

**Consumer Federation of America
Fund Democracy
AARP
Certified Financial Planner Board of Standards, Inc.
Financial Planning Association
Investment Adviser Association
National Association of Personal Financial Advisors**

Via Email

March 28, 2012

Mary L. Schapiro, Chairman
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Framework for Rulemaking under Section 913 (Fiduciary Duty) of the Dodd-Frank Act; File No. 4-604

Dear Chairman Schapiro:

We write as organizations that strongly support extension of the Investment Advisers Act of 1940 (“Advisers Act”) fiduciary duty to all broker-dealers when they offer personalized investment advice about securities to retail customers. Moreover, we support the general approach to accomplishing this goal outlined in the Section 913 Study¹ issued by the Commission staff in January 2011: the adoption of parallel rules imposing a uniform fiduciary duty on broker-dealers and investment advisers consistent with Congress’s grant of authority under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).² Properly implemented, this approach would provide badly needed and long overdue protections for individuals who receive investment advice from broker-dealers without imposing undue regulatory burdens on brokers and without disrupting transaction-based aspects of the broker-dealer business model.

Some members of the broker-dealer community have expressed the concern that imposition of a fiduciary duty on brokers’ personalized investment advice could have catastrophic consequences – forcing brokers to abandon commission-based compensation, proprietary sales, or transaction-based recommendations. These concerns are clearly unfounded. They ignore both the clear direction from Congress with regard to how the fiduciary duty would

¹ Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers: As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, January 2011.

² While we have previously advocated approaches that would not have involved parallel rulemaking – including eliminating the broker-dealer exclusion from the Advisers Act or adopting a more appropriate definition of “solely incidental to” – we support the approach advocated in the Section 913 Study as a well-conceived and workable solution to a long-standing investor protection imperative.

be applied and extensive evidence that the Advisers Act fiduciary duty is sufficiently flexible to apply to a variety of business models. One need only look at longstanding practices under the Advisers Act as applied to dual registrants and to financial planners who are registered as investment advisers for evidence that the fiduciary duty is fully consistent with sales-related business practices, including receipt of transaction-based compensation, sale of proprietary products, and sale from a limited menu of products.

While the Commission must be mindful of the impact upon the industry as it implements the fiduciary standard for brokers, it must also avoid an over response to expressions of broker-dealer concerns that reflect either a misunderstanding of the standard or an unwarranted effort to limit its scope. The result of accommodating such unfounded concerns would undermine entirely the Congressional initiative to provide necessary investor protections. As long as the Commission stays true to the vision outlined in the Section 913 Study, however, it can implement the standard in a way that retains aspects of the broker-dealer business model investors value while fulfilling the Congressional mandate to improve protections for investors.

The purpose of this letter is to outline what we view as the critical characteristics of a framework for rulemaking in this area that achieves this goal of enhancing investor protection without diminishing investor choice. Last year, SIFMA submitted a letter outlining its views on an appropriate framework for rulemaking in this area.³ The SIFMA letter does a good job of highlighting the key issues the Commission will need to consider in developing a rule proposal. We agree with many of their points but disagree, sometimes strongly, with others. In order to make it as easy as possible for the Commission to determine both our points of agreement and where our views diverge, we have chosen to use their letter as a starting point for our own discussion of the same issues.

* * *

I. The Need for a New Articulation of a Uniform Fiduciary Standard of Conduct

SIFMA argues in its letter that a “new articulation” of the fiduciary standard is needed. If the point is that the existing fiduciary duty under the Advisers Act should be newly articulated through parallel, principles-based fiduciary rule-making under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940, as the Dodd-Frank Act authorized and the SEC staff recommended in the Section 913 Study, we agree. However, we strongly disagree with the suggestion that the substantive uniform standard articulated through those rules should be “new” or “separate and distinct from the general fiduciary duty implied under Section 206 of the Advisers Act.” Rather, the goal in writing the new rules should be to extend the existing Advisers Act standard to brokers, while clarifying its applicability in the context of broker-dealer conduct, rather than to replace the Advisers Act standard with something new and different.⁴ It

³ July 14, 2011 letter from Ira Hammerman, Senior Managing Director and General Counsel, on behalf of SIFMA to SEC Chairman Mary Schapiro, regarding a “Framework for Rulemaking under Section 913 (Fiduciary Duty) of the Dodd-Frank Act.”

⁴ Although the fiduciary duty would be articulated through uniform rules, its application would vary depending on the facts and circumstances. For example, the specific duties owed by a broker providing one-off, transaction based

is only in this way that the Commission will be able to arrive at an approach that is both no less stringent than the existing standard and identical for brokers and investment advisers.

A. Applicability of Existing Guidance and Legal Precedent

SIFMA correctly notes that Congress did not choose to adopt an approach in the Dodd-Frank Act that simply removes the broker-dealer exemption from the Advisers Act. Moreover, we agree that “Congress recognized that the uniform fiduciary standard should ‘appropriately adapt to the differences between broker-dealers and investment advisers.’” This much is clear from legislative language that is designed to alleviate any misunderstanding about the ability of brokers to charge commissions, offer transaction-based recommendations, sell proprietary products, and sell from a limited menu of products – all without violating the fiduciary duty.

However, we disagree with the conclusion SIFMA draws that, “in order to maintain broker-dealer products and services for investors,” the obligations of broker-dealers under the uniform fiduciary standard should not be governed by “the existing rules, case law, guidance or other legal precedent under Section 206 of the Advisers Act.” As discussed in greater detail below, this conclusion is based on a false picture of the existing legal precedent and guidance. Moreover, SIFMA suggests that this legal precedent and guidance should continue to apply to investment advisers. On the face of it, this proposed approach fails to meet the explicit Dodd-Frank Act requirement that the fiduciary standard be identical for brokers and advisers and no less stringent than the existing standard.

SIFMA asserts that certain SEC statements and legal opinions regarding the fiduciary duty of investment advisers under the Advisers Act could be read as prohibiting conflicts, but its selective reading of the documents in question suggests a problem where none exists. For example:

- In citing Release No. IA-3060’s statement that “An adviser must ... seek to avoid conflicts with its client ...,” SIFMA neglects to include the remainder of the sentence, which reads as follows, “and, at a minimum, make full disclosure of any material conflict or potential conflict.” Thus, the implication that the fiduciary duty precludes conflicts of interest is false, as is clearly demonstrated by the quoted statement when read in context.
- In citing the SEC’s information for newly registered investment advisers, SIFMA makes a similarly significant omission, creating the impression that the fiduciary duty is something it is not. While it highlights the statement warning advisers against engaging “in any activity in conflict with the interest of any client,” it omits a later portion of the same paragraph, which states: “You must eliminate, or at least disclose, all conflicts of interest that might incline you – consciously or unconsciously – to render advice that is not disinterested. If you do not avoid a conflict of interest that could impact the impartiality of your advice, you must make full and frank disclosure of the conflict.”

advice would be different than the specific duties owed by a broker or adviser offering on-going portfolio management and advice, even though the over-arching fiduciary standard would be the same.

- In citing the Initial Decision Release (Release ID-140) *In re Terence Michael Coxon*, SIFMA quotes one statement regarding the obligations of investment advisers, “A fiduciary must therefore refrain from putting himself in a position of conflict of interest ...” But SIFMA ignores the surrounding discussion, which includes the following relevant statements: “If the fiduciary’s interests conflict with his beneficiary’s or if he has interests that might subvert the unbiased and loyal performance of his duties, he breaches his duty, unless he discloses the conflict to the beneficiary and obtains the beneficiary’s consent ... The fiduciary ... should disclose conflicts of interest, avoid intentional misconduct, and refrain from competing with or seizing opportunities of his beneficiary.”⁵ Moreover, the case itself involved not the existence of a conflict of interest but a failure to make full disclosure.

When they are viewed in context, each of these statements cited by SIFMA as a source of concern is revealed to be completely consistent with the “eliminate or disclose conflicts’ approach” that the Section 913 Study recommends and that SIFMA says it supports.

SIFMA also cites an SEC No-Action Letter (“NDC Letter”) that addresses the ability to penalize clients for terminating an advisory relationship.⁶ Again, SIFMA selectively quotes the letter to create the appearance that it broadly prohibits any fees charged in connection with terminating an advisory relationship. As quoted by SIFMA, the letter states: “An adviser may not fulfill its fiduciary obligations if it ... imposes an additional fee on a client for choosing to change his investment.” However, the complete sentence imports a very different meaning:

An adviser may not fulfill its fiduciary obligations ***if it imposes a fee structure penalizing a client for deciding to terminate the adviser's service*** or if it imposes an additional fee on a client for choosing to change his investment.

As clearly indicated by the complete quotation, the analysis in the NDC letter and a number of subsequent SEC No-Action Letters addressing the same issue, the staff’s concern was that punitive termination fees might inappropriately dissuade a client from ending an unsatisfactory advisory relationship. For example, in a 1999 letter to BISYS the staff relied on the NDC Letter in agreeing that a contingent fee charged at the termination of an advisory relationship is consistent with Section 206 of the Advisers Act.⁷ The staff specifically cited the NDC Letter in support of the following proposition:

Because certain fee arrangements may have the effect of penalizing a client for ending the advisory relationship, or may make the client reluctant to terminate an unsatisfactory adviser, the staff has taken the position that an adviser’s imposition of certain fees upon the termination of

⁵ This statement is itself a quotation from Tamar Frankel’s, “The Regulation of Money Managers” (1978). It is also cited in the Monetta Financial Services case referred to in the SIFMA letter, a case in which defendants were accused of willfully violating Section 206(1) and Section 206(2) of the Advisers Act by virtue of a *disclosure* failure.

⁶ SEC No-Action Letter to National Deferred Compensation Incorporated, July 31, 1987 (publicly available August 31, 1987).

⁷ SEC No-Action Letter to BISYS Fund Services, Inc. Sep. 2, 1999 (publicly available Sept. 2, 1999).

an advisory relationship may be inconsistent with the adviser's fiduciary duty, and may violate Section 206 of the Advisers Act.

This statement contradicts SIFMA's characterization of the NDC Letter. In no way does the NDC Letter challenge the right to charge standard fees, nor does it call into question the ability to charge normal commissions. In fact, the BISYS letter states that the appropriate means of addressing fees imposed at the termination of the client relationship is through disclosure, as discussed above.

In short, SIFMA appears to have scoured the record and found nothing in the existing rules, case law, guidance, or other legal precedent that suggests that the existing Advisers Act fiduciary standard cannot be appropriately applied to brokers' transaction-based business model. Indeed, many dually registered broker-dealers successfully offer transaction-based services subject to all of the Act's requirements (e.g., discretionary, commission-based accounts). There is therefore every reason to believe that, contrary to SIFMA's assertion, it is possible both to retain broad applicability of existing legal precedent and guidance and maintain access to broker-dealer products and services for investors. Moreover, we fully anticipate that the Commission will provide general staff guidance on applicability of the rules to broker-dealer conduct that would further clarify the situation.

Finally, in its discussion of existing case law, SIFMA notes that the "nationwide body of state case law on whether broker-dealers owe fiduciary duties and the scope of those duties also raises concerns, given that this body of law is so uneven and inconsistent." These cases generally deal with *whether* the fiduciary duty applies under various circumstances. One of the chief benefits of having a single federal regulatory agency apply a uniform standard is that it would significantly reduce if not entirely eliminate any confusion about whether a fiduciary duty applies. Moreover, if the Commission provides general guidance regarding when and how the standard applies to broker-dealer conduct, its doing so should alleviate any risk that courts and regulators would misinterpret or misapply existing legal precedents to broker-dealer conduct.

B. The need for legal certainty

SIFMA expresses the concern that "inability to gauge compliance with, or legal exposure under, the Advisers Act standard would undermine the broker-dealer business model." In particular, SIFMA notes that the Advisers Act standard does not provide "necessary guidance" regarding such issues as what disclosures are required, what consents must be obtained, when the fiduciary duty begins and ends, and how it applies in specific circumstances. "Absent new rules and guidance ... to enable broker-dealers to apply the fiduciary standard to their distinct operations models, broker-dealers cannot adequately supervise or gauge their compliance with the standard, nor can they manage litigation risks."

This concern ignores the extensive experience the many dually registered broker-dealer firms have had in operating under the fiduciary duty regime for their discretionary accounts, fee-based accounts, and other advisory accounts. Moreover, since violation of fiduciary duty

remains the most common complaint against brokers in arbitration,⁸ one must assume that existing compliance systems are designed with that possibility in mind.

In any event, the solution for this concern is not to exempt brokers from existing legal precedent and guidance, but to accompany the new rule with guidance and education regarding how the fiduciary duty should be applied in the context of the broker-dealer business model. The goal should be to provide general guidance that would clarify brokers' obligations without adopting a check-the-box approach that would undermine the principles-based protections afforded by the fiduciary duty. We urge the Commission to avoid the temptation to address SIFMA's desire for "legal certainty" by embarking on a detailed rule-making that undermines the flexibility and breadth of the fiduciary duty.

C. The risks of "undifferentiated" application of the Advisers Act duty to broker-dealers

In its letter, SIFMA discusses at length the harm that could flow from "undifferentiated application" of existing Advisers Act case law, guidance and other precedents to brokers-dealers. According to SIFMA, these harms include reduced choice and product access and increased cost. As discussed above, however, when read in context the existing guidance and case law does not support that interpretation. Moreover, it ignores the fact that the fiduciary duty, as a facts-and-circumstances-based standard, is inherently "differentiated." In other words, the nature of the obligations owed under the fiduciary duty are not rigidly applied, but rather are determined by the nature of the services subject to the duty.

It is frankly disappointing that SIFMA continues to argue that there is some ambiguity about brokers' ability to charge commissions or to sell proprietary products if they were subject to legal precedent and guidance regarding the Advisers Act fiduciary duty. Not only are these issues expressly dealt with in the legislation, but these practices are already engaged in by practitioners who are dually registered as brokers and investment advisers and thus are subject to the Advisers Act fiduciary duty, a fact which ought to offer conclusive proof that SIFMA's concerns are unfounded. Again, to the degree that there is any ambiguity, it could and should be dealt with through general guidance regarding application of the fiduciary duty to practices common in the broker-dealer business model.

One area where SIFMA's concern might be justified relates to the application of the Advisers Act fiduciary duty to principal trading. Application of the specific prophylactic provisions of section 206(3) of the Advisers Act might raise concerns regarding the workability of the rules for brokers. For this reason, we support the Section 913 Study recommendation that, as part of the fiduciary duty rulemaking, the Commission examine its approach to principal trading restrictions for brokers and advisers alike. The goal should be to provide a framework for principal trades that allows these trades to go forward where they are demonstrably in the best interest of the customer.

⁸ See <http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/>.

In short, none of the concerns raised by SIFMA justify exempting broker-dealers from existing rules, guidance, and legal precedents under the Advisers Act (except perhaps with regard to principal trading, which the SEC has indicated it will address).

II. The Framework for Rulemaking

Leaving aside the recommendation to exempt broker-dealers from existing Advisers Act guidance and legal precedents, the SIFMA letter offers a useful framework for considering how the Advisers Act fiduciary duty would apply to brokers' personalized investment advice. This section of our letter responds to the SIFMA framework, identifying both areas of agreement and areas where adjustments would be needed to protect investors.

A. The Standard

Like SIFMA, we support the adoption of new rules under the grant of authority provided by Section 913(g) of the Dodd-Frank Act. We also agree with SIFMA that, in exercising this authority, the SEC should supplement the rules with general guidance designed to help clarify for broker-dealers how "to apply the fiduciary standard to their distinct operational model." We disagree with SIFMA only in that we believe the rules and guidance should supplement, rather than replace, existing guidance under the Advisers Act, as we discuss in greater detail above, and in the desirable level of specificity involved.

B. Rulemaking Principles to Implement Section 913 of the Dodd-Frank Act

Enunciate the Core Principles

We share SIFMA's view that "investors and industry members alike would benefit from a clear articulation of the core principles of the uniform fiduciary standard of conduct." Moreover, we agree with much of what SIFMA describes regarding certain key principles, with the following exceptions and clarifications.

1. We agree that an articulation of the basic fiduciary standard for all brokers, dealers and investment advisers, when providing personalized investment advice about securities to retail customers, should be based on the best-interest language in Section 913 of the Dodd-Frank Act.

In discussing this standard, however, SIFMA omits that portion of the standard which provides that the duty is to act in the best interests of the customer "*without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.*" In our view, this language is essential to understanding congressional intent. Specifically, while the statute is not intended to prohibit the existence of conflicts of interest, including compensation-related conflicts of interest (as the rest of the statutory language in Section 913 makes clear), it is intended to ensure that recommendations made subject to the fiduciary duty are free from bias resulting from those conflicts. In other words, brokers and advisers subject to a fiduciary duty cannot satisfy that duty merely by disclosing their conflicts and obtaining customer consent to

those conflicts, though that is certainly an important part of the fiduciary duty. They must not allow those conflicts to adversely affect their recommendations.

2. We agree that the standard should be no less stringent than the standard applicable to investment advisers under Sections 206(1) and (2) of the Advisers Act.

Beyond that, the statute directs that the standards for brokers and advisers be the same.⁹ What this means in our view is that, to the degree that brokers and advisers are engaged in identical conduct, they should be subject to identical standards. The point of the legislation, after all, is to eliminate the existing inconsistency in the standard as it applies to personalized investment advice offered by brokers and advisers. It does not follow, however, that the obligations of brokers and advisers will always be identical, only that any differences in obligations will be driven by differences in the particular activities in which the financial professional engages. As discussed in greater detail above, we believe the only way to achieve a standard that is both no weaker than the existing standard under Sections 206(1) and (2) of the Advisers Act and the same for brokers and advisers is to ensure that all are subject to the existing legal precedent and guidance under the Advisers Act fiduciary duty, supplemented but not supplanted by guidance specific to the application of the fiduciary duty to brokerage activities.

3. We agree that material conflicts of interest should be disclosed and may be consented to by the customer.

The fiduciary duty unquestionably demands clear, up-front disclosures of material conflicts of interest associated with the particular business model of the broker or adviser. This would include, for example, disclosures designed to elucidate the existence and magnitude of conflicts associated with receipt of sales-based compensation, sale of proprietary products, sale from a limited menu of products, and engagement in principal trading. In addition to disclosing these conflicts and obtaining customer consent, the broker or adviser would be required under a fiduciary duty to appropriately manage those conflicts. And, as noted above, the obligation to make recommendations in the best interest of the customer would still apply; it could not be disclosed or consented away.

4. While we agree that the fiduciary duty should permit advice regarding a discrete transaction without necessarily triggering a continuing duty of care, we emphatically do not agree that a continuing duty would be exclusively a matter of written customer agreement.

We do not agree that the clarification regarding whether there is a continuing duty of care for brokers under various circumstances is a “core principle” of fiduciary duty that should be embedded in rule-making. However, we do agree that, in drafting Section 913 of the Dodd-Frank Act, Congress clearly intended that brokers should be permitted to offer one-off, transaction-based advice without automatically incurring a continuing duty of care. The relevant portion of the Act states that, “nothing in this section shall require a broker or dealer or registered

⁹ Section 913(g) states that “the standard of conduct for such broker or dealer with respect to such customer **shall be the same as** the standard of conduct application to an investment adviser under section 211 of the Investment Advisers Act of 1940.” (Emphasis added.)

representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.” The key to determining the effect of the statute is determining what is meant by “after providing personalized investment advice,” a topic on which additional Commission guidance may be needed. It does not follow, however, that brokers should only incur a continuing duty of care if that is included in a customer agreement. The continuing duty of care exists wherever there is on-going advice, or the implication of on-going account monitoring, regardless of whether that is provided for in a customer agreement. If the nature of the broker-dealer’s services contradicts their characterization in the agreement, then the actual services must dictate the nature of the legal duties that apply. In other words, the facts and circumstances of the relationship, and not the customer agreement, will determine the extent to which a continuing duty exists.

Articulate the Scope of Obligations

While we agree that the Commission could provide guidance regarding the scope of obligations under the fiduciary duty, we do not believe it is possible or desirable to do that entirely, or even primarily, through the rulemaking process. The type of very specific “scenario planning” requested by SIFMA to be part of a rulemaking would be detrimental to investor protection by limiting the breadth and flexibility of fiduciary principles. Instead, the Commission should adopt rules based on broad clear principles supplemented with specific rules in a few key areas (e.g., disclosure) but clarified as necessary through appropriate guidance. The Commission could take a layered approach using interpretive guidance (e.g. soft dollar release), letters to industry discussing observations (e.g. derivatives-related disclosures), and frequently asked questions (e.g. custody rule FAQs). Such an approach would provide greater flexibility than a strictly rules-based approach and would be less subject to gaming by those taking advantage of inevitable loopholes in the rules.

1. Commencement of the standard of conduct.

SIFMA suggests that the standard of conduct should commence with the earlier of the signing of the customer agreement or the making of trades based on personalized investment advice. It suggests further that the fiduciary standard should apply only to the provision of personalized investment advice about securities to retail customers, and that the duty should not apply to “introductory discussions” regarding the nature of the relationship. We see these issues somewhat differently:

- To the degree that “introductory discussions” do not involve personalized advice about securities, brokers need not fear application of a fiduciary duty. On the other hand, Section 913 is unequivocal in stating that the best interest standard would apply whenever such personalized advice about securities is offered. The fiduciary duty’s application therefore cannot hinge on the timing of the signing of the account statement or the making of trades. If it did, a broker-dealer could evade the duty simply by providing advice before the agreement is executed or a trade occurs. Moreover, we believe any recommendation regarding the type of account the customer should enter into – such as fee-based versus commission-based account –

constitutes the type of personalized advice that should be subject to the fiduciary duty and based on the best interests of the customer.

- We are concerned about the potential for confusion where certain advice offered by the broker or adviser is subject to a best-interest standard and other advice offered in the same context (e.g., advice about a non-security product such as an equity-indexed annuity) is not. While we agree that the standard applies to advice about securities, the application of the standard must be interpreted broadly enough to include advice not to invest in securities where securities are among the options being considered. In other words, where securities represent an alternative to non-securities, then advice to invest in non-securities necessarily entails advice not to invest in securities, which constitutes advice *about* securities. Failure to include such advice under the standard would create an incentive to recommend non-security products simply to escape the fiduciary obligation. In addition, where fiduciary and non-fiduciary services are offered side-by-side, the rules and accompanying guidance should provide direction on how the resulting conflicts should be disclosed and managed.

2. Shape of the standard of conduct

SIFMA suggests that a broker-dealer's obligations to a retail customer "should be specified in the customer agreement." While SIFMA acknowledges the existence of a "mandatory core to the fiduciary duty that cannot be overridden by agreement," and cites the duty "to act in good faith and deal fairly with and for" the customer as duties that cannot be overridden, it is not completely clear from the letter how SIFMA would define this core and whether it would include within that "core" the duty to act in the best interest of the customer without regard to financial or other interest of the broker, dealer or investment adviser. In our view, a fiduciary duty is something that cannot be signed away. So, while we believe a customer agreement can be useful in spelling out the nature of the services to be provided and the duty that attaches to those services, we think it is important to emphasize that a customer agreement cannot be used to limit fiduciary duties that would otherwise apply to the services offered.

3. Application of the standard of conduct to an account

SIFMA argues that the uniform fiduciary standard of conduct should apply on an account-by-account basis. We agree, but only to a point. For example, it might be appropriate for a single customer to have both an account in which it receives recommendations and a self-directed account for which the customer makes his or her own investment decisions. Under these circumstances, it would arguably be appropriate to apply the fiduciary duty to the account where investment advice is provided and not to the account where no investment advice is provided as long as this distinction was clearly spelled out. If the Commission were to follow this account-by-account approach too rigidly, however, it might be possible for broker-dealers to evade the duty by segregating the advice and execution of recommendations into separate accounts. Any such attempt to game the system should be treated as a clear violation of the fiduciary duty.

4. Inclusion of traditional product sales or compensation

SIFMA suggests that traditional types of broker-dealer product sales – such as sale of proprietary-only products or limited range of products – or compensation arrangements – such as receipt of compensation based on commission or other standard forms of compensation – should automatically be deemed not to violate the fiduciary standard as long as they are appropriately disclosed. While we agree that it is appropriate for the Commission to deem certain such practices as not, in and of themselves, inconsistent with a fiduciary duty, there are limits to this approach. For example, while the legislation makes clear that sale of proprietary products or sale from a limited menu of products should be deemed not to automatically violate the fiduciary standard, it does not follow that a recommendation from that limited menu of products should automatically be deemed to satisfy the best interest standard for each and every customer as long as the limitation is disclosed. Furthermore, the Commission may determine that certain sales practices, conflicts of interest, or compensation schemes are “contrary to the public interest and the protection of investors,” in which case disclosure alone would not resolve the issue.¹⁰ As a general matter, however, as long as the Commission retains the ability to take action against conduct that is not in the best interest of investors, we support an approach that affirms that certain traditional brokerage practices and compensation arrangements do not in and of themselves constitute violations of the fiduciary duty.

Define personalized investment advice

We agree that the Commission should define “personalized investment advice” to which the fiduciary duty would apply and supplement that definition with guidance regarding the types of business activities that would, and would not, constitute such advice.¹¹ While SIFMA calls for this specificity to be included in the rule, we believe this would result in a bulky, complex, and rigid rule that would be vulnerable to gamesmanship. By adopting a general principles-based rule, and supplementing that with guidance, the Commission can provide the clarity that SIFMA is seeking without sacrificing the flexibility needed to respond to changing market conditions.

SIFMA offers a sound model of what a principles-based definition of personalized investment advice to retail customers might look like. Its focus on advice about securities that purports to be designed with the specific needs or objectives of the client in mind is the right one. Moreover, we agree that the four items identified by SIFMA all should be included within a definition of personalized investment advice. The Commission will need to consider what, if any, other activities should be explicitly included within the definition and under what circumstances.¹² Among other things, as mentioned above, we believe personalized investment advice should include advice on a decision not to purchase or sell securities.

¹⁰ Section 913(h)(2) of the Dodd-Frank Act states: “The Commission shall ... examine and, where appropriate, promulgate rules *prohibiting or restricting* certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.” [Emphasis added.]

¹¹ It is important to recognize that any such definition would supplement, not supplant, the existing broad definition of investment advice under the Advisers Act.

¹² In doing so, the Commission should not in any way limit the extent to which facts and circumstances will ultimately determine the application of the duty.

SIFMA's letter also includes a long list of activities that, in its view, should not be included in the definition. While there is much here that we agree with, some of the items on SIFMA's list fall into a gray area where a fiduciary duty might or might not apply depending on whether the investor might reasonably perceive the communication as personalized advice. In such cases, the SEC may need to provide guidance on the factors that should be weighed in determining whether or not a particular service or communication would be considered to be personalized investment advice. Moreover, anything that is presented to the customer in the guise of personalized investment advice should be subject to the fiduciary duty, regardless of whether it would otherwise fall within an excluded category.

- We agree that providing general research and strategy literature alone would generally not fall under a fiduciary duty, since it is by definition not personalized for the customer. On the other hand, personalized advice to a customer about or based on the literature would be subject to a fiduciary duty.
- We agree that describing general investment and allocation strategies would not constitute personalized investment advice, again because it is self-evident that it is not personalized. Recommending a particular investment or allocation strategy for a particular client would constitute personalized advice.
- While we agree that seminar content would not generally fall within the definition of personalized investment advice, we do not support a blanket exemption from the definition for all seminar content. Rather, whether seminar content would constitute investment advice would depend on the facts and circumstances. To the degree that the seminar constitutes communications to a targeted group of customers purporting to be based on their needs and designed to encourage them to purchase or sell a particular security, we believe it would fall within a definition of personalized investment advice. On the other hand, strictly educational content would not.
- We agree that general marketing and education materials that are not specific to the customer would not be covered by a fiduciary duty for personalized investment advice because they are not personalized.¹³ On the other hand, the decision to provide certain marketing materials to a particular customer might reasonably be perceived as a recommendation if it is associated with personalized advice, in which case a fiduciary duty would apply, if not to the material itself, then to the advice or recommendation about or based on that material.
- We do not believe a determination of whether financial planning tools or calculators constitute advice should turn on whether they recommend *specific* securities. If they make any recommendations that would otherwise constitute personalized investment advice – such as a recommendation to allocate or reallocate funds in securities – then those recommendations should be covered by the fiduciary duty. It is essential that the

¹³ On the other hand, advertisements are subject to a fiduciary duty under the Advisers Act. In keeping with the goal of creating uniform standards, the Commission should seek to adopt a consistent approach for brokers and advisers that does not weaken existing investor protections.

Commission not provide a loophole that would allow brokers to escape their fiduciary duty with regard to investment strategies (as opposed to investment products) simply by running their recommendations through a financial planning tool.

- We agree that online brokerage services in which investors make self-directed investment decisions should generally not be subject to a fiduciary duty, so long as no personalized advice is being offered.
- We agree that an investor decision to hold securities, including concentrated positions or other complex or risky investment strategies, at the customer's request in a non-discretionary account would not constitute personalized investment advice. The key here is that this is done at the investor's request and not pursuant to a recommendation by the broker, since the fiduciary duty constrains the recommendations a broker can make, not the actions an investor can take.
- Taking and executing unsolicited customer orders does not entail advice and thus would not be subject to the fiduciary standard.
- The category of account and customer relationship maintenance is too vague for a determination of whether there are activities within this category that should be subject to a fiduciary standard. If SIFMA believes there are activities within this category that should be excluded from the definition of personalized investment advice, it needs to be more specific about what those services are.
- It is not entirely clear what SIFMA would include within the category of needs analysis. However, it is difficult for us to see how the needs analysis could be deemed to be somehow separate from the recommendations based on that needs analysis, which if they relate to securities, clearly constitute personalized investment advice.
- Similarly, it is not clear to us that all ancillary services would rightly be excluded from the fiduciary duty that would apply to personalized investment advice. Indeed, two of the examples provided – cash sweep and margin lending – would often involve recommendations that ought to be subject to a best interest standard. The Commission should therefore not provide a blanket exemption for ancillary services. If necessary, it could provide guidance regarding how to determine which services would be subject to the fiduciary duty and under what circumstances.
- Market making and underwriting, absent efforts to recommend the traded or underwritten securities, would not constitute investment advice. On the other hand, where these activities are combined with investment advice, they create particularly potent conflicts of interest, making it all the more important that the best interest standard apply to any such recommendations.
- Providing referrals under certain circumstances (e.g. advice regarding the selection or retention of an investment manager) would constitute investment advice and thus would be subject to the fiduciary duty.

- We agree that most social media communications would generally not constitute personalized investment advice, but we are concerned that a blanket exemption for such communications could open the door to abuse. A recommendation to purchase or sell a particular security should not be exempt simply because it is delivered through social media. The substance and intent of the communication should determine the applicability of the standard.

Provide clear guidance regarding disclosure that would satisfy the uniform fiduciary standard¹⁴

We agree with SIFMA that “adequate disclosure guidance should be in place on or before the date the Section 913 standard of conduct becomes operative.” This is necessary not merely (or even primarily) to help brokers manage their liability risks, but also to ensure uniform compliance with a pro-investor standard. We are concerned, however, to the extent that SIFMA’s request for guidance relates to specificity as to which disclosures are “adequate and reasonable.” The Commission should not and will not be able to provide such specificity because the adequacy and reasonableness of disclosure is necessarily based on facts and circumstances. If, on the other hand, SIFMA is requesting guidance as to the areas that disclosure should cover (similar to the instructions in Form ADV, Part 2), we agree with this request. We further agree both that the goal of any such disclosure rules should be to promote concise, direct, and up-to-date plain English disclosures and that a layered approach that incorporates web-based disclosures can often be beneficial in achieving this goal. We are encouraged, moreover, that SIFMA acknowledges the need to provide paper disclosures to customers that lack effective Internet access or that otherwise so request.

Our support for such a system is conditioned on its not equating access to information on the Internet with delivery of that information. One of the benefits of electronic and web-based disclosures is that they allow timely delivery of relevant information (at the point of recommendation, for example) at virtually no cost to the provider. For investors to receive those benefits, however, there must be some active form of delivery of the information (for example, through an email containing a link to the document or a PDF attachment of the document). A generic notice that information is available online, as SIFMA appears to suggest, would not constitute adequate delivery in the retail context.

We generally agree with SIFMA’s discussion of the types of information that would need to be provided at account opening. Ideally, disclosures from brokers and advisers should be uniform in order to allow for easy comparison across firms. As such, the existing Form ADV would provide a reasonable starting point for discussion of the types of information that should be conveyed at the outset of a customer relationship. We believe information about disciplinary record must form an important component of pre-engagement disclosure. A simple referral to the BrokerCheck database would not suffice; direct disclosure is a must.

We agree that disclosure rules should address pre-sale disclosures regarding investment products (“point of sale”).¹⁵ For these disclosures to be effective, they must come at the point of

¹⁴ This discussion relates specifically to the disclosures that would be required by the fiduciary duty and is not intended to imply that disclosures alone can satisfy the fiduciary duty.

recommendation, to the degree that is possible, rather than being delayed to the actual point of sale. Otherwise, they are unlikely to be incorporated into the investor's investment decision. We do not agree, moreover, that it would typically be necessary to permit oral disclosures, since modern technology offers the ability to provide communications that combine the timeliness of oral disclosures with the verifiability and greater clarity of written disclosures. Delivery of disclosures through email of a web link or PDF document would make the need to rely on oral disclosures obsolete.

We do not support SIFMA's proposed approach to updating disclosures. While annual updates might be sufficient in some cases, in many instances it would not. The Commission should provide guidance on the types of disclosures that would need to be updated in a more timely fashion. These should include any material change in a customer agreement or investment strategy, which might also require customer consent. Similarly, we do not believe simply providing a web address for updates is adequate. As discussed above, we believe actual delivery of disclosures, in this case with regard to updated information, is necessary.

We agree that the Commission should provide guidance regarding when a customer's affirmative consent is required and when it is not. Moreover, while we do not automatically assume that all consents could be handled through a global consent at account opening, we do agree that the regime should be designed to minimize unnecessary paperwork. Finally, we agree that any such guidance should address how to deal with existing customers, and the policy should balance both the need to ensure these investors are fully informed and the desirability of avoiding any interruption in service for these customers.

Preserve principal transactions

SIFMA requests the SEC to preserve the ability of broker-dealers to engage in principal transactions. As discussed above, we support the Section 913 Study recommendation that, as part of the fiduciary duty rulemaking, the Commission examine its approach to principal trading restrictions for brokers and advisers alike. Ideally, rules for brokers and advisers should be as close to uniform as possible and should be designed to ensure that any such transaction is in the best interests of the customer.

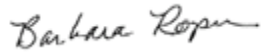
III. Conclusion

We appreciate SIFMA's support for a uniform fiduciary standard and its willingness to engage in a constructive discussion regarding the appropriate framework for rulemaking to implement such a standard. Moreover, we agree that rulemaking under the grant of authority provided in Section 913(g) of the Dodd-Frank Act is the best way for the Commission to realize that goal. Finally, while we continue to have significant differences with SIFMA regarding the details of such a regulatory framework, we share their belief that it is possible to develop a regulatory structure for the uniform fiduciary duty that ensures both that investors are protected

¹⁵ This paragraph addresses the disclosures that would be required in non-discretionary accounts, where investors are assessing recommendations and acting on them, rather than discretionary accounts, where decisions are being made for them.

and that they are able to access the financial services they want and need to achieve their investment goals. We look forward to continuing to work with you to achieve that goal.

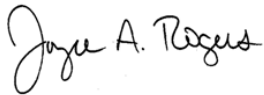
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