



BY ELECTRONIC DELIVERY

November 30, 2010

Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street N.E.  
Washington, DC 20549-1090

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

Dear Ms. Murphy:

The Financial Planning Coalition<sup>1</sup> writes to comment on a recent submission by the Securities Industry and Financial Markets Association (SIFMA). On October 27, 2010, SIFMA submitted a presentation summarizing findings of a study “to assess the impact of significant changes to the existing standard of care for broker-dealers and investment advisors.”<sup>2</sup> Upon review of SIFMA’s submission, including the assumptions and methodology, we do not find its findings convincing, and we question whether it is sufficiently objective to assist the Securities and Exchange Commission (SEC) in conducting its study under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

As we understand SIFMA’s study, the principal findings are based on a scenario that eliminates the broker-dealer exclusion from the Investment Advisers Act of 1940 (Advisers Act). Specifically, the study finds that “[w]holesale adoption of the Investment Advisers Act of 1940 for all brokerage activity” would restrict choice, reduce access to products, and increase the costs of advisory services. Section 913 directs the SEC to consider “the potential impact of eliminating the broker and dealer exclusion from the definition of ‘investment adviser’” as one of the thirteen considerations in its study of the standards of care

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<sup>1</sup> The members of the Coalition are Certified Financial Planner Board of Standards, Inc. (CFP Board), the Financial Planning Association® (FPA®), and the National Association of Personal Financial Advisors (NAPFA). The Coalition represents over 75,000 financial planners who, as CERTIFIED FINANCIAL PLANNER™ professionals or through their membership in FPA or NAPFA, have voluntarily embraced fiduciary accountability. The Financial Planning Coalition submitted a comment letter in support of a strong and uniform fiduciary standard for all financial professionals who provide personalized investment advice about securities to retail customers. Letter from Kevin R. Keller, Chief Executive Officer, Certified Financial Planner Board of Standards, Inc., Marvin W. Tuttle, Jr., Executive Director/Chief Executive Officer, Financial Planning Association, and Ellen Turf, Chief Executive Officer, National Association of Personal Financial Advisors, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Aug. 30, 2010), <http://sec.gov/comments/4-606/4606-2593.pdf>.

<sup>2</sup> SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION/OLIVER WYMAN, STANDARD OF CARE HARMONIZATION: IMPACT ASSESSMENT FOR SEC 3 (Oct. 2010).

that apply to broker-dealers and investment advisers. Notably, the SEC does not have authority to apply the Advisers Act to all brokerage activity in a “wholesale” manner. It is not, as the study suggests, among the range of options available to regulators. Rather, the SEC has the authority to adopt a strong and uniform fiduciary standard for both broker-dealers and investment advisers when making personalized recommendations to retail customers. The Financial Planning Coalition has recommended that the SEC exercise its authority, which it can do without asking Congress to make any further amendments to the Advisers Act.

We believe any consideration of SIFMA’s findings, to the extent the SEC believes them to be reliable given our observations regarding the study’s assumptions and methodology,<sup>3</sup> should be limited to a determination of the potential impact of asking Congress to eliminate the broker-dealer exclusion from the Advisers Act.

## **I. Impact on Choice**

SIFMA’s study appears to find that adoption of the Advisers Act for all brokerage activity would result in reduced access to commission-based brokerage accounts for retail investors. SIFMA argues that because 95% of households use commission-based brokerage accounts and the Advisers Act prohibits receipt of commissions (or requires a fee-based compensation structure), investors will face reduced access to the “preferred” model.<sup>4</sup> We disagree with the notion that the Advisers Act would reduce or eliminate access to commission-based services. Nothing in the Advisers Act or the Dodd-Frank Act prevents investment advisers from charging commissions. In fact, a large number of financial planners currently charge fees and commissions while operating under the Advisers Act.

For some investors, especially those who do not expect to engage in frequent trading, a commission-based account may be in their best interests. The rulemaking authority granted to the SEC in Section 913 of the Dodd-Frank Act recognizes as much by providing that “[t]he receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of” the standard of conduct applicable. We have advocated the SEC adopt a strong and uniform fiduciary standard of care for broker-dealers and investment advisers. Charging commissions, without more, would not be inconsistent with a strong and uniform fiduciary standard.

## **II. Impact on Product Access**

SIFMA’s study suggests that adoption of the Advisers Act for all brokerage activity would result in reduced access to municipal and corporate bonds because they are offered on a principal basis. We recognize that Section 206(3) of the Advisers Act places restrictions on principal trading, and that the SEC has elected not to extend Rule 206(3)-3T. In an earlier draft of the financial reform bill that would have

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<sup>3</sup> It is unclear whether the survey represents a statistically representative sample of the brokerage industry. The data provided by SIFMA is aggregated, preventing an objective review of the account and other information underlying the findings. The study explains that “[t]o obtain a fairly representative sample of the industry, data on asset management accounts, investor profiles, and cost structure was gathered from a diverse set of brokerage firms.” However, without access to the underlying data gathered, we are unable to determine whether the survey is a fairly representative sample of the industry.

<sup>4</sup> Given the lack of transparency in SIFMA’s survey methodology, we question the implication that these investors have “chosen” commission-based accounts over fee-based accounts. A review of the underlying data would allow the SEC to determine the extent to which these firms even offer fee-based accounts or have given customers the opportunity to switch into fee-based accounts.

eliminated the broker-dealer exclusion from the Advisers Act, the SEC was granted discretion to facilitate principal trading by broker-dealers. Should the SEC recommend that the broker-dealer exclusion be eliminated, it could request similar authority to grant relief with respect to principal trading in appropriate circumstances, as it did under Rule 206(3)-3T. A strong and uniform fiduciary standard would require a broker-dealer to engage in a principal trade only where it is in the customer's best interests. But we do not believe that adoption of a strong and uniform fiduciary standard necessarily would result in any restriction in access to corporate or municipal bonds, or participation in public offerings, for retail customers.

In comparison, the sale of proprietary products creates a potential conflict of interest with a customer that the Dodd-Frank Act recognizes. It therefore provides that "[t]he sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of" the standard of conduct, and grants the SEC authority to promulgate rules to require the broker-dealer to provide notice and receive the customer's consent or acknowledgement. Providing proprietary or another limited range of products is not necessarily inconsistent with a strong and uniform fiduciary standard. The primary limitations here, just as with principal trading, should be that the sale of such products be in the customer's best interests, and appropriate disclosure be made to, and consent received from, the client.

### **III. Impact on Cost**

SIFMA's study suggests adoption of the Advisers Act for all brokerage activity could increase costs for all investors and possibly result in many investors "at the margin" losing access to advisory services. The study concludes that a shift to fee-based pricing could result in a small investor paying an additional \$13,000 in fees and losing \$7,000 in investment gains over 20 years.<sup>5</sup> This conclusion assumes the application of the Advisers Act would require a broad shift from commission-based accounts to fee-based accounts. As discussed above, the Advisers Act does not prevent investment advisers from receiving commissions and the Dodd-Frank Act expressly provides that receipt of commissions is not in and of itself a violation of the standard of care. Again, the SEC does not have the authority to apply the Advisers Act to broker-dealers in a wholesale manner. Any findings related to the wholesale application of the Advisers Act, to the extent the SEC determines them to be reliable, should only be considered for purposes of the report to Congress required under Section 913. They should not be considered with respect to any potential rulemaking to raise the standard of care for broker-dealers providing personalized investment advice to retail clients.

We recognize that adopting a strong and uniform fiduciary standard of care may make overall costs more transparent, not only to retail clients of broker-dealers, but to all clients receiving personalized investment advice, including those of financial planners and investment advisers. However, we do not believe that application of a strong and uniform fiduciary standard would necessarily result in a substantial increase in costs to clients. The benefits to clients will far outweigh any potential increased costs. Clients may receive cost savings from the enhanced duties required by the Advisers Act fiduciary standard. Additionally, clients will have greater clarity regarding the duties and obligations of financial professionals, will be better able to compare financial professionals, and will likely select a financial

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<sup>5</sup> The SIFMA study's cost assumptions are almost completely unexplained. SIFMA projects a 23 basis point cost increase for a typical "small investor," but does not explain where the asserted incremental costs come from, what it believes advice providers will charge these investors, or why that is different from what they charge today. The SIFMA study also suggests that an annual two hours of training and documentation translates into an annual 20 basis point cost for small investors, but does not explain any of the variables that would go into such a cost increase (such as how many investors it believes each advice provider will serve), much less explain why market competition would not restrain the ability of firms to pass these costs on to customers.

professional with fewer potential conflicts of interest. We believe that a comprehensive analysis of all costs and benefits is necessary to determine the true impact on cost to the investor. While we appreciate the contribution of SIFMA's analysis, we are concerned that it presents only a limited view and includes assumptions that do not reflect the overall picture.

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The Financial Planning Coalition appreciates the opportunity to comment on SIFMA's impact assessment. If you have any questions, please contact Marilyn Mohrman-Gillis, Managing Director, Public Policy and Communications, CFP Board, via telephone at (202) 379-2235 or via e-mail at [mmohrman-gillis@cfpboard.org](mailto:mmohrman-gillis@cfpboard.org), or Dan Barry, Managing Director of Government Relations, FPA, via telephone at (202) 449-6343 or via e-mail at [dan.barry@fpanet.org](mailto:dan.barry@fpanet.org).

Respectfully submitted,



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CERTIFIED FINANCIAL PLANNER  
BOARD OF STANDARDS, INC.

**FPA.**  
FINANCIAL PLANNING ASSOCIATION  
*The Heart of Financial Planning™*

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The National Association of  
Personal Financial Advisors

cc: The Honorable Mary L. Schapiro, Chairman  
The Honorable Kathleen L. Casey, Commissioner  
The Honorable Elisse B. Walter, Commissioner  
The Honorable Luis A. Aguilar, Commissioner  
The Honorable Troy A. Paredes, Commissioner