October 6, 2011

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

Re: File Number S7-36-11, Retrospective Review of Existing Regulations

Dear Ms. Murphy:

This letter is submitted on behalf of the National Society of Compliance Professionals, Inc. (hereafter referred to as the "NSCP")[1] in response to the Commission's Request for Information concerning Retrospective Review of Existing Regulations (File No. 87-36-11). We appreciate the opportunity to provide our comments relating to this important proposal.

Our remarks reflect the NSCP's fundamental mission, which is to set the standard for excellence in the securities compliance profession. This commitment is exemplified by, among other things, the time and resources the NSCP, and the industry professionals whose volunteer services it marshals, have devoted in the past five years to the development of a voluntary certification and examination program for compliance professionals.[2]

Our mission is directed at the interests of compliance programs and compliance officers. We accordingly support a regulatory scheme that: (i) promotes practices that support market integrity and the interests of investors; (ii) creates clarity as to a firm's obligations to provide a reasonable system of supervision; (iii) promotes requirements that enable compliance officers to create reasonably workable programs; and (iv) avoids requirements or mandated tasks that are more costly or less efficient in realizing a regulator's public policy objectives, thereby increasing the difficulty facing a compliance officer in the discharge of his or her duties.

[1]The NSCP is a non-profit membership organization made up of approximately 1,900 securities industry professionals committed to developing education initiatives and practical solutions to compliance-related issues.

[2]Persons who complete NSCP's certification program (CSCP) qualify for the "Certified Securities Compliance Professional" designation.

Background

The SEC's mission is to protect investors, maintain fair and efficient markets, and to facilitate capital formation. One of the many ways that the SEC accomplishes this mission is through the creation of rules and regulations. Congressional legislation, such as the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 (among others), serve as the foundation for SEC rulemaking. The SEC creates rules, through its rulemaking process, to ensure that the principles underpinning these broad statutes are carried out under specific circumstances.

The SEC has utilized, for some time, both formal and informal mechanisms to periodically review the continued utility and effectiveness of its existing rules. Specifically, the SEC reviews its rules through: retrospective studies of substantive program areas, annual review of rules that became final within the past 10 years (as mandated by section 610(a) of the Regulatory Flexibility Act), receipt and consideration of comments received from Congress, industry groups and investors, and various types of interactions with the public (*e.g.*, advisory committees, regulatory roundtables, and conferences).

The President's Executive Order 13579 entitled "**Regulation and Independent Regulatory Agencies**," directs independent regulatory agencies to consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient or excessively burdensome" for the express purpose of facilitating the periodic review of existing rules and regulations. Further, this Executive Order also states that, based on the data and information obtained from this retrospective review process, independent agencies should consider modifying, streamlining or repealing the rules and regulations that no longer serve their original purpose. We understand that the Commission is directed by Executive Order 13579 to "develop and release to the public a plan, consistent with the law and reflecting its resources and regulatory priorities and processes" for a periodic review of the agency's rules and regulations.

Consistent with the terms of the Executive Order, the SEC has issued a Request For Information entitled "Retrospective Review of Existing Regulations." Interested parties are invited to submit comments to the SEC in order to assist it in "considering the development of a plan for the retrospective review of its regulations" (the "Invitation"). The Invitation seeks comments on the scope, elements and criteria for a plan for the SEC's retrospective review. The SEC also encouraged commenters, in assembling their response, to consider seven discrete questions, which we are responding to in this letter.

Questions Posed by Commission

Recognizing that the Commission's regulatory scope is very broad, this letter addresses the questions posed in the Invitation with regard to regulatory issues affecting broker-dealers and investment advisers. Thus, our comments are focused primarily on those concerns and issues regarding rulemaking pursuant to the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940. We shall direct our comments to each question posed by the Commission.

Question 1. What factors should the Commission consider in selecting and prioritizing rules for review?

A. Involve Stakeholders. Staff should gather stakeholders in each set of rules and before considering changes to such rules, consult with practitioners (compliance, legal and business) in the subject-matter area concerning potential ways to improve the process for retaining or creating such rules. Those stakeholders should reflect a broad cross-section of the financial services sector. Stakeholders have substantial experience in their subject-matter areas, and will be able to provide unique insight and data on the effects of existing regulations. Stakeholders may also be able to propose rules that achieve the intended purposes, but do so in a more efficient, less burdensome and less intrusive manner. Further, such consultations should be broad-based. There is a risk in consulting with too few industry members and representatives. Finally, we believe that such interactions should be transparent, which can only serve to facilitate an improved understanding of the input the Commission and its staff have received.

B. Systematic and Transparent Process. The Commission should establish a systematic approach to reviewing each rule and apply certain specified criteria in its analysis. This applies both to the schedule of review used, as well as the methodology for conducting such review. The Commission should clarify the schedule for review and transparently track the review status of each rule. The method of transparent reviews should be consistent for all rule-making review and rule retention decisions.

We suggest that rules be reviewed at least every five years and, as further explained below, certain rules may require a more frequent review. In conducting this review, established and transparent criteria should be followed. For example, the Commission could enact a Rule Review Table on its website, which would identify for the public rules to be reviewed during a specific time period. The Commission could also publish (with the Table) the criteria to be utilized to review its rules. Examples of such criteria could be: Purpose for adopting the rule; Evaluation of Compliance with the rule, such as examination findings and consequent enforcement proceedings; Cost-Benefit Analysis based on actual experience with the rule; Interpretive Issues; and Evaluation of successful/unsuccessful impact of the rule. Industry input could be informative in this analysis; since the Commission could request, both in writing and personal dialogue, such input to address the rule-review criteria.

Normally, we believe the Commission should have an ongoing program to monitor the implementation, compliance with, and operation of a rule since the date of enactment. If persistent issues arise with compliance or unintended consequences arise, the formal evaluation process could be accelerated as appears appropriate.

C. Outmoded/Outdated Rules. The Commission should consider whether a rule continues to serve its intended purpose(s) or if better methods are available to reach the same end. Rules requiring registrants to make periodic filings which were adopted decades ago may no longer serve an important regulatory objective. For example, the SEC Inspector General's Report related to the Commission's Broker-Dealer Risk Assessment Program[3] indicated the Commission's staff does not review a vast majority of filings made by registrants. We suggest that the Commission consider whether filed information is reviewed and/or integrated with other data it collects. If the Commission is not using this information, it seems appropriate to consider why such unused information is required to be filed with the Commission. An even larger issue may be what other steps or actions industry registrants are taking that the Commission, through lack of review or otherwise, may no longer deem critical to its mission.

D. Duplicative Rules. We recommend that the Commission consider eliminating, or reducing, the number of duplicative rules. For example, currently there are two largely identical hypothecation rules. Duplicative rules may engender confusion and uncertainty for registrants attempting to comply with the correct and most precisely applicable rule.

E. Non-SEC Initiated Proposals. Certain initiatives proposed by responsible industry groups are seemingly relegated to the back burner. For example: the BD-Lite proposal contained in a Report and Recommendation of the Task Force on Private Placement Broker-Dealers several years ago, has been languishing in the SEC with little if any attention (at least apparent to the public). We understand that the Enforcement Division may have been searching for a high profile example-setting case in this area. In the meantime, many firms have not received the clarity they need regarding issues relating to whether they must be registered and establishing an efficient mechanism for facilitating such registrations. The Commission might better allocate its resources while at the same time providing much needed clarity to the industry, simultaneously to developing an efficient mechanism for facilitating such registration, as recommended by the ABA Task Force. An appropriate enforcement initiative could follow the promulgation of clarifying rules allowing time for firms to comply with those rules, *i.e.*, get registered.

[3] SEC's Oversight of Bear Stearns and Related Entities: Broker-Dealer Risk Assessment Program, Report No. 446-B (September 25, 2008), at pp. iv, 6 and 7. The Report found that the Commission's Trading and Markets Division "avoided . . . formal rulemaking process in favor of making an internal and unwritten decision to not review many of the firms' 17(h) filings."

Question 2. **How often should the Commission review existing rules?**

We believe, as set forth more fully below, the Commission should review each rule every five years, and review certain rules more frequently.

Question 3. **Should different rules be reviewed at different intervals? If so, which categories of rules should be reviewed more or less frequently, and on what basis?**

We believe the Commission should consider reviewing rules at different intervals. For example, any rule which has not been the subject of any investigative or enforcement attention or any other focused attention should be reviewed every two years. If a rule has not been enforced or received attention for some time, surely it deserves a systematic review. The following questions (among others) in such a scenario merit consideration: Does there continue to be a valid purpose for keeping the rule? Does compliance with the rule impose an enormous cost or burden on registrants? Is that cost or burden justified by the regulatory result?

Included in any review, the Commission should conduct a regular cost-benefit analysis of existing regulations. While such studies may have been conducted initially in connection with adoption of a rule, economic and market conditions may have changed to make previous analyses outdated. We observe that the Shadow Financial Regulatory Committee submitted a Comment Letter on September 12, 2011. In that letter the Shadow Committee recommended that the Commission "conduct empirical work to measure what has been achieved and what costs (both estimated and unintended) were imposed, as compared to what was claimed or estimated at the time or the release." We agree with and support this concept. The example cited by the Shadow Committee is a good one. In this process, compliance officers could assist in identifying burdens and costs related to a rule's operation. They could also identify challenges in being able to comply with a rule, or to monitor their firms' activities for compliance. This input of compliance experts in such evaluations could better inform Commission staff as to how best to achieve an intended objective.

The Shadow Committee specifically referenced and applauded the use of statistical studies generated during a controlled experiment in connection with potential tick-test regulation. The use of statistical and empirical evidence can readily identify, with hard data, the costs and benefits of specific regulations.

In addition to a systematic approach for reviewing rules (such as at least every 5 years), the Commission should consider other methodologies to review rules. As noted above, the Commission receives public feedback through comments received from Congress, industry groups and investors, along with interactions with the public (*e.g.*, advisory committees, regulatory roundtables, and conferences). We suggest that, if a rule is continuously cited by these groups as being outdated or imposing an undue burden on capital formation, that may well indicate that such a rule demands more frequent review.

Question 4. **To what extent does relevant data exist that the Commission should consider in selecting and prioritizing rules for review and in reviewing rules, and how should the Commission assess such data in these processes? To what extent should these processes include reviewing financial economic literature or conducting empirical studies? How can our review processes obtain and consider data and analyses that address the benefits of our rules in preventing fraud or other harms to our financial markets and in otherwise protecting investors?**

A cost-benefit analysis for each rule once every five years or so may prove useful. This could be done simultaneously with the evaluation for those rules that are on a five-year review cycle. For those rules on some other (such as a two-year) cycle, such review could be done independently. The cost and benefits of a rule may change over time. A rule may make sense one day but perhaps less so five years later. We believe that if the SEC has not applied a rule or a rule has not been at issue with some frequency, that rule should be evaluated on a short time frame (*e.g.*, every 2 years). While the Commission could prioritize for more frequent review those rules generating major public feedback.

We also submit that any cost-benefit analysis be undertaken in the same systematic way, and with the same transparency, as any other rule review.

Question 5. **What can the Commission do to modify, streamline, or expand its regulatory review processes?**

Standardization. The Commission should look to standardize across rules so that similar concepts are addressed in similar ways and that new rules build on existing rules to the extent possible, (The Commission took this approach with respect to information to be collected by broker-dealers regarding large traders). By way of example, we believe that it would be productive for the Commission to provide a standard sophisticated investor definition and then build off the standard definition rather than have completely bespoked definitions for various purposes.

Impact of Judicial Review. Another area we believe the Commission should reconsider its approach relates to instances such as the aftermath of the *Financial Planning Association* decision. Specifically, in that matter a rule was invalidated by a court decision, and the Commission appeared to rush to adopt a successor rule, rather than fully reflect on the Court's reasoning and promulgate a new rule that considered the deficiencies cited by the Court. We believe that, in these types of circumstances, it is important that the Commission consult with a breadth of legal and industry experts (among other groups), before hastily enacting a successor rule.

Differentiation for Retail and Institutional Registrants. Identifying rules that have specific or certain investor application would be extremely beneficial. As the Commission is aware, the evolution of the investment industry over the last fifty years has created two distinct environments: (1) institutional portfolio management; and (2) individual portfolio management. The Commission should consider the relevance to one group or the other when determining the need for a new rule or the applicability of an existing rule under review. Many institutional investment advisers find it difficult and costly to establish policies and procedures that have no relevance to their customers or business model but are nonetheless required in order to comply with a rule. While there are certainly firms with both institutional and individual clients, there are many investment advisers that specialize in one category of clients. It appears that many rules, once finalized, tend to address one type of management style at the expense of another. The Commission could consider involving stakeholders, industry groups, and various public forums to attain a sense of industry-wide relevance. Prior to taking action, the Commission might better understand the potential consequences of implementation for different categories of registrants.

Question 6. How should the Commission improve public outreach and increase public participation in the rulemaking process?

We believe the recently formed Division of Risk, Strategy and Financial Innovation ("RSFI") may be an asset in facilitating the process for open and continuing dialogue with the public and members of the industry. Industry participants could meet with and provide regular input to RSFI staff members to support their mission of identifying new developments and trends in financial markets and systemic risk. An important aspect of their dialogue could address the economic and other impacts of various regulations. This process could enhance the Commission's understanding of how rules affect the markets and registrants, along with ways to modify, add or subtract rules to better achieve regulatory goals.

In that vein, we note that in the Commission's Draft Strategic Plan for Fiscal Years 2011-2015 with respect to the strategic goal 2 [establishing an Effective Regulatory Environment] Outcome 2.3 identifies that one of the agency's primary objectives is to maintain a regulatory framework "that enables market participants to understand clearly their objectives." The Draft Strategic Plan (at pp. 30 and 31) describes several initiatives to accomplish these outcomes including:

- Improve agency-wide coordination of the process;
- Embrace the economic support for Commission rules and regulations;
- Address the effect of prior rule making;
- Improve the process for no action, interpretative and regulatory requests.

We recommend that, in a broader sense, the Commission consider as an important initiative more frequent outreach efforts with industry practitioners for input and dialogue at all states of the rulemaking and rule review process.

Question 7. Is there any other information that the Commission should consider in developing and implementing a preliminary plan for retrospective review of regulations?

FINRA and Other SROs. In reviewing its rulemaking processes, the Commission should also consider the FINRA/SRO rulemaking process. FINRA seemingly mirrors the Commission's rulemaking process and could benefit from the same review protocols recommended in this letter.

NSCP appreciates the opportunity to submit comments in response to the Invitation. NSCP would welcome the opportunity to answer any follow-up questions the Commission has on this submission specifically, or the Rulemaking process generally.

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Thank you for your attention to these comments. Questions regarding the foregoing should be directed to the undersigned at (860) 672-0843.

Very truly yours,

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