



July 5, 2013

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

Re: Duties of Brokers, Dealers, and Investment Advisers, File No. 4-406

Dear Ms. Murphy:

The Association of Institutional INVESTORS (the “Association”) appreciates the opportunity to comment on the Security and Exchange Commission’s (“SEC”) request for data and other information relating to the benefits and costs that could result from various alternative approaches regarding the standards of conduct and other obligations of broker-dealers and investment advisers (the “RFD”).¹ Through this comment letter, the Association hopes to provide the SEC with helpful information it may use as it considers standards of conduct for broker-dealers and investment advisers when providing personalized investment advice to retail customers.

The Association includes some of the oldest, largest, and most trusted fiduciary investment advisers in the United States. The Association consists primarily of institutional investment management firms that serve the interests of individual investors through public and private pension plans, endowments, foundations, and registered investment companies. Collectively, our member firms manage ERISA defined benefit and defined contribution (401(k)) plans, governmental pension plans, mutual funds, and personal investments on behalf of more than 100 million American workers and retirees.

OVERVIEW OF THE ASSOCIATION’S COMMENTS

The RFD refers to Section 913(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”) and the rulemaking authority under that provision that grants to the SEC the authority to extend rules “as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide)”² To that end, the Association believes the current fiduciary standard that applies to

¹ Duties of Brokers, Dealers, and Investment Advisers, 78 Fed. Reg. 14,848 (Mar. 7, 2013).

² See Section 913 of the Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

investment advisers pursuant to the Investment Advisers Act of 1940 (“Advisers Act”)³ should remain unchanged in the context of providing investment advice predominately to institutional and retail clients, to the extent such clients are “accredited investors” under the Securities Act of 1933.⁴ We note that the RFD does not suggest that the SEC is considering any rulemaking that would apply to investment advisers or broker-dealers other than when providing investment advice to retail customers, and we therefore ask that the SEC confirm and clarify, in any proposed rule or accompanying release, that investment advice provided to clients other than retail customers is out of scope.

I. APPLICATION OF FIDUCIARY STANDARD UNDER THE ADVISERS ACT TO INVESTMENT ADVISERS

In 2010, the Association submitted a comment letter to the SEC on Sections 913 and 914 of the Act, which discussed among other things why we believe that the fiduciary standard that applies to investment advisers pursuant to the Advisers Act when managing all categories of client accounts is appropriate and should not be changed (the “Section 913 Letter”).⁵ We continue to believe in the efficacy of this standard, which our clients are well aware of and rely on, especially for those advisers who manage institutional client assets. To that end, we would like to take this opportunity to reiterate the benefits of the current regulatory regime that governs these types of advisers.

As institutional investment advisers, our clients rely on us to prudently manage participants’ retirements, savings, and investments. This reliance is based, to a large extent, upon the fiduciary duty we owe to these organizations and individuals. Under the Advisers Act, investment advisers must act in the best interest of their clients and owe them a duty of loyalty and care in rendering investment advice and executing their services. Investment advisers must treat each client fairly, make investment decisions consistent with client objectives, disclose all material facts accurately and manage any conflicts of interest. Failure to live up to this responsibility can result in reputational damage, SEC enforcement, unfavorable litigation and the loss of the ability to serve in the capacity of investment adviser.

Moreover, given the nature of the clients of institutional investment advisers, institutional investment advisers may also be subject to the fiduciary standards under the Employee Retirement Income Security Act of 1974 (“ERISA”).⁶ As stated above, many clients of the Association’s investment advisors are covered by Title I of ERISA, in that they tend to be defined benefit and/or defined contribution plans established or maintained by an employer or employee organization, including retirement plans (e.g., pension, profit sharing, 401(k) plans and ESOPs) and welfare plans (e.g., medical, life and disability plans). In addition, many clients of the Association’s investment advisors are governmental defined benefit plans and although not subject to ERISA, include ERISA-like state statutes and/or require advisers to apply ERISA

³ 15 U.S.C. § 80b-1 *et seq.*

⁴ 15 U.S.C. § 77a *et seq.*

⁵ See letter from the Association of Institutional INVESTORS to the SEC, dated Dec. 24, 2010, *available at*: <http://www.sec.gov/comments/df-title-ix/enhancing-ia-examinations/enhancingiaexaminations-32.pdf>.

⁶ 29 U.S.C. § 1001, *et seq.* (1974).

standards pursuant to contract. ERISA regulation provides an extra layer of investor protection that ensures that advisers act in the best interests of their clients.

For decades, the Advisers Act fiduciary standard has been reinforced under common law and through regulatory action resulting in enhanced and ever stronger investor protection. To that end, our fiduciary clients have a clear understanding and expectation of the level of service and fiduciary standard of their investment advisers when providing investment advice. In the context of investment advisers who are predominately engaged in providing investment advice to institutional and retail clients who are “accredited investors,” the Association believes that no further rulemaking is necessary or appropriate.

II. INSTITUTIONAL V. RETAIL ADVISERS

The Association continues to believe that it is important to distinguish between investment advisers who predominantly provide investment advice to accredited investors (an “institutional adviser”) and advisers who provide personalized investment advice to non-accredited investors (a “retail adviser”). In distinguishing between retail and institutional advisers, the Association recommends that: (1) “accredited investor” be defined as it is currently defined in Regulation D under the Securities Act of 1933;⁷ (2) “institutional adviser” be defined as a registered investment adviser, whose annual gross revenues earned from providing advisory services to accredited investors represent 85% or more of the annual gross revenues earned from providing advisory services to all clients of the registered investment adviser;⁸ and (3) “retail adviser” be defined as any registered investment adviser who is not an institutional adviser.

We therefore urge that if the SEC adopts new standards of conduct for broker-dealers and investment advisers that provide investment advice to retail customers within the meaning of Section 913, institutional advisers should remain subject only to the Advisers Act and the jurisprudence and SEC regulations, guidance and interpretations thereunder, rather than any new standards adopted pursuant to Section 913, notwithstanding that their accredited investor clients may include retail customers.

The Advisers Act and the federal securities laws differentiate meaningfully between the levels of protection provided to accredited investors versus non-accredited investors. Accredited investors are allowed to invest in various investment products, such as unregistered investment companies, 144A offerings, and privately placed securities that are simply off-limits to retail investors. Certain accredited investors are permitted to agree to performance-based fee arrangements that are unavailable to retail investors. Permitting accredited investors the freedom to invest in these products and strategies is appropriate because accredited investors are able to better understand complex financial matters and risks than the typical retail investor.

⁷ 17 C.F.R. §230.501.

⁸ The proposed definitions of institutional advisers and limited purpose broker use the same standards used in Section 102(a)(6) of the Act to define “predominantly engaged.”

In our experience, accredited investors are more proactive and self-reliant in overseeing the institutional advisers they hire. Almost all registered investment companies have independent boards and counsel, and most clients of institutional advisers either have their own staff or consultants that perform extensive due diligence on the institutional adviser's investment process and business operations and receive regular detailed reports on the performance of their portfolio.

The Association believes that an adviser's activities related to sponsoring and managing pooled investment products (such as mutual funds) should be considered institutional in nature for the purposes of the institutional adviser definition above, even if the ultimate purchasers of those products may be non-accredited investors. In addition, the Association believes that to the extent that an adviser supplies investment research or model strategies to other advisers for such adviser's use with end clients, but does not have investment discretion or direct contact with the non-accredited customer, such activities should be considered institutional in nature, and should not be categorized as providing "personalized investment advice to retail clients" for the purpose of determining whether the adviser should be considered an institutional adviser.

The Association believes that the distinction between institutional advisers and retail advisers should be drawn at the entity level in order to avoid duplication of regulatory oversight. This is appropriate because institutional advisers -- all of whose investment advisory activities are subject to the overarching fiduciary duties and the SEC's regulations and guidance under the Advisers Act -- do not present any need to be made subject to any additional requirements that may be adopted to govern investment advice to retail customers. If there is no regulatory gap that needs to be addressed (e.g. investor protection or reduction of investor confusion), there is no need for additional regulation. Retail customers of institutional advisers currently benefit, and will continue to benefit, from the full protections of the Advisers Act standards and regulatory regime, and labor under no confusion about the nature of the services they receive, the standards that apply or how their adviser addresses conflicts of interest (matters disclosed in the Form ADV brochure that they receive).

III. REGULATORY HARMONIZATION

In the RFD, the SEC notes that the SEC staff study on Section 913 recommended that the SEC consider harmonizing other areas as well, such as advertising and other communications, supervision, licensing and registration of firms, licensing and continuing education requirements for persons associated with firms, books and records, and the use of finders and solicitors.⁹

The Association strongly urges the SEC to focus on resolving questions relating to the fiduciary standard for retail customers before proceeding with addressing regulatory harmonization. We believe it is not feasible for the SEC to determine whether new harmonized requirements are needed, or to design new requirements, unless and until its approach to a possible retail fiduciary standard becomes clear. Further, it is exceedingly difficult for us or any other market participant, at this stage of the Section 913 process, to provide data or other information or comment on

⁹ See Duties of Brokers, Dealers, and Investment Advisers, 78 Fed. Reg. at 14,8562.

questions related to regulatory harmonization, prior to answering the threshold fiduciary duty question. Only when that has been accomplished can it be determined whether there are regulatory gaps or benefits exceeding costs from imposing harmonization.

CONCLUSION

The Association supports the SEC's goals of creating a coordinated, appropriate regulatory regime and believes such a regime is critical to the future of the investment advisory community. We appreciate having the opportunity to comment on the SEC's RFD and look forward to working with the SEC as it determines whether to proceed with a rulemaking under Section 913 of the Dodd-Frank Act. Please feel free to contact me with any questions you may have on our comments at jgidman@loomissayles.com or (617) 748-1748.

On Behalf of the Association of Institutional INVESTORS,

A handwritten signature in black ink, appearing to read "John Gidman", with a long, sweeping horizontal flourish extending to the right.

John Gidman
President, Association of Institutional INVESTORS