American Bankers Association
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ABASA
ABA SECURITIES ASSOCIATION
an affiliate of the American Bankers Association

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Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090

Re: Request for Information: Duties of Brokers, Dealers, and Investment Advisers; File Number 4–606; 78 Federal Register 14848 (March 7, 2013).

Dear Ms. Murphy:

The American Bankers Association[1] (ABA) and the ABA Securities Association (ABASA)[2] appreciate this opportunity to provide comments on the Securities and Exchange Commission's (Commission) request for information on the duties of brokers, dealers, and investment advisers. As required under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), the Commission staff submitted a study to Congress that recommended, among other things, imposing a standard of care on broker-dealers when providing personalized investment advice to retail customers no less stringent than the one applied to investment advisers under Investment Advisers Act of 1940 (Advisers Act). The Commission has made this latest request for information to assist it in determining whether to engage in rulemaking allowed under Section 913, and if so, the form it would take.

As we noted in an August 30, 2010, letter to the Commission, the issues raised under Section 913 are of great interest to ABA. Our member banks and trust companies offer investors investment products through a number of distribution channels, including bank trust departments, registered broker-dealers, and registered investment advisers. We continue to support efforts to mitigate investor confusion regarding the standard of care a financial intermediary exercises when providing

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees. Learn more at aba.com.

[2] ABASA is a separately chartered affiliate of ABA, representing those holding company members of ABA that are actively engaged in capital markets, investment banking and broker-dealer activities. ABASA members also generally have more international operations than their counterparts in ABA, including many with full service branch, bank and capital markets operations in several jurisdictions outside the United States.

personalized investment advice to its retail clients. However, such efforts should not reduce investor choice or access to the investor education that helps them better understand concepts and options available to them when they make important financial decisions. Addendums I and II outline how some of our members differentiate between investor education and advice, as well as how their employees are trained to tell the difference to provide only education. Addendum III illustrates how our members believe "personalized" investment advice can be defined in such a way that it would not preclude very helpful targeted marketing to clients and potential clients.

As an association that represents the trust business, we strongly believe that the term "fiduciary" may be a misleading or confusing term for investors as well as the courts if incorporated into the Commission's regulatory provisions. Addendum IV summarizes the differences between fiduciary duties and the remedies provided to customers under trust and agency law, highlighting where some of the confusion might occur when using the term "fiduciary."

We again appreciate the continuing discussion of these important issues and hope that ABA can be a helpful resource to the SEC as agency staff continues to consider an appropriate standard of care for broker-dealers. Please feel free to contact the undersigned if you wish to discuss further.

Sincerely,

Cecelia A. Calaby
Senior Vice President

Addendum I: Examples of How One Financial Institution Differentiates between Education and Advice, and Supports Continuing Such Differentiation.

Education is differentiated from advice as illustrated by the following best practices.

INVESTMENT EDUCATION

Investment education includes a broad range of information, and can include: providing definitions and illustrations of general financial and investment concepts, such as risk and return; diversification; dollar cost averaging; compounded return; and tax-deferred investments.

Education can also include helping customers estimate future retirement needs and assess risk tolerance based assumptions drawn from basic personal financial information (e.g., annual income, age). This education helps customers understand the types of programs or products that are suitable for them and their specific situation.

Education also includes determining investment time horizons, as well as the use of interactive investment materials, such as questionnaires, worksheets, calculations and similar materials that:

- Estimate future retirement income needs, and/or
- Assess the impact of different asset allocations on income

In addition, asset allocation models of portfolios of hypothetical individuals with different time horizons and risk profiles, such as pie charts, graphs, and case studies are also considered educational.

ADVICE

The definition of advice, at minimum, encompasses the definition of the making of a "recommendation."[3]

A recommendation is a communication that constitutes a "call to action" to the customer to enter into a particular transaction or to engage in a particular trading strategy. Examples include:

- Communications encouraging a specific customer to purchase or sell a security
- Communications stating that customers should be investing in stocks from a particular sector and urging customers to purchase one or more stocks from a list of "buy" recommendations
- Portfolio analysis tools that generate a specific list of "buy" or "sell" recommendations for a customer based on that customer's input regarding his/her investment goals and other personalized information

[3] PricewaterhouseCoopers, LLP. March 2011. *A Closer Look: A Uniform Fiduciary Standard for Broker Dealers and Investment Advisors: The SEC's Study.* Retrieved from http://www.pwc.com/us/en/financial-services/regulatory-services/publications/assets/closer-look-fiduciary-duty-march.pdf

Addendum II: Examples of One Institution's Role-Playing or Training on How to Avoid Giving Investment Advice while Providing Education, along with a Sample Compliance Disclosure.

EMPLOYEES

Employees whose roles involve providing investment education are taught that they cannot give investment/tax advice in any way. These employees often guide a customer to written materials that provide additional educational information (e.g., fact sheets, Morningstar reports, rates and values).

These employees are not to use language such as:

- "You should put your money here…,"
- "I think you should…"
- "I recommend…"

Instead, employees are to use phrases such as:

- "Some options for you to consider are…,"
- "Have you considered…"
- "Here are some options available to you…"

The following examples demonstrate specific training that is provided for employees who will be providing education (not personalized investment advice):

Example 1:

Client: Where should I invest my contributions? What do you recommend?

Retirement Professional: We cannot recommend an investment option; however, we can help you to develop a strategy for determining what is right for you. You should select the investment options that fit your needs. You should consider your comfort level with risk and your personal financial goals. We developed an Investor Profile Quiz to help you determine how comfortable you are with risk.

Example 2:

At times, customers will request our assistance with allocating their funds. We cannot make any specific recommendations; however, we can assist the customers by educating them on the different investment options for which they have the ability to invest. Use the Fund Fact Sheets and the Risk Profile Questionnaire as tools when educating customers.

FINANCIAL PROFESSIONALS

The following is an example of a financial institution's script for a conversation that a registered representative (RR) might have in an initial meeting with a potential customer, providing education without giving personalized investment advice.

Investor: Where should I invest my money?

RR: Let's talk about some options that are available to you. Tell me about your comfort level with risk. What type of goals do you have?

Investor: My goal is to not lose any money. What would you invest in?

RR: Well, my long term goals are probably different than yours given my risk tolerance and time horizon. I'm only a few years away from winding down into retirement. When would you like to retire?

Investor: I could see myself retiring in 20 years or so, when I'm 65, but I really don't like to lose any money. The last few years have left me fearful and worried about my retirement.

RR: I can appreciate that. So it sounds like you have a decent amount of time to invest, but you'd maybe like to keep your money pretty conservatively invested. Have you completed an asset allocation questionnaire recently? They can help to point out the things you need to consider when investing your money so you have an idea of what allocation you should consider.

Investor: My wife and I haven't done that for years! The last time I checked, I think it said I should invest aggressively.

RR: Well that's the great thing about those questionnaires; they can really put things into perspective and it's a good idea to take them every few years because your feelings about investing will evolve with you.

I'll leave you with a few copies tonight so you and your wife can talk about it. Let's set up some time in a few days to review what you found. I'd even be happy to review the questions with you in case you need guidance along the way.

Investor: Sounds good. Let's meet next week. My wife has some time off and we could do this together.

GENERAL

Finally, in written communications, this financial institution includes the following disclosure to identify something as educational vs. providing investment advice:

For educational information only. Not to be construed as providing investment advice.

Addendum III: How to Define "Personalized" Advice.

PERSONALIZED INVESTMENT ADVICE

To provide personalized investment advice, many factors need to be present, including knowledge of a prospective client's:

- Net worth
- Risk tolerance
- Tax bracket
- Marital status
- Children
- Risk tolerance
- Investment objective
- Money type (e.g., qualified or nonqualified) and where that money is currently invested

TARGETED MARKETING AS EDUCATION

It's important for investors to receive educational materials delivered through targeted marketing, as it provides an immense value which informs them on topics that they may not readily have access or exposure to. Without this education, the investing public may not have the knowledge required to make fully-informed investing decisions, which are necessary to meet long-term financial goals.

It is crucial that marketing to a targeted group of people for general types of investments not be deemed "personalized investment advice." Only if a specific investment is recommended should it be considered "personalized investment advice."

In many cases, financial professionals establish alliances with other specialized financial professionals or utilize the services of firms that provide lists of individuals based on *broad demographics*. This allows financial professionals to appeal to various groups of people who may be in more need of a particular product than others (e.g., a new college graduate who was just hired for his or her first job may not have a need for a conservative, income-producing portfolio, while a near-retirement age individual may seek that type of investment).

For example, a company could target various groups for mailings based on their "life stage." This takes into consideration their age range, the phase they are in for their career, and the phase they are in for their retirement savings. The products and strategies relevant to each life stage vary greatly based on these stated factors. Typically, these mailings will call out products or strategies that the company has available for each group. The sample language below exemplifies how the company would reference its mutual fund offerings for a potential customer:

> *Diversify your portfolio with our wide range of mutual funds. Call your financial professional to learn which best meets your needs.*

Addendum IV: Difference between Fiduciaries under Trust and Agency Law.

As the Commission is well aware, the term "fiduciary" carries a variety of meanings. A "fiduciary" under agency law, such as an investment adviser, means that the agent has agreed to act on behalf of the principal and the principal has the right to control the agent's acts. In agreeing to act on behalf of the principal, the agent must act with the care, competence, and diligence that are normally exercised by agents in similar circumstances. A principal can consent, either before or after the conduct has taken place, to waive an agent's duties.

A "fiduciary" under trust law is an altogether different type of fiduciary. Such fiduciary must act in the best interests of all existing and future beneficiaries. The duties of a fiduciary under trust law are many, chief among them are the duties of loyalty, care, impartiality, and prudent investment. Self-dealing is strictly prohibited unless: (i) the consent of all beneficiaries, after full disclosure, has been obtained; (ii) it is specifically allowed under the terms of the trust or state law; or (iii) it is authorized under court order. Even when the duty of loyalty is waived, trustees must still comply with their many other fiduciary duties, including the duty to exercise care and to invest prudently.

We are concerned that if broker-dealers are, in the future, deemed to be "fiduciaries," retail customers will be confused when different financial services providers, e.g., broker-dealers, investment advisers, and bank trust departments, represent to their customers that they are fiduciaries. We, therefore, urge the Commission to avoid using the term "fiduciary" in any prospective regulation.

Selected Duties and Remedies Available under Trust Law and Agency Law

	Trustee, Executor, Guardian, Custodian Under Uniform Gifts to Minors Act	**Investment Adviser**
Source of Duties and Remedies	Common law. State statutes. Federal banking laws and regulations.	*SEC v. Capital Gains Bureau*, 375 U.S. 18 (1963). Federal securities laws and regulations, including the Investment Advisers Act of 1940.
Duty of Care / Administration	Among other things, a fiduciary must: (1) administer the account in accordance with its terms, purposes, and interests of beneficiaries; (2) administer the account prudently using reasonable care; and (3) incur only reasonable costs of administration.	Advisers must provide investment advice that is consistent with the client's investment objective(s) and have a reasonable, independent basis for its recommendations.
Duty of Loyalty	A fiduciary must act and administer an account solely in the best interests of the beneficiaries. Conflicts only may be waived in the governing document, by statute, by court order, or by waiver from all beneficiaries. For example, bank fiduciaries may not use affiliated investment products sponsored by a bank or its affiliates, unless authorized by the governing document, statute, court order, or by a waiver from all	Advisers must act in solely in the best interests of clients. Generally, clients may consent, either before or after the conduct has taken place, to waive an agent's duties. For example, an adviser may use affiliated investment products as long as that fact is disclosed to the client

	beneficiaries after full disclosure of the conflict. Even when the duty of loyalty is waived by statute, court order, or waiver of all beneficiaries, fiduciaries must still comply with their many other duties, including the duty to invest prudently.	
Remedies Available to Clients Due to Breach of Duties	A full range of remedies may be available to clients: • Reduction/Denial of Trustee's Compensation and Fees • Trustee's Payment of Damages, including Interest • Information and accounting • Injunction • Increase in Trustee's Bond • Removal of Trustee • Appointment of a Receiver or Successor Trustee • Court Setting Aside Acts of Trustee • Court Direction to Trustee for Specific Performance • Court Supervision of Trustee Act's Note: A court is not confined to a limited list of remedies but can mold the relief in equity to protect the client's rights.	Clients have limited private rights of action and no equitable remedies against advisers. Thus, as a practical matter they may only recover fees paid to the adviser. Clients may have other private rights of action under state law.