MARKETCOUNSEL®

July 5, 2013

VIA INTRANET COMMENT FORM

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

RE: Duties of Brokers, Dealers, and Investment Advisers
File Number 4-606

Dear Ms. Murphy,

Please accept our comments to the U.S. Securities and Exchange Commission's (the "Commission's") request for data and other information regarding the Duties of Brokers, Dealers, and Investment Advisers.

MarketCounsel supports the Commission's attempt to cure the confusion that has proliferated among retail customers between investment advisers and broker-dealers. We agree that the investing public is confused and that the confusion can result in negative and unexpected results for investors as well as the American financial system. What we strenuously disagree with, however, is the notion that the Commission should make brokers and advisers indistinguishable instead of educating the public and enforcing existing rules that would clarify the utility and benefits of both distinct services.

It is ironic that the Commission has used the term "harmony" in trying to make investment advisers look exactly like broker-dealers. Harmony is a word that is difficult to define. In simple terms, however, harmony involves the playing of multiple notes that sound pleasant together. For example, the notes E and G are harmonious with C. Here, the Commission is not trying to make a harmonious chord with the two industries, but instead trying to make them a bland monophonic din that nobody will enjoy.

The assumption being made is that more regulation and a higher standard of care are better. Because broker-dealers are subject to a rules-based set of regulations, that assumption will primarily gravitate investment advisers principles-based regulations towards more rules. This assumption is not, however, based in any fact. More is not always better.

For perspective, MarketCounsel is a business and regulatory compliance consulting firm to some of the country's preeminent entrepreneurial investment advisers. In addition, our affiliated law firm, the Hamburger Law Firm, renders legal counsel to over 1,000 entrepreneurial companies, investment advisers, broker-dealers, hedge funds, family offices, and registered securities personnel. It would reason that we stand to benefit from a more onerous regulatory climate for our clients. However, this short-term view is outweighed by our interest in independent investment advice in America which has been, and seems poised to continue to be, the most significant gain for investors in decades.

OVERVIEW

Investment advisers and broker-dealers have been separately regulated since the 1930's. For decades, brokers sold securities for a commission and advisers provided advice for a fee. The Investment Advisers Act of 1940 (the "Advisers Act") recognized the distinction between advice and sales and required anyone that provided *advice* about *securities* for *compensation* to register as an investment adviser. The Advisers Act even provided an exemption (not an exclusion) for broker-dealers that provided advice *solely incidental* to their brokerage services.

Over a period of years, however, the sales vs. advice distinction became blurred and it's no wonder that the public became confused. Brokers were permitted to use names like "advisor" and "financial advisor" that certainly sounded like they were holding themselves out as investment advisers. Additionally, they were permitted to provide their services for a "fee in lieu of commission" which was practically indistinguishable from the way investment advisers charged fees. Finally, more individuals began providing both brokerage and advisory services simultaneously, sometimes to the same clients.

When a person is confused between two issues, there are typically three options to cure that confusion: i) educate the person so they understand the difference; ii) eliminate the differences; or iii) eliminate the ramifications to any decision. Unfortunately, it appears that the Commission and Congress favor the latter solutions which assume investors are too simple to understand the difference between someone selling something and someone providing advice.

Many investment advisers industry have championed that part of harmonization that has received the most press, the extension of a fiduciary duty to broker-dealers – some because they feel it's in the best interest of investors, others because they feel what's good for the goose is good for the broker. We believe, however, that extension of the fiduciary duty to brokers presages a slippery slope that quite likely will result in: (i) investment adviser regulations being amended to look far more like the rules-based broker-dealer regulations; and (ii) create a more logical conclusion to impose a self-regulatory organization ("SRO") for investment advisers since, after all, they'd already be enforcing the same regulations. Either of these results would cripple independent investment advisers who provide a valuable service to investors and the securities industry.

Lost amid all this regulatory and legislative furor is a clear and unmitigated truth: registered representatives, as agents of their broker-dealer (not the investor) are simply paid transaction-based compensation to buy and sell securities. They have compensation arrangements with their broker-dealer employers that incent certain behaviors that may not be in the best interests of their clients. Asking individuals in this position to function in a fiduciary capacity doesn't fit. Today, many of these individuals do, however, act in either a salesman or advisor position depending upon a particular relationship. It would seem logical that the Commission simply enforce the requirement that *brokers* limit themselves to "solely incidental" advice if they wish to avoid being regulated as *advisers*.

Should the Commission continue to pursue its concept of harmonization, individual investors are the only certain casualties. The definition of "fiduciary duty" will become watered down, even if by interpretation and no-action letters, in order to cover the business practices of broker-dealers. Brokers, who provide an invaluable service to investors, will need to re-assess their services provided specifically to smaller investors because of increased cost and liability. Finally, independent investment advisers will be challenged to thrive amidst increased costs of doing business under a rules-based regulatory scheme.

Stop assuming that investment advisers and broker-dealers should be treated the same just because they speak to the public about securities. The true path to ending confusion is a simple one. Finally enforce the rules that are already in place and require clear disclosure to clients regarding the scope of their relationship, responsibilities, and conflicts of interest with their broker or adviser.

CONFUSION IS NOT LIMITED TO THE INVESTING PUBLIC

Over the past several years, the adviser versus broker political debate has intensified, with politicians and regulators weighing into the conflict over the best way to protect individual investors from fraud and financial mismanagement. Despite the vast majority of fraud, liability, and other regulatory problems emanating from broker-dealers, much of the political rhetoric has focused on the best and most effective means of ensuring vigorous oversight of all securities professionals. While this is a noble cause on its face, at no point has the Commission stepped back to question the need to treat investment advisers and brokers the same.

When first proposed in June of 2009, President Obama's Financial Regulatory Reform Plan summarized the marketplace inequities quite clearly:

> *Retail investors are often confused about the differences between investment advisers and broker dealers. Meanwhile, the distinction is no longer meaningful between disinterested investment adviser and a broker who acts as an agent for an investor; the current laws and regulations are based on antiquated distinctions between the two types of financial professionals that date back to the early 20th century. Brokers are allowed to give 'incidental advice' in the course of their business, and yet retail investors rely on a trusted relationship that is often not matched by the legal responsibility of the securities broker. In general, a broker-dealer's relationship with a customer is not legally a fiduciary relationship, while an investment adviser is legally its customer's fiduciary.*

The Plan went on to issue a compelling mandate:

> *Standards of care for all broker-dealers when providing investment advice about securities to retail investors should be raised to the fiduciary standard to aligning the legal framework with investment advisers.*

Nowhere does this Plan imply that the roles of investment advisers and brokers should be identical. It merely points out that the distinction has become meaningless. That's because broker-dealers have been allowed to converge on investment advisers (under the cover of "solely incidental" services) without furnishing similar protections for investors. In fact, the functions of brokers and advisers are patently disparate and distinct. The President's underlying desire is that brokers, when functioning in an advisory capacity, be required to adhere to a fiduciary standard similar to that imposed on investment advisers.

THE COMMISSION'S HARMONIZATION REQUEST FOR DATA

The Commission's request primarily asked for quantitative data about the cost and benefit to harmonizing the industries. While we do not have such quantitative data, it is apparent from our review of the other comment letters submitted to the Commission to date that nobody else does either. The absence of quantitative results following the Commission's request for such data should be the most compelling information that could be gleaned. It would appear to be time for the Commission to step back and examine the general premise of whether harmonization, as the term has come to be used, makes sense at all.

The Advisers Act and its rules have traditionally been principles-based, while the Securities Exchange Act and SRO rules have traditionally been rules-based. Because of this, the Commission's harmonization of rules would naturally result in more rules for investment advisers. The cost to advisers would be significant from a financial *and* cultural standpoint, especially in view of the diversity of investment advisers' business models, sizes and structures. The benefit to clients, however, would be negligible considering the limited degree of economic loss to clients perpetrated by those acting solely as investment advisers. Investment advisers have generally not been the ones creating headlines for defrauding clients and losing or misplacing assets over the years, and when they were, it was almost never for their

investment advisory activities. If investment advisers and brokers are family because they both provide services within the securities industry, then don't punish the adviser because his cousin misbehaves.

Somewhere along the way, the Commission made an assumption that investment advisers and broker-dealers should be moved towards the same standard of conduct, rules, and regulations. The Commission is considering going as far as having a single set of rules for the two industries. In its request for data and other information regarding the Duties of Brokers, Dealers, and Investment Advisers, the Commission solicits submissions to determine the 'cost' side of a cost-benefit analysis, presumably having already reached its own conclusion on the benefits that would be created by such harmonization.

CONCLUSION

Both investment advisers and broker-dealers are important to our financial system and American investors. It is incontrovertible that everyone is confused by the standard of conduct and general relationship characteristics of investment advisers and broker-dealers with their clients.

We respectfully ask that the Commission take the bold action of re-assessing the benefits of harmonization and refrain from continuing down the path of removing distinctions among two disparate service providers within the securities industry and, rather, restore the distinction by enforcing the current rules. Instead of taking the easy way out by getting rid of those distinctions, the Commission should work towards making those differences clear. Enforce the Advisers Act and require brokers to register as investment advisers when their advice is not solely incidental to their brokerage services. Require disclosure by brokers and advisers that explains the scope of their relationship, responsibilities, and conflicts of interests.

This is undoubtedly not the quantitative data and information that the Commission solicited, but we urge you to consider that the absence of quantitative results following the Commission's request for such data should be the most compelling information that it could have hoped to collect from its request.

MarketCounsel hopes that our comments, made on behalf of us and our entrepreneurial, closely-held, independent, investment adviser clients are beneficial to this process. Thank you for the opportunity to provide input and should you have any questions or require any additional information regarding any of the foregoing, we remain available at your convenience.

Best regards,
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