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Invested in America

July 21, 2017

Via Webform to: https://www.sec.gov/cgi-bin/ruling-comments

U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-1090
Attn: Mr. Brent J. Fields, Secretary

Re: Standards of Conduct for Investment Advisers and Broker-Dealers

Dear Mr. Fields:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates SEC Chairman Clayton's recent request for public comment on the standards of conduct for investment advisers and broker-dealers (the "Request").[2] We welcome the SEC's renewed focus on this important issue. We wish to remain constructive participants in the process and hope that you find our members' collective feedback helpful.

The Request states that the SEC is continuing to evaluate a range of potential regulatory options including:

(1) maintaining the existing regulatory structure,
(2) requiring enhanced disclosures to mitigate investor confusion,
(3) developing a best interest standard for broker-dealers ("BDs"), and
(4) developing a uniform standard of conduct for BDs and investment advisers ("IAs") when providing personalized investment advice to retail investors.

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[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Public Statement by Chairman Jay Clayton, *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (June 1, 2017), available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

The Request further states that the recent applicability of the Department of Labor ("DOL") Fiduciary Rule (the "DOL Rule"), along with other marketplace changes, constitute significant developments since the SEC last solicited comments from the public in 2013. We note that the President has directed the DOL to study whether the DOL Rule has limited investor choice, encouraged litigation, and had a harmful effect on the industry, and if it finds that any of these results will ensue from the DOL Rule, the DOL must revise it accordingly (or rescind it altogether). Secretary Acosta has urged the Chairman to collaborate on consistent regulation, and the Chairman has pledged to do so. Thus, the Request expresses the mutual interest of the SEC and the DOL in closely coordinating their regulatory activities on this issue.

Consequently, SIFMA's comment will focus on the feasibility of the four regulatory options described above[3] in light of the recent applicability of the DOL Rule, and the recently expressed interest in SEC/DOL regulatory coordination.[4] Our comment will also emphasize our strong support for SEC/DOL coordination and the unique opportunity it presents to craft a single, consistent long-term solution for all retail investors. Meaningful and productive coordination, however, will take time. Thus, we are urging – and we welcome the SEC joining us in urging – the DOL to extend the January 1, 2018 applicability date of the provisions in the DOL's Best Interest Contract Exemption and Principal Transactions Exemption that are not now in effect.[5]

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[3] Options (1) and (2) are addressed in Appendices 1 and 2 hereto, respectively.

[4] The Request also seeks any relevant data that may inform the standard of conduct debate. SIFMA continues to review whether we may be able to collect and produce such data and if so, we would do so in a separate submission at a later date.

[5] *See* SIFMA comment letter to DOL, Reference: RIN 1210-AB82 (July 13, 2017) (expressing the critical importance of delaying the January 1, 2018 date by a minimum of 24 months after completion of the review and publication of final rules).

SIFMA has long supported SEC action to enhance standards of conduct.

As you know, Section 913 of the Dodd-Frank Act empowers the SEC to establish a uniform fiduciary standard that applies equally to BDs and IAs when providing personalized investment advice about securities to retail clients. Section 913 requires that the uniform fiduciary standard be "no less stringent than" the general fiduciary duty implied under Section 206 of the Investment Advisers Act of 1940 ("Advisers Act").

For many years, SIFMA has proactively and publicly supported SEC action to enhance standards of conduct for BDs and RIAs. Since 2009, SIFMA's formal written advocacy on this issue has included: Congressional testimony on five separate occasions;[6] six separate comment letters to the SEC;[7] and one comment letter to FINRA,[8] not to mention countless media interviews, op-eds, and public speaking engagements on the topic. Notwithstanding SIFMA's years-long public engagement and advocacy on this issue, our work product constitutes but a tiny fraction of the truly voluminous and robust record – consisting of thousands of comments – that the SEC has compiled on this issue over the past seven years.[9]

SIFMA's work product includes: two economic study reports quantifying the costs and expenses under various approaches; two reports providing a detailed roadmap for SEC rulemaking under Dodd-Frank Section 913; and a robust cost-benefit analysis.

Regardless, at this point, it seems unlikely that the SEC will proceed to rulemaking to frame a uniform standard that is "no less stringent than" the Advisers Act standard, given some

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[6] (1) SIFMA testimony before the Senate Banking Committee (March 10, 2009), http://www.sifma.org/issues/item.aspx?id=1510.
(2) SIFMA testimony before the House Financial Services Committee (July 17, 2009), http://www.sifma.org/issues/item.aspx?id=1515.
(3) SIFMA testimony before the House Financial Services Committee (October 6, 2009), http://www.sifma.org/issues/item.aspx?id=1519.
(4) SIFMA testimony before House Financial Services Committee (September 13, 2011), http://www.sifma.org/issues/item.aspx?id=8589935390.
(5) SIFMA testimony before House Financial Services Committee (June 6, 2012), http://www.sifma.org/issues/item.aspx?id=8589938957.

[7] (1) SIFMA comment to SEC (August 30, 2010), https://www.sifma.org/issues/item.aspx?id=22263.
(2) SIFMA & Oliver Wyman comment to SEC (November 1, 2010), http://www.sifma.org/issues/item.aspx?id=21999.
(3) SIFMA & Oliver Wyman comment to SEC (November 17, 2010, http://www.sifma.org/issues/item.aspx?id=22336.
(4) SIFMA comment to SEC (July 14, 2011), http://www.sifma.org/issues/item.aspx?id=8589934675.
(5) SIFMA comment to SEC (May 4, 2012), https://www.sifma.org/issues/item.aspx?id=8589938634.
(6) SIFMA comment to SEC (July 5, 2013), https://www.sifma.org/issues/item.aspx?id=8589944317.

[8] SIFMA comment to FINRA (December 3, 2010), http://www.sifma.org/issues/item.aspx?id=22482).

[9] *See* Comments on Duties of Brokers, Dealers, and Investment Advisers, Release Nos. 34-69013; IA-3558; File No. 4-606, available at: https://www.sec.gov/comments/4-606/4-606.shtml.

of the inherent differences between BDs and IAs.[10] Accordingly, to move forward, the SEC should consider establishing a best interest standard of conduct for BDs that builds upon their existing regulatory regime.

FINRA currently has well-developed and well-understood rules and guidance governing BDs. Under existing FINRA Rules, for example, BDs are required to deal fairly with customers and to "observe high standards of commercial honor and just and equitable principles of trade."[11] This obligation requires, among other things, having a reasonable basis for recommendations about securities in light of a customer's financial situation and needs.[12] FINRA has, in turn, interpreted this suitability obligation as requiring that BDs' recommendations be consistent with their customers' best interests, thereby prohibiting BDs from placing their interests ahead of their customers' interests.[13] These existing rules and guidance provide a solid foundation upon which to build a heightened and more stringent standard of conduct for the benefit of retail customers.

The SEC should consider a best interest standard for BDs that encompasses a duty of loyalty, a duty of care, and enhanced up-front disclosures.

On June 9, 2017, the fiduciary definition in the DOL Rule, and the Impartial Conduct Standards in the Best Interest Contract Exemption (the "BICE") and the Principal Transactions Exemption, as well as in five other prohibited transaction exemptions, became applicable.[14] Consequently, BDs who make recommendations to retirement investors regarding investments, rollovers, distributions and transfers are fiduciaries, and they may not provide services to plans or IRAs, may not sell products to plans or IRAs, and may not receive direct or indirect fees in connection with transactions in plans or IRAs without qualifying for an exemption.

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[10] Three key differences are: (1) IAs commonly provide <u>continuous</u> investment advice to their clients, which entails an ongoing duty to supervise, regardless of whether any trading occurs. The IA compensation structure reflects this business model, as most IAs charge their clients fees based on the percentage of assets under management. BDs, in contrast, provide <u>episodic</u> investment guidance incidental to a specific transaction, and are generally compensated through commissions. (2) IAs frequently exercise investment <u>discretion</u> over their client accounts, meaning that the adviser under the terms of an agreement with the client has the power to trade on the client's behalf without even speaking with the client. BDs, on the other hand, provide <u>non-discretionary</u> recommendations. BDs generally cannot trade on their client's behalf; clients must authorize any transactions. (3) BDs and IAs operate under very different regulatory regimes. While the Advisers Act does not expressly mandate a <u>fiduciary duty</u> for IAs, one was read into it by the Supreme Court decision in *Capital Gains*. 375 U.S. 180 (1963). Under the Exchange Act, a BD that provides investment services to clients is generally not a fiduciary, but must comply with FINRA standards of <u>fair dealing</u> with clients.

[11] FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade).

[12] FINRA Rule 2111 (Suitability).

[13] FINRA Rule 2111 (Suitability) FAQ, Q7.1, available at https://www.finra.org/industry/faq-finra-rule-2111-suitability-faq.

[14] 82 Fed. Reg. 66 (April 7, 2017), available at https://www.gpo.gov/fdsys/pkg/FR-2017-04-07/pdf/2017-06914.pdf.

The impact of these new rules has been to significantly shift IRAs from brokerage accounts to advisory accounts, from personal service to call centers or the internet, and to limit the products and fee arrangements available to IRAs. It is critical that the SEC not frame a rule that will have a similar negative impact on investors.

The DOL Rule's Impartial Conduct Standards require: (1) providing advice in the best interest of the client, which means acting prudently and without regard to the fiduciary's own interests, (2) charging no more than reasonable compensation,[15] and (3) avoiding materially misleading statements.[16]

In addition to the Impartial Conduct Standards, the BICE and the Principal Transaction Exemption contain a host of onerous conditions, including, among others, warranties, written disclosure requirements, and a private right of action. These onerous conditions have contributed and will continue to contribute to greater cost, less choice and less professional services for retirement savers. These conditions, along with the rest of the DOL Rule and exemptions, will be reviewed by the DOL as directed by the Presidential Memorandum on the DOL Rule issued on February 3, 2017.[17] Regardless, firms do not need to comply with these additional conditions during the transition period from June 9, 2017 through January 1, 2018 (the "transition period").[18]

The SEC should consider a new standard of conduct for BDs that reflects its market expertise and experience, but without the pitfalls of the DOL Rule. For example, the BICE requires a party making a recommendation to:

> act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and

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[15] In the Principal Transaction Exemption, the Impartial Conduct Standards refer to the fiduciary's obligation to seek the best execution reasonably available under the circumstances with respect to the transaction, rather than "reasonable compensation."

[16] 81 Fed. Reg. 68 (April 8, 2016), 21077, available at https://www.gpo.gov/fdsys/pkg/FR-2016-04-08/pdf/2016-07924.pdf.

[17] Presidential Memo available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule. Moreover, the DOL Rule is also the subject of ongoing legal challenges. Although we will not repeat them at length here, we respectfully submit that the DOL Rule raises a host of serious legal problems. Indeed, the DOL itself has recently acknowledged in its legal briefing that the exemptions' restrictions on class-litigation waivers, which are among the requirements set to take effect January 1,2018, are improper and should be vacated.

[18] 82 Fed. Reg. 66 (April 7, 2017), available at https://www.gpo.gov/fdsys/pkg/FR-2017-04-07/pdf/2017-06914.pdf.

> needs of the Retirement Investor, ***without regard to the financial or other interests of the [BD]*** …. (emphasis added).[19]

The language "without regard to the financial or other interest of" derives from the fiduciary duty standard under ERISA,[20] which is recognized as the "highest known to the law."[21] The "without regard to..." proviso, however, has caused confusion and uncertainty in the IRA setting, and the SEC should not import this confusion into the BD world. Nor should the SEC adopt a standard of conduct that may be alleged to be violated every time a BD recommends anything other than the least expensive product, or considers costs, both of which are expressly permitted in various circumstances under existing securities laws.[22]

Given that the existing FINRA regulatory framework already contains the beginnings of a best interest standard of conduct for BDs, it would make logical sense for the SEC to direct, and as appropriate approve, FINRA rulemaking to incorporate the principles of a duty of loyalty and a duty of care, as well as enhanced up-front disclosure, into the appropriate FINRA Rules, including the Suitability Rule. Specifically, the Suitability Rule could be amended to provide that when making a 'recommendation'[23] to a 'retail customer,'[24] a BD shall act in the best interest of such customer at the time the recommendation is made (i.e., a duty of loyalty), and

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[19] Best Interest Contract Exemption at Section VIII(d), p. 31, available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/best-interest-contract-exemption-with-amended-applicability-dates.pdf.

[20] ERISA § 404(a), 29 U.S.C. § 1104, available at https://www.law.cornell.edu/uscode/text/29/1104 ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries….")

[21] *Donovan v. Bierwith*, 680 F.2d 263, 272 n. 8 (2d Cir. 1985).

[22] *See, e.g.*, FINRA Rule 2111 (Suitability) FAQ, Q7.1, available at https://www.finra.org/industry/faq-finra-rule-2111-suitability-faq ("The requirement that a [BD's] recommendation must be consistent with the customer's best interests does not obligate a [BD] to recommend the "least expensive" security or investment strategy … as long as the recommendation … is not placing his or her interests ahead of the customer's interests. Some of the cases in which FINRA and the SEC have found that [BDs] placed their interests ahead of their customers' interests involved cost-related issues. The cost associated with a recommendation, however, ordinarily is only one of many important factors to consider …."); FINRA Rule 2121.01(b)(2) (Fair Prices and Commissions) (FINRA's markup/markdown rules expressly include consideration of cost to the financial institution – "in the case of an inactive security the effort and cost of buying or selling the security").

[23] 'Recommendation' means, as such term is defined under FINRA guidance, and for which the BD receives or will receive compensation, either of the following recommendations: (1) a non-discretionary recommendation to buy, hold, or sell securities, or to follow an investment strategy involving securities, for taxable and non-taxable accounts; or (2) a non-discretionary recommendation to roll over or transfer assets in an employer-sponsored retirement plan to an individual retirement account (IRA).

[24] 'Retail customer' means a natural person or legal entity, or the legal representative of such natural person or legal entity, in each case other than an 'institutional account' (as defined under FINRA Rule 4512), who receives a recommendation from his, her or its BD and implements such recommendation with such BD primarily for personal, family, retirement, or household purposes.

shall not have a continuing duty to the customer after making the recommendation.[25] Further, the recommendation shall reflect the 'reasonable diligence'[26] and the reasonable care, skill, and prudence that a prudent registered representative would exercise based on the 'customer's investment profile'[27] (i.e., a duty of care).

The new standard of conduct should also be accompanied by appropriate principles-based rules on disclosure. Such rules could provide that the first time or prior to the first time a BD executes a transaction based on a recommendation to a retail customer, such BD shall disclose to such customer, in a clear and concise manner, the following: (i) the type and scope of services the BD may provide; (ii) the standard of conduct that may apply to the relationship; (iii) the types of compensation the BD (and its registered representatives and associated persons) may receive and the customer may pay; and (iv) any 'material conflict of interest.'[28] BDs should retain flexibility to elect the timing and content, form (whether paper, electronic, web-based, or otherwise), and manner of delivery (whether hard copy or electronic delivery or access) of disclosure, including any updates to disclosure and notices thereof, based on the BD's particular business model. Specifically, we urge the SEC to avoid the pitfalls of the DOL's overly prescriptive exemptions that have proven to be a heavy financial burden for the industry and a concomitant increase in cost to investors.

As discussed above,[29] the host of additional onerous conditions in the BICE and the Principal Transaction Exemption do not require compliance until the conclusion of the transition period. We do not contemplate that any of these conditions, or any other requirement under these exemptions, other than those described above, would apply to BDs under a new, SEC/FINRA best interest standard of conduct for BDs. Rather, the standard would remain principles-based and circumscribed.

Likewise, consistent with our prior written advocacy on this issue, the new standard would not prohibit BDs from offering any of the following, if accompanied by appropriate disclosure, and the product or service is in the best interest of the customer: (1) proprietary products or services (including those from affiliates); (2) transaction charge-based accounts (*e.g.,* commissions); (3) complex products (*e.g.,* structured products, alternative investments such as hedge funds and private equity funds, etc.); and (4) principal transactions, upon a one-time written disclosure and corresponding client consent.

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[25] Consistent with Section 913 of the Dodd-Frank Act, Congress has already determined that a BD shall not have "a continuing duty of care or loyalty to the customer after [making a recommendation] about securities."

[26] 'Reasonable diligence' means as defined under current FINRA guidance.

[27] 'Customer's investment profile' means as defined under current FINRA Rule 2111 (Suitability).

[28] 'Material conflict of interest' means a financial interest of a BD that a reasonable person would expect to affect the impartiality of a recommendation.

[29] See footnotes 17 – 18 and accompanying text.

Once these principles are adapted to BD services and thereafter incorporated into FINRA Rules, the new standard of conduct would be in place and in effect, and further formal rulemaking would not be necessary but would be permissive. As a predominantly principles-based standard, this approach would allow BDs to retain an appropriate measure of flexibility to choose precisely how to ensure compliance with the new standard of conduct.

This proposed approach would derive a number of significant regulatory efficiency and investor protection benefits. Our proposed approach would:

- enhance the existing suitability obligation under FINRA rules, building upon them to create a heightened and more stringent best interest standard of conduct for the benefit of retail customers;

- apply across all securities recommendations made to retail customers in all BD accounts (not just IRA accounts);

- build upon, and fit seamlessly within, the existing and long-standing securities regulatory regime for BDs, coupled with robust examination, oversight, and enforcement by the SEC, FINRA and state securities regulators; and

- be akin to, and well aligned with, the IA standard under the Advisers Act insofar as the new standard would include a duty of loyalty and a duty of care, and would require up-front disclosure to the customer of important information.

Thus, the new standard of conduct would operate in harmony and consistency with all existing standards of conduct, including the current BD and IA regulatory frameworks (and the DOL Rule as we would expect it will be revised following the President's directed review), as well as any prospective future rulemaking by the SEC under its Dodd-Frank Section 913 authority.

Further SEC and DOL coordination could ensure that the conduct standards for BDs remain high, consistent, and harmonized across all regulatory regimes.

We applaud the recently expressed mutual interest of the SEC and the DOL in closely coordinating their regulatory activities on this important investor protection issue.

The SEC and DOL should work together moving forward. Specifically, we encourage the SEC to coordinate with the DOL to develop a new exemption consistent with the new SEC/FINRA standard.

Finally, as we stated at the outset, we are also urging the DOL – and we encourage the SEC to join our request – to extend the January 1, 2018 applicability date by a minimum of 24 months after completion of the DOL's review and publication of final rules, in order to provide, among other things, sufficient time for the SEC and DOL to collaborate appropriately.

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We look forward to further discussions with you regarding our proposal, including the potential for joint discussions with DOL staff. Please contact us at 202.962.7300 if you have any questions or comments.

Sincerely,

Kevin M. Carroll

Kevin M. Carroll
Managing Director and Associate General Counsel

cc: The Honorable Jay Clayton, Chairman
The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara M. Stein, Commissioner
David Grim, Director, Division of Investment Management
Heather Seidel, Acting Director, Division of Trading and Markets

Appendix 1

Doing nothing is not an option.

The first option identified by the SEC is to maintain the existing regulatory structure (i.e., essentially do nothing). Doing nothing is not an option. To understand why, it is helpful to articulate the differences and similarities between BD and IA business practices, the public policy interest in establishing similar standards for similar conduct, and the practical impact on investors.

As discussed above, there are inherent differences between BDs and IAs.[30] IAs generally provide continuous, discretionary, investment advice to their clients and may also, or instead, provide financial planning services and reports on securities.[31] BDs, on the other hand, generally provide episodic, non-discretionary, investment guidance to their clients and may also, or instead, focus their business activities on clearing and settling trades, underwriting securities, or serving as market makers.[32]

The current debate over standards of conduct focuses on the narrow overlap in services provided by BDs and IAs, specifically, when they provide non-discretionary, personalized investment assistance to their retail clients. In general, similar services should be made subject to similar professional standards. This should be accomplished by norming and making more uniform the conduct standards for BDs and IAs when providing nondiscretionary, personalized investment assistance.

During 2009, numerous members of Congress and their staff, and senior officials at the SEC and FINRA and their staff, expressed the sentiment that investors should receive comparable levels of protection when they purchase comparable products and services, regardless of the financial professional involved.[33] SIFMA and its members were at the time (and remain) active supporters of this approach. Particularly in the wake of the 2008 financial crisis, we wanted to make very clear and public that our industry firmly supports consistent and high standards for interacting with individual clients, including putting the client's interest first.

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[30] *See* footnote 10 and accompanying text.

[31] *See* Comment Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth M. Murphy, Secretary, Sec. & Exch. Comm'n at 11 (July 5, 2013), available at http://www.sifma.org/issues/item.aspx?id=8589944317.

[32] *See* Michael Koffler, *Six Degrees of Separation: Principles to Guide the Regulation of Broker-Dealers and Investment Advisers* 41 SRLR 766, 3 (2009), available at http://www.sutherland.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEv0JDu0!/fileUpload.name=/PDFArtic42709.pdf.

[33] *See e.g.*, Speech by SEC Commissioner Elisse B. Walter, *Regulating Broker-Dealers and Investment Advisers: Demarcation or Harmonization?* (Mutual Fund Directors Forum, May 5, 2009) available at https://www.sec.gov/news/speech/2009/spch050509ebw.htm.

In July 2009, SIFMA testified before Congress in a hearing entitled, *Industry Perspectives on the Obama Administration's Financial Regulatory Reform Proposals.*[34] A few months later, SIFMA provided further Congressional testimony – this time in response to a discussion draft of what would ultimately become the Dodd-Frank Act.[35]

One year later, on July 15, 2010, Congress passed the Dodd-Frank Act.[36] Shortly thereafter, the Department of Labor injected itself into the fiduciary debate covered by Dodd-Frank and began work on a rule that reaches beyond its jurisdiction over labor and employment matters: Individual Retirement Accounts ("IRAs") and 401(k)s. As you know, the DOL Rule became applicable, in part, on June 9, 2017.

The DOL Rule stands in direct conflict with the approach contemplated by Congress under Dodd-Frank Section 913, and more generally with the concept of comparable standards for comparable advisory services across all retail customer accounts, established by the primary securities regulators and subject matter experts (i.e., the SEC and FINRA). The DOL Rule adds yet another standard into the mix, creating an even more confusing, trifurcated system for both financial advisors and their clients. The new complications introduced by the DOL Rule, as well as the continuing proliferation of conduct standards generally,[37] invite action by the primary securities regulators in order to restore consistency and clarity to the regulatory regime. If ever there were a time to act, that time is now.

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[34] SIFMA testimony before the House Financial Services Committee (July 17, 2009), http://www.sifma.org/issues/item.aspx?id=1515.

[35] SIFMA testimony before the House Financial Services Committee (October 6, 2009), http://www.sifma.org/issues/item.aspx?id=1519.

[36] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).

[37] *See, e.g.*, Nevada Senate Bill No. 383 (2017), available at https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB383_EN.pdf (imposing a State statutory fiduciary duty on BDs and IAs). *See also* CFP Board Proposed Revisions to Standards of Conduct (2017), available at https://www.cfp.net/about-cfp-board/proposed-standards (proposing a continuing fiduciary duty for all CFPs, including BDs).

Appendix 2

Beefing up disclosures about the titles and duties of BDs and IAs will not solve the issue of ever-proliferating, differential standards.

A second option identified by the SEC is to require enhanced disclosures. Under this approach, presumably IAs would disclose that they are subject to a fiduciary standard and would be the only ones authorized to use the title "advis(o)(e)r." BDs, in turn, for example, presumably would disclose that they are subject to a suitability standard and would only be able to use the title "broker" or something similar. This approach will not address the real issue, which is multiple – and ever proliferating – different standards.

Moreover, to describe a BD's duty toward their retail client as mere "suitability" would be patently unfair to both BDs and their retail clients, not to mention inaccurate and misleading. Over the eighty-plus years since the passage of the Exchange Act, the SEC, FINRA and state securities regulators who oversee BDs have developed a comprehensive regulatory regime based on brokers' duty of fair dealing.[38] This regime includes the obligation to make suitable recommendations, ensure best execution, and observe high standards of commercial honor and just and equitable principles of trade – a concept which itself embodies fiduciary principles.[39]

As stated by SEC staff and FINRA guidance, the suitability obligation generally requires a BD to make recommendations that are "consistent with the best interests of his customer."[40] Numerous securities cases have explicitly held the same.[41] The current BD standard is clearly far greater and more protective of investors than the (frequently pejorative) label "suitability" would imply.

Finally, we are not arguing against disclosure. Investors should have the benefit of disclosure regarding the applicable standard(s) of conduct. But disclosure does not address the fundamental need to norm – to the extent possible – the standards for BDs and IAs. Raising the bar – i.e., the standard of conduct – would help address that fundamental need.

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[38] *See* MORGAN, LEWIS & BOCKIUS LLP, DEPARTMENT OF LABOR RETIREMENT INITIATIVE FAILS TO CONSIDER CURRENT REGULATORY REGIME, WHICH COMPREHENSIVELY PROTECTS INVESTORS INCLUDING IRA INVESTORS, AND PRESERVES INVESTOR CHOICE (2015) (explaining how the current framework governing financial professionals protects investors as broker dealers and their registered representatives are subject to extensive regulatory oversight in addition to investors' private rights of action) available at https://www.morganlewis.com/~/media/files/publication/morgan%20lewis%20title/white%20paper/im_whitepaper_dolretirementinitiative_march2015.ashx.

[39] *See In re E.F. Hutton & Co. Inc.*, Release No. 25887, 41 S.E.C. Docket 413, 418 (July 6, 1988) ("The concept of just and equitable principles of trade embodies basic fiduciary responsibilities….").

[40] SEC Staff Study on Investment Advisers and Broker-Dealers (January 2011), at 59, available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf; FINRA Regulatory Notice 11-02 (January 2011), at 7 n. 11, available at http://www.finra.org/sites/default/files/NoticeDocument/p122778.pdf.

[41] FINRA Rule 2111 (Suitability) FAQs, at A7.1, n. 69 (citing numerous cases), available at https://www.finra.org/industry/faq-finra-rule-2111-suitability-faq