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*Financing America's Economy*

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July 5, 2013

**Via electronic mail at rule-comments@ sec.gov**

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

***Re: Duties of Brokers, Dealers and Investment Advisers, Release No. 34-69013; IA-3558; File No. 4-606 (the "Release")***

Dear Ms. Murphy:

The Financial Services Roundtable[1] (the "Roundtable") appreciates the opportunity to comment on the Securities and Exchange Commission's (the "Commission") request for data and other information relating to the Commission's consideration of the standards of conduct for, and the harmonization of regulation of, broker-dealers and investment advisers.[2] The Roundtable commends the Commission for its deliberative process in approaching these issues. In this regard, we note that pursuant to Section 913(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"),[3] the Commission may promulgate rules to address the legal or regulatory standards of care for brokers, dealers, and investment advisers when providing investment advice about securities to "retail customers" if the rulemaking is necessary or appropriate in the public interest and for the protection of retail customers. The Dodd-Frank Act does not, however, mandate that the Commission engage in any rulemaking to implement a uniform standard of conduct.

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[1] The Financial Services Roundtable represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

[2] *See* Duties of Brokers, Dealers, and Investment Advisers, Exchange Act Release No. 69,013 (Mar. 1, 2013), 78 Fed. Reg. 14,848 (Mar. 7, 2013).

[3] *See* Pub. L. No. 111-203, 124 Stat. 1376, at 1827-1828 (2010).

The Roundtable's members strongly support the Commission's data and information gathering efforts as framed by the Release. We believe that those efforts will inform the Commission's determination of (a) whether rulemaking is necessary or appropriate in the public interest and for the protection of retail investors, (b) whether it will promote efficiency, competition, and capital formation,[4] and (c) whether any burdens on competition from such rulemaking pursuant to section 913(f) of the Dodd-Frank Act are necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934 (the "Exchange Act").[5]

## I. Executive Summary

The Roundtable continues its long-standing support for the harmonization of the regulations governing the conduct of broker-dealers and investment advisers that provide personalized investment advice to retail customers.[6] As the Roundtable previously stated, we believe that

> "[t]hese worthy goals can be achieved without subjecting broker-dealers and investment advisers to identical legislative and regulatory regimes that may not acknowledge the different services and products provided by these professionals. We believe the Commission can achieve regulatory harmonization and increased consumer-protections by harnessing the Commission's existing rulemaking powers with the new authority granted in section 913(f) of the Dodd-Frank Act."[7]

The Roundtable's members also continue to believe that any rulemaking on this issue should be subject to a careful costs and benefits analysis to determine the extent of any burdens on competition and the impact on capital formation. This analysis would also determine the impact on Main Street Investors[8] so that the end result is not fewer—and *more expensive*—

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[4] Pursuant to Section 3(f) of the Securities Exchange Act of 1934, whenever the Commission "is required to consider or determine whether an action is necessary or appropriate in the public interest," it also is required to consider "whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f).

[5] *See* 15 U.S.C. § 78u(a)(2).

[6] *See* Letter from The Financial Services Roundtable to Elizabeth Murphy, Secretary of the Securities and Exchange Commission at 1 (Aug. 30, 2010) Re: File No. 4-606, "Study Regarding Obligations of Brokers, Dealers, and Investment Advisers" ("2010 Roundtable Comment Letter"), *available at* http://www.fsround.org/fsr/policy_issues/regulatory/pdfs/pdfs10/FINALBROKER-DEALERSTUDYLETTER8-30-10.pdf; http://www.sec.gov/comments/4-606/4606-2659.pdf.

[7] *Id.* The Roundtable further noted that "creating a uniform fiduciary standard does nothing to protect investors from fraud unless there is a robust supervisory and regulatory structure capable of deterring, detecting, and prosecuting fraud." *See id.* at 6.

[8] The term *Main Street Investors* means individual investors, excluding: (a)(1) individuals who are registered with the Commission and applicable self-regulatory organizations as securities or options brokers, traders, investment bankers, research analysts, portfolio managers, *etc.*; or (a)(2) individuals who provide investment products and services to investors but are not required to be registered with the Commission (*e.g.*, hedge fund and

investment choices, or increased disclosure obligations that result in less meaningful information and greater confusion for Main Street Investors. For these reasons, we support the Commission's request for extensive data, notwithstanding the cost and burdens to broker-dealers and investment advisers in collecting and providing this information.

In addition, the Roundtable:

- Believes the Commission's articulation of the scope of any "continuing fiduciary duty" would in essence create a *de facto* continuing duty in most cases.

- Supports the Commission's review of the disclosures provided to Main Street Investors who receive personalized investment advice, but encourages the Commission to leverage existing disclosure requirements (*i.e.*, Part 2A of Form ADV) rather than creating a new overlay of disclosure, which in our view would not advance investor education or protection.

- Urges the Commission to take a leadership role in coordinating the numerous regulatory initiatives mandating disclosures to Main Street Investors in order to guide the development of clear and precise disclosures that provide meaningful information to Main Street Investors.

- Endorses the Commission's approach of regulatory neutrality regarding the business models of broker-dealers *vis-à-vis* registered investment advisers, which would permit broker-dealers to continue to receive commissions, to effect transactions with customers on a principal basis without being subject to trade-by-trade disclosure and consent requirements, and to sell proprietary or other limited range of products.[9]

- Opposes a wholesale ban on non-cash compensation, particularly where the Release does not present any findings supported by empirical data that particular non-cash compensation practices are contrary to the public interest and the protection of investors.[10]

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private equity fund managers); or (b) officers or directors of broker-dealers, asset management firms (whether or not registered with the Commission), securities exchanges or associations, *etc.*

[9] *See* Section 913(g) of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. at 1828. *See also* Letter from Ranking Member Barney Frank (May 31, 2011) ("Ranking Member Frank's Letter") (stating that "[the] new standard contemplated by Congress is intended to recognize and appropriately adapt to the differences between broker-dealers and registered investment advisers"), *available at* http://www.fsround.org/fsr/dodd_frank/pdfs/fiduciary-duty/Barney-Frank-Letter-to-SEC-on-Standards-of-Care-for-BDs-5.31.11.pdf.

[10] *Id.*

Finally, the Commission noted in the Release that its staff recommended extending existing interpretative guidance and precedent under the Investment Advisers Act of 1940 (the "Advisers Act") regarding fiduciary duty to broker-dealers as well as investment advisers under a uniform fiduciary standard of conduct.[11] If the Commission determines to extend existing Advisers Act guidance and precedent to broker-dealers as part of a uniform fiduciary standard of conduct, the Roundtable requests that the Commission identify relevant case law; enforcement actions; and other interpretations, precedent, and lore under the Advisers Act (collectively referred to herein as "Advisers Act Guidance") that will apply to broker-dealers so that they have fair notice of their obligations under the standard of conduct.[12]

## II. Adoption of a Uniform Standard of Conduct Must Be Supported by a Vigorous Costs-Benefits Analysis

The Roundtable continues to support a uniform standard of conduct that preserves a broker-dealer's ability to charge commissions, offer proprietary or other limited range of products, and engage in principal trading without providing trade-by-trade disclosures.[13] However, our support is dependent upon the Commission conducting rigorous cost-benefit analyses demonstrating that adopting a uniform standard of conduct is more necessary or appropriate in the public interest and for the protection of retail customers, than adopting a uniform requirement for broker-dealers and investment advisers to provide disclosures about the primary products and services that they offer, including their material conflicts of interest.[14]

## III. Requests for Data and Other Information

The Commission requests a considerable amount of detailed data and other information on a range of topics related to the provision by broker-dealers and investment advisers of personalized investment advice about securities to retail customers. The requested information includes customer demographics, account types, services provided, customer securities' selections, principal trading, customers' understanding of the obligations of their financial service providers, and differences in regulatory régimes that govern broker-dealers and investment advisers, respectively. The Commission also requests detailed information about retail customers' understanding of the differences in regulation of broker-dealers and investment

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[11] *See* 78 Fed. Reg. at 14,857. *See also* 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 (Jan. 2011) *available at* www.sec.gov/news/studies/2011/913studyfinal.pdf.

[12] *See, SEC v. Upton*, 75 F.3d 92, 98 (2d Cir. 1996) (stating that "[d]ue process requires that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited").

[13] *See* 2010 Roundtable Comment Letter, *supra* note 6, at 4 (noting that the "Roundtable does not oppose harmonizing regulations, but [encourages] the Commission to examine the alternate roles and services provided by broker-dealers and investment advisers so [that] the final rules are appropriately tailored to meet the diverse needs of consumers in each industry").

[14] *See* Release, *supra* note 2, at 14,858.

advisers, the potential costs and benefits to investors of a uniform standard of conduct, and the respective claims processes available to retail customers to resolve disputes with broker-dealers and investment advisers.

Due to the varying business models and characteristics of Roundtable member companies, it is difficult for the Roundtable to provide meaningful consolidated data. Accordingly, our members have determined that it is more appropriate for them to provide any responsive data individually or through other industry groups. As a preliminary matter, however, we note the findings from the study published by Oliver Wyman Inc. and the Securities Industry and Financial Markets Association ("SIFMA") (the "Oliver Wyman/SIFMA Study").[15] Particularly, the Oliver Wyman/SIFMA Study found that approximately 12 million to 17 million small investors (*i.e.*, investors with less than $250,000 in assets) could lose access to their current levels of advisory services if additional compliance, disclosure, and surveillance result in just two hours of additional coverage and support per client.[16]

We further note that the industry also has provided a considerable amount of data on these topics to the Department of Labor (the "Department") in connection with its proposed rulemaking (the "Department Proposal") related to the definition of the term "investment-advice fiduciary."[17] Given the significant expense—in terms of time as well as money— required to collect and process the requested data, and respond to the Commission's extensive queries concerning the data, the Roundtable believes that it is imperative that the Commission leverage the information that many industry participants or financial trade associations have already provided to the Department.

While cross-agency regulatory coordination not only makes good sense and is an efficient use of the respective agencies' resources, it also is required by the President's Executive Order directing federal agencies to coordinate their rulemaking efforts (the "Executive Order").[18] To that end, we strongly urge the Commission and the Department to coordinate their rulemakings that seek to regulate the same activities that are directed to retail customers and conducted by the same market participants. Not only do we believe that such coordination is required by the Executive Order, but without coordination, the result likely will be overlapping and inconsistent

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[15] *See Standard of Care Harmonization: Impact Assessment for SEC* (Oct. 2010), *available at* http://www.sifma.org/issues/item.aspx?id=21999 ("Oliver Wyman/SIFMA Study").

[16] *Id.* at 4.

[17] *See* 75 Fed. Reg. 75,263 (Oct. 22, 2010). *See, e.g.*, the Oliver Wyman Inc. study on the potential effects of the Department's proposed definition of "investment-advice fiduciary" on rollover individual retirement accounts, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-PH060.pdf. The Department withdrew this proposed rulemaking on September 19, 2011, and stated that it would re-propose the rule. *See* Department of Labor, *Labor Department's EBSA to re-propose rule on definition of a fiduciary* (Sept. 19, 2011), *available at* http://www.dol.gov/ebsa/newsroom/2011/11-1382-NAT.html.

[18] *See* Executive Order 13,563 -- *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

rules that continue the same investor confusion that was noted in a report issued by the Rand Corporation.[19]

## IV. Continuing Duty

Under section 913(g)(1) of the Dodd-Frank Act, broker-dealers and their registered representatives would not have a "continuing duty of care or loyalty" to their retail customers after providing them with personalized investment advice about securities. Accordingly, the Commission directs commenters to assume that a uniform fiduciary standard of conduct "would not generally require a broker-dealer or investment adviser to . . . have a continuing duty of care or loyalty . . . ," but then proceeds to outline the circumstances under which a continuing duty would (or could) be found to exist.[20]

As outlined by the Commission, however, even if a retail customer agreed in writing that the scope of services provided by the broker-dealer or investment adviser did not include a continuing duty of care or loyalty, the retail customer could claim, after the fact, that a *continuing duty* existed by asserting some combination of factors and course of dealings in order to override the express terms of the retail customer's written contract with the broker-dealer or investment adviser.

The Commission's proposed construct raises three issues. First, brokers, dealers, and investment advisers need certainty about the scope of their relationships with retail customers in order to satisfy their respective regulatory obligations. The Roundtable believes that any rulemaking related to a uniform standard of conduct should provide that the duty exists at a specific point in time (*i.e.*, when securities-investment advice is provided to the retail customer), or as agreed to in writing by the parties. If, however, the Commission proceeds with a proposal based on the outlined assumption, the Commission should provide clear guidance regarding the facts and circumstances that would convert what is clearly an "episodic fiduciary duty" into a "continuing fiduciary duty."

Second, the Roundtable is concerned that the assumed approach would foster retail customer claims seeking to establish a *continuing fiduciary duty* notwithstanding written agreements to the contrary. This could substantially increase the business costs and risk-management expenses incurred by brokers, dealers, and investment advisers—including additional compliance expenses, and costs to defend claims based on a putative continuing fiduciary duty.

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[19] *See* Angela A. Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, and Farrukh Suvankulov, "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers," Rand Institute for Civil Justice (2008) (a study commissioned by the Securities and Exchange Commission), *available at* http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

[20] *See* Release, *supra* note 2, at 14,855.

Third, the Roundtable asks that the Commission, the Department and the Financial Industry Regulatory Authority ("FINRA") work with the industry to determine how the determination of the existence of a duty of care and duty of loyalty would apply in different contexts, such as (a) investors with multiple accounts (including pension and retirement savings accounts); (b) professionals who are registered as brokers and investment advisers ("dual registrants"); and (c) a call (or other contact) from a retail customer that has not requested investment advice for a long period of time.

## V. Impact on Main Street Investors

The Roundtable believes that the overarching concern of the Commission should be the impact on investors. As shown in the 2010 Oliver Wyman/SIFMA Study,[21] it is expected that retail investors would experience reduced product and service availability and pay higher costs if a uniform standard of conduct is adopted for broker-dealers and investment advisers. Specifically, the Oliver Wyman/SIFMA Study concluded that retail investors would experience reduced account-type choice, have more limited access to various investment products, and pay higher costs. Moreover, not only would investors experience higher direct costs, but the industry would face greater compliance costs with the new fiduciary, disclosure and regulatory compliance and supervisory requirements.[22]

As a result of the anticipated higher costs from a uniform fiduciary standard of conduct, the Roundtable believes that it is imperative that the Commission's cost-benefit analysis demonstrate that the benefits to retail investors outweigh the costs. Moreover, in light of the multiple overlapping regulatory initiatives directed at investor disclosures and broker-dealers and investment advisers' client obligations, we believe that the cost-benefit analysis should include not only any proposed Commission rulemaking, but also the overall costs of increased regulation, including disclosure requirements.[23]

## VI. Disclosures

The Commission asks commenters to assume that any broker-dealer or investment adviser that provides personalized investment advice about securities to any retail customer would be required to provide the following disclosures to the retail customer:

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21 *See* 2010 Oliver Wyman/SIFMA Study, *supra* note 15.

22 *Id.*

23 *See* CFTC, Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-17/pdf/2012-1244.pdf; the Department Proposal, *supra* note 16; MSRB Notice 2011-48 (Aug. 23, 2011), *available at* http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-48.aspx; and FINRA Regulatory Notice 10-54, *available at* https://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122361.pdf.

A. A "General Relationship Guide," similar to Part 2A of Form ADV, containing a description of all material conflicts of interest with retail customers, particularly the firm's services, fees and scope of services, including: (i) whether advice and related duties are ongoing or limited in time, or are otherwise limited in scope (*e.g.*, limited to certain accounts or transactions); (ii) whether the firm only offers or recommends proprietary or other limited ranges of products; and (iii) whether, and under what circumstances, the firm will seek to effect principal trades with a retail customer; and

B. Oral or written disclosure of any new material conflicts of interest or any material change of an existing conflict at the time that personalized investment advice is provided.[24]

The Commission, however, did not address the mechanics of providing and recording real-time new and updated disclosures of material conflicts of interest, which would present many logistical challenges and costs to the financial services industry.

The Roundtable supports providing retail customers with simple and clear disclosures, including information about material conflicts of interest. Fair disclosures are an important component in ensuring that retail investors can fairly evaluate and compare the many different products and services that are available in the investment market. Our members believe that the Commission should not reinvent the wheel when it comes to disclosure requirements, but should instead leverage Part 2A of Form ADV to provide clear and meaningful disclosures that will be most beneficial to Main Street Investors.

With respect to the content of any required disclosure, the Roundtable believes that the Commission should use its expertise and coordinate with financial and other regulators (including the Department) to construct a disclosure régime that does not inadvertently harm Main Street Investors by providing duplicative or confusing disclosures. For example, if a dually-registered broker-dealer and investment adviser is already providing customers with disclosures pursuant to Part 2A of Form ADV, giving customers a new document (*e.g.*, a General Relationship Guide) with essentially the same information, albeit in a different format, would likely be confusing.

The Roundtable believes that the Commission should take a leadership role[25] in coordinating with other regulators, including the Commodity Futures Trading Commission, the Department, the Municipal Securities Rulemaking Board ("MSRB") and, certainly, FINRA, that

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[24] *See* Release, *supra* note 2, at 14,856.

[25] We believe that the Commission's regulatory leadership on these issues is, in fact, necessitated by Section 913 of the Dodd-Frank Act, in which the Commission—and not the Department or any other federal department or agency—was designated by Congress as the sole federal agency responsible for studying and promulgating rules regarding the standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers.

also impose investor disclosure requirements. The Commission's leadership is necessary to ensure that the universe of information that retail investors are required to receive is neither overwhelming, nor confusing; which would defeat the laudable goal of educating retail investors about the investment opportunities and financial services available to them. As the adage goes, "more" does not necessarily mean "better."[26] The Roundtable believes that there is a material risk that investor harm may occur if Main Street Investors are provided with disclosures that are inherently confusing because they address the same subject matter, but are necessarily different as a result of inconsistent regulatory requirements. Moreover, duplicative disclosure requirements not only contribute to investor confusion, but they also unnecessarily increase investors' costs.

Finally, with respect to the mechanism for disclosure, the Roundtable believes that the Commission should allow broker-dealers and investment advisers to provide disclosures of material conflicts of interest through web-based and other electronic communications tools based on an "access equals delivery" model. There is established precedent for providing disclosures of conflicts of interest to customers online, which is really the only effective means for consistently providing this type of complex information in real-time to retail customers.[27] In particular, we believe that a process consisting of individual investors signing written agreements directing them to a website where disclosures of material conflicts of interest would be provided, and an annual reminder of the website disclosures, would be consistent with Congress's intent, as set forth in paragraph (g) of Section 913 of the Dodd-Frank Act. Specifically, subparagraph (g)(1) directs the Commission, pursuant to new Section 15(l) of the Exchange Act, to facilitate simple and clear disclosures to investors regarding the terms of their relationships with broker-dealers and investment advisers, including any material conflicts of interest. Further, subparagraph (g)(2) amended Section 211 of the Advisers Act by adding new subparagraph (g)(1) to authorize the Commission to promulgate rules providing for a uniform standard of conduct that, if adopted, would require the disclosure of material conflicts of interest to retail customers, which may be consented to by the customers. Of course, individuals who prefer to receive disclosures *via* the U.S. Mail would retain the option to do so.

The Roundtable believes that the Commission should provide rigorous cost-benefit analysis with respect to new disclosure requirements from the perspective of retail investors as well as broker-dealers and investment advisers. This analysis is particularly important if the Commission seeks to require new or additional disclosure documentation, rather than leveraging off of the existing disclosure outlined in Part 2A of Form ADV.

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[26] *See, e.g.*, Remarks by Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA, "Addressing the Crisis of Confidence in the Markets" (May 21, 2013), *available at* http://www.finra.org/Newsroom/Speeches/Ketchum/P264525, noting FINRA's focus on the quality and effectiveness of broker-dealers' disclosures to their customers.

[27] *See, e.g.*, FINRA's NASD Rule 2711(h)(11) providing that certain required disclosures of material conflicts of interest in connection with research reports can be provided by means of a FINRA member's website.

## VII. Commission-Based Compensation and Fees

Paragraph (g) of Section 913 provides that "[t]he receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard applied to a broker, dealer, or investment adviser." In the Release, the Commission specifically noted that broker-dealers would be permitted to continue to receive commissions and would not be required to charge asset-based fees.

The Roundtable strongly supports a regulatory approach that permits different and competing business models and fee structures. We believe that unbiased regulatory models can best preserve retail customers' choices, and facilitate the availability of a wide range of affordable financial products and services for Main Street Investors.

## VIII. Principal Trading and Proprietary or Limited Range of Products

In authorizing the Commission to promulgate rules relating to a uniform fiduciary standard of conduct, Congress said that such rules were required to provide for a standard of conduct that is "no less stringent" than that set forth in Section 206(1) and (2) of the Advisers Act. In the Release, the Commission outlines a possible approach to broker-dealers' principal trades with retail customers that is consistent with the disclosure requirements relating to material conflicts of interest under Section 206(1) and (2), without imposing the transaction-by-transaction disclosure and consent requirements for principal trading that currently are required under Section 206(3) of the Advisers Act.[28] The Roundtable believes that this approach is consistent with the Congressional mandate of Section 913(g) of the Dodd-Frank Act.

The Commission further directs commenters to assume that offering or recommending only a limited range of products, or only proprietary products, would not, in and of itself, be deemed a violation of the uniform standard of conduct. The Roundtable supports such an approach, which we believe is required by the provisions of Section 913(g) of the Dodd-Frank Act.

## IX. Non-cash Compensation Practices

The Commission states in the Release that commenters should assume that the payment or receipt of non-cash compensation, such as trips and prizes, in connection with providing personalized investment advice about securities to retail customers would be prohibited.[29] The Commission does not, however, provide any rationale for a *per se* prohibition on non-cash compensation, or indicate that the prohibition would be limited to non-cash compensation that creates risks or material conflicts of interest that are different or greater than those inherent in any form of remuneration. For example, the Commission does not provide any evidence to

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[28] *See* Release, *supra* note 2, at 14,855.

[29] *Id.* at 14,857.

suggest that the existing rules of FINRA are ineffective. For example, FINRA's rules permit broker-dealers to compensate registered persons with non-cash as well as cash compensation in connection with the sale and distribution of investment company securities and variable annuities provided that the compensation does not create or encourage conflicts of interest, such as promoting the securities of one fund over another.[30] Moreover, a review of FINRA disciplinary actions did not reveal a single action in 2012 involving a violation of FINRA Rule 2320 or the prohibited use of non-cash compensation.

In order to justify an absolute ban on the payment of non-cash compensation, the Roundtable strongly believes that the Commission should provide a detailed rationale for its position, including any identified abuses and why the disclosure of conflicts of interest with respect to non-cash compensation is not sufficient to address such abuses. Alternatively, unless it is necessary to prevent a specifically identified abuse, conflicts of interest with respect to any form of compensation are most appropriately addressed through disclosure.

## X. Possible Extension of Prior Advisers Act Guidance and Precedent to Broker-Dealers

Commenters are asked to identify specific citations to Advisers Act Guidance that they believe should (or should not) apply to broker-dealers when providing personalized investment advice about securities to retail customers. The Release suggests that the Commission is contemplating applying Advisers Act Guidance to broker-dealers. The Roundtable believes that the extension of Advisers Act Guidance to broker-dealers is inappropriate for several reasons.

First, the wholesale extension of Advisers Act Guidance to broker-dealers would be inconsistent with the Congressional intent and express provisions of the Dodd-Frank Act. As stated by then-Ranking Member Barney Frank in his May 31, 2011 letter to then-Commission Chairman Mary L. Schapiro:

> "[w]hile the law gives the [C]ommission authority to establish a new standard of care, the requirement that the new standard be 'no less stringent than' 206(1) and (2) was not intended to encourage the SEC to impose the [Advisers Act] standard on broker-dealers, but to ensure that the new standard would not be a 'watered down' version of the investment advisers' fiduciary standard. If Congress intended the SEC to simply copy the [Advisers] Act and apply it to broker-dealers, it would have simply repealed the broker-dealer exemption – an approach Congress considered but rejected."[31]

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[30] *See* FINRA Rule 2320(g)(4)(D), which permits associated persons of FINRA member firms to receive non-cash compensation if: (1) any non-cash compensation arrangement including variable annuities is based on the associated person's total production with respect to all variable contracts distributed by the member firm, and is not limited to particular securities; (2) the non-cash compensation arrangement requires that the credit received for each variable contract security is equally weighted; (3) no unaffiliated entity participates in the organization of the non-cash compensation arrangement; and (4) certain record keeping requirements are satisfied.

[31] *See* Ranking Member Frank's Letter, *supra* note 9.

Second, the regulation of investment advisers under the Advisers Act is based on Congress's intention to regulate the basic function of investment advisers, *i.e.*, "furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments and their clients."[32] By contrast, broker-dealers, acting other than as registered investment advisers, may provide investment advice only ". . . insofar as their advice is merely incidental to brokerage transactions for which they receive only brokerage commissions. . . ".[33] Notwithstanding these different and long-standing approaches to the regulation of investment advisers and broker-dealers, the Commission outlines in the Release several scenarios in which broker-dealers as well as investment advisers would be deemed to have a continuing duty. The Roundtable believes that this extension of an Advisers Act concept of a continuing duty to broker-dealers is inconsistent with the long-standing legislative intent and judicial interpretations of the respective duties of broker-dealers and investment advisers when providing investment advice about securities.[34]

Third, extending Advisers Act Guidance to broker-dealers under the Exchange Act would not create a uniform standard, but would instead create investor confusion as well as an uneven standard of care. For example, clients of investment advisers do not have a private right of action under Section 206 of the Advisers Act; however, customers of broker-dealers have private rights of action under the Exchange Act and under FINRA's rules. Therefore, applying the Advisers Act Guidance to broker-dealers would not harmonize the regulatory regimes governing broker-dealers and investment advisers. Rather, application of the Advisers Act Guidance would confuse individual investors about the scope of protections and remedies available to them in the event of a dispute with their investment professional.[35]

Fourth, the Roundtable strongly believes that the Commission is required to identify the specific Advisers Act requirements — whether imposed by rule, interpretation, or lore —that will be applicable to broker-dealers in order to give them "fair notice" of their obligations.[36] As President Obama noted in Executive Order 13563,[37] the U.S. regulatory system must promote

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[32] *SEC v. Capital Gains Research Bureau, Inc.*, 275 U.S. 180, 187 (1963), *citing* Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong., 2d Sess., 28.

[33] S. Rep. No. 76-1775, at 22 (3d sess. 1940); and H. R. Rep. No. 76-2639, at 28. *See also* 15 U.S.C. § 80b-2(a)(11)(C).

[34] *See* Section IV for the Roundtable's views on the continuing duty.

[35] *See, e.g., Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 19 (1979).

[36] *See SEC v. Upton*, 75 F.3d at 98 ("Due process requires that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.").

[37] *See* Executive Order 13563, *supra* note 18. Although Executive Order 13563 does not on its face apply to independent regulatory agencies, such as the Commission, Executive Order 13579, Regulation and Independent Regulatory Agencies, directs independent regulatory agencies, to the extent permitted by law, to base their

predictability and reduce uncertainty. Extending decades of interpretative guidance, case law, and lore under the Advisers Act to broker-dealers who are neither subject to, nor intended to be subject to, the Advisers Act would create great uncertainty for the industry as well as for Main Street Investors.

The Roundtable believes that the public also should be given notice of the specific Advisers Act Guidance that the Commission proposes to extend to broker-dealers. This would allow the public to consider and comment on whether it is appropriate to apply such guidance to broker-dealers, particularly if it would result in confusing individual investors because of the inconsistencies in the numerous prescriptive rules applicable to broker-dealers as a result of their mandatory membership in FINRA, the MSRB, or other self-regulatory organizations.

We appreciate that the Commission acknowledged in the Release that Advisers Act Guidance relating to the allocation of investment opportunities and the aggregation of orders may not easily be applied to broker-dealers. Accordingly, the Commission asked commenters to assume that the broker-dealer's duty of loyalty would require the broker-dealer to disclose to retail customers how the firm will allocate investment opportunities among its customers, and between customers and the firm's own account. For a broker-dealer, this could include disclosing the method of allocating shares of an initial public offering, and the manner of allocating securities out of the firm's principal account to its customers when agency orders are placed on a riskless principal basis.

The Advisers Act Guidance on allocation requires that any allocation methodology be *fair and equitable*, and the specific allocation practices that the staff has countenanced—*pro rata* or sequential allocation—are premised on a business model in which individual investors are receiving similar advice from related investment processes. Because, as the Commission notes, a *pro rata* or sequential allocation methodology is not easily applied to all business models, the Roundtable respectfully requests that the Commission provide guidance on appropriate allocation methodologies in various scenarios. We believe that the Commission's guidance should at a minimum address a scenario in which a broker-dealer receives numerous orders from a variety of individual investors at many different points during the trading day, which might be attributed to hundreds of individual registered representatives working independently with hundreds, or even thousands, of individual investors.

Advisers Act Guidance also would permit broker-dealers to aggregate (or bunch) orders—without favoring one customer over another. However, broker-dealers would be required to disclose whether, and under what conditions, they aggregate orders.

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rulemakings on the analysis of quantitative and qualitative costs and benefits. *See* 76 Fed. Reg. 41,587 (July 14, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf.

## XI. Potential Areas for Harmonization

The Commission identified six specific areas for the potential harmonization of the regulation of brokers, dealers, and investment advisers, and it requested comment generally on other areas for possible harmonization:

(1) Advertising and Other Communications

(2) Use of Finders and Solicitors

(3) Supervision

(4) Licensing and Registration of Firms

(5) Continuing Education Requirements for Associated Persons

(6) Books and Records

While the Roundtable believes that there likely are potential benefits from harmonization if a uniform standard of conduct were adopted, we do not believe that meaningful comments can be provided at this stage. Nonetheless, it is our view that any harmonization of rules should be focused on streamlining and simplifying rules and disclosure obligations that address the same activities without layering on new requirements.

## XII. Alternative Approaches to a Uniform Fiduciary Standard of Conduct

The Commission identified six possible alternatives to a uniform fiduciary standard of conduct, including taking no action and leaving existing regulatory régimes in place. One of the alternatives put forth by the Commission was to adopt a non-U.S. regulatory model, such as the requirement in the United Kingdom and Australia that persons providing personalized investment advice to retail customers (a) act in the retail customers' best interests and (b) comply with certain requirements relating to fees.

The Roundtable believes that the primary, if not the only, consideration when analyzing the appropriate regulation of broker-dealers and investment advisers must be what is best for investors, and what form of regulation obtains appropriate protection of investors without (a) limiting investors' choices of investment products or services, or of investment professionals; or (b) imposing unnecessary costs or unnecessary burdens on capital formation. The Roundtable strongly opposes incorporating into U.S. regulatory régimes any non-U.S. regulatory model affecting the standard of conduct of broker-dealers and investment advisers, because we believe this alternative would be inconsistent with the express provisions of the Dodd-Frank Act, which require that any promulgated rules relating to the standard of conduct not favor one business model over another, limit investor choice, or preclude broker-dealers from charging commissions.

## XIII. Conclusion

The Roundtable generally continues to support a uniform standard of conduct for broker-dealers and investment advisers. Nevertheless, we believe that the results of the analysis of information provided in response to the Commission's data request will have tremendous importance in determining the scope and substance of any rulemaking. It may very well be that the most appropriate solution is for the Commission to focus its attention on revisions to the disclosure requirements applicable to broker-dealers and investment advisers when providing investment advice about securities to retail customers, rather than to adopt rules that would cause broker-dealers or investment advisers to reduce—or eliminate—the products or services that these financial services providers are able to offer and recommend to their clients.

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The Roundtable appreciates the opportunity to submit comments on the Commission's request for data and other information on the duties of brokers, dealers, and investment advisers as set forth in the Release. If it would be helpful to discuss the Roundtable's specific comments or general views on this issue, please contact me at Rich@fsround.org or Richard Foster at RFoster@fsround.org.

Sincerely yours,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable

*With a copy to*:

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The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
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