August 30, 2010

Via email to rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to comment on Securities Exchange Act ("**Exchange Act**") Release No. 62577 and Investment Advisers Act ("**Advisers Act**") Release No. 3058, in which the Securities and Exchange Commission (the "**SEC**" or "**Commission**") requested public comment on the obligations of broker-dealers and investment advisers. The request for public comment was mandated by section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**"). Throughout the legislative process and debate that preceded the enactment of the Dodd-Frank Act, SIFMA has supported the development of a clearly defined, uniform federal fiduciary standard of care for broker-dealers and investment advisers when providing personalized investment advice about securities to retail clients.[2]

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[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] *See, e.g., Capital Markets Regulatory Reform: Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office: Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. (2009) 2-3 (statement of John Taft, Head of U.S. Wealth Management, RBC Wealth Management on behalf of SIFMA)
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I. Executive Summary

We welcome Congress's enactment of section 913 of the Dodd-Frank Act, which provides the basis for a strong, uniform standard of care. We also welcome the Commission's study of this issue.

As discussed more fully below, we believe the following key principles should guide the development of a uniform standard of care:

- The interests of retail customers should be put first. When providing personalized investment advice to retail customers about securities, broker-dealers and investment advisers should deal fairly with these customers, and, at a minimum, appropriately manage conflicts by providing retail customers with full disclosure that is simple and clear and allows retail customers to make an informed decision about a particular product or service.

- The standard of care should be clearly defined by the SEC and the Commission should provide guidance as to how the standard of care can be implemented by broker-dealers and investment advisers, tailored to their respective business models.

- Retail customers should receive the same standard of care when receiving the same services irrespective of the regulatory status of the entity with whom they have a relationship.

- The uniform standard of care should be "business model neutral."

- Investors should continue to have access to, and choice among, a wide range of products and services. The standard of care should allow broker-dealers to continue to offer products and services that are available today, such as providing retail customers liquidity as principal, proprietary

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available at http://financialservices.house.gov/media/file/hearings/111/taft_testimony.pdf. ("[W]hen broker-dealers and investment advisers engage in the identical service of providing *personalized investment advice* about securities to individual investors, they should be held to a uniform, federal fiduciary standard of care."); *Industry Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. 21 (2009) (statement of Randolph C. Snook, Executive Vice President of the Securities Industry and Financial Markets Association) *available at* http://financialservices.house.gov/media/file/hearings/111/snook.pdf. ("When broker-dealers and investment advisers engage in the identical service of providing personalized investment advice about securities to individual investors, they should be held to the same standard of care.")

products and advice regarding sophisticated investment strategies, and should allow retail customers to choose among various models for compensating their financial services provider.

- Where products and services involve material conflicts of interest, broker-dealers and investment advisers should be able to provide disclosures to clients in a pragmatic way to clearly and effectively communicate, and receive consent to, these conflicts of interest.

- The standard of care should apply to "personalized investment advice about securities," *i.e.*, investment recommendations that are made to meet the objectives or needs of a specific retail customer after taking into account the retail customer's specific circumstances, and not affect client directed or other ancillary services in a brokerage account.

II. The Need for a Uniform Standard of Care

Section 913 of the Dodd-Frank Act requires the Commission to study the effectiveness of existing legal or regulatory standards of care for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. In addition, the Dodd-Frank Act authorizes the Commission to adopt rules to provide that the standard of care for all broker-dealers and investment advisers, when providing such advice, is 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. This standard of care shall be no less stringent than the fiduciary duty standard applicable to investment advisers under sections 206(1) and (2) of the Advisers Act.

Investment advisers and broker-dealers provide advice and services under distinct operating models, each of which provides protection and services to investors in different ways. The Dodd-Frank Act recognizes these differences, and contemplates that with simple and clear disclosure, such business models could continue to offer the products and services they do today. In that regard, section 913 provides the SEC authority to adopt rules that (i) require a broker-dealer to disclose if it sells only proprietary or a limited range of products and (ii) facilitate the provision of simple and clear disclosure regarding the terms of an investor's relationship with a broker-dealer or investment adviser.

Because the uniform standard will apply to both investment adviser and broker-dealer business models, it is essential that the Commission clearly express the standard that will so apply. It is also essential that the Commission provide clear guidance regarding how this duty can be satisfied by broker-dealers when they offer the wide range of products and services that today are not offered under

the investment adviser model. This duty will be satisfied in a different manner for a fully discretionary trading account than for a trade-by-trade recommendation of an individual security, for example. Broker-dealers will need clear guidance regarding the disclosure and consent requirements under the standard regarding these various products and services, to prevent broker-dealers from curtailing the products and services available to investors.

A. Investment Adviser Model

Investment advisers are retained by investors to provide advice about securities for a fee and are subject to a duty to act in the best interest of the customer (both institutional and retail) and avoid or disclose material conflicts of interest. The retail customer investment adviser model is relationship-based and typically uses an assets under management-based compensation model. Advisory relationships often are structured to provide an investment adviser with full discretion to invest the customer's assets. Typically, in these discretionary accounts a limited range of products and services are offered to retail customers.

In other advisory relationships, the client may make certain investment decisions, with the investment adviser providing advice. In these accounts, the client may have access to a broader range of products and services when making investment decisions, although more limited than that available in the commission-based broker-dealer model.

Many retail customers seek to consolidate various types of accounts with a single financial services provider such as a dually-registered investment adviser/broker-dealer, or a broker-dealer affiliate of an investment adviser. Thus, it is important to facilitate the ability of retail customers to maintain, with the same individual representative within a single financial services provider, multiple types of accounts and relationships, *e.g.*, a discretionary advisory account, a non-discretionary advisory account, and a commission-based transactional brokerage account in which the broker may provide personalized investment advice in connection with some transactions but not others.

B. Broker-Dealer Model

Broker-dealers are retained to effect transactions in securities, which may include incidental advice, and are subject to a duty of fair dealing with the customer in accordance with industry standards, a duty to recommend only suitable investments,[3] and a duty to seek best execution for their customers'

[3] We note that FINRA has recently proposed to amend its suitability rule in connection with the process of developing a consolidated rulebook. *See* Notice of Filing of Proposed Rule (…continued)

orders. In addition, broker-dealers are subject to SEC rules that require the safeguarding of client assets, Financial Industry Regulatory Authority ("**FINRA**") rules that govern the qualification requirements for associated persons, and state common law duties.

This model is transaction-based and generally relies on a commission mark-up/mark-down or sales load-based compensation model, where advice is provided incidental to transactions. A wide range of products and services, some of which can only be offered through principal transactions, are typically provided, which have differing compensation and potentially present a variety of conflicts. In addition, broker-dealers often offer accounts that provide ancillary services, such as lending, cash sweep arrangements and debit cards, that allow retail customers to satisfy financial services needs with a single relationship. Specific rules protect individual investors' interests by governing sales activities and related conflicts. Broker-dealers and their associated persons are closely supervised and examined by both the SEC and FINRA.

C. The Status Quo Must Yield to a Uniform Standard

The Dodd-Frank Act authorizes the SEC to develop a uniform standard of care, even though Congress simply could have eliminated the broker-dealer exception to the Advisers Act definition of "investment adviser" and applied to both broker-dealers and investment advisers the standard of care under the Advisers Act. Congress appears to have recognized that eliminating the broker-dealer exception would ultimately harm retail investors by limiting their access to and choice among financial products and services.

There are various reasons why eliminating the broker-dealer exception in the Advisers Act would be a poor choice, specifically:

- *The Advisers Act was not designed to regulate brokerage activity.* Eliminating the broker-dealer exception would sweep broker-dealers wholesale into the Advisers Act. The Advisers Act, however, was not intended or designed to apply to the incidental advice offered in connection with specific non-discretionary, commission-based transactions that broker-dealers frequently provide. Although a uniform standard of care with disclosure and consent to material conflicts can and

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Change to Adopt FINRA Rule 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook, Exchange Act Release No. 62718 (Aug. 20, 2010), 75 FR 51310 (Aug. 19, 2010).

should be applied to such incidental advice in connection with brokerage transactions, this should be done through focused rulemaking. Other aspects of brokerage activity involve no personalized investment advice at all (*e.g.*, unsolicited trading, cash sweep services so that customers earn interest on their cash balances, online financial tools and calculators that do not recommend specific securities, and lending or margin account features). The Advisers Act was never intended to regulate these activities.

- *The Exchange Act already pervasively regulates broker-dealers.* Broker-dealers are already subject to extensive regulation under the Exchange Act, which is in many ways more comprehensive than regulation under the Advisers Act. Imposing investment adviser registration would not recognize this extensive existing regulation.

The Commission has been given the opportunity to create a uniform standard of care for retail investors through rulemaking, which will avoid disparate judicial opinions interpreting a common law standard and the investor confusion that results from the same services being subject to different standards based on technical legal distinctions.

D. A Uniform Standard Would Best Protect Individual Investors

As the Commission considers adopting a uniform standard of care applicable to broker-dealers and investment advisers, it should be guided by two key principles: (i) individual investor protection and (ii) individual investor choice and access to financial products and services. The standard should be easy to understand, offer clear and consistent protections to individual investors, and preserve investors' rights to choose the services, products and payment methods they believe meet their investment goals. The standard should also preserve individual investors' choice of the range of cost-effective investment products and services they can access via their broker-dealers or investment advisers. And, in cases where broker-dealers provide services not offered by investment advisers and where personalized advice is not involved, SIFMA believes the current high standards and stringent rules for broker-dealers should continue to apply.

Investor Protection with a Uniform Standard. By adopting a uniform standard of care, to be defined by the SEC, retail customers would have an opportunity from the very outset of their relationship with their broker-dealer or investment adviser to understand clearly the duties and obligations that define the relationship and to make informed investment decisions. In addition, a uniform standard would reduce confusion about existing legal and regulatory regimes by being the exclusive standard that applies to broker-dealers and investment advisers when providing personalized investment advice about securities to retail

customers. Thus, the standard of care should subsume the investment adviser duty for personalized investment advice to retail customers about securities under sections 206(1) and (2) of the Advisers Act.

The Importance of Choice and Access. The best interest of retail customers requires preserving the choice among services and products offered by their financial services provider. In order to maintain retail customer access to a broad array of beneficial products and services offered by broker-dealers that may exceed those offered by investment advisers, the uniform standard of care must be "business model neutral" and provide for investor choice as to how to pay for the various products and services.

Informing Retail Customers Through Disclosure. If a uniform standard of care cannot be applied and supervised in a practical manner, broker-dealers will likely significantly curtail offering certain commission-based services and securities sold as principal (including initial and follow-on public offerings and other underwritten offerings, structured and affiliated products, and securities sold from a broker-dealer's inventory such as municipal bonds and proprietary mutual funds). A loss of access to these products and services would have the unintended consequence of seriously disadvantaging retail customers rather than protecting them. As discussed more fully below, in order to maintain retail customer access to these products and services, it must be possible for broker-dealers to pragmatically disclose material conflicts of interest and obtain consent from retail customers in order to provide retail customers the opportunity to make an informed choice.

The Broad Range of Retail Customer Objectives. We note that the standard of care and conflicts disclosures must address the capabilities and investment objectives of a broad range of "retail customers." The definition of "retail customer" in the Dodd-Frank Act does not exclude persons based on high-net worth status or any other indicia of market sophistication. Yet the standard of care may involve different outcomes for an inexperienced investor than for a hedge fund manager trading for her own account in a product in which she is an expert.[4]

[4] As the Commission contemplates how to address the needs of a broad range of "retail customers," SIFMA believes that it would be useful to consider a framework that allows broker-dealers and investment advisers to implement the standard of care based upon investment objectives and terms and conditions that have been agreed upon with a particular customer, supported by procedures and disclosure of conflicts of interests to assure that the firm's relationship with that customer is consistent with such terms and conditions.

Providing Retail Customers Liquidity and Best Execution on a Principal Basis. Rightly, section 913(g) of the Dodd-Frank Act does not require the standard of care to include the principal trading restrictions of section 206(3) of the Advisers Act. Congress did not include section 206(3) because it would have inappropriately deprived retail customers of the benefits of access to broker-dealer inventories of a range of securities. Accordingly, trade-by-trade disclosure and consent requirements of section 206(3) of the Advisers Act should not be applied to principal transactions that are subject to the uniform standard of care where the broker-dealer or investment adviser does not have discretionary authority regarding the customer account.

We also note that the SEC staff has announced that it does not intend to recommend to the Commission the extension of temporary rule 206(3)-3T, which provides relief to dually registered investment advisers and broker-dealers when engaging in principal transactions with certain advisory customers.[5] If this decision is not reconsidered, safe harbors for disclosure of principal transactions are of heightened importance. Without such safe harbors, it is highly likely that retail customers could lose access to a broad range of products. As discussed more fully in section III.B below, broker-dealers offer a variety of products on a principal basis, including fixed-income products, initial and follow-on public offerings and other underwritten offerings and proprietary structured products.[6] Without relief for principal transactions, many broker-dealers may not be willing to offer these products on a principal basis, which often provides the best prices to retail customers. Thus, an unintended consequence of limiting customer access to principal liquidity is that retail investors could lose access to the means to assemble a portfolio that is evenly balanced among equity and fixed-income products. In turn, corporate and municipal issuers of fixed-income securities could experience a significant contraction of the market for this type of financing.

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[5] Letter from Andrew J. Donohue, Director, Division of Investment Management, SEC, to Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA (Aug. 9, 2010). SIFMA may separately comment in more detail on this decision, which could negatively impact firms and retail customers.

[6] In addition, if temporary rule 206(3)-3T expires, firms will require sufficient advance time to implement technological and infrastructure changes and modify client relationships in order to ensure compliance. Many clients may not be able to maintain a transaction-based relationship with their broker-dealer. If firms do not have sufficient time to implement the necessary changes, it would impose unnecessary hardship and costs on both firms and investors who rely upon principal trading as a value-add service.

III. Investor Choice and Access

A. Overview

Retail clients need a choice of investment models, products and services. While the investment adviser model is appropriate for many retail customers, for some it may not provide access to the range of investment opportunities that the retail customer seeks or it may require a higher fee in exchange for a level of service that many retail customers may not desire. For a retail customer who determines that an advisory model is not the right fit, a broker-dealer model provides access to a wider range of products and the retail customer is able to pay the broker-dealer for transactions and incidental advice on a commission basis. This model may be particularly cost effective for retail customers who infrequently trade securities.

A standard of care that does not allow for disclosure and customer consent to material conflicts of interest in a pragmatic way will significantly ***harm*** retail investors. First, if client consent cannot be provided in a practical way, retail clients could be effectively locked out from purchasing or selling securities on anything other than an unsolicited basis. Second, broker-dealers could severely limit the products and services they are willing to offer to retail customers to whom they provide personalized investment advice. Third, certain products and services may be offered at a significantly higher cost to account for the additional costs of complying with regulatory requirements. And finally, broker-dealers may only offer advisory accounts, which, as noted above, would be more expensive than necessary for customers who infrequently purchase securities, such as many typical "buy and hold" individual investors. In addition, investor choice would be limited if any standard of care required a broker-dealer or investment adviser to necessarily recommend the lowest cost product available.

Thus, it is critical that any uniform standard of care under the broker-dealer model provide pragmatic methods for disclosure and consent from retail customers.

B. Specific Products and Services

The following discussion focuses on three categories of products or services, specifically:

- products sold on a principal or proprietary basis (*e.g.*, underwritten offerings, market making and principal trading, and principal and affiliated products);

- sophisticated investment strategies (*e.g.*, advice in connection with concentrated positions and other complex strategies); and

- ancillary account services and features that are not personalized investment advice about securities (*e.g.*, cash sweep features, margin and other lending, bill payment, and debit cards).

Principal/Affiliated Products. The standard of care must allow retail clients to have ready access to investments that are sold on a principal basis.

- *Equity market making and fixed income securities*. Many broker-dealers provide liquidity and best execution to retail customers by acting as principal in securities transactions. This is a cornerstone of the equity securities markets and a basic equity market maker function that many broker-dealers perform. Broker-dealers also provide substantial liquidity and best execution in the fixed-income market by transacting on a principal basis. If retail customers lose access to this liquidity, their execution costs will in many cases substantially increase, and markets will lose a significant source of liquidity.

- *Underwritings*. Public offerings obviously are a primary means for corporations to raise capital. Retail customers seek access to underwritten offerings for many reasons. In these offerings underwriters have performed due diligence, customers are provided with extensive disclosure, and investors can apply their own business judgment to the investment. The uniform standard should not adversely impact retail clients' access to these underwritings.

- *Affiliated Products.* Affiliated products such as affiliated mutual funds, structured products, private equity, and other alternative investments, may represent a firm's best intellectual capital and are important investment options for retail customers.

A broker-dealer cannot offer many of the investment products described above if written trade-by-trade disclosure and retail customer consent are required. A standard of care that in practice requires proof of transaction-by-transaction disclosure to and consent from retail customers would be extremely difficult to implement because prices will move or particular securities may no longer be available during the period in which the broker-dealer provides specific disclosure and documents consent, particularly if such disclosure and consent must be in writing. Without pragmatic safe harbors for disclosure and consent from retail

customers, retail customers likely would lose access to products in a broker-dealer's inventory, liquidity that a broker-dealer can provide when buying a product on a principal basis, initial and follow-on public offerings and other underwritten issues, and the variety of proprietary products offered by broker-dealers and their affiliates. Furthermore, effectively precluding or significantly impeding retail customers from participating in these markets could have a significant adverse effect on capital formation in the United States.

As discussed more fully in section IV below, retail customers' interests could be protected by requiring simple and clear disclosure and client consent to material conflicts of interests.

Sophisticated Strategies. For a variety of reasons, a retail customer may seek advice in connection with a sophisticated investment strategy. A retail client may wish to hedge risk on a concentrated position in his or her employer's stock, hedge a portfolio using options or use other complex strategies. Retail clients seek advice on these types of investments on a daily basis and these activities are governed by an extensive regulatory framework.

These strategies, although in some cases potentially risky and requiring a sophisticated understanding of the markets, are perfectly suitable for certain retail customers. For example, a retail customer may choose to undertake more risk in seeking to achieve above-average returns. In addition, a retail customer may have significant resources and be willing to make aggressive investments with a portion of his or her total assets. Other strategies do not involve a high degree of risk, but rather require an understanding of a more sophisticated investment strategy.

Under a standard of care that the Commission adopts, however, a broker-dealer may determine that it could not provide personalized investment advice on an aggressive or sophisticated strategy to retail customers, even where the retail customer has sought advice and indicated his or her decision to employ an aggressive or sophisticated strategy, because it could be argued in hindsight that the strategy may not represent the "best interests" of such customer if more conservative options are available. Thus, any uniform standard of care that is adopted should make clear that a broker-dealer is not prohibited from providing advice in connection with an aggressive or sophisticated investment strategy for appropriate, consenting retail customers. Otherwise, retail customers could be forced into a one-size-fits-all model, which would preclude many customers from availing themselves of the broad array of financial products and services that are available and could be beneficial to them.

Ancillary Account Services that are not Personalized Investment Advice About Securities. Many retail customers use a brokerage account as a way to consolidate their financial services needs with a single provider. For example, retail customers may use their brokerage account to pay bills or use a debit card linked to a brokerage account to make everyday purchases. In addition, retail customers are able to take advantage of cash sweep services to earn interest on uninvested cash, and may be provided with the ability to borrow on margin. Broker-dealers provide robust account opening and other timely disclosure that explains the risks and conflicts presented by these services. Any standard of care that is adopted should make clear that these and similar account services could be offered to all customers without triggering the standard of care.[7]

Personalized Investment Advice. Section 913 of the Dodd-Frank Act provides the Commission with authority to adopt a standard of care that applies when providing personalized investment advice about securities to a retail customer. Integral to preserving customer choice and access is the need for the SEC to define the scope of the term "personalized investment advice." If the term is interpreted too broadly, retail customers could be cut off from investment opportunities even if the retail customer is making the investment decision without a specific recommendation. Accordingly, to protect retail customers and at the same time continue to provide retail customers with access and choice, the term "personalized investment advice" should be defined to mean – and should apply only to – investment recommendations that are provided to address the objectives or needs of a specific retail customer after taking into account the retail customer's specific circumstances.[8] Thus, personalized investment advice should not include financial planning tools and calculators that do not recommend specific securities, general research and strategy literature, seminar content, marketing and general education materials that do not offer or recommend

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[7] In addition, these types of account features are offered to retail customers irrespective of a particular retail customer's specific circumstances, and therefore should not be interpreted as being offered pursuant to "personalized investment advice," unless, of course, a broker-dealer specifically advised a retail customer to, for example, purchase securities on margin.

[8] This construct is consistent with the Supreme Court's decision in *Lowe v. SEC*, 472 U.S. 181, 208 (1985) (noting that a newsletter does not provide personalized investment advice where it does not provide "individualized advice attuned to any specific portfolio or to any client's particular needs.").

The construct is also consistent with Rule 203A-3(a)(3) under the Advisers Act, which defines the term "impersonal investment advice" as investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts.

specific securities, or broker-dealer investing web sites where retail customers use tools to make self-directed investment decisions.

In addition, the Dodd-Frank Act, in providing detailed authority regarding the standard of care rulemaking process, provides that any standard of care that is adopted is transactional, applying only "when providing" personalized investment advice about securities to a retail customer.[9] Thus, Congress has made clear that the standard of care applies to broker-dealers with respect to particular transactions and that the standard of care does not apply to conditions that arise after personalized investment advice about securities is provided to a retail customer. Of course, traditional brokerage functions, *i.e.*, taking unsolicited retail and other customer orders, should not be interpreted to be personalized investment advice.

IV. Disclosure of Material Conflicts of Interest and Retail Customer Consent

As noted above, retail customer access and choice would be severely curtailed if broker-dealers and investment advisers are subject to a standard of care adopted by the Commission but are not practically able to disclose and receive consent from retail customers to material conflicts of interests in a workable manner.

Retail customers should be provided with disclosure at the very outset of their relationship – when they open an account with the investment adviser or broker-dealer. This would provide retail customers with the clear understanding from the beginning of their relationship with the broker-dealer or investment adviser of the obligations and duties of the broker-dealer or investment adviser. In addition, the retail customer would have an opportunity to make an informed choice after assessing whether any material conflicts of interest are not appropriate in light of his or her investment objectives.

For disclosure to be most useful to retail customers, it should be in plain English and clearly communicate general categories of material conflicts of interest, *e.g.*, compensation, proprietary products, underwritten new issues, and principal trading to provide liquidity to a customer, characteristic of the particular

[9] This is reinforced by Dodd-Frank Act section 913(g)(1) which states that the standard of care does not require "a continuing duty of care or loyalty to the customer after providing personalized investment advice."

type of account relationship or customer. [10] The disclosures in account opening documents could be permitted to reference a web site where more detailed disclosure is available, including more specific disclosure of conflicts of interest relative to particular products.

Such a layered approach to disclosure would allow broker-dealers and investment advisers to efficiently provide printed materials applicable to all retail customers at the time of account opening, with specific disclosures that are relevant to particular transactions available at the time of sale on the internet. This approach would assist retail customers by providing material information at the time it is most relevant and meaningful to them and therefore is most likely to be read.[11] Indeed, many firms use electronic delivery to provide clients with specific point of sale disclosure information today.[12] An investor's order to purchase securities pursuant to such disclosure documents should serve as consent to disclosed conflicts.

Because any standard of care would likely apply to existing customers, these customers would need to receive any disclosure that is required under the standard of care. Retail customers with accounts established prior to the effective date of the standard should not be required to provide written consent to those disclosures. Requiring written consent from millions of existing retail customers would be unduly burdensome and would provide no additional benefit or protection to retail customers. Many retail customers would find it a nuisance at best if they received constant solicitations for a written response to a disclosure document. In a worst case scenario, a broker-dealer or investment adviser would not be able to continue effecting transactions for a customer if the retail customer failed to return a disclosure document. For these existing retail customers, consent by continuing to accept or use account services after disclosure should be permitted due to the impracticability of obtaining signatures from all existing

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[10] As part of the study, the Commission should review broker-dealer best practices in use today, which include providing disclosures to customers about how the firm's representatives earn their compensation, how the firm earns a profit, and noting the potential conflicts of interest.

[11] We note that this approach to disclosure is consistent with the Commission's mutual fund "summary prospectus" approach and notice and access proxy rules. *See* Rule 498 under the Securities Act of 1933 (summary prospectus rule); Rule 14a-16 under the Exchange Act (notice and access rule).

[12] We note that if the Commission were to modernize its electronic delivery interpretations and rules, it would be more feasible for greater numbers of customers to receive and firms to communicate pre-sale product-specific disclosure. *See*, *e.g.*, Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Advisers Act Release No. 1562 (May 9, 1996), 61 FR 24644 (May 15, 1996).

retail customers. Erecting procedural hurdles that in practice could prevent retail customers from making, or liquidating, investments is not a positive result.

SIFMA would like to work with the Commission on developing a disclosure and consent process that addresses these concerns. The disclosure and consent guidance that the Commission provides should recognize that some firms are dually registered as both broker-dealers and investment advisers. Some dually registered firms may find that it is most effective to disclose material conflicts of interest to retail customers by using a single document. Other firms may find that it is more effective to provide separate disclosure for broker-dealer activities and investment adviser activities. Thus, firms should be provided with the flexibility to combine disclosures if they choose.

Of course, the financial markets are constantly evolving, and the matters that need to be disclosed may change after a retail customer opens an account. Thus, an annual notification could be sent to retail customers describing material modifications to the disclosure and providing a web site address where more specific changes are disclosed. A retail customer would be deemed to have consented to any such updated disclosures if the customer continued to accept or utilize account services after receiving the disclosure.

SIFMA also believes that to provide retail customers with as much information as possible, there is a role for detailed product-specific disclosure that could be included on customer confirmations, as noted above, and point of sale documents. We encourage the Commission to seek public comment on these issues.[13]

V. Conclusion

We urge the Commission to use its detailed authority under the Dodd-Frank Act to adopt a clear, well-defined uniform standard of care for broker-dealers and investment advisers that requires acting in the best interests of retail customers when providing personalized investment advice about securities.

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[13] Section 919 of the Dodd-Frank Act authorizes the Commission to adopt rules designating documents or information that shall be provided by a broker-dealer to a retail investor before the purchase of an investment product or service by the retail investor. As the Commission develops a proposal for a clearly defined standard of care, it should also consider the need for it to be consistent with other rules that the Commission or FINRA may adopt under new authority provided by Dodd-Frank or otherwise, such as the point of sale authority noted above, as well as authority to adopt rules regarding sales practices, disclosure of material conflicts, and compensation models. Indeed, a robust standard of care rule would cover many of these other issues.

Preserving retail customers' access to a broad range of products and services and choice among account types is a part of this critical objective. In addition, to provide retail customers with as much information as possible to make informed decisions and to preserve the different roles of broker-dealers and investment advisers, a standard of care should be accompanied with disclosure of and retail customer consent to material conflicts of interest.[14]

We hope we can serve as a constructive and insightful voice of the securities industry during the course of what we expect will be a significant undertaking and multi-step process.

Sincerely yours,

Ira D. Hammerman
Senior Managing Director
and General Counsel

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

[14] A standard of care would raise a variety of more detailed practical issues for the SEC, FINRA, and the broker-dealer community. For instance, market participants will need sufficient time to implement training programs and to build systems to comply with any standard of care that is adopted. Thus, any new rule should have a delayed effective date to allow firms to adequately prepare for its implementation. SIFMA looks forward to providing more detailed comments on these issues as the consideration of a clearly defined standard of care progresses.