Dear Sirs:

SIFMA has provided the Commission with a detailed and thoughtful commentary regarding the development and application of a fiduciary standard. Unfortunately, many of the points made in the commentary confuse the concept of “fiduciary” with business operations. A fiduciary standard is not a business operations standard. Contrary to the caveat emptor standard for a business relationship, a fiduciary standard establishes the relative responsibilities of two parties where one has placed trust in another. Examples of the confusion of these two standards follow (the quoted sections arte from the SIFMA submission):

## DISCLOSURE

“…at a minimum, appropriately manage conflicts by providing retail customers with full disclosure that is simple and clear and allows retail customers to make an informed decision about a particular product or service.”

> What is missing from this statement is the requirement of a fiduciary to make every effort to *eliminate conflicts and* in cases where the *conflict cannot be eliminated, to manage the conflict in the best interest of the client*.

“The Dodd-Frank Act recognizes these differences, and contemplates that with simple and clear disclosure, such business models could continue to offer the products and services they do today.”

> This statement implies that “simple and clear disclosure” is the equivalent of a fiduciary standard. It is not. As noted above, in a fiduciary relationship disclosure is applicable only after an effort has been made to “elimination conflicts” and remaining conflicts are managed in the client’s best interest. Furthermore, even with these caveats, disclosure is only one element of a fiduciary relationship.

## CONFUSION OF DUTY WITH BUSINESS OPERATIONS

"… duty will be satisfied in a different manner for a fully discretionary trading account than for a trade-by-trade recommendation of an individual security…"

> In a fiduciary relationship there is no "different manner." If personalized advice is provided, the scope of the engagement may be different; however, the same fiduciary duty applies whether the relationship is discretionary or trade-by-trade.

"Many retail customers seek to consolidate various types of accounts with a single financial services provider … Thus, it is important to facilitate the ability of retail customers to maintain, with the same individual representative within a single financial services provider, multiple types of accounts and relationships, e.g., a discretionary advisory account, a non-discretionary advisory account, and a commission-based transactional brokerage account in which the broker may provide personalized investment advice in connection with some transactions but not others."

> It may be appropriate to provide that a firm have differing relationships with a client; however, it is inappropriate to allow an individual advisor to "switch hats" once a fiduciary relationship has been established. Once a relationship of trust has been established it cannot be rejected. There is a long history of clients being offered "planning" based on a fee/fiduciary basis and subsequently, with a quick switch of the hats (i.e., from advisor to broker), being offered investments to implement the plan based on the suitability standard. The result, unbeknown to the client, the protections of a fiduciary relationship disappear.

"The uniform standard of care should be "business model neutral."

> Fiduciary duties *are* business model neutral. It is the business models that must adjust not the fiduciary duties.

“The Adviser Act was not designed to regulate brokerage activity. Eliminating the broker-dealer exception would sweep broker-dealers wholesale into the Advisers Act.”

> The fiduciary duty only applies to cases where advice is offered, not traditional broker-dealer activities. Broker-dealers will not be swept wholesale into the Advisers Act.

“The Advisers Act, however, was not intended or designed to apply to the incidental advice offered in connection with specific non-discretionary, commission-based transactions …”

> Although the original ’40 Act contemplated the concept of “incidental advice,” business environment and business activities have evolved in the last 70 years such that the concept of “incidental” is obviously no longer a viable concept (e.g., RAND report). As contemplated by the current law, advice is advice; discretion is not the issue. From a business perspective there is no requirement for a broker to offer personalized advice, hence he or she can easily continue to operate under the current suitability standard

## CONFUSION OF RULES VERSUS PRINCIPAL BASED STANDARDS

“The Exchange Act already pervasively regulates broker-dealers. Broker-dealers are already subject to extensive regulation under the Exchange Act, which is in many ways more comprehensive man regulation under the Advisers Act. Imposing investment adviser registration would not recognize this extensive existing regulation.”

> It is obvious that Congress and the SEC are well aware of current regulations. It is also irrelevant that there are extensive rules based regulations. Although they may compliment principals based standards, they in no way are adequate substitutes.

“ We note that the standard of care and conflicts disclosures must address the capabilities and investment objectives of a broad range of ‘retail customers.’"

> Principal based fiduciary standards do not vary by client sophistication. In a business relationship (e.g., suitability), sophistication may be a significant factor in evaluating relative responsibilities. In a fiduciary relationship, the issue is one of trust; a factor that is independent of sophistication. As an example, many ERISA trustees are obviously extremely sophisticated; however, advisors to ERISA plans are equally held to a fiduciary standard.