THE COMMITTEE FOR THE FIDUCIARY STANDARD

PO BOX 3325
FALLS CHURCH, VIRGINIA 22043

December 21, 2010

Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F Street, N. E.
Washington D.C. 20549

RE: File Number 4-606
Study Regarding Brokers, Dealer and Investment Advisers

Dear Secretary Murphy:

This letter is submitted by the Committee for the Fiduciary Standard * to follow our December 7 meeting with Commission staff to further put on the record our views regarding the inappropriateness and ineffectiveness of *disclosure* in addressing conflicts of interest. This key issue will be addressed in the Study Regarding Brokers, Dealer and Investment Advisers and any prospective rulemaking that might follow regarding applying the fiduciary standard in a brokerage setting. The key question is:

> *"Is casual disclosure sufficient for an advisor or broker to address a material conflict of interest in a fiduciary-client relationship?"*

Industry groups, such as SIFMA, advocate that, in essence, disclosures followed by client affirmation or consent sufficiently fulfills the fiduciary obligation to address conflicts of interest. SIFMA states in its August 30 letter, "(BDs and IAs) 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."

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*The Committee for the Fiduciary Standard formed in 2009 to advocate for the fiduciary standard under the Advisers Act of 1940 and as represented in the Committee's five core principles. There are over 800 investment professionals who are members of the Committee. Additional information on The Committee for the Fiduciary Standard and its activities can be found at www.thefiduciarystandard.org.

1. Introduction

Fiduciary duties have served vital legal and social objectives for centuries, with one party relying on and trusting the expertise and of another party in the holding of property or the management of assets. (a) Early judicial decisions and comments by Commissioners and Commission staff noted the existence of a fiduciary standard of conduct Fiduciary. In 1963, the investment adviser's fiduciary status was explicitly confirmed and the special relationship between an investment adviser and its client was recognized by the U. S. Supreme Court in the seminal *SEC V Capital Gains Research Bureau* (b), decision.

This recognition resulted, in large part, because of the legislative history of the Investment Advisers Act. The U. S. Supreme Court noted that because of "what happened in this country in the 1920s and 1930s" it is essential that "the highest ethical standards prevail in every facet of the securities industry." Also quoting extensively from the SEC's own report, which addressed investment advisory services, the Court explained:

"The report reflects the attitude – shared by investment advisers and the Commission – that investment advisers could not "completely perform their basic function – furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments – unless all conflicts of interest between the investment counsel and the client were removed. 16" (c)

The U. S. Supreme Court in *Capital Gains* expressed the conscience of the Investment Advisers Act of 1940. The "conscience" of the '40 Act is clear and straightforward and should be central as the Commission addresses numerous issues, including the role of disclosures in addressing conflicts.

Due to the scale of information asymmetry between a retail client and investment professional, the premise of fiduciary duties is plain. The client can not be presumed able to effectively judge the facts and circumstances regarding markets, risks, and products, and then make a decision that is truly "informed." The client cannot second guess an advisor or broker any more than a patient can be presumed able to effectively question his or her physician.

Consequently, to preserve the fiduciary standard as meaningful to investors, it is imperative to ensure that the fiduciary advisor is held accountable for his investment recommendations. He or she must not be legally permitted to circumvent or otherwise shift this responsibility, the fiduciary's responsibility, on to the shoulders of the client and, therefore, transform a fiduciary relationship back to an arms length or commercial relationship. In light of this imperative, the question becomes whether disclosures and client affirmation or consent, by themselves, can be considered investor protection tools that uphold the requirements of the Investment Advisers Act of 1940.

2. Background – Lessons of the Financial Crisis According to Former SEC Chairman, Arthur Levitt, Jr.

Former SEC Chairman Arthur Levitt, Jr. testified before the Senate Banking Committee only 26 months ago, in October 2008, (d) about the financial crisis. The former chairman was blunt and clear. He said "the unthinkable has happened" and called on Congress and the SEC to be "daring." "The key problem plaguing our markets is a total breakdown in trust – in investor confidence," Levitt said. "Investors of all sizes and types have little faith in the information they have been given."

Blaming a lack of transparency, enforcement and resources as major causes of the crisis, Levitt closed his comments stressing that SEC enforcement, with its core task to "keep a market functioning," is vital. He noted, "Enforcement is so important because … its holds people accountable…. (and by doing this) the SEC builds the investors' confidence that someone is looking out for them, which, in turn builds market trust.

"Restoring trust in our markets will require rejuvenating the SEC," Levitt emphasized. "It is the only agency with the history, experience and specific mission to be the investor's advocate. Losing that legacy would be devastating to our ability to regulate the markets and restore investor confidence."

3. Chairman Schapiro's Statements reflect The Authentic Fiduciary Standard

Chairman Schapiro has spoken often of the SEC's role in restoring investor confidence. In May 2009, Schapiro spoke before the Investment Company Institute (ICI) and set out reform principles she deemed essential. Prefacing her remarks:

Any new regulatory system must promote and preserve public trust in our financial markets. Markets do not work well unless investors believe they do. And investors will not believe that markets work well unless they do, in fact. That means, above all, that investors must know that the information upon which they base their investment decisions is the truth, the whole truth, and nothing but the truth.... Without that essential confidence that they have truthful and complete information upon which to base their decisions, investors will avoid our financial markets for ones that are more transparent, or they will demand risk premiums for their continued participation....

A month later, before the New York Financial Writers Association, Schapiro came out for the fiduciary standard for investment professionals rendering "personalized investment advice about securities." She spoke about what this meant:

The fiduciary duty means that the financial service provider must at all times act in the best interest of customers or clients. In addition, a fiduciary must avoid conflicts of interest that impair its capacity to act for the benefit of its customers or clients. And if such conflicts cannot be avoided, a fiduciary must provide full and fair disclosure of the conflicts and obtain informed consent to the conflict. A fiduciary owes its customers and clients more than mere honesty and good faith alone. A fiduciary must put its clients' and customers' interests before its own, absent disclosure of, and consent to, conflicts of interest.

Then, on September 24, she spoke before the Financial Services Roundtable, and stated the standard should not be "watered down":

"The standard of conduct that applies to the act of giving professional advice to investors should not be a watered-down, "fair and reasonable" commercial standard. In order to be consistent with the reasonable expectations of investors, the standard that applies to this activity, which is so integral to investors' financial security, must be the type of fiduciary standard that applies to a relationship of trust and confidence.

4. The Fiduciary Relationship is defined by *Trust.*

The fiduciary relationship is based on trust and confidence and premised on the fiduciary discharging duties of care, utmost good faith and loyalty, and remaining solely responsible for carrying out these duties. Uniquely, in contrast to other service providers and product vendors, fiduciaries possess significant specialized expertise that investors can not realistically and efficiently acquire. This is the basis of the "knowledge gap" between the fiduciary and the investor.

Investors, by virtue of these circumstances – the very circumstances which explain why fiduciary duties exist – are reliant on the fiduciary's expertise. It is this reliance that both requires and nurtures the relationship of trust and confidence. This trust and confidence allows investors, with peace of mind, to accept an advisor or broker's advice and accept the risk of allowing the advisor or broker to manage their assets. In so doing, investors, by definition, have come to believe their advisor or broker is trustworthy. This is clear.

It should be equally clear, then, why these same investors should not be expected to scrutinize and heed disclosure warnings. Heeding disclosure warnings would mean the investor fundamentally changed his mind, done an about-face, and affirmatively decided he should now not trust his advisor or broker – just because of the disclosure. Making this "about-face" would be a significant psychological transition, a transition some may suggest is "irrational" on the basis of a simple disclosure of conflicts of interest from a "trusted" advisor.

This illustrates why, in a relationship of trust and confidence, avoiding material conflicts of interests is vital, and key to establishing and reinforcing a robust fiduciary culture. This is also why truly unavoidable conflicts must be minimized, or mitigated such that the investor's interests continue to be first.

5. The role and effectiveness of disclosures.

Disclosure "makes up the core of federal securities laws," Professor Troy Paredes wrote (e) in 2003. Professor Paredes pointed out that "(t)wo things are needed for federal securities laws to be effective" – information has to be disclosed and the consumers of the disclosure "need to use the disclosed information effectively."

He then observed how "federal securities laws generally assume that investors and other capital market participants are perfectly rational, from which it follows that more disclosure is always better than less. However, investors are not perfectly rational." Furthermore, Paredes wrote, "To the extent that investors, analysts, and other market participants are subject to information overload, the model of mandatory disclosure that says that more is better than less is incomplete and may be counter productive."

Paredes concludes by stating that the tone and conclusions from his article are "necessarily tentative" and calls for more research. He also notes, "Ultimately we need to understand what investors, analysts, and others do with the information in order to craft a disclosure regime that better satisfies the goals of federal securities laws."

Key Point. Though not stipulated either way, the article's comments mainly refer to commercial, as opposed to fiduciary relationships. The "users of information" Paredes refers to – investors (institutional and retail) securities, analysts, brokers and money managers – are often outside a fiduciary relationship. While the importance of disclosure in federal securities law generally is clear, its direct relevance to the role of disclosure in delivering advice to retail clients within a fiduciary relationship is not as clear.

6. Research suggests that investors do not heed disclosure warnings regarding conflicts of interest and they generally do not "discount" the "conflicted" advice, according to Professor Daylian Cain.

Research by Yale professor Daylian Cain (f) demonstrates how difficult it is for consumers to discount conflicted advice. He notes, "Especially difficult in the presence of 'anchoring' bias … this bias persists even if the anchors are being disclosed as being randomly generated. If people have difficulty ignoring advice they know to be random, it seems likely they will have difficulty discounting advice that is merely disclosed as coming from a source that 'may or may not have a conflict of interest.'"

7. Research of investor understanding of investment services and costs suggest many investors are very uninformed about the services and their total costs; they appear far more than "confused" about services, providers and costs.

AARP. The 2007 AARP report, "401(k) Participant's Awareness and Understanding of Fees" underscores 401 (k) participants' lack of awareness of plan fees. Key findings: 83% of participants admit "they do not know how much they pay for fees and expenses associated with their own plan, while 65% reported they pay no fees,… (and) 17% stated they do pay fees." (g)

Rand. The SEC's 2008 Rand Report, "Investor and Industry Perspectives on Investment Advisers and Broker Dealers," is widely cited for revealing that investors are unaware of the basic different legal requirements of brokers and registered investment advisers. (h)

"Overall, we found that many survey respondents and focus group participants do not understand key distinctions between investment advisers and broker-dealers – their duties, the titles they use, the firms for which work, or the services they offer." Rand also reports that investors are generally satisfied with the services they receive, and "this satisfaction was often reported to arise from the personal attention the investor receives." Regarding investment expenses, "Survey respondents also indicate confusion about fees."

The Rand report found that 25% of the survey respondents who reported using a financial service provider also report that they paid "$0" for advisory or brokerage services.

Envestnet. The more recent Envestnet Fiduciary Standards Study serves to reinforce concerns about investors' understanding of advisors and brokers. (i) The report characterizes investors as being "foggy" about brokers' and advisors' roles and obligations. Of particular note regarding investors' knowledge of investment expenses and broker or advisor compensation, only 15% of investors state they can "very well" "assess how your advisor gets paid." (39% state "well" and the 53% state "not too well," "not well at all"or "don't know".)

That only 15% of investors indicate they understand how (and perhaps by implication, what) their broker or advisor is paid suggests there is far more than mere "confusion" involved; it suggests a level of "disengagement" (j) from the services and service provider. As a point of comparison, the question might be asked whether there is any other profession or group of service providers where 85% of their clients or customers acknowledge that they do not know, "very well," how much they pay for the services rendered.

Key Point. These research studies offer insight into the nature of investor "confusion," and the consequent level of investor risk. The extraordinary lack of awareness of the fees and expenses investors pay for their brokerage and advisory services and the prevalence of the belief that these services are "free" highlights the weakness of disclosure and should, at minimum, raise red flags before the profession and regulators alike.

8. Investor's substantial misunderstandings of basic aspects of the *business relationship* with their service provider – suggesting a level of disengagement – is separate and apart from investor misunderstandings of the markets or investing principles and practices.

Concern about disclosure ineffectiveness and the knowledge gap is as old as securities laws themselves. As Paredes notes, William O. Douglas raised this concern in 1934, stating that "those needing investment advice will receive small comfort" from the information provided in the registration statement. (k) More recently, the Tully Report (l) recognized the limitations of most investors, saying it is a "rare client who truly understands the risks and market behaviors of his or her investments."

The "knowledge gap" between broker or advisor and investor typically refers to markets, investing strategies, practices and the industry jargon used to describe them. The Tully Report is the classic expression of this "gap." However, the evidence suggesting investors' substantial misunderstandings of, or disengagement from, the most basic aspect of the business relationship (the costs of the service) is additional to and separate from investors being uninformed about investing. It is arguable this business relationship "knowledge gap" presents even greater client risk than the knowledge gap of investing, generally.

9. The stringency of fiduciary duties correlates with the level of client risk.

These significant investor limitations and the associated investor risks suggest the nature of the fiduciary relationship between an advisor or broker and investor should more closely parallel the relationship of the trustee and trust beneficiary as opposed to the principal agent relationship. They should be regulated as such. The key rationale for the trustee and trust beneficiary model centers on the these limitations and the "knowledge gap" that is not the case in the principal-agent relationship. (m)

10. The fiduciary standard requires the fiduciary to undergo a stringent process to overcome the presumption against proceeding with a transaction when a material conflict of interest is present.

As opposed to the fair dealing or suitability standard associated with transaction facilitation, the fiduciary standard requires the fiduciary to ensure the client understands the potentially detrimental implications of the conflict on the client, to obtain fully informed client consent and, critically, still be able to demonstrate that the transaction is fair and reasonable for the client, consistent with the client's best interest.

11. SIFMA describes its vision of a "uniform standard of care" that is founded on retail customers making "informed choices" through disclosures. Further, SIFMA maintains, "managing conflicts" only requires providing disclosures and, sometimes, getting client affirmation or consent.

SIFMA writes, "Broker-dealers and investment advisers should ...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 product or service." (n) Further, "Retail customers should be provided with disclosure at the very outset of their relationship... This would provide retail customers with the clear understanding from the beginning of the relationship... of the obligations and duties of the broker-dealer or investment adviser.

"In addition, the retail customer would have an opportunity to make an informed choice after assessing whether any material conflicts of interest are not appropriate in light of his or her investment objectives."

Further, SIFMA stresses that a standard that does not "allow for disclosure and customer consent *in a pragmatic way* (emphasis added) will significantly harm retail investors." And, "disclosures in account opening documents could be permitted to reference a web site where more detailed disclosure is available,

including more specific disclosure of conflicts of interest relative to particular products." Also, "some dually registered firms might find it most effective to disclose material conflicts of interest... by using a single document."

Key Point. A disclosure –centric regulatory regime as envisioned by SIFMA for a "uniform standard" is directly aligned to the fundamental tenet of the fair dealing standard for commercial transaction rather than the fiduciary standard for the provision of trustworthy advice. The overriding concern expressed by SIFMA in advocating for "pragmatic" disclosures is for the convenience of financial service firms, rather than for the best interests of investors. There is not a single mention, reference or expressed concern as to whether, or if, disclosures are effective and actually work for the investor or, as Commissioner Paredes notes above, whether they actually achieve the objectives of the Commission.

12. Accountability is the foundation of the fiduciary - client relationship of trust and confidence. Former SEC Chairman Arthur Levitt has stressed (noted above) the vital role of SEC enforcement, generally, in holding market players accountable. Similarly, fiduciary status will only exist, de facto, as long as fiduciaries are held accountable for their conduct, decisions and recommendations.

In this respect, relying on disclosure and consent to address conflicts is antithetical to preserving the fiduciary standard, because it relieves the fiduciary of his responsibility. Disclosure/consent regimes explicitly transfer responsibility to the client. The broker or advisor is no longer solely responsible for his recommendation and accountable in law for upholding fiduciary duties. Disclosure/consent regimes permit, in law, the advisor or broker to proceed with transactions that serve *their* best interest and not necessarily the best interest of the investor. As such, in these circumstances, the fiduciary standard is not just weakened, it is removed.

It should be noted the Commission recently acknowledged that Commission staff found compliance issues related to every single disclosure requirement related to the temporary principal trading rule. See release at: http://www.sec.gov/rules/proposed/2010/ia-3118.pdf. This apparent lax regard for disclosure requirements casts doubt on the effectiveness of yet increasing the importance of the role of disclosure, and casts further doubt on the efficacy of using disclosures as a blanket solution to address all conflicts of interest in advisor's and broker's relationships with investors.

13. Holding advisors and brokers accountable for putting clients best interests first does not limit investor choices of products or services.

There seems to be some confusion or concern that the fiduciary standard will limit investor "choice," and this confusion seems to be based on what amounts to the blurring of the role of the advisor or broker and the role of the client or customer.

One firm expresses concern of "ensuring the continued ability of investors to make...decisions as to the financial services that best suit their needs...the ability of investors to retain control over their portfolios" (o) It is not clear from this expression how it is that the broker or advisor's obligation to only make recommendations that are in the client's best interests will in any way impact "investors control over their portfolios."

There are two possible explanations for this confusion.

First, the confusion could be based on mixing the responsibilities of the parties regarding making bad choices. The fiduciary standard restricts the advisor or broker from making recommendations that are not in the investor's best interest; it does not restrict the investor, per se, in deciding to make bad choices. (Within the fiduciary relationship, of course, the investor should only choose from recommendations that are in his best interest.) Second, the confusion could be based on the view that the investor is harmed when the advisor or broker is not allowed to recommend products that are not in the investor's best interest.

Thirty years of experience with pension, profit sharing and 401 (k) plans subject to the fiduciary standard of ERISA clearly demonstrates that choice is not eliminated under a fiduciary standard.

The fiduciary standard is not a "silver bullet" that will singularly prevent all inferior investor choices. However, it will significantly assure that the "right" or "superior" investment choices are recommended to, or effected for, the investor since such investments are expected to be selected in the best interest of the investor. Over time, through economic Darwinism, "superior" investment choices will grow and multiply. This client centric "silver bullet" will only be fostered under a regulatory scheme that protects and advances the fiduciary standard.

14. Closing Summary

The essence of the fiduciary relationship is trust, founded on confidence and reliance that the advisor or broker only acts in the best interest of the client, and is solely responsible for his decisions and recommendations. In *Capital Gains*, the Supreme Court found the Advisers Act of 1940 aimed, in the wake of the scandals of the 20s and 30s, to reestablish this standard and this required, according the Court, removing "all conflicts of interest between the investment counsel and the client."

As an alternative to avoiding all conflicts or mitigating conflicts that cannot be avoided, some industry lobbyists suggest disclosing and attaining consent or client affirmation when a conflict is present. This option should be rejected. A disclosure/consent regime will effectively eliminate the fiduciary standard in those circumstances when a conflict is neither avoided nor mitigated. The fiduciary standard will be effectively eliminated because there is overwhelming evidence in new research that disclosures do not work. The research suggests strongly that investors do not heed disclosure warnings. Significantly, this research has not been publically refuted, or even questioned, by those who advocate that disclosures can address conflicts.

Additionally, separate new research suggests the depth of investor disengagement regarding the costs of investment services is material. Combined, the risks to clients when within a conflicted relationship are significant and merit the highest fiduciary level of obligations available, near that of the trustee/ beneficiary relationship. Likewise, because there is a much smaller (if any) knowledge gap between the principal and the agent, the principal–agent relationship is not the appropriate model.

Moreover, even if disclosures were shown to be effective in some instances, (the Committee has seen no party or group offer evidence during this current debate that disclosures are effective), a disclosure regime on its own should still be rejected to address conflicts of interest. Reliance on casual disclosures, alone, is the opposite of reliance on the fiduciary professional's recommendation, and negates the very purpose of the fiduciary standard.

15. Recommendation

There are two clear and distinct visions of the meaning and vitality of the fiduciary standard as it addresses conflicts of interest. One vision is offered by the Court in *Capital Gains* and former SEC Chairman Arthur Levitt. Their views speak to the importance of rigorous enforcement as key to investor trust and confidence, as well as the inherent perniciousness of conflicts and the vital mandate that they be "removed." The other vision speaks of "disclosures" and of allowing "retail customers" ... "make informed choices," and the importance of "customer consent" being attained in a "pragmatic way."

The Committee for the Fiduciary Standard urges the Commission, as called on by former SEC Chairman Levitt in October 2008, to be "daring," to 'rejuvenate' itself and restore its legacy as the investor's advocate. Rejecting the principle that disclosure and consent meets the high standard of the 40 Act would be a "giant leap" forward for all investors. Requiring all professional providers of financial advice to meet the fiduciary standard is a major and necessary step toward protecting all investors equally. Anything short of equal protection under the law would be tantamount to legitimizing a regime in which the investor's best interest is *sometimes* paramount.

Modern research has provided overwhelming evidence that disclosure is, at best, insufficient for addressing conflicts of interest. Indeed, there is convincing evidence that disclosures are frequently confusing and misleading for investors, even when made under the best circumstances with the purest of intentions. Financial professionals must necessarily possess greater sophistication and expertise than their customers – so the ultimate responsibility for the integrity of their recommendations must necessarily rest solely with them. We do not serve the investing public, the markets, and our economy by allowing disclosure to become a "get out of jail free" card for financial professionals whose recommendations are conflicted.

Universally applying the existing fiduciary standard under the 40 Act would remove the burden from the consumer for knowing which regulatory regime governs his individual financial professional. It would unequivocally place the responsibility for the integrity of financial advice on the professional. Critically, it would also restore investors' confidence in the fundamental tenet that their best interests always come first, regardless of the financial professional who advises them.

The Committee for the Fiduciary Standard is comprised of leaders in the advisory industry who are prepared to provide any assistance to the Commission as it addresses this critical issue.

Sincerely,

Knut A. Rostad

Knut A. Rostad
Chairman

Copies to:

Chairman Mary L. Schapiro
Commissioner Luis A. Aguilar
Commissioner Kathleen L. Casey
Commissioner Troy Paredes
Commissioner Elisse B. Walter

Contact Information:

Knut A. Rostad
The Committee for the Fiduciary Standard
P. O. Box 3325
Falls Church, VA 22043
703-821-6616 x 429

Notes

a. For a general discussion of the role of the fiduciary from an historic perspective see, Blaine F. Aikin, Kristina A. Fausti, "Fiduciary: A Historically Significant Standard."

b. 375 U. S. 180.

c. Id at 184.

d. Testimony of Arthur Levitt, Jr., Senate Banking Committee; Washington DC 15 October 2008 – Submitted to the Record

e. Troy Paredes, Associate Professor of law, "Blinded by the Light: Information Overload and its Consequences for Securities Regulation"

f. For a detailed treatment of this subject, see:

   Conflicts of Interest: Problems and Solutions from Law, Medicine and Organizational Settings (with D.A. Moore, and G. Loewenstein, and M. Bazerman, eds.), Cambridge University Press, 2005.

   Also, see: "The Dirt on Coming Clean: The Perverse Effects of Disclosing Conflicts of Interest" (with G. Loewenstein and D. A. Moore), Journal of Legal Studies, January, 1-25, 2005.

g. See: http://assets.aarp.org/rgcenter/econ/401k_fees.pdf

h. See: http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf

i. See: http://www.thefiduciaryopportunity.com/

j. To suggest only that investors are *confused,* in light of the investor views discussed here, is to consider the research data in a very narrow sense, and is to understate what appears to be investors' misunderstandings with their service providers. It is true that investors "confuse IAs from BDs." But this confusion is not the only issue.

   A dictionary definition of "confuse" serves to suggest that the investor behavior noted here extends beyond what is typically associated with *confusion.* The definition of confuse includes "perplex," "bewilder," or "to fail to distinguish." As examples, of using *confuse* or *confusion* in a sentence, these definitions offer, for example: "He always confuses the twins." Or, "Try not to confuse the papers on the desk." (See Dictionary.com)

The scale of investor unawareness of fees, expenses and compensation reflects such a fundamental "gap" that it seems far more appropriate to associate this phenomenon as an indicator of *disengagement* more than of *confusion*. Examples of definitions of *disengage* include: "To release or become released from a connection," or, to "detach," disconnect" or "uncouple." (See Dictionary.com for further examples.)

By only suggesting that investors are *confused*, and by continually applying the label of *investor confusion* to what we observe of investor conduct and views, we may be subtly framing the circumstances far more positively than the evidence actually warrants. In doing so, we may be understating the gravity of investors' misunderstandings of investing and their advisor or broker.

k. Id at 14.

l. See: http://www.sec.gov/news/studies/bkrcomp.txt

m. Professor Deborah DeMott, Duke Law School, David F. Cavers Professor of Law notes:

"Agency law is not a good starting point for analyzing advisory relationships because the recipient of the advice ... necessarily relies on the advisor's greater expertise, and lacks the realistic ability to monitor how the adviser formulates its recommendations. This is especially so when the recipient of advice is an individual (non-institutional) client, even more so when the advisor is the client's sole source of advice. Additionally, agency at its heart is about relationships in which an actor represents a principal in interactions with third parties (by acting "on behalf of" the principal), which isn't the same thing as furnishing advice.

Separately, agency law itself requires consent by the principal to conduct that would otherwise breach the agent's fiduciary duties. The agent bears the burden of showing that such consent has been obtained. to be effective, a principal's "consent" must be informed as to facts "that would reasonably affect the principal's judgment," a standard that is not satisfied by blanket consents that lack specificity, such as "consent" to an agent's use for its own purposes or those of third parties of information furnished by the principal to the agent. Agency law differentiates between "general or broad language purporting to release the agent in advance from the agent's fiduciary obligation" and consent by the principal "to specific transactions or to specified types of conduct ...." See Restatement (Third) of Agency sec. 8.06, cmt. b ("a broadly sweeping release of an agent's fiduciary duty may not reflect an adequately informed judgment on the part of the principal; if effective the release would expose the principal to the risk that the agent will exploit the agent's position in ways not foreseeable by the principal at the time the principal agreed to the release.")

n. See: http://www.sec.gov/comments/4-606/4606-2553.pdf

o. In their August 30, 2010 comment letter, LPL Financial made this point. See: http://www.sec.gov/comments/4-606/4606-2606.pdf