August 30, 2010
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

This letter is in response to the notice published on the SEC's website seeking public comments for the study of the obligations of brokers, dealers and investment advisors under the Dodd-Frank Wall Street Reform and Consumers Protection Act.

Americans deserve to know if their advisor is their advocate or someone who is just selling them a product. That is not at all clear today. Registered Investment Advisors are fiduciaries, brokers are not. The standards of care are different, yet brokers can call themselves advisors. If brokers are going to hold themselves out to be advisors and sell commission based products they need to be a fiduciary and make the proper disclosures of any conflicts of interest they have with investors. A true fiduciary standard for advisors is clearly what the public wants.

It is totally understandable why broker dealers (including discount brokers) and many registered representatives of broker dealers (including life insurance agents selling mutual funds and annuities) do not want to be held to a fiduciary standard. Currently, they can masquerade as fiduciaries by offering "financial services" and call themselves "independent" or financial planners, financial advisors, investment advisors, financial consultants, counselors or almost anything else that promotes an aura of trust. Then, after the sale they can retreat behind the suitability standard and arbitration.

We have all seen the expensive polished commercials where banks, brokerage firms and insurance companies try to position themselves as the trusted unbiased "advisor" that is looking out for you. No wonder the public is confused! Investors don't understand that in the end when they deal with a broker it is a salesman – customer relationship and it is up to them, the investor, to compare products and make the final purchase decision. The average investor does not have the time or the knowledge to compare and choose their own investments which is why they are seeking advice in the first place. The brokerage industry has successfully blurred the lines. The public expects a trusted advisor and many times they unknowingly get a salesman.

Of course there are different standards of care, gaps, shortcomings and overlays between brokers and investment advisors. As you know The Rand Study in 2008 found the same thing. Investors are confused. Even if an investor knew the difference between a broker and a fiduciary advisor, it is currently next to impossible for them to determine which one they are dealing with. They could be dealing with both at the same time.

It is a matter of labeling. There could be two kinds of brokers as long as they are clearly separated and defined with no overlap and no possibility of confusion. This would still allow for "discount brokers", insurance company salespeople and others who don't want to give advice. **Transactional Brokers**. If a broker is only filling an order initiated by the investor or they are clearly just offering a product and the firm or the individual

registered representative clearly discloses that they are only selling a product they should only be able to use the titles “broker” or “stockbroker”, no “financial services” or “registered representative” no other titles and no letters behind their name. **Advisory Brokers.** If a broker dealer or a registered rep gives advice or holds themselves out to the public in anyway as an advisor, they need to be held to a true fiduciary standard. They cannot be allowed to switch back and forth or act differently with different customers. This is what is confusing for investors. We clearly need sales professionals but they need to choose what they want to be. They can’t have it both ways. Some watered down standard that tries to include all investment professionals will end up with the same confusion for the public.

Whatever new standards the SEC finally decides on, advisory brokers will still be able to sell commission based products and offer a limited menu of investment options. Because of these exceptions all brokers need to clearly disclose to the public when they are acting as brokers. If a broker is going to give any kind of advice the broker should be a fiduciary and have to make disclosures of any conflicts of interest just like a registered investment advisor (RIA) must do and that means clearly disclosing the fact that they are acting as a broker and disclosing how much compensation they and their firm will receive.

Being a true fiduciary can be compatible with charging commissions. I believe the majority of brokers are acting like a fiduciaries today and they will have no problem. So why are so many brokers who say they do the best for their clients objecting? If what they are saying is true, the new fiduciary standard won’t change their business at all. But if shining the light of disclosure into a dark corner of a broker’s business causes them to have a problem or not make a sale, then maybe it is time the SEC turned that light on.

**REQUIRE BROKERS WHO ARE ADVISORS TO BE FIDUCIARIES**

Brokers giving advice should be held to the current true fiduciary standard as it applies to RIA’s in all respects – period. Watering down the current fiduciary standard or just cosmetically tweaking the current suitability standard to attempt to fit all brokers into one standard is a convenient and politically expedient thing to do and it may even address the mandate from Congress to hold brokers to a higher fiduciary duty. But a weak fiduciary standard is not what the public expects and assumes when dealing with an advisor. Confusion will linger. People want real protection not some standard with yet another big loophole for brokerage firms, banks and insurance companies.

**REQUIRE ALL BROKERS TO MAKE A “BROKER DISCLOSURE”**

All brokers should be required to disclose the fact that they are acting as a broker. At the time of any product presentation, a broker should have to present and discuss a <u>separate</u> document disclosing that they are acting as a broker, that they are selling a product. This includes the overall cost of the product they are selling including any ongoing expenses <u>in dollars</u> and how much commission the broker is personally making on the sale <u>in dollars</u>, including ongoing compensation like 12-b1 fees. This may dovetail nicely with any proposed 12-b1 reforms. All brokers should also have to disclose that they offer only a limited menu of products and that there may be better performing, less expensive or more tax efficient product choices outside of their own limited offerings and they need to

disclose that they have no legal on-going duty to the investor after the sale. The investor should have to separately acknowledge each of these points in writing.

**REQUIRE ADVISORY BROKERS TO MAKE ADITIONAL DISCLOSURES OF ANY COFLICTS OF INTEREST REALTED TO THEIR ROLE AS FIDUCIARIES**

In addition to the broker disclosure advisory brokers would need to disclose any other additional conflicts of interest they might have as fiduciaries such as added incentives to sell certain products.

Brokers will want to be able to make a one time disclosures in small print buried deep in some tissue paper thin document or agreement but would settle for a disclosure on the bottom of confirmations or somewhere no one will ever read them. The broker disclosure needs to be presented and verbally explained and then acknowledged point by point by the investor on a separate document in large type before the sale. Otherwise there is really no informed consent to the disclosures and continued confusion in the public's eye. Why is informed consent not fair and reasonable when it protects the public and gives them all the information the need to make a decision?

Brokers will argue that disclosures are burdensome and are just more paperwork on top what they already have to do. One insurance agent complained in the public comments that he had to do 37 pages of paperwork and another comment said they had to get the approval of 3 supervisors to sell an annuity or mutual fund. This is probably because some brokers were not even meeting the lesser suitability standard. What is burdensome about informing and protecting the public?

Advisory brokers will muddy the waters by wanting detailed guidance on what is fiduciary behavior and what is not. They know what it is – broker dealers have been successful in avoiding the fiduciary standard for years. If a product is not in the best interest of the investor you can't sell it. If you don't disclose everything that is a conflict of interest you can't make the sale. You can't misinform or mislead investors or omit relevant facts. And most importantly, you cannot put your interest or that of your broker-dealer ahead of the investor's interest. Without question this is incompatible with some broker's sales models. But who are we trying to protect here? If you want to be just a transactional broker you can't offer advice - you're a salesperson. If you want to be an advisory broker, be a true fiduciary.

Is imposing a true fiduciary duty going to reduce the profits of some broker dealers and some registered representatives? Absolutely, many products are sold today because they are just suitable for an investor, but not the best. And sales may be down because some won't have the "advisor" persona to hide behind. On the other hand as I said before, there are many thousands of successful brokers today that give advice and act like fiduciaries that won't be affected.

Will a broker disclosure and a true fiduciary standard hurt the public? One argument is that new regulation will hurt investors with only small amounts to invest. I don't buy it. This argument is without merit because broker dealers have already been moving away

from small accounts for years. They are charging small accounts minimum account fees and other similar fees and sending them to call centers by the thousands. Transactional and advisory brokers who want to will still be able to sell products to small investors - if their broker dealer will let them. There are also successful RIA's today that give advice to anyone for a relatively low hourly rate. You pay for what you need. Maybe this segment of the advisory business will take off and small investors can get real unbiased advice instead of being shuttled into some high cost fund of the month.

Another argument is that the public especially small investors will pay more for investments. Wow! Are they kidding? Fees are high now. The problem is that investors don't know what they are paying because the fees are hidden. There are mutual fund companies that have 14 different share classes for the same fund. The fees are taken out of mutual funds and annuities before investors get their statements, they never see the fees. The argument is really not that investors will be paying more if there is full disclosure and a fiduciary standard. Brokers are just afraid that investors will find out what they are really paying now.

**There would be three actual categories of investment professionals. To the public there would really be only two, advisors and brokers.**

**This would only work if there is total separation of advisory brokers from transactional brokers, no loopholes.**

**Transactional Brokers** – commission only discount brokers, stockbrokers, sales professionals and insurance agents who only want to do transactional business. No increased regulation except for the separate document broker disclosure (above). They cannot call themselves anything but "Brokers" or Stockbrokers". They can give no advice and must adhere to the suitability standard. They cannot work for a broker dealer, insurance company or any other entity that is, or is affiliated with a company that holds themselves out to the public as an advisor and they cannot be dually registered or be affiliated in any way with any RIA. No "advisory" ties.

**Advisory Brokers** – do business on a commission only basis. They would be subject to full fiduciary duty and the broker disclosure (above) and they would be required to make disclosures of any and all additional conflicts of interest. No on-going management, no management fees and no discretionary accounts. No charging for financial planning unless they are an RIA or an investment advisor representative (IAR). Can be dually registered but must make all of the required disclosures when acting an advisory broker.

**Registered Investment Advisors** – Regulated the same as now. They are a fiduciary and can charge fees for financial planning and asset management. They must fully disclose any conflicts of interest as they do now.

What the SEC would be doing in practice is keeping the broker-dealer exclusion in the definition of "investment advisor" under the Investment Advisors Act of 1940. But there would need to be new regulations as outlined above including requiring all brokers to make the broker disclosure and a regulation that requires brokers who give advice to be a

fiduciary. By keeping the exclusion a broker dealer would not be required register as an SEC or state advisor. Transactional brokers and brokers who want to give advice could still be regulated by FINRA under the new rules. Registered investment advisors would still be regulated by the SEC and the states. Broker dealers can't hold themselves out to be advisors in anyway or be affiliated with any such company and have transactional brokers as registered reps.

For this to work the SEC needs to be more involved in making sure FINRA does its job. After all, the SEC is *allowing* brokers to regulate themselves. This could be changed. The public needs to know if a broker has any history of problems. Require all brokers to disclose prior claims, regulatory actions and settlements to investors. Don't just make the information available on the web. If the brokerage industry wants to be self-regulating they need to do a better job of disciplining brokers who break the rules. In the past the NASD and now FINRA have been more interested in protecting brokers than protecting the public. To help this process the SEC should not permit arbitration of customer claims. Allowing arbitration is a huge advantage to brokers. If the threat of a lawsuit is scary to a broker dealer or a registered rep maybe it will scare them into really putting the public first. If the cost of E&O insurance goes up maybe a broker or their broker dealer will stop the behavior that causes it to increase.

Am I dreaming? Will this ever happen? I am probably completely delusional. What I have outlined gives brokers the ability to operate in either an advisory or a transactional arena just not both. They just can't confuse the public anymore. I'm sure brokers and especially the insurance industry are currently lobbying the SEC trying to water down any fiduciary standard or disclosures they may be required to make. These companies have powerful well funded lobbies. They have already successfully kept any true fiduciary language out of the financial reform act. Now all they have to do is keep it out of any SEC regulations.

Banks, brokers and insurance companies have made lots of money and had their way for years at the expense of many Americans. Investors have no one to speak for them. They depend on the SEC. The time for talking is over. It's time to look at the study when it is done and listen to the public and protect the public. Don't compromise. The public wants to know clearly and without question if a financial advisor is an advocate for them or not. Only then can they make intelligent informed investment decisions.

Respectfully submitted,

William Oldfather