MARKETCOUNSEL®

August 7, 2018

VIA INTERNET UPLOAD

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-07-18: Regulation Best Interest;
File No. S7-08-18: Form CRS Relationship Summary; and
File No. S7-09-18: Standard of Conduct for Investment Advisers

Dear Chairman Clayton:

It was a pleasure meeting with you and other Commissioners and staff earlier this summer. MarketCounsel shares the U.S. Securities and Exchange Commission's (the "Commission") goals of protecting investors and ensuring fair markets by improving the quality of investor relationships with their financial professionals. We commend the Commission's efforts to address these concerns through the package of proposals issued in April 2018: (1) to improve the standard of conduct for broker-dealers (File No. S7-07-18: "Regulation BI"); (2) to clearly disclose the relationship status between the investor and their financial professional (File No. S7-08-18: "Form CRS"); and (3) to codify the fiduciary duty that advisers follow at all times (File No. S7-09-18: "Standard of Conduct for Investment Advisers", collectively with Regulation BI and Form CRS, the "Proposals").

For perspective, MarketCounsel is a business and regulatory compliance consulting firm to some of the country's preeminent independent investment advisers. In addition, our affiliated law firm, the Hamburger Law Firm, renders legal counsel to entrepreneurial investment advisers, broker-dealers, hedge funds, family offices, and registered securities personnel. From its roots in 2000, MarketCounsel has been steadfast in its mission to deliver elegant solutions to the most substantial challenges faced by entrepreneurs in this fast-growing and highly-regulated industry.

While MarketCounsel agrees with much of what is contained in the Proposals, our most significant objection is reserved for the easiest thing the Commission can fix: the phraseology of Reg BI. Its broker-dealer standard of care uses nomenclature that makes investors feel that they are getting what is best for them, when in reality, they are entitled, at best, to what is not harmful to them. We write today to encourage the Commission and all market participants to align on the priority of leveling with investors; and making it clear to them what standard of care they are receiving from each of their financial professionals.

THE HISTORICAL SIGNIFICANCE

Broker-dealers who provide advice to retail investors have posed regulatory challenges for almost twenty-five years. Discussion has ranged from providing an exemption to the Investment Advisers Act of 1940 (the "Advisers Act") to raising their standards of care to match their investment adviser counterparts to maintaining the *status quo*. We believe that the Proposals represent the Commission's opportunity to pass its most significant rulemaking in a generation and correct so much of the confusion that has clouded the securities industry for decades.

For purposes of simplicity, we can pick up on the timeline of customer confusion among broker-dealers and investment advisers in the 1990s where brokers-dealers, *en masse*, started offering the same services they traditionally provided (transaction-based securities sales) albeit under a more enticing marketing wrapper and charging an asset-based fee.[1] It is of no coincidence that this shift was happening as competition and technology decreased commissions dramatically.[2] Their entry into fee-based services along with a new emphasis on the advice they provided that was supposedly incidental to those transactions started to blur the lines between securities sales and investment advice.

During this time, the Commission sat on the sidelines as broker-dealers started calling their agents "advisers," "consultants," and "financial planners," to name a few, even as those titles did more than simply imply an advisory (rather than a sales) relationship with clients. Except that in 1994, these concerns led former Commission Chairman Arthur Levitt to form a broad-based Committee on Compensation Practices. In what became known as the Tully report,[3] the committee found persistent conflicts of interest that could damage retail customers, including in fee-based brokerage accounts. The committee recommended best practices to align the interests of all three parties in the relationship: the firm, the registered representative, and the customer.

In 1999, the Commission proposed an exemption from the Advisers Act for broker-dealers.[4] The proposed rule would allow broker-dealers to provide brokerage services for an asset-based fee without registering as an investment adviser. The comment period expired in January 2000 but the Commission took no formal action. Broker-dealers were, however, allowed to continue to provide fee-based brokerage services under the no-action pledge in the 1999 rulemaking release.[5]. This became known as the "Merrill Lynch Rule."

In 2004 the Commission reopened comment period to Merrill Lynch Rule citing significant continuing public interest. And in 2005 the "Certain Broker-Dealers Deemed Not to Be Investment Advisers" rule became effective.[6] Shortly thereafter, the Financial Planning Association (the "FPA") filed a lawsuit to eliminate the exemption for broker-dealers. The FPA claimed the exemption gave brokers-dealers a loophole, allowing them to operate as financial advisers without disclosing potential conflicts of interest.

In 2006, the Commission hired the RAND Corporation to study the effects of broker-dealer and adviser convergence.[7] The report found that the distinctions between advisers and broker-dealers had been blurred, that market participants had difficulty determining whether a financial professional is an adviser or a broker-

[1] Jr., Robert D. Hershey. "Investing; The Rise of the Fee-Based Account." *The New York Times*, The New York Times, 27 Jan. 2002, www.nytimes.com/2002/01/27/business/investing-the-rise-of-the-fee-based-account.html

[2] Wile, Rob. "Back In The Day, Brokers Got Away With Murder In Trading Commissions." *Business Insider*, Business Insider, 31 Mar. 2014, www.businessinsider.com/historical-trading-commissions-2014-3

[3] "Report of the Committee on Compensation Practices." *Sec.gov*, 10 Apr. 1995, https://www.sec.gov/news/studies/bkrcomp.txt

[4] "Proposed Rule: Certain Broker-Dealers Deemed Not To Be Investment Advisers." *SEC.gov*, Nov. 1999, www.sec.gov/rules/proposed/34-42099.htm

[5] Certain Broker-Dealers Deemed Not To Be Investment Advisers, SEC Rel. No. IA-1845, 64 Fed. Reg. 61226 (Nov. 10, 1999) (the "1999 rulemaking release")

[6] 17 CFR 275.202(a)(11)-1, "Certain Broker-Dealers Deemed Not To Be Investment Adviser" April 15, 2005, https://www.sec.gov/rules/final/34-51523.pdf

[7] Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, *SEC.Gov*, 3 Jan 2008, https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf

dealer, and that investors believed that advisers and broker-dealers offer the same services, subject to the same duties.

In 2007 the FPA prevailed,[8] the Certain Broker-Dealers Deemed Not to Be Investment Advisers rule was vacated, and the Commission took no further action to resolve investor confusion in this area.[9]

In 2008, during the worst financial crisis since the Great Depression, investors grasped for objective advice, only to learn that, although they had been paying an asset-based fee or otherwise believed that their broker was acting in their best interest, the advice was merely incidental to their securities transactions. [10] In other words, they learned that the advice was not holistic or in their best interest at the moment they needed it most. [11] [12]

In 2010, Dodd-Frank Wall Street Reform and Consumer Protection Act in Section 913 gave the Commission the authority to promulgate a uniform fiduciary standard for retail investment advice.[13] The section required that any change to the standard of broker-dealer conduct be, “no less stringent than the standard applicable to investment advisers under section 206(1) and (2)”.[14]

A January 2011 Commission’s Staff Study on this section had similar findings: (a) that investors were confused as the difference between advisers and broker dealers and (b) the Commission should adopt a rule for broker dealers as stringent as the Adviser’s Act.[15] But again, the Commission made no significant progress despite encroachment in recent years from the Department of Labor with its uniform fiduciary rule.

Which brings us to today: it’s no surprise that investors remain confused as to the differences between investment advisers who offer fiduciary advice with respect to securities and broker-dealers who facilitate securities transactions that are suitable. And most likely, the same findings from the 2006 commissioned RAND report would hold true today.[16]

Today, the Commission has the authority and the leadership to address standards of conduct for all financial professionals who may offer retail securities advice. To take advantage of this opportunity, we believe that it is in everyone’s best interest that the Commission: (1) uses clear language in Reg BI (2) raises standards for broker-dealers, (3) clearly states fiduciary standards for advisers, and (4) educates investors on the differences between the two distinct models that allow our financial system to thrive.

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[8] Fin. Planning Ass’n v. SEC, 482 F.3d 481, 375 U.S. App. D.C. 389

[9] Somers, Bailey. “SEC Will Not Appeal Fee-Based Accounts Ruling - Law360.” *Law360 - The Newswire for Business Lawyers*, Law360, 15 May 2007, www.law360.com/articles/24760/sec-will-not-appeal-fee-based-accounts-ruling.

[10] Welch v. TD Ameritrade Holding Corp., No. 07 Civ. 6904(RJS), 2009 WL 2356131 (S.D.N.Y. July 27, 2009).” “mere existence of a broker-customer relationship is not proof of its fiduciary character.”

[11] Browning, E.S. “Stock Investors Lose Faith, Pull Out Record Amounts.” *The Wall Street Journal*, Dow Jones & Company, 22 Dec. 2008, www.wsj.com/articles/SB122990642933825357.

[12] Mincer, Jilian. “Insight: Mom and Pop Investors Miss out on Stock Market Gains.” *Reuters*, Thomson Reuters, 30 Sept. 2012, www.reuters.com/article/us-usa-stocks-retailinvestors/insight-mom-and-pop-investors-miss-out-on-stock-market-gains-idUSBRE88T0AE20120930

[13] Study on Investment Advisers and Broker-Dealers, *SEC.gov*, Jan. 2011 https://www.sec.gov/news/studies/2011/913studyfinal.pdf

[14] 15 U.S. Code § 80b-11 (g)(1)

[15] “SEC Releases Staff Study Recommending a Uniform Fiduciary Standard of Conduct for Broker-Dealers and Investment Advisers.” *SEC.gov*, 6 Jan. 2011, www.sec.gov/news/press/2011/2011-20.htm.

[16] Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, *SEC.Gov*, 3 Jan 2008, https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf

THE PROPOSALS EXACERBATE THE CONFUSION

Unfortunately, investors will remain confused between the transactional, episodic, broker-dealer model, which was created to sell and distribute securities, and the holistic objective adviser model. Investors will remain confused because, despite the almost one thousand pages of prose, Regulation BI does not define "best interest."

Understandably leaving the term "best interest" undefined allows for a disparate and wide range of subjective interpretations.[17] The Commissioners themselves have offered three different definitions of the term. Commissioner Stein said it, "maintains the *status quo*" and that "the emperor has no clothes".[18] Commissioner Peirce labeled it, "suitability plus".[19] And Chairman Clayton said, "It is definitely a fiduciary principle, just like the fiduciary duty in the investment adviser space is a fiduciary principle".[20] If three Commissioners cannot agree on what "best interest" means then how can retail investors and their broker-dealers be expected to?

Further, Regulation BI does not give any example of a practice that would be allowed today under the suitability standard that the new standard would prohibit. This makes it difficult to rebut the "maintains the *status quo*" and "the emperor has no clothes" sentiments.

Given that the transactional broker-dealer model has always taken a rules based approach, it is not clear how these firms and their agents will react to a principles based standard. Alternatively, we would urge the Commission to take a rules based approach to protecting investors from broker-dealer sales practices known to be widespread and harmful. For example, rules could proscribe: receiving or providing differential compensation based on the product sold, receiving third-party compensation, recommending proprietary or affiliate products, recommending a transaction executed in a principal capacity, or allocating trades and research among different types of customers and between retail customers and the broker-dealer's own account.[21] Unfortunately, Regulation BI does not clearly eliminate any of these conflicted practices as it is written.[22]

THE FIDUCIARY DUTY

Regulation BI will perpetuate further investor confusion because "best interest" will naturally be confused with the Advisers Act's fiduciary standard. But it is not a fiduciary standard at all, and certainly not on par with that which investment advisers are subject to.

The Standard of Care of Investment Advisers clearly sets forth the generally accepted duties of fiduciaries in the context of offering investment advice. The Court in *Capital Gains* first articulated the notion of adviser's fiduciary duty based on the common law concept of fraud, "*[An investment adviser] should continuously occupy an impartial and disinterested position"*.[23]

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[17] Regulation Best Interest, 83 Fed. Reg. 21,567 (May 9, 2018). *We are not proposing to define 'best interest' at this time*

[18] Stein, Kara. "Statement on Proposals Relating to Regulation Best Interest, Form CRS, Restrictions on the Use of Certain Names or Titles, and Commission Interpretation Regarding the Standard of Conduct for Investment Advisers." *SEC.gov*, 18 Apr. 2018, www.sec.gov/news/public-statement/stein-statement-open-meeting-041818.

[19] Peirce, Hester. "Statement at the Open Meeting on Standards of Conduct for Investment Professionals." *SEC.gov*, 18 Apr. 2018, www.sec.gov/news/public-statement/statement-peirce-041818.

[20] Waddell, Melanie. "Why Did SEC Leave 'Fiduciary' Out of Best-Interest Rule?" *ThinkAdvisor*, 24 May 2018, www.thinkadvisor.com/2018/05/24/why-did-sec-leave-fiduciary-out-of-best-interest-r/. *Quoting remarks made during a Q&A session at FINRA's annual conference in Washington DC on May 22, 2018.*

[21] "SEC's Standards of Conduct for Investment Professionals Rulemaking Package1." *SIFMA.org*, Apr. 2018, https://www.sifma.org/wp-content/uploads/2018/04/WilmerHale-Summary-re-Reg-BI.pdf

[22] Regulation Best Interest, 83 Fed. Reg. 21,609 (May 9, 2018). *States these practices are not per se violations.*

[23] SEC v. Capital Gain Research Bureau, 375 US 180 (1963)

Since *Capital Gains,* the concepts of fiduciary duties for investment advisers have evolved through Commission guidance, but have always maintained the concept of continuous duty. Since a single definitive list of an adviser's fiduciary duties is not found in either the common law or the Advisers Act, the Proposals clarify those duties in the adviser conduct section. In summary, fiduciary duty is comprised of the duty of loyalty and the duty of care. The duty of care has three components: providing advice in the best interest of the client, seeking best execution, and an ongoing duty to monitor. [24]

The "best interest" standard gives broker-dealers only one component of the adviser's duty of care.[25] It falls short of replicating the fiduciary duty of care under the Adviser's Act mainly because there is no ongoing duty and no explicit duty of loyalty. Investors will reasonably expect that their broker-dealer will continue to monitor their account as long as it is open and that other client's interests will not be placed in front of theirs, but that is not what Regulation BI requires. "Best interest" may be a fiduciary principle, but no one is a 'fiduciary in principle' or 'like a fiduciary.'

In our experience, many investors do not understand the definition of "fiduciary," but everyone will assume they understand the words, "best interest". To an average investor, "best interest" sounds even better than "fiduciary." Yet, the Proposals do not offer a clear distinction between the two standards of care. Although it holds advisers to a higher level of care given the duties imposed on them, the Proposals do not indicate that the fiduciary duty is higher than the "best interest" standard.

THE ROOT CAUSE

Regulation BI's fundamental flaw stems from extrapolating the two most important words from the fiduciary standard, "best interest", and grafting them on to a suitable transactional standard. The "best interest" standard,[26] closely resembles the current FIRNA suitability rule applicable to broker-dealers[27] except that Regulation BI has replaced the term, "suitability" with "best interest.

Botanists have found that graft failure occurs in plants when the rootstock and scion are incompatible, often because of genetic differences.[28] Similarly, the DNA of broker-dealers is vastly different from that of advisers. Broker-dealer agents have a complex relationship among three principal parties: the firm of which they are an agent, the issuer or product sponsor of which compensates them, and the client who they have an obligation to make suitable recommendations to. Advisers, meanwhile, have a simple relationship between themselves and their clients, deriving no compensation and owing no duties to any other party.

Adding two words in place of one lends credit to the "suitability plus" interpretation shared by Commissioner Peirce. As Commissioner Peirce suggested, Regulation BI should remove the words "best interest" because Regulation BI, "does not attempt to define best interest because nobody can explain what it means" and because "we are sending investors a message that they need not ask questions precisely the opposite of the message investors need to hear".[29] We agree that the new broker-dealer standard should include the traditional suitability standard and add a second component that broker-dealers cannot put their interests ahead of the retail customer. We also feel strongly that obligations should be imposed through the existing rules based framework instead of through language in rulemaking release.

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[24] Standards of Professional Conduct, 83 Fed. Reg. 21, 2121 (May 9, 2018). *The Standards of Conduct details the duty of care and duty of loyalty.*

[25] Regulation Best Interest, 83 Fed. Reg. 21,595 (May 9, 2018).

[26] *SEC Proposed Regulation Best Interest*, SEC.gov, 18 Apr. 2018, www.sec.gov/news/statements/2018/annex-a-reg-bi-regtext.pdf.

[27] FINRA Rule 2011 (Suitability) http://www.finra.org/industry/suitability.

[28] "Graft Failure." *Mutations: Plant/RHS Gardening*, www.rhs.org.uk/advice/profile?PID=608.

[29] Peirce, Hester. *"What's In Name? Regulation Best Interest v. Fiduciary*" *sec.gov,* 24 July 2018. https://www.sec.gov/news/speech/speech-peirce-072418 *sec.gov.*

The Commission has bestowed upon broker-dealers the marketing friendly "Regulation Best Interest" while advisers get handed the uninspiring, "Standard of Conduct for Investment Advisers." Removing the words "best interest" would immediately absolve the Commission from feeding into the current state of investor confusion and not permit broker-dealers to take cover under a best interest standard while investment advisers had to explain an arcane, "Standard of Conduct for Investment Advisers."

The irony of the current scenario is profound. Based on the proposed standard for investment advisers and previous enforcement cases, the Commission would likely deem an adviser to be engaged in making misleading statements if the adviser represented to current or prospective clients that it was acting in their best interests if it were only held to the proposed broker standard instead since the standard did not extend that duty of care to the entirety of the relationship. For example, a recent *Wall Street Journal* article highlighted the practice of broker-dealers pushing clients from money-market accounts into lower yielding sweep accounts which are more lucrative for the broker-dealer.[30] This type of activity would presumably be permitted under the "best interest" standard, which does not extend to account type recommendations,[31] but would be a clear violation an adviser's fiduciary duty, absent clear disclosure.

FORM CRS: CONFLICTS, CONFLICTS EVERYWHERE[32]

Admittedly, conflicts of interest persist throughout the industry and in both investment adviser and broker-dealer relationships. We commend the intent behind the Form CRS aspect of the Proposals and appreciate the research that the Commission undertook in drafting the templates. We agree with the Commission that only through complete and timely disclosure can fiduciaries discharge their obligation to put their clients' interests ahead of their own.[33]

However, investment advisers already have an obligation to furnish clear disclosure on the Form ADV disclosure brochure. For investment advisers, Form CRS will be will be overly burdensome, redundant and of marginal value to their clients, considering an adviser's requirement to deliver Form ADV, which includes much of the same information proposed by Form CRS. Form CRS proscribes the order and language that advisers must use to describe their services, but the rigidity of this form limits an advisers ability to adequately describe their business to customers and leads to the same commoditization that has plagued broker-dealers. We strongly believe that the existing Form ADV and its disclosure brochure is the tool the Commission should use to ensure complete and timely disclosure by investment advisers.

In fact, if the Commission could find their way to merely enforce the limited broker-dealer exception of the Advisers Act, broker-dealers too could utilize the existing Form ADV to disclose their conflicts of interest to customers when rendering investment advice.

To answer Commissioner's Pierce first question on Form CRS,[34] yes, the Commission should take a step back from the proposals and comprehensively review disclosures already provided to investors. We think that the disclosure brochure that investment advisers already provide to their clients includes the information material to most investors, but understand that Commission may have improved guidance after

[30] Zweig, Jason. "How Your Brokers Can Make 10 Times More on Your Cash Than You Do" *wsj.com*. 7 Aug 2018 https://blogs.wsj.com/moneybeat/2018/08/03/how-your-brokers-can-make-10-times-more-on-your-cash-than-you-do/.

[31] "SEC's Standards of Conduct for Investment Professionals Rulemaking Package1." *SIFMA.org*, Apr. 2018, https://www.sifma.org/wp-content/uploads/2018/04/WilmerHale-Summary-re-Reg-BI.pdf.

[32] Riewe, Julie M. "Conflicts, Conflicts Everywhere – Remarks to the IA Watch 17th Annual IA Compliance Conference: The Full 360 View." *SEC.gov*, 26 Feb. 2015, www.sec.gov/news/speech/conflicts-everywhere-full-360-view.html.

[33] *Ibid.*

[34] Peirce, Hester. *"What's In Name? Regulation Best Interest v. Fiduciary"* *sec.gov* 24 July 2018. https://www.sec.gov/news/speech/speech-peirce-072418 *sec.gov.*

its review. Given the open questions about Form CRS and its likelihood of duplicative disclosure, Form CRS is not yet ripe for further consideration.

INVETSMENT ADVISER'S CONTINUING EDUCATION AND FINANCIAL SECURITY

The final sections of the Proposals' Standard of Care for Investment Advisers poses a series of questions regarding continuing education and financial security concerns for investment advisers.

First, the Standard of Conduct asks whether advisers should be subject to federal continuing education and licensing requirements.[35] The answer is no. The Standard of Care lacks any impetus, fails to state a cause beyond harmonization, and proposes no framework. For many advisers who already possess designations and certifications, mandatory continuing education would be duplicative. Harmonization, in and of itself, is not a valid objective and advisers, unlike broker-dealers, don't have the same rule changes that they need to keep apprised of. Finally, such continuing education and licensing requirements give customers a false sense of security. Today, customers have ample opportunity to select their advisers based upon their qualifications.

Second, the Standard of Conduct asks whether advisers be subject to net capital or other financial responsibility requirements in order to ensure they can meet their obligations?[36] The answer is no. Investment advisers are already subject to a notification provision in the event they find themselves in a "precarious financial situation.

The proposed net capital requirement for advisers should be replaced with a standard that clarifies the existing standards for a "precarious financial condition".[37] The Commission could add interpretive guidance to that meaning. For example, "investment advisers have to contact to their clients in writing if they may be unable to meet their anticipated obligations over the next six months." We understand that there are states that have net capital requirements, but they are so insignificant that we cannot imagine a scenario in which they would help investors in any meaningful way. The Standard of Conduct does not make the purpose of the net capital requirement clear and how much would it need to be for it to be meaningful. Given the wide disparity of size and complexity amongst investment advisers, a net capital requirement would have to take several risk factors into consideration. And any meaningful net capital could lead to smaller firms having to shutter without any real benefit to the client.

Like term "best interest," the continuing education, licensing, and net capital requirements would only provide a false sense of security to investors, without any meaningful benefit.

The other financial responsibility questions are less applicable to independent investment advisers who generally do not have custody of their client's funds or securities. While most advisers use a qualified custodian, however, the issues of custody continue to lead deficiencies for investment advisers on regulatory examinations as many are inadvertently deemed to have custody based on the operation of the custody rules.[38] We think that a better approach would for the Commission to address all custody concerns by reviewing the custody rule instead of through professional standards of conduct.

While many may not see the danger in continuing education or a small minimum net capital requirement, these requirements open the door for something much worse: FINRA asserting themselves as primary regulator of investment advisers. We have voiced our strong opposition to past attempts at FINRA's regulation of advisers. If investment advisers and broker-dealers have similar net capital, continuing

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[35] Standards of Professional Conduct, 83 Fed. Reg. 21, 2121 (May 9, 2018).

[36] Standards of Professional Conduct, 83 Fed. Reg. 21,214 (May 9, 2018).

[37] "Letter From the Office Of Compliance Inspections and Examinations: To Registered Investment Advisers, on Areas Reviewed and Violations Found During Inspections." *SEC.gov*, 1 May 2000, www.sec.gov/divisions/ocie/advltr.htm.

[38] *The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers*, SEC.gov, 7 Feb. 2017, www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf.

education, and standards of care, then it would give support to FINRA that it is best positioned to take on the tasks of monitoring both investment advisers and broker-dealers. Since FIRNA is funded by its members, it may look to recapture its dwindling numbers by expanding its scope. FINRA oversight would be far more costly for investment advisers without any evidence that it would be more effective than the Commission. Prior projections showed that member fees for advisers would skyrocket if FIRNA took on oversight of them or established a separate SRO. [39] And FIRNA is protected from lawsuits as a state actor, but they do not have the transparency of a state actor as are not subject to requirements like the Freedom of Information Act. FINRA is the worst of both worlds for investment advisers and would smother the most successful component of the securities industry, independent investment advisers.

PERFECT HARMONY

When vocalists sing in harmony they do not sing the same exact note. They sing notes that relate to one another, in other words, notes that agree. If two models work in harmony, they work together, the models may have the same parts done differently or have different parts that complement each other. When vocalists try to sing the same note, but are slightly off, they sound horrible.

At MarketCounsel we admittedly champion the entrepreneurial independent investment adviser as the sole remaining bastion of objective investment advice. But we appreciate the utility of the broker-dealer model, too. Investors need investment advisers when they are looking for objective client-centered investment advice. Investors (and their investment advisers) need broker-dealers to provide distribution and access to capital markets. In addition, retail clients may choose broker-dealers for transaction-based services (including incidental advice).

We do not support the notion that all broker-dealers should be held to a fiduciary standard. That would raise costs and limit access to markets for investors. We do support a true fiduciary standard for any financial professional who holds itself out as providing advice to retail investors because, truthfully, all financial professionals who hold themselves out as an investment adviser or are marketing financial advice are not giving advice that is "solely incidental". So, all such financial professionals should be held to the Adviser Act's fiduciary standard.

But regardless of whether you think that broker-dealers should be held to a fiduciary standard, let's at least align on the importance of taking this historic opportunity to level with investors and make clear to them what they're getting from their financial professionals. That would be a legacy we could all be proud of.

We hope that our comments, made on behalf of us and our entrepreneurial, 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.

[39] "News & Events." *Code and Standards*, www.cfp.net/news-events/latest-news/2011/12/15/sro-for-investment-advisers-would-likely-cost-at-least-twice-as-much-as-an-adequately-funded-sec-investment-advisers-express-strong-oppostition-to-sro.

Best regards,
MARKETCOUNSEL, LLC

By: ______________________
Brian Hamburger, JD, CRCP
President and CEO

XC: The Honorable Kara Stein, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Robert J. Jackson, Jr., Commissioner