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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

Charles Schwab & Co., Inc. ("Schwab ") appreciates the opportunity to comment on the Commission's upcoming study on the obligations of brokers, dealers, registered investment advisers and their respective associated persons, required under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank" or the "Act").[1] Schwab is a dually registered investment adviser and broker-dealer with whom our customers have entrusted over $1.4 trillion in assets. We custody over 40% of those assets on behalf of more than 6,000 independent registered investment advisers ("RIAs") and their clients.

## I. Introduction and Overview

Based on our experience serving millions of American investors over the last 35 years, we have learned that retail customers expect financial services firms and representatives to meet their needs and serve their best interests when giving them advice, processing their transactions, safeguarding their assets, and managing their money. They expect regulators not to impose undue burdens on their receipt of those services. Because they value freedom of choice in the types of services they can access, they expect that new regulations intended to protect their interests not drive up the cost of or reduce access to those services. New regulations should have a demonstrated and quantifiable benefit to investors – not just theoretical. This is why the study Congress mandated is important: to serve as a reasoned basis for any future rulemaking.

This is consistent with the fundamental mission of the Commission to protect investors. Protection of investors means not only safeguarding them from unscrupulous

[1] Study Regarding Obligations of Brokers, Dealers, and Investment Advisers, Release No. 34-62577, IA-3058 (July 30, 2010) ("Study Request for Comment").

practices and fraud, but overseeing a regulatory framework that enables and preserves investor choice and access to investing services that a competitive marketplace provides.[2] Schwab believes this should be a cornerstone of the study as well as a central principle in any subsequent rulemaking on a harmonized standard of care.

Because our business model focuses on serving retail customer directly and the independent RIAs who serve them, Schwab has a unique perspective to offer and our customers have an important stake in the issues relevant to the Commission's study. We have operated effectively under standards of care that apply to both broker-dealers and RIAs. We do so in order to serve our customers in the ways that best meet their individual needs. This includes customers who: are self-directed and do their own research and trading; need occasional help and guidance from our representatives in buying or selling a security; delegate at least a portion of their investment portfolio to an affiliated or third-party money manger in a separately managed account program; or rely on an independent RIA to manage their accounts. Reflecting these diverse needs, many customers choose more than one form of service and maintain a variety of accounts at Schwab.

Schwab's Position on the Best Interest Standard. In terms of harmonizing a standard of care and reforming disclosure practices, the following summarizes Schwab's longstanding position:

- When broker-dealers (and RIAs) provide personalized investment advice to customers about buying or selling securities, they should do so in the best interest of their customers. This should be required explicitly under law.
- Broker-dealers, like RIAs, should disclose in a clear uniform manner up front in the customer relationship any conflicts of interest and the terms and scope of the services the firm will provide and the customer will pay for.
- A broader rule-based fiduciary duty for brokers and RIAs is not necessary, as additional or ongoing duties should continue to depend on context and circumstances under current law, including state common law of fiduciary duty.

With this position in mind, our comments below include data from our own customer base and focus on the portions of the study that will analyze the services that retail customers have access to today at varying price points to meet their needs. The letter also:

- Defines "personalized investment advice";
- Identifies key distinctions in the spectrum of investment advisory services and the resulting duties owed to retail customers; and
- Proposes that the Commission can best address the primary gaps in broker-dealer regulation while maintaining the important distinctions between RIAs and broker-dealers by adopting new carefully tailored rules under Section 913(f) and (g) of the Act.

[2] *But see* "Asset Managers May Neglect Emerging Wealthy Post-Reg Reform," American Banker (Aug. 26, 2010) (new requirements and costs may force wire houses and other firms to abandon advice to smaller investors).

## II. The Range of Services Provided to Retail Investors Is Broad, and They Have Reasonable Expectations

Section 913(c) of the Act requires the Commission to consider the potential impact on retail customers of any regulatory change to the standard of care.[3] Before considering the potential impact, the Commission must first understand the "varying level of services provided by" broker-dealers and RIAs and the "varying scope and terms of retail customer relationships."[4] To assist the Commission in this undertaking, we provide information below about our customers, as indicative of the variety of services and relationships that retail customers value and need today.

### A. Retail Customers Focus on Value and Relationship and Expect RIAs and Broker-Dealers to Serve Their Best Interests

We see no evidence that there is a "source of confusion . . . regarding the quality of personalized investments advice that retail customers receive."[5] On the other hand we do generally agree with the prior studies which found that retail customers do not understand the distinction in the current standard of care between RIAs and broker-dealers. For the vast majority of retail customers the legal distinctions in the standard of care are not nearly as important as their actual relationships with their financial services firm and its representatives, the value they receive from those relationships, and the investing choices made available to them.

As discussed in more detail below in Part III, a standard of care and the scope of obligations owed are based on the agreed upon service for which a customer hires a firm and the facts and circumstances of that relationship. This is consistent with basic fiduciary principles and customer expectations. The range of services available to customers is broad, as highlighted by the facts and figures provided below. Retail customers value being able to select from that range and often have multiple accounts for that purpose. If a retail customer establishes a relationship with a brokerage firm to receive brokerage services plus occasional non-discretionary advice, the retail customer does not expect the brokerage firm to engage in ongoing monitoring of the account or market conditions on that customer's behalf. Those services are available in the marketplace, but they cost more than the customer has determined he or she wants or needs to pay.

At discount brokerage firms a customer may ask for occasional buy or sell recommendations, but does not want or need ongoing involvement from his or her broker. When paying discount commissions, there is no customer expectation that the broker will proactively review the account for follow-up. Similarly, many advisers provide a one-time financial plan. There is no customer expectation that the adviser will

[3] *See* considerations under Section 913(c)(9), (10)(A), (12), and 13(A) of the Act.

[4] Section 913(c)(11) of the Act.

[5] Study Request for Comment, question 4.

continue to update that plan for the customer unless the parties have explicitly contracted for that ongoing service.

B. Retail Customers Have Access to a Diverse Range of Services to Meet Their Needs and Sometimes Choose both Broker-Dealer and Investment Advisory Relationships

Our experience is that many retail investors seek to manage their investments through a mix of self-directed brokerage services, non-fee based advice, and fee-based investment advisory services, both discretionary and non-discretionary. Customers maintain 9.4 million accounts at Schwab. About 84 % of these accounts are in either our "Investor Services" unit that serves retail customers directly or our "Adviser Services" unit which serves retail customers through independent RIAs. Customers select Schwab's services based on the size and complexity of their portfolios, their investing experience, their personal preferences, and their willingness and ability to pay for an ongoing advice relationship.

Schwab serves directly approximately 2.5 million households in our Investor Services unit. Of those households 117,040 of them with nearly $90 billion in assets have at least one account enrolled in a fee-based advisory program.[6] These programs include a non-discretionary advice program for an ongoing fee, a mutual fund wrap program, and referrals to separate managed account strategies managed by third party money managers or an affiliate. The great majority of these households (80,215) have both self-directed brokerage accounts and fee based investment advisory accounts at Schwab. Even those retail customers enrolled in our non-discretionary program trade on their own (unsolicited trades) in those advised accounts about 20% of the time. Schwab refers to independent RIAs almost 6,000 retail customers a year who seek more individualized discretionary management of their accounts or need more sophisticated financial planning services.

Outside of these advisory programs, 30,000 customers a year (and this number is growing) sign up for and receive a complimentary advice consultation by appointment with a Schwab registered representative. Most of these consultations occur by phone, which enables nationwide outreach, efficiency, and convenience for the customer. During a consultation a representative reviews the customer's accounts, advises on asset allocation and diversification in light of the customer's investment goals and risk tolerance, and recommends a rebalancing plan to buy and sell securities in the accounts.

Hundreds of thousands of other retail customers have access to a representative on the phone or in a branch office to request help with their investments or for an occasional investment recommendation. Schwab charges no fee for providing this advice. The commission for a retail customer who places a stock order through a representative is $33.95 ($8.95 self-directed commission plus a $25 live service charge). There is no additional charge if the customer receives an investment recommendation as part of that live interaction. For the hundreds of no-load mutual funds available at Schwab, there is

[6] All numbers are as of July 2010. A "household' consists of individual or families who reside at the same address who together maintain at least one brokerage account at Schwab.

no commission or transaction fee, even if a representative helps that customer select the investment. Schwab delivers disclosures about how representatives and Schwab earn their compensation and how it may vary depending on the investments a customer selects. Customers receive these disclosures at account opening, once a year, and persistently on our website.

This model works: providing retail customers with access to the type of advice relationship they want, in light of their individual needs and ability to pay a fee, with transparency of fees and disclosure of potential conflicts.

The trend over the last few years demonstrates that more retail customers want and need access to investment advice. Industry statistics show a large growth in assets under management with independent RIAs. Much of those assets are transferring from the large wirehouses. This shows that retail customers understand the difference in services available to them and can and do make their own informed election among those services.

It is still the case, however, that most retail customers still either do not want or cannot afford to pay an ongoing fee for advice. This continuing trend will require Schwab and other financial services providers who serve retail customers – especially those with less than $100,000 in investable assets – to introduce new, efficient methods for serving this important segment of the American population. Any regulatory changes to the standard of care or the form and method of disclosure delivery should not impede customer access to affordable advice.

## III. Commission's Study Should Define "Personalized Investment Advice," Consider and Measure Effectiveness, Recognize Overlaps, and Determine the Best Way to Fill Gaps in Regulation

Section 912(b) of the Act requires the Commission to consider "the effectiveness of the existing legal or regulatory standard of care" for broker-dealers and RIAs, when providing "personalized investment advice and recommendations about securities," and to analyze "gaps, shortcomings, or overlaps" in those standards of care. Below we offer suggestions for the Commission's consideration of these three important aspects of the study.

### A. Methods to Measure the Effectiveness of Existing Legal and Regulatory Standards of Care

For the study's evaluation of the effectiveness of the existing standards of care for broker-dealers and RIAs, the Commission should consider how to define or measure "effectiveness" in terms of personalized investment advice about securities. As a threshold review, the study should analyze how state and federal common law and statutory protections as well as SRO rules and other industry standards and governing bodies work together to protect retail customers. In addition, we suggest analysis of the following factors to help quantify effectiveness:

- Remedies available to enforce the standards of care.

- How retail customers fare when they or a government agency invoke those remedies for breaches.
- The direct and indirect costs to retail customers of the administration of the standard of care.
- Overall customer satisfaction and confidence in their financial services provider.

### B. "Personalized Investment Advice about Securities" Should Include Discretionary Management, and Transactional Non-Discretionary Securities Recommendations

Both the study and any future rulemaking under Section 913(f) of the Act must focus on "personalized investment advice about securities." This concept is the foundation of the study and is the core term Congress used in delegating rulemaking authority to the Commission to adopt a common standard of care to act in a retail customer's best interests. Thus a working definition and common understanding is necessary for the Commission to prepare the study and propose any subsequent rules.

We suggest that the Commission consider the following definition of "personalized investment advice" to cover the applicable broker-dealer and RIA activities:

> Discretionary authority to make investment decisions in a customer's account, or an investment recommendation to a customer about one or more securities based on that customer's individual circumstances.

The second part of the definition is transactional, not ongoing. This is consistent with language in the Act. Although "personalized investment advice" is not expressly defined, Section 913(g) of the Act states that any new standard of care would apply "*when* providing personalized investment *about securities*" and may be compensated "based on commission." Further reinforcing the transactional nature of personalized advice is that Section 913(g) states that any standard of care the Commission adopts would not require "a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities."[7]

General advice and education made available to multiple customers, such as research, tools, and calculators, by definition is not "personalized."[8]

Using the above definition of personalized investment advice, services subject to the standard of care to act in a retail customer's best interests can be identified. This is

[7] This is consistent with longstanding common law. An agency relationship for a particular task terminates on the performance or completion of that task. Restatement (Third) of Agency § 8.01. Courts have applied this principle in the context of a variety of agency relationships. American Environmental v. 3-J Co., 583 N.E.2d 649, 655 (Ill. App. 1991) (insurance broker); Dubbs v. Stribling & Assoc., 752 N.E.2d 850, 852-53 (N.Y. Ct. of Appeals 2001) (real estate broker); Clinkenbeard v. Central Southwest Oil Corp., 526 F.2d 649, 652 (5th Cir. 1976) (oil lease); Hardy v. Davis, 164 A.2d 281 (Md. Ct. of Appeals 1960) (real estate broker); First Trust Co. of Montana v. McKenna, 614 P.2d 1027 (Mont. S.Ct. 1980) (real estate broker).

[8] *See, e.g.*, NASD Notice to Members 01-23 (Suitability Rule and Online Communications).

important so that retail customers understand when they are protected under the duty of care, and RIAs and broker-dealers know when to comply with their obligations. "[There is a] very legitimate need for definiteness in the rules that govern fiduciary relationships. Such relationships impose unusual and stringent duties while they subsist. It is only fair that those subject to such duties be reasonably able to determine their extent and duration."[9]

The spectrum of personalized investment advice about securities includes:

1. Transaction-specific recommendations to buy or sell securities for commission-based compensation in a non-discretionary account.
2. Non-discretionary investment advisory program for a fee.
3. Discretionary investment portfolio or account management (also known as money management).
4. Comprehensive wealth management, including discretion to trade as well as comprehensive planning and advice across a range of non-investment financial matters.

One important dividing line in this spectrum is the difference between discretionary management of customer accounts and non-discretionary recommendations to customers who make the final investment decision. The standard of care for discretionary management generally should be heightened in comparison. Unlike with non-discretionary advice, a customer hands over investment control of her accounts to the adviser. Where the element of trust is greater, the duty should be greater.

In this spectrum, only the first – transaction specific recommendations – falls into the overlap between broker-dealers and investment adviser conduct where the standard of care logically should be the same. Services offered to retail customers under 2, 3, and 4 are already regulated under the fiduciary duty found in Section 206(1) and (2) of the Investment Advisers and Act. This includes situations when any of these services is provided by the approximately 600 dually-registered investment adviser/ broker-dealers.[10]

In 2010, 89% of all investment advisers had discretionary authority over customer accounts. Less than 9% of assets under management reported by SEC-registered advisers were reported as non-discretionary ($3.3 trillion out of $38 trillion total).[11] Except in certain rare and limited circumstances, broker-dealers who have discretion over their customers' accounts must be registered as investment advisers and offer their discretionary services under the Investment Advisers Act.[12] So where RIA and broker-

[9] Clinkenbeard, 526 F.2d at 653.

[10] *See* Interpretive Rule under the Advisers Act Affecting Broker-Dealers, Investment Advisers, Investment Advisers Act Rel. No. 2652 (Sept. 24, 2007).

[11] *See* Investment Adviser Association and National Regulatory Services, *Evolution/Revolution 2010: A Profile of the Investment Advisory Profession* (expected publication date Sept. 2010) (cited in Investment Adviser Association comment letter on the Dodd-Frank study).

[12] *See* note 10, *supra*.

dealer conduct overlaps is with respect to that relatively small portion of the investment adviser industry that offers non-discretionary investment advice. For Schwab, on the broker-dealer side of our business, non-discretionary investment advice (solicited trades) constitutes less than 3% of the tens of millions of trades placed each year by our retail customers. To burden retail customers with the indirect costs of additional regulations and protections they do not need for the other 97% of the trades they place with Schwab would not serve their interests.

### C. Current Standards of Care Mostly Overlap, and Gaps can be Filled under the Current Frameworks and New Rulemaking Authority under the Act

The SEC staff's May 17, 2010 memorandum to the Investor Advisory Committee on "Standards of Conduct Applicable to Investment Advisers and Broker-Dealers,"[13] and comment letters from the Investment Adviser Association and the Securities Industry and Financial Markets Association, respectively, do a thorough job of discussing and comparing the current standards of care. Rather than repeating the same material here, we offer below a number of observations about the circumstantial nature of fiduciary duty, the duties that both broker-dealers and RIAs already owe retail customers today, and a brief comparative look at the two ways the Commission (and Congress) can harmonize the standards of care to create more certainty.

Circumstantial Nature of Fiduciary Duty. Fiduciary duty is a legal relationship of confidence and trust between parties, such as a trustee and a beneficiary where the trustee holds and manages assets for the beneficiary's interests. Whether a fiduciary duty exists depends on the nature of the relationship between the agent and principal, including any contractual commitments and their course of conduct.[14] Under the common law, a fiduciary is someone who has undertaken to act for and on behalf of another under circumstances which give rise to a relationship of trust and confidence. The fiduciary must not put personal interests before duty, and must not profit from the position of trust unless the principal (or beneficiary) consents. The fiduciary typically has an ongoing obligation to serve the interests of his principal, such as proactive, ongoing monitoring of the customer's property or account.

Both broker-dealers and RIAs may be subject to a fiduciary duty under current law. With RIAs, the duty arises from registration as an investment adviser. For broker-dealers, the duty may arise – although relatively rarely - based on facts and circumstances of their relationship with a particular customer.

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[13] Memorandum dated May 17, 2010 to SEC Investor Advisory Committee from Holly Hunter-Ceci and Emily Westerberg Russell ("SEC Staff Memo").

[14] The existence of a fiduciary relationship, and the duration of any contractual obligation or clear expectation creating such a relationship, is a question of fact. *E.g.*, Cooper Manufacturing Corp. v. Home Indemnity Co., 131 F.Supp.2d 1230, 1235 (N.D.Ok. 2001); American Environmental, 583 N.E.2d at 654-55; Clinkenbeard, 526 F.2d at 654-55; First Trust Co. of Montana, 614 P.2d at 1032.

Courts have generally held that a broker does not owe fiduciary obligations to a customer, absent special circumstances. This is because brokers typically do not manage or have discretion over other people's money and they maintain contracts with customers that disclaim that authority and obligation. Most brokers also do not charge an additional fee that would be required for undertaking a fiduciary role and enhanced potential liability. But a fiduciary duty nonetheless may exist under the common law based on facts and circumstances. For example, a broker who undertakes to monitor and manage investments for the customer may be deemed a fiduciary, although technically the account is a non-discretionary commission-based brokerage account.

Even for RIAs the scope of the duty depends on the facts and circumstances of the relationship including their contractual commitments to customers and the type of services they perform. As noted above, an important distinction in those services is whether the RIA has discretion to trade in the account. Also relevant is whether the RIA serves as a trustee or has power to make other financial decisions such as managing household expenses and paying bills. The scope of the duty of care, such as whether there is an ongoing proactive duty to monitor accounts will depend on the facts of the particular relationship. This flexibility is not a shortcoming. It is a strength of the common law approach. Beyond the baseline requirement of a best interest standard, specific prescriptive rules attempting to govern the duty of care would run a serious risk of either being over-inclusive or under-inclusive in terms of application to the vast range of advice services available to retail customers today.[15]

Investment Adviser and Broker-Dealer Obligations – Many Overlaps but Inconsistent Approach. There is considerable overlap between the obligations that broker-dealers and RIAs owe their customers. According to the Investment Adviser Association's Standards of Practice, an investment adviser's affirmative fiduciary duties depend on the scope of the advisory relationship and may include the following:

- Place the interests of customers first.
- Have a reasonable basis for investment advice.
- Seek best execution for customers' securities transactions.
- Make investment decisions consistent with mutually agreed upon customer objectives, strategies, policies, guidelines and restrictions.
- Treat customers fairly.
- Make full and fair disclosure to customers of all material facts about the advisory relationship, particularly regarding conflicts of interest.
- Respect the confidentiality of customer information.

The IAA's standards go on to say that advisory personnel should have experience, ability, competence, and integrity, and that an adviser should follow responsible business

[15] Over-inclusiveness would essentially alter the contract between the customer and firm, in some cases likely driving driving-up the cost of providing basic non-discretionary advice services. This includes the potential cost in defending a minority of misplaced claims alleging violation of a fiduciary duty for failing to supervise or monitor an account, despite a contractual arrangement between the firm and customer which limits the broker's role given the small commission or fee the customer pays.

practices including ensuring that its financial condition, operations, and compliance structure are appropriate to protects its customers' interests.

Instead of a pervasive fiduciary duty, brokers are subject to a well-established system of requirements under Commission and FINRA rules intended to assure fair dealing and investor protection in whatever function a broker is performing, including:

- Duty of fairness and fair dealing under SRO rules and case law.
- Duty to make investment recommendations that are suitable.[16]
- Duty to seek best execution of customer securities transactions, taking into account factors such as price, speed, and market quality.
- Maintaining custody and safeguarding customer assets pursuant to strict SEC rules, including those relating to financial condition.
- Maintaining required licensing and qualification standards for personnel who interact with customers on their accounts.
- Maintaining a documented supervisory system designed reasonably to detect and prevent regulatory violations.
- Duty to disclose conflicts of interest that impact the broker's recommendation.

Notably, suitability for broker-dealers is rule-based, but for RIAs it is not. On the other hand, duty to disclose conflicts of interest for RIAs is rule-based, but for broker-dealers it is not. The broker's duty to disclose material conflicts arises from the common law shingle theory under the anti-fraud provisions of the Securities and Exchange Act. Under the shingle theory, a broker-dealer impliedly represents that the terms of a recommended transaction are fair and are not based on undisclosed reasons benefiting the broker but not the retail customer.[17] Unlike other broker-dealer duties, the duty to disclose conflicts is not explicit in a rule the way it is for RIAs.

One distinction between rule-based broker-dealer duties and a broader fiduciary relationship under the investment adviser standard of care is that, in most cases, the customer does not grant discretion to make decisions for the customer. There is no

[16] The Commission recently published for public comment "FINRA's Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated Rule Book," 75 Federal Register 51310 (Aug. 19, 2010). Because suitability is part of the standard of care for both investment advisers and broker-dealers, and because the study will review the standards to determine any gaps as a prelude to potential new Commission rules, the Commission should withhold approval of FINRA's rule change pending Commission action under the Dodd-Frank Act. Otherwise it may appear that FINRA is creating "facts on the ground" by creating a new definition of fiduciary duty that could interfere with the Commission's study. Moreover, implementation of FINRA's proposed suitability rule will require firms to implement new account documentation, amend systems to capture and retain new data elements, and revise advice policies, procedures and supervisory systems, efforts that could be wasted or subsequently duplicated if the Commission adopts a new harmonized standard taking a different approach.

[17] *See* SEC Staff Memo at 9-10 (and authorities cited therein); Guide to Broker-Dealer Registration, SEC Division of Markets and Trading (April 2008) at Section V.A.1 (summarizing shingle theory under duty of fair dealing). The broker-dealer duty to disclose springs forth from the common law shingle theory as incorporated into the Securities Exchange Act's anti-fraud provisions, not unlike how the RIA fiduciary duty springs forth from the common law as incorporated into Section 206 of the Investment Advisers Act.

express or implied obligation for ongoing monitoring, account supervision, or pro-activity in terms of always seeking out the best arrangement for the customer beyond the particular transaction(s) at hand.[18]

Gaps and Best Way to Address Them. As summarized above, there is substantial overlap already between the standards that govern RIAs and broker-dealer conduct, with a few key exceptions. Unlike investment advisers who have a detailed prescribed form for disclosing their conflicts (Form ADV Part II), broker-dealers do not have a uniform framework for making firm-wide disclosures today. Best practices that Schwab and certain other broker-dealers follow include disclosing how registered representatives and the firm earn their compensation, at account opening, annually, and persistently on the firm's website. The Commission has the authority to address this gap and harmonize RIA and broker-dealer disclosure under Section 913(g) of the Act.

We caution, however, that disclosure requirements should not impede investor access to the range of services and investments available to them today on the Web, over the phone, and in the office. Blindly applying investment adviser disclosure to broker-dealers who have very different relationships with their customers (non-discretionary, sometimes including investment recommendations and sometimes not) would be applying a blunt instrument where a scalpel is required. Onerous trade-by-trade disclosure, voluminous disclosure documents, requiring every broker-dealer representative to have their own always-updated "brochure supplement," and boilerplate mandatory disclosure statements are not in retail customers' best interest due to the added burdens and costs and their limited effectiveness.[19] How broker-dealers disclose potential conflicts today, and whether those methods are effective in comparison, is something the Commission should study before proposing new disclosure rules.[20]

Although subject to the suitability standard and the common law of fiduciary duty, broker-dealers are not subject to a rule that makes sure they give personalized investment advice in their customer's best interest when making securities recommendations to a customer. As noted in the introduction, Schwab is in favor of an express broker-dealer duty to give personalized investment advice about securities in the

[18] For a securities brokerage nondiscretionary account, the agency relationship normally terminates upon the execution of the order. Robinson v. Merrill Lynch, 337 F.Supp 107, 111 (N.D. Al. 1971), aff'd 453 F.2d 417 (5th Cir. 1972); Walston & Co v. Miller, 410 P.2d 658, 661 (Az. S.Ct. 1966). A broker only owes duties to a nondiscretionary customer on a transaction-by-transaction basis. De Kwiatkowski v. Bear Stearns, 306 F.3d 1293, 1302 (2d Cir. 2002). For a nondiscretionary account, a securities broker ordinarily has no duty to monitor the account or give advice on an ongoing basis. Even if advice is given, this does not trigger a duty to continue to give advice. *See* De Kwiatkowski at 1302 and 1308-09.

[19] One unfortunate example of this was the mandatory disclosure required under now overturned Investment Advisers Act Rule 202(a)(11)-1, which required all broker-dealers who offered a fee-based program to disclose verbatim: "We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time." That ambiguous disclosure was neither very informative nor accurate depending on the firm and program.

[20] This includes firm best practices as well as explicit brokerage industry requirements such as Broker-Check.

customer's best interest. Where the best interest standard is likely to make a difference is when representatives at some firms today recommend a mutual fund with a high sales load, or a relatively costly affiliated product, instead of an available third party product that overall is less expensive for the customer.[21]

The above two gaps in the broker-dealer standard of care – providing personalized investment advice about securities in the best interest of customers and a uniform mandatory method for disclosing potential conflicts of interest – may be addressed by the rulemaking authority Congress granted the Commission under Section 913(f) and (g) of the Act.

The Commission's study, however, must also consider whether that rulemaking is enough, or whether Congress should consider eliminating the brokerage exclusion from the definition of "investment adviser" under Section 202(a)(11)(C) of the Investment Advisers Act, in light of the "impact and potential benefits and harm to retail customers that could result from such a change."[22] To prepare this part of the study, Schwab urges the Commission to recognize that the vast majority of broker-dealer activity does not involve personalized investment advice, and that those other activities are already subject to a pervasive regulatory scheme. Applying two comprehensive regulatory schemes to the same conduct will result in unnecessary costs and increased confusion to retail customers, and likely would diminish retail customer access to products and services that they enjoy today. Requiring better disclosure and application of the best interest standard may be accomplished while keeping RIAs and broker-dealers distinct under the existing statutory and regulatory frameworks that have protected investors for 70 years.

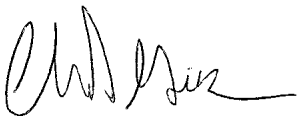
[21] As for RIAs, although industry standards of practice include having requisite experience and qualifications as well as financial, operational and supervisory resources, broker-dealer requirements in those areas are rule-driven and much more specific. These are additional topics the Commission's study may cover.

[22] Dodd-Frank Act, Section 913(c)(10)(A).

CONCLUSION

Schwab believes the study should be an important foundation for subsequent Commission rulemaking that will increase protections for retail customers while assuring that they have the same access to the range of affordable investment advice available to them today. We will continue to work with our customers, independent RIAs, industry trade associations, and the Commission staff to consider the important changes that are coming. Please contact us with any questions relating to the study and our comment letter.

Very truly yours,



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