize the regulatory treatment of investment advice. The SEC should clearly establish that it will interpret the term "personalized investment advice" consistently with its long history and usage in the Advisers Act.

Continuous Duty of Care and Loyalty

The standard of conduct adopted under the Section 913(g)'s Exchange Act rulemaking authority cannot require that broker-dealer owe a "continuing duty of care or loyalty to the customer after providing personalized investment advice about securities."[30] This continuous duty proviso creates the risk that it will be interpreted to permit broker-dealers to remove their fiduciary mantle in the course of an ongoing advisory relationship. They may argue that the advisory relationship ceases at the moment, for example, that a financial plan has been delivered to a customer, at which time the broker-dealer would be relieved of any fiduciary duty arising from standards of conduct promulgated under Section 913.

Such an interpretation of the continuous duty proviso threatens the efficacy of any standard of conduct rules adopted under Section 913. As studies have repeatedly found, investors do not understand the different legal standards that apply to brokers and investment advisers.[31] They expect those who provide professional services such as personalized

[27] Ibid., p. 112.

[28] The Section 913 Study (p. 127) states that, at a minimum, "personalized investment advice" should include all "recommendations" under FINRA rules and exclude "impersonal" investment advice as that term is used under the Advisers Act.

[29] Ibid., p. 127, "[t]he phrases 'personalized investment advice' and 'recommendations' relate to existing terms of art in both the broker-dealer and investment adviser regimes. This usage suggests that the phrase 'personalized investment advice about securities' in the uniform fiduciary standard could be read in a way that is consistent with the scope and interpretive history of both statutes."

[30] It is well established that the "giving of advice triggers no ongoing duty to do so." *de Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1302 (2d Cir. 2002).

[31] See, e.g., *U.S. Investors and the Fiduciary Standard*, AARP, Consumer Federation of America and North American Association of Securities Administrators (Sept. 15, 2010); Angela A. Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, and Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* (Rand Corporation, 2008).

investment advice to be required to act in their best interest. Allowing brokers to switch hats would facilitate the use of the fiduciary relationship to lull unsuspecting customers into a false sense of security, making them easier targets for fraud and abuse.

Although the Section 913 Study does not discuss the extent to which the uniform fiduciary duty applies with respect to services following the providing of investment recommendation, the staff has previously taken positions that appear to authorize misleading hat-switching.[32] The SEC should expressly repudiate these positions and provide guidance narrowly circumscribing the circumstances in which broker-dealers can provide investment advice subject to a fiduciary duty and then implement that advice or provide other related services without being subject to the fiduciary duty.

Recommendations Made Without Regard to Broker-Dealers' "Interests"

Fiduciary rules adopted under the Advisers Act, and therefore rules derivatively adopted under the Exchange Act, must require that broker-dealers act in the best interest of their customers "without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice." Although some commentators have suggested that this phrase could mean that broker-dealers must provide their services for free,[33] it more likely means that the broker-dealer cannot provide advisory services that are unduly motivated or influenced by the amount of the compensation the broker-dealer receives in connection with the advice.

This requirement may raise issues for broker-dealers when the nature of their advice affects their compensation. For example, broker-dealers that receive differential compensation, such as revenue-sharing payments from mutual funds, that varies depending on which investment they recommend, may be more vulnerable to claims that their advice was not given "without regard to the financial or other interests of the broker" than brokers that unbundle their fees and charge the same fee regardless of the investment selected.[34]

The broker-dealer community also has expressed concern regarding the extension of the "without regard to" standard to what might be called "second-tier" differential compensation. This includes indirect benefits that may inure to broker-dealers when they recommend, for example, proprietary funds or investments in initial public offerings in which their firm is a syndicate member. Even if the individual registered representative who makes the recommendation receives no direct benefit therefrom, the representative may have an indirect incentive to recommend certain transactions. The Section 913 Study does not discuss this

[32] See, e.g., *Securities Industry Association*, SEC No-Action Letter, 2005 WL 3526529 (Dec. 16, 2005), permitting hat switching.

[33] See, e.g., Clifford Kirsch, *Broker-Dealer Advisory Services*, SR029 ALI-ABA 193 (Oct. 8–9, 2009), "Is the standard of acting 'without regard to' the financial interest of the broker-dealer so broad that it effectively requires no compensation . . .?"

[34] This unbundling incentive is also reflected in the SEC's proposed 12b-1 fee reforms. See *Mutual Fund Distribution Fees; Confirmations*, Exchange Act Rel. No. 62544 (July 21, 2010), pp. 244–45. The issue is analogous to the debate regarding proposed rules that implement the Employee Retirement Income Security Act of 1974 (ERISA) requirement that certain advisers' fees not be affected by the recommendations that they make to plan beneficiaries. See, generally, *Investment Advice—Participants and Beneficiaries*, 75 F.R. 9360 (Mar. 2, 2010).

issue, but it should be the central feature of fiduciary rulemaking. The SEC should identify the circumstances in which a financial professional's receipt of compensation or other second-tier benefits that vary depending on the advice provided to a customer create a conflict of interest and therefore could cause the advice to be deemed to have been provided "with regard" to the broker-dealer's financial interest for purposes of Section 913. The SEC also should consider banning certain of these practices, as specifically authorized by Section 913(g).

Nonretail Investors

Section 913's rulemaking grant of authority extends to retail customers "and such other persons as the Commission may by rule provide." It is unlikely that any fiduciary rulemaking regarding nonretail investors will occur in the near term. The SEC's workload will be dominated by Dodd-Frank requirements for most or all of 2011; merely promulgating standards for retail investors in the near term will tax the SEC's resources. The Section 913 Study does not recommend extending (or not extending) the fiduciary duty to nonretail clients.[35] Recent congressional questioning regarding the fiduciary standard as applied to retail investors makes the near-term possibility of applying the standard to nonretail investors less likely.

However, the retail/nonretail distinction in Section 913 creates significant tensions in the regulation of investment advice that should not be left unaddressed in the long term. Many "nonretail" advisory clients manage assets for retail investors, which militates for extending fiduciary standards to at least some types of nonretail customers. For example, public pension plans manage billions of dollars in public assets on which the quality of life of millions of natural (retail) persons depends, and many of these pension plans are the kind of unsophisticated investors for which a fiduciary duty would be appropriate. In light of the growing problems of public financial mismanagement,[36] the SEC should not delay considering the application of the fiduciary duty to certain nonretail investors.[37] Indeed, the potential societal costs of failing to do so may exceed a failure to apply the fiduciary duty to retail investors.

Implementation of the Uniform Fiduciary Standard

The promulgation of a uniform fiduciary standard is likely to be followed, if not accompanied, by rulemaking and interpretive guidance regarding specific elements of the fiduciary duty. The Section 913 Study discusses these elements as set forth below.

[35] Section 913 Study, p. 913, "The Commission could consider whether the uniform fiduciary standard should also be extended to persons other than retail customers that may also benefit from the additional investor protections that would be provided by the standard."

[36] See Meredith Whitney, "The Hidden State Financial Crisis," *Wall Street Journal* (May 18, 2011).

[37] Cf. Dodd-Frank Sections 731 (generally providing that swap dealers and major swap participants acting as advisers "shall have a duty to act in the best interests" of certain nonretail customers, including states, municipalities, public and private pension plans and endowments) and 975 (establishing a fiduciary duty for "municipal advisors").

Disclosure of Conflicts of Interest

Disclosure of conflicts of interest is arguably the core requirement of the fiduciary duty. As stated in the Section 913 Study, "for the uniform fiduciary standard to be effective, investors need to understand any material conflicts of interest of their investment adviser or broker-dealer."[38] Section 913 provides that, under fiduciary rulemaking, "any material conflicts shall be disclosed and may be consented to by the customer." Broker-dealers and investment advisers currently disclose conflicts of interest under a variety of rules, in different formats, and at different times.

Unlike the discretionary authority granted to the SEC to adopt fiduciary rules, Section 913 of Dodd-Frank *requires* that the SEC "facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest." The mandatory nature of this directive makes it likely that the promulgation of a uniform fiduciary standard will be accompanied or soon followed by new disclosure rules.

The Section 913 Study notes that broker-dealers are not required to provide a specific disclosure document to a customer at the inception of the relationship. In contrast, investment advisers are required to deliver part of their registration form (Form ADV), which is known as the "brochure," at the time that they enter into a relationship with a client. Broker-dealers are not subject to the same level of disclosure as required in Form ADV.

Broker-dealers are subject to certain disclosure requirements at the time an investment recommendation is made and must provide post-transaction information to customers on the trade confirmation required by Exchange Act Rule 10b-10. However, these disclosures do not necessarily precede the customer's investment decision, much less the decision to retain the broker-dealer.

The staff recommends that SEC consider three approaches to facilitate the disclosure of conflicts of interest, along with other information, that is "uniform, simple and clear."[39] The staff recommends that the SEC—

- consider requiring broker-dealers to deliver a disclosure document similar to an adviser's brochure at or before the time the customer opens an account;
- "explore the utility and feasibility of a summary disclosure document that would describe in clear, summary form, a firm's services (including the extent to which its advice is limited in time or is continuous and ongoing), charges, and conflicts of interest;" and

[38] Ibid., p. 116.

[39] Ibid., p. 117. Pursuant to Section 919B of Dodd-Frank, the SEC conducted a study of "ways to improve the access of investors to registration information (including disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information)" about broker-dealers and investment advisers. See *Study and Recommendations on Improved Investor Access to Registration Information About Investment Advisers and Broker-Dealers* (SEC Office of Investor Education and Advocacy, Jan. 2011). The study's near-term recommendations, which must be implemented by August 2012, relate to the consolidation of BrokerCheck and the Investment Advisor Public Disclosure (IAPD) system to improve the usability of the information for investors. See Section 913 Study, pp. 5–6.

- consider developing uniform disclosure requirements that apply at the time the investment advice is provided on, for example, information regarding products, risks, and compensation that is more specific to a particular transaction.

It appears that the summary document might be made available on a firm's website, with the brochure being delivered to each client. Notably, the staff does not recommend that the broker-dealer registration form (Form BD) and Form ADV be consolidated.

It is likely that the SEC will propose rules that substantially revise the framework in which broker-dealers provide disclosure to their clients. This may entail the delivery of a brochure, such as that proposed by FINRA in 2010,[40] as well as more specific disclosure delivered at the time of a transaction and/or investment recommendation, such as the point-of-sale disclosure originally proposed by the SEC in 2004.[41] As noted, the mandatory nature of Dodd-Frank's instructions regarding disclosure makes it likely that this rulemaking will accompany or follow closely on the promulgation of a uniform fiduciary standard. The SEC should adopt rules that require broker-dealers to provide a brochure prior to the time of the engagement in order to allow clients an opportunity to evaluate the broker-dealer's services and compensation structure before opening an account. Additional, transaction-specific disclosure should be required as appropriate.

Restricted/Prohibited Conflicts of Interest

In addition to enhancing the disclosure of conflicts of interest, the SEC is likely to consider outright prohibitions of certain practices. Section 913(g) of Dodd-Frank requires that the SEC—

> examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.

The Section 913 Study does not indicate what practices should be examined pursuant to this mandate. The most likely candidates for prohibition may be compensation practices that create financial incentives for financial professionals to favor one course of action or investment product over another, regardless of which is in the client's best interests. This would be consistent with Section 913's mandate that the fiduciary standard require a broker-dealer or investment adviser to act in the customer's best interest "without regard to [its] financial or other interest." For example, the SEC should require disclosure of the dollar amount of all fees received by broker-dealers and investment advisers and that such disclosure be accompanied by a statement of the conflict of interest created by differential compensation and/or the offering of a limited menu of proprietary products (as subparagraph (d)(2) in the draft rules in appendix A should be interpreted

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[40] *Disclosure of Services, Conflicts and Duties*, FINRA Regulatory Notice 10-54 (Oct. 2010). The Section 913 Study briefly discusses this proposal in footnote 517 on page 114.

[41] See *Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds*, Investment Company Act Rel. No. 26341 (Jan. 29, 2004).

to require). Alternatively, the SEC should consider an outright ban on revenue-sharing payments that vary depending on the fund that a broker-dealer recommends.

Principal Transactions

Section 206(3) of the Advisers Act generally requires investment advisers to obtain client consent prior to any transaction in which the adviser acts as principal. Fiduciary rulemaking would not make Section 206(3) directly applicable to broker-dealers, but it would raise the question as to what a uniform fiduciary standard requires with respect to principal transactions. The staff's position on this issue is unclear. On the one hand, the Section 913 study recognizes that "[p]rincipal trades by broker-dealers raise the same potential conflicts of interest as such trades by investment advisers and thus implicate the duty of loyalty included in the uniform fiduciary standard."[42] Section 913 provides that, under fiduciary rulemaking, "any material conflicts shall be disclosed and *may be consented to by the customer*" (emphasis added). These positions would support requiring broker-dealers to obtain client consent to at least some transactions to which Section 206(3) applies.

On the other hand, the staff takes the position that Congress's incorporation of only Sections 206(1) and (2) in the uniform fiduciary standard "appears to reflect a Congressional intent" that Section 206(3) not be included.[43] The staff provides no support for this position. Nor does it explain why, in Section 913, Congress required that the fiduciary standard be "no less stringent" than Sections 206(1) and (2) unless it contemplated the possibility that requirements in excess of those established by those sections might be imposed, or why it required that the uniform fiduciary standard mandate disclosure of material conflicts of interest that "may be consented to by the customer," unless it contemplated client consent requirements similar to, if not specifically entailing Section 206(3)'s consent requirement.

In addition, the study notes that the SEC could "consider whether any changes should be made to the principal trading requirements that apply to investment advisers."[44] This statement implies that investment advisers might be relieved of Section 206(3)'s provisions, presumably on the same terms as broker-dealers, with respect to certain types of transactions.[45]

In summary, the SEC staff has artificially excluded principal trades from the reach of the fiduciary duty under Section 913, which would result in broker-dealers engaging in principal transactions with advisory clients without obtaining transaction-specific client consent—even when such consent is in the best interests of investors and would be required under a true fiduciary standard. The staff's position also undermines the harmonization goal of Section 913, because whether broker-dealers providing personalized retail advice were required to obtain transaction-specific consent for principal trades with clients would depend on whether the broker-dealer was paid only commissions or received asset-based fees. The SEC should, pursuant to fiduciary rulemaking, ensure that transaction-specific client consent is required for all transactions where the fiduciary duty would require such consent.

[42] Section 913 Study, p. 120.

[43] Ibid., p. 119.

[44] Ibid., p. 120.

[45] See, e.g., *Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Investment Advisers Act*, Advisers Act Release No. 2653 (Sep. 24, 2007).

Basis of Investment Recommendations

The Section 913 Study recommends that the SEC "consider specifying uniform standards for the duty of care owed to retail customers, through rulemaking and/or interpretive guidance."[46] For example, under FINRA rules, broker-dealers are subject to detailed requirements regarding their basis for making investment recommendations. In contrast, "[d]etailed guidance in this area has not been a traditional focus of the investment adviser regulatory regime."[47] The SEC may seek to harmonize broker-dealer and investment adviser requirements regarding the basis for the investment recommendations made to retail customers.[48] The SEC should subject all providers of retail investment advice to minimum standards of care and require documentation of their investment recommendation processes. These standards should be heightened when investment recommendations may be subject to a conflict of interest, such as when a broker-dealer or adviser receives differential compensation depending on the recommendation or offers only a narrow range of proprietary products.

FINRA's Role in the Promulgation of Fiduciary Standards of Conduct

As discussed above, if the SEC promulgates fiduciary rules under Dodd-Frank Section 913, it is likely to do so under the Exchange Act. FINRA not only is *permitted* to enforce Exchange Act rules, but also is *required* to do so. Therefore, assuming broad, principles-based fiduciary rulemaking under the Exchange Act, FINRA will become the primary regulator for the interpretation and enforcement of the uniform fiduciary standard as to FINRA members and will have rulemaking authority thereunder.[49]

Indeed, FINRA may effectively become the predominant source of fiduciary law under the Advisers Act as well. It is likely that FINRA's regulatory output would make it the primary driver of the development of the law under Sections 206(1) and (2). It brings more retail sales practices enforcement actions and can promulgate rules more easily than the SEC, and it oversees thousands of private claims each year in arbitration.

[46] Section 913 Study, p. 123.

[47] Ibid.

[48] The SEC may seek to harmonize other regulatory areas relating to the duty of care, such as best execution obligations, the suitability standards as to specific products, and fair pricing and compensation, but the Section 913 Study does not make specific recommendations in these areas. See Ibid., p. 122 and note 555, citing commentators that, "[i]n considering whether and how to develop investment advisers' duty of care, . . . have pointed to the detailed rules imposed on broker-dealers as a useful framework." For the most part, these duties of broker-dealers address concerns that generally arise in connection with the providing of brokerage services as opposed to only advisory services. It is the fiduciary duty under the Advisers Act to which many broker-dealers are not subject that should be the SEC's first priority.

[49] Most associated persons of investment advisers are dually registered as registered representatives of broker-dealers. FINRA reports that, as of October 2010, there were 275,873 registered investment adviser representatives, of which whom 241,586 (87.6 percent) were also registered representatives of a broker-dealer. See Letter from FINRA to SEC, pp. 1–2 (Nov. 3, 2010), http://www.sec.gov/comments/4-606/4606-2836.pdf.

FINRA implementation and enforcement of fiduciary standards therefore is likely to affect standards that apply to nonmembers under the Advisers Act. The Dodd-Frank Act evinces Congress's intent that these standards be harmonized, and this is formally accomplished by making the Exchange Act fiduciary standard derive from the Advisers Act standard. As fiduciary law develops under the Exchange Act, this law therefore will contribute to, if not substantially determine, the developing contours of the Advisers Act fiduciary duty that is its source. In short, Exchange Act precedent will travel upstream and become part of the fiduciary law under the Advisers Act.

FINRA aspires to assume this lawmaking role,[50] which may generate certain benefits for investors. FINRA already has principal rulemaking, inspection, and enforcement authority over broker-dealers, and some argue that its inspections are far more frequent[51] (although arguably less independent) than the SEC's. FINRA operates under lighter administrative law requirements than the SEC, which allows it to shepherd rules through to final approval more easily. In practice, FINRA's rules have been less susceptible to Administrative Procedures Act (APA) challenges by industry members. Its enforcement actions also are less vulnerable to legal challenges, and its examinations less constrained by limits on government action.

The delegation of responsibility for promulgating fiduciary standards to FINRA also would create certain risks. The SEC and the states would surrender some control over the substance and enforcement of the standards, while the financial services industry (FINRA members) would gain additional control over the content of the rules. FINRA, which for years took the position that broker-dealer regulation set standards that were as high or higher than those applied to investment advisers,[52] might not apply sufficiently stringent standards. Indeed, FINRA recently proposed a rule relating to the disclosure of revenue sharing that falls demonstrably short of what the fiduciary duty would require.[53] To the extent that fiduciary rulemaking is delegated to FINRA, the SEC must exercise diligent oversight to prevent or at least minimize the dilution of the existing standard under the Advisers Act.[54]

[50] In anticipation of fiduciary rulemaking under Section 913, FINRA already has proposed a rule that would require its members to deliver a document to noninstitutional customers that is "similar in purpose to Form ADV." FINRA Notice 10-54 (Oct. 2010).

[51] See Hearing before the Committee on Financial Services, House of Representatives (Oct. 6, 2009) (testimony of Richard Ketchum, President, FINRA). The SEC and FINRA examine 55 percent of registered broker-dealers; the SEC examines 9 percent of registered investment advisers.

[52] See, e.g., Barbara Black, "Brokers and Advisers: What's in a Name?" *Fordham Journal of Corporate and Financial Law* 31 (2005): 52–53, discussing FINRA claim that its advertising rules are the "highest" in the industry.

[53] See FINRA Notice of Filing of Proposed Rule Change (May 3, 2011), http://www.sec.gov/rules/sro/finra/2011/34-64386.pdf.

[54] See *Organizational Study and Reform* (Boston Consulting Group, Mar. 10, 2011), discussing the adequacy of SEC oversight of FINRA, http://www.sec.gov/news/studies/2011/967study.pdf.

Conclusion and Recommendations

Fiduciary rulemaking under Dodd-Frank Section 913 could substantially mitigate the disparate regulation problem of broker-dealers and investment advisers being held to different standards of conduct when providing personalized investment advice. Any fiduciary rules under the Exchange Act will be linked to the standard applied under Advisers Act rules, and both will be effectively linked to the standard under Sections 206(1) and (2) of the Advisers Act. This linkage should generally ensure that the fiduciary duty under the Exchange and Advisers Acts ultimately derives from the same source of law: judicial and administrative interpretation and application of Advisers Act Sections 206(1) and (2).

The fiduciary duty is likely to take the form of a combination of principles-based rules, such as the draft rules in appendix A, and specific conduct rules in certain areas. The SEC staff's recent study of broker-dealer and investment adviser regulation recommended rulemaking in a number of areas, including harmonization of the information disclosure requirements for broker-dealers and investment advisers. The study also recommended that the SEC issue guidance on the application of a uniform fiduciary standard to principal transactions with clients and consider rulemaking regarding the minimum basis necessary for a financial professional to make investment recommendations. In addition to recommendations related directly to the uniform fiduciary standard, the staff outlined a broad harmonization initiative that would generally extend FINRA-style regulation in many areas to investment advisers.

Fiduciary rulemaking under Section 913 generally should improve the protection of investors who receive investment advice from broker-dealers who are not subject to the fiduciary duty under the Advisers Act. However, the reconciling of long-standing broker-dealer practices with the fiduciary duty and FINRA's likely role in determining the substance of that duty under the Advisers Act combine to create a significant risk that the current fiduciary standard under the Advisers Act will be diluted. Nonetheless, the net effect may be positive for investors as a whole if the additional protection gained by raising the lowest (suitability) standard exceeds the protection lost by diluting the highest (fiduciary) standard.

The SEC can mitigate the potential dilution of the fiduciary standard by adopting a principles-based base rule similar to the draft rules in appendix A and then promulgating detailed rules that follow these recommendations (or ensuring that FINRA does so):

- Interpret the term "personalized investment advice" consistent with its long history and usage in the Advisers Act.
- Provide guidance narrowly circumscribing the circumstances in which broker-dealers can provide investment advice subject to a fiduciary duty and then implement that advice or provide other related services without being subject to the fiduciary duty.
- Identify the circumstances in which a financial professional's receipt of compensation or other second-tier benefits that vary depending on the advice provided to a customer create a conflict of interest and therefore could cause the advice to be deemed to have been provided "with regard" to the broker-dealer's financial interest for purposes of Section 913.
- Consider banning certain of compensation practices, such as revenue sharing, as authorized by Dodd-Frank Section 913(g).
- Promptly consider the application of the fiduciary duty to certain nonretail investors.

- Require broker-dealers to provide a brochure prior to the time of the engagement in order to allow clients an opportunity to evaluate the broker-dealer's services and compensation structure before opening an account and require additional, transaction-specific disclosure as appropriate.
- Require disclosure of the dollar amount of all fees received by broker-dealers and investment advisers and that such disclosure be accompanied by a statement of the conflict of interest created by differential compensation and/or the offering of a limited menu of proprietary products (as subparagraph (d)(2) in the draft rules in appendix A should be interpreted to require).
- Ensure that transaction-specific client consent is required for all transactions where the fiduciary duty would require such consent.
- Subject all providers of retail investment advice to minimum standards of care and require documentation of their investment recommendation processes, with heightened standards when investment recommendations may be subject to a conflict of interest.

Appendix A: Draft Fiduciary Rules

This appendix provides draft rules under the Exchange and Advisers Acts pursuant to Dodd-Frank Section 913. They are principles-based rules that would, in effect, provide the umbrella authority for the SEC and/or FINRA to establish specific conduct rules, as appropriate, with respect to particular business practices.

[Exchange Act Rule 15k-1] [Advisers Act Rule 211g-1][55]

(a) The standard of conduct for a [broker or dealer] [investment adviser] when providing investment advice about securities to retail [customers] [clients] shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.

(b) For purposes of paragraph (a), the term "retail [customer] [client]" means any natural person and any legal representative of a natural person acting on behalf of such person who receives personalized investment advice about securities from a [broker or dealer] [investment adviser] that is used primarily for personal, family, or household purposes.

(c) The term "retail [customer] [client]" does not include a natural person solely by reason of that person's investment in a private fund, as defined in [cross-reference], where the fund has entered into an advisory contract with the investment adviser that manages the fund.

(d) The standard set forth in paragraph (a) shall—

(1) be no less stringent than the standard set forth in paragraphs (1) and (2) of Section 206 of [the Investment Advisers Act of 1940] [this title];

(2) require that all material conflicts of interest of the [broker or dealer] [investment adviser] providing the investment advice be disclosed and consented to by the [customer] [client], including but not limited to conflicts of interest related to:

(A) any compensation received by the [broker or dealer] [investment adviser] in connection with investment advice or

(B) the sale of only proprietary or limited range of products; and

(3) not limit in any way any rulemaking authority exercised under any other provision of the federal securities laws or other authorizing statute.

(e) The receipt of compensation based on a commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of the standard set forth in paragraph (a).

(f) The sale of only proprietary or limited range of products shall not,

[55] These illustrative draft rules do not attempt to resolve all of the technical issues raised by Section 913's grant of rulemaking authority.

in and of itself, be considered a violation of the standard set forth in paragraph (a).

(g) A single instance in which a [broker or dealer] [investment adviser] provides investment advice shall not, in and of itself, create a continuing obligation to provide investment advice in the future.

APPENDIX B: DODD-FRANK ACT SECTION 913

SEC. 913. STUDY AND RULEMAKING REGARDING OBLIGATIONS OF BROKERS, DEALERS, AND INVESTMENT ADVISERS.

(a) Definition- For purposes of this section, the term 'retail customer' means a natural person, or the legal representative of such natural person, who—

(1) receives personalized investment advice about securities from a broker or dealer or investment adviser; and

(2) uses such advice primarily for personal, family, or household purposes.

(b) Study- The Commission shall conduct a study to evaluate—

(1) the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice and recommendations about securities to retail customers imposed by the Commission and a national securities association, and other Federal and State legal or regulatory standards; and

(2) whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute.

(c) Considerations- In conducting the study required under subsection (b), the Commission shall consider—

(1) the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice and recommendations about securities to retail customers imposed by the Commission and a national securities association, and other Federal and State legal or regulatory standards;

(2) whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute;

(3) whether retail customers understand that there are different standards of care applicable to brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers in the provision of personalized investment advice about securities to retail customers;

(4) whether the existence of different standards of care applicable to brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers is a source of confusion for retail customers regarding the quality of personalized investment advice that retail customers receive;

(5) the regulatory, examination, and enforcement resources devoted to, and activities of, the Commission, the States, and a national securities association to enforce the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers when providing personalized investment advice and recommendations about securities to retail customers, including—

(A) the effectiveness of the examinations of brokers, dealers, and investment advisers in determining compliance with regulations;

(B) the frequency of the examinations; and

(C) the length of time of the examinations;

(6) the substantive differences in the regulation of brokers, dealers, and investment advisers, when providing personalized investment advice and recommendations about securities to retail customers;

(7) the specific instances related to the provision of personalized investment advice about securities in which—

(A) the regulation and oversight of investment advisers provide greater protection to retail customers than the regulation and oversight of brokers and dealers; and

(B) the regulation and oversight of brokers and dealers provide greater protection to retail customers than the regulation and oversight of investment advisers;

(8) the existing legal or regulatory standards of State securities regulators and other regulators intended to protect retail customers;

(9) the potential impact on retail customers, including the potential impact on access of retail customers to the range of products and services offered by brokers and dealers, of imposing upon brokers, dealers, and persons associated with brokers or dealers—

(A) the standard of care applied under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) for providing personalized investment advice about securities to retail customers of investment advisers, as interpreted by the Commission and the courts; and

(B) other requirements of the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.);

(10) the potential impact of eliminating the broker and dealer exclusion from the definition of 'investment adviser' under section 202(a)(11)(C) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)(C)), in terms of—

(A) the impact and potential benefits and harm to retail customers that could result from such a change, including any potential impact on access to personalized investment advice and recommendations about securities to retail customers or the availability of such advice and recommendations;

(B) the number of additional entities and individuals that would be required to register under, or become subject to, the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.), and the additional requirements to which brokers, dealers, and persons associated with brokers and dealers would become subject, including—

(i) any potential additional associated person licensing, registration, and examination requirements; and

(ii) the additional costs, if any, to the additional entities and individuals; and

(C) the impact on Commission and State resources to—

(i) conduct examinations of registered investment advisers and the representatives of registered investment advisers, including the impact on the examination cycle; and

(ii) enforce the standard of care and other applicable requirements imposed under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.);

(11) the varying level of services provided by brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers to retail customers and the varying scope and terms of retail customer relationships of brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers with such retail customers;

(12) the potential impact upon retail customers that could result from potential changes in the regulatory requirements or legal standards of care affecting brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers relating to their obligations to retail customers regarding the provision of investment advice, including any potential impact on—

(A) protection from fraud;

(B) access to personalized investment advice, and recommendations about securities to retail customers; or

(C) the availability of such advice and recommendations;

(13) the potential additional costs and expenses to—

(A) retail customers regarding and the potential impact on the profitability of their investment decisions; and

(B) brokers, dealers, and investment advisers resulting from potential changes in the regulatory requirements or legal standards affecting brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers relating to their obligations, including duty of care, to retail customers; and

(14) any other consideration that the Commission considers necessary and appropriate in determining whether to conduct a rulemaking under subsection (f).

(d) Report-

(1) IN GENERAL- Not later than 6 months after the date of enactment of this Act, the Commission shall submit a report on the study required under subsection (b) to—

(A) the Committee on Banking, Housing, and Urban Affairs of the Senate; and

(B) the Committee on Financial Services of the House of Representatives.

(2) CONTENT REQUIREMENTS- The report required under paragraph (1) shall describe the findings, conclusions, and recommendations of the Commission from the study required under subsection (b), including--

(A) a description of the considerations, analysis, and public and industry input that the Commission considered, as required under subsection (b), to make such findings, conclusions, and policy recommendations; and

(B) an analysis of whether any identified legal or regulatory gaps, shortcomings, or overlap in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers.

(e) Public Comment- The Commission shall seek and consider public input, comments, and data in order to prepare the report required under subsection (d).

(f) Rulemaking- The Commission may commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to address the legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to such retail customers. The Commission shall consider the findings conclusions, and recommendations of the study required under subsection (b).

(g) Authority to Establish a Fiduciary Duty for Brokers and Dealers-

(1) SECURITIES EXCHANGE ACT OF 1934- Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended by adding at the end the following:

'(k) Standard of Conduct-

'(1) IN GENERAL- Notwithstanding any other provision of this Act or the Investment Advisers Act of 1940, the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940. The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.

'(2) DISCLOSURE OF RANGE OF PRODUCTS OFFERED- Where a broker or dealer sells only proprietary or other limited range of products, as determined by the Commission, the Commission may by rule require that such broker or dealer provide notice to each retail customer and obtain the consent or acknowledgment of the customer. The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the standard set forth in paragraph (1).

'(l) Other Matters- The Commission shall—

'(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

'(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.'

(2) INVESTMENT ADVISERS ACT OF 1940- Section 211 of the Investment Advisers Act of 1940, is further amended by adding at the end the following new subsections:

'(g) Standard of Conduct-

'(1) IN GENERAL- The Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. In accordance with such rules, any material conflicts of interest shall be disclosed and may be consented to by the customer. Such rules shall provide that such standard of conduct shall be no less stringent than the standard applicable to investment advisers under section 206(1) and (2) of this Act when providing personalized investment advice about securities, except the Commission shall not ascribe a meaning to the term 'customer' that would include an investor in a private fund managed by an investment adviser, where such private fund has entered into an advisory contract with such adviser. The receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard applied to a broker, dealer, or investment adviser.

'(2) RETAIL CUSTOMER DEFINED- For purposes of this subsection, the term 'retail customer' means a natural person, or the legal representative of such natural person, who—

'(A) receives personalized investment advice about securities from a broker, dealer, or investment adviser; and

'(B) uses such advice primarily for personal, family, or household purposes.

'(h) Other Matters- The Commission shall—

'(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

'(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and

investment advisers that the Commission deems contrary to the public interest and the protection of investors.'

(h) Harmonization of Enforcement-

(1) SECURITIES EXCHANGE ACT OF 1934- Section 15 of the Securities Exchange Act of 1934, as amended by subsection (g)(1), is further amended by adding at the end the following new subsection:

'(m) Harmonization of Enforcement- The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer shall include—

'(1) the enforcement authority of the Commission with respect to such violations provided under this Act; and

'(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser under the Investment Advisers Act of 1940, including the authority to impose sanctions for such violations, and

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under this Act to same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to an investment advisor under the Investment Advisers Act of 1940.'

(2) INVESTMENT ADVISERS ACT OF 1940- Section 211 of the Investment Advisers Act of 1940, as amended by subsection (g)(2), is further amended by adding at the end the following new subsection:

'(i) Harmonization of Enforcement- The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser shall include—

'(1) the enforcement authority of the Commission with respect to such violations provided under this Act; and

'(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under the Securities Exchange Act of 1934, including the authority to impose sanctions for such violations, and

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to an investment adviser under this Act to same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under the Securities Exchange Act of 1934.'

Commentary

Financial Planners Can Do Better Than FINRA-FP

By Mercer Bullard | 09-13-11 | 06:00 AM | E-mail Article

Organizations representing financial planners are on the spot. A subcommittee of the House Financial Services Committee will hear testimony Tuesday on a draft bill that would create a self-regulatory organization for investment advisors, or IA-SRO. If financial-planner organizations do not move quickly to develop an IA-SRO for their members, they might be consigning planners to regulation by the SRO for broker-dealers, the Financial Industry Regulatory Authority, commonly referred to as FINRA.

A group of my students has created an IA-SRO in anticipation of the IA-SRO bill becoming law. Their Self-Regulatory Organization for Independent Investment Advisors, or SROIIA, is intended to offer an alternative to FINRA for non-broker-dealer investment advisors. SROIIA has certain advantages over FINRA that would enable it to offer a superior IA-SRO alternative for financial planners. However, the financial-planner community will need to get behind SROIIA well before the IA-SRO bill becomes law in order to compete with FINRA in the IA-SRO market.

The IA-SRO Bill

The IA-SRO bill authorizes the SEC to approve an investment advisor self-regulatory association that would have broad rulemaking, examination, and enforcement authority over most advisors. The bill generally mirrors the broker-dealer law under which FINRA was created. Enactment of the IA-SRO bill would achieve FINRA's long-sought expansion of its jurisdiction to investment-advisory activities and make it the primary source of authority under the federal and state laws and rules that regulate investment-advisory activities.

The biggest impact of the IA-SRO bill would be felt by the retail advisors who are not dually registered as broker-dealers. These are the advisors who generally call themselves "financial planners" and hold designations such as the Certified Financial Planner. About 34,000 individuals fall into this category.

In contrast, dually registered advisors who are already members of FINRA (about 241,000 individuals) would not be greatly affected. FINRA would simply become their IA-SRO in addition to being their broker-dealer SRO. The SEC and the states already enforce advisory regulations that apply to dual registrants; as an IA-SRO, FINRA would simply enforce them, as well. This might increase these advisors' regulatory burdens somewhat, but they might also realize efficiencies to the extent that FINRA coordinates overlapping broker-dealer and investment-advisor rules.

Dual registrants could, in theory, choose an IA-SRO other than FINRA, but this is unlikely. They will almost certainly prefer the known-quantity FINRA, under which they would continue to be subject to only one SRO, over a new, unknown IA-SRO that would subject them to a second SRO.

The bill also would not affect advisors to nonretail clients who are not already FINRA members, such as managers of hedge, venture capital, and mutual funds. The bill

exempts them altogether. This exemption is necessary to mollify the Investment Company Institute, Managed Funds Association, and other lobbying organizations that represent nonretail money managers and probably have the clout to defeat any SRO legislation that applied to them.

That leaves only retail advisors who are not broker-dealers--that is, financial planners --subject to a new SRO under the IA-SRO bill. This distinction should make financial planners major players in the IA-SRO discussion, but the House hearing does not include a single witness representing this group. The Investment Advisers Association is testifying, but it is by no means a voice for financial planners. The Financial Planning Association, CFP Board, and National Association of Personal Financial Advisors, each of which represents non-dual-registrants to a greater or lesser extent, did not make the cut. However, three broker-dealer and two insurance organizations will be there, along with FINRA--the IA-SRO's ringleader.

Each of the IAA, FPA, CFP Board, and NAPFA would prefer that weaknesses in the oversight of investment advisors be addressed through increased funding, even if that entails user fees collected from their members.

And that would, in fact, be the best approach.

But the IA-SRO bill is a blow to their hopes. If the House approves the IA-SRO bill, then the bill's--and financial planners'--fate will be decided in the Senate Banking Committee. Its chairman, Sen. Tim Johnson (D-S.D.), has not taken a position on the IA-SRO question, but the IA-SRO bill clearly has some effective lobbying forces behind it. Financial planners need to start planning for its probable enactment.

Is FINRA-FP Inevitable?

As noted above, there is little doubt that FINRA would become the IA-SRO for advisors who are already FINRA members. FINRA has been lobbying financial planners to accept it as their IA-SRO, as well. Many financial planners may disagree, but FINRA does have the capacity to offer a workable IA-SRO structure for financial planners, or FINRA-FP. FINRA has a regulatory infrastructure in place and credibility with the SEC. (The current SEC chairman Mary Schapiro was formerly FINRA's CEO; SEC commissioner Elisse Walter also came from FINRA.) It already enforces certain rules that indirectly regulate investment-advisory activities. It can directly or indirectly use its existing members' dues to create and finance a new regulatory structure for new, nonbroker members. And it will be prepared to apply to the SEC to be an IA-SRO before the ink is dry on final legislation.

Despite these advantages, there is an alternative to FINRA-FP, but the emergence of the IA-SRO bill threatens its viability. Earlier this year, students at the University of Mississippi School of Law created an IA-SRO--SROIIA--that is intended to create a regulatory home for financial planners. SROIIA hopes to tap the strong vein of "anyone-but-FINRA" sentiment among planners by offering an IA-SRO alternative that better suits planners' needs. Anti-FINRA sentiment alone, however, will not be enough for SROIIA to succeed.

SROIIA is seeking to exploit other advantages over FINRA. For example, SROIIA hopes to maintain the bona fide fiduciary standard that has become an effective

marketing brand for financial planners, as I discussed in a previous article. FINRA's members are salespersons--not fiduciaries required to act in their clients' best interests. Even if FINRA imposes a fiduciary duty on them, it will be diluted to accommodate brokers' business practices, which are inherently more susceptible to conflicts of interest.

If SROIIA can maintain the fiduciary standard in a way that clearly distinguishes its members from FINRA salesperson-members, it will offer something to financial planners worth paying for. SROIIA members will be able to point to their SROIIA membership as evidence that they offer higher-quality services to their clients.

SROIIA has announced that it will hold its members to a tangibly higher standard and has backed that up with a proposed examination administered with fi360 that will focus on fiduciary conduct. It also may prohibit certain broker-dealer business practices that create conflicts of interest, such as engaging in principal transactions and/or charging commissions.

A survey conducted by SROIIA suggests that many financial planners would support such an IA-SRO. Of the 228 respondents, 87% stated that, if required to join an SRO, they would prefer an advisor-specific SRO over FINRA. More than 90% stated that they would not object to being held to a higher fiduciary standard than that imposed by FINRA. Eighty-nine percent would not object if they could not engage in principal transactions with clients, and 95% would not object if they could not be paid commissions. These data suggest that SROIIA will be able to back up its claim to maintain a bona fide fiduciary standard with concrete differences in its conduct rules, thereby offering advantages that FINRA cannot match.

A 'Self'-ish Self-Regulatory Organization

SROIIA also can distinguish itself from FINRA by adopting a more member-friendly, efficient approach to regulation. As illustrated by a recent Chamber of Commerce report, FINRA is perceived by many industry members as having taken the "self" out of self-regulatory and become, in effect, a government actor. Indeed, FINRA's rulemaking, examination and enforcement authority substantially overlaps with SEC and state activities. Some state regulators perceive FINRA as usurping their position.

FINRA is likely to expand this quasi-governmental role as legislators and regulators come to recognize the inherent advantages of the SRO structure in making and enforcing securities law, especially across national borders. The evidence is mounting that national governments and government agencies lack the responsiveness, sophistication, and jurisdictional reach that is necessary to effectively regulate complex aspects of securities markets and the world economy in general.

In fact, FINRA is likely to become a significant source of global corporate and securities law during the next few decades. Investor advocates may recoil from the delegation of regulatory oversight to non- or quasi-governmental authorities. However, it is difficult to survey the post-World War II development of corporate and securities regulation without being confronted with a broad coincidence of increasing market complexity/interdependence on the one hand, and the delegation of governmental authority to private associations on the other.

But enough of FINRA star-gazing; the dynamics of retail investment-advisor regulation are quite different. Compared with the complexity of FINRA's current and future responsibilities, the regulation of non-broker-dealer, retail financial planners is a relatively simple, low-risk task. Financial planners do not take custody of client assets, engage in principal transactions, or receive transaction-based compensation. Financial planners' opportunities for theft and self-dealing are minimal, and planners are subject to a fiduciary duty.

The simpler nature of investment-advisor regulation would allow SROIIA to offer a more selfish self-regulatory model. For example, by designing its examination structure to supplement and support--rather than supplant--SEC and state activities, SROIIA can reduce the costs of regulation for both its members and regulators. A truly self-regulatory organization should provide a voice for regulated persons that helps maximize society's overall return-on-regulation by more efficiently bridging the gap between the private and public interests. It should not and need not involve volumes of detailed conduct rules that a FINRA-model IA-SRO would entail.

Privatized Compliance for Financial Planners

This model of self-regulation embraces a kind of privatized compliance. The strong trend across all forms of business regulation in the United States is the emphasis on compliance structures with which regulated entities are expected to comply over a deterrence-through-punishment approach. Rules relating to antitrust, health care, environmental, communications, employment, workplace safety, privacy, financial services and other regulatory hot spots have increasingly taken the form of systems-based expectations that assign implementation to SRO-like associations and/or directly to individual firms.

SROIIA can provide an effective mechanism for maximizing the effectiveness of compliance-oriented regulation. For example, it can enlist private providers of financial planners' systems tools to adapt their products, such as the types of systems recently described by Bill Winterberg, to be proxies for regulatory examinations. SROIIA would establish the criteria for proof of compliance that a private product would have to achieve to be certified, and then work with states to obtain their agreement that such certified systems will be accepted as a substitute for aspects of state examinations.

If a securities law violation occurs under the auspices of a particular product, the provider's status will be at risk. The states would lead the investigation and prosecution of the advisor, with the support of SROIIA, while SROIIA would re-evaluate the product's certification. The success of privatized compliance depends on its achieving a net-net gain. Advisors would have to see a reduction in compliance burdens (thereby reducing overall costs and increasing lower-income access to advisory services) while states would have to see enhanced overall compliance.

Toward this end, SROIIA is developing a structure for such a privatized compliance system. On Sept. 29, SROIIA and the University of Mississippi School of Law are sponsoring a small gathering of financial planners and firms that provide software support, compliance consulting, and legal guidance to planners to advise SROIIA about designing a blueprint for a privatized model of financial planner compliance.

This and other initiatives offer the best chance for SROIIA to provide an SRO experience for financial planners that FINRA cannot match.

Time for a Strategy Shift?

The biggest factor in SROIIA's success might be the policy position of groups representing SROIIA's target membership. As discussed above, the FPA, CFP Board, and NAPFA are opposed to an IA-SRO. They even support user fees to help fix the SEC's funding shortfalls as an alternative to being subject to a new regulator. As a practical matter, it would be difficult for them to simultaneously lobby for government oversight and user fees and embrace a non-FINRA IA-SRO, such as SROIIA. It must be one or the other; the issue for them is how long to cling to a user-fees strategy.

If these groups stick with their user-fees strategy too long, they risk ceding the IA-SRO market to FINRA. FINRA will apply for and receive SEC approval as an IA-SRO soon after the approval of the IA-SRO bill. If no alternative IA-SRO is available at that point, financial planners will have no choice but to join FINRA initially. It is unrealistic to expect that they would later switch to SROIIA; it will be a challenge for SROIIA to woo financial planners even if it is an option from the start. Thus, if FINRA is the first mover in the IA-SRO market, it will be game over for any competitor.

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FINANCIAL
PLANNING
COALITION

STATEMENT OF

THE FINANCIAL PLANNING COALITION

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON FINANCIAL SERVICES

CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES SUBCOMMITTEE

ON

ENSURING APPROPRIATE REGULATORY OVERSIGHT OF BROKER-DEALERS AND LEGISLATIVE PROPOSALS TO IMPROVE INVESTMENT ADVISER OVERSIGHT

September 13, 2011

Mr. Chairman, Ranking Member Waters, and Members of the Subcommittee, thank you for the opportunity to submit this statement as part of the record for the Capital Markets and Government Sponsored Enterprises Subcommittee hearing on September 13, 2011, titled "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight." We appreciate the opportunity to share our views on the most-pressing issues regarding the regulation of broker-dealers and investment advisers.

The Financial Planning Coalition (the Coalition),[1] which is comprised of Certified Financial Planner Board of Standards, Inc. (CFP Board), the Financial Planning Association (FPA), and the National Association of Personal Financial Advisors (NAPFA), represents over 75,000 financial planning professionals in the United States. The Coalition provides the financial planning profession with a strong, unified voice in advancing the recognition and regulation of the financial planning profession, and advocating for enhanced consumer financial protection.

We strongly supported section 913 of the Dodd-Frank Act, which authorized the Securities and Exchange Commission (SEC) to create a uniform fiduciary standard of care for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. We also supported section 919C, which required the Government Accountability Office (GAO) to study the oversight of financial planners and the use of designations by financial planners.

We continue to believe these important investor protection provisions of the Dodd-Frank Act deserve broad bipartisan support. We urge the Subcommittee members to support the SEC as it moves forward to establish a strong and uniform fiduciary standard of conduct for broker-dealers and investment advisers. Additionally, we believe it is vitally important to provide the SEC with the resources necessary to fulfill its regulatory mandate, including enhancing examinations of investment advisers. Finally, we look forward to working with the Subcommittee members to address the issues identified in the GAO's study on financial planning.

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[1] CFP Board is a non-profit organization that acts in the public interest by fostering professional standards in personal financial planning through setting and enforcing education, examination, experience, and ethics standards for financial planner professionals who hold the CFP® certification. CFP Board's mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for personal financial planning. CFP Board currently oversees more than 63,000 CFP® professionals who agree, on a voluntary basis, to comply with our competency and ethical standards and subject themselves to the disciplinary oversight of CFP Board under a fiduciary standard of care. For more information on CFP Board, visit www.cfp.net.
FPA® is the leadership and advocacy organization connecting those who provide, support, and benefit from professional financial planning. FPA demonstrates and supports a professional commitment to education and a client-centered financial planning process. Based in Denver, Colo., FPA has close to 100 chapters throughout the country representing more than 24,000 members involved in all facets of providing financial planning services. Working in alliance with academic leaders, legislative and regulatory bodies, financial services firms, and consumer interest organizations, FPA is the community that fosters the value of financial planning and advances the financial planning profession. For more information on FPA®, visit www.fpanet.org.
Since 1983, NAPFA has provided fee-only financial planners across the country with some of the strictest guidelines possible for professional competency, comprehensive financial planning, and fee-only compensation. With more than 2,400 members across the country, NAPFA has become the leading professional association in the United States dedicated to the advancement of fee-only comprehensive financial planning. For more information on NAPFA, visit www.napfa.org.

I. Broker-Dealers and Investment Advisers Should Be Held to a Strong and Uniform Fiduciary Standard of Conduct

The Coalition believes that establishing a strong and uniform fiduciary standard of care, that is at least as stringent as the standard currently applied to investment advisers under the Investment Advisers Act of 1940 (Advisers Act), for all financial professionals who provide personalized investment advice to retail customers is among the most important investor protection initiatives the SEC can undertake. The suitability standard that currently applies to broker-dealers is ineffective in protecting investors receiving personalized investment advice. Moreover, investors do not understand the regulatory differences between broker-dealers and investment advisers or the standards of care that apply to each, and even more importantly, they expect to receive advice that is in their best interests.

The fiduciary standard that has been applied to investment advisers for decades is a well-established and workable standard of conduct that has served investors well. We strongly support the SEC in its efforts to establish a uniform fiduciary standard of conduct that is no less stringent than the standard currently applied to investment advisers. We believe the SEC, which has extensive experience and knowledge of broker-dealer and investment adviser business models, will establish a fiduciary standard of conduct that enhances investor protection while maintaining access to current products and services that are consistent with investors' best interests.

A. Suitability Standard Is Ineffective in Protecting Retail Customers

Under current law, investment advisers are held to a fiduciary standard of care, which requires that advice be provided in the client's best interest and that any conflicts of interest be fully disclosed and consented to by the client, while broker-dealers are held to a lower suitability standard, which requires that any recommendations be suitable for the client on the basis of the facts, if any, disclosed by the client concerning his or her other security holdings and as to his or her financial situation and needs.[2] Absent unusual facts, such as the existence of a fully discretionary account or a special relationship of trust and confidence between the client and the broker-dealer, the large majority of courts have held that a broker-dealer is not a fiduciary to its client.[3] Moreover, a number of cases have held that although a fiduciary would have been liable on the facts at issue, a broker-dealer was not liable because it was not acting as a fiduciary.[4]

This difference in the standards of care that apply to broker-dealers and investment advisers has real, practical effects on the advice retail customers receive. In a given situation, a broker might identify several different securities as being suitable for a retail customer, and would be free (without disclosure of this fact) to recommend the one that provides the highest compensation to the broker, even if the broker believes that other choices in fact would better meet the retail customer's financial situation and needs. The resulting higher costs and lower payouts from these types of suitable recommendations that are not in the retail customer's best interest and that do not involve full and fair disclosure of conflicts of interest can amount to lower returns (often amounting to tens of thousands of dollars or more) that middle Americans cannot afford.

[2] *See* NASD Rule 2310.

[3] *See, e.g.*, Lieb v. Merrill Lynch, 461 F. Supp. 951 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981); Fesseha v. TD Waterhouse Investor Servs., 305 A.D.2d 268, 268-69 (N.Y. App. Ct. 2003).

[4] *See* De Kwiatkowski v. Bear Stearns & Co., 306 F.3d 1293 (2d Cir. 2002) (collecting cases).

The elderly are particularly vulnerable when dealing with an investment professional who is not legally required to put their interests first. In a survey conducted by CFP Board in 2009 and 2010, nearly 60% of the 4,000 CFP® professionals who responded to the survey reported that they had a client or prospective client who had not received proper financial advice from another investment professional. Over 40% of those who responded indicated problems with individuals between 61 and 75 years old. Many examples involved the sales of annuity products to elderly clients that provided significant commissions to the investment professionals but were not in the best interests of the clients.

In comparison, an investment adviser cannot recommend an investment that he believes is inferior to other alternatives available for a retail customer. Additionally, to the extent the recommended product would provide higher compensation to the investment adviser, he would be required to disclose that conflict of interest fully and fairly to the customer. We believe it is critical that the retail customers of broker-dealers receive the same protections as those of investment advisers when broker-dealers are providing personalized investment advice. While suitability may be an effective standard in a sales environment, it falls short in an advice context where investors have a reasonable expectation that their investment professional is acting in their best interests.

B. Retail Customers Expect to Receive Advice in Their Best Interests

It is clear that retail customers do not understand and are confused by the current differences in standards applicable to broker-dealers and investment advisers when providing personalized investment advice. Moreover, retail customers reasonably expect that they will receive advice that is in their best interests. In September 2010, the Coalition, along with AARP, the Consumer Federation of America, the Investment Adviser Association, and the North American Securities Administrators Association, conducted a survey of 1,319 investors.[5] This survey confirmed that investors remain confused about the advice they receive.

- Retail investors do not understand the regulatory differences between broker-dealers and investment advisers, or the standards of care that apply to each.
- Most American investors mistakenly believe stockbrokers and insurance agents are required to act in the best interests of their clients.

We believe this confusion is understandable and a critical reason for the SEC to establish a strong and uniform fiduciary standard of care. Quite frankly, most retail customers do not have the sophistication, information, or access necessary to manage their own finances and instead rely on financial professionals to assist them in making these important financial decisions.

The survey also showed that retail investors overwhelmingly believe that all financial professionals who give personalized investment advice should be required to act in the best interests of their clients and disclose conflicts of interest. An almost unanimous 97% of investors agreed that a financial professional who provides investment advice should put the investor's interests ahead of the financial professional's

[5] Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, Denise Voigt Crawford, President, North American Securities Administrators Association, David G. Tittsworth, Executive Director, Investment Adviser Association, Kevin R. Keller, CEO, CFP Board, Marvin W. Tuttle, Jr., Executive Director/CEO, FPA, Ellen Turf, CEO, NAPFA, and David P. Sloane, Senior Vice President, Government Relations and Advocacy, AARP, to the Honorable Mary L. Schapiro, Chairman, SEC (Sept. 15, 2010), *available at* http://sec.gov/comments/4-606/4606-2748.pdf.

interests. A strong and uniform fiduciary standard of care for the delivery of personalized investment advice by broker-dealers and investment advisers will resolve ongoing investor confusion and meet investor expectations of fiduciary accountability.

C. The Clarifications in the Dodd-Frank Act Can and Should Be Interpreted Consistently with a Strong and Uniform Fiduciary Standard

We strongly support the recommendation in the SEC staff study that

> the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.[6]

This description of the fiduciary standard broker-dealers and investment advisers, however, is only the beginning of the analysis. Specifically, section 913(g) of the Dodd-Frank Act requires that the fiduciary standard "be no less stringent than the standard applicable to investment advisers under section 206(1) and (2) of" the Advisers Act.[7] We encourage the SEC to look to precedent under the Advisers Act for guidance as it develops a fiduciary standard applicable to broker-dealers. This is especially important to ensure any new, federal fiduciary standard is no less stringent than the Advisers Act standard. All of those provisions are consistent with the adoption of a strong and uniform fiduciary standard of care for retail customers.

- The uniform standard of care will only apply in connection with personalized investment advice.

  The principal limits on what constitutes personalized investment advice is that the information must include an opinion or analysis rather than simply relaying facts, and the advice must concern securities (e.g., as opposed to commodities or real estate). Advice is personalized if it reflects the personal circumstances of the customer. Under a fiduciary standard, consistent with the Dodd-Frank Act and the SEC staff study, broker-dealers and investment advisers will be able to prepare generalized research reports, target asset allocations, or electronic investment analysis tools without fear that those activities will give rise to fiduciary liability to everyone who reads those reports or uses those tools. Similarly, if a retail customer chooses to conduct only unsolicited trading at a firm, then the firm would not assume a fiduciary duty to advise the customer concerning that trading.

- Charging a retail customer on a commission basis, in and of itself, is not inconsistent with a strong and uniform fiduciary standard of care.

  The Dodd-Frank Act and the SEC staff study make it clear that a commission-based pricing model can be consistent with a fiduciary standard. However, to the extent a firm or investment professional chooses to use a commission-based pricing model, it must recognize that it creates

[6] STAFF OF THE SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS 110 (2011) [hereinafter 913 STUDY].
[7] Investment Advisers Act of 1940 § 211(g)(1), 15 U.S.C. 80b-11(g)(1).

inherent conflicts of interest that are not present in an asset-based pricing model. The firm or investment professional must disclose that potential conflict of interest to the customer before the beginning of the relationship and at regular intervals thereafter, and obtain fully informed consent to that model from the client. Moreover, the burden must remain on the firm and the investment professional, not the customer, to justify each and every transaction (and the sum total of the transactions) as consistent with the client's best interest. And, if the firm offers both commission-based and asset-based pricing models, the firm and the investment professional have the obligation to recommend to the retail customer the pricing model that is in the customer's best interest, and to monitor regularly to assure that the customer remains in the account structure that is in the customer's best interest.

- The provision of individualized investment advice does not necessarily create an ongoing duty of care to the retail customer.

  A customer may obtain one-time, "snap-shot" financial advice, without necessarily creating an obligation on the part of the investment professional to monitor the ongoing activity of the customer. However, if the customer and the investment professional agree to create an ongoing relationship involving investment advice, then the fiduciary standard must continue throughout the course of that relationship. As the SEC has long held, an investment adviser cannot provide personalized advice to a customer, and then take off the investment adviser "hat" and act as merely a broker when executing transactions for that client.[8] If an investment professional promises to provide ongoing services to a customer, then the investment professional must live up to that ongoing obligation, and all of those services must be subject to the strong and uniform fiduciary standard of care.

- The provision of a limited range of products, or of proprietary products, is not, in and of itself, necessarily inconsistent with a fiduciary standard of care.

  A fiduciary duty does not create an obligation to create "open architecture"; indeed, a thorough and prudent due diligence process before offering each new product necessarily means that a firm likely will choose not to offer some products or services. However, the decision to offer only a limited range of products, and particularly the decision to offer a proprietary product, does create a potential conflict of interest with the customer. As a result, the firm and the investment professional must make full and fair disclosure of this conflict of interest to the customer, and obtain the customer's fully informed consent, before offering the product in these circumstances.

* * *

There are many potential conflicts of interest that are not per se breaches of a fiduciary standard on their face. However, in each instance, the burden must be on the investment professional to demonstrate that he has fully satisfied his fiduciary duty, for example, by making full and fair disclosure even where that full and fair disclosure is not in the interest of the investment professional. None of these potential conflicts of interest excuses an investment professional from the basic obligation to act in the best

[8] *See* Marc N. Geman, Inv. Adv. Act Rel. No. 1924 (Feb. 14, 2001) (rejecting argument that investment adviser can use "dual hat" approach and act simply as a broker-dealer when executing client's transactions), *aff'd sub nom.* Geman v. SEC, 334 F.3d 1183 (10th Cir. 2003).

interests of his clients at all times. The fact that some potential conflicts of interest, in some circumstances, may be permissible, should not become a set of loopholes that undercuts the fundamental protections of a strong and uniform fiduciary standard.

D. Fiduciary Standard Requires More than Just Disclosure and Consent

We were pleased to see the SEC staff's statement that "[t]he fiduciary standard, because it would be 'no less stringent than' Advisers Action Sections 206(1) and 206(2), would ensure that the basic protections regarding conflicts of interest currently available under the Advisers Act would be preserved and would not be watered down."[9] It has been argued by some that compliance with a fiduciary standard is solely a matter of disclosure and consent concerning a firm's potential conflicts of interest. The Coalition disagrees, and fortunately, the SEC staff has previously rejected a disclosure only standard:

> We do not agree that "an investment adviser may have interests in a transaction and that his fiduciary obligation toward his client is discharged so long as the adviser makes complete disclosure of the nature and extent of his interest." While section 206(3) of the Investment Advisers Act of 1940 ("Act") requires disclosure of such interest and the client's consent to enter into the transaction with knowledge of such interest, the adviser's fiduciary duties are not discharged merely by such disclosure and consent. The adviser must have a reasonable belief that the entry of the client into the transaction is in the client's interest. The facts concerning the adviser's interest, including its level, may bear upon the reasonableness of any belief that he may have that a transaction is in a client's interest or his capacity to make such a judgment.[10]

Consent is only informed if the client has the ability fully to understand and evaluate the information. Many complex products may be appropriate only for sophisticated and experienced investors. It is not sufficient for a firm or an investment professional to make full disclosure of potential conflicts of interest with respect to such products. Rather, as the SEC staff study indicates, "it is the firm's responsibility—not the customers'—to reasonably ensure that any material conflicts are fully, fairly, and clearly disclosed so that investors may fully understand them."[11]

The fiduciary standard is not just a "disclosure and consent" process standard—it is a substantive standard that requires an investment professional to act consistently with the long-standing and well-established duty to act as a "prudent investor." It is well-established that an element of fiduciary duty under the Advisers Act is (as part of the duty of due care) a duty of due diligence to assure that the investment professional fully understands and has fairly evaluated an investment recommendation. Even with full and fair disclosure and consent, if an investment professional gives investment advice that is inconsistent with what a prudent investor would do in similar circumstances, then the investment professional has violated the fiduciary duty to the client to engage in fair dealing and provide disinterested advice. It is vitally important that the SEC include these substantive elements of the Advisers Act fiduciary standard as part of the fiduciary standard applied to broker-dealers who provide personalized investment advice.

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[9] 913 STUDY, *supra* note 6, at 117,
[10] Rocky Mountain Financial Planning, Inc. (pub. avail. Feb. 28, 1983).
[11] 913 STUDY, *supra* note 6, at 117.

E. Investors Would Maintain Access to Advice and Services Under a Strong and Uniform Fiduciary Standard

Some industry organizations have argued that requiring broker-dealers to operate as fiduciaries will raise costs and limit investors' access to products and services. For example, in October 2010, the Securities Industry and Financial Markets Association (SIFMA) conducted a study of its members "to assess the impact of significant changes to the existing standard of care for broker-dealers and investment advisors" (the Oliver Wyman Study).[12] The Oliver Wyman Study finds that "[w]holesale adoption of the Investment Advisers Act of 1940 for all brokerage activity" would restrict choice, reduce access to products, and increase the costs of advisory services.

While we agree that, because the differences between a fiduciary standard and a suitability standard are real and substantial, if broker-dealers do not adapt their business models, they will incur additional liabilities under a fiduciary standard, we do not believe that it therefore follows that a fiduciary standard will deprive retail customers of access to financial products or services. As we understand the Oliver Wyman Study, the principal findings are based on a scenario that would eliminate the broker-dealer exclusion from the Advisers Act and thereby make broker-dealers subject to the provisions of the Advisers Act. The SEC staff study does not recommend eliminating the broker-dealer exclusion; rather it recommends adoption of a uniform fiduciary standard of conduct. Because the Oliver Wyman Study is based on assumptions that are not recommended by the SEC, its findings do not constitute reliable evidence regarding the impact of requiring broker-dealers to operate at a fiduciary standard that is consistent with Dodd-Frank and the SEC staff study.

Application of a fiduciary standard will not restrict an investor's access to commission-based services. Nothing in the Advisers Act or the Dodd-Frank Act prevents investment advisers from charging commissions. In fact, as discussed below, a large number of financial planners currently receive commissions while providing fiduciary advice.

Nor will application of a fiduciary standard restrict retail customers' access to products or offerings that are made available on a principal basis or as proprietary products, such as corporate or municipal bonds or participation in public offerings. The Dodd-Frank Act makes clear that the provision of a limited range of products or of proprietary products is not, in and of itself, necessarily inconsistent with the fiduciary standard of care. The primary limitations should be that the sale of such products be in the customer's best interest, and appropriate disclosure be made to, and consent received from, the client.

Finally, we do not believe that application of a strong and uniform fiduciary standard would necessarily result in a substantial increase in costs to clients. Contrary to the assertions in the Oliver Wyman Study, neither the Dodd-Frank Act nor the SEC staff study would require a shift from commission-based to fee-based accounts. While there may be some modest increases in compliance costs, we believe that the benefits to clients will far outweigh any potential increased costs. Clients may receive cost savings from the enhanced duties required by the Advisers Act fiduciary standard. Additionally, clients will have greater clarity regarding the duties and obligations of financial professionals, will be better able to compare financial professionals, and will likely select a financial professional with fewer potential conflicts of interest. We believe that an appropriate analysis of the costs and benefits is necessary to

[12] SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION/OLIVER WYMAN, STANDARD OF CARE HARMONIZATION: IMPACT ASSESSMENT FOR SEC 3 (Oct. 2010).

determine the true impact on cost to the investor, and we support the SEC in its efforts to conduct a careful and thorough cost benefit analysis in support of its rulemaking under section 913.

F. Financial Planners Have Successfully Operated Under a Fiduciary Standard While Providing Brokerage Services

Some commentators have argued that the standard of care for firms providing personalized investment advice to retail customers should be modified to accommodate different business models. The SEC has been given latitude to adopt a standard as long as it is no less stringent than that of the Advisers Act. This is inviolable. Accommodation must not mean a weakened standard. As discussed above, the fiduciary standard already provides flexibility.

CFP Board and FPA are business model neutral. CERTIFIED FINANCIAL PLANNER™ professionals and FPA members operate in a variety of different business models, including brokerage, insurance, and advisory models, with a variety of fee structures, including commission-based, fee-only, and assets under management fee structures. [13] At the same time, CERTIFIED FINANCIAL PLANNER™ professionals and FPA members voluntarily embrace, by virtue of their CFP® certification or membership in FPA, a commitment to provide financial planning services (which include investment advice) at a fiduciary standard of care.

That commission-based financial professionals can operate successfully under a fiduciary standard is nothing new. Our tens of thousands of fiduciary financial professionals provide strong evidence that the fiduciary standard is a practical, flexible, and workable standard no matter if the financial professional providing investment advice is a broker, insurance agent, investment adviser, or financial planner. Contrary to some who suggest that requiring the fiduciary standard will hurt investors by increasing costs and reducing services, our experience is just the opposite: providing services with fiduciary accountability is good for investors and good for business. Moreover, permitting a modified or watered down version of the "fiduciary" standard to accommodate different business models would completely frustrate the interests of eliminating client confusion, closing regulatory gaps, and developing a strong and uniform fiduciary standard of care for the delivery of personalized investment advice—regardless of the legal registration of the investment professional.

In fact, earlier this year more than 5,400 financial planning professionals signed a petition urging the SEC to apply a fiduciary standard to anyone providing personalized investment advice to retail customers. The Coalition and thousands of financial planners across the nation believe that those who provide personalized investment advice to retail customers should be held to a strong and uniform fiduciary standard. Requiring financial professionals to act in their clients' best interests should help restore the confidence of millions of American investors in the securities markets and facilitate the needed return to the markets as the economy continues to recover.

[13] In contrast, NAPFA members operate only under a fee-only compensation model. The organization has required its members to sign the NAPFA Fiduciary Oath since the 1980s.

II. Authorization of a Self-Regulatory Organization Is Not the Solution to Increase Investment Adviser Examinations

Congress, in section 914 of the Dodd-Frank Act, recognized that the frequency with which investment advisers are examined is inadequate and required the SEC to conduct a study on enhancing investment adviser examinations. This study included a review and analysis of the need for enhanced examination and enforcement resources for investment advisers, including consideration of the frequency of examinations of investment advisers over the preceding five years, the extent to which authorizing a self-regulatory organization (SRO) would improve the frequency of examinations, and other approaches to examining investment advisers that are dually-registered as, or affiliated with, a broker-dealer.

We agree that the current frequency in which SEC-registered investment advisers are examined is inadequate and that a solution will be necessary in the coming years as the number of investment advisers registered with the SEC grows. However, authorizing the SEC to recognize an SRO for investment advisers, as proposed in the Discussion Draft of the Investment Adviser Oversight Act of 2011 (Discussion Draft), is not the solution to increase investment adviser examinations.

While properly governed SROs have a place in the U.S. securities regulatory scheme,[14] we do not believe an SRO is the solution to increase investment adviser examinations. Unlike broker-dealers, which have been regulated by SROs since the 1790s, the investment adviser industry has been directly regulated by the SEC for more than seventy years. When the SEC recommended to Congress that it adopt what became the Advisers Act, it made a conscious and informed decision that an SRO model—which the SEC and Congress had relied on only the year before for over-the-counter broker-dealers—would not be as effective for investment advisers.

We strongly believe the SEC (and the states), which has overseen investment advisers for over seventy years, is the appropriate regulator of investment advisers. The SEC has a substantial, professional, and experienced staff of investment adviser examiners. Additionally, the SEC staff is already fully conversant with the legal and regulatory issues pertaining to investment advisers. Leveraging these resources is the quickest and most effective way to enhance examinations of investment advisers. As the existing SEC oversight of investment advisers generally has been effective, we strongly urge Congress to provide the SEC with the resources necessary to enhance examinations of SEC-registered investment advisers rather than shift oversight to an SRO.

A. The Proposed SRO Does Not Address Inherent Problems Identified by the SEC in an SRO Model

While SROs can be effective, the inherent conflicts of interest present in a self-regulatory membership model have resulted in uneven effectiveness over the years. These are exemplified in a series of failures in SRO oversight, which include the conviction of NYSE President Richard Whitney for embezzlement

[14] The Coalition does not oppose SROs as a general matter. During the legislative process on the Dodd-Frank bill, the Coalition advocated that Congress establish federal regulation of financial planners by allowing the SEC to recognize a financial planner oversight board that would set professional standards for, and oversee the activities of, individual financial planners. This oversight board is distinctly different from an SRO and more-closely aligned with a PCAOB model. Additionally, the proposal is designed to fill a gap and regulate an unregulated profession.

in the 1930s;[15] the collapse of regulation at the American Stock Exchange detailed in the SEC's 1963 Special Study of the Securities Markets;[16] the SROs' failure to prevent the paperwork crisis of the late 1960s; Nasdaq's failure to prevent price-fixing among market-makers[17] and the collusion among the options exchanges to prevent multiple listing in the 1990s; the failure of the NYSE and regional exchanges to prevent off-floor trading by floor brokers[18] and trading ahead by specialists[19] early in this decade; and the failure by the NASD and Nasdaq to detect wash sales that benefitted those SROs in terms of market data revenues.[20]

These repeated problems, together with the conversion of many SROs to for-profit, shareholder-owned status, led the SEC to issue a Concept Release on SRO governance in 2004.[21] As the SEC recognized at that time, while SROs can be effective, they have inherent conflicts of interest that need to be addressed by carefully designed governance mechanisms. However, the SEC has not yet acted on the issues in that Concept Release by adopting rules to address proper SRO governance and oversight. As discussed below, the Discussion Draft does nothing to address the issues identified in the SEC's Concept Release.

B. The Proposed Investment Adviser SRO in the Discussion Draft Goes Far Beyond the Targeted Approach Needed to Increase Investment Adviser Examinations

Congress and the SEC have recognized a narrow problem facing oversight of investment advisers: namely, that the current frequency of examinations of SEC-registered investment advisers is inadequate and that a solution will be necessary in the coming years as the number of investment advisers registered with the SEC grows. The SEC staff study, which addresses a number of issues related to examinations of SEC-registered investment advisers, does not mention any problems related to the rules under or enforcement of the Advisers Act.[22] Additionally, the SEC staff study does not mention issues related to the examination resources of the states.[23] Yet, the proposed SRO would have jurisdiction over state-registered investment advisers; have broad rulemaking and enforcement authority; and implement an

[15] *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 156–79 (Aspen Pub. 3rd ed. 2003).
[16] *See id.* at 281–86.
[17] *See* In the Matter of National Association of Securities Dealers, Inc.; Exchange Act Release No. 37,538, August 8, 1996; Administrative Proceeding File No. 3-9056 ("21(a) Administrative Order"); Report and Appendix to Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and The Nasdaq Stock Market (August 8, 1996) and Exchange Act Release No. 37,538 (August 8, 1996) ("21(a) Report").
[18] New York Stock Exchange, Inc., Exchange Act Release No. 41,574 (June 29, 1999).
[19] New York Stock Exchange, Inc., Exchange Act Release No. 51,524 (Apr. 12, 2005).
[20] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 ("Exchange Act") Regarding The Nasdaq Stock Market, Inc. ("Nasdaq"), as Overseen By Its Parent, The National Association of Securities Dealers, Inc. ("NASD"), Exchange Act Release No. 51,163 (Feb. 9, 2003).
[21] *See* Exchange Act Release No. 50,700 (Nov. 18, 2004).
[22] In a separate study required under section 913 of the Dodd-Frank Act, the SEC staff recognized a number of differences in the rules that apply to broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. The staff recommended that the regulatory protections that apply to broker-dealers and investment advisers should be the same or substantially similar when performing the same or substantially similar functions. "[H]armonization should be considered to the extent that such harmonization appears likely to add meaningful investor protection." 913 STUDY, *supra* note 6, at 129.
[23] In fact, Congress determined in the Dodd-Frank Act that transferring oversight of mid-size investment advisers to the states was an appropriate and effective way of enhancing oversight of those investment advisers. Dodd-Frank Wall Street Reform and Consumer Protection Act § 410, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

additional layer of regulation and costs for investment advisers, which could particularly burden small businesses, without the benefit of a thorough cost-benefit analysis.

The proposed legislation to create an SRO for investment advisers directly impacts financial planners, most of whom provide investment advice to retail clients as SEC- or state-registered investment advisers. We do not believe this approach, which creates additional costs and an added layer of regulation, can be justified without conducting an appropriate and thorough analysis of the costs and benefits, which, at a minimum, should demonstrate that the proposed approach is the most efficient, cost-effective way to enhance protection of investment advisory clients. We urge the Committee to give particular consideration to the views of those, like us, who are most directly affected by this proposal.

Based on an initial review of the Discussion Draft, we have a number of initial concerns regarding the potential for an SRO for investment advisers, including but not limited to:

- The SRO would have jurisdiction over state-registered investment advisers. This would create an anomalous situation in which the SEC, which does not regulate state-registered advisers, would have oversight authority over an SRO that oversees state-registered advisers. This would impose an additional layer of regulation on state-registered advisers, with potentially conflicting rules and enforcement mechanisms between federal and state regulators.
- The SRO would have broad rulemaking and enforcement authority, yet neither Congress nor the SEC has recognized problems related to the SEC's ability to establish and enforce rules under the Advisers Act.
- The proposed rules of the SRO would not be subject to cost-benefit analysis or requirements under the Administrative Procedures Act.
- The SRO would not be required to be a transparent body, and would not be subject to the Freedom of Information Act (FOIA), the Sunshine Act, or other open government laws.
- The SRO is not required to provide its members with basic constitutional protections, such as due process rights.
- While the SEC has approval authority over the SRO's fees, there are no clear limits or restrictions on the structure or amount of fees, potentially creating an unlimited tax on investment advisers.

Creating a new layer of bureaucracy and cost in order to improve the frequency of investment adviser examinations is not the best use of limited regulatory resources. First, it does not necessarily reduce the SEC's need for additional resources. Under this proposal, the SEC would be required to oversee the newly created SRO, while retaining responsibility for most of the advisers with the highest risk profile. In addition, it would include additional infrastructure costs involved with creating an SRO oversight structure for investment advisers. Outsourcing oversight could result in inconsistent or redundant regulation and enforcement (as the SRO, the SEC, and the states interpret and enforce the relevant rules). Further, an SRO model would dilute accountability. Currently, depending on the size of the investment advisory firm, either state securities regulators or the SEC have the undivided responsibility for rulemaking, oversight, and enforcement for investment advisers. For the larger advisers, that means the SEC has exclusive jurisdiction and is accountable directly to the Congress (and thus to the general public). In contrast, an SRO is, to a significant extent, accountable to its members as well as the SEC.

Efforts to insulate SROs from inappropriate influence from their members cannot fully counteract the fundamental conflict of interest in a membership organization.[24]

Moreover, this approach may not solve the problem it seeks to address. Some have suggested that an SRO is necessary to prevent future Madoff Ponzi schemes. But the proposed investment adviser SRO will not necessarily prevent future fraud. Madoff conducted his scheme for over twenty years while operating a registered broker-dealer, subject to SRO oversight.[25] Congress and the SEC have already taken targeted steps to reduce the likelihood of future Madoff Ponzi schemes by amending the custody rules for broker-dealers and investment advisers and allowing the Public Company Accounting Oversight Board (PCAOB) to implement oversight of independent public accountants of broker-dealers. These approaches are designed to leverage third parties to audit the activities of broker-dealers and investment advisers without creating an additional layer of regulation.

It is not clear that an SRO will substantially enhance these protections, at least not to a degree that warrants changing 70 years of adviser oversight at a significant cost. We believe further Congressional and regulatory review can identify a targeted approach to address the narrow issue of inadequate examinations of SEC-registered investment advisers.

C. Supporting Enhanced SEC Oversight is the Most Appropriate Solution

We strongly believe the SEC (and the states) is the appropriate regulator of investment advisers. SEC regulation of investment advisers has generally been effective at protecting investors over the past seventy years. Compared to the broker-dealer community, the investment adviser area has had comparatively fewer problems.[26] We do not believe there is sufficient reason for a change in the policy of direct federal regulation that has largely been effective for such an extended period of time in favor of a costly outsourcing of investment adviser oversight.

Because the SEC has been the sole federal regulator of investment advisers, it has a substantial, professional, and experienced staff of investment adviser examiners already in place. These examiners are located in every one of the SEC's regional offices as well as its headquarters. This examination staff already works closely with the SEC's Division of Investment Management, which has primary responsibility for issuing regulations concerning investment advisers, and the SEC's Division of Enforcement, which has a dedicated asset management unit that focuses on investigations of investment advisers. The fact that all three groups are located within the SEC makes each of them more effective than if the examination function were moved to a separate organization.

We believe it would be much quicker and more efficient to leverage the SEC's existing investment adviser examination staff, which is already fully conversant with all of the legal and regulatory issues that pertain to investment advisers, than to create an entirely new SRO from scratch to oversee investment advisers. The SEC can provide for increased examinations by hiring new examiners in the

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[24] In contrast, the Coalition's proposed financial planner oversight board would not be a membership organization, which would limit potential conflicts of interest. *See supra* note 14.

[25] Bernard L. Madoff Investment Securities LLC did not register with the SEC as an investment adviser until 2006.

[26] There have been a number of repeated industry-wide scandals that have plagued the broker-dealer industry for at least the past twenty years (e.g., insider trading, penny stocks, limited partnerships, market-maker price-fixing, unsuitable mutual fund share classes, research conflicts of interest, auction rate securities, CDOs).

investment adviser area, which can be trained by existing experts on the SEC staff. The expansion of the SEC's existing investment adviser examination staff could start immediately. By contrast, an SRO would have to obtain funding; lease offices; build information technology systems; appoint officers and senior staff; propose and adopt rules (which would be subject to SEC approval); create internal policies and procedures; and then hire an entire line-level staff.

The Coalition strongly urges Congress to provide the SEC with the resources needed to enhance its current direct oversight of SEC-registered investment advisers and create a robust and effective examination and enforcement program for those investment advisers. Given that the SEC is funded through fees assessed on the industry, not through tax revenues, an increase in SEC funding would have no impact on taxpayers and no impact on the federal deficit. Nor would it hinder the formation of capital. Rather, it would enhance the SEC's ability to adequately police the securities markets, thereby increasing investors' confidence that they will be adequately protected.

D. Supporting Enhanced SEC Oversight Avoids Significant Concerns with FINRA Oversight

FINRA has suggested that it is capable of stepping in and taking responsibility for investment adviser oversight, and has discussed specific governance and advisory structures that it would put in place to oversee advisers. While we appreciate FINRA's recognition of some of the many issues that would need to be addressed to achieve appropriate self-regulatory oversight of investment advisers, we have serious concerns with the possibility of FINRA being designated as the SRO for advisers. FINRA is at its core a membership organization for broker-dealers, not investment advisers. We question whether a governance structure that is affiliated with FINRA would allow for the type of truly independent governance that will be critical to ensuring oversight that is not subject to conflicts of interest. Moreover, FINRA's experience is primarily with a rules-based approach designed for the oversight of salespeople, sales practices, products, and financial/operational concerns, as well as market integrity. It does not have any experience examining or enforcing the Advisers Act and, more generally, lacks experience interpreting and applying concepts of fiduciary duty and enforcing a principles-based fiduciary standard of care. This knowledge and experience is essential for the effective oversight of investment advisers.

III. The Gap in Financial Planner Regulation Should Be Considered and Addressed Going Forward

Another issue of importance to the regulation of broker-dealers and investment advisers is the oversight of financial planners. Section 919C of the Dodd-Frank Act required the GAO to study whether there are any gaps in the regulation of financial planners and make recommendations to fill any recognized gaps. The GAO submitted its report, titled "Regulatory Coverage Exists for Financial Planners, but Consumer Protection Issues Remain," on January 18, 2011.

The Coalition appreciates the time and effort GAO staff spent in developing its report, and recognizes the short time frame under which they were required to operate. The GAO report recognizes many of the same regulatory gaps and consumer protection issues that have long concerned financial planners. While the GAO's judgment was that given the data available, another layer of regulation is not necessary at this time, we continue to believe regulation of financial planning is necessary to address the regulatory gaps and consumer protection issues that remain. We are committed to continuing to build

the case for regulatory recognition of this emerging profession while at the same time working with Congress, regulatory agencies, and industry to address these issues.

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March 19, 2010

The Honorable Carolyn McCarthy
2346 Rayburn HOB
House of Representatives
Washington, D.C. 20515-3204

Dear Representative McCarthy:

Thank you for your January 20, 2010 letter regarding the Wall Street Reform and Consumer Protection Act of 2009. The North American Securities Administrators Association ("NASAA") welcomes the opportunity to engage with you and other Members of Congress on these important financial regulatory reform proposals.

Your letter focuses on important questions related to state supervision of investment advisers and, more particularly, the states' abilities to handle the oversight of advisers with assets under management ("AUM") in the $25 million to $100 million range. Currently, state regulators devote significant resources to investment adviser regulation and will take the appropriate steps to maintain their exemplary track record in this area should the AUM threshold be increased to $100 million.

Although the specifics regarding individual and aggregate state resources are set forth below in response to your individual questions, the fact is that the states today collectively devote significantly more examination resources than the Securities and Exchange Commission ("SEC") devotes nationally to the examination of advisers under its jurisdiction. As the SEC concedes, it is unable to timely and effectively examine the 4,000 smaller advisory firms in the $25 million to $100 million AUM range in light of the demands associated with examining the 7,000 larger advisory firms with billions of dollars under management and higher risk. Rightly or wrongly, the SEC has made the decision to focus its attention and examination resources on the larger firms. States welcome and are singularly qualified to accept responsibility over the smaller firms.

To see the complete picture of investment adviser regulation it is critical to understand that securities regulation involves much more than resources. Real dollars and bodies are necessary to be sure, but to be truly effective, the securities regulator must put those resources to good use. No one has a stronger presence, better track record or reputation, or is as familiar with and accountable to the industry and public they serve than state securities regulators when it comes to investment adviser regulation:

- Presence – States have significantly greater geographic distribution and proximity to the industries and constituents they serve than their federal counterpart and any applicable self-regulatory organization. Whereas the SEC's presence is concentrated in its Washington, D.C. headquarters and regional offices spread unevenly in ten states, state regulators have offices in all fifty states to respond immediately to the needs of advisers and investors in their locale. Clearly the presence and capacity of state regulators is unmatched.

- Performance – According to the SEC's 2008 Annual Report, the SEC examines approximately 10 percent of the more than 11,000 firms they regulate each year. As alluded to above, the SEC focuses on a small minority of advisers (10-15 percent) it deems high-risk, seeking to examine these firms at least once every three years. The remaining majority (85-90 percent) of advisers deemed low or moderate risk is subject to random sampling with a goal of exam every 5 to 14 years. States, on the other hand, currently have nearly 3,000 more advisory firms than the SEC and collectively perform examinations of approximately 30 percent of all of their firms every year.

- Familiarity – States know their advisers and their investors better than any federal regulator or self-regulatory organization ever could. Regional demographics, income levels, local economy, education levels, and local affinity groups would not be readily discernible to a regulator whose focus is a larger multi-state or even national territory.

- Accountability – Many state securities commissions are located in agencies headed by local elected officials. Investors and their investment advisers, therefore, are not just investors and advisers, they are constituents. There is little barrier, whether geographic or bureaucratic, between the agency and the grass-roots investor or the adviser. This increased local accountability creates a heightened duty of responsiveness, attentiveness, and commitment on the part of the local regulator to even the smallest advisory firm or the solitary customer. As a result, state regulators are regarded as the "local securities cop on the beat" who promptly respond to all calls from investors, including those matters of lesser magnitude that historically failed to meet SEC and federal thresholds.

- Reputation – Whether justified or not, recent criticisms have impaired the credibility of both the SEC and the Financial Industry Regulatory Authority ("FINRA") and underscore the need for independent, reputable state regulation. It has been lost on no one that both the SEC and FINRA are scrambling to overhaul their processes after failing to detect the massive Madoff and Stanford frauds that resulted in billions of investor losses. Meanwhile, state securities regulators are being lauded, in the Madoff Congressional hearings and recent hearings by the Financial Crisis Inquiry Commission for their success in investigations and examinations – the mutual fund and auction-rate securities cases being just two recent examples. As we all recognize that rebuilding

> investors' faith in our securities markets is the key to emerging from this financial crisis, no regulator is better suited to leading the charge than those found in the states.

While the foregoing illustrates NASAA's view of the critical role that state regulation plays, NASAA understands the need for concrete qualitative data. Below is NASAA's attempt to provide that data by answering the questions presented in your letter.

Please note that NASAA, through the work of its Investment Adviser Section, has expended considerable effort over the course of the past year gathering specific data on state regulation of investment advisers. While the data is extensive, NASAA does not have access to all of the data requested in your letter and is not authorized to release all of the data it has or otherwise provide an official individual response for all states. To the extent that NASAA does have information responsive to your request and has been authorized to release it, we have included that information in the attached charts. We would be happy to assist you in obtaining state specific information that is not included in the attachments.

- *Do all states have on-site examination programs in place for state registered advisory firms? (please provide on a state by state basis).*

Generally, state securities regulators employ two methods of examining investment advisers: desk reviews and on-site reviews. A state may use these tools in combination or may primarily rely on one form of review over another. Desk reviews involve a review of all registration forms for the adviser (primarily the Form ADV) and any individuals (primarily the Form U4) who will also register with the state as a representative of the adviser. An examiner undertaking a desk review of an adviser evaluates the comprehensive information about an adviser and its business as described on the ADV. Some of the items subject to review include disclosure history of the individuals, the business practices of the adviser including the provisions in client contracts, and potential conflicts of interest.

If the examiner has any concerns or questions the examiner will address those to the applicant until such time as the applicant answers the concerns to the satisfaction of the examiner. States may also require annual questionnaires to supplement the information on the ADV and as a tool to monitor adviser activity. The average time spent on desk reviews varies greatly due in large part to how long it takes a registrant to supply requested material.

On-site reviews are inspections of advisers by state examiners at the adviser's place of business and are generally preceded by a desk exam. Depending on the size of the adviser and types of business it conducts, these reviews generally take one to two weeks including the time spent on preparing for the review, conducting the review, and preparing the review report.

NASAA is currently aware of two states that conduct neither desk nor on-site reviews at this time. These two states are Wyoming and New York. Wyoming does not have the statutory authority to regulate investment advisers.[1] New York registers investment advisers and regulates those entities primarily through the work of its investigatory and enforcement staff rather than through a standalone examination program. As has been made clear throughout the many Congressional hearings debating financial reform proposals, the New York Securities Bureau which is part of the New York Attorney General's office is repeatedly lauded for its oversight of the securities industry and it would be unfortunate if federal action diminished the state's regulatory authority. State-specific data on investment adviser examinations that NASAA is authorized to release is set forth in the attached chart.[2]

- *How many investment advisor firms are currently registered at the state level, and how many do you expect to have registered if the threshold is raised to $100 million in assets under management? (please provide on a state by state basis)*

As of March 1, 2010, there were 14,379 investment adviser firms registered at the state level. Based on a report generated on May 20, 2009, states should expect that number to increase by approximately 4,000 if the AUM threshold is raised to $100 million. A copy of that report is attached hereto.

- *How many examiners are currently staffed at each of the 50 state securities regulators, and do you have plans to increase the examination force if the federal registrant threshold is raised?*

NASAA has limited data regarding the precise number of employees contributing to or responsible for examinations performed by each state. Based on prior surveys conducted by NASAA we are aware of more than 200 dedicated state examiners conducting investment adviser reviews and field exams. It is important to note that this is just a fraction of the resources committed by the states as many if not most perform exams with staff that they do not consider dedicated to advisory examination. These staff members perform and have significant expertise in other substantive duties in the area of industry regulation, another factor that positively distinguishes state from federal regulation. Nonetheless, NASAA would expect many states to increase staffing in the event the AUM threshold is increased to $100 million. Texas, for example, is expected to receive funding from the legislature for additional examiners if the AUM threshold is raised to $100 million.

- *With the current strain on many state budgets, how do your members anticipate funding the increased workload?*

[1] Investment advisers in Wyoming register and are regulated by the SEC. According to data available on the SEC's website, there are 31 advisers in Wyoming.
[2] A state's omission from the chart is not an indication that the state does not conduct IA exams.

Not every state will experience a material increase in their workloads that would precipitate the need for resources to examine the firms transitioning from the SEC. As you can see from the attached chart, some states will see very few firms added to their roster while other states will experience more significant adjustments. Indeed, it is believed that at least 21 states could adhere to a five year or less examination cycle today without hiring a single additional examiner.

A five year or less cycle is considered by many states to be the "gold standard" for conducting state advisory exams and would represent a dramatic improvement in the frequency with which these advisory firms are currently examined by the SEC. As noted above, it is the SEC's goal to examine investment advisers in the $25 million to $100 million range at least once every 5 to 14 years. NASAA would anticipate that virtually all states could improve upon the 5 to 14 year cycle pursued by the SEC by hiring few or no additional resources. Many states would still desire and likely seek additional examiners to retain a more aggressive cycle that would more fully serve their investor protection mandates.

Many, if not most state securities divisions, do not rely on state revenue or other forms of public funding to support their operations. Such divisions are self-funded through licensing and registration fees collected from the securities industry. These securities regulators generally do not experience the same budget strains encountered by other general revenue funded agencies. That said, state regulators have a long history of leveraging resources and developing innovative ways in which to protect investors. The numerous multi-state enforcement actions are but one example of a cooperative effort on the part of the states to address misconduct in the securities industry. In regard to the examination of investment advisers, the states recently entered into a Memorandum of Understanding promulgated by NASAA that will allow states to conduct joint examinations and otherwise share resources to ensure timely review of state advisory firms. In addition, NASAA will continue to actively support state administrators' requests for additional resources where needed such as specialized training through distance education programs and the development of new examination tools.

- *How many of the state regulator agencies have reduced budgets for the upcoming fiscal year?*

NASAA does not have the data necessary to answer this question, but would reiterate its contention that many state securities regulators have not experienced the same budget strains as general revenue funded agencies. The states will distribute the resources made available to them as needed to ensure an appropriate exam schedule under their provided budgets.

- *Is there a central database where individuals may find the examination and enforcement process for each state, as well as yearly results and action taken against an investment advisor firm?*

General examination and enforcement procedures are contained in state rules and statutes which are available on state websites. Examination findings, whether state or federal, are generally confidential, unless they lead to an enforcement action. State enforcement actions are publicly reportable and available to the public through state open records laws and the Investment Adviser Public Disclosure system ("IAPD"). This system, which is available to the public on the SEC's website, contains regulatory disclosures and other important information on state and SEC registered investment advisers. As a result of an initiative by state securities regulators, I am pleased to report that in the coming months the scope of IAPD will be expanded to include individual investment adviser representatives. The information made available to the public on the backgrounds of individual investment adviser representatives will exceed the information currently provided through BrokerCheck for stock brokers.

Thank you again for your inquiry regarding state regulation of investment advisers. Please do not hesitate to contact Joseph Brady in the NASAA Corporate Office at 202-737-0900 should you have any questions about the information in this letter or the attached charts.

Sincerely,

Denise Voigt Crawford

Denise Voigt Crawford
NASAA President
Texas Securities Commissioner

Attachments

State:	*Exams*
Alabama	onsite
Alaska	onsite
Arizona	onsite
Arkansas	onsite
Colorado	onsite plus desk
Connecticut	onsite
Delaware	onsite
District of Columbia	onsite
Florida	onsite
Georgia	desktop
Hawaii	onsite
Idaho	onsite
Indiana	onsite
Iowa	onsite
Kansas	onsite
Kentucky	onsite
Louisiana	onsite
Maine	onsite
Maryland	onsite
Massachusetts	onsite
Michigan	desktop
Minnesota	desktop
Mississippi	onsite
Missouri	onsite
Montana	onsite
Nebraska	onsite
Nevada	onsite
New Hampshire	onsite
New Jersey	onsite
New Mexico	onsite
New York	none
North Carolina	onsite
North Dakota	onsite
Ohio	onsite
Oklahoma	onsite
Oregon	onsite
Pennsylvania	onsite
Rhode Island	onsite
South Carolina	onsite
South Dakota	desktop + occ. onsite
Texas	onsite
Utah	onsite
Vermont	onsite
Virginia	onsite
Washington	onsite
West Virginia	desktop
Wisconsin	onsite
Wyoming	none

no info for CA, & Illinois

State-by-State IA Registration Numbers

As of May 20, 2009

State of Domicile	State Registered Firms	Additional # up to 100M
AK	17	3
AL	74	37
AR	53	18
AZ	303	67
CA	2661	593
CO	582	124
CT	347	133
DC	24	11
DE	32	16
FL	788	233
GA	445	91
HI	37	13
IA	89	25
ID	58	16
IL	616	165
IN	209	47
KS	119	42
KY	92	15
LA	91	21
MA	611	165
MD	410	91
ME	66	17
MI	390	105
MN	250	70
MO	211	66
MS	35	7
MT	38	8
NC	324	89
ND	17	4
NE	45	29
NH	128	34
NJ	543	119
NM	52	18
NV	119	27
NY	804	350
OH	518	135
OK	114	33
OR	128	68
PA	573	138
PR	3	2
RI	49	18
SC	73	49
SD	17	4
TN	153	60
TX	988	268
UT	132	47
VA	368	122
VI	6	0
VT	43	10
WA	382	104
WI	199	58

State of Domicile	State Registered Firms	Additional # up to 100M
WV	11	5
Totals	14437	3990
		This column reflects the additional number of IA firms for each state with an AUM threshold of $100 million.

NEW DEMS New Democrat Coalition

Rep. Joseph Crowley, Chair
Rep. Jim Himes, Vice-Chair
Rep. Ron Kind, Vice-Chair
Rep. Rick Larsen, Vice-Chair
Rep. Allyson Schwartz, Vice-Chair

May 10, 2011

The Honorable Hilda Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Mary L. Schapiro
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

The Honorable Gary Gensler
Chairman
U.S. Commodity Futures Trading Commission
1155 21st Street, NW
Washington DC 20581

Dear Secretary Solis and Chairmen Schapiro and Gensler:

As members of the New Democrat Coalition, we are writing today with respect to the Department of Labor's proposal to redefine the term "fiduciary" for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and for purposes of certain Internal Revenue Code provisions affecting IRAs and similar arrangements.

During debate of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the New Democrat Coalition played a critical role in advocating for an approach that would reduce systemic risk and increase transparency and certainty in our markets. Given our work, we understand and appreciate the Department's desire to update the definition of a fiduciary in a way that is broad enough to protect the interests of retirement plan participants and sponsors seeking investment advice. While the proposed rule is intended to protect employee participants and plan sponsors from unfair and deceptive practices, we are concerned that it would have an adverse effect; ultimately limiting access to investment education and information. This would result in worse investment decisions by participants and would, in turn, increase the costs of investment products, services, and advice that are absolutely critical parts of a sound investment strategy for consumers.

We also feel strongly that these changes should be made in consultation and coordination with all the relevant regulators to avoid duplicative or contradictory guidelines governing investment in U.S. markets. A coordinated regulatory approach among the agencies will provide clarity and certainty both to investors and to advisers.

Given the complexity and importance of this issue, over 200 written submissions have been made regarding the proposed rule, in addition to those made at the Department's public

hearing. We understand the Department is considering modifications. In order to consider fully these comments and to provide more transparency and certainty to the rulemaking process, we urge the Department to provide the public with an opportunity to review these modifications through a re-proposed rule.

We appreciate the Department's leadership on this issue. We look forward to working with you in coordination with other agencies to create a balanced approach that protects plan participants and sponsors while ensuring continued access to investment education, information, and affordable investment products and services.

Sincerely,

Carolyn McCarthy
Carolyn McCarthy
Member of Congress

Rush Holt
Rush Holt
Member of Congress

Joseph Crowley
Member of Congress

Ron Kind
Ron Kind
Member of Congress

Jason Altmire
Jason Altmire
Member of Congress

Jim Himes
Member of Congress

Allyson Y. Schwartz
Allyson Schwartz
Member of Congress

John Barrow
Member of Congress

Shelley Berkley
Shelley Berkley
Member of Congress

Russ Carnahan
Russ Carnahan
Member of Congress

John Carney
Member of Congress

Gerry Connolly
Member of Congress

Martin Heinrich
Member of Congress

Gregory Meeks
Member of Congress

Chris Murphy
Member of Congress

Ed Perlmutter
Member of Congress

Pedro Pierluisi
Member of Congress

Laura Richardson
Member of Congress

André Carson
Member of Congress

Joe Courtney
Member of Congress

Rick Larsen
Member of Congress

Jim Moran
Member of Congress

Bill Owens
Member of Congress

Gary Peters
Member of Congress

Jared Polis
Member of Congress

Cedric Richmond
Member of Congress

David Scott
Member of Congress

Terri Sewell
Member of Congress

David Wu
Member of Congress

CC: Director Jack Lew, Office of Management and Budget

Exposing Corruption Exploring Solutions
Project On Government Oversight

September 13, 2011

House Committee on Financial Services
Subcommittee on Capital Markets and Government Sponsored Enterprises
2129 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Garrett and Ranking Member Waters:

We appreciate your leadership in considering possible reforms to the existing regulatory regime for investment advisers, especially in the aftermath of a financial crisis that continues to wreak havoc on retail investors across the nation. However, we are writing today to raise concerns about recently proposed reforms that would potentially delegate governmental authority to an industry-funded self-regulatory organization for the investment adviser industry.

We urge the Subcommittee to closely examine recent trends at the Financial Industry Regulatory Authority (FINRA)—the self-regulatory group for the broker-dealer industry—before deciding to give FINRA or a new self-regulatory organization (SRO) any authority to examine investment advisers.

The Project On Government Oversight (POGO) is a nonpartisan independent watchdog that champions good government reforms. As such, POGO believes that industry regulation is most effective when carried out by a governmental agency that is transparent, independent, ethical, and accountable. In addition, POGO's investigations have raised serious concerns about FINRA with respect to its inherent conflicts of interest, its weak enforcement record, the relationship between its senior officials and large broker-dealers, its lack of transparency and accountability, its advertising and lobbying expenditures, and its executive compensation practices, among other issues. For these reasons, we oppose expanding SRO oversight for the investment adviser industry.

Problems with the SRO model

Last week, House Financial Services Committee Chairman Spencer Bachus (R-AL) released a discussion draft of legislation that would require most registered investment advisers to become a member of a self-regulatory national investment adviser association.[1] However, we strongly

[1] Discussion Draft of the "Investment Adviser Oversight Act of 2011."
http://financialservices.house.gov/UploadedFiles/BACHUS_017_xml.pdf (Downloaded September 12, 2011) (hereinafter "Investment Adviser Oversight Act of 2011")

urge you to examine the many potential drawbacks of a self-regulatory framework for investment advisers and other financial firms.

Two recent studies required by the Dodd-Frank Wall Street Reform and Consumer Protection Act—one by the SEC Division of Investment Management, the other by the Boston Consulting Group—identified a number of serious problems with the SRO model. The SEC's study pointed out that "[o]verseeing an SRO requires substantial resources," even though "[t]here is no certainty that the level of resources available to the Commission over time would be adequate to enable staff to effectively oversee the activities of the SRO."[2] Although SROs are typically funded by fees imposed on their members, SEC resources would still be required for "conducting oversight examinations of the SRO, considering appeals from sanctions imposed by the SRO, and approving SRO fee and rule changes."[3] There is also a serious threat of industry capture, under both a single-SRO and multiple-SRO framework:

> Multiple SROs could focus expertise and better accommodate industry diversity, but also could more likely lead to SRO "capture" by the discrete industry group from which SRO staff are drawn and to which they may return after their service. Even a single SRO, because it is not only funded by the industry it oversees, but also may include industry representatives in its governance structure or otherwise have a different relationship with industry than an independent government regulatory agency, could possibly have enhanced susceptibility to industry capture.[4]

The Boston Consulting Group's study also identified many common critiques of the SRO model, all of which could potentially apply to an investment adviser SRO. "The most fundamental critique," according to the study, "is that self-regulation is not real regulation at all: at best, self-regulation is less effective than government regulation, and at worst, is merely an 'illusion' meant to deflect calls for government oversight."[5] Another criticism is that "SROs govern with only limited democratic accountability: besides their respective boards of directors, SRO leadership answers only to the SEC, meaning that investors and other market participants have, at best, indirect democratic means for effecting regulatory change."[6]

Problems with FINRA

In addition to the numerous theoretical problems with the SRO model, POGO has raised the following specific concerns with respect to FINRA.[7]

[2] Securities and Exchange Commission, Staff of the Division of Investment Management, *Study on Enhancing Investment Adviser Examinations*, January 2011, p. 28. http://www.sec.gov/news/studies/2011/914studyfinal.pdf (Downloaded September 12, 2011) (hereinafter "SEC Study")
[3] SEC Study, p. 30
[4] SEC Study, p. 33
[5] Boston Consulting Group, *U.S. Securities and Exchange Commission: Organizational Study and Reform*, March 10, 2011, p. 25. http://www.sec.gov/news/studies/2011/967study.pdf (Downloaded September 12, 2011) (hereinafter "BCG Study")
[6] BCG Study, p. 25
[7] Letter from Danielle Brian, Executive Director, Project On Government Oversight, to various Congressional Committees calling for increased oversight of financial self-regulators, February 23, 2010. http://www.pogo.org/pogo-files/letters/financial-oversight/er-fra-20100223-2.html

Inherent conflict of mission

FINRA's practice of collecting fees from its member firms and investing in the securities industry raises concerns about an inherent conflict of mission. It is hard to imagine FINRA ever taking an enforcement action that would jeopardize the financial well-being of a firm that FINRA relies on for its funding and investments. POGO believes that FINRA's inherently conflicted self-funding model has contributed to many of the problems described below.

Weak enforcement record

A lawsuit recently filed by one of FINRA's smaller member firms alleged that the self-regulatory group failed to adequately oversee and regulate many of the larger member firms such as Bear Stearns, Lehman Brothers, Merrill Lynch, Madoff Investment Securities, and Stanford Financial Group. The complaint stated that "FINRA knew or should have known about the fraud being perpetrated by several of its most influential members, but there is nothing in the public record to indicate that FINRA conducted any oversight of these now-failed malefactors or their senior executives."[8]

Even an internal review conducted by FINRA found that the organization missed several key opportunities to detect and crack down on Allen Stanford's $7.2 billion Ponzi scheme.[9] And while FINRA officials have denied any wrongdoing in the failure to detect Bernard Madoff's Ponzi scheme, securities law scholar John Coffee has testified before Congress that "Madoff's brokerage business was by definition within...FINRA's jurisdiction."[10]

Furthermore, an investigation by *The Wall Street Journal* demonstrated that FINRA and its predecessor NASD (the National Association of Securities Dealers), under the leadership of current SEC Chairman Mary Schapiro, had a decidedly light touch when it came to regulation and enforcement, with significant declines in disciplinary fines assessed, individuals barred, and firms expelled during her time at the organization.[11] Although some enforcement trends have picked up over the past two years,[12] FINRA's track record leading up to the 2008 financial crisis should raise serious concerns about the ability of any SRO to protect U.S. financial markets from the next crisis.

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[8] *Amerivet Securities, Incorporated v. FINRA*, No. 09-cv-1715 (D.D.C.). August 10, 2009.
[9] *Report of the 2009 Special Review Committee on FINRA's Examination Program in Light of the Stanford and Madoff Schemes*, September 2009. http://www.finra.org/AboutFINRA/Leadership/Committees/P120076 (Downloaded September 10, 2011)
[10] Testimony of John C. Coffee, Jr., before the Senate Committee on Banking, Housing, and Urban Affairs, January 27, 2009. http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=d3f6706f-2d65-4fad-a349-d839e04149e9 (Downloaded September 10, 2011)
[11] Randall Smith, Tom McGinty, and Kara Scannell, "Obama's Pick to Head SEC Has Record Of Being a Regulator With a Light Touch," *The Wall Street Journal*, January 15, 2009. http://online.wsj.com/article/SB123194123553080959.html (Downloaded September 10, 2011)
[12] Financial Industry Regulatory Authority, "FINRA Statistics," September 1, 2011. http://www.finra.org/Newsroom/Statistics (Downloaded September 12, 2011); and Letter from Richard Ketchum, Chairman and CEO, Financial Industry Regulatory Authority, to Danielle Brian, Executive Director, Project On Government Oversight, regarding transparency and accountability reforms, February 16, 2011. http://pogoarchives.org/m/fo/finra-response-20110216.pdf (hereinafter "Ketchum Letter")

To be sure, the SEC also failed to crack down on the widespread trading abuses in the brokerage industry leading up to the financial crisis, and missed several key opportunities to pursue enforcement action against Madoff and Stanford. However, the SEC's failures have been extensively documented through independent reviews by Congress and the SEC Office of Inspector General,[13] and the SEC has responded by initiating several key reforms to improve its operations, such as revamping its handling of tips and complaints, recruiting more staff with specialized expertise, implementing an improved whistleblower award program, and making widespread reforms to its enforcement and examination practices.[14] Meanwhile, FINRA has not been held accountable for its examination and enforcement failures, and there is no indication that the organization has implemented any comparable reforms to improve its operations.

Lack of transparency and accountability

Earlier this year, POGO sent a letter to FINRA criticizing the decision by the organization's Board of Governors to reject a proposal seeking transcripts from Board meetings.[15]

In a notice sent to FINRA's members, the Board explained that it objects to providing transcripts of its meetings because:

- The Board already communicates to FINRA's members through notices, an Annual Financial Report, and other means;
- The Board does not currently transcribe its meetings;
- Transcribing meetings could stifle candid deliberations among Board members;
- The proposal makes no exceptions to protect against the release of sensitive or proprietary information; and

[13] Securities and Exchange Commission, Office of Inspector General, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme* (Report No. OIG-509), August 31, 2009. http://www.sec.gov/news/studies/2009/oig-509.pdf (Downloaded September 12, 2011); and Securities and Exchange Commission, Office of Inspector General, *Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme* (Report No. OIG-526), March 31, 2010. http://www.sec.gov/news/studies/2010/oig-526.pdf (Downloaded September 9, 2010)
[14] Securities and Exchange Commission, "The Securities and Exchange Commission Post-Madoff Reforms," http://www.sec.gov/spotlight/secpostmadoffreforms.htm. (Downloaded September 12, 2011); and Testimony of SEC Chairman Mary Schapiro before the Senate Subcommittee on Financial Services and General Government, Committee on Appropriations regarding the President's FY 2012 Budget Request for the SEC, May 4, 2011. http://www.sec.gov/news/testimony/2011/ts050411mls.htm (Downloaded September 12, 2011)
[15] In fact, there were seven transparency and accountability proposals approved by FINRA's members, most of which were rejected by FINRA's Board. The proposals called on FINRA to: 1) disclose in each annual report the compensation approved for the most highly paid FINRA employees and the amount paid to compensation consultants; 2) provide an independent study on the ties between FINRA and Bernie Madoff; 3) disclose more information on FINRA's investment transactions, policies and practices; 4) provide transcripts of FINRA's Board meetings; 5) give FINRA members a non-binding "say on pay" for the five most highly compensated FINRA employees; 6) employ an independent private-sector inspector general to oversee FINRA's performance; and 7) disclose FINRA's correspondence with the IRS concerning the regulatory merger that led to FINRA's creation. Letter from Danielle Brian, Executive Director, Project On Government Oversight, to Richard Ketchum, Chairman and CEO, Financial Industry Regulatory Authority, December 8, 2010. http://www.pogo.org/pogo-files/letters/financial-oversight/fo-fra-20101208.html

- The Board is not aware of any corporation that transcribes and publishes transcripts of board meetings.[16]

Many of these objections simply do not hold up to scrutiny. Annual financial reports, notices, and other means of limited communication are no substitute for full transcripts of Board meetings. And the fact that FINRA's Board does not transcribe its meetings is itself troubling. Many federal advisory committees with far less responsibility post transcripts from their open meetings, in addition to briefing materials, slides, agendas, conflict-of-interest waivers, recusal statements, and more.[17] We see no reason FINRA's Board could not do the same. In addition, a rule could easily be proposed allowing FINRA to close any portion of a Board meeting that would reveal preliminary deliberations or confidential information. Such provisions are a common feature in the rules governing open meetings at government agencies.[18]

In a response letter, FINRA Chairman and CEO Richard Ketchum identified numerous measures FINRA has taken to make its operations transparent, including publishing rulemaking items and Board decisions on its website, disclosing compensation details for its 10 most highly compensated employees, publishing the names of the money management firms it hires to manage its portfolio, and publishing an annual financial statement on its website.[19]

Nonetheless, we believe these measures do not provide sufficient transparency or accountability for an organization with such significant oversight authority. In fact, POGO believes there should be not only transcripts, but also open public access to board meetings at FINRA or any other self-regulatory group. Making SRO board meetings open to the public would give members, investors, taxpayers, and other stakeholders a much-needed glimpse into the organization's affairs.

In addition, POGO has concerns about the public's ability to obtain records pertaining to the SEC's oversight of FINRA, especially in light of the SEC's FOIA practices. In September 2010, POGO's Angela Canterbury testified before the House Financial Services Committee about a Dodd-Frank provision supported by the SEC that would have greatly expanded the agency's authority to withhold key records from the public. Among other things, POGO raised concerns that the SEC has been abusing FOIA Exemption 8, an exemption that is widely considered to be overly broad.[20]

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[16] Financial Industry Regulatory Authority, "Election Notice: Notice of Annual Meeting of FINRA Firms and Proxy," July 12, 2010. http://www.finra.org/Industry/Regulation/Notices/2010/P121716 (Downloaded September 12, 2011)
[17] Food and Drug Administration, Advisory Committees, "Committees & Meeting Materials." http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/default.htm (Downloaded September 12, 2011); and Securities and Exchange Commission, "SEC Investor Advisory Committee." http://www.sec.gov/spotlight/investoradvisorycommittee.shtml (Downloaded September 12, 2011)
[18] 94th Congress, "Government in the Sunshine Act" (5 U.S.C. § 552b(c)). http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc5.wais&start=390059&SIZE=22647&TYPE=PDF (Downloaded September 12, 2011); and Securities and Exchange Commission, "Closed Meetings," 17 CFR Part 200.402. http://edocket.access.gpo.gov/cfr_2010/aprqtr/pdf/17cfr200.402.pdf (Downloaded September 12, 2011)
[19] Ketchum Letter
[20] Testimony of Angela Canterbury, Director of Public Policy, Project On Government Oversight, before the House Committee on Financial Services regarding "Legislative Proposals to Address Concerns Over the SEC's New

It was recently revealed that the SEC is now using Exemption 8—which is supposed to protect against the release of matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions"[21]—to withhold records concerning the SEC's oversight of FINRA's forced arbitration process.

The Public Investors Arbitration Bar Association (PIABA), which filed the request seeking records related to the SEC's oversight of FINRA's process for selecting arbitrators, appealed the SEC's denial, arguing that the release of the requested records would not endanger FINRA's stability as a "financial institution," nor would it undermine the SEC's ability to oversee FINRA. However, the SEC maintained that the records were "obtained or created during the course of an inspection conducted by Commission staff," and that the information "facilitates the staff's oversight and supervision of this self-regulatory organization's activities."[22]

POGO is concerned that the SEC has adopted an overly broad definition of "financial institution" with regards to FINRA. Exemption 8 is normally used to protect the records of banks and other financial firms examined by federal regulators, but in this case it is being used to protect a self-regulatory group that conducts its own examinations. Since FINRA itself is not subject to any open records laws, the SEC's decision to withhold these records further shields FINRA from any public scrutiny or oversight, and raises concerns about the potential lack of transparency and accountability for an investment adviser SRO.

Revolving door and excessive executive compensation practices

In 2009, FINRA's top 18 executives and board members received nearly $23 million in base compensation, bonus and incentive compensation, deferred compensation, and other benefits, according to FINRA's 990 statement.[23] POGO believes these executive compensation packages are excessive for a non-profit regulatory organization, especially one that failed to crack down on the widespread abusive trading practices leading up to the financial crisis. POGO is also concerned that these executive compensation practices have served to exacerbate FINRA's inherent conflicts of interest, as FINRA's top officials become even more indebted to the industry they are supposed to oversee.

In September 2010, FINRA issued a report that attempted to justify the organization's executive compensation practices. The report emphasized the importance of benchmarking FINRA's compensation with the compensation approved at comparable organizations. A consulting firm retained by FINRA found that "most of FINRA's employees and management had come from and were leaving to the financial services industry," and that "FINRA's role as a complex private sector regulator required a pool of executive talent with the knowledge and skills similar to those

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Confidentiality Provision," September 16, 2010. http://www.pogo.org/pogo-files/testimony/financial-oversight/fo-fra-20100916.html

[21] Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Exemption 8.* http://www.justice.gov/oip/foia_guide09/exemption8.pdf (Downloaded September 12, 2011)

[22] Project On Government Oversight, "SEC Withholds Records on Oversight of Self-Regulatory Group," June 16, 2011. http://pogoblog.typepad.com/pogo/2011/06/sec-withholds-records-on-oversight-of-self-regulatory-group.html

[23] Financial Industry Regulatory Authority, Form 990, 2009. http://pogoarchives.org/m/fo/finra-2009-990.pdf

in the financial industry."[24] The consulting firm, along with FINRA's Compensation Committee, concluded that:

> "[B]ecause FINRA competed primarily with the financial services industry for talent, the financial services industry, including broker-dealers, global investment banks, Federal Reserve banks, commercial banks and insurance companies, would provide the best benchmarks for senior management compensation. They also concluded that non-profit organizations and governmental agencies were inadequate comparables for compensation purposes because FINRA required of its executives a different skill set and knowledge base than many such organizations."[25]

POGO understands the need to offer competitive pay so that FINRA can attract and retain highly qualified senior management. However, POGO does not agree that governmental agencies are "inadequate comparables for compensation purposes." In fact, the SEC and other governmental regulatory agencies are authorized to pay their employees at rates beyond the normal governmental pay scale in order to compete with private sector compensation.[26] POGO believes that any difference in the skill sets required of FINRA executives and senior SEC officials would not be enough to justify the vast disparity in compensation at the two entities.

This disparity has created a unique challenge in the case of SEC Chairman Mary Schapiro, who received a final distribution of nearly $9 million when she stepped down as the head of FINRA.[27] She is now in the potentially conflicted position of having to oversee an organization that approved her generous pay package just a few years ago. It is worth noting that Chairman Schapiro signed an ethics agreement recusing herself from participating in certain matters related to FINRA,[28] and she was recused from voting on the SEC staff study regarding investment adviser oversight.[29] Meanwhile, another SEC Commissioner, Elisse Walter, is also a former senior executive at FINRA, which paid her more than $3.7 million in salary and bonuses in 2008.[30] However, Commissioner Walter did not recuse herself from voting on the SEC study; in fact, she issued an unusual statement criticizing the study and calling on Congress to delegate significant authority to an investment adviser SRO.[31]

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[24] Financial Industry Regulatory Authority, *Report of the Amerivet Demand Committee*, September 13, 2010, p. 86. http://www.finra.org/AboutFINRA/Leadership/Committees/P122215 (Downloaded September 12, 2011) (hereinafter "FINRA Compensation Report")
[25] FINRA Compensation Report, p. 86
[26] Securities and Exchange Commission, "Pay Parity Implementation: Plan and Report," March 6, 2002. http://www.sec.gov/news/studies/payparity.htm (Downloaded September 12, 2011)
[27] FINRA Compensation Report, p. 92
[28] Letter from Mary Schapiro, Chairman, Securities and Exchange Commission, to William Lenox, Ethics Counsel and Designated Agency Ethics Official, Securities and Exchange Commission, January 11, 2009. http://www.propublica.org/documents/item/obama-administration-ethics-agreements#document/p28 (Downloaded September 12, 2011)
[29] Sarah N. Lynch, "SEC to unveil studies on brokers, advisers," *Reuters*, January 12, 2011. http://www.reuters.com/article/2011/01/12/us-sec-fiduciary-idUSTRE70B60W20110112 (Downloaded September 12, 2011)
[30] Financial Industry Regulatory Authority, Form 990, 2008. http://pogoarchives.org/m/er/merrill-2008-compensation.pdf
[31] Statement by Elisse B. Walter, Commissioner, Securities and Exchange Commission, regarding SEC study on enhancing investment adviser examinations, January 2011. http://sec.gov/news/speech/2011/spch011911ebw.pdf (Downloaded September 12, 2011)

In addition, there are many examples of FINRA executives and board members leaving the organization to go work for FINRA's member firms. Several former FINRA employees went to work for Allen Stanford: Lena Stinson, director of global compliance at Stanford, served on FINRA's membership committee, while Frederick Fram, chief operating officer of Stanford Group Holdings, served on FINRA's continuing education committee.[32] Bernerd Young, a former NASD official, is reportedly under investigation for his subsequent role as chief compliance officer of Stanford Financial Group.[33] And Susan Merrill, FINRA's former head of enforcement, recently returned to private practice in the New York office of Bingham McCutchen, where she will "lead Bingham's enforcement practice and advise clients on regulatory and securities enforcement matters."[34] She recently joined with several former SEC officials in representing JPMorgan in its widely criticized settlement with the SEC[35] for allegedly structuring and marketing a complex mortgage securities deal just as the housing market was starting to plummet, without informing investors that the hedge fund Magnetar had essentially created the deal and bet against it.[36]

FINRA recently introduced a revolving door rule that would impose a one-year cooling off period on certain senior officials during which they cannot represent or testify as an expert witness on behalf of a FINRA-regulated entity in disciplinary and other proceedings that take place before FINRA adjudicators.[37] However, POGO believes the rule is woefully inadequate—for instance, it does not address the revolving door between FINRA and the SEC—and serves as an important reminder that employees at FINRA and other SROs are not bound by the same post-employment regulations that were put in place to protect the public's interest at government agencies.[38]

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[32] Anna Driver, "Stanford workers had ties to regulator FINRA," *Reuters*, February 24, 2009. http://www.reuters.com/article/2009/02/24/us-stanford-finra-idUSTRE51N5RO20090224 (Downloaded September 12, 2011)

[33] Kara Scannell, "Ex-NASD Official Under Scrutiny for Work at Stanford Group," *The Wall Street Journal*, July 22, 2010. http://compliancesearch.com/compliancex/current-affairs/exnasd-official-under-scrutiny-for-work-at-stanford-group/ (Downloaded September 12, 2011)

[34] Project On Government Oversight, "Departing FINRA Executive to Join Other Former Enforcement Officials at Bingham McCutchen," April 12, 2010. http://pogoblog.typepad.com/pogo/2010/04/departing-finra-executive-to-join-other-former-enforcement-officials-at-bingham-mccutchen.html

[35] Jonathan Weil, "JPMorgan Gets a Break Where Goldman Got Nailed," *Bloomberg*, June 23, 2011. http://www.bloomberg.com/news/2011-06-23/jpmorgan-gets-a-break-where-goldman-got-nailed-jonathan-weil.html (Downloaded September 12, 2011)

[36] Project On Government Oversight, JPMorgan Represented by Former Senior SEC Officials in SEC Settlement," June 28, 2011. http://pogoblog.typepad.com/pogo/2011/06/jpmorgan-represented-by-former-senior-sec-officials-in-sec-settlement.html

[37] Securities and Exchange Commission, "Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Implement Revolving Door Restrictions on Former Officers of FINRA," (Release No. 34-64841; File No. SR-FINRA-2011-032), July 8, 2011. http://sec.gov/rules/sro/finra/2011/34-64841.pdf (Downloaded September 12, 2011)

[38] Project On Government Oversight, "Self-Regulatory Group Introduces Revolving Door Rule -- But Does It Go Far Enough?" July 14, 2011. http://pogoblog.typepad.com/pogo/2011/07/self-regulatory-group-introduces-revolving-door-rule-but-does-it-go-far-enough.html

Board stacked with industry representatives

FINRA's Board of Governors is supposed to include a certain number of public representatives, and Representative Bachus's proposed legislation would similarly require an investment adviser SRO to "assure a fair representation of the public interest...in the selection of its directors and the administration of its affairs."[39]

On FINRA's Board, however, many of the members who are supposed to represent the public's interest[40] appear to have close ties to the securities industry. For instance, William Heyman is a former Vice Chairman and CIO of St. Paul Travelers;[41] Richard Pechter is a former Chairman of the Financial Services Group at Donaldson, Lufkin & Jenrette;[42] and John Schmidlin is a former CIO of JPMorgan Chase.[43]

Significant expenditures on advertising and lobbying

In addition to its excessive executive compensation practices, FINRA has recently invested significant resources defending its record through advertisements in *The Washington Post*, commercials on CNN, and "public interest" spots on National Public Radio.[44] In addition, between 2008 and 2010, FINRA spent nearly $2.7 million on lobbying, according to data from the Center for Responsive Politics.[45] POGO believes these spending practices should raise questions about FINRA's allocation of resources. In addition, it is worth noting that federally registered lobbyists retained by FINRA have also lobbied on behalf of Goldman Sachs & Co., BlackRock Capital Management, Inc., and other FINRA member firms,[46] which raises additional concerns about the organization's cozy relationship with the securities industry.

Mandatory binding arbitration

Many consumer groups have raised concerns that forced arbitration denies investors and consumers their constitutional right to sue in court when they have been harmed by a company, and that it is an inherently biased system in favor of companies and organizations that are repeat customers.[47] Likewise, POGO is concerned that FINRA's forced arbitration process deprives investors and consumers of their access to court, their due process rights, and their choice of

[39] "Investment Adviser Oversight Act of 2011"
[40] Financial Industry Regulatory Authority, "FINRA Board of Governors," August 3, 2011. http://www.finra.org/AboutFINRA/Leadership/P009756 (Downloaded September 12, 2011)
[41] St. Paul Travelers, "St. Paul Travelers Announces William Heyman Named Vice Chairman and Chief Investment Officer," May 5, 2005. http://investor.travelers.com/phoenix.zhtml?c=177842&p=irol-newsArticle&ID=706391&highlight= (Downloaded September 12, 2011)
[42] "Richard S. Pechter to Retire From DLJ," November 1, 1999. http://findarticles.com/p/articles/mi_m0EIN/is_1999_Nov_1/ai_57051011/ (Downloaded September 12, 2011)
[43] New York Stock Exchange, "John W. Schmidlin Joins NYSE Regulation Board of Directors," August 2, 2007. http://www.nyse.com/press/1186398060067.html (Downloaded September 12, 2011)
[44] Sarah Lynch, "New Finra Ad Campaign Talks Tough On Fraud." *Dow Jones Newswires*. June 15, 2009.
[45] Center for Responsive Politics, "Lobbying Spending Database – Financial Industry Regulatory Authority." http://www.opensecrets.org/lobby/clientsum.php?id=D000043164&year=2011 (Downloaded September 12, 2011)
[46] Center for Responsive Politics, "Lobbyist Profile: Mitchell L. Feuer." http://www.opensecrets.org/lobby/lobbyist.php?id=Y0000041101L&year=2011 (Downloaded September 12, 2011)
[47] "Fair Arbitration Now." http://fairarbitrationnow.org/ (Downloaded September 12, 2011)

venue and arbitrator, and that it does not allow for a proceeding that meets the standards of the civil justice system or even those mandated by the Administrative Procedure Act.

Hidden costs

In previous testimony before Congress, FINRA Chairman and CEO Richard Ketchum argued that "the increased manpower and enhanced investor protection" that would result from authorizing FINRA or another SRO to regulate investment advisers "would come at no cost to the taxpayer" because SROs are funded exclusively by the entities they regulate.[48] Unfortunately, this funding system amounts to a user tax on investors in the form of transaction costs. Furthermore, as mentioned above, taxpayers must foot the bill for the SEC's oversight of FINRA and other self-regulators, which entails approving SRO rules, monitoring their activities, hearing internal appeals, and overseeing board activities. Many of these same responsibilities are included in Chairman Bachus's proposed legislation.

In some cases, these oversight requirements may even result in a duplication of efforts between the SEC and FINRA, an unacceptable state of affairs given the SEC's severely limited resources. For these reasons, POGO agrees with SEC Commissioner Luis Aguilar's statement that creating an investment adviser SRO would be an "illusory way of dealing with the problem of resources."[49]

Funding effective oversight

The SEC's study urged Congress to consider other avenues for increasing funding and resources for investment adviser oversight. One possible reform would be to give the SEC the authority to collect user fees from registered investment advisers to support the SEC's examination program. The SEC's study identified several possible advantages to this approach: for instance, it could "provide OCIE with the resources to perform earlier examinations of newly-registered investment advisers and more frequent examinations of other registered investment advisers... provide resources that would permit OCIE to improve the effectiveness of its examinations through long-term strategic planning...[and] provide the adviser examination program increased flexibility to react to developing and emerging risks associated with investment advisers."[50] In addition, it would avoid many of the problems mentioned above that are likely to result from establishing an investment adviser SRO.

However, POGO believes that imposing user fees on investment advisers is not an ideal solution since it could lead to many of the same inherent conflict-of-interest issues related to self-funding that have limited FINRA's effectiveness. It is ultimately Congress's responsibility to ensure that the SEC and other financial regulatory agencies have the funding they need to effectively carry out their mission, including their expanded responsibilities under Dodd-Frank.

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[48] Testimony of Richard G. Ketchum before the House Financial Services Committee. October 6, 2009. http://www.finra.org/Newsroom/Speeches/Ketchum/P120108 (Downloaded September 12, 2011)
[49] Speech by Luis Aguilar, Commissioner, Securities and Exchange Commission, regarding SEC's oversight of the adviser industry, May 7, 2009. http://www.sec.gov/news/speech/2009/spch050709laa.htm (Downloaded September 12, 2011)
[50] SEC Study, p. 26.

Recommendations

POGO believes there is no substitute for governmental regulation of the investment adviser industry. Therefore, we oppose Representative Bachus's draft legislation.

FINRA's inherent conflict of mission, poor enforcement record, and lack of transparency and accountability illustrate why an SRO model for investment advisers will not serve the interests of investors, shareholders, consumers, and other market participants. Instead of delegating additional authority to a private self-regulatory group, Congress should reduce the SEC's current reliance on FINRA, improve FINRA's transparency and accountability, and provide sufficient funding to the SEC to ensure that it is able to carry out its important regulatory duties on its own. If we have learned anything from the financial crisis of the past few years, it is that inadequate federal regulation of the financial industry leads to excessive risk and instability in our economy.

We appreciate your ongoing leadership in establishing an effective oversight regime for registered investment advisers. We would be pleased to discuss this issue in more detail with you or your staff. If you have questions or would like any additional information, please contact us at 202-347-1122 or acanterbury@pogo.org or msmallberg@pogo.org.

Sincerely,

Angela Canterbury
Michael Smallberg

cc: Chairman of House Financial Services Committee Bachus, Ranking Member Frank, and Members of the Committee