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Randy F. Wallake
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SECURIAN

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

Re: Request for Comment on 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 on behalf of Securian Financial Group, Inc. ("Securian") and its life insurance, broker-dealer and investment adviser affiliates in response to the request of the Securities and Exchange Commission ("Commission") for public comment on the Commission's study regarding the obligations of brokers, dealers and investment advisers ("Study").

The Study, as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, is required to evaluate the effectiveness of existing legal or regulatory standards of care for broker-dealers and investment advisers when providing investment advice and recommendations about securities to retail investors; and whether there are gaps or shortcomings in the protection of retail customers relating to such standards of care. Securian supports the Commission's efforts to ensure that applicable standards of care provide retail customers with appropriate protections. We are concerned, however, that changes in the standard of care applicable to broker-dealers, particularly in connection with recommendations regarding variable insurance products, may have the unintended effect of:

- diminishing retail customer choice regarding such products;
- restricting retail customer access to those products;
- disrupting existing variable insurance product distribution models under which retail customers for such products are currently well-served; and
- diminishing, rather than enhancing, registered representatives' understanding of their specific obligations to retail customers.

Current Retail Customer Protections

Under current law, investment advisers and broker-dealers are subject to different standards with respect to the duty of care each owes to its retail customers when providing advice about securities. It is important to note that these different standards and the obligations they entail have been developed, elaborated upon, and refined through a process of extensive rulemaking, regulatory guidance, and judicial interpretation that has extended over a period of decades. A common theme in that process has been to promote and ensure that adequate protections are provided to retail customers of both investment advisers and broker-dealers, while also taking into account the different regulatory structures for investment advisers and broker-dealers established by the Congress.

The Investment Advisers Act of 1940 (the "Advisers Act") does not specifically set forth fiduciary requirements. Nonetheless, the Commission has long held that an investment adviser owes its clients a duty to act in the clients' best interests. In addition, the Supreme Court has held that an implicit common law fiduciary duty arises from the anti-fraud provision in Section 206 of the Advisers Act. It is noteworthy that, under this fiduciary duty, investment advisers are not required to eliminate all potential conflicts of interest, but only to make full and frank disclosures regarding such conflicts.

Broker-dealers and their registered representatives are not generally bound by any rule or other guidance that imposes a fiduciary duty upon them. In contrast to investment advisers, broker-dealers and their registered representatives are subject to an extensive array of rules and duties in the conduct of their business. Congress, in recognition of the comprehensive regulation to which broker-dealers are subject, specifically excluded broker-dealers from the definition of 'investment adviser' in Section 202(a)(11)(C) of the Advisers Act, and thus from coverage by the Act's fiduciary standard of duty. These rules and duties, imposed on broker-dealers by the Financial Industry Regulatory Authority ("FINRA"), include the duty to recommend to an investor only securities that are suitable for that investor, to review all customer communications, to establish and test detailed, written supervisory procedures and controls, and to observe high standards of commercial honor and just and equitable principles of trade in the conduct of a broker-dealer's business. FINRA also regularly conducts extensive examinations of broker-dealers, often with greater frequency than the Commission's examinations of investment advisers.

In addition, broker-dealers and their registered representatives who sell variable insurance products are subject to a multi-layered and well-developed set of responsibilities under state statutes and regulations, regulatory interpretations, and case law. These responsibilities are implemented through additional licensing, educational and disclosure requirements and are subject to a comprehensive system of oversight by state insurance regulators. In its efforts to ensure adequate customer protection, FINRA has also recognized the unique challenges presented by variable insurance product sales. In response to those challenges, FINRA has issued special interpretative guidelines covering public communications regarding such products, as well as special guidance regarding suitability determinations for both variable life insurance and variable annuities. In addition, the heightened requirements for sales of variable annuities in FINRA Rule 2330 provide an especially high level of retail customer protection.

A careful consideration of the protections currently provided to retail customers of broker-dealers in connection with the sale of variable insurance products does not clearly indicate that such customers would be better served if there were a specific fiduciary standard applicable to broker-dealers. On the contrary, it may reasonably be argued that, because of the comprehensive regulation to which broker-dealers selling variable insurance products are subject, retail customers purchasing variable insurance products receive protections that may in some case exceed what might be provided under a general fiduciary standard. In addition, the standards applicable to broker-dealers in connection with such sales have the added value of being specific in terms of their application, well-known and understood, and capable of being effectively monitored and audited by broker-dealer supervisory personnel, FINRA and the Commission.

<u>Benefits of a Standard of Care Based on Specific Conduct Requirements Versus a General Principle</u>

The rules that establish and govern a broker-dealer's duty to its retail customers in recommending the purchase of variable insurance products are well-established and well-understood by both broker-dealers and their registered representatives. Because these rules are clear and specific, in contrast to the general fiduciary standard applicable to investment advisers, they provide better guidance to registered representatives and their supervisors in the conduct of their business and in meeting their obligations to retail customers.

In contrast to a principle-based standard, a duty of care based on standards that set specific business conduct requirements is more likely to be adhered to, and to achieve the intended customer protection. The specific requirements, and high customer protection standards, embodied in FINRA Rule 2330 for variable annuity sales provide a model for setting standards of care that are both clear and effective in their application. Any future rulemaking by the Commission that seeks to improve the standard of care owed by broker-dealers to their retail customers, or to harmonize such standard with the fiduciary duty owed by investment advisers, should be careful to preserve the current focus on concrete business practices. 'Improvement' and 'harmonization' are desirable regulatory goals, but retail customers of broker-dealers will not be better protected if the practical consequence of such improvement and harmonization is a loss of clear direction or undue complexity in applying a new standard of care.

If the issue of customer confusion over the nature of the legal duties owed by broker-dealers versus investment advisers to their respective retail customers is a point of concern — as has previously been suggested in published research reports — there are remedies available to address such confusion without changing the legal duties owed by broker-dealers. Existing FINRA and Commission rules may be amended, or supplemented by new rules, to require clear disclosures describing the regulatory structures applicable to broker-dealers and investment advisers and the nature of the legal duty that each owes to its retail customers. Customers thus informed will be in a better position to insist that they receive the full benefit of the legal duties required of broker-dealers, and broker-dealers will be further incented to ensure that they satisfy all of their duties and responsibilities to their customers.

Limits and Consequences of a Change in the Broker-Dealer Standard of Care

Enhancing investor protections by changing the duty owed by broker-dealers to their retail customers may well prove to be easier said than done in more ways than one. First, for the reasons discussed above, the duties and responsibilities of broker-dealers under current standards, particularly in connection with their sales of variable insurance products, already provide customers with clearly prescribed and meaningful protections. Second, because of the high standards and protections under current standards, an attempt to enhance customer protections by imposing a new fiduciary standard on broker-dealers may result only in enhancements that are more ephemeral than real. Third, unless the adoption of a new fiduciary standard is carefully crafted and effected through concrete conduct-based requirements of the type already applicable to broker-dealers and sales of variable insurance products, the adoption of a new standard may result in a number of unintended adverse consequences for consumers and broker-dealers.

Registered representatives of broker-dealers affiliated with life insurance companies typically sell a mix of both variable and non-variable insurance products. The non-variable or “fixed” insurance products may in some cases be sold by registered representatives through the broker-dealer, but in many cases are sold by those same individuals away from the broker-dealer. A new standard of care for broker-dealers that results in the imposition of substantial additional obligations, or that sets a standard that appears to be an enhancement but actually creates greater uncertainty about a registered representative’s specific responsibilities, may have particularly adverse effects on broker-dealers selling variable insurance products and on consumers interested in purchasing such products:

- Registered representatives who sell a mix of variable and fixed insurance products may choose to limit their sales of insurance products to fixed products only, thereby further bifurcating the insurance market into a smaller number of broker-dealers and registered representatives who sell only variable products and a larger number of agents who sell only fixed products.

- As a result of the foregoing, existing distribution models for variable insurance products may in some cases be eliminated, existing business relationships between variable insurance product customers and broker-dealers may be disrupted, and customer access to variable products reduced.

- Customer choice may also be reduced if broker-dealers respond to additional duties and burdens under a new standard by offering a smaller number of variable insurance products, or a narrower range of products emphasizing simpler products with fewer features and benefits.

- Existing business models that currently offer customers a choice between a lower cost transaction-based relationship with a broker-dealer and a higher cost continuous-service relationship with an investment adviser may also be disrupted if broker-dealers and their costs of doing business are pushed closer to the investment adviser model. Such disruptions would not only raise costs and rob customers of choices they enjoy today, but many low and middle-income customers may lose even the opportunity to realize the intended "benefit" of a new fiduciary standard if the cost of service becomes prohibitively high relative to their levels of income.

Conclusion

In considering any change in the standard of care applicable to broker-dealers, we encourage the Commission to keep in mind the clear, conduct-specific duties currently owed by broker-dealers to their retail customers and the meaningful and observable protections those duties provide. It would be unfortunate, in our view, if existing protections were undercut in pursuit of a presumptively higher fiduciary duty that may actually deliver less certain protections because of unnecessary confusion about required conduct. In addition, we strongly encourage the Commission to avoid other possible adverse consequences that may result from a change in the standard of care, taking into consideration the negative effect of such a change on existing business and distribution models for variable insurance products, customer preferences regarding their ability to choose among different cost and service relationships, customer access to variable insurance products, and the available range of variable insurance products from which customers may choose.

We greatly appreciate your attention to our views.

Sincerely,

Randy F. Wallake

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