August 27, 2010

VIA ELECTRONIC DELIVERY

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. 4-606; Release 34-62577; IA-3058
Study Regarding Obligations of Brokers, Dealers and Investment Advisers

Dear Mr. Cook:

TIAA-CREF Individual & Institutional Services, LLC ("TC Services") submits this letter in response to the release issued by the Securities and Exchange Commission ("Commission") entitled the "Study Regarding Obligations of Brokers, Dealers and Investment Advisers".[1]

The release requests public comment on a study ("Study") to evaluate: (i) the effectiveness of existing legal or regulatory standards of care for broker-dealers, investment advisers, and persons associated with them when providing personalized investment advice and recommendations about securities to retail investors; and (ii) whether there are gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for these intermediaries. The Study is required by Section 913 of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank Act").

TC Services supports harmonizing the standards of care between broker-dealers and investment advisers when providing personalized investment advice to retail investors. TIAA-CREF believes that distinctions between the standards of care are largely lost on retail investors. While such distinctions may have made sense when first implemented in the 1930s and 1940s, we believe that they no longer serve a useful role. Perpetuating these distinctions may run counter to the best interests of investors. An investor should be able to assume that the standard of care is the same regardless of the title held by a financial consultant.

In order to be most effective, we believe harmonization efforts should consider the following:

- There remains a significant investor need for episodic advice—e.g., advice that is point-in-time, not ongoing and transactional based. The Commission should preserve a broker-dealer's ability to provide this type of advice.

[1] The Release was published in Exchange Act Rel. No. 62577 (July 27, 2010).

- Harmonizing the standards of care for broker-dealers and investment advisers should not result in the application of the Investment Advisers Act of 1940, as amended ("Advisers Act") to broker-dealers. The Commission should seek to preserve the broker-dealer exclusion in Advisers Act section 202(a)(11)(C).

- Should the Commission consider new point-of-sale disclosure obligations for broker-dealers in connection with the Study, the Commission should permit streamlined and cost effective delivery methods that allow an "access equals delivery" approach. Disclosure and delivery requirements should be flexible so they recognize advice is not a "one size fits all" product—e.g. disclosures should be principle based, not rigidly prescribed.

- The Commission should ask Congress to amend the Advisers Act to permit broker-dealers to again receive asset-based compensation when providing investment advice incidental to brokerage services. This type of compensation reduces the potential for conflicts of interest between broker-dealers and customers.

TC Services welcomes the opportunity to discuss these comments further with the staff through a subsequent meeting.

I. DESCRIPTION OF TC SERVICES

TC Services is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934, as amended ("Exchange Act") and is a member of the Financial Industry Regulatory Authority ("FINRA"). TC Services has approximately 1,900 financial consultants ("FCs") registered with FINRA that service customers.[2]

TC Services is wholly owned by Teachers Insurance and Annuity Association of America ("TIAA"). TC Services and TIAA are members of the TIAA-CREF group of companies which comprise one of the world's largest retirement plan systems. For over 90 years, TIAA-CREF has helped people in the academic, research, medical and cultural fields plan for and live through retirement. TIAA-CREF presently serves over 3.7 million individuals at over 15,000 institutions.

The overwhelming majority of TC Services' clients are participants within employer sponsored retirement plans that TIAA administers—e.g., 401(k) or 403(b) plans. These participants' retirement plan accounts often represent their largest source of assets. Given the importance of these accounts to participants, they have been seeking retirement account advice from TC Services. These requests have intensified with the market volatility of the past several years.

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[2] TC Services is also registered with the Commission as an investment adviser. The comments herein focus upon its experience providing incidental advice in its capacity as a broker-dealer.

In response to these requests, TC Services developed an incidental advice service which includes, among other things, providing participants with point-in-time, non-discretionary advice regarding their plan account balances. TC Services provides this advice in compliance with Department of Labor Advisory Opinion 2001-09A (also known as the "SunAmerica Opinion").[3] TC Services follows the SunAmerica Opinion because, as a service provider to a retirement plan, ERISA would otherwise consider TC Services' provision of advice to plan participants a prohibited transaction.

The requirements of the SunAmerica Opinion protect the customers of TC Services. It requires TC Services to hire an independent financial expert to serve as the source of the investment advice. TC Services cannot change or affect the advice and must compensate the financial expert without regard to the type or brand of products recommended. In other words, the advice cannot be skewed in favor of TC Services' affiliated products. TC Services makes this independent, objective advice available to its individual participant customers without charge.

In addition to being free of charge and sourced from an unbiased third party, the advice is appealing to customers for another reason—it is relatively simple and quick to receive. TC Services delivers the financial expert's advice through one brief counseling session that lasts 30-45 minutes. TC Services delivers the advice through either an in-person consultation—e.g., on a campus—or through a phone session from one of our national call centers.

During these sessions, the FC asks the customer a series of questions aimed at the customer's goals, investment objectives, financial circumstances and other relevant investment criteria. The customer's responses are compared against several different customized model portfolios designed by the independent financial expert specifically for that retirement plan.

The model portfolios consist of asset allocation models with corresponding mutual fund and variable and fixed annuity recommendations.[4] The independent financial expert draws its recommended securities from the retirement plan's investment menu, as selected by the plan fiduciary which generally is the employer. Once matched to a model portfolio, the FC shares the output with the participant who can then implement the advice with or without the assistance of the FC. The participant is not obligated to purchase any securities from TC Services or invest in

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[3] Advisory Opinion 2001-09A (Dec. 14, 2001). In this advisory opinion, the Department of Labor ("DOL") opined favorably on a structure where a retirement platform provider outsourced to an independent financial expert the design, control and operation of a computerized investment advice program considering both proprietary and non-proprietary investment options. The advisory opinion allows retirement plan service providers to provide advice consistent with the Employee Retirement Income Security Act's ("ERISA") prohibited transaction provisions by retaining an independent third party to serve as the source of the advice if, among other things, the third party's compensation does not vary based on which securities are recommended. This so-called "SunAmerica" approach has been adopted by many providers.

[4] By way of overly simplified example, an investor scoring as a moderate investor could be matched with a balanced portfolio. This balanced portfolio could consist of 60% equities and 40% fixed income, with the corresponding recommended funds being a diversified total stock market fund and a total bond market fund.

accord with the recommendations. The participant subsequently receives a written report through the mail confirming the findings of the earlier session.

The advice TC Services provides is not ongoing, but point in time. TC Services does not monitor the participant's account on a going forward basis. In addition, the advice is limited in focus to the participant's retirement plan account holdings; while any external retirement holdings identified by the participant are taken into account, TC Services does not provide advice over those other assets.

This incidental investment advice provided by TC Services has been well received by both plan participants and plan sponsors. The service has been adopted for use by over 70% of the TIAA-CREF asset base. TC Services has observed that it helps participants improve their chances of funding an appropriate retirement balance, increases their savings rate and improves their diversification. By way of example, participants who implement the advice on average increase their portfolio's diversification from three asset classes to nine.

TC Services believes that applying a fiduciary standard to this incidental investment advice would by itself require little change. The advice is sourced from an independent third party, TC Services cannot alter the advice and the third party is compensated without regard to the products or the product brands that are recommended. The third party builds its model portfolios with only one goal in mind—the best interest of the plan participant.

TC Services is concerned, however, that the Study could lead to changes beyond harmonization of the standard of care between broker-dealers and investment advisers. For example, because a large portion of the advice sessions are conducted remotely through a phone call, any future requirement to deliver a point of sale disclosure document could greatly complicate the advice TC Services provides. It could turn a short advice session into two sessions, adding cost, complexity and burden to both TC Services and the plan participant. Offering the service without charge could become no longer feasible, possibly discouraging participation. TC Services is further worried other additional new requirements could make the advice sessions overall less attractive to plan participants—e.g., not as convenient—which could also cause participation rates to decline.

It is with this background in mind that TC Services offers the comments below, which are designed to ensure TC Services can continue to provide this objective brokerage service without charge to participants on a convenient basis for all.

II. COMMENTS

TIAA-CREF believes the protection of retail investors should be the goal of any rulemaking following the Study, and that the Commission should evaluate subsequent rulemaking against how well it satisfies this standard. We believe our comments below protect the interests of retail investors in a manner that also promotes the cost effective delivery of advice and preserves an investor's ability to choose from a variety of different advice models.

We also believe the Commission's consideration of our comments will help future rulemaking efforts demonstrate consistency with the requirements imposed upon the Commission by Section 2(b) of the Securities Act of 1933. That section reads that for every rulemaking in which the SEC "is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."

A. Harmonization Should Preserve Episodic Advice.

We believe the Commission should preserve investors' ability to choose episodic advice—e.g., advice that is point in time, transactional based and offered on less than an ongoing basis. Our experience helping participants prepare for retirement suggests many Americans have a significant need for this type of advice.

Congress favors preserving episodic advice. Section 913(k)(1) of the Dodd Frank Act provides that "[n]othing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities."[5] The Commission itself has previously acknowledged that broker-dealers' investment advice to customers is episodic and is not ongoing.[6]

Preserving episodic advice furthers investor choice, a topic with which Congress is concerned. In Section 913(c)(9) of the Dodd Frank Act, Congress directs the Commission to consider:

> the potential impact on retail customers, including the potential impact on access of retail customers to the range of products and services offered by brokers and dealers, of imposing upon brokers, dealers and persons associated with brokers or dealers (A) the standard of care applied under the Investment Advisers Act of 1940 . . ."

Accordingly, we request the Commission not adopt standards hindering the ability of broker-dealers to provide episodic advice. We further request the Commission state specifically in any future rulemaking that broker-dealers do not have a continuing duty of care or loyalty to retail customers following the provision of episodic advice.

[5] *See* Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, H.R. 4173, 111th Cong. § 913(g)(1).

[6] Exchange Act Rel. No. 38480 (Apr. 7, 1997) ("Unlike the sale of a single security or other products and services, the service provided by an investment adviser typically involves an ongoing personal relationship...").

B. Harmonization Should Not Subject Broker-Dealers to the Advisers Act.

Section 913(c) of the Dodd Frank Act requires the Commission consider the potential effect of eliminating the broker-dealer exclusion from the definition of "investment adviser" in Section 202(a)(11)(C) of the Advisers Act.

We believe eliminating this exclusion will reduce investor access to advice, particularly access by smaller balance investors. This is because eliminating the exemption will impose a second layer of regulation—that of the Advisers Act—on broker-dealers that would increase the costs and burdens for firms in a number of areas, several of which would be duplicative. These areas include registration and licensing, books and records, and policies and procedural requirements.

These increased regulatory costs could force many broker-dealers to stop providing incidental advice to smaller balance accounts—e.g., they could no longer service these accounts without incurring a loss or charging a fee prohibitive for smaller investors.

The increased costs and burdens are not offset by meaningful additional investor protection. Broker-dealers are already subject to a comprehensive regulatory regime under the Exchange Act, the rules thereunder and FINRA rules.[7] There is no substantive area of conduct including the provision of incidental investment advice that is not already regulated and examined by the Commission and FINRA.[8]

The Commission has in the past acknowledged the need to avoid duplicative regulatory schemes. It noted that the broker-dealer exclusion was designed "not to except broker-dealers whose advice to customers is minor or insignificant, but rather to avoid additional and duplicative regulation of broker-dealers, which were regulated under provisions of the Exchange Act that had been enacted six years earlier."[9] This is as true today as when the broker-dealer

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[7] *See* Exchange Act Rel. No. 34-51523 (Apr. 19, 2005) ("The Exchange Act, Commission rules and those of the SROs provide substantial protections for broker-dealer customers.") *See also,* nn. 93 discussing broker-dealer disclosure obligations.

[8] *See* Letter to Jonathan G. Katz, Secretary, SEC, from Ira D. Hammerman, General Counsel Securities Industry Association, February 7, 2005, available at http://www.sec.gov/rules/proposed/s72599/sia020705.pdf. Exhibit A to this letter is a chart comparing the extensive regulation of broker-dealers to that of investment advisers.

[9] Advisers Act Rel. No. 2340, at nn. 39-43 and accompanying text (Jan. 6, 2005). Prior Commission staff guidance reflects the understanding that the Advisers Act was intended to cover broker-dealers only to the extent that they were offering investment advice as a distinct service for which they were specifically compensated. Advisers Act Rel. No. 2376, text accompanying n. 73 (Apr. 12, 2005). *See also* Advisers Act Release No. 2 (Sept. 27, 1946) (The broker-dealer exclusion "amounts to a recognition that broker-dealers commonly give a certain amount of advice to their customers in the course of their regular business and that it would be inappropriate to bring them within the scope of the [Advisers Act] merely because of this aspect of their business.") As the Commission has noted, the legislative history of the broker-dealer exclusion "tends to indicate that the drafters of the Advisers Act chose not to limit the broker-dealer advice excepted by section 202(a)(11)(C) to advice that is provided only occasionally."

exclusion was enacted. The regulatory scheme governing broker-dealers has greatly expanded and affords even more investor protections today than at the time that the broker-dealer exclusion was adopted.

Congress also acknowledged the importance of retaining the broker-dealer exclusion. The Dodd Frank Act maintains the broker-dealer exclusion even though an earlier discussion draft provided by Chairman Dodd of the Senate Banking Committee proposed eliminating it.[10]

TC Services believes supporting a harmonized standard of care for similar advisory services is not inconsistent with opposing a wholesale application of the Advisers Act to broker-dealers. Outside of advice, many functions performed by broker-dealers are quite distinct from those of investment advisers and do not squarely lend themselves to oversight by the Advisers Act.

C. Any Point of Sale Disclosure Requirements Should be Flexible.

If broker-dealers become subject to a fiduciary duty, TC Services anticipates the Commission may consider requiring broker-dealers provide certain disclosures at the point of sale. Should the Commission do so, TC Services requests the Commission adopt flexible principle based disclosure standards that accommodate different business models.

TC Services is concerned about being penalized by rigid new disclosure requirements designed for firms that have not aligned their interests with that of the client, as TC Services takes pride in doing so. TC Services should not be burdened with prescribed disclosure requirements designed for a broker-dealer with significant conflicts of interest, who may always physically meet with customers or provide ongoing investment advice.

Certain types of broker-dealer relationships and incidental advice models present reduced potential for conflicts of interest and require little disclosure. The incidental investment advice that TC Services provides to retirement plan participants under the SunAmerica Opinion is one such example. The underlying investment options are selected by an independent plan fiduciary. TC Services has no ability to alter the advice selections of the independent third party and must compensate the third party on a basis that is blind to the specific security or type of security recommended.

We do not believe incidental advice rendered pursuant to the SunAmerica Opinion provides any meaningful potential for conflicts of interest. Accordingly, any point-of-sale rule

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Advisers Act Rel. No. 2376, at n.83 (Apr. 12, 2005). On the contrary, the Commission has stated that "[b]roker-dealers have traditionally provided investment advice that is substantial in amount, variety, and importance to their customers." Advisers Act Rel. No. 2376 (Apr. 12, 2005).

[10] *See* Staff of S. Comm. On Banking, Housing, and Urban Affairs, 111th Cong., Restoring American Financial Stability Act of 2009, at 634 (Comm. Print 2009).

adopted by the Commission should be crafted such that the level of required disclosure matches the level of conflicts.[11]

D. The Commission Should Account for Widespread Internet Usage When Crafting Disclosure Requirements.

Should the Study or another initiative lead to new point of sale disclosure obligations, the Commission should make the delivery of these materials as streamlined and cost-effective as possible. The Commission can do so in large measure by extending the "access equals delivery" model it currently employs elsewhere in the federal securities laws. The Commission could also streamline delivery by exercising its exemptive powers under the Electronic Signatures in Global and National Commerce Act of 2000 ("E-SIGN") to confirm customers can provide consent to electronic delivery in any form—e.g., verbally, in writing or electronically. These twin efforts will benefit customers through reduced costs, more timely disclosure and ease of use.

The time for "access equals delivery" is now. We have found that investors strongly embrace this delivery model. This is consistent with the experience of other companies in the financial industry and with research data. For instance, the Investment Company Institute ("ICI") found in a recent study that 95% of investors surveyed use the Internet and that 90% of those surveyed "agree or strongly agree with the statement that 'getting investment information online is the wave of the future.'"[12] The ICI survey also found that almost 90% of investors overall and more than 80% of mutual fund investors who access the Internet use it to gather financial information.[13]

1. The Commission is Already Trending Toward "Access Equals Delivery" Through Recent Rulemakings.

Other recent actions of the Commission already reflect widespread and effective use of the Internet. Extending the use of "access equals delivery" to broker-dealer disclosure obligations is the logical next link in the following chain.

Securities Offering Reform Rules. The Commission embraced the access equals delivery concept in the securities offering reform rules and amendments adopted in 2005.[14] These rules serve to modernize and liberalize the registration and offering of securities under the Securities Act of 1933, as amended ("Securities Act"). Among other things, the offering reforms include

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[11] This principle should be followed regardless of whether the Commission adopts form or rulemaking requirements under the Exchange Act or if such requirements are adopted following the elimination of the broker-dealer exclusion in Section 202(a)(11)(C) of the Advisers Act.

[12] "Investor Views on U.S. Securities and Exchange Commission's Proposed Summary Prospectus" (March 14, 2008) at 19, *available at* http://www.ici.org/stats/res/ppr_08_summary_prospectus.pdf.

[13] *Id.*

[14] Securities Act Rel. No. 8591 (July 19, 2005).

relief from the requirement under Section 5 of the Securities Act to deliver a final or statutory prospectus at or prior to the earlier of the delivery of a confirmation of sale or delivery of the security.[15] The rules embrace the "access equals delivery" model for delivery of prospectuses based on the assumption that investors have access to the Internet, and thereby permit issuers to satisfy the Section 5 delivery requirement if the prospectus is posted via EDGAR on the Commission's website.

Proxy Rules. The Commission took an approach similar to the securities offering reform rules in its adoption of amendments to the proxy rules relating to the electronic delivery of proxy material.[16] Rule 14a-16(d) under the Exchange Act governs the contents of the notice that an issuer must send to its security holders in connection with the availability on the Internet of proxy material for that issuer. The rule requires the notice to state that if the security holder wants a paper copy of the proxy material, the security holder must request one. It also requires that the notice provide the security holder with a toll-free phone number, email address and Internet website where current and future proxy material in paper form can be requested.

Mutual Fund Summary Prospectus. Along the same lines as the securities offering reform rules and the proxy rules, the Commission recently adopted rules that would permit mutual funds to use a new summary section of the prospectus as an optional "summary prospectus" to satisfy the fund's prospectus delivery requirements under Section 5(b) of the Securities Act. Funds are permitted to use short-form summary prospectuses only on the condition that they make their full statutory prospectus and other specified fund documents available on the Internet, with paper copies available upon request. The fund's full statutory prospectus on the Internet is in turn required to contain hyperlinks to assist investors in being able to quickly navigate from the headings in the table of contents in the full statutory prospectus to the corresponding sections in that prospectus and from the full statutory prospectus to the summary prospectus and the statement of additional information. The Commission stated that this approach is "intended to provide investors with better ability to choose the amount and type of information to review, as well as the format in which to review it (online or paper)."[17]

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[15] New Rule 172 under the Securities Act provides that a prospectus would be deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) of the Securities Act as long as a prospectus meeting the requirements of Section 10(a) of the Securities Act is filed with the Commission. This allows for the delivery to investors of only the confirmation and no prior or accompanying delivery of a written prospectus. Notwithstanding the relief provided under new Rule 172, issuers relying on the Rule still need to retain some paper copies of the prospectus. Specifically, new Rule 173 under the Securities Act requires the principal underwriter or selling broker-dealer to provide a paper copy of the prospectus upon request by an investor.

[16] Exchange Act Rel. No. 56135 (July 26, 2007).

[17] Securities Act Rel. No. 8998 (Jan. 13, 2009).

2. "Access Equals Delivery" is Particularly Important When Customers Choose to Receive Advice Over the Phone.

The Commission should allow broker-dealers to deliver point of sale documents by posting them on a website and referring the customer to the site. A requirement that broker-dealers deliver this disclosure in paper format, or electronically but only with investor consent, would not reflect investors' widespread use of the Internet or the Commission's own access equals delivery trends from Section D1 above.

Allowing access equals delivery is particularly important where customers seek incidental advice through a phone counseling session. Imposing a default paper delivery requirement breaks a presently "one stop" brief session into at least two sessions by requiring the broker-dealer to first physically provide the paper disclosure document prior to the phone session. We are concerned based upon our experience that the extra step required to deliver paper disclosure may result in certain customers not pursuing an advice session—e.g., they no longer consider it convenient. Paper delivery also adds expense. Alternatively, an "access equals delivery" approach permits broker-dealers to refer customers in advance of a counseling session to the web based disclosure through the use of prominent language in advice promotional materials.

The Commission should view an "access equals delivery" model as being consistent with a fiduciary standard of care. This is because as fiduciaries broker-dealers would be legally required to act in customers' best interests. Requiring firms subject to this standard to deliver paper disclosure documents as opposed to directing clients to such disclosure seems unnecessary—e.g., the broker-dealer is bound by this standard of care regardless of the method used to deliver disclosure materials. An access equals delivery approach does not effect the content, scope, or depth of disclosure but only the mechanics through which disclosure is made.

3. The Commission Should Address E-SIGN When Considering Point of Sale Disclosures.

The Commission cannot fully implement an "access equals delivery" approach without resolving the uncertainty posed by E-SIGN.

Section 101(c)(1) of E-SIGN Act provides that a consumer must either consent electronically to electronic delivery, or confirm his or her consent electronically, "in a manner that reasonably demonstrates that the consumer can access [the] information in the electronic form that will be used to provide the information." Thus, under E-SIGN a client may consent to electronic delivery only through an electronic consent method—e.g., by confirming e-mail or clicking an "I agree" button on a website. Written or verbal consent is not sufficient.

Conversely, the Commission's electronic delivery guidance is more permissive[18] and reflects the reality that financial advice is often delivered through phone calls or over the Internet. It allows a client to consent to electronic delivery through both written and verbal consent. While the Commission has addressed the application of E-SIGN in certain limited contexts,[19] it has not addressed how E-SIGN affects the electronic delivery guidance in its interpretive releases. The Commission consistently has, however, asserted that its guidance remains valid.[20]

The inconsistency between the standards in E-SIGN and the Commission's interpretive guidance has inhibited a more widespread adoption of e-delivery by the financial services industry, which is contrary to Congressional intent because E-SIGN was designed to promote the use of electronic commerce.

Fortunately, the Commission has the authority to resolve this uncertainty. Section 104(d) of E-SIGN provides federal regulatory agencies the authority to exempt a specified "category or type of record" from section 101(c)'s affirmative consent requirements "without condition" if the exemption (i) is necessary to eliminate a substantial burden on electronic commerce and (ii) does not increase the material risk of harm to consumers. The Department of Treasury ("Treasury") determined to take this approach in issuing its e-delivery guidance and both the DOL[21] and Treasury[22] have adopted provisions that provide less stringent alternatives to E-SIGN's consent requirements if certain conditions are met. Because the Commission has not expressly addressed how its interpretive guidance which pre-dates E-SIGN is effected, if at all, by E-SIGN, the extent to which E-SIGN preempts the Commission's interpretive guidance is left unclear.

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[18] The Commission's interpretive guidance does not require consent. Instead, consent is one way a registrant can satisfy the Commission's "evidence of delivery" requirement. In addition, such consent can be provided in a number of ways.

[19] *See, e.g.*, Rule 160 under the 1933 Act.

[20] *See, e.g.,* Exchange Act Rel. No. 55146, at n.43 (Jan. 22, 2007); Staff Responses to Questions about Amended Custody Rule, question IV.1 (Jan. 10, 2005), *available at* http://www.sec.gov/divisions/investment/custody_faq.htm.

[21] *See* Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans, DOL Release, 67 FR 17264 (Apr. 9, 2002). DOL Rule 2520.104b-1 contains DOL's delivery requirements for DOL required documents.

[22] *See* Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents, Treasury Release, 71 FR 61877 (Oct. 20, 2006). Treasury discussed E-SIGN extensively in its release adopting its rule, and expressly invoked its exemptive authority under section 104(d) of E-SIGN. As noted in the release, the exemption is based on Treasury's reasoning that "if the consumer consent method were the only method available to satisfy the requirements for providing an applicable notice . . . it would impose a substantial burden on electronic commerce . . ." Thus, Treasury felt comfortable that the exemption was "necessary to eliminate a substantial burden on electronic commerce." It also concluded that the exemption would "not increase the material risk of harm to consumers," as required by section 104(d) of E-SIGN.

Section 104(d) provides the Commission with at least two options for eliminating this uncertainty. The Commission could exercise its exemptive authority to allow "access equals delivery" for required disclosure documents—e.g., firms could deliver documents by posting them on their website without the need to obtain client consent. Alternatively, the Commission could consistent with its prior guidance expressly exempt point of sale disclosure documents from E-SIGN's electronic consent requirements—e.g., permitting firms to obtain consent to e-delivery through a client's written or verbal consent.

E. Broker-Dealers Should Be Permitted to Charge Asset Based Fees.

Although not specifically addressed within the Study, the Commission also should recommend to Congress that it amend Section 202(a)(11)(C) of the Advisers Act to allow broker-dealers to provide fee-based brokerage services that entail incidental investment advice. This is worthwhile because asset based fees can reduce the conflicts of interest a broker-dealer may have with its customers. The Commission has noted as much in past releases, as have certain studies performed at Commission request.[23]

Reinstating a broker-dealer's ability to charge asset based fees requires the involvement of Congress to amend the federal securities laws due to the outcome of *Financial Planning Association v. Securities & Exchange Commission* (the "FPA Case").[24] There, the United States Court of Appeals for the District of Columbia Circuit vacated a provision under Advisers Act Rule 202(a)(11)-1 permitting broker-dealers to receive fee-based compensation without also registering as investment advisers. Underlying the D.C. Circuit's holding was the court's finding that the Commission had exceeded its rulemaking authority under Advisers Act Section 202(a)(11)(F).[25]

Approaching Congress to suggest this change is timely—harmonizing the standard of care seems to undercut the historical rationale for not permitting broker-dealers to charge asset-based fees. Moving to an asset based fee compensation model does not revise the services provided by a broker-dealer; it is merely a re-pricing of such services.[26] Moreover, the Commission as a whole and various Commissioners on an individual basis consistently declared that the form of compensation – whether fee-based or commission-based – should not drive how broker-dealers are regulated.[27]

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[23] *See, e.g.*, Exchange Act Rel. No. 51523 (Apr. 12, 2005). *See also,* "The Report of the Committee on Compensation Practices", issued April 10, 1995. This so-called "Tully Report", named for Committee Chairman Daniel Tully, was undertaken at the request of then SEC Chairman Arthur Levitt in response to concerns about conflicts of interest in the retail brokerage industry.

[24] 482 F.3d 481 (D.C. Cir. 2007).

[25] *Id.* at 492.

[26] *See* Exchange Act Rel. No. 51523 (Apr. 12, 2005).

[27] *See, e.g.*, Exchange Act Rel. No. 42099, at text accompanying n. 15 (Nov. 4, 1999); Exchange Act Rel. No. 50980, at text accompanying n. 16 (Jan. 14, 2005); Exchange Act Rel. No. 51523, at text accompanying nn. 77-78

For example, in the release proposing the revisions to Advisers Act Rule 202(a)(11)-1 that would allow broker-dealers to charge asset based fees, the Commission explained that, "Under the rule, the nature of the services provided, rather than the form the broker-dealer's compensation takes, would be the primary feature distinguishing an advisory account from a brokerage account."[28] Furthermore, in the context of a speech advocating for the implementation of a harmonized standard of care for broker-dealers and investment advisers, Commissioner Walter stated her belief that "regulation of a financial professional should depend on what she does, not what she calls herself or how she is paid."[29] We believe that fee-based brokerage programs, which reduce broker-dealers' conflicts of interest, should once again be permitted and regulation cease being based on the form of compensation. There remain other distinct yardsticks for the Commission to consider when drawing a line between broker-dealer advice and investment adviser advice, such as discretion.

III. CONCLUSION

TC Services very much appreciates the opportunity to comment on the Study and welcomes the opportunity to further discuss our views in person with the staff. Should you have any questions, please contact the undersigned at 303.626.4229.

Very truly yours,

Adym W. Rygmyr
Associate General Counsel
TIAA-CREF Individual & Institutional
Services, LLC

cc: Chairman Mary L. Schapiro
Commissioner Kathleen L. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Andrew J. Donohue, Director, Division of Investment Management

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(Apr. 12, 2005); Luis A. Aguilar, Commissioner, SEC, Speech by SEC Commissioner: SEC's Oversight of the Adviser Industry Bolsters Investor Protection (May 7, 2009), *available at* http://www.sec.gov/news/speech/2009/spch050709laa.htm; Elisse B. Walter, Commissioner, Securities and Exchange Commission, Speech by SEC Commissioner: Regulating Broker-Dealers and Investment Advisers: Demarcation or Harmonization?, (May 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch050509ebw.htm.

[28] Exchange Act Rel. No. 42099, at text accompanying n. 15 (Nov. 4, 1999).

[29] Elisse B. Walter, Commissioner, Securities and Exchange Commission, Speech by SEC Commissioner: Regulating Broker-Dealers and Investment Advisers: Demarcation or Harmonization?, (May 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch050509ebw.htm.

Robert Cook, Director, Division of Trading & Markets