August 25, 2010

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Request for Comment to Inform Study Regarding Obligations of Brokers, Dealers, and Investment Advisers (Release No. 34-62577; IA-3058; File No. 4-606)

Dear Ms. Murphy:

I am writing in response to the Securities and Exchange Commission's ("SEC") request for public comment to inform its study of the obligations and standard of care of brokers, dealers, and investment advisers when providing personalized investment advice about securities to retail customers. I am the Senior Staff Attorney for ValMark Securities, Inc. ("ValMark") in Akron, Ohio. ValMark is a national independent broker-dealer specializing in both equity and insurance products, as well as support services for the nation's top echelon of wealth transfer, corporate insurance and wealth advisory firms. Licensed in 50 states for life insurance and securities, the firm has 100 independently owned member offices throughout the United States. I also offer legal support to ValMark Advisers, Inc. ("ValMark Advisers"), an SEC-registered investment advisory firm. The products offered by my firm and its affiliates subject us to regulation by the SEC and the Financial Industry Regulatory Authority ("FINRA"). Prior to joining ValMark, I was an Enforcement Attorney with the Ohio Division of Securities ("Division") for nearly four years, where in addition to investigating violations of the Ohio Securities Act and other rules and regulations, I provided legal counsel and advice to Division examination staff on securities regulation, practices, procedures and related issues. As a former regulator that now works in the private sector, I appreciate your efforts to obtain information from the public and conduct a comprehensive and objective study before deciding whether to propose new regulations. I am hopeful that opportunities for input from financial professionals and members of the financial services industry will continue as the process unfolds.

The Dodd-Frank Act permits the SEC to require that all broker-dealers be held to the same legal fiduciary requirement investment advisers have when providing advice to clients. Should the SEC choose to exercise that authority, the fiduciary duty, as defined by the Dodd-Frank Act, would require that all broker-dealers be held to a legal standard "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice." However, in many scenarios, the suitability standard that is currently in place for brokers is more rigorous than the proposed fiduciary standard. A brief review of the fiduciary standard for advisers and the current suitability standard for brokers will make this abundantly clear.

Section 202(a)(11) of the Investment Advisers Act of 1940 defines an "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." Interestingly, one word that is missing from the definition of

investment adviser is the word "fiduciary." However, the United States Supreme Court made clear in *SEC v. Capital Gains Research Bureau, Inc.* (375 U.S. 180 (1963)) that the Investment Advisers Act of 1940 "reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship, as well as a congressional intent to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser - consciously or unconsciously - to render advice which was not disinterested." Further, an investment adviser owes its clients a duty of "utmost good faith, and full and fair disclosure of all material facts," as well as an affirmative obligation "to employ reasonable care to avoid misleading clients."

As touched on in *SEC v. Capital Gains*, there are five core principles of Investment Advisers Act of 1940 that establish fiduciary requirements:

- Put the client's best interests first;
- Act with the skill, care, diligence, and good judgment of a professional;
- Do not mislead clients; provide conspicuous, full, and fair disclosure of all important facts;
- Avoid conflicts of interest; and
- Fully disclose and fairly manage, in the client's favor, any unavoidable conflicts.

Under this standard, an investment adviser must provide its "best advice" to clients. So yes, on a legal level, working with a client in a fiduciary capacity imposes a legal duty to always work in that client's best interests. However, the fiduciary standard is often vague, and though the bullet points above contain a general roadmap of fiduciary care, the fiduciary standard is in essence a backward looking standard supported by ideas, not actions, enforcing violations retroactively through SEC enforcement or private lawsuits. The suitability standard, on the other hand, is forward looking and better protects the client through multiple, defined levels of scrutiny and review, preventing harm to consumers through ongoing and frequent FINRA and broker-dealer audits and compliance processes.

NASD Rule 2310, Recommendations to Customers (Suitability), states in part:

(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.

As shown by NASD Rule 2310, the suitability standard is very proactive. It also provides ample protection and cost effective remedies for the investor that the fiduciary standard does not. A representative cannot sell a product he/she doesn't believe is suitable. Even though that is the case, every transaction must be reviewed and approved by a registered principal to determine suitability, and those that are determined to be unsuitable require further investigation and a response. Every communication with the public is monitored and must be approved. Every transaction is recorded and reviewed. There are continuing education requirements to complete for securities examinations, state insurance licenses and

FINRA registrations. In addition, both FINRA and state regulators conduct audits of trades. These requirements don't exist in the advisory world, and to say that the suitability standard of the brokerage doesn't look out for the best interests of the client is flat out wrong. Clients should have a level of comfort knowing that their transactions are subject to several levels of checks and balances, and their representatives are subject to thorough scrutiny by the supervising principal, home office and regulators.

It is not as though the suitability standard does not offer the client the potential for relief – in fact, it is quite the contrary. If an unsuitable recommendation has been made, relief can be provided via state and federal regulatory bodies, as well as arbitration or the courts. The Dodd-Frank Act fiduciary standard will, in essence, add a vague legal liability standard that looks back and is enforced after the fact. This benefits nobody except plaintiff's attorneys.

In comparing the investment adviser and broker-dealer regulatory structures, the broker-dealer regulatory structure provides better guidance to registered representatives and their supervisors, leading to better protection for their customers, because the rules are clear and specific, and the conduct of registered representatives is capable of being monitored and audited. By contrast, the principles-based nature of the investment adviser regulatory structure is more difficult to follow and enforce.

Not only does the suitability standard address many of the points in *SEC v. Capital Gains*, it provides additional protections that are simply not available through either the current or proposed fiduciary standard. If protecting the brokerage client is the ultimate goal, the best standard is already in place – there is no better standard than suitability.

As the legal counsel for a broker-dealer and registered investment adviser, and also in my capacity as a former state regulator, I strongly encourage the SEC to consider the input of financial services professionals, as well as our unique role in the marketplace and the fundamental nature of the products our firms sell when moving forward with its study of the obligations and standards of care for broker-dealers and investment advisers. Again, I thank the Commission for the opportunity to comment and welcome future opportunities to provide input.

Sincerely,

T. Mitchell Deane
Senior Staff Attorney