INVESTMENT ADVISER
ASSOCIATION

August 30, 2010

Via Electronic Filing

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, Rel. No. IA-3058; File No. 4-606

Dear Ms. Murphy:

The Investment Adviser Association (IAA)[1] greatly appreciates the opportunity to respond to the request for comment by the Commission on the study regarding the obligations of broker-dealers and investment advisers (Study Release).[2] We commend the Commission for moving quickly to address these important issues, particularly considering the relatively short timeframe for the study and the significant amount of other work required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Section 913 of the Dodd-Frank Act requires the SEC to evaluate the effectiveness of existing legal or regulatory standards of care for broker-dealers, investment advisers, and their associated persons in providing personalized investment advice about securities to retail customers and whether there are gaps, shortcomings, or overlaps in those standards. The Dodd-Frank Act further authorizes the SEC to conduct a rulemaking to address the legal or regulatory standards of care for broker-dealers and investment advisers (and their associated persons), taking into account the findings of the study.

The IAA has long believed that financial professionals who perform the same activities should be regulated in the same manner. Accordingly, we have advocated for many years that all persons providing investment advice about securities to clients (regardless of the level of the client's sophistication) should be subject to the same high standard of care – the

[1] The IAA is a not-for-profit association that represents the interests of investment adviser firms that are registered with the SEC. For more information, please visit our web site: www.investmentadviser.org.

[2] Study Regarding Obligations of Brokers, Dealers, and Investment Advisers, Rel. No. IA-3058 (File No. 4-606) July 27, 2010.

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well-established fiduciary duty standard under the Investment Advisers Act of 1940.[3] This federal fiduciary standard, which we discuss at length below, requires investment advisers to act in the best interests of clients and to place the interests of clients before their own. In conducting this study and any subsequent rulemaking, we strongly urge the Commission to avoid efforts to weaken or water down the Advisers Act fiduciary standard.

Under current law, broker-dealers are excluded from the Advisers Act and its fiduciary duty if they provide investment advice "solely incidental" to the conduct of their business as a broker-dealer and receive no "special compensation" for such services.[4] For many years, this exclusion provided a bright line separating traditional brokerage services from traditional investment advisory services. During the last two decades, however, broker-dealers have increasingly moved toward more traditional investment advisory activities (for example, by receiving fee-based compensation instead of commissions), resulting in a blurring of the line under the Advisers Act. Since at least 1999, the SEC has engaged in rulemakings and other activities regarding the standard of care for broker-dealers giving investment advice.[5] Despite these efforts, the issues remain unresolved.

Investors are understandably confused by the different standards that apply to broker-dealers and investment advisers.[6] The provisions of Section 913 reflect congressional concern about this confusion, as well as competing arguments that have made resolution of

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[3] *See, e.g., Hearing on Capital Markets Regulatory Reform: Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office Before the H. Comm. on Fin. Servs*. 111th Cong. (Oct. 6, 2009) (statement of David G. Tittsworth, Executive Dir. and Executive Vice President, IAA) (Tittsworth House Testimony); *Enhancing Investor Protection and the Regulation of Securities Market Hearing Before the S. Comm. on Banking, Hous. and Urban Affairs 111th Cong.* (Mar. 26, 2009) (statement of David G. Tittsworth, Executive Dir. and Executive Vice President, IAA) (Tittsworth Senate Testimony); Letter from David G. Tittsworth, Executive Dir., IAA, to Jonathan Katz, Secretary, SEC, re: Release No. IA-2278 Certain Broker-Dealers Deemed Not to be Investment Advisers (Sept. 24, 2004); Letter from David G. Tittsworth, Executive Dir., ICAA, to Jonathan G. Katz, Secretary, SEC (Jan. 12, 2000).

[4] Section 202(a)(11)(C) of the Advisers Act.

[5] The SEC sought to address these concerns with a rulemaking adopting changes to the exclusion, but the rule was subsequently vacated after a legal challenge. The SEC adopted Advisers Act rule 202(a)(11)-1 to exclude certain broker-dealers offering fee-based brokerage accounts from the Advisers Act. *See* Certain Broker-Dealers Deemed Not to be Investment Advisers, Investment Advisers Act Rel. No. IA-2376 (Apr. 12, 2005). The Financial Planning Association (FPA), however, opposed it and filed suit against the SEC to vacate the rule. The SEC had originally proposed a similar rule in 1999, which also was opposed by the FPA because, among other things, the proposing release embedded a no-action position to create an immediate exception to the definition of broker-dealer. The FPA filed suit against the SEC, and, in response, the SEC withdrew the original proposed rule and reproposed the rule, which was adopted in 2005. In 2007, the D.C. Circuit vacated the SEC's rule on the grounds that the agency lacked the authority to except broker-dealers offering fee-based brokerage accounts from the definition of investment adviser. Financial Planning Association v. SEC, 482 F.3d 481 (D.C. Cir. 2007). Then in 2008, the SEC contracted with the Rand Corporation to study how the different regulatory systems that apply to broker-dealers and investment advisers affect investors.

[6] *See e.g.,* Angela A. Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, Farrukh Suvankulov, *RAND Report: Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, 14 (Jan. 3, 2008) (RAND Report); TD AMERITRADE Investor Perception Study 2006 ("If investors knew that stockbrokers provided fewer investor protections than investment advisors, 63% **would not seek** financial advice from them.").

these issues elusive. The Commission's study presents an opportunity to reconsider relevant facts and arguments that pertain to these important issues.

We are well aware of the strong rhetoric that has permeated the debate about fiduciary duty. At times, it appears that some are arguing that imposition of the fiduciary standard will solve all investor concerns. On the other hand, there have been claims that fiduciary duty will literally destroy legitimate business models. We respectfully suggest that appropriate policies designed to address the realities of these issues lie somewhere in the middle of such extreme views.

Extending the fiduciary standard to brokers who provide personalized investment advice to retail clients (which we strongly support) will not, in and of itself, prevent fraudulent behavior. Fiduciary duty, based on common law principles arising from a relationship of trust, is an overarching standard that has many beneficial consequences for investors. When properly implemented, the Advisers Act fiduciary standard can and should breed a culture of putting the client's interests first at all times. We also recognize, however, that appropriate regulation and a robust inspection program are critical elements of successful oversight activities. Our organization thus has advocated strongly in favor of bolstering SEC resources to ensure that investment advisers are subject to an effective inspection program. Numerous provisions of the Dodd-Frank Act will result in a dramatic increase of SEC resources. At the same time, we believe that more frequent inspections do not equate to better oversight and thus we continue to support efforts to improve the efficiency and effectiveness of SEC examinations.

On the other hand, arguments that extending the Advisers Act fiduciary duty will result in massive business disruptions and will reduce investor options and choice are clearly misleading and overstated. The Advisers Act fiduciary duty has accommodated a broad spectrum of advisory-related activities for many decades. An integral aspect of the standard is the duty to provide clear and appropriate disclosure to clients of the advisory relationship, potential conflicts of interest, and relevant costs. 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. In conducting the study and in its subsequent report, we trust that the Commission will give the interests of investors paramount importance as it seeks to find the appropriate policy ground based on the extensive factual record available.

In conducting the study and considering any subsequent rulemaking, we urge the Commission to focus on the standard of care for investment advice. The regulatory requirements for broker-dealers and investment advisers have evolved over the period of several decades based on largely different activities. 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 (*i.e.*, those who effect securities transactions and are generically referred to as the "sell side") and of investment advisers (*i.e.*, those who are engaged in the business of providing investment advice and are referred to as the "buy side"). 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. Although Section 913 of the Dodd-Frank Act sets forth a number of broad areas to be studied, the legislative history of the provision clearly indicates that the key issue the Commission should focus on is whether the Advisers Act fiduciary duty should be extended to brokers who provide investment advice to individuals. Accordingly, we have focused our comments on this aspect of the study.

We appreciate that the SEC is on a short deadline to submit a report to Congress. In turn, the SEC has provided a brief period for public comment. This letter responds to the SEC's request for comment with respect to items raised in the Study Release. Due to the short comment period, we expect to supplement this letter with additional information before the SEC submits its report to Congress.

We look forward to working with the Commission in the coming weeks and months and stand ready to provide any additional information that may assist the Commission in conducting the study and preparing its report.

I. The Standard of Care Applicable to Investment Advisers Is Most Effective in Protecting Retail Clients

In Item (1) of the Study Release, the SEC requests comment on the effectiveness of existing legal or regulatory standards of care for broker-dealers and investment advisers for providing personalized investment advice and recommendations about securities to retail clients.

The existing standard of care for investment advisers is the fiduciary duty.[7] In a seminal decision in 1963, the U.S. Supreme Court held that the Advisers Act imposes a fiduciary duty on investment advisers.[8] 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.[9] Under this federal fiduciary standard,[10] investment advisers must,

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[7] Under the Advisers Act, a person who for compensation is in the business of providing advice about securities is an investment adviser. Once a person is considered an investment adviser and not excluded from the definition, that person is subject to the Advisers Act's fiduciary duty.

[8] SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963).

[9] *Id.* These duties of a fiduciary were applied by the SEC and the courts long before the Supreme Court in the Capital Gains case 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).

[10] *See* Transamerica Mortgage Advisors Inc. v. Lewis, 444 U.S. 11 (1979) ("Section 206 establishes 'federal fiduciary standards' to govern the conduct of investment advisers"); Laird v. Integrated Resources, Inc. (5th Cir. 1990) (in a 10b-5 action against an investment adviser, the court looked to the federal fiduciary standard and stated that its "holding encompasses a developed federal standard"). *See also* Political Contributions by Certain Investment Advisers, Investment Advisers Act Rel. No. IA-2910 (Aug. 3, 2009) ("The Supreme Court has construed section 206 as establishing a federal fiduciary standard governing the conduct of advisers").

among other things, act in the best interests of their clients and place the interests of their clients before their own.[11] 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 care.[12]

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 potential conflicts of interest.[13]

The fiduciary standard is based on common law principles arising from the relationship of trust between the adviser and the client. The parameters of an adviser's fiduciary duty depend on the scope of the advisory relationship.[14] Thus, a fiduciary obligation with respect to a particular service is triggered in circumstances in which there is an explicit or implied promise or expectation to provide such advice or service.

In practical terms, fiduciary duty means that, in the course of providing advice to clients, securities professionals must disclose all material information 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, securities professionals 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 clients. Most important, whenever the interests of securities professionals who are fiduciaries differ from those of their clients, they must explain the

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[11] *See, e.g.,* Lemke & Lins, Regulation of Investment Advisers, 188 (2010) ("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 than that used for mere commercial transactions").

[12] *See, e.g.,* Proxy Voting by Investment Advisers, Investment Advisers Act Rel. No. IA-2059 (Sept. 20, 2002) ("An adviser's fiduciary duty includes the duty of care and the duty of loyalty to clients").

[13] *See* Amendments to Form ADV, Investment Advisers Act Rel. No. IA-2106 (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 and citing various sources); Applicability of Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Rel. No. IA-1092, (Oct. 16, 1987) (1092 Release) (discussing fiduciary duties).

[14] *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) ("The scope of a fiduciary's duty under the law necessarily and purposely varies depending on the scope of authority, the ability of entrustors to control the fiduciary, the ability of entrustors to monitor their fiduciary, the extent of power and entrustment provided to the fiduciary, the nature and extent of the services provided by the fiduciary and various other factors.").

conflict to the clients and act to mitigate or eliminate it, ensuring they act in the interests of the clients and not for their own benefit.

A good example of how the fiduciary duty works in practice arises in the area of compensation. If investment advisers receive payment from others for recommending certain types of products, the advisers must tell their clients about the compensation and how the compensation may potentially affect or influence the investment advice that is given. In addition to disclosing this information to clients, investment advisers must act to recommend securities that are in the best interests of the clients regardless of the additional compensation they may receive. Investment advisers must make disclosures regarding conflicts created by their compensation arrangements. For example, advisers paid by commission are required to disclose that commission-based compensation may motivate them to trade more frequently or to recommend trades because they would receive more compensation.

Because of the overarching nature of the fiduciary duty, the obligations of investment advisers cannot be easily circumscribed by a proscribed set of rules.[15] The breadth and flexibility of the fiduciary duty have allowed the regulation of investment advisers to remain dynamic and relevant in changing business and market conditions.[16]

Some broker-dealers are already subject to the fiduciary standard of care with respect to certain of their activities. In particular, broker-dealers that provide discretionary asset management for a fee are subject to the Advisers Act and its accompanying fiduciary duty with respect to those accounts.[17] In addition, the SEC staff has taken the position that brokers

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[15] *See id*. ("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.").

[16] Over the years, the SEC has favored a flexible approach to fiduciary duty. 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").

[17] These firms generally are dually registered as both broker-dealers and investment advisers. *See infra* note 25. Broker-dealers also may be subject to state law fiduciary duty under very limited circumstances. In some states, courts have found a broker-dealer to owe a fiduciary duty to a customer in limited circumstances in which the broker-dealer has discretion over an account or because of a special relationship of trust and confidence has *de facto* discretion. *See e.g.*, Hecht v. Harris, 430 F.2d 1202 (9th Cir. 1970) (holding that despite a non-discretionary account, a broker-dealer owed fiduciary duties to a 77-old customer who was unable to understand confirmation slips); Kravitz v. Pressman, Frohlich & Frost, 447 F.Supp. 203 (D.Mass.1978) (holding that a broker-dealer owed fiduciary duties in a non-discretionary account where the customer was clearly unable to understand confirmation slips and completely relied on decision of the broker, who the customer was dating at the time). Unlike investment advisers under the Adviser Act, however, broker-dealers are not considered fiduciaries by operation of law.

providing discretionary management based on commissions and brokers that charge a separate fee for advice also are subject to the Advisers Act and its fiduciary duty.[18]

On the other hand, a broker-dealer whose performance of advisory services is "solely incidental" to the conduct of its business as a broker-dealer and who receives no "special compensation" for such services is excluded from the Advisers Act and its overarching fiduciary duty. Thus, the services with respect to which there is a difference in the standard of care are primarily non-discretionary services, such as making recommendations about securities to brokerage customers. The existing standard of care for such activities is the suitability standard. Under FINRA Rule 2310, broker-dealers that provide such advice to retail customers are required to ensure that the advice is "suitable" to the client.[19] 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."[20] These standards are essentially standards of fair treatment reflecting a commercial relationship rather than a relationship of trust and confidence.

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[18] After the Court vacated Advisers Act rule 202(a)(11)-1, the SEC proposed to reinstate three interpretive provisions of the rule. Interpretive Rule under the Advisers Act Affecting Broker-Dealers, Investment Advisers Act Rel. No. IA-2652 (Sept. 24, 2007) (Proposed Interpretive Rule Release). The three provisions sought to codify the Commission's views that: (1) a broker-dealer that exercises investment discretion with respect to an account, or that charges a separate fee or separately contracts for advisory services, provides investment advice that is not "solely incidental to" its business as a broker-dealer; (2) a broker-dealer does not receive special compensation within the meaning of section 202(a)(11)(C) solely because it charges a commission for discount brokerage services that is less than it charges for full-service brokerage; and (3) a registered broker-dealer is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject it to the Advisers Act. Although the proposed interpretations were never formally adopted, they are the most recently expressed views of the Commission on this subject and it is our understanding that they continue to represent the interpretations of the Commission.

[19] FINRA Rule 2310 provides:
(a) In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer 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.
(b) Prior to the execution of a transaction recommended to a non-institutional customer, other than transactions with customers where investments are limited to money market mutual funds, a member shall make reasonable efforts to obtain information concerning:

(1) the customer's financial status;
(2) the customer's tax status;
(3) the customer's investment objectives; and
(4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

[20] FINRA Rule 2010 prohibits broker-dealers from: (1) filing misleading information about membership or registration; (2) trading ahead of a customer limit order; (3) failing to abide by FINRA's front-running policy; (4) engaging in certain purchases or sales in initial public offerings; and (5) failing to register its employees. *See* FINRA 1122 Filing of Misleading Information as to Membership or Registration; IM-1000-3 Failure to Register Personnel; IM-2110-2 Trading Ahead of Customer Limit Order; IM-2110-3 Front Running Policy; 5130 Restrictions on the Purchase and Sale of Initial Equity Public Offerings.

The suitability standard falls short of the breadth of the fiduciary duty.[21] Indeed, the duty to provide suitable investment advice is merely one aspect of the fiduciary duty.[22] For example, brokers under a suitability duty may make recommendations or make investment decisions as long as they are "suitable" for that client under his or her particular circumstances even if they are not in the best interests of the client. Moreover, even if the 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.

The difference between these standards has been uniformly recognized. During congressional hearings before the enactment of the Dodd-Frank Act, regulators, industry representatives, and academics all testified that the fiduciary standard is higher (and more protective of investors) than the suitability standard.[23] Many commenters also have recognized the strength of the fiduciary principles and written in support of extending fiduciary duty to all financial professionals giving investment advice.[24]

II. The Gap in the Standard of Care of Retail Investors Should be Eliminated

Item (2) of the Study Release requests information on whether there are legal or regulatory gaps or overlaps in standards in the protection of retail customers relating to the standard of care that should be addressed by rule or statute.

We respectfully submit that the disparity between the standard of care for investment advisers and broker-dealers providing advice should be eliminated. First, as discussed above,

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[21] FINRA has issued several interpretive notices that clarify what suitability means. *See, e.g*, FINRA IM 2310-2 Fair Dealing with Customers; IM 2310-3 Suitability Obligations to Institutional Clients; 05-59 NASD Guidance Concerning the Sale of Structured Products. In FINRA Notice to Members 2310-2, Fair Dealing with Customers, FINRA states that even though a broker-dealer is not precluded from pursuing its sales efforts, such efforts must represent fair treatment for the persons to whom the sales efforts are directed.

[22] *See* Suitability Release *supra* note 13 ("Investment advisers are fiduciaries who owe their clients a series of duties, one of which is the duty to provide only suitable advice").

[23] *See* Tittsworth House Testimony, *supra* note 3. 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 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 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.

[24] *See, e.g.*, Jane Bryant Quinn, *Will Brokers Have to Put Your Interest First?*, janebryantquinn.com, May 6, 2010; Tara Siegel Bernard, *Trusted Adviser or Stock Pusher? Finance Bill May Not Settle It*, N.Y. Times, Mar. 3, 2010; Paul Sullivan, *Broker? Adviser? And What's the Difference*, N.Y. Times, Feb. 18, 2010; Tara Siegel Bernard, *Struggling Over a Rule for Brokers*, N.Y. Times, Feb. 16, 2010; Jason Zweig, *The Fight Over Who Will Guard Your Nest Egg,* WALL ST. J., Mar. 28, 2009.

the fiduciary standard is higher and more protective than the standard applicable to broker-dealers providing personalized investment advice. Second, retail customers mistakenly believe their broker-dealers are already required to act in their best interests. Third, retail clients will greatly benefit from this higher standard of care. We discuss the latter two reasons in more detail below.

As raised by the SEC in Item (10) of the Study Release, this disparity could have been addressed by removing the broker-dealer exclusion in section 202(a)(11)(C) of the Advisers Act, thereby eliminating completely any regulatory gaps that may exist between broker-dealers providing investment advice and investment advisers.[25] Although we would have supported such a legislative change, we appreciate that Congress elected to adopt an alternative approach. Given the legislative mandate in the Dodd-Frank Act, the SEC can achieve a similar result by imposing by rule the fiduciary duty on broker-dealers that provide personalized investment advice that requires them to act in the best interests of their clients.

The Dodd-Frank Act authorizes the SEC to impose on brokers providing advice to retail customers (or such other customers as the SEC may by rule provide) the same standard of conduct applicable to advisers under section 211 of the Advisers Act. The Act correspondingly authorizes the SEC to promulgate rules that the standard of conduct under section 211 shall be no less stringent than the standard of care under Advisers Act sections 206(1) and (2). Although not specifically raised in the Study Release, which is focused on retail clients, we urge the SEC not to require different standards of care under the Advisers Act for different types of clients, including institutional clients. The Dodd-Frank Act does not compel this result, which could result in a diminution of the current strong protections for advisory clients. Thus, we respectfully submit that the Commission should codify the principles-based fiduciary standard applicable to all clients under the Advisers Act rather than adopt a detailed set of rules delineating duties for brokers and advisers with respect to individual clients.

III. Retail Customers Do Not Understand the Different Standards of Care Applicable to Broker-Dealers and Investment Advisers and Are Confused by the Different Standards Because Broker-Dealers Have Portrayed Themselves as Trusted Advisers

In Items (3) and (4) of the Study Release, the SEC requests comment on whether retail customers do not understand that there are different standards of care applicable to broker-dealers and investment advisers in the provision of personalized investment advice about securities to retail customers and whether the existence of different standards of care is a source of confusion. The answers to these questions are unequivocally in the affirmative.

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[25] The vast majority of broker-dealers that report providing investment advisory services are already dually registered as investment advisers with the SEC or the states. *See* RAND Report, *supra* note 6 at 54-60, 122-123 (finding approximately 550 brokers dually registered with the SEC and 360 dually registered with the states). Eliminating the broker-dealer exclusion would simply require these broker-dealers to adhere to a fiduciary duty to all accounts for which they provide personalized investment advice. Moreover, there may be as many as approximately 230 additional broker-dealers that would be required to register under the Advisers Act or with the states if the broker-dealer exclusion was eliminated. *See id.* There would be some additional costs associated with SEC and state registrations. Moreover, it would be likely that there would be more firms to examine as registered investment advisers by the SEC and the states.

During recent years, broker-dealers increasingly have migrated toward the investment advisory model and held themselves out as trusted advisers. A result of this significant development has been investor confusion. The SEC has clear evidence of both phenomena. For example, in 2008 the SEC commissioned a study by the Rand Corporation that found that "broker-dealers have begun to drift subtly into a domain of activities that (at least under the regulatory regime) have historically been the province of investment advisers."[26] Moreover, based on interviews conducted with investors, the report found investor confusion resulting from the manner in which broker-dealers marketed themselves:

> *much of the recent marketing by broker-dealers focuses on the ongoing relationship between the broker and the investor and as brokers have adopted such titles as "financial advisor" and "financial manager."*[27]

Broker-dealers have been aggressively marketing themselves as "advisors" and "financial consultants" who customers can rely upon and trust. The resulting customer confusion has created a mismatch between client expectations and reality: customers now expect that brokers are acting in their best interests when in fact there is no obligation to do so.[28] The SEC should act to ensure that investors who place their trust in broker-dealers are protected by the higher standard of care required of fiduciaries.

IV. Retail Clients Will Benefit From the Uniform Application of the Advisers Act Fiduciary Standard

In Item (12) of the Study Release, the SEC requests comment on the potential impact upon retail customers from changes in standards of care. Currently, retail clients are protected differently depending on whether they engage a broker-dealer or an investment adviser to provide them with investment advice. Retail clients will benefit in important and specific ways from the application of a uniformly high fiduciary standard to all securities professionals who provide investment advice.

Following are concrete illustrations of how fiduciary duty would benefit customers of broker-dealers:

- Brokers recommending and selling investment products to customers would have to disclose all fees, compensation, and other incentives they earn from the advice;

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[26] *See* Rand Report, *supra* note 6.

[27] *Id.* at 19; *see also, Industry Perspectives on the Obama Administration's Financial Regulatory Reform Proposals, Hearing Before the H. Comm. on Fin. Servs*., 111th Cong. 16-17 (July 17, 2009) (statement of Paul Schott Stevens, President and CEO, Investment Company Institute) (noting that "over the last decade, brokers have significantly shifted their business model to include providing investment advice and charging fees based on assets under management, rather than commissions for each transaction. This model previously had been used solely by investment advisers").

[28] RAND Report, *supra* note 6 at 31-32.

- Brokers would have to recommend products that are in the best interests of their customers, and would not be able to steer customers to certain products that, while technically not inappropriate for the customer (and, therefore "suitable"), are not in the customer's best interests;

- Brokers would have to disclose not only information about investment products they recommend, but also information about themselves, including conflicts of interest, including an explanation of

    - the potential incentive to favor certain products over others as long as the investment is at least suitable for that client or an explanation that their commission-based fee could potentially be an incentive for brokers to engage in more transactions than necessary to generate higher fees;

    - any economic interest in steering clients to certain products or an extra reward that a broker-dealer representative can receive for being the highest seller of a particular type of product;

- Brokers would have to offer a limited investment opportunity (as well as any other appropriate investment opportunity) to their clients first and not take the opportunity for themselves; and

- Brokers would have to disclose at the outset if they or their representatives have a material disciplinary history (rather than their customers having to take the initiative to look at FINRA's BrokerCheck for disciplinary information).

V. Investor Choice Would Not Be Inappropriately Limited by Imposing a Fiduciary Duty on Brokers

In Item (9) of the Study Release, the SEC requests comment on the potential impact on access of retail customers to the range of products and services offered by broker-dealers, access to personalized investment advice, and the availability of personalized advice and recommendations. We understand that these issues were included in the Dodd-Frank Act in large part to address concerns raised by broker-dealers and insurance agents that they may not be able to continue to recommend exclusively proprietary products or securities for which they receive additional compensation. We believe these concerns are unfounded. Under the fiduciary duty standard, with appropriate disclosure, broker-dealers generally should be able to manage a client's account investing only in a limited range of products or to recommend only their proprietary products.[29]

The Advisers Act fiduciary duty requires full disclosure of all material facts. Applied to the situation posed here, fiduciary duty would require a broker-dealer, at the inception of a

[29] Indeed, the language in Section 913(k)(2) of the Dodd-Frank Act is intended to confirm the current operation of the fiduciary duty standard in this and a number of other areas discussed below.

client relationship, to disclose the types of investments that the broker-dealer would be recommending to clients and to disclose if it will be recommending only proprietary or a limited range of investment products.[30] There may be situations where none of the proprietary products (because of their investment objectives, for example) would be in the best interests of a particular client. In these circumstances, the fiduciary duty appropriately may restrict the ability of the broker-dealer to recommend such products.

When recommending either proprietary products or products for which a broker-dealer receives compensation from a party other than the client, the fiduciary duty would require the broker-dealer to disclose specific information on potential conflicts of interest. Disclosure must include information about the compensation that the broker-dealer would receive and that the broker-dealer may have an incentive to recommend securities that offer it the greatest compensation.

Some also have argued that retail investors may have less access to certain types of securities that are not widely available because a broker-dealer that has these securities in its inventory may be prohibited from trading with a client as principal under the Advisers Act. As an initial matter, it is unclear whether the prohibition on principal transactions without transaction-by-transaction consent under section 206(3) of the Advisers Act would apply if the SEC adopted a fiduciary duty rule for broker-dealers because Section 913 of the Dodd-Frank Act references only Advisers Act sections 206(1) and 206(2) in requiring a minimum standard of care for broker-dealers. Given that principal trading involves a fundamental conflict of interest "and a substantial risk that the proprietary interests of the adviser will prevail over those of its clients,"[31] we believe that the duties imposed under section 206(3) should apply to broker-dealers that provide advice to retail clients. We recognize that there may be facts and circumstances under which it is appropriate for the SEC to provide relief pursuant to its broad exemptive authority under Advisers Act section 206A.[32] Regardless of whether the specific prophylactic provisions of section 206(3) apply, however, as fiduciaries, broker-dealers would be required to provide full and fair disclosure regarding the practice to clients, adopt policies and procedures to address the conflict, and ensure that a principal trade is fair and in the best interest of clients.

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[30] Investment advisers already have this obligation if, for example, they only invest in mutual funds for their clients and not in individual securities or they invest in mutual funds available on certain platforms or invest in proprietary mutual funds.

[31] Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Investment Advisers Act Rel. No. IA-2653 (Nov. 30, 2007) at 14.

[32] We understand that at the present time broker-dealers dually registered as investment advisers and investment advisers with affiliated broker-dealers have found the requirement for transaction-by-transaction disclosure and consent to engage in principal transactions to be difficult and one of the major challenges of operating under the Advisers Act. There are legitimate concerns in permitting fiduciaries to engage in principal trading with client accounts. The fact that to date the SEC has not been able to develop appropriate safeguards to permit principal trading on a more liberal basis reflects how important this issue is to the protection of retail clients of both investment advisers and broker-dealers.

VI. Extension of the Advisers Act Fiduciary Duty Would Not Result in Unreasonable Costs to or Restrictions on Broker-Dealers

Item (13) of the Study Release requests comment on the costs and expenses to broker-dealers resulting from potential changes in the regulatory requirements or legal standards. Moreover, in Items (12)(B) and (C) of the Study Release, the SEC requests comment on the potential impact on access to and the availability of personalized advice and recommendations.

We believe that there will be some costs involved in training broker-dealer personnel with respect to fiduciary duty and to develop a fiduciary culture.[33] We are of the view, however, that those who argue that certain business models will be destroyed by the change in legal standard are exaggerating the potential impact. Contrary to these assertions, the activities that are carried out by broker-dealers would not be prohibited or fundamentally undermined by the imposition of a fiduciary duty. Broker-dealers would remain free to pursue their essential business models.

The fiduciary duty for broker-dealers should operate in the same manner as it does for investment advisers. Broker-dealers who provide investment advice to retail clients must act in the best interests of their clients and place the interests of their clients before their own. As with investment advisers, the fiduciary duty would apply to those activities and services to which broker-dealers and their clients have agreed. To the extent that an agreed upon service constitutes investment advice, the broker's fiduciary duty would apply to that service. In this regard, broker-dealers would have to ensure that they are not holding themselves out as offering more advisory services than they are prepared to perform under this standard. The fiduciary duty, however, would not require broker-dealers to undertake services to which they have not explicitly or implicitly agreed. Where no such promise is made or implied, no fiduciary obligation to provide such services would exist.

The fiduciary duty under the Advisers Act generally does not prohibit a particular type of activity or compensation arrangement but requires disclosure and/or mitigation of potential conflicts of interest that a particular arrangement or transaction may pose. If the SEC imposes a fiduciary duty on broker-dealers for the provision of personalized investment advice to retail clients, the most significant changes to the broker-dealers' obligations and to the broker-dealers' business models generally would be the requirement on broker-dealers to manage potential conflicts of interest and to make appropriate upfront disclosures to clients regarding potential conflicts of interest, compensation, and other material facts. Most important, the extension of the fiduciary duty to broker-dealers who provide investment advice would require these broker-dealers to develop a fiduciary culture among those who provide personalized investment advice to retail clients to act in the best interests of their clients and to place the interests of the clients above their own. Imposing the fiduciary duty on broker-dealers in this fashion would be unequivocally beneficial to retail investors.

[33] Many broker-dealers that provide advice are already dually registered and, therefore, should be well-equipped to provide such training.

Those who are not familiar with the fiduciary culture have expressed specific concerns regarding the impact of imposing a fiduciary duty on the broker-dealer business models. For example, some have voiced concerns that broker-dealers would no longer be able to receive commission-based compensation. Under the fiduciary duty standard, a broker-dealer would be able to provide investment planning services and provide other types of investment advice and still be compensated by commissions, provided that it has made appropriate disclosures regarding potential conflicts of interest. This disclosure would include providing information about the potential incentive for broker-dealers to engage in more transactions than necessary to generate higher fees for themselves. Investment advisers that are paid on a commission basis are explicitly required to make these types of disclosures.[34]

Others have argued that a fiduciary duty would obligate broker-dealers who provide investment planning services or who provide a specific security recommendation to monitor the investments made by the clients at the recommendation of broker-dealers on an ongoing basis and that broker-dealers would no longer be able to provide these services if these obligations attached. We disagree with this premise. Unless the broker-dealer entered into an agreement (implicitly or explicitly) with the client to monitor the client's portfolios or it is implied in the relationship, the broker-dealer, even as a fiduciary, would not have an obligation to monitor the financial condition of the client or the investments to determine whether they continue to meet the investment objectives of the client or to suggest adjustments regarding the recommended portfolio.[35] The nature of the relationship between the broker-dealer and its client would dictate whether there is an ongoing responsibility with respect to the client.

Similarly, there has been some concern regarding the length of time a client may rely on a specific recommendation by a broker-dealer in a fiduciary context. We believe that unless a fiduciary has agreed to continue updating a client regarding a recommendation, a client may continue to rely on that recommendation only for a reasonable period of time or until there are changes to the client's circumstances or new developments in the market that a reasonable person would believe may change a recommendation about a particular security.

Finally, broker-dealers often may have investor information centers or departments that provide information requested by investors on certain products. Some have voiced

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[34] See Item 5.E of Form ADV, Part 2A (requiring an adviser that receives compensation attributable to the sale of a security or other investment product., *e.g.*, brokerage commissions, or whose personnel receive such compensation, to disclose this practice and the conflict of interest it creates, and to describe how the adviser addresses this conflict).

[35] Similarly, investment advisers that only provide a financial plan even as a fiduciary do not have an obligation to continuously monitor the financial conditions of their clients unless there was an implicit or explicit agreement for such a service. Broker-dealers may be concerned about state law fiduciary duty cases in which the courts have found that they had a continuing duty to monitor. In these cases, the courts found that the broker-dealers in those situations had de facto *discretionary authority*. By its definition, discretionary authority entails continuous monitoring. Absent discretionary authority or "constructive" discretion, a broker-dealer has no duty to monitor the client's investments or warn the client about potential investment risks after the execution of the transaction. *See e.g.*, Leib v. Merrill Lynch 461 F.Supp. 951 (D.C.Mich., 1978); Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 337 F. Supp. 107 (N.D. Ala. 1971).

concern about the fiduciary duties imposed on personnel performing these functions. Personnel of broker-dealers who respond to requests for specific information regarding a product or a type of product should not be subject to a fiduciary standard as long as they only provide factual information about a product or investment and do not imply in any way that they are providing personalized investment advice.[36]

There is a continuum of potential relationships between clients and financial service providers. On one end of the spectrum are self-directed individuals who use brokerage platforms to execute their own investment decisions. In such cases, no advice is given and the Advisers Act fiduciary duty would not apply. At the other end of the spectrum are clients who receive ongoing discretionary investment advisory services. The Advisers Act fiduciary duty clearly applies to these activities on an ongoing basis. In between, the scope of the fiduciary duty will depend on the scope of the relationship. In such cases, appropriate disclosure is the key to ensuring investor protection.

VII. Advisers and Brokers Provide a Broad Range of Services

Item (11) of the Study Release requests information about the various services provided by investment advisers and broker-dealers. This information is important not only to the prior analysis of the application of the fiduciary duty to brokers providing various types of investment advice but also to the analysis of the substantive differences in the regulation of brokers and advisers called for by Items (6) and (7) of the Study Release.

The core activity of the vast majority of SEC-registered investment advisers is providing investment advice on a discretionary basis to clients; that is, they are granted authority by their clients to make investment decisions for their clients' portfolios on an ongoing basis.[37] In addition, some investment advisers provide financial planning services (*i.e.*, identifying investment goals and recommending strategies to achieve those goals that incorporate recommendations regarding securities), recommend specific securities (including

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[36] This approach is consistent with the Advisers Act. *See* 1092 Release, *supra* note 13; Olena Berg (pub. avail. Feb. 22, 1996) ("information that simply describes or explains the various investment options available through a plan, without including any analysis or recommendation with respect to those options, would not constitute 'investment advice' as that term is used in the Advisers Act"); *see also* Financial Strategies Inc., (pub. avail. Feb. 14, 1994) ("a person could be providing investment advice if, in the course of developing a financial program, he recommends that clients allocate certain percentages of their assets to life insurance, high yielding bonds, and mutual funds, or particular types of mutual funds, such as growth stock or money market funds").

[37] In 2010, 89% of all investment advisers reported having discretionary authority over client accounts. Indeed, of the $38 trillion assets under management reported by SEC-registered advisers in 2010, only $3.3 trillion were reported as non-discretionary. In addition, approximately 75% of advisers provide portfolio management for individuals and/or small business, 63% of advisers provide portfolio management for business or institutional clients (other than mutual funds); 41% of advisers provide financial planning services; and 31% of advisers assist clients to select other advisers. *See* Investment Adviser Association and National Regulatory Services, *Evolution/Revolution 2010: A Profile of the Investment Advisory Profession*, (expected publication date Sept. 2010) (2010 Evolution/Revolution Report). A complete list of advisory services and the percentages of investment advisers providing such services are provided in Appendix 4 of the 2010 Evolution/Revolution Report.

mutual funds) for the particular circumstances of a client, recommend a particular asset allocation plan, provide portfolio analysis and evaluation, assist in selection and monitoring of other advisers, or provide wealth management 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, charitable endowments, foundations, and corporations and serve as sub-advisers to funds offered by other advisers.

Broker-dealers engage in a wide 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; or engaging in stock exchange floor activities. The substantive regulation of these non-advisory broker-dealer activities is not the focus of the study mandated by legislation. Investment advisers generally do not and, without broker-dealer registration or affiliation or an appropriate exemption, cannot engage in these activities. The one significant area of overlap between broker-dealers and advisers is the provision of investment advice.

This overlap is the intended focus of the study mandated by Section 913 of the Dodd-Frank Act. Thus, we do not address below other regulations applicable to advisers or broker-dealers that are not relevant to the provision of investment advice to retail clients - for example, the regulations under the Securities Exchange Act of 1934 (Exchange Act) and FINRA rules that apply to brokers in their capacity as market-makers or for executing securities transactions or the regulations under the Investment Company Act of 1940 that apply to advisers in their management of mutual funds.

VIII. The Substantive Regulations of Broker-Dealers and Advisers Differ in Some Respects

Items (6) and (7) of the Study Release request comment on the substantive differences in the regulation of broker-dealers and investment advisers when providing personalized investment advice and recommendations about securities to retail clients and where these regulations provide greater protection to retail customers.

The current regulatory landscape reflects the different purposes of the two main statutes regulating investment advisers and broker-dealers – the Advisers Act and the Exchange Act. The purpose of the Advisers Act is to address concerns with respect to the provision of investment advice while the purpose of the Exchange Act is to address concerns regarding the securities markets and their participants. Given that the regulations of broker-dealers and investment advisers developed under separate statutory frameworks with different purposes, there are, of course, substantive differences in these regulations. The Advisers Act is entirely focused on the provision of investment advice, whereas the Exchange Act and FINRA rules are focused on a much broader range of activities with a subset of provisions related to specific aspects of investment recommendations, which have been supplemented as broker-dealers offered more of these services.

As discussed above, there is currently a significant substantive difference between the standard of care for investment advisers and broker-dealers in providing investment advice, with the standard of care for investment advisers providing greater protection to retail customers than the standard of care for broker-dealers providing the same services. Although the difference in the standard of care is the most critical aspect of and the focus of the Section 913 study, there are differences in regulation in a number of other areas as well.[38] For example, different rules apply to disclosure, codes of ethics, proxy voting, contractual requirements, and advertising. The Advisers Act regulatory regime is specifically geared toward investment advisory activities and provides a flexible framework that permits the broad diversity of investment advisory firms to tailor their compliance programs to fit the nature of their firms.[39]

A more exhaustive comparison of the various regulations applicable to broker-dealers and investment advisers when providing investment advice is attached as Appendix A to this letter.[40]

Some in the broker-dealer community have argued that certain broker-dealer requirements are more protective of retail investors and should be applied to investment advisers. We are open to constructive dialogue with the Commission to enhance investment adviser regulation where appropriate. We note, however, that some of these arguments are based on misunderstandings about investment adviser regulation or are not based on apples-to-apples comparisons of the same activities. For example, some inappropriately compare rules governing sales of products with rules governing portfolio management. Although the Dodd-Frank Act specifically directs the SEC to consider adopting rules to prescribe a "standard of conduct" for broker-dealers that is no less stringent than the standard for advisers, if the SEC determines that a broader rulemaking is appropriate, we request that the SEC seek views on the general framework in a concept release. We would welcome the opportunity to provide our specific views to the Commission at such time.

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[38] Despite their different regulatory roots, many requirements for brokers and advisers are similar. For example, both broker-dealers and advisers are required to have written policies and procedures for their compliance programs and to designate a chief compliance officer. Broker-dealers and advisers also are subject to similar regulations with respect to insider trading, supervisory duties, and safeguarding client information.

[39] See *supra* note 16

[40] Item (8) of the Study Release requests comment on existing standards of state regulators to protect retail clients. Under state law, investment advisers registered with the SEC are subject to the state anti-fraud laws and certain of their personnel who provide advice to retail clients are subject to state licensing and qualification requirements. With respect to state-registered investment advisers, in addition to licensing and qualification requirements, the states generally have investment adviser regulations that mirror or are substantially similar to SEC regulations of investment advisers.

IX. Regulatory, Examination, and Enforcement Resources Should Be More Effectively Deployed to Enforce the Standards of Care for Broker-Dealers and Investment Advisers

In Item (5) of the Study Release, the SEC requests comment on the regulatory, examination, and enforcement resources devoted to, and activities of the SEC, the states and a national securities association to enforce the standards of care for broker-dealers and investment advisers, including the effectiveness of the examinations, the frequency of the examinations, and the length of time of the examinations.

In addition to an appropriate standard of care, we believe a well-designed oversight program with inspections and examinations is critical to investor protection. In this regard, the IAA has long supported efforts by the SEC to improve its inspection program for investment advisers. Since the adoption of the compliance program rule – Rule 206(4)-7 – the SEC examinations and inspections of registered investment advisers have become more involved with voluminous document requests, intensive questioning of advisory personnel, and lengthy on-site inspections of advisers. We have worked with the staff to ensure that these efforts result in more effective examinations rather than just more laborious ones. We also have urged the SEC to ensure a robust and appropriate oversight program of the investment advisory profession.

Recently, Chairman Schapiro has taken meaningful steps to enhance the current oversight program.[41] We applaud these initiatives, which represent positive steps to strengthen the Commission's examination program,[42] and believe that the SEC must continue to work toward the shared goal of enhancing the effectiveness of investment adviser exams. In this regard, the SEC should focus its examination program on ferreting out fraud rather than focusing on technical violations (*i.e.*, a less "check-the-box" approach to examinations and more activities designed to assess and evaluate risk). The SEC can take a more substantive approach to examinations by hiring examiners with the requisite knowledge and experience in securities trading, portfolio management, valuation, derivatives, risk management and other important areas and has taken significant steps towards that end. The SEC also can leverage its resources by providing more training to its existing staff, conducting exams more focused on firms with higher risk profiles and practices, providing examiners with more tools and methodologies to detect fraud, and utilizing better the available technologies to improve surveillance and for the collection of useful data. In addition, the SEC should ensure that there is no internal incentive for the quantity of examinations conducted rather than the quality of examinations. We look forward to working with the Commission to continue to develop new ways to ensure an effective examination program for investment advisers.

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[41] *See SEC Oversight: Current State and Agenda, Hearing Before the H. Sub. Comm. on Capital Markets, Insurance and Government Sponsored Enterprises Hearing*, 111th Cong. (July 14, 2009) (statement by Mary L. Schapiro, Chairman, Sec. and Exch. Comm'n).

[42] *See* Letter from David G. Tittsworth, IAA, to The Hon. Mary L. Schapiro, Chairman, SEC (July 29, 2009).

With respect to funding of the SEC's oversight program, we also fully appreciate that the SEC has had insufficient resources to conduct examinations of the more than 11,000 advisers under its jurisdiction.[43] We have advocated for a number of measures to address the SEC's resource issue. We are pleased that the Dodd-Frank Act has authorized substantially increased funding for the SEC. Although we have long-supported self-funding for the SEC, the substantial increase in the budget for the SEC in addition to the $100 million reserve fund that the SEC can potentially use for long-term planning will significantly enhance the SEC's ability to regulate and examine SEC-registered investment advisers.[44]

The Dodd-Frank Act also coupled the increase in funding with a significant reduction in the number of advisers that the SEC will have to supervise. The raising of the threshold that separates federally-registered and state-registered advisers from $25 million to $100 million may shift up to 4,200 investment advisers – or 36% of currently registered advisory firms – from SEC regulation to various state regulators.[45]

We understand that the frequency with which broker-dealers are examined currently by FINRA and the SEC is higher than that for examinations of investment advisers by the SEC. We, however, disagree with the proposition that frequency of examinations or imposing an additional layer of regulation and examination will necessarily ensure an effective regulatory oversight program. Neither frequency of examinations nor multiple examinations by different regulatory or quasi-regulatory bodies assure that fraudulent activities will be caught in a timely manner. For example, the numerous inspections of the Bernard Madoff firm over a period of many years by the SEC and FINRA failed to uncover Madoff's massive fraudulent activities. This case clearly negates the argument that insufficient resources or lack of oversight was the cause of the failure to uncover the fraudulent activities of the firm.

Senator Dodd has expressed similar views, as he noted on the Senate floor with respect to this study:

> *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.*[46]

As Senator Dodd noted, merely adding more examinations will not be an answer to this complex issue. In this regard, we urge the SEC to resist the illusory solution of

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[43] *See* Tittsworth House Testimony, *supra* note 3.

[44] Section 991 of Dodd-Frank Act authorizes $1.3 billion for the SEC's budget in 2011 and increases the budget each year through 2015 to $2.25 billion.

[45] 2010 Evolution/Revolution Report, *supra* note 37.

[46] 156 Cong. Rec. S5920 (July 15, 2010) (statement of Senator Christopher Dodd).

recommending a self-regulatory organization (SRO) for investment advisers.[47] Although the concept of an SRO may appear on its face to solve the problem of increasing the frequency of examinations and therefore may be a tempting alternative to proper oversight, there are grave consequences to this approach. Other jurisdictions have tested the SRO model but have discarded the structure over time.[48] 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.[49]

We have discussed in various fora the reasons why we oppose the idea of establishing an SRO for investment advisers and the significant issues with self-regulation.[50] We strongly believe the drawbacks to an SRO – which include inherent conflicts of interest, serious questions about transparency, accountability, and oversight, and added costs and bureaucracy – continue to outweigh the convenience of merely increasing the number of examinations and finding a "quick" solution.[51] Instead, we believe the SEC has the requisite expertise and investor protection mandate to be the most effective regulator of investment advisers. Therefore, we urge the SEC and its staff to develop a thoughtful approach to the supervision of investment advisers and develop new and innovative ways to make oversight of investment advisers more efficient and effective. Clients and customers of investment advisers will be the ultimate beneficiaries of a more creative approach.

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[47] Section 914 of the Dodd-Frank Act requires the SEC to study whether Congress should authorize the SEC to designate an SRO for investment advisers. We expect that the SEC will be seeking comments as it examines the SRO issue in greater detail. We will be providing comments on that study.

[48] "Whereas [SROs] are rather significant in the United States, they do not play any role in the United Kingdom and are hardly of any importance in Germany. In the EU, priority is given to the statutory approach to regulation." *See Securities Market Regulation: International Approaches*, Deutsche Bundesbank Monthly Report. (January 2006), available http://www.bundesbank.de/download/volkswirtschaft/mba/2006/200601mba_en_securities.pdf. Similarly, Australia does not have SROs as classically defined although exchange organizations have limited self-regulatory powers. *See* Prof. Berna Collier, Comm'r, ASIC, *Ensuring Capacity, Integrity and Accountability of the Regulator* (2005) available http://www.oecd.org/dataoecd/63/12/35174567.pdf.

[49] 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." *See 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).

[50] Tittsworth House Testimony, *supra* note 3, at 28-32; Tittsworth Senate Testimony, *supra* note 3, at 17-26.

[51] Given its clear preference for broker-dealer rules, we believe it would be inappropriate and counterproductive for FINRA to be designated as the SRO for investment advisers. Any regulator for investment advisers should, at a minimum, acknowledge and reflect the practices, culture, regulation, and oversight of the advisory profession. In light of its explicit statements favoring the broker-dealer regulatory model, FINRA clearly cannot serve in this capacity. Establishing FINRA as the SRO for investment advisers would eviscerate the "self" in self-regulation. Instead, it would lead to an inappropriate extension of the broker-dealer regulatory model to the advisory profession.

X. Recommendations to Congress and Rulemaking

As discussed in detail above, there is a significant regulatory gap between broker-dealers and investment advisers who provide personalized investment advice to retail investors because broker-dealers are not subject to a fiduciary duty. We request that the Commission remedy that gap by imposing the Advisers Act fiduciary duty on these broker-dealers.

With respect to rulemaking that would impose a fiduciary duty on broker-dealers providing personalized investment advice to retail investors, we have some initial suggestions. Because of the overarching nature of the fiduciary duty, which requires the interests of clients to be placed over those of a securities professional in every circumstance, the SEC does not need to develop an exhaustive list of rules to address conflicts that may exist now or in the future. In fact, it would be contrary to the interests of investor protection to attempt to define precisely all elements of the fiduciary duty. Instead, the SEC should proceed with its rulemaking and codify in a rule under section 15(k) of the Exchange Act that broker-dealers that provide personalized investment advice about securities to retail clients are fiduciaries to clients in providing those services and must act in their best interests.

Adopting a principles-based rule of conduct would prevent brokers-dealers – as the fiduciary duty under the Advisers Act has prevented investment advisers – from being able to exploit regulatory loopholes presented by rules addressing only specific activities and conflicts. The principles-based approach in the Advisers Act has provided the framework to address potential issues that would have been difficult to foresee when the Advisers Act was adopted 70 years ago.

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We appreciate the opportunity to present our views to the Commission on its study of the effectiveness of broker-dealer and investment adviser regulation. Please contact the undersigned, Karen L. Barr, General Counsel, or Jennifer S. Choi, Associate General Counsel, at (202) 293-4222 with any questions regarding these matters.

Respectfully submitted,

David G. Tittsworth
Executive Director

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey

The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes

Robert W. Cook, Director
Division of Trading and Markets

Andrew J. Donohue, Director
Division of Investment Management

Enclosure: Appendix A

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
Standard of Conduct			
General Anti-Fraud	Advisers Act Section 206 (prohibiting fraud and manipulative devices) '34 Act Section 10(b), Rule 10b-5	FINRA Rule 2020 (prohibiting fraud and manipulative devices) '34 Act Section 10(b), Rule 10b-5	Equivalent requirements. And, Section 10(b) and Rule 10b-5 apply to both advisers and brokers where appropriate.
Fiduciary Duty	All investment advisers have a comprehensive fiduciary duty to their clients. This duty includes the obligation to act in the client's best interests and place their client's interest above their own. It also includes the duty to make full and fair disclosure of all material facts, including potential conflicts of interest. Other obligations that flow from this fiduciary duty include: • the duty to seek best execution • the duty to provide suitable advice • the duty to have a reasonable basis for recommendations • the duty to maintain client confidentiality • the duty to vote proxies in best interest of client, and • the duty to disclose material financial and disciplinary information	No fiduciary duty. Under FINRA Rules: • "High Standard of Commercial Honor and Just and Equitable Principles of Trade" [FINRA Rule 2010] • "Suitability" [FINRA Rule 2310] • "Reasonable Basis" [FINRA Rule 2310]	The Advisers Act fiduciary duty is an overarching principle that applies to every aspect of an adviser's relationship with its clients and requires that an adviser conduct itself with its clients' best interests in mind at all times. This principle provides for more comprehensive investor protection, beyond that which can be addressed by specific rules that apply in specific circumstances. The SEC has broad authority to promulgate rules and interpret what constitutes breach of fiduciary duty by an adviser.

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
Code of Ethics Personal Trading and Insider Trading	Rule 204A-1: • Written "code of ethics" (including requirements to comply with securities laws and firm standards of conduct, report violations, secure employee acknowledgements) • Holdings and transaction reporting requirements • Pre-approval of IPOs and private placements • Firm standards of business conduct that reflect fiduciary duties Advisers Act Section 204A requires policies and procedures to prevent insider trading.	NASD Rules 3040 & 3050: • Duty to disclose accounts • Broker must send duplicate account statements and confirms • Pre-approval for certain private securities transactions '34 Act Section 15(f) requires policies and procedures to prevent insider trading.	Advisers are required to adopt Codes of Ethics that "set out ideals for ethical conduct premised on fundamental principles of openness, integrity, honesty and trust." (Adopting Release). Codes address conflicts of interest and must ensure that advisory personnel cannot take advantage of their positions. Brokers are not subject to such requirements. Equivalent regulation already exists for insider trading.
Disclosure			
Initial and Ongoing Disclosure regarding *Investment Advice*	Advisers Act Section 206-Overarching fiduciary duty to disclose conflicts of interest, compensation arrangements, and other material facts. Advisers Act Section 203 and Rule 203-1 - Form ADV must be provided to each client at the outset of the advisory relationship.	No overarching duty '34 Act Rule 17a-5(c) requires disclosure of financial statements.	Advisers are required affirmatively to disclose substantial information about their businesses, their fees and compensation, their conflicts of interest, and their disciplinary history upfront to each client so that the client can evaluate these practices and conflicts in making decisions.

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
	- Part 1 available publicly: business information, disciplinary history, AUM, nature of business and types of clients, compensation arrangements, advisory activities, other business activities, affiliations, custody, participation or interest in client transactions, control persons - Part 2A available publicly: advisory business, fees and compensation, performance-based fees and side-by-side management, types of clients, methods of analysis, investment strategies, and risk of loss, conflicts of interest, disciplinary information, other financial industry activities and affiliations, code of ethics, participation or interest in client transactions and personal trading, brokerage practices, review of accounts, client referrals and other compensation, custody, investment discretion, proxy voting, financial information - Part 2B: for advisory personnel, disclosure of educational and		Brokers are not generally required to make upfront disclosure to their customers regarding all conflicts of interest, compensation arrangements, or disciplinary history. Advisers have an overarching fiduciary obligation to disclose conflicts of interest and other material information and brokers do not. Brokers' disclosure duties are very product and transaction-specific

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
	business background, disciplinary history, other activities, and supervision		
Product disclosure	To the extent advisers sell products (e.g. as dual registrants), they must comply with FINRA rules.	FINRA Product-Specific Disclosure Rules: • Penny Stock • CMOs • Options • Variable Annuities • Margin Accounts	Equivalent requirements. To the extent advisers engage in product sales, they are also required to make product-specific disclosures.
Client Relationship/Sales Practices			
Contract Requirements:	Advisers Act Section 205: • Written Agreement (not required by rule but required in practice) • Performance Fees • No assignment w/o consent • Change in partnership • No hedge clauses	In general, written agreements not required by FINRA unless for certain types of products or accounts, e.g.: • Penny Stocks • Options • Margin Accounts Mandatory pre-dispute arbitration clauses *(industry practice)*	Advisers and brokers, though not required by rule, typically have written contracts with clients or customers. Advisory contracts are more substantive, reflecting personal ongoing relationships and contracts for personal services. Advisory contract requirements embed investor protections, while there are no equivalent broker contract rules. Most investment advisory agreements do not include mandatory pre-dispute arbitration

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
			clauses. Brokers' contracts typically eliminate the ability of their customers to choose their preferred dispute resolution venue.
Advertising - General (see below for performance advertising)	General anti-fraud provisions of Advisers Act Section 206 and no-action letters: • Must be fair and balanced • No material misstatements or omissions • Past performance no guarantee of future performance, etc. Advisers Act Rule 206(4)-1: • No testimonials No past specific recommendations (the conditions for use are so unworkable that the provision is in effect a prohibition) • No charts, graphs and other "devices" • No "free" reports • No material misstatements or omissions	General principles under NASD Rule 2210: • Must be fair and balanced • No material misstatements or omissions • Past performance no guarantee of future performance etc. Process under FINRA Rule 2210 for ads related to advice: • Sales Literature o Principal approved • Correspondence o Monitoring system required	Equivalent general anti-fraud-type principles. Advisers are prohibited from using client testimonials or mentioning past specific recommendations in their advertising, while brokers routinely use testimonials. Equivalent requirements on internal approval of advertising: FINRA requires principal approval for brokers, while the SEC compliance program rule construct provides a framework for firms to ensure that advertisements are not misleading and generally involve internal approval processes. Equivalent supervisory liability.
Performance Advertising	Anti-fraud liability – Advisers Act Rule 206(4)-1	General principles under NASD Rule 2210	Equivalent general anti-fraud-type principles.

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
	Extensive interpretive guidance exists through SEC enforcement proceedings and no-action letters, for example related to: • Composite construction • Gross of fees-net of fees • Investment of dividends • Benchmarks • Model results • Portability • Disclosure of conditions, limitations, strategies • Market or economic conditions The Global Investment Performance Standards (GIPS®) is a set of standardized, industry-wide principles that provide investment firms with guidance on how to calculate and report their investment results to clients and prospective clients. The standards address input data, calculation methodology, composite construction, disclosure, presentation and reporting and other topics. Claims of GIPS compliance are closely scrutinized by SEC staff.	FINRA interpretations under Rule 2210 relate only to mutual funds, e.g.: • 1/3/5/10 or Life of Fund performance data for mutual funds • Ban on use of hypothetical or synthetic performance for mutual funds • Use of rankings in mutual fund advertisements • Bond fund volatility ratings	Adviser performance records are highly scrutinized by SEC staff. There is generally no tracking of performance of brokerage accounts. Broker-dealers are subject to only specific mutual fund performance rules, which also apply to advisers that manage mutual funds. Many investment advisers comply with GIPS, performance standards issued by the CFA Institute, a professional organization that promotes ethical standards in performance presentation. Firms that claim compliance with GIPS must be verified by an independent third party or disclose that they are not so verified. Claims of GIPS compliance is closely scrutinized by SEC staff. Brokers generally do not claim compliance with GIPS.

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
Use of solicitors	Cash Referral Fees [Advisers Act Rule 206(4)-3] Requires agreement with solicitor (including solicitor's agreement to comply with Advisers Act) and separate disclosure document to client with disclosure regarding solicitor's compensation and relationship with adviser. Must also disclose referral arrangements on Form ADV.	None related to investment advice or brokerage business generally (MSRB Rule G-38 for brokers in the municipal securities business)	Advisers are subject to detailed rules regarding use of solicitors, while brokers are not. Brokers generally are not required to make disclosures to customers regarding referrals. New rule 206(4)-5 bans advisers' use of solicitors for state and local pension plan business unless the solicitors are certain "regulated persons"; it has not proposed similar rules for brokers soliciting brokerage business other than for brokers in the municipal securities business.
Political contributions	SEC rule 206(4)-5 imposes two year time out on receipt of compensation if adviser or personnel make certain contributions to officials of government plans who have direct or indirect influence over selecting adviser.	MSRB Rule G-37 political contribution rules for brokers apply only to municipal securities business.	Advisers will be subject to substantial sanctions for contributions to state and local officials. Brokers are subject to equivalent rules only with respect to municipal securities business – not with respect to other services they provide to state and local pension plans (e.g., investment advice, brokerage). FINRA, however, has announced that it will consider proposing similar rules for brokers.
Investment Operations			
Best Execution	Covered under general fiduciary principles and compliance program rule (Advisers Act Rule (206(4)-7).	Brokers must use reasonable diligence to determine the best market for a security and transact for	Equivalent regulation in advisory context. The different ways the best execution duty works is

Appendix A: IA/BD Comparison Matrix

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	Advisers must seek to obtain the best price and execution on a qualitative basis, taking all factors into account. In selecting a broker, advisers must consider the full range and quality of services provided, execution capability, commission rate, financial responsibility, and responsiveness to the adviser.	the client so that the price is as favorable as possible under prevailing market conditions. [FINRA Rule 2320] Post-transaction disclosure obligation [“34 Act Rule 10b-10] Fair price and commissions [FINRA Rules 2230 and 2440]	appropriate for the differing activities involved.
Affiliated Principal Trading Agency Cross Transactions	Prohibited without prior transaction by transaction client consent [Advisers Act Section 206(3)] Client consent required [Advisers Act Rule 206(3)-2]		Advisers Act rules governing principal and agency cross transactions provide strong protections for clients because they require disclosure and consent prior to the transaction. Brokers only have to disclose capacity and terms in after-the-fact confirms.
Proxy Voting	Advisers Act Rule 206(4)-6: Advisers with proxy voting authority must have: • Written policies and procedures reasonably designed to ensure adviser votes client securities in best interest of clients • Public reporting for investment companies, client reporting upon	NYSE Rule 452 Brokers holding shares as custodian on behalf of customers may vote for customers in routine matters if they do not receive instructions but are not subject to any duties in connection therewith. They typically vote with management without any disclosure to their customers. Otherwise, brokers generally serve a	Advisers are subject to extensive proxy voting regime while brokers are not. Advisers must vote proxies in best interest of the client, and disclose and manage conflicts, while brokers have no such duties. Advisers Act rules reflect an adviser’s fiduciary duties to exercise care and loyalty with respect to client assets, including voting rights, where the client delegates voting authority to the adviser.

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
	request for all clients • Duty to vote proxies in best interest of client, disclose and mitigate conflicts	ministerial function in transmitting proxy information to customers.	Brokers generally only have administrative functions with respect to proxies.
Compliance Program			
Compliance Program	Advisers Act Rule 206(4)-7: • Written policies and procedures • Designated CCO • Annual review	FINRA Rule 3010: • Written policies and procedures • Designated CCO	Equivalent regulation already exists.
Duty to Supervise	Advisers Act Section 203(e)(6)	FINRA Rule 3012	Equivalent regulation already exists. While the regulatory approaches (e.g. principle-based vs. rules based) are different, the results are the same.

Custody of Client Assets	Advisers Act Rule 206(4)-2:
	• Qualified Custodian must hold client funds and securities
	• Qualified Custodian must send client statements directly to clients
	• Independent verification of client assets
		'34 Act Rule 15c3-3:
		• Segregation of Client Assets
		  o Fully paid securities
		  o Excess margin securities
			Regulations are appropriately tailored to different services provided and address different functions. Broker regulations address the risks of acting as a qualified custodian physically maintaining client assets. Advisers that are not qualified custodian are not permitted to hold client assets. Adviser regulations require use of a qualified custodian and layer additional protections for risks

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
	• Internal control report where adviser or affiliate serves as Qualified Custodian		posed by other types of access to client assets (*e.g.* deemed custody by acting as trustee for trust or as general partner for limited partnership).
AML	OFAC requirements Many firms have AML policies and procedures as a matter of practice.	OFAC requirements Written policies and procedures Designated AML Officer Independent annual audit Training KYC, CIP, SAR	Same OFAC requirements. Equivalent regulation already exists as a matter of practice. Similar to the custody rule, the differences in regulation are appropriate based on different functions. Advisers do not hold cash or process transactions. Advisers have long-term discretionary relationships with clients that do not generally involve frequent inflows and outflows into managed accounts. Brokers and banks are subject to AML rules because they process transactions and hold customer assets. They are in a position to monitor transactions and cash flows in accounts.
Privacy	Reg S-P Reg S-AM	Reg S-P Reg S-AM	Equivalent regulation already exists.

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
Record-Keeping	Specified records [Advisers Act Rule 204-2] OCIE interpretive practice	Business as such ['34 Act Rules 17a-3 & 17a-4]	Both record-keeping regimes are outdated and in need of review and modernization. SEC should consider appropriate information to maintain rather than requiring that firms keep all records.
Registration & Licensing Requirements			
Registration	Advisers Act Section 203 and Rule 203-1: Submit Form ADV, Parts 1 and 2. Part 1 is available publicly now and Part 2 will be as of January 2011. In Part 1, provide business information, disciplinary history, AUM, nature of business and types of clients, compensation arrangements, advisory activities, other business activities, affiliations, custody, participation or interest in client transactions, control persons. In Part 2, provide further detail about advisory business, fees and compensation, conflicts of interest, disciplinary information, code of ethics, methods of analysis, investment strategies, financial industry activities and affiliations, custody, investment discretion, brokerage practices, proxy voting,	Section 15(b): Submit Form BD; in Form BD provide information about business, types of business engaged in, disciplinary history. Applicable state registrations. NASD Rule 1010 Series - Become member of SRO (*e.g.* FINRA). For FINRA, this includes submission of business and supervisory plan and firm rep interview.	Advisers must submit extensive information initially to SEC, particularly about conflicts of interest (Form BD is not as comprehensive as Form ADV). In order to register and complete Form ADV, advisers must assess and address conflicts of interest, assess risks and establish and implement a compliance program. Key issues with respect to the business and compliance program are disclosed in the registration process and to clients. Brokers have FINRA registration requirements in addition to Form BD. The compliance and supervisory aspects are equivalent in substance to the adviser requirements. Other information provided by brokers is more appropriate for the broker business model with its broad range of

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
	financial information. File Form ADV and submit a fee ("notice file") with applicable states.		activities and risks.
Firm Financial Requirements	Form ADV, Part 2 - Audited balance sheet must be disclosed if adviser proposes to charge >$1,200 in fees per client 6 months or more in advance Part 2 requires advisers with discretion or custody to disclose to clients any financial condition that is reasonably likely to impair an adviser's ability to meet contractual commitments to clients. Affirmative disclosure obligations under fiduciary duty if an adviser suffers a materially adverse financial event. Bonding with respect to ERISA and investment company clients	• '34 Act Rule 15c3-2: Net Capital • Bonding • Financial Reporting • SIPC	Affirmative disclosure obligation for advisers appropriate to fiduciary relationship. Firm financial standing requirements important for brokers because they maintain custody of customer assets and engage in market making, underwriting, trade settlement and clearing and other activities integral to the functioning of the securities markets. Advisers – unless also registered as broker-dealers – do not engage in these broker-dealer activities or otherwise hold client assets.
Individual Qualification Disclosure	Form ADV Part 2B (brochure supplement) requires disclosure of individual's educational background, business experience, disciplinary information, other business activities, additional compensation and supervision.	No affirmative disclosure requirements to clients; disclosure to FINRA on Form U-4 of individuals' education and business background. Customers may seek out information on BrokerCheck.	An adviser's disclosure of qualifications of its adviser personnel (e.g. Form ADV Part 2B) is more meaningful for client evaluation than examination requirements.

Appendix A: IA/BD Comparison Matrix

Subject	SEC Registered Investment Adviser	Broker/Dealer	Similarities and Differences
	The supplement must be delivered for each supervised person who provides advisory services to that client.		
Licensing	State licensing of IA representatives (IARs)	State registration of BD representatives (RRs) FINRA Licensing Regime [FINRA Rule 1030]	Similar licensing regimes – filing of Form U-4 for IARs (all but 3 states) and RRs.
Examinations – advisory personnel Examinations – product sales	IARs must pass Series 65 or combination of Series 66/7; most portfolio managers have advanced degrees or CFA designation; many financial planners have CFP designation Series 7 if selling securities products (e.g. dual registrant) Series 6 if selling limited to mutual funds and variable annuities	No examination of investment management knowledge; may have CFP designation Continuing Education [FINRA Rule 1120] Series 6 or 7	Equivalent regulation; IARs tested on IA knowledge; RRs tested on BD knowledge. Both advisers and brokers are responsible for the training and competence of their personnel. To extent an individual employed by an adviser sells securities products the individual must be licensed and take Series 6 or 7 examination.
Examination and Oversight			
	OCIE	FINRA OCIE (in conjunction with FINRA, principally oversight role regarding FINRA exams)	Examinations and expertise by each regulator appropriate to types of services overseen by each. SEC resources should be bolstered to increase the frequency of adviser exams.