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August 30, 2010

Elizabeth M. Murphy
Secretary
U.S. Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File Number 4-606, Study Regarding Obligations of Brokers, Dealers, and Investment Advisers

Dear Secretary Murphy,

Fiduciary360 (fi360) appreciates the opportunity to comment on the Commission's Study Regarding Obligations of Brokers, Dealers, and Investment Advisers. We commend the Commission on the interest it has taken in further analyzing the effectiveness of existing regulatory standards for brokers, dealers, and investment advisers and identifying any gaps or overlap in regulation, and for allowing the public to provide input early in the process. We also commend Chairman Schapiro for her recent remarks confirming her support for a uniform fiduciary standard and recognition that, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, such standard must be no less stringent than the standard applicable to investment advisers.[1] And finally, we appreciate the Chairman's call for comments that both recognize the central importance of investor protection and provide suggestions on implementing fair and flexible regulation.

About fi360

Fi360 offers a full circle approach to investment fiduciary education, practice management, and support. Our mission is to promote a culture of fiduciary responsibility and improve the decision making processes of investment fiduciaries, including investment advisors, managers, and stewards. With legally substantiated Practices as our foundation,[2] we offer training, tools, and resources in support of that mission. In particular, fi360 Tools provide research, analytical, and

[1] Moving Forward: The Next Phase in Financial Regulatory Reform, Speech by SEC Chairman Mary L. Schapiro before the Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, July 27, 2010, *available at* http://www.sec.gov/news/speech/2010/spch072710mls.htm.

[2] Fi360 publishes the *Prudent Practices for Investment Fiduciaries* handbook series. The Practices in the handbooks are legally substantiated by the law firm of *Reish & Reicher* (formerly known as *Reish Luftman Reicher & Cohen*), and formally reviewed by the American Institute of Certified Public Accountants (AICPA).

reporting services that are designed to aid advisors who serve as or support investment fiduciaries. In addition, we manage the Accredited Investment Fiduciary® (AIF®) and Accredited Investment Fiduciary Analyst™ (AIFA®) designation programs.[3] Fi360 is also dedicated to providing the fiduciary community additional resources through our webinars, blog, annual conference, and general advocacy efforts.

As a part of our mission to promote a culture of fiduciary duty, fi360 also has supported the advocacy efforts of the Committee of the Fiduciary Standard (www.thefiduciarystandard.org) since its inception in May 2009.[4] A key component of the Committee's mission is to ensure that any regulatory changes preserve the authentic fiduciary standard (as established in the Investment Advisers Act of 1940 and other laws) and extend that standard to all professionals who provide investment advice. Blaine Aikin, fi360's CEO, is a founding member of the Committee and currently serves on its Steering Committee and Management Group. In addition, several fi360 employees and AIF and AIFA designees are members of the Committee and/or serve the Committee in an advisory capacity.

Gaps in Existing Regulatory Structure

The RAND Findings

As the Commission and its staff are well aware, the 2008 RAND Report concluded that investors do not understand key distinctions between investment advisers and broker-dealers, including their duties, the titles they use, and the services they offer.[5] Based on the findings of RAND, from an investor protection standpoint, there are clearly gaps that exist in the regulatory standards for broker-dealers and investment advisers. In particular, many investors are unaware of the basic differences between the different categories of investment professionals. It's even harder for investors to make distinctions given the fact that broker-dealers both use confusing titles and offer services that are very similar to those offered by investment advisers. While those familiar with the investment industry are aware that broker representatives use the title "financial advisor," members of the general investing public are not. Furthermore, investors are not able to discern the difference between a financial advisor, financial planner, financial consultant, investment adviser or broker.

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[3] At present, there are over 3,700 active AIF and AIFA designees. AIF designees receive training that provides a unique comprehensive overview of fiduciary standards of excellence, asset allocation, preparation of investment policy statements, manager search and due diligence, performance measurement, and other related subjects. AIFA designee training builds on that foundation and prepares students to provide Fiduciary Assessments to institutions.

[4] The Committee was formed in May 2009 as a grass roots effort to promote the authentic fiduciary standard. It is open to all like-minded financial professionals and investors who wish to publicly support the authentic fiduciary standard, and members join through a LinkedIn page maintained by the Committee. As of August 26, 2010, the Committee has 830 members on its LinkedIn page.

[5] RAND Corporation Technical Report: Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, 2008, *available at* http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

To rectify this situation, some commenters have suggested limiting the titles professionals may use. While we agree that such an approach may assist with reducing confusion, it is not a complete solution. The RAND Report showed that even if investors begin to understand the distinctions between the professionals with whom they consult, they still are not aware that these professionals operate under different standards of care. Moreover, the RAND Report showed that investors question whether the fiduciary and fair dealing (or suitability) standards of care are in fact different. It is this misperception by investors that must be addressed by extending the fiduciary standard to broker-dealers and providing greater regulatory guidance to all investment professionals on their duties when providing personalized investment advice to investors.

Broker Objections

We understand that many professionals do not view the path to extending the fiduciary standard as being clear cut and we would like to address directly certain objections raised by other commenters. Specifically, several broker representatives and insurance providers have argued that they are already subject to a myriad of federal and state regulatory requirements, and that imposing a fiduciary standard in addition to these requirements will not assist investors. In essence, these professionals question whether the fiduciary standard is a higher standard. We would note that within any regulatory structure principles must be supplemented by rules, and the fiduciary standard offers a higher overarching base of principles upon which advisers must rely when serving clients and meeting their regulatory obligations. In fact, there are several requirements that are similar under both the fiduciary and fair dealing standards, such as suitability and best execution. However, the way that conflicts are managed and disclosures are made is significantly different because of the different principles from which the rules are drawn.

Another argument advanced by several broker representatives is that the fiduciary standard looks backward through enforcement and that the suitability standard looks forward to prevent harm to clients. We believe this characterization is both unfair and inaccurate. In fact, both standards are forward looking in their implementation and backward looking in their enforcement. In order for a fiduciary to truly serve the best interests of his client from the start he must implement a prudent process that documents the professional's due diligence and care in serving the client.[6] Due diligence starts with the adviser's choice of products to offer and carries through to the relationship with the client. Just as a broker must collect information on a customer's financial position and investment objectives under the fair dealing standard, so too must an adviser under a fiduciary standard. Just as a broker has a duty to form a reasonable basis that a security or investment strategy is suitable for a customer, so too must an adviser ensure that his investment advice is suitable and fits the client's needs and objectives. And in all cases, where a customer becomes unsatisfied and files a complaint, both the fair dealing and fiduciary standards will look backwards at the broker's or adviser's actions.

[6] A large part of the training that fi360 provides focuses on how investment fiduciaries can implement a prudent investment process by following certain practices. We encourage the Commission to view fi360's Prudent Practices for Investment Advisors handbook available at http://www.fi360.com/main/pdf/handbook_advisor.pdf.

Finally, in addressing these concerns raised by broker representatives and insurance providers, we believe that it is important to note that we believe there is a place for non-fiduciary transactional services as well as for fiduciary advisory services. Furthermore, we recognize that these are distinct services and providers of each play valuable roles in the marketplace. And because these are distinct services, we believe both professionals and regulators must recognize that they represent two separate playing fields and that participants in each field must play by consistent rules that apply to each particular field.

With regard to the extension of the fiduciary standard, the intent should be to provide a level playing field whereby those professionals who provide similar services are held to the same standards, principles and rules, so that those investors seeking the services can be assured that they are receiving the same level of protection no matter whom they seek advice from. Because the fiduciary standard has been in place for over seventy years under the Advisers Act and has governed how investment advice must be provided, we believe it is reasonable to extend the same standard to other professionals that provide the exact same service.

Potential Rulemaking

Perhaps the greatest concern of broker-dealers and their representatives is the fear of uncertainty related to the extension of the fiduciary standard to their investment advice services and how it may permeate other brokerage services and practices. In particular, it is clear that broker representatives are concerned with the lack of clarity, guidance, and specific rules. While such concern is understandable, we are confident that the Commission is well aware that greater certainty and specific guidance will be needed when it comes to drawing conclusions to report to Congress and promulgating new rules.

<u>Demarcation of Product and Advice Providers</u>

Before addressing some of the specific issues that rulemaking will need to address, we would like to discuss the issues related to what appears to be an environment that seems to be promoting less differentiation between investment professionals. The federal securities laws were written in a way that recognized that several intermediaries play different roles in the marketplace. While it is easy to argue that the regulatory system is outdated, it is still the system under which we operate today with separate laws for separate players. And in many ways, we believe that the federal securities laws have gotten it right in that product providers and advice providers should clearly be demarcated from both a general regulatory and investor protection perspective. It appears, though, that certain industry players, and perhaps some regulators, are seeking to promote the increasing blending of investment roles. Because of the inherent conflicts that can arise in the way product providers interact with customers and are compensated, we do not believe that a blending of roles is productive or in the best interests of investors. To the extent that professionals are permitted to perform similar roles and provide similar services, we do believe that they should all be regulated in the same manner and under the same regulatory regime. Thus, where a broker provides investment advice, we do not believe that the advice provider should continue to be exempt from investment adviser registration and regulation. In preparing its final report for Congress and considering future rulemaking, we would encourage the Commission to consider recommending that the exemption for incidental advice be removed from the Advisers Act; and in parallel, that the Commission seek to make the rules for brokers and advisers with regard to fiduciary duties and related disclosures and requirements as uniform as possible. This will allow investors to receive the same level of protection under both the Exchange Act and Advisers Act. In addition, it would ease the regulatory burden on dually-registered firms and individuals.

With regard to the demarcation of product and advice providers, we would also like to address arguments that investor access to products and services will be hampered if the fiduciary standard is extended or the broker exemption is removed from the Advisers Act. We believe such arguments are not only misguided, but are also without substantiation. Many investment advisers currently serve the interests of middle-income Americans and have built effective business models serving as fiduciaries; and many of those advisers have submitted comments to the Commission in these proceedings. Investors have choices now and to argue that those choices will disappear as a result of extending the fiduciary duty to a discrete sector of the brokerage community is without credit. We urge the Commission to dig deeper into the claims made by advisers and brokers alike in their comments. For example, how is it that advisers have a viable business model serving as a fiduciary to a wide range of clients, but brokers argue that they would not? In addition, in relation to claims that compliance burdens and costs would increase, have broker's provided actual numbers and statistics to back their claims? For advisers that have served as fiduciaries, what is it that has made their business sustainable and what practices have they employed to manage the costs associated with compliance?

Regulatory Guidance

While some commenters have raised issue with regard to the fact that the Dodd-Frank Act does not define specific terms and that rules related to fiduciary obligations are not specific enough, we are confident that the Commission has the resources and expertise to provide guidance to investment professionals on key terms that will need to be defined, including "fiduciary," "best interest of the customer," and "personalized investment advice." With regard to the terms "fiduciary" and "best interest of the customer," we believe that the five core principles identified by the Committee for the Fiduciary Standard serve as a useful guide:

1. Put the client's best interest first.
2. Act with prudence; that is, with the skill, care, diligence and good judgment of a professional.
3. Do not mislead clients; provide conspicuous, full and fair disclosure of all important facts;
4. Avoid conflicts of interest.
5. Fully disclose and fairly manage, in the client's favor, unavoidable conflicts.

The principles are meant to illustrate a core relationship of trust reinforced by loyalty and due care that forms the foundation of the fiduciary standard. Moreover, as explained by the Committee, while these principles do not necessarily capture everything that is required of a fiduciary, they do provide a useful checklist to ensure that an investor's best interests are not compromised. Accordingly, we believe that these principles would be useful to the SEC in promulgating new rules and providing additional guidance to brokers and advisers. In addition to considering these principles, we trust the SEC will recognize and rely upon the firmly established history of the fiduciary standard as the essential code of conduct for those who have been entrusted to care for others' property.[7] As has been recognized by Commissioner Aguilar, there is one fiduciary standard and it is important to keep that standard sacrosanct.[8] Furthermore, we note that if the playing fields and rules for non-fiduciary transactional services and fiduciary advisory services are not kept distinct, the strong history supporting the fiduciary standard and the core fiduciary principles identified by the Committee for the Fiduciary Standard would cease to be meaningful from an investor protection standpoint.

With regard to the term "personalized investment advice", we note that Advisers Act Rule 204-3 provides a useful starting point by defining "contract for impersonal advisory services" that the Commission has long relied upon.[9] Thus personalized investment advice should be based upon activities that fall outside of the parameters set for impersonal advisory services, which are provided (i) by means of written material or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts; (ii) through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or (iii) any combination of the foregoing services.[10]

In addition to concerns about defining terms, we understand that brokers are concerned about the practical application of the fiduciary standard. As other commenters have acknowledged, the legislation has already provided baseline guidance on issues related to commissions, sales of proprietary or limited range of products, and the scope of the fiduciary standard for broker-dealers. Moreover, the Commission has sufficient experience in regulating investment advisers and broker-dealers and understanding the unique issues that face these professionals. We also believe the Commission will have sufficient resources to draw upon in the industry in order to better understand how practitioners have operated under the fiduciary standard for over seventy years. Thus, we

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7 *See* Blaine F. Aikin, The Role of a Fiduciary is Timeless, Investment News, August 15, 2010, *available at* http://www.investmentnews.com/article/20100815/REG/308159995.

8 SEC's Oversight of the Adviser Industry Bolsters Investor Protection, Speech by Commissioner Luis A. Aguilar before the Investment Advisers Association Annual Conference, May 7, 2009, *available at* http://www.sec.gov/news/speech/2009/spch050709laa.htm.

9 *See* Advisers Act Release No. 1406, Proposed Rule, Suitability of Investment Advice Provided by Investment Advisors; Custodial Account Statements for Certain Advisory Clients, publically available March 16, 1994.

10 Advisers Act Rule 204-3(g).

are sure the Commission is well-equipped to provide the guidance needed to address the practical application of the fiduciary standard, especially as it relates to compensation, scope of services and products offered, and sales practices, and that the Commission will protect time-honored fiduciary principles as it promulgates rules to guide advice providers in the practical application of those principles.

Finally, we feel that it is important to address the role of disclosures in regulatory guidance. As has been widely recognized, the Dodd-Frank Act seeks to enhance transparency and has called upon the Commission to improve disclosures, especially as they relate to an investor's relationship with a broker-dealer or investment adviser. While we believe that disclosures play an important role in the services provided by investment professionals, we caution the Commission from creating a regulatory environment that relies too heavily on disclosures. Investors seek the guidance of investment professionals for specific reasons and should be able to rely on the guidance they receive without being bogged down in disclosure documents. With regard to advisory services, investors are particularly relying on the independence and expertise of their investment professionals. Disclosures will be needed where conflicts exist that may impair the independence of a professional. However, an emphasis should be placed on avoiding and managing conflicts rather than solely relying on disclosures to cure conflicts. Moreover, the Commission should carefully consider whether certain conflicts should be banned for policy reasons because those conflicts cannot be adequately managed or cured through client consent. The regulatory burdens associated with acting as a fiduciary should remain firmly in the hands of the advice provider and should not be permitted to be shifted to investors who may not fully appreciate what is at stake or whether they are still receiving the protections upon which they rely in seeking professional advice.

Conclusion

We truly appreciate the opportunity to provide our views on these important issues. Please do not hesitate to contact us if you have any questions or would like additional information.

Sincerely,

Blaine F. Aikin
CEO

Kristina A. Fausti
Director of Legal and Regulatory Affairs