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By electronic delivery

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

RE: Study Regarding Obligations of Brokers, Dealers, and Investment Advisers, File No. 4-606, 75 Federal Register 44996 (July 30, 2010).

Dear Ms. Murphy:

The American Bankers Association (ABA)[1] and the ABA Securities Association (ABASA)[2] appreciate the opportunity to provide comments to the Securities and Exchange Commission (Commission) in regard to a study it is conducting on the obligations of brokers, dealers, and investment advisers when providing personalized investment advice and recommendations about securities to retail investors. We note that the Commission's obligation to conduct this study arises under section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA), which requires the Commission to submit a study report to the Senate Committee on Banking, Housing and Urban Affairs and the House Financial Services Committee no later than 6 months after enactment of the DFA.

The issues raised by the Commission's study are of great interest to our membership. We believe we bring a unique perspective to this discussion as our members offer investors access to investment products through a number of distribution channels including bank trust departments, registered broker-dealers and registered investment advisers. As we discuss more fully below, we strongly support efforts to eliminate investor confusion regarding the standard of care financial intermediaries' exercise when providing personalized investment advice to their retail clients. Very careful attention should be paid, however, in crafting this standard to avoid eliminating the ability of individual investors to choose the specific products and levels of services that best meet their investment needs at any particular time.

Towards these ends, we believe that the following principles should be adhered to:

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[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

[2] ABASA is a separately chartered affiliate of the ABA that represents those holding company members of the ABA that are actively engaged in capital markets, investment banking, and broker-dealer activities.

All Professionals Offering *Personalized* Investment Advice to Retail Customers Should Act in the Best Interests of their Customers

We agree with the development of a harmonized standard of behavior for broker-dealers and investment advisers that provides that comparable retail customers receiving *personalized* investment advice are entitled to comparable protections no matter whether they receive that advice from a broker-dealer or an investment adviser. The general principle should be that when offering retail customers personalized investment advice, broker-dealers and investment advisers should act in the best interests of their customers.[3] This standard, that should apply whenever a broker-dealer or investment adviser is providing personalized investment advice to a client, should, however, take into account the level of service sought by the customer, including recognizing that in some circumstances a customer may be seeking little or no investment advice. For example, many customers come to the broker-dealer with a sense of how they intend to invest and seek limited advice about whether, for example, equity " X" or equity "Y" would be a better choice. These investors are not seeking full-blown financial plans and do not wish to expend the time and resources necessary to share detailed information about their financial circumstances that would be necessary for the investment professional to provide a full evaluation of investment options. Therefore, it is crucial that this standard adjust depending on whether the advice given is discretionary, non-discretionary or incidental.

We also believe that consistent with the imposition of a harmonized best interest standard; a financial professional may treat different clients, or classes of clients, differently, depending upon the nature of the relationship (*e.g.*, discretionary, non-discretionary, or incidental advice) *and* whether the professional has made adequate disclosure regarding the different treatment. Financial intermediaries, providing non-discretionary advice to a customer, do not make the ultimate decision on whether or not to invest; that decision is left to the customer. The best interest standard of care in this situation should not impose the same level of duties that would be required when a financial intermediary provides discretionary advisory services.

In authorizing the Commission to establish a fiduciary duty[4] for broker-dealers under Section 913, Congress recognized that the standard of care does not continue after providing the personalized investment advice. We agree. Financial intermediaries that provide non-discretionary advice should not assume a continuing duty of care or loyalty to the customer after the intermediary provides the personalized investment advice.

Moreover, the best interest standard of care should **not** apply to instances when a firm provides impersonal advice, for example such as general investment research, to retail investors. It also should not apply to traditional brokerage services such as market making, underwriting, trade

[3] Under this construct, it is important to recognize that retail customers should not include those natural persons that are also simultaneously being advised by investment professionals, e.g., corporate trustees and registered investment advisers. In addition, firms must continue to be able to distinguish between types of natural person customers as it may be appropriate to offer a level of service to a wealthy sophisticated individual, but not to a customer with less financial sophistication and fewer financial resources.

[4] As we discuss later on, we believe the use of the term "fiduciary" is misplaced with respect to broker-dealers and can lead to customer confusion.

executions, and exercising limited time and price discretion. Because broker-dealers may offer services that do not involve retail customers or personalized investment advice, we do not support eliminating the broker-dealer exemption from the definition of investment adviser.[5]

Further, the standard of care should recognize that individual customers may have multiple relationships with the same broker-dealer and that the standard applicable to one account does not necessarily apply to all other accounts. For example, a broker-dealer advisory customer should be permitted to have a self-directed brokerage account should he or she so choose. That account would, of course, be subject to the full panoply of regulations that protect all brokerage customers, including Self-Regulatory Organization rules requiring just and equitable principles of trade, disclosure of conflicts of interest, standards for communications, order-handling requirements, fair-pricing standards, and best execution of orders, among others.

Similarly, the imposition of a harmonized standard must consider the appropriate treatment when financial intermediaries act in a principal capacity. As explicitly recognized in the legislation, acting in a client's best interest would not preclude a broker-dealer from acting in a principal capacity. And, where disclosures are required, we urge the Commission to allow financial services providers to obtain customer consent to principal transactions at the time of account opening and not on a transaction-by-transaction basis. [6]

We also urge the Commission as it moves forward with this study and report to Congress to recognize the importance of eliminating uncertainty. Financial service providers and investors will need greater clarity and guidance regarding the scope of the duty under the differing types of relationships that customers seek from their providers. To ignore the need for clarity, we would submit, would have a chilling effect on product innovation and customer service.

<u>In Determining the Appropriate Standard of Care for Broker-Dealers, the Commission Should Not Increase Investor Confusion by Labeling the Standard as Fiduciary.</u>

As the Commission is well aware, the term "fiduciary" carries a variety of meanings. A "fiduciary" under agency law means that the agent has agreed to act on behalf of the principal and the principal has the right to control the agent's acts. In agreeing to act on behalf of the principal, the agent must act with the care, competence, and diligence that are normally exercised by agents in similar circumstances. A principal can consent, either before or after the conduct has taken place, to waive an agent's duties.[7]

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[5] As the Commission notes in its request for comment on this issue, elimination of the broker-dealer exemption from investment adviser registration also raises licensing, registration and education issues, as well as Commission examination and enforcement resource issues.

[6] In this context we would note that while Section 913 of DFA provides that if the Commission promulgates standard of conduct rules, those rules "shall be no less stringent than the standard applicable to investment advisers under sections 206(1) and 206(2) of the [Investment Advisers] Act." The Commission was not directed to carry forward the principal transaction prohibitions of Section 206(3) of the Investment Advisers Act.

[7] See Restatement (Third) of Agency, § 8.06

A "fiduciary" under trust law is an altogether different type of fiduciary. A trust fiduciary must act in the best interests of all existing and future beneficiaries. The duties of a trust fiduciary are many, chief among them are the duties of loyalty, impartiality, and prudent investment. Self-dealing is strictly prohibited unless: (i) the consent of all beneficiaries has been obtained; (ii) it is specifically allowed under the terms of the trust or state law; or (iii) it is authorized under court order. Even when the duty of loyalty is waived, trustees must still comply with their many other fiduciary duties, including the duty to invest prudently.[8]

We are concerned that if broker-dealers are, in the future, deemed to be "fiduciaries," retail customers will be confused when different financial services providers, e.g., broker-dealers, investment advisers, and bank trust departments, represent to their customers that they are fiduciaries. While we support harmonization of standards when financial intermediaries are providing the same level of service and that the standard can encompass some of the duties outlined under agency law, we believe that the standard of care for broker-dealers, when providing advice about securities to their retail clients, should be a "best interest" standard.

Further, a best interest standard of care approach will allow the parties to define the scope of the duties of the broker-dealer or investment adviser at the commencement of the relationship and will allow for the application of the duty to vary with the specific services that the client seeks and the specific obligations assumed by the financial services provider. Thus, for example, a retail customer and his or her broker-dealer can structure the level of service sought under a best interest standard to make clear, as the statute does, that the duty only arises during the giving of the investment advice and ends following the rejection of that advice or the consummation of the transaction. If a retail customer is informed that the broker-dealer is a fiduciary, he or she may assume incorrectly that the broker-dealer's duties continue beyond the giving of the advice.

One of the six principles for regulatory reform implementation recently outlined by Treasury Secretary Geithner stated that policy makers, regulators and supervisors "will not simply layer new rules on top of old, outdated ones." [9] We strongly support that statement. The Commission should not simply layer a new duty on top of existing broker-dealer or investment advisory rules. Rather, we hope that the Commission will carefully formulate new guidance so that it revises or eliminates regulation that makes it harder to serve our customers. Additionally, we believe such revised regulation should aim to level the playing field to ensure that customers of broker-dealers and investment advisers receive comparable protections when receiving comparable services and are subject to a comparable level of regulation, examination and enforcement, commensurate, of course, with the services being offered.

Investors Need Better Disclosure

We wholeheartedly agree with the studies that have found that investors are confused about what it means to be a broker-dealer or an investment adviser and we support efforts to ensure that this investor confusion is eliminated and customers' expectations are met. Toward that end there is a

[8] See Restatement (Third) of Trusts, §§ 78, 90, 91, 92 (2007); Uniform Prudent Investor Act.

[9] See Speech entitled "Rebuilding the American Financial System" delivered by Secretary of the Treasury Timothy F. Geithner, New York University's Stern School of Business, Aug. 2, 2010.

need for standardized disclosure by financial intermediaries regarding the nature of a firm's relationships with its clients, the services or products that will be offered to the client, and the actual and potential conflicts of interest and compensation arrangements. It is fundamental that different levels of services should be disclosed differently. Thus, for example, many of our members offer customers limited investment opportunities through bank branches, e.g., mutual funds offered through Series 6 registered representatives. Customer disclosures for this level of service should be appropriately tailored.[10]

We hope that the Commission, based on information gathered from the study, will provide meaningful guidance on appropriate standardized disclosures to help ensure that investor confusion is eliminated. Customers should know the limits of the services that are being provided. Similarly, with the use of clear and concise disclosure financial services providers should be able to tailor the services, and the costs of those services, to meet the varied needs of their particular customers.

As part of the development of this guidance, we also hope that the Commission will include in its study the cost of disclosure compliance and ways to reduce excessive costs—including compliance costs—while ensuring that the required disclosure is meaningful and comprised of what the customer truly wants and needs to know. This effort is necessary to ensure that the Commission assesses the overall burden that the new guidance may present when compared to the benefits that it might offer. For example, we believe the costs and burdens associated with the investment adviser disclosure model do not warrant applying the same disclosure models to broker-dealer customer relationships. We also believe that adding line item disclosures to customer confirmations is very costly and not necessarily effective disclosure. We believe it is far preferable to provide clear disclosure at account opening, possibly via the Internet where appropriate, to retail clients.

Customer Choice Should Be Preserved.

While the frequently cited RAND Report[11] concludes that investors are confused about what it means to be a broker-dealer versus an investment adviser, it also concluded that investors generally are satisfied with the financial services they personally receive from their financial advisers.[12] Furthermore, it is vital to recognize that section 913 is business model neutral, and Congress did not suggest that customers should be denied access to certain products and services or that financial services providers should be denied the freedom to innovate and grow. Customers value the ability to choose between different types of services and fee structures when determining the type of relationship they want to have with a financial intermediary. The Commission should take care to ensure that customers may continue to make these choices, aided by clearer standardized disclosure and a harmonized standard of care.

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[10]Customers seeking investments through bank branch-based broker-dealers frequently seek limited investment services and do not possess the resources necessary to obtain comprehensive advice. We ask that the study include consideration of this delivery channel and the needs of these customers.

[11]Angela A Hung et al., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers (RAND Corp. ed 2008).

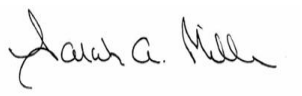
[12]Id. at 87, 99, 118.

We therefore urge the Commission, as it conducts its study, to be mindful of the varying types of services that financial intermediaries provide and preserve customer flexibility in selecting among financial services providers.

Conclusion

The ABA and ABASA appreciate the opportunity to provide meaningful comment to the Commission on the appropriate standard of care for financial service providers when providing personalized investment advice to retail customers. We believe that the Commission's deliberations in this regard should be guided by the following overarching principles, namely that retail customer confusion regarding the standard of care exercised by financial services providers should be eliminated through clear disclosures; that customer choice to appropriate products and services should be preserved; and that financial innovation, so important to this country's economic growth, should not be inhibited.

Sincerely yours,



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