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July 4, 2013

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

Re: Duties of Brokers, Dealers and Investment Advisers, File No. 4-606

Dear Ms. Murphy:

Thank you for the opportunity to provide information in response to the Request for Data and Other Information ("RFD") regarding the duties of brokers, dealers, and investment advisers. As an academic researching and writing in the fiduciary area, and in the area of broker-dealers' and investment advisers' obligations in particular, I have followed the issue with interest.

In the RFD, the Securities and Exchange Commission requested information on the extent to which regulatory harmonization might address customer confusion about obligations owed to them, and on whether harmonization could result in additional confusion. I addressed those questions in an article entitled *Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries*, 87 WASHINGTON LAW REVIEW 707 (2012), which I have attached to this letter and submit for your consideration. In the article, I raised doubts about whether harmonization would resolve customer confusion. Instead, I offered an alternative reason to support imposing a fiduciary obligation on brokers that give advice to retail customers.

In the RFD, the SEC also requested information describing the circumstances under which broker-dealers have fiduciary obligations to retail customers under current law, and how frequently such obligations arise. I addressed those issues in an article entitled *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 VILLANOVA LAW REVIEW 701 (2010), also attached. The article analyzes differences between brokers' and advisers' duties in the context of the debate over imposing a fiduciary duty on brokers that give advice.

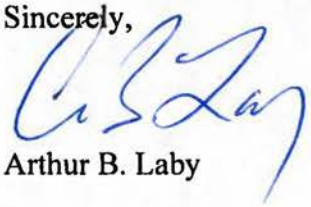
The SEC requested information regarding recent changes in the types of services offered by broker-dealers and investment advisers. I provided an historical overview of changes in brokerage services, and discussed the implications for the debate over whether to impose a fiduciary obligation on brokers that give advice, in an article entitled *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 THE BUSINESS LAWYER 395 (2010), also attached. This article also discusses whether the broker-dealer exclusion from the Advisers Act remains tenable in light of changes in brokerage services, and it addresses possible reforms.

I would like to comment on one other matter in the RFD. In Section III.B., the RFD quotes the Supreme Court case of *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), in a discussion of sections 206(1) and 206(2) of the Investment Advisers Act of 1940. After fifty years, *Capital Gains* remains the leading case applying the Advisers Act. In my view, the Commission has inadvertently misinterpreted the Supreme Court's opinion in one important respect.

The RFD states that the Supreme Court has construed the Advisers Act as requiring an adviser to "*fully disclose* to its clients all material information that is intended 'to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser'" to render advice that is not disinterested. RFD at 29 (quoting *SEC v. Capital Gains*, 375 U.S. at 194) (emphasis added). The actual language of the Court's opinion, however, is slightly different from the Commission's summary in an important respect. The passage the Commission quotes, which actually appears on pages 191 and 192, not on page 194, states simply that the Advisers Act reflects "a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser" to render advice that is not disinterested. *SEC v. Capital Gains*, 375 U.S. at 191-92. (Another passage on page 194 references "full and fair disclosure.")

This subtle difference is important. According to the interpretation in the RFD, the Supreme Court has stated that the Advisers Act requires an adviser to "fully disclose" material information – and such disclosure could eliminate or expose conflicts. According to the Court, however, disclosure is only one possibility. The other possibility, and the first one the Court provides, is elimination of the conflict in its entirety. Elimination of a conflict is not the same as disclosure of a conflict. Although this difference may appear to be an overly technical lawyer's point about the case, it is important in my view to the robust debate over whether disclosure is sufficient to satisfy one's fiduciary obligation. I analyzed the case more extensively in a paper entitled *SEC v. Capital Gains Research Bureau and the Investment Advisers Act of 1940*, 91 BOSTON UNIVERSITY LAW REVIEW 1051 (2011), also attached.

Sincerely,



Arthur B. Laby

Attachments

Copyrighted material redacted. Author cites:

Laby, Arthur B. "Fiduciary Obligations Of Broker-Dealers And Investment Advisers." *Villanova Law Review* 55 (2010): 701-42. Print.

Laby, Arthur B. "Reforming the Regulation of Broker-Dealers." *The Business Lawyer* 65 (2010): 395-440. Print.

Laby, Arthur B. "*SEC v. Capital Gains Research Bureau* and the Investment Advisers Act Of 1940." *Boston University Law Review* 91.3 (2011): 1051-104. Print.

Laby, Arthur B. "Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries." *Washington Law Review* 87.3 (2012): 707-76. Print.