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**BY ELECTRONIC MAIL**

August 30, 2010

Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090  
[rule-comments@sec.gov](mailto:rule-comments@sec.gov)

*Re: Comments on File No. 4-606: Study Regarding Obligations of Brokers, Dealers,  
and Investment Advisers*

Dear Ms. Murphy:

Bank of America<sup>1</sup> appreciates the opportunity to submit this letter in response to a request by the Securities and Exchange Commission (“SEC” or the “Commission”) for comments regarding a study of the obligations of broker-dealers and investment advisers (the “Study”).<sup>2</sup> We hope our views will help inform the Commission as it completes its Study and considers any subsequent rulemaking.

Bank of America supports applying a new, harmonized standard of care to all financial professionals providing personalized investment advice to individual investors. In particular, we believe that both broker-dealers and investment advisers giving personalized investment advice to individual investors should be subject to a fiduciary duty that is clearly prescribed. We further

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<sup>1</sup> Bank of America Corporation is one of the world’s largest financial institutions, serving its clients with a full range of banking, investing, asset management and other financial and risk management products and services. It is among the world’s leading wealth management companies. Bank of America Corporation stock (NYSE: BAC) is a component of the Dow Jones Industrial Average and is listed on the New York Stock Exchange. Of particular note for purposes of this letter is that Bank of America Corporation and/or its affiliates are registered as both broker-dealers and investment advisers.

<sup>2</sup> See SEC Release No. 34-62577, IA-3058 (July 27, 2010) (the “Release”).

believe that any new fiduciary standard of care should be applied in a manner that both enhances investor protection and preserves the availability of choices for clients. Informed client choice is critical to ensuring that investment objectives are attained.

I. *Investors are satisfied with current services, but confused about the standards of care that currently apply to different types of financial professionals.*

The Release asked whether retail investors understand that there are different standards of care for broker-dealers, investment advisers, and associated persons who are providing personalized investment advice, and whether the existence of different standards of care is a source of confusion for retail investors. The 2008 study commissioned by the SEC and conducted by the RAND Institute for Civil Justice (“RAND”)<sup>3</sup> concluded, among other things, that: (1) many investors do not understand the key differences between broker-dealers and investment advisers, including the legal duties that apply; and (2) notwithstanding their confusion, most investors tend to have a long-term relationship with their financial professional and are satisfied with the services they receive. Bank of America’s recent internal analysis is consistent with the findings of the RAND Study; we found that our clients are generally pleased with their Financial Advisors and the services they provide, regardless of the legal structure through which these services are provided.

II. *Existing investor protection should be enhanced through a new, harmonized standard of care.*

Today, retail investors seeking investment advice are protected differently depending on the source of that advice. Investment advisers are subject to a fiduciary duty, meaning that they must provide advice that is in the client’s best interest and disclose any material conflicts of interest. Broker-dealers have a duty to deal fairly with customers, and to act consistently with just and equitable principles of trade. The principles by which broker-dealers are expected to conduct business are clarified through specific rules, including a suitability standard<sup>4</sup> (*i.e.*, recommendations by a broker-dealer must be suitable for the investor at the time of the investment), various disclosure requirements, and prohibitions on certain conflicts of interest.

While both standards of care provide important protections, we believe they should be harmonized. When an individual investor requests personalized investment advice, it should not matter whether that advice is given by a registered investment adviser or a broker-dealer, or through a managed account or a brokerage account — in every case the advice should be in the client’s best interest. Bank of America believes there is a real opportunity to eliminate investor

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<sup>3</sup> See Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, *available at* [http://www.sec.gov/news/press/2008/2008-1\\_randiabdreport.pdf](http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf) (the “RAND Study”).

<sup>4</sup> See, *e.g.*, NASD Rule 2310, “Recommendations to Customers (Suitability).”

confusion and enhance investor protection by subjecting all financial professionals to a fiduciary duty requiring them to act in an individual investor's best interest when providing personalized investment advice.

There are a number of significant regulatory protections that already attach to a brokerage relationship, but are not present in an investment advisory relationship. We believe it is important not only to preserve these protections for clients of broker-dealers, but at a minimum to ensure that all investors receive adequate disclosure about these differences in regulatory protection and oversight. For example, registered representatives of a broker-dealer are subject to industry-wide licensing and continuing education requirements,<sup>5</sup> whereas the training standards for investment advisory representatives vary by firm. Broker-dealers also are required to purchase a fidelity bond from an insurance company, providing a source of compensation for clients who are victims of fraud or embezzlement by broker-dealer personnel.<sup>6</sup> Investment advisers are subject to no such federal securities requirement (although state and ERISA requirements may impose bonding or minimum net capital requirements).

Examinations of financial professionals also serve as an important investor protection. Because they are within the jurisdiction of multiple regulators (*e.g.*, the SEC and FINRA), broker-dealers currently are subject to frequent audits and examinations, often on an annual basis. In contrast, investment advisers typically are examined only by the SEC and on a much less frequent basis.<sup>7</sup> In 2009, the SEC's Office of Compliance, Inspections and Examinations examined an estimated 1,300 of over 11,000 registered investment advisers,<sup>8</sup> and as of 2009, more than 3,000 investment advisers had never been examined by the SEC. This problem will become even more acute as the population of investment advisers increases due to the private fund registration requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").

In light of these and other protections that are afforded to brokerage customers, it would not benefit investors to replace the regulatory framework for broker-dealers with the regulatory regime applicable to investment advisers. A new, fiduciary standard of care should be applied primarily through amendments to the Securities Exchange Act of 1934 (and, as harmonization

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<sup>5</sup> See, *e.g.*, NASD Rule 1000 Series, "Membership & Registration Rules."

<sup>6</sup> See NASD Rule 3020, "Fidelity Bonds."

<sup>7</sup> State regulators have the authority to investigate federally registered investment advisers only for suspected fraud or deceit. See 15 U.S.C. § 80b-18a (outlining limitations on state regulation of investment advisers).

<sup>8</sup> The growth in the number of investment advisers outstripped the Commission's ability to examine every firm on a regular basis. See Speech by Lori A. Richards, The Role that Surveillance Might Play in the Risk-Based Oversight of Mutual Funds (Dec. 16, 2008).

requires, the Investment Advisers Act of 1940), rather than through elimination of the broker-dealer exclusion in the Advisers Act.

III. *A new, harmonized standard of care should not limit client choice.*

Investors have long demanded and expected a range of choices regarding their financial services:

- whether to receive (and pay for) personalized investment advice, or some more limited services, such as unsolicited trade execution, or services which do not include personalized investment advice (*e.g.*, online services);
- how to interact with their financial professionals (*e.g.*, multiple accounts);
- how to pay for personalized investment advice and other services (*e.g.*, through commissions or asset-based fees);
- access to services that do not involve personalized investment advice; and
- access to the widest array of investment products, both with and without personal investment advice.

Indeed, the overall satisfaction that investors have expressed is likely attributable at least in part to the range of choices that are currently available. Therefore, we believe it is imperative that the Commission preserve investors' ability to choose.

*a) Investors should be able to seek the type and level of advice they want.*

We strongly believe that any new, harmonized standard of care should apply only when a financial professional is providing *personalized* investment advice about securities to individual investors. In other words, where the advice or recommendation in question is not tailored to the particular client, the new standard of care should not attach. For example, the provision of a research report or educational materials to a retail investor should not be deemed personalized investment advice for purposes of applying a new standard of care.

In connection with any rulemaking regarding a new, harmonized standard of care, we encourage the Commission to establish a rebuttable presumption that brokerage services provided solely online do not constitute personalized investment advice. Online brokerage services typically are provided at a discount to other services because they do not incorporate features like investment advice or recommendations. For example, Merrill Edge offers a service through which clients can direct their own investments online. That service, in and of itself, does

not involve the requisite provision of individualized advice to clients based on their particular circumstances. This service is similar to traditional brokerage services, *i.e.*, the orders are unsolicited. Thus, investors would not expect a different level of protection than exists under the current regulatory structure for broker-dealers. If, however, an investor elects to use the services of an investment professional to obtain financial advice and guidance for the investor's particular circumstances and objectives, that would be personalized investment advice and, in our view, should trigger the new standard of care.

- b) *Investors should be able to decide how to interact with their financial professionals.*

If a new, harmonized standard of care is implemented, the Commission also should preserve clients' ability to maintain multiple types of accounts and relationships with a financial services firm (*e.g.*, both investment advisory and brokerage accounts). It is not uncommon for clients to decide that they want some of their assets to be guided by advice and to self-direct other assets, and to maintain two or more accounts with the same financial services provider. More specifically, a client may want to maintain a discretionary investment advisory account, a brokerage account in which personalized investment advice is provided, and a brokerage account for unsolicited trade executions (which may or may not be an online account). We believe that any rulemaking should allow a client to maintain all three accounts, with a new, harmonized standard of care applying to the first two only.

- c) *Investors should be able to decide how to pay for personalized investment advice and other services.*

The Dodd-Frank Act obviates some of our concerns about disincentivizing broker-dealers from offering a range of products or services. For example, the Dodd-Frank Act provides that receipt of commission-based compensation will not by itself be a violation of a new standard of care. This is encouraging, and makes it likely that broker-dealers will continue to offer clients a variety of payment options.

We encourage the Commission to clarify that broker-dealers may continue to offer products and services with different pricing and commission structures without violating a new standard of care. Investors should continue to be able to decide what services they will seek from brokerage firms, and how to pay for those services.

- d) *Investors should be able to decide when they want to accept personalized investment advice, and when they do not.*

The Dodd-Frank Act also specifies that a broker-dealer would not be required to have a continuing duty of care or loyalty to a retail investor after providing personalized investment

advice. Bank of America supports incorporating such a provision into any rulemaking, as we believe clients should be able to elect to receive (and pay for) personalized investment advice only when they want it. Including such a provision would ensure that a broker-dealer that provides personalized investment advice to a client is not automatically subject to any new, harmonized standard of care in connection with account services that do not constitute personalized investment advice. For example, many clients use their brokerage accounts for other financial needs such as bill paying, debit card payments, cash sweeps, and borrowing. These account services should not be subject to any new standard of care.

- e) *Investors should have access to a wide array of investment products, including products that are currently sold on a principal basis.*

Section 206(3) of the Advisers Act imposes significant restrictions on investment advisers' ability to trade as principal with clients. The practical effect of Section 206(3) has been that investors with an advisory account at a financial services firm often are unable to access that firm's principal inventory. Bank of America strongly believes that when implementing a new, harmonized standard of care, the Commission should issue specific guidance or relief to ensure firms' ability to continue to transact investment products as principal. Such guidance would be consistent with the fact that the Dodd-Frank Act refers to a standard of conduct that is no less stringent than the standard applicable to investment advisers under Sections 206(1) and 206(2), but makes no mention of Section 206(3).

Bank of America currently makes a wide range of different securities and investment products available to brokerage and certain investment advisory clients,<sup>9</sup> including, among other things: fixed income securities (e.g., municipal securities); firm-sponsored structured products; and initial public offerings. Many of these securities and investment products are sold by Bank of America primarily or exclusively as principal. Similarly, hundreds of thousands, if not millions, of clients of other financial services firms effect trades that their broker-dealer executes as principal. This well-established practice would be severely disrupted if there was confusion

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<sup>9</sup> Bank of America currently relies upon the relief provided in Rule 206(3)-3T to trade as principal with non-discretionary advisory clients under certain conditions. Specifically, Rule 206(3)-3T allows the firms to comply with Rule 206(3) by: (i) providing written prospective disclosure regarding the conflicts arising from principal trades; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal transactions; (iii) making certain disclosures, either orally or in writing, and obtaining the client's consent before each principal transaction; (iv) sending to the client confirmation statements disclosing the capacity in which the adviser has acted and disclosing that the adviser informed the client that it may act in a principal capacity and that the client authorized the transaction; and (v) delivering to the client an annual report itemizing the principal transactions. This rule is expected to expire on December 31, 2010. Bank of America encourages the Commission to consider a further extension to this rule while it determines whether and how to apply a new, harmonized standard of care to broker-dealers and investment advisers providing personalized investment advice to retail investors.

about whether a new, harmonized standard of care acted as a practical prohibition on such activity.

The importance of giving clients access to products traded on a principal basis is illustrated by municipal securities. If an investor expressed interest in purchasing or selling a municipal security, but the financial professional was actually or effectively prohibited from trading as principal, the financial professional would have to seek an alternative source of supply. The restriction would therefore almost certainly reduce the availability of appropriate securities for the client, delay execution, and increase costs to the client. Such a disruption also would negatively impact the issuers of the securities (*i.e.*, the municipalities) by making capital raising more difficult.

Another example of investment products that clients expect to be able to choose to invest in through Bank of America are the various funds and other products sponsored by the firm and/or its affiliates. The existing relief for non-discretionary advisory accounts (Rule 206(3)-3T) does not cover principal trading in instances where the firm seeking to rely on the rule (or one of its affiliates) is the issuer or underwriter of the security. We believe that any principal trading relief granted in connection with the adoption of a new, harmonized standard of care should allow clients to purchase a firm's proprietary products and securities from the firm's own inventory. As with the municipal trading example provided above, any restriction to the contrary could delay execution and increase costs to the client, or worse, prevent clients from having access to the product altogether.

IV. *A new, harmonized standard of care should not result in wholesale application of "fiduciary" principles to the brokerage business.*

While Bank of America supports applying a fiduciary standard of care to the provision of personalized investment advice to individual investors, we are concerned that simply referring to a "fiduciary" duty in principle may cause significant confusion for both financial professionals and investors. As you know, the Advisers Act and the Employee Retirement Income Security Act ("ERISA") have a number of specific rules that accompany the fiduciary standard, not the least of which are principal trading restrictions. We encourage the SEC to make clear that any new, harmonized standard of care does not necessarily implicate principal trading and other restrictions that may accompany certain types of fiduciaries (e.g., ERISA). For example, as long as a financial professional is acting in a client's best interest, and therefore satisfying the new standard and any duty of best execution, he or she should be able to offer a client a proprietary product or a security out of the firm's inventory. We encourage the SEC to also make clear that broker-dealers may continue to provide traditional brokerage services (*i.e.*, taking unsolicited retail and other customer orders) without application of a new fiduciary standard of care. Giving financial professionals flexibility in how to satisfy a fiduciary standard of care would permit

them to truly act in their clients' best interest and also would ensure that investor choice is preserved.

V. *The SEC should allow adequate time for financial services firms to make an orderly transition to a new, harmonized standard of care.*

Bank of America strongly believes that any rulemaking regarding a new, harmonized standard of care should provide adequate time for an orderly transition. Therefore, we encourage the SEC to solicit comment regarding the transition period that would be necessary before any new rules would apply. Depending on the rules that are ultimately proposed, financial services firms could be required to implement significant technological and infrastructure changes, draft and disseminate new disclosures regarding conflicts of interest, revise policies and procedures, and train all employees with client-facing responsibilities about the new, harmonized standard of care. In addition, clients should be afforded time to understand the new regulatory regime and available investment choices.

VI. *Conclusion*

In summary, we strongly support the adoption of a fiduciary standard for all financial professionals providing personalized investment advice to individual investors. In connection with any such rulemaking, the Commission should take care to preserve the range of products and services currently available and their pricing structures, and thereby preserve investor choice. If you have any questions, or if we can provide any further information, please contact me at 646-855-1180.

Sincerely,



R. Scott Henderson

cc: Chairman Mary L. Schapiro  
Commissioner Luis A. Aguilar  
Commissioner Kathleen L. Casey  
Commissioner Troy A. Paredes  
Commissioner Elisse B. Walter