MEMORANDUM

TO: File No. 4-606

FROM: Catherine Courtney
Division of Investment Management

DATE: March 1, 2011

RE: Meeting Relating to Section 913 of the Dodd-Frank Wall Street Reform Act of 2010 (the "Act")

On March 1, 2011, staff members of the Securities and Exchange Commission ("SEC") met with representatives of the Securities Industry and Financial Markets Association ("SIFMA") to discuss issues relating to Section 913 of the Act.

The following members of the SEC Staff attended the meeting:

Jennifer McHugh of the Chairman's Office;
Catherine Courtney, Sara Crovitz, David Grim, Doug Scheidt and Sarah ten Siethoff, of the Division of Investment Management;
Matthew Kozora and Jennifer Marietta-Westberg of the Division of Risk, Strategy and Financial Innovation;
Leila Bham, James Brigagliano, Dan Fisher and Lourdes Gonzalez of the Division of Trading and Markets;
Mavis Kelly of the Office of Compliance Inspections and Examinations;
Sarah Buescher of the Office of the General Counsel; and
Rich Ferlauto of the Office of Investor Education and Advocacy.

The following representatives of SIFMA attended the meeting:

John Hogarty, MD, Chief Operating Officer, GWIM, Bank of America Merrill Lynch;
Anne Cooney, Managing Director, MSSB Deputy GC, Morgan Stanley Smith Barney;
Victor Siclari, Managing Counsel-Asset Management and Managing Director, Bank of New York Mellon;
David Potel, Senior Vice President, Deputy General Counsel, Fidelity;
Jeff Brown, Senior Vice President, Legislative & Regulatory Affairs, Charles Schwab;
Walter S. Robertson, III, Senior Managing Director, Scott & Stringfellow, LLC;
Randy Snook, Executive Vice President, SIFMA;
Ira Hammerman, Senior Managing Director and General Counsel, SIFMA;
Kevin Carroll, Managing Director and Associate General Counsel, SIFMA;
John Maurello, Managing Director, Private Client Group, SIFMA;
Tim Cameron, Managing Director, SIFMA; and
Robert Colby and Annette Nazareth, Partners, Davis Polk.

At the meeting, the representatives of the SIFMA discussed the issues listed on the attached agenda which they had provided in advance of the meeting.

Proposed Agenda

Purpose

1. Summarize positive findings and recommendations in the study
2. Summarize concerns raised by the study
3. Discuss how we can remain engaged and helpful, and identify specific areas in which we might share our expertise

1. Positive findings and recommendations in the study

- Creates a new standard. Study recommends a *new* uniform fiduciary standard, and not application of the 40 Act to the BD business model, or repeal of the BD exclusion

  "The staff therefore recommends establishing a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice about securities to retail customers that is consistent with the standard that currently applies to investment advisers" (Study at p. ii).

  "The study recommends the adoption of a new uniform fiduciary duty standard and harmonization of the two disparate regulatory regimes" (Casey/Paredes joint statement on the Study at p. 1).

- Provides BD-specific guidance. Recognizes need for rulemaking and guidance on application of the standard to BDs

  "Any Commission rulemaking or guidance relating to the uniform fiduciary standard should particularly focus on assisting broker-dealers with complying with the minimum requirements of the uniform fiduciary standard and what it means to generally operate under the uniform fiduciary standard" (Study at p. 111).

- Preserves principal trading for BDs.

  "The Staff recommends that the Commission address through guidance or rulemaking how broker-dealers would fulfill the uniform fiduciary standard when engaging in principal trades" (Study at p. 120).

- Recognizes the need to be "business-model neutral."

  *"[W]hile the uniform fiduciary standard would affect certain aspects of principal trading, it would not in itself impose the principal trade provisions of Advisers Act Section 206(3) on broker-dealers . . . These provisions and others should address a number of concerns from broker-dealers that the standard of conduct should be '**business model-neutral**.'" (emphasis added) (Study at p. 113).*

  "[T]he implementation of the uniform fiduciary standard should preserve investor choice among such services and products and how to pay for these services and products (e.g., by preserving commission-based accounts, episodic advice, principal trading and the ability to offer only proprietary products to customers)" (Study at p. 113).

- Adopts an "eliminate or disclose" approach to conflicts.

"A uniform standard of conduct will obligate both investment advisers and broker-dealers to eliminate or disclose conflicts of interest" (Study at p. vii).

2. Concerns raised by the study

- The new standard would be an "overlay" on existing IA and BD regimes.

  "The Staff also contemplates that the uniform fiduciary standard would be an overlay on top of the existing investment adviser and broker-dealer regimes and would supplement them, and not supplant them" (Study at p. 109).

- Rulemaking could prohibit certain conflicts, or impose specific consent requirements.

  "The Staff believes that it is the firm's responsibility—not the customers'—to reasonably ensure that any material conflicts of interest are fully, fairly and clearly disclosed so that investors may fully understand them. To this end, however, the Commission could consider whether rulemaking would be appropriate to prohibit certain conflicts, or where it might be appropriate to impose specific disclosure and consent requirements (e.g., in writing and in a specific format, and at a specific time) in order to better assure that retail customers were fully informed and can understand any material conflicts" (Study at p. 117).

- Certain key definitions are deferred:

  Personalized investment advice – *"The Staff believes that such a definition at a minimum should encompass the making of a "recommendation," as developed under applicable broker-dealer regulation, and should not include "impersonal investment advice" as developed under the Advisers Act. Beyond that, the Staff believes that the term also could include any other actions or communications that would be considered investment advice about securities under the Advisers Act (such as comparisons of securities or asset allocation strategies), except for "impersonal investment advice" as developed under the Advisers Act" (Study at p. 127).*

  Retail customer – *"The Staff also is concerned about communications with prospective customers" (Study at p. 128, fn 583).*

- Extent / limit of liability is unclear.

  "[T]he Staff recommends that any rulemaking or guidance explicitly provide that it establishes only minimum expectations for the appropriate standard of conduct and does not establish a safe harbor or otherwise prevent the Commission from applying a higher standard of conduct based on specific facts and circumstances" (Study at p. 123).

- Interplay with ERISA remains uncertain.

"[T]he recommended uniform fiduciary standard and the related discussion below would not have any direct bearing on other persons who may be characterized as fiduciaries in other areas of the law, including ERISA fiduciaries or financial institutions such as banks and trust companies" (Study at p. 109).

3. Our continuing engagement with the Staff on Section 913, and specific areas in which we might share our expertise.

- Provide guidance about key terms
- Provide guidance for principal trading & proprietary products
- Provide guidance on application of the standard to BDs particularly
- Provide guidance on disclosure of conflicts by BDs particularly
- Provide insights into DOL's ERISA / fiduciary rule proposal