



August 30, 2010

U.S. Securities and Exchange Commission  
Attn: Elizabeth M. Murphy, Secretary  
100 F Street, NE  
Washington, DC 20549  
**Electronic Address:** [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**Re: File No. 4-606 – Study Regarding Obligations of Brokers, Dealers, and Investment Advisers**

Dear Secretary Murphy:

The National Society of Compliance Professionals (NSCP) appreciates the opportunity to comment on the Study Regarding Obligations of Brokers, Dealers, and Investment Advisers ("Study") by the Securities and Exchange Commission ("SEC").

The Study is of considerable interest to NSCP and its members. NSCP is the largest organization of securities industry professionals devoted exclusively to compliance issues, effective supervision, and oversight. The principal purpose of NSCP is to enhance compliance in the securities industry, including firms' compliance efforts and programs and to further the education and professionalism of the individuals implementing those efforts. An important mission of the NSCP is to instill in its members the importance of developing and implementing sound compliance programs across-the-board.

Since its founding in 1987, NSCP has grown to nearly 1,800 members. NSCP's membership is drawn principally from traditional broker-dealers, investment advisers, bank and insurance affiliated firms, as well as the law firms, accounting firms, and consultants that serve them. NSCP's membership is unique in that the vast majority of its members are compliance and legal personnel from financial services firms that span a wide spectrum, including employees from the largest brokerage and investment management firms to operations with only a handful of employees. [The diversity of our membership allows NSCP to represent numerous perspectives in the financial services industry.]

### **NSCP's Focus is on Issues for Compliance Professionals**

NSCP supports the broad goals of recent financial reform efforts, in particular the goals of protecting retail investors and strengthening the safety and soundness of our financial markets. Nevertheless, in light of the diversity of its members as well as its special focus on encouraging the adoption of regulations that are carefully considered, appropriately focused, and accompanied by clear direction and guidance, NSCP must limit its comments to those that will most directly impact compliance professionals. For this reason, NSCP will not be commenting more generally on the merits of the various regulatory schemes under consideration by the SEC or the appropriate scope of regulation for broker-dealers as opposed to investment advisers.

### **Lessons Learned – The Rand Study**

NSCP urges the SEC not lose sight of the conclusions of its recently commissioned study.<sup>1</sup> Specifically, that study concluded:

Overall, we found that the industry is very heterogeneous, with firms taking many different forms and offering a multitude of services and products. Partly because of this diversity of business models and services, investors typically fail to distinguish broker-dealers and investment advisers along the lines that federal regulations define. Despite their confusion about titles and duties, investors express high levels of satisfaction with the services they receive from their own financial service providers.

The Rand Study was completed in early 2008, before the sub-prime crisis and subsequent financial upheaval was based on survey data collected for the period 2001-2006. Nevertheless, the conclusions drawn by the study are consistent with what our members see; namely, that the diversity of financial services providers allows customers to find the services they need.

Accordingly, we urge that you be mindful of the need to encourage competition and diversity and, in light of that diversity, of both customers and their needs, and of the financial service firms that serve these customers. A one size fits all approach to regulation is unlikely to be a good fit for anyone -- whether customer or firm.

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<sup>1</sup> Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, Rand Corporation (Jan. 2008), [http://www.sec.gov/news/press/2008/2008-1\\_randiabdreport.pdf](http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf).

### **The Need for Clear Guidance**

NSCP understands the obligation of the SEC to study the imposition of the “fiduciary standard” to govern the conduct of broker-dealers in their interaction with retail investors. Studying the use of a fiduciary standard as a broad framework for analyzing the specific duties that broker-dealers (as well as investment advisers) owe to their retail customers is consistent with the overriding historical investor protection objectives of federal securities laws and the intent of Dodd-Frank. Having said that, in assessing the industry’s ability to achieve compliance with any investor protection standard, it is absolutely essential for the SEC to provide clear guidance as to the meaning of any fiduciary obligations it elects to impose. As noted above, we question whether a “one-size-fits-all” articulation of any standard is likely to appropriately recognize the diversity of customers or services in the vastly divergent financial services industry.

NSCP's members are charged with creating, implementing, and monitoring compliance systems for their employers. In order to discharge this responsibility, NSCP's members must have sufficient guidance from the SEC to understand what any fiduciary standard may require in practice. As an organization that represents compliance professionals, we are concerned that imposing a fiduciary standard without delineating its specific requirements could impose difficult compliance burdens, engender confusion among customers and result in reputational risks for both the industry and the SEC.

A simple example can illustrate this issue. An organization named the Committee for the Fiduciary Standard advocates the imposition of fiduciary standards on retail brokerage activity. That organization offers the following definition of the fiduciary standard on its website:

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.<sup>2</sup>

These are all laudable objectives in theory, but understanding their precise meaning in practice can be exceedingly difficult. For example, does putting the client's best interest first require a broker to recommend that a client go to a competing firm that offers a superior product that the broker's firm does not offer, or is it sufficient for the broker to recommend the best available product for the customer at the broker's firm? New Section 15(k)(2) of the Securities Exchange Act of 1934, added by Section 913(g) of Dodd-Frank, would suggest that disclosure by a broker-dealer that it offers only proprietary or some other limited range of products might be sufficient, provided it was coupled with customer acknowledgement and consent. How do fees fit within the above precepts? It has been recognized that a commission-based, rather than fee-based,

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<sup>2</sup> <http://www.thefiduciarystandard.org/>.

system of charges may pose a conflict as such a fee structure gives a retail securities broker an incentive to “churn” a customer’s account. By contrast, investment advisers’ services are generally fee-based. It has also been recognized, in the broker-dealer context, that fee-based charges for a “buy and hold” investor could result in considerably higher fees for such an investor over time, which is certainly not in the client’s best interest. These represent small examples of the types of issues a compliance professional would confront, as to which clear guidance would be crucial.

These examples illustrate that it is exceedingly difficult for compliance professionals to implement a compliance system designed to ensure that fiduciary standards are met without specific guidance about what particular conduct would be inconsistent with a fiduciary obligation. We would accordingly urge the SEC to consider clearly delineating a firm’s obligations based upon the nature of the service offered (i.e., online trading, point of sale advice, full discretionary money management, etc.) in light of the reasonable expectations of the client.

In response to this concern, it might be noted that investment advisers are currently subject to open-ended fiduciary standards and compliance professionals must work with broad concepts at such firms. Although this is the case, the brokerage industry is different from the advisory industry in an important respect. While investment advisers tend to establish long-term relationships with clients, broker-dealers tend to have more of a transactional focus to their businesses, which means that they tend to establish a greater number of short term relationships with their clients. Depending on the broker-dealer’s business model they may face more frequent and varied compliance issues than a typical investment adviser.

In addition, the fact that the fiduciary obligations imposed on investment advisers have, for the most part, been crafted through a disjointed combination of legal precedent, individual firm exam findings and public interpretive comments by regulatory and industry personnel, rather than through rulemaking that specified clear standards. This creates many ambiguities that compliance professionals are required to navigate in establishing compliance programs and has been recognized by SEC staff in speeches.<sup>3</sup> Section 206 of the Advisers Act (the anti-fraud provision) historically has been the vehicle through which the SEC has conveyed to the industry the federal fiduciary standards that apply to investment advisers. To date, at least ten substantive rules and numerous interpretative and no-action letters have been created under Section 206. The fiduciary obligations imposed on investment advisers have arisen almost entirely organically through various court and administrative decisions, and industry “lore,” rather than through clearly articulated standards. This is far from ideal and has imposed serious burdens on advisory compliance professionals.

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<sup>3</sup> See Speech by Lori Richards (Director of OCIE) “Fiduciary Duty: Return to First Principles” February 27, 2008, <http://www.sec.gov/news/speech/spch022706lar.htm>. (“Instead the Investment Advisers Act incorporates a fiduciary standard under Section 206 and envisions that, in whatever factual scenario the adviser will act in the best interest of his clients. This is a simple statement to make but one that is more difficult to apply.”)

We encourage the staff to approach this study with a clear recognition of how the fiduciary standard has evolved over time. NSCP believes this will support the development of a clear standard, which will aid compliance professionals in developing effective programs.

### **Inspections of Advisers and Brokers**

NSCP also believes that a vigorous and efficient inspection program vitally supports the efforts of compliance professionals. The likelihood of an SEC inspection provides an important additional incentive for business professionals to follow policies and procedures. The inspections themselves provide an excellent benchmark of the effectiveness of the firm's compliance program.

NSCP applauds the SEC's efforts to continually improve its inspection program. NSCP recognizes, however, that any increases in the burdens imposed on the inspection program dilute the resources otherwise available to that program. In this regard, imposing new obligations on broker-dealers could impose additional burdens on the SEC's inspection program for broker-dealers. To help reduce this burden, NSCP is prepared to help support the SEC inspection program by assisting with training and providing feedback on inspection techniques. NSCP can also provide SEC examiners with various resources such as its periodic publications and outlines from its compliance conferences. Such support could assist the SEC in utilizing its inspection resources more efficiently.

NSCP's comments reflect its fundamental mission, which is to set the standard for excellence in the securities compliance profession. This commitment is exemplified by the time and energy NSCP and its volunteers have devoted in the past three years to the development of a voluntary certification and examination program for compliance professionals.<sup>4</sup>

Our mission is directed at the interests of compliance programs and compliance officers. We accordingly support a regulatory scheme that: (i) promotes practices that support market integrity and the interests of investors; (ii) creates clarity as to a firm's obligations to provide a reasonable system of supervision; (iii) promotes requirements that enable compliance officers to create reasonably workable programs; and (iv) avoids requirements or mandated tasks that are more costly and/or less efficient in realizing a regulator's public policy objectives.

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<sup>4</sup> Persons who complete the NSCP's program qualify for the "Certified Securities Compliance Professional" designation. ([www.cscp.org](http://www.cscp.org))

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NSCP appreciates the opportunity to provide comments on the SEC's Study Regarding Obligations of Brokers, Dealers, and Investment Advisers and hopes you find our comments useful. NSCP would be pleased to assist the SEC in any way that it can going forward. Questions regarding our comments or requests for additional information should be directed to the undersigned at 860.672.0843.

Thank you in advance for your kind consideration.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Joan Hinchman', with a long horizontal flourish extending to the right.

Joan Hinchman  
Executive Director, President and CEO  
NSCP

“NSCP... setting the standard for excellence in the securities compliance profession.  
<http://www.nscp.org>”

“CSCP; Gain greater recognition and respect with our industry's credential. <http://www.cscp.org>”

**cc via postal mail:**

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