



**The Derivative
Project**

Petition for Immediate Regulatory Action for SEC Rule Changes to Reestablish the Original Congressional Intent for a Clear Dichotomy Between “Salesperson” and “Investment Adviser” under the Investment Advisers Act of 1940

April 3, 2012

To:

**Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington D. C. 20549**

From:

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Individual Investor
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This Petition for Rulemaking is filed pursuant to 17 C.F.R. § 201.192 (“Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary.”).

www.thederivativeproject.com

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[PETITION FOR IMMEDIATE REGULATORY ACTION FOR SEC RULE CHANGES TO REESTABLISH THE ORIGINAL CONGRESSIONAL INTENT FOR A CLEAR DICHOTOMY BETWEEN "SALESPERSON" AND "INVESTMENT ADVISER" UNDER THE INVESTMENT ADVISERS ACT OF 1940]

April 3, 2012

Ms. Elizabeth Murphy, Secretary, Securities and Exchange Commission

Via Email and U.S. Mail

Petition for Immediate Regulatory Action for SEC Rule Changes to Reestablish the Original Congressional Intent for a Clear Dichotomy Between "Salesperson" and "Investment Adviser" under the Investment Advisers Act of 1940

(1) Proposed Rule Change to Eliminate Wrap Accounts Provided by Dually Registered Broker Dealers and SEC Registered Investment Advisors (2) Immediate ban of any mandatory arbitration clause for Wrap Accounts with a dually registered broker and SEC Adviser (3) Effective immediately, any retirement account investor is entitled to a private right of action for any retirement account, including IRA and SEP. Arbitration will optional.

Dear Ms. Murphy:

The growth of American's retirement accounts outside defined benefit pension accounts has exploded with the elimination of corporate America's defined benefit pensions and the introduction of 401K plans and of Individual Retirement Accounts in the 1980's. The prudent investment by professional fiduciaries of these accounts has not followed, putting American's retirement savings at risk, as evidence by the loss of over \$2 trillion dollars in American's retirement savings in the 2008-2009 financial crises. This Petition for three proposed rule changes analyzes and presents what changes must be made immediately to prevent a reoccurrence of avoidable retirement savings losses and losses to those most vulnerable, the elderly. The Investment Advisers Act of 1940, as currently structured and affirmed in a 2007 Appellate Court ruling, *FPA v. SEC*, is not currently being enforced by the brokerage industry's self-regulating organization (SRO), Financial Industry Regulatory Association, FINRA. This is depriving IRA investors, and other investors, from their right to a fair and just legal due process. Further, it is preventing recoverable losses due to IRA investors when SEC regulated investment advisers have breached their fiduciary duty under the Investment Advisers Act of 1940.

Summary of Current Emergency Need for Immediate SEC Action Concerning Wrap Accounts for Dually Registered Brokers/SEC Advisers

There are gaping holes for investors in the current structure of enforcement in the FINRA mandatory arbitration process that are leading to significant securities laws violations that are harming individual investors, in particular Individual Retirement Account (IRA) investors. This is no accident by the brokerage industry. The Dodd-Frank reform act has not dealt with this most very basic issue, nor has the SEC report to Congress on the "Oversight of Investment Advisers and Brokers Dealers", submitted to Congress January 2011. So-called "consumer advocates" such as the Consumer Federation of America

and Fund Democracy, whose founder and director is a Vice President, at the investment securities firm, Plancorp, continue to advocate for this blurring of roles that clearly harms the retail retirement investor, contrary to Congressional intent of the original law. This is clearly depicted in a most recent Letter to the SEC, dated March 28, 2012 RE: Framework for Rulemaking under Section 913 (Fiduciary Duty) of the Dodd-Frank Act:

https://www.investmentadviser.org/eweb/docs/Publications_News/Comments_and_Statements/Current_Comments_Statements/120328cmnt.pdf.

As this Petition will reveal, this blurring of roles clearly harms the retail retirement investor, most strikingly through the limits of rights to a fair and just legal due process. Recent actions by FINRA and the brokerage industry, in dually registered Wrap Accounts, is a clear obstruction of justice.

The brokerage industry and “planning industry” through the blurring of roles of the congressional intent of a dichotomy for salesperson and SEC registered investment adviser, have allowed significant takings of retail retirement investors funds that have escaped prosecution, due to lack of enforcement of current securities laws. This is no more evident than in Wrap Accounts where dually registered brokers/SEC registered investment advisers are providing advice.

Most IRAs are opened in a brokerage account. *Every* brokerage account is subject to mandatory arbitration. FINRA is a private corporation that is funded by the brokerage industry. The brokerage industry makes the rules for investor arbitration hearings and then hears investor complaints when securities laws are broken. FINRA appoints the arbitrators to hear the complaints. It is a system riddled with conflict of interest and has been structured by the brokerage industry to abuse the legal rights of individual retirement investors, particularly in IRAs and SEPs.

This Petition demonstrates that the brokerage industry, through its Agent, FINRA, has decided, arbitrarily, it will not enforce the fiduciary standard for investment advice in dually registered Wrap Accounts as mandated by the Federal Courts in March 2007. That is not the brokerage industry’s prerogative.

This practice has escaped scrutiny for several reasons:

- The brokerage industry’s SRO FINRA, escapes SEC scrutiny since FINRA mandatory arbitration hearings and FINRA’s rulemaking, internal records, are not subject to the Freedom of Information Act (FOIA)
- Inappropriate or “illegal application of current law” is not available from the Mandatory Arbitration Hearings, thus it continues without recourse to the brokerage industry benefit
- The brokerage industry and “financial planning” industry, with confusing certifications, blur the role of salesperson and SEC registered investment advisor and plays one regulator off the other. FINRA states that they cannot enforce breaches of fiduciary duty under the IAA of 1940 and the SEC says they (FINRA) can. The retail retirement investor is left without a legal due process for valid claims of breach of fiduciary duty under the Advisers Act, due to this purposeful blurring of rules.
- Conflicts in dually registered Wrap Accounts **are not** disclosed as mandated by current law. In fact, orally to a client, the dually registered broker and SEC registered investment adviser states the exact opposite of what the agreement states, which is very difficult for the retail retirement investor to prove in a FINRA mandatory arbitration hearing. “Fine print” material disclosures are often difficult to read and understand, even for trained brokerage industry salespersons. Disclosures of conflicts of interest, as proposed by “consumer advocates” and industry groups in

their March 2012 Letter (linked to above) to SEC Chairman Schapiro is not a path that protects retail retirement investors from inherent conflicts of interest between ‘salesperson’ and ‘Adviser.’ It will further harm the retail retirement investor.

Issue Number One

FINRA arbitrators are hearing FINRA disputes for dually registered SEC investment advisers/broker dealers on cases that involve a fee paid for investment advice, that concern a breach of fiduciary duty under the Investment Advisers Act of 1940. FINRA arbitrators are hearing these cases based on the broker-dealer *suitability* standard, in lieu of the requisite *fiduciary* standard, as currently required under the Investment Advisers Act of 1940. Thus, the investor has no legal due process when a claim is heard and/or denied, based on faulty training by FINRA of their arbitration staff and the conscious decision by FINRA and the brokerage industry to not enforce current law on dually registered Wrap Accounts.

FINRA cannot argue or plead the “ignorance” defense in this instance that has harmed so many retail retirement investors. This obstruction of justice is different than the “stupidity” defense used by AIG executives (and mistakenly accepted by the Department of Justice) in the writing of trillions of dollars of uncollateralized speculative credit default swaps and that of the most recent cry of “ignorance” by M. F. Global executives in the “disappearance” in clients’ segregated funds. In this situation there exists clear and concise documentation that FINRA allowed this confusion to continue to benefit the brokerage industry to the detriment of the retail retirement investor.

Issue Number Two

Wrap Account Agreements of several broker-dealers and investment advisers have undisclosed embedded conflicts of interest that breach the Investment Advisers Act of 1940, a significant securities law violation that must be corrected immediately. This conflict of interest is not only a securities law violation; it is causing unnecessary investor losses. The concept of salesperson, “financial planner” and SEC registered investment advisor acting within the same account to provide advice is a failed business model, that has allowed the brokerage and “planning” industry and its self-regulatory body that it funds, to take away retail retirement investors (and other investors’) basic legal rights under the Investment Advisers Act of 1940.

Why is it an Emergency to Eliminate “Dually Registered” Wrap Accounts?

SEC staff has generally adopted the position that, under the Investment Advisers Act, mandatory arbitration clauses “(or indeed any contractual clause which implies the waiver of rights under the federal securities laws) may not be included in Investment Adviser contracts with their customers.”

Obstruction of justice in the United States necessitates an immediate response and corrective action from Congress, the Executive Branch and the Judicial Branch, particularly when every American’s hard earned retirement savings are at risk.

History of The Derivative Project

The Derivative Project is an advocacy group that was initially created (March 2008) to alert Americans and Congress to the financial instability of a dangerous amount (with values exceeding a trillion dollars) of uncollateralized, speculative credit default swaps sold or written by AIG, which presented an indisputable threat to the nation's equity markets, as early as November 2007. Congress and asset management firms that charged a fee for investment advice, such as Charles Schwab, chose to ignore the warning signs to the detriment of retirement savers. They were materially conflicted.

During the 2008-2009 financial crisis, many SEC registered investment advisers, at both the institutional and retail level, were (1) conflicted due to monetary arrangements, and/or (2) not properly trained to alert retirement savers to the significant risk in the equities markets of an impending financial crisis due to trillions of dollars of uncollateralized, excessive speculation in credit default swap contracts that exacerbated counter party credit risk.

The Derivative Project seeks to create an even playing for American retirement savers in the current judicial and regulatory system, where the brokerage industry's self-regulatory body (FINRA) has silenced the voice of the retirement investor and prevented enforcement of *existing* securities law to protect the retirement saver.

The Derivative Project seeks to have the SEC and Congress reinforce the original congressional intent of the Investment Advisers Act of 1940, by restoring the clear dichotomy between sales person and SEC registered investment adviser.

The Derivative Project seeks to have Congress and the SEC create one standard of education and experience and certification exam for a SEC registered investment adviser, to (1) eliminate all confusion for retail retirement investors as to who is qualified, as to SEC established standards, to provide investment advice and (2) ensure that there are appropriate standards, as to education in today's global capital markets (including experience in OTC derivatives, for example) combined with an Advisers Act fiduciary standard to eliminate a reoccurrence of the \$2 trillion loss of retirement savings in 2008-2009.

The Derivative Project was founded based on experience in a 25-year diversified financial services career including:

- International commercial banking and trade finance, which included the ongoing analysis of financial statements, loans and credit extensions subject to ongoing country risk and currency risk for small importers, exporters and multinational corporations and direct loans (Exim-Bank), Commodity Credit Corporation and other government guaranteed export-import finance programs
- Corporate currency trader/foreign currency risk management advisor for transactional and translational exposures to small and large multinationals in the Euro-Currency and Foreign Exchange Markets
- Counter party credit risk analyst for OTC derivatives, including credit extensions for foreign currency swaps and forwards and interest rate swaps, caps and collars
- Equity trader at a regional bank asset management subsidiary
- Series 7 and Series 4 Registered Options Principal with a major Broker-Dealer
- Dually registered broker and SEC Registered Investment Advisor for a major broker-dealer/investment advisor for 6 years.

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Further, as an individual retail retirement investor and one with first-hand experience as a dually registered broker and SEC registered investment adviser, the writer can attest to three facts:

- ❖ Stockbrokers are salespersons, which have been trained to sell product. Increasing sales of their product or service is their primary function. The culture of a stockbroker, on a day-to-day basis, is a singular focus on increasing sales. There is nothing wrong with that. It is clearly their primary job function and objective of their employer.
- ❖ Education and training for stockbrokers is not mandated. There is a straightforward, limited several hour exam, Series 7, but it does not prepare one to provide investment advice to American’s retirement accounts in a global capital market that necessitates training and education in over-the-counter derivatives, currency risk, credit risk and the use of options to hedge portfolios, for example. The Series 7 is an exam that serves to provide just sufficient training to salespersons that “sell” product and does not mandate any formal higher education.
- ❖ A diversified background in banking, credit analysis, securities markets, derivatives and a higher education is a foundation for a career as a SEC registered investment adviser professional. A professional is a fiduciary. A salesperson is not a fiduciary and is by definition, not a trained professional, such as a doctor or a lawyer or a CPA. There have never been mandated professional standards for a SEC registered investment advisor. However, given the movement of American’s retirement savings from defined benefit pensions to 401ks and IRAs, that time is long overdue. Further, given the loss of over \$2 trillion dollars of American’s retirement savings and losses to endowments and non-profits, it is imperative that Congress and the SEC create the professional standards so these losses never happen again. These losses clearly could have been minimized through (1) professional advisers, that were not conflicted and were professional fiduciaries and (2) understood and were adequately trained in over-the-counter derivatives and use of options for hedging portfolios.

Existing Wrap Account Rules and Interpretive Rulings

SEC Rule 204-3 under the Investment Advisers Act, which contains a definition of a wrap fee program under subsection (g)(4) (<http://taft.law.uc.edu/CCL/InvAdvRls/rule204-3.html>), and SEC Rule 3a-4 under the Investment Company Act, which addresses the applicability of investment company registration to wrap fee programs (<http://taft.law.uc.edu/CCL/InvCoRls/rule3a-4.html>). The 1979 adopting release for Rule 3a-4, which also addresses investment adviser registration requirements, is located at <http://www.sec.gov/rules/final/ic-22579.txt>.

In March 2007, the U.S. Court of Appeals vacated Rule 202 (a)(11)-1.

In a case known as Financial Planning Association v. SEC, the Financial Planning Association (FPA), headquartered in Denver, challenged a rule adopted by the SEC in April 2005 that has come to be known as the “Merrill Lynch Rule.” The Financial Planning Association challenged SEC rule 202(a) 11)-1 and the SEC was forced to rescind it based on the Appellate Court ruling.

Here is the SEC Section 202(a)(11)(C) Interpretive Guidance following the Court’s Decision in 2007:

“In addition to adopting the Temporary Rule, the Commission also approved Interpretive Guidance under Section 202(a)(11)(C) of the Advisers Act. Section 202(a)(11) of the Advisers Act sets forth the definition of an “investment adviser” and provides, among other things, that a broker-dealer will not be deemed to be an “investment adviser” if the broker-dealer’s advisory services are “solely incidental” to its broker-dealer business and it receives no “special compensation” for such services.

The SEC Interpretive Guidance addresses this definitional exclusion with respect to a number of common broker-dealer practices. In particular, the Interpretive Guidance discusses the following broker-dealer practices and the treatment of such practices under Section 202(a)(11)(C):

1. Separate Contract or Fee for Investment Advisory Services. If a broker-dealer enters into a separate contract with a customer or charges a separate fee for investment advisory services, such services will *not* be considered to be “solely incidental” to the broker-dealer’s brokerage business under Section 202(a)(11)(C) of the Advisers Act. *If a Dual Registrant charges such a separate fee, it should treat the advice as subject to the Advisers Act.*”

Further, in November 2011, the SEC wrote regarding **f. Rule 202(a)(11)-1**

“We are rescinding rule 202(a)(11)-1 under the Advisers Act. (375) Although the rule was vacated by a federal appeals court (and is therefore not in effect), it has remained in the CFR.376” *See Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007).

Proposed Rule Change: SEC Rule 204-3

This petition requests that “Wrap Fee” Programs currently offered by the brokerage industry, that provide advice through dual registrants (broker and SEC registered investment adviser) pursuant to SEC Rule 204-3 will be immediately banned by the SEC.

Proposed Rule Change: Ban on Mandatory Arbitration Clauses for any retail retirement account

This petition requests an immediate ban on mandatory arbitration for any retail retirement account, including IRAs and SEPs.

The blurring of the dichotomy between salesperson (broker) and SEC registered investment adviser has caused an abuse of legal rights to many retirement savings accounts, including SEPs and IRAs. This blurring of roles must be brought to the attention of the State and Federal Courts. It would not have continued for so long, if retail retirement investors had access to state and federal courts for securities laws violations in their retirement savings accounts. Mandatory arbitration by FINRA has prevented the SEC and our judicial system from being aware of the extent of the violation of securities laws by the brokerage and financial planning industry.

- The SEC must call an emergency hearing between the Department of Labor, Congress and the SEC to take immediate action due to current illegal actions that are ongoing by FINRA, the brokerage’s industry’s SRO, who despite existing investor protection, by appellate court ruling, “FPA v. SEC”, has taken the unconscionable stance to ignore SEC interpretive rulings and Federal securities laws by blocking retail retirement investor’s rights to a fair and just legal process and a mandatory arbitration hearing under an Advisers Act “fiduciary” standard, not the lesser brokerage “suitability” standard.

Proposed Rule Change: Right to a “Private Right Action” for Any Retirement Account

ERISA standards currently enforced in other retirement accounts, such as 401ks, allow the right of private action. It logically follows that a retirement investor, who does not have access to a 401K type of account, say because one is self-employed, has the same legal right to private action in an IRA or SEP.

Through a “right of private action” for an IRA, Congress could uphold the strict dichotomy between salesperson and fiduciary investment Adviser, as originally envisioned by the Advisers Act.

- (1) There is a compelling reason not to adopt a new “universal fiduciary standard” that extends to brokers and SEC registered investment advisers as proposed by the Securities Industry Financial Marketing Association (SIFMA). This is contrary to the original Congressional intent of the Adviser’s Act. The blurring of roles in dually registered Wrap Accounts and the brokerage industry and financial planning industry’s involvement with FINRA’s actions to not enforce the current “fiduciary” standard in Wrap Accounts, is the most compelling rationale for Congress and the SEC to continue to uphold this strict dichotomy between salesperson and Adviser.
- (2) There is a compelling reason not to extend the Advisers Act fiduciary standard to the brokerage industry, who has so clearly abused its responsibility through its agent, FINRA, to uphold the current court mandated Advisers Act fiduciary standard in its mandatory FINRA arbitration hearings. Further, as SIFMA has argued to the SEC, the current Adviser Act fiduciary standard does not allow brokerage commissions, in addition to a fee. There is an inherent conflict of interest that the Act will not allow.
- (3) Sales persons may or may not have the extensive education and standards to advise American’s retirement savings. Fiduciaries are by definition professionals, such as a doctor or lawyer that have mandated State and Federal licensing standards. Reference Page 25, “Brokerage and Financial Planning Salespersons are not Professionals”.

The treatment of IRA investors, over the last five years, by the brokerage and planning industry, as evidenced by the stripping of their right to a fair and just legal process is the most compelling reason Congress, the SEC and the Department of Labor must uphold the Congressional intent for a strict dichotomy between salesperson (broker or financial planner) and SEC registered investment adviser.

IRA, SEP and other retirement accounts, too small to pay for advice from a SEC registered investment adviser, will continue to operate in brokerage accounts that are subject to the existing suitability standard. However, if there are abuses of these IRA and other retirement savings accounts, action may be taken by the retirement investor in the State and Federal courts, through a private right of action. These abuses will become public, a powerful deterrent to violations of existing securities laws in American’s retirement accounts.

Further, through SEC public education, the retail retirement saver will be advised he or she is being providing advice by a “salesperson”, which is not currently the case. The financial planning industry and the brokerage industry will be prevented from using any title or certification this misleads a retail

retirement saver. The SEC will mandate, for any communication with a retail retirement investor, that the term “salesperson” be used in all communications with retail retirement investors in a brokerage account.

As the size of the IRA or retirement plan grows, or even at inception, the retail retirement plan saver will understand the difference between salesperson and SEC registered investment adviser and may at any time choose to pay a fee from a trained professional. The SEC’s Office of Investor Education and Advocacy can create and distribute curriculum for public schools on retirement investing basics, highlighting the distinction between roles of salesperson and professional SEC Registered Investment Adviser and why historically there was a Congressional mandate in the Advisers Act for this dichotomy. Non-profits can be formed to mobilize retired SEC registered investment adviser professionals and other Advisers may choose to offer “pro bono” quality investment advice to those that do not have the means to pay for it in their retail retirement accounts.

Governing Rationale for Rule Changes

It has been estimated that Americans, lost in their retirement accounts, over \$2 trillion dollars in the 2008-2009 financial crisis. Were these losses avoidable? The author, based on extensive experience in capital markets, hedging tools in both the over-the-counter markets and exchange traded derivative markets, and application of securities market regulations believes retirement plan, endowment plan and pension plan losses were exacerbated by:

- Lack of enforcement of existing securities laws, in particular Adviser Act fiduciary standard in dually registered broker/SEC registered investment adviser Wrap Accounts
- Conflicts of interest embedded in existing brokerage products, Wrap Accounts that blur the original congressional intent for a clear dichotomy between salesperson and investment adviser
- Conflict of interest with FINRA, the SRO that “interprets” the existing rules for retail investors in mandatory arbitration and lack of public scrutiny of this conflict
- Lack of SEC mandated Adviser training and experience in global capital markets and OTC and exchange traded derivatives.
- The role of sales persons is to sell product. Protection of American’s retirement savings was secondary in traditional “suitability” brokerage accounts. Retail retirement investors were confused. They clearly believed they were receiving advice from professional fiduciaries, which they trusted. Retail retirement investors were deceived by the brokerage and planning industry as to roles and responsibilities. It was not a question of “financial literacy” of investors. It was an issue of deception by an industry as to their role and responsibilities.

Further, the failure by the SEC and Congress to uphold the original Congressional intent of the Investment Advisers Act of 1940, where a salesperson is distinct from an investment adviser, left American’s retirement savings beholden to an industry that believed it had the right to operate in the best interests of the broker dealer, in lieu of up holding the court mandated standard, the fiduciary standard, as defined in the Investment Advisers Act of 1940 and interpreted in Court rulings.

The “salesperson vs. Adviser” conflict is no better represented than through the examination of the blurring of roles in certain Wrap Accounts, which has caused illegal takings of American’s retirement savings and deprived retail retirement investors to any legal recourse in a valid court of law.

There is a compelling rationale for the immediate ban of dually registered Wrap Accounts.

There is a compelling rationale for the *immediate* removal of FINRA as arbiter of any investor fiduciary claim that is protected by the Investment Advisers Act of 1940, including an immediate ban to mandatory arbitration for SEC registered investment advisors that are also registered as broker dealers at FINRA. There is a compelling rationale for the immediate granting of a right to private action for any retirement plan, including IRA or SEP.

1. In sum, the SEC's interpretive rule, in March 2007, following the FPA v. SEC court ruling made it very clear: *If a Dual Registrant charges such a separate fee, it should treat the advice as subject to the Advisers Act.*

FINRA has not enforced this SEC mandate, Section 202(a)(11)(C), in its rule making or on behalf of retail retirement investors in FINRA arbitration hearings concerning any breach of the Advisers Act.

FINRA has consciously chosen to subject retail retirement investors to mandatory arbitration proceedings with a court-rejected brokerage profit model of Wrap Accounts over the inalienable legal rights of retail retirement investors, mandated by the Federal Courts, Congress and the SEC to a fiduciary standard protection under the Investment Advisers Act of 1940.

Governing Rule SEC Rule 204-3

(1) Reference SEC Statement on Supreme Court Case (<http://www.sec.gov/divisions/investment/capitalgains1963.pdf>) SEC vs. Capital Gains 1963 and excerpt below:

"The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's. The Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, and the Investment Company Act of 1940 preceded it.

A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry. As recently said in a related context, "It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail."

(2) Reference Federal Court's Opinion on the "Merrill Lynch" Rule - March 2007

The following paragraphs are taken from:

FPA Rises Up and Wins • Spring 2007 • www.rightpathinvestments.com 2007 Right Path Investments & Financial Planning, Inc.

"Following the 1929 stock market crash and the Depression, Congress passed the Securities Exchange Act of 1934 to govern the securities industry and the conduct of brokers and dealers. Six years later, it

passed the Investment Advisers Act of 1940, placing further requirements on persons providing investment advice to the public:

- They must register with the SEC,
- They must be free of conflicts of interest, and
- They must conform their conduct to a fiduciary standard of care—i.e., placing their clients' interests above their own. By contrast, broker-dealers are not required to completely disclose their conflicts of interest and are subject only to a "suitability standard" when selling investment products to their customers. Congress created a specific broker-dealer exemption to the Investment Adviser Act of 1940 requirements under certain circumstances—the meaning of which was the subject of the FPA challenge. Congress also established a catch-all, allowing the SEC to grant discretionary exemption to persons not covered by other exemptions.
- The broker-dealer exemption contains a dual requirement for broker-dealers to become exempt:
 - (1) Investment advice must be "solely incidental" to the broker's basic services; and
 - (2) The broker must not receive "special compensation." The SEC established the Merrill Lynch rule in response to industry changes during the 1980s and 1990s: the elimination of fixed commission rates, the advent of discount brokers (e.g., Fidelity and Schwab), and consumers discovering the advantages of working with a Registered Investment Adviser.
 - (3) To formulate the rule, the SEC determined that fee-based brokerage was "not...fundamentally different from traditional brokerage programs." Although it acknowledged that receiving fees was indeed "special compensation" within the meaning of the Act, the SEC granted exempt status to "fee-based programs" on the condition that investors receive a specific disclosure that such accounts were not protected by the fiduciary standards of the Investment Advisers Act of 1940.

Further, the legislative history convinced the majority that, despite industry changes over the decades, the original dichotomy established by Congress—salesperson vs. adviser—remains a profound basis for regulatory distinction. Congress' use of the conjunctive "and" in the exemption identified for the court a clear legislative intent to require Investment Adviser Act compliance by brokers not charging commissions.

Due to the clarity of the broker-dealer exemption to the Investment Advisers Act of 1940, the majority found it unnecessary even to address the SEC's purported rationale for promulgating the rule (embraced by the dissent): discouragement of churning, recommending unsuitable securities, and aggressive marketing by broker-dealers. Moreover, this decision is consistent with a half century of SEC interpretations that brokers receiving special compensation should be considered an investment advisor."

The Brokerage Industry and FINRA have ignored and obfuscated this Appellate Court Ruling in FPA v. SEC, harming the IRA or SEP investor, which has impacted the safety and performance of all IRA Accounts

Here is a retail retirement investor's experience, beginning in December 2007, with a Charles Schwab "dually registered" Wrap account, "Schwab Private Client Service" used in IRA and SEP accounts:

**[PETITION FOR IMMEDIATE REGULATORY ACTION FOR SEC RULE CHANGES TO
REESTABLISH THE ORIGINAL CONGRESSIONAL INTENT FOR A CLEAR DICHOTOMY
BETWEEN “SALESPERSON” AND “INVESTMENT ADVISER” UNDER THE INVESTMENT
ADVISERS ACT OF 1940]**

- The dual registrant, (FINRA Broker and SEC registered Investment Advisor) pitches the retail retirement investor: “Would you like me to provide you regular investment advice for a fee, so you will have the ability to retire when you want to? I will provide you with regular investment advice, from our Charles Schwab experts, such as Liz Ann Sonders. You will have access to their expertise for a simple quarterly fee, which will be unbiased advice, in your best interest, subject to a fiduciary standard, since we will not be trying to sell you products. You will have advice, that is not conflicted, by paying this quarterly fee.”
- The dually registered broker and SEC investment adviser does not disclose, as required by law material facts, such as failure to disclose that he had previously been fined by FINRA over \$100,000 for breach of fiduciary duty and churning under brokerage suitability standards, (2) failed to disclose conflicts of interest in the Schwab Agreement, such as extra fees, from mutual fund loads and proprietary Schwab funds and (3) that the broker/Adviser will not be paid if your account assets are moved to cash.

When one goes to FINRA as required by brokerage account binding arbitration, concerning breach of fiduciary duty in Schwab’s Private Client Wrap Account, Charles Schwab’s attorney will tell the **arbitration panel** two things:

- You have the moral and legal responsibility to only act within the existing law. FINRA has not yet been given by Congress the authority to impose awards for breach of fiduciary duty by Congress for breach of fiduciary duty under the Advisers Act. Only the SEC has that authority. The Schwab attorney will then quote Stephen Luparello, FINRA Interim CEO, who testified on January 27, 2008, before the Senate Banking committee, “FINRA is not authorized to enforce compliance with the Investment Advisers Act of 1940. Authority to enforce that Act is granted solely to the SEC and to the States.”
- Charles Schwab’s attorney will tell the FINRA arbitration panel that even if there was a breach of fiduciary duty in this case, you cannot award the Claimant any damages, since there is no right of private action for this investor for IRAs and breach of fiduciary duty in a Wrap Account.
- The three arbitrators will then judge and ask questions of the Claimant and Respondent based on the brokerage “suitability” standard, not the required Investment Advisers Act of 1940 “fiduciary” standard, based on SEC Interpretive Ruling in March 2007, following the Appellate Court ruling, *FPA v. SEC*. There will be absolutely no questions or debate by the arbitrators concerning the retail retirement investor’s legal arguments that there are material conflicts of interest under the Investment Advisers Act fiduciary standard, since the entire focus of the Hearing is based on the brokerage “suitability” standard.

Further, the arbitrators focus on the concept that the investor is a “sophisticated investor” which is a term that has no relevance under the IAA of 1940 “fiduciary” standard.

When the Claimant brings up lack of disclosures and material conflicts under the Investment Advisers Act of 1940, the Arbitrators imply and rule there is a distinction between fiduciary standard in a discretionary vs. non-discretionary account in a dually registered Wrap Account. They cite the fine print and tell the Claimant, “ It was a non-discretionary account. You accepted the advice. Any error is your fault. You were free to take or leave the advice.” The brokerage industry and FINRA is claiming that

non-discretionary accounts are not subject to the Investment Advisors Act of 1940, despite SEC rulings to the contrary.

Once the Arbitration Hearing tape is turned off, despite the Arbitrators ruling that the IRA investor, Claimant, had the right to be the last to speak in the Hearing, the Charles Schwab attorney breaks that sacred rule and threatens the three arbitrators, “*You* had better follow the letter of the law, that I have outlined here. *You* have no other choice, but to do so.”

Thus, the IRA investor who paid a fee for investment advice, who has valid claims and rights to a fair and just Hearing for breach of fiduciary duty under the Investment Advisers Act of 1940, as ruled by the SEC, has no rights to a legal due process, when breaches of fiduciary duty are judged on a brokerage suitability standard in lieu of the Court mandated fiduciary standard. The brokerage industry has determined how to play the regulator, FINRA’s roles and responsibilities, off of the regulator, SEC’s roles and responsibilities. This is the exact explanation as to why the Madoff Ponzi scheme escaped regulatory scrutiny, “ a confusion of roles between NASD and the SEC.”

From late 2007 to present, FINRA is still hearing arbitrations for “dually registered” investment advisors under the “suitability” standard, when the existing case law clearly determines the retail retirement investor is entitled to a “fiduciary” standard hearing under the Investment Advisers Act of 1940 and as represented to retail retirement investors by the SEC Office of Education and Advocacy.

FINRA has allowed the brokerage industry to continue to submit Federal Securities law violations to mandatory arbitration, when the SEC allows these violations access to Federal courts in the case of SMA’s and ERISA allows the right of private action.

The Investment Advisers Act of 1940 provides a fiduciary standard if you pay a regular fee for investment advice. Your SEC registered investment advisor must act as a fiduciary under the IAA of 1940 in a Wrap Account. There is no exception. Your SEC registered investment advisor that provides that advice is a fiduciary as interpreted by *Capital Gains* in 1963, the *FPA v. SEC* concerning the “Merrill Lynch Rule” of 2007 and the SEC Interpretive Ruling of 2007, following the *FPA vs. Merrill Lynch* court ruling.

“Existing FINRA regulations offer no guidance whatsoever as to what standards should be applied to a broker’s ongoing asset management activities (discretionary accounts) or to a broker’s ongoing monitoring and recommendations concerning a client’s portfolio (non-discretionary wrap accounts). This type of continuous service, however, is exactly what customers logically expect in the case of a wrap account in exchange for the ongoing payment of an annual fee. If brokers are no longer being paid simply to execute trades, what are they being paid for?”

<https://lawlib.wlu.edu/lexopus/works/445-1.pdf>

--Daniel M. Miller, Esquire, the founder of the Miller Fiduciary Law Group (“MFLG”), which provides legal advice concerning fiduciary investment management compliance, compensation, and litigation issues to leading Banks and Trust Companies.

Why hasn’t FINRA promulgated new rules for arbitrators and industry since the SEC interpretive rule on *FPA v. SEC* in March 2007? Will they plead the “stupidity defense?”

The reason is simple as to why FINRA has not adopted mandated case law and ignored SEC rulings. It is in the retail retirement investor’s best interest and would cut into brokerage/planning industry profits. FINRA and the planning and brokerage industry blur the roles and use fine print to confuse retail retirement investors and assumed no one would understand their legal rights.

**[PETITION FOR IMMEDIATE REGULATORY ACTION FOR SEC RULE CHANGES TO
REESTABLISH THE ORIGINAL CONGRESSIONAL INTENT FOR A CLEAR DICHOTOMY
BETWEEN “SALESPERSON” AND “INVESTMENT ADVISER” UNDER THE INVESTMENT
ADVISERS ACT OF 1940]**

FINRA is well aware of the FPA v. SEC ruling in March 2007. This ruling occurred over 5 years ago. FINRA has taken absolutely no action to provide the Court-ordered mandated protection to IRA investors that invest their retirement savings in “dually registered” Wrap accounts.

FPA v. SEC affirms that investment advice in a non-discretionary account, such as a Wrap Account, is *not* an exception to the Investment Advisers Act of 1940’s fiduciary standard for investment advice that is in exchange for a regular fee. The only exception is that the advice be “solely incidental,” which is not defined by the SEC as charging a quarterly fee for ongoing investment advice. Wrap account fees are clearly “not incidental,” thus they are subject to the Investment Advisers Act of 1940 fiduciary standard.

Here is what happens when a retail retirement investor complains they have lost their legal rights under dually registered Wrap Accounts:

- When a retail retirement IRA investor is subjected to a FINRA mandatory arbitration hearing on breach of fiduciary duty under the Advisers Act, based on the suitability standard, the investor contacts the SEC for assistance. The SEC is informed of this clear obstruction of justice when FINRA allowed the arbitrators to conduct the Hearings based on the inappropriate “suitability” standard.
- The SEC contacts FINRA on behalf of the investor. FINRA then misrepresents to the SEC and states that is not the case. FINRA tells the SEC they are using the “fiduciary standard” in these mandatory arbitration hearings, yet both FINRA and the SEC refuse to listen to the tapes from the Hearings that clearly delineate that arguments and questioning using a “suitability” standard were applied in Hearings that mandated a “fiduciary” standard, as the governing law. This is fraudulent misrepresentation by FINRA to the SEC.
- Despite changes in law to protect retail retirement investors, FINRA has not initiated requisite rule making changes and has not trained and insisted arbitrators hear “dually registered” Wrap Account arbitration cases under the IAA of 1940 fiduciary standard in lieu of the broker suitability standard, thus depriving the retail retirement investor to a fair hearing under current case law.
- When a retail retirement investor complains to FINRA that their case was a breach of fiduciary duty, under the Investment Advisers Act of 1940 and that the arbitrators heard it under the suitability standard, FINRA does not amend the hearing process for the retail retirement investor, they side with the brokerage firm and ignore the misapplication of justice towards the retail retirement investor who must suffer unnecessary losses that have protection under existing securities laws.
- FINRA refuses to listen to the tapes, at the request of a retail retirement, IRA investor, of an Arbitration hearing that represents: (1) Biased arbitrators, (2) a Hearing based on a suitability standard when the law mandates a fiduciary standard and (3) a Hearing that revealed a Charles Schwab broker/SEC registered investment advisor had not provided a mandated ADV and had not disclosed to the retirement investor a NASD disciplinary history resulting in fines in excess of \$100,000 and (4) revealed indisputable breaches of the Investment Advisers Act of 1940, all clear and distinct breaches of law and SEC rulemaking.

The Brokerage Industry is “Papering the File” concerning applicable legal rules concerning Dually Registered Wrap Account Agreements, that distorts and prevents fair and just IRA and SEP Account FINRA Arbitration Hearings

Here are two instances where the Brokerage industry is “papering the file” with false and misleading statements to obfuscate the underlying legal issues to prevent retail retirement investors from access to a proper fiduciary standard arbitration under the Advisers Act for dually-registered broker dealers.

(1) Here is an excerpt from an article in the *Henry Stewart Publications* written by Daniel M. Miller, Founder, Miller Fiduciary Law Group and Eugene F. Maloney, EVP and Corporate Counsel, Federated Investors, March 28, 2012.

- “Brokers offering wrap accounts, who provide continuing investment advice to their customers, will likely be subject to *new* ongoing fiduciary duties that will require them to continuously monitor both their clients’ accounts and their existing recommendations made to clients under standards heretofore applicable only to investment advisers;
- FINRA regulation of wrap accounts, therefore, must be extensively revised not only to incorporate a fiduciary duty of care but also to codify and provide clear guidance on prudent investment management practices with respect to wrap accounts; and

FINRA must also promptly act to meaningfully educate both brokers and, importantly, FINRA arbitrators, on the requirements of the new standards.”

The SEC, through its Interpretive Ruling in March 2007, ruled that Wrap Accounts are, effective *immediately*, are subject to the Investment Adviser’s Act of 1940.

This publication, this attorney and the Federated Investors Corporate Counsel are attempting to rewrite history to protect FINRA and the brokerage industry from their abject failure to conduct FINRA arbitration hearings under Federal court and SEC mandated fiduciary standard under the Advisers Act, **effective March 2007**.

(2) Here is an Excerpt From a Paper: “*Wrap Fee Programs and Separately Managed Accounts* presented at the ALI-ABA Investment Adviser Regulation Fordham University School of Law January 15-16, 2009”, where attorney Steven W. Stone Morgan, Lewis & Bockius LLP discussed the fact that the SEC has ruled that the concept of discretionary and non-discretionary in a Wrap Account is not relevant when a quarterly fee is paid for investment advice.

“According to the SEC, “the staff is of the view that a [wrap fee program] generally is not incidental to a sponsor’s broker-dealer business and . . . the sponsor’s portion of the wrap fee is special compensation.” This principle was left undisturbed in the SEC’s 1997 release adopting Rule 3a-4 <<http://www.sec.gov/rules/final/ic-22579.txt>> (“Rule 3a-4 Adopting Release”) and the SEC’s 1999 rule proposal (and no-action position) clarifying the scope of the broker-dealer exception from the definition of investment adviser <<http://www.sec.gov/rules/proposed/34-42099.htm>>. In that 1999 rule proposal, the SEC stated that, even if broker-dealer sponsors do not have discretionary authority, the advice the sponsor provides on asset allocation or selection of portfolio managers could not be viewed as incidental to its brokerage services. The SEC re-affirmed this view in guidance in the release adopting (now vacated) Rule 202(a)(11)-1, stating that “advisory services provided by certain brokers in connection with wrap fee programs are not solely incidental to brokerage for the purposes of the broker-dealer exemption.”

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However, in mandatory arbitrations for retail retirement investors, FINRA continues to permit the distinction for non-discretionary accounts that FINRA arbitrators then may use to exempt dually registered broker dealers advice in Wrap Accounts from the fiduciary standard under the Advisers Act, since the account was “non-discretionary.” FINRA is ignoring, once again, the SEC interpretive rulings that benefit the brokerage industry over the retail retirement investor’s basic legal rights.

FINRA has allowed statements in dually-registered Wrap Accounts, including Charles Schwab’s Private Client Agreement, that in essence state, that although the SEC registered investment adviser is providing you regular investment advice for a fee in a Wrap Account, it is up to you to determine whether you accept the advice, since it is a “non-discretionary” account.

The Schwab Private Client Wrap Account service account agreement ignores the SEC mandate that the concept of a “discretionary” and “non-discretionary” which clearly defines “non discretionary” is not relevant when a regular fee is paid for investment advice, under the Investment Advisers Act of 1940.

Further there are clear material conflicts of interest that breach the IAA of 1940 fiduciary standard, that are not disclosed to the IRA investor in a Schwab Private Client Agreement, thus rendering the advice conflicted.

The Rationale for a Retail Retirement Investor’s Right of Private Action for Breaches of Fiduciary Duty in all Retirement Accounts

- FINRA is fully aware that the retail retirement investor, with a complaint about breach of fiduciary duty in an IRA, has no right to legal due process and no right of private action and cannot go into the Federal courts. In sum, it is a rigged game to the benefit of the brokerage/planning industry and to the detriment of the IRA investor, who is stripped of all legal rights under law by FINRA’s illegal arbitration process.
- When the retail retirement investor goes to the SEC Office of Investor Advocacy about a claim of breach of fiduciary duty in a Wrap Account that FINRA ruled on, based on a suitability standard, the retail retirement investor is told, “You have already had your day in court with FINRA, there is nothing we can do.” “A hundred thousand dollar loss in an IRA is too small for us to go against a securities firm to reclaim this money for you, even if you might be entitled to it. The costs to the taxpayer are too great to pursue these \$100,000 losses for IRA accounts for breach of fiduciary duty in IRA’s.
- When a retail retirement investor seeks a securities attorney to go to Federal court to overturn the FINRA arbitration, that IRA investor is told. “Don’t waste your time. Federal courts will never overturn FINRA rulings. We will not take the case.” Further, Wall Street has ensured that over 99 percent of securities attorneys are “conflicted” and will not represent a retail retirement investor. There is more money to be made representing brokerage firms.
- The Separately Managed Account (SMA) distinction for access to Federal Courts highlights the hypocrisy of the rationale that an IRA/SEP investor has no access to any legal remedies for violations of the Investment Advisers Act of 1940. “SEC regulated investment advisors, unless

they are also brokers, are not subject to regulation by FINRA. Instead, as fiduciaries, under state law, each IA's continuous ongoing management of their client's SMA investments may be subject to review under the investment standards created under various versions of the "Prudent Investor Rule" which have been enacted by almost every state and the District of Columbia. In the case of a dispute between a SMA client and an Investment Adviser, the SMA client is **generally free to litigate his or her dispute with the Investment Adviser in state or federal courts** because the SEC staff has generally adopted the position that, **under the Investment Advisers Act, mandatory arbitration clauses (or indeed any contractual clause which implies the waiver of rights under the federal securities laws) may not be included in IA contracts with their customers.**" (Excerpted from "Brokers are fiduciaries - Now what?" The proposed new federal fiduciary standard of care owed by brokers and its impact on existing FINRA Regulations" Daniel M. Miller, Esquire.

- Individual Retirement Accounts of all types, including SEPs, should have no different treatment than a 401k. They deserve a private right of action. If brokers continue to provide advice that is based on the traditional "suitability" standard a private right of action would deter the brokerage industry from unsuitable actions towards American's retirement savings in a brokerage account. These unsavory actions would no longer be shielded from public view from a conflicted self-regulatory body. FINRA's flawed mandatory arbitration process that escapes scrutiny and allows imprudent and illegal actions to continue, without justice, would be revealed through a private right of action.

Wrap Accounts: Discretionary vs. Non-Discretionary: FINRA's and the Brokerage Industry's Smokescreen

The brokerage industry created an obfuscation of investor's rights under the Investment Advisers Act of 1940 by "creating" an illusory distinction that there was a different fiduciary standard under the Investment Advisers Act of 1940 if one was provided advice for a fee in a "non-discretionary" brokerage account, in lieu of a "discretionary" brokerage accounts. This is an absurd and meaningless distinction, that SEC interpretive rulings dispute.

Has FINRA decided to pretend that Federal Court mandated protection for a fiduciary standard under the Investment Advisers Act of 1940, is subservient to NY law concerning the fiduciary rights of the retail retirement investor?

FINRA has allowed a fabricated concept of "discretionary vs. non-discretionary" account in a Wrap Account to misrepresent a retail retirement investor rights to a fiduciary standard as mandated by the Federal courts and reaffirmed in FPA v. SEC.

"Most notably, New York law (which is the law that governs the customer agreements used by many securities broker-dealers) holds that a broker-dealer does not owe a fiduciary duty to a customer who maintains a standard, non-discretionary account. *See, e.g., Liberman v. Worden*, 268 A.D. 2d 337, 339, 701 N.Y.S. 2d 419, 420-21 (1st Dep't 2000); *Perl v. Smith Barney Inc.*, 230 A.D. 2d 664, 666, 646 N.Y.S. 2d 678, 680 (1st Dep't 1996)."

This case law is not relevant following FPA v. SEC. Neither the SEC nor the Federal Courts have provided exception to a fee paid for Investment Advice in a Wrap Account based on the determination whether or not the account is discretionary or non-discretionary. The Courts and the SEC are clear that in a Wrap Account the investor is entitled to the Investment Advisers Act of 1940 fiduciary standard, if a fee is paid for investment advice. The concept of discretionary vs. non-discretionary is not relevant in Wrap

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accounts and it is a mere ploy by FINRA and the brokerage industry to deprive the retail retirement investor of their basic contractual rights, to a fiduciary standard under the Advisers Act.

This case law also refers to a “standard” account. A Wrap Account is not a “standard account”. The Courts have ruled it is subject to Federal Securities law, when a fee is paid for investment advice.

FINRA is Allowing Material Conflicts of Interest to the Advisers Act in Wrap Account Agreements, Which Escape Public Scrutiny due to Blurring of Role of Salesperson vs. SEC Registered Investment Adviser

There are material conflicts of interest with dually registered Wrap Agreements, which the Federal Courts have stated are subject to fiduciary duty under the Investment Advisers Act of 1940. FINRA is not currently enforcing existing laws and forces retail retirement investors to mandatory, binding arbitration where Arbitrators base decisions on suitability standard, a miscarriage of justice.

After examining the history of the Adviser Act, the Court discussed Congress’s philosophy concerning the investment adviser’s relationship with a client.

“The Investment Advisers Act of 1940 thus reflects a congressional recognition “of the delicate fiduciary nature of an investment advisory relationship,” as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested. It would defeat the manifest purpose of the Investment Advisers Act of 1940 for us to hold, therefore, that Congress, in empowering the courts to enjoin any practice which operates “as a fraud or deceit,” intended to require proof of intent to injure and actual injury to clients.¹⁹”

The Court went on to emphasize the fiduciary nature of an investment adviser’s relationship to his client.

“Nor is it necessary in a suit against a fiduciary, which Congress recognized the investment adviser to be, to establish all the elements required in a suit against a party to an arm’s-length transaction. Courts have imposed on a fiduciary an affirmative duty of “utmost good faith, and full and fair disclosure of all material facts,” as well as an affirmative obligation “to employ reasonable care to avoid misleading” his clients.²⁰ ¹⁹ *Capital Gains Research Bureau*, at 191-192. ²⁰ *Capital Gains Research Bureau*, at 194 [footnotes omitted].

Here are these material breaches that FINRA will not enforce, despite Congressional and Court legal rulings that they must:

- (1) SEC registered Investment Advisers are paid more if their clients are in equities over bonds is a material conflict in dually registered Wrap Accounts and a major cause of the phenomenal losses of retail retirement investors in the 2008-2009 financial crash
- (2) SEC registered Investment Advisers are not paid if their clients are in cash is a material conflict, which is also not at all disclosed in Wrap Accounts; such as the Charles Schwab Private Client Service wrap account agreement. As testified under oath in FINRA arbitration, concerning

conflicts of interest the Charles Schwab SEC registered investment advisor to a Wrap Account, testified that he did not get paid if the Client's assets were moved to cash. This is another material conflict of interest that contributed to the size of losses to American's retail retirement investors during the 2008-2009 financial crash, where over \$2 trillion dollars in retirement dollars were lost.

- (3) Charles Schwab Private Client was instructed by a Wrap Account client to investigate the risk of a collapse of the equity markets due to AIG's trillions of dollars of uncollateralized speculative credit default swap contracts. Charles Schwab's business model, dually registered Wrap Account, was conflicted. Despite a fiduciary duty under the Advisers Act, Schwab Private Client refused to investigate and to comment to the investor on this very basic question about potentially unusual risk. Charles Schwab Private Client, in this dually registered Wrap Account, refused to move the client to cash, as requested. The Schwab Private Client SEC registered investment advisor would have received less in annual income, from both fees and proprietary product, so he chose his and Charles Schwab's profits over the needs and safety of the retail retirement investors life savings:

- As a fiduciary, an investment advisor has a "duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendation on materially inaccurate or incomplete information...if those risks are significant or unusual..."

In sum, Charles Schwab and FINRA were complicit in allowing retirement accounts during the 2008-2009 financial crisis, in many cases lose close to 40 percent, preventing many retirees from retiring or having to return to work, due to breach of *existing* securities' laws and lack of enforcement of the Investment Advisers Act of 1940 fiduciary standard.

Why didn't Charles Schwab Private Client alert their dually registered Wrap Account investors, that trillions of dollars of uncollateralized, speculative credit default swap contracts on AIG's books, could portend significant instability in the financial markets, despite being advised it was a threat to retiree's savings? They were conflicted and due to the blurring of role as both salesperson and Adviser, the retail retirement investor was confused and trusted they would act in their best interest, as a fiduciary under the Advisers Act.

In determining the framework for fiduciary duty and standards under Section 913 of the Dodd-Frank Act these are the questions the SEC, Congress and the Department of Labor should be asking the brokerage industry. Did current brokerage industry practices and brokerage industry models for advising American's retirement savings contribute to excessive retirement plan losses during the financial crisis? If the Congressional mandate in the Advisers Act for a clear dichotomy between salesperson and Adviser, had been in effect, would retail retirement investors have taken more action to protect their life savings or would true fiduciaries taken their mandated role under the Advisers Act more seriously?

Charles Schwab was advised there was a significant threat to financial markets and they chose not to act as a fiduciary for all their retirement accounts. Why?

The concept of fiduciary duty in the Advisers Act has been interpreted over the years and reinforced by the SEC. Gains and losses are not relevant in determining if an Adviser breached his fiduciary duty. What is relevant in this case with Schwab Private Client Service and every fiduciary situation:

- Was there a material conflict of interest? Yes. There was in the case of Charles Schwab Private Client. Schwab's SEC registered Adviser and broker sales person did not get paid if they moved their Wrap clients to cash or earned less if they moved their clients to

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bonds. These SEC registered investment Advisers, despite being paid a quarterly fee for investment advice, chose their interests over their client's best interest.

- Charles Schwab Private Client brochure advertised that Schwab Private Client retail retirement plan investors would have access to Schwab's expertise in hedging strategies. Schwab Private Client's SEC registered investment advisers, despite a close to 50 per cent drop in the equity markets from 2007 to 2009, chose not to use these hedging strategies to protect their retiree's assets. This is misrepresentation under the Advisers Act, to promise they will deliver hedge protection and not deliver it during the most critical time.
- FINRA arbitrators did not cite the Schwab Private Client SEC registered investment adviser for admitting to violation of SEC Rule 206(4)-4 -- Financial and Disciplinary Information that Investment Advisers Must Disclose to Clients and protect the retail retirement client when there was a SEC rule violation. Why?
- Did Charles Schwab have a fiduciary duty to investigate a Schwab Private Client's concerns and questions about the impact of trillions of dollars of uncollateralized speculative AIG credit default swaps on the financial system and equity markets when their investor paid a Schwab SEC registered investment adviser a fee for investment advice. Yes, it was their fiduciary duty...."if those risks are significant or unusual."

The brokerage industry cannot contend, "no one understood these risks." Trained and experience OTC derivative professionals understood these risks. Schwab Private Client's brochure advertised they had expertise in derivatives.

For fiduciary rulemaking, the question for the SEC is did Charles Schwab Private Client and other comparable programs that blur the role of salesperson and Adviser, ignore the client's concerns and breach their fiduciary duty because there was a material conflict in their dually registered Wrap Account agreement based on Adviser compensation? Further, has Charles Schwab and other firms not adequately trained their sales force and should the SEC create a mandate to create a true professional, with SEC approved standards to prevent another \$2 trillion dollars of American's retirement savings?

FINRA breached its most cherished mandate to protect investors in the most critical time of need, by not requiring the brokerage and planning industry adhere to existing case law beginning in March 2007. This is a breach that has wreaked havoc on the lives of many retirees and was completely avoidable.

FINRA's Obstruction of Justice Towards the Retail Retirement Investor

There is no transparency under FINRA arbitrators' decisions. There is no factual definition of the substance of an arbitration case, which would shed light to the SEC about ongoing miscarriage of justice in FINRA arbitration hearings. This is purposeful and must change immediately.

In fact, FINRA will go so far as to publish the arbitration results under a heading that misrepresent the substance of the Arbitration case, in particular complaints of breach of fiduciary duty under the

Investment Adviser Act of 1940. FINRA will label the case as something innocuous as “Claimant Did Not Like The Advice.”

Lori A. Richards, then Director, Office of Compliance Inspections, SEC spoke February 27, 2006 to an Advisor Compliance Summit and stated:

“A fiduciary must act for the benefit of the person to whom he owes a fiduciary duty, to the exclusion of any contrary interest.

She stated the Advisers Act: “reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship, as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser - consciously or unconsciously - to render advice which was not disinterested.”² And, the Court said that: investment advisers are fiduciaries with “an affirmative duty of ‘utmost good faith and full and fair disclosure of all material facts,’ as well as an affirmative obligation ‘to employ reasonable care to avoid misleading’ ... clients.”³

The Original Dichotomy “salesperson vs. adviser” remains a Profound Basis for Regulatory Distinction

“Further, the legislative history convinced the majority that, despite industry changes over the decades, the original dichotomy established by Congress—salesperson vs. adviser—remains a profound basis for regulatory distinction.”

What is the Scope of the Problem of Salesperson acting as Professional Investment Adviser?

The SEC defines the scope of brokers that are also registered as SEC investment advisers on Page 12 of their Report to Congress on “Study on Investment Advisers and Broker-Dealers” As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act:

“3. Dual Registrants

As indicated above, many financial services firms may offer both investment advisory and broker-dealer services. For example, approximately 5% of Commission-registered investment advisers reported that they also were registered as a broker-dealer, and 22% of Commission-registered investment advisers reported that they had a related person that was a broker-dealer. In addition, as of mid-October 2010, 842 firms registered with FINRA as a broker-dealer, or approximately 18% of broker-dealers registered with FINRA, were also registered as an investment adviser with either the Commission or a state. 41 Further, as of the end of September 2010, approximately 37% of FINRA-registered broker-dealers had an affiliate engaged in investment advisory activities.

Many of these financial services firms’ personnel may also be dually registered as investment adviser representatives and registered representatives. As of mid-October 2010, approximately 88% of investment adviser representatives were also registered representatives of a FINRA registered broker-dealer.”

Statistical Studies Post 2008 Financial Crash Provide Empirical Evidence Training and Education Impact the Understanding and Application of Risk Management Tools

The original Congressional intent for the dichotomy between salesperson and Investment adviser was concerned with both a fiduciary duty for the investment adviser, combined with a base level of

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professionalism and education, which neither the SEC nor FINRA currently mandate for SEC registered investment advisers to retirement accounts.

Two independent studies on university education and knowledge/training of hedging contribute to a more successful risk management of assets.

(1) Here is a March 2012 Paper by Georges Dionne, Thouraya Triki and Olfa Maalaoui Chun

"Risk Management and Corporate Governance: The Importance of Independence and Financial Knowledge" <http://ssrn.com/abstract=2020987>

"We show that financially educated directors encourage corporate hedging while financially active directors and those with an accounting background play no active role in such policy. This evidence combined with the positive relation we report between the firm's hedging ratio and its performance suggests that shareholders are better off with financially educated directors on their boards and audit committees. Finally, we provide the first direct evidence showing that university education of directors is an important determinant of the hedging activity."

The U.S. Chamber of Commerce presented a sturdy to Congress that there was a base level of education and professionalism lacking on the Board of Directors of FINRA, which among other things is impacting a lower standard of professionalism and training that is requisite in today's global capital markets to manage American savings in IRAs and SEPs.

https://www.uschamber.com/sites/default/files/reports/1107_UnfinishedAgenda_WEB.pdf

"Unchallenged and largely unchecked, the influence of these organizations can be very detrimental to the development of vibrant capital markets. These organizations can, with few practical limitations, establish significant policies by arbitrary means and without any sound public policy or factual basis."

"Rather than a board comprised of experienced members from across the financial services industry, today's FINRA board consists of a majority of independent directors with limited or no experience working for a financial services firm."

"FINRA is not subject to the Freedom of Information Act or the APA, nor is it required to conduct a cost-benefit analysis when it engages in rulemaking or exercises its policy-making functions."

A May 2009 study by Deloitte LLP, "*Mining the Retirement Income Market*" highlights the extent that American's retirement assets are subject to the profit motives of the brokerage and "planning" sales industry, rather than prudent fiduciary management by a professional. As the excerpt below emphasizes, the most important criteria for financial services sales persons is the revenue stream. The prudent investment of the retirement assets is a secondary consideration.

"Although there may be considerable resistance to compensation changes among established advisors, the conditions are ripe for new players to shift from asset-based fees and commissions to a system that encourages maximizing a reliable income stream during the retirement payout phase while customer assets are being drawn down. This approach is expected to be supported by the emergence of new and innovative sales channels."

The fees for “retirement income products” such as annuities are the most lucrative for a sales person in the brokerage, insurance or planning industry. Congress, the Department of Labor and the SEC must be aware that the conflict between the “sales person” and SEC registered investment adviser is exceptional concerning the push for “annuitizing” American’s retirement savings, with a rationale equity losses of the 2008-2009 financial crisis, mandate such. To the contrary, the losses were exacerbated by the lack of prudent fiduciary, professionals who were not also selling product that would have minimized these losses.

Further, the “push” for annuitizing retirement savings, that has already begun, has not clearly disclosed for retail retirement investors that while providing a life income stream, retail retirement investors would be “handing over” their life savings to the brokerage, planning and insurance industry during a time when interest rates are close to the lowest in history of the United States. This may not be the most prudent advice in a raising interest rate environment, comparable to the advice that Greece, Jefferson County and small villages in France received to swap their floating rate debt through interest rate swaps for fixed rate debt in a falling interest rate environment, creating excessive fees and locking in very high fixed rates.

There is great cause for concern in the blurring of the role between sales person and SEC investment adviser in the push to move retirement savings to annuity “products” with the historically low interest rate payouts. Retirement savers clearly need a SEC registered investment adviser that is not conflicted, to provide independent fiduciary advice on the retirement income products that are now being created and marketed as the “alternative” to equity losses during the most recent financial crisis.

There is a Current, Bi-Partisan Congressional Push, from the Brokerage and “Planning” Industry, to Insist that the Department of Labor Not Change the Existing Brokerage Profit Model – Is this Brokerage Profit Model More Important Than the Safety of American’s Retirement Savings?

Here is an excerpt from a 2011 letter from Primerica, requesting the Department of Labor allow their stockbrokers to continue to sell mutual funds and other products to America’s IRAs, putting the interests of the brokerage firm ahead of the IRA client. Further, this would also require the IRA holder to arbitrate any complaints before FINRA, without a legal right to go to the Courts when they have been harmed and the stockbroker has broken laws.

“Primerica respectfully submits that the proposed rule, (by DOL) while well-intentioned, will cause significant harm to holders in small and medium-sized IRAs unless it is revised.... the proposed rule will require broker-dealers to fundamentally restructure their IRA businesses, resulting in higher minimum account balances and reduced investor choice. The effect will be to raise costs and decrease retirement savings at a time when holders of IRAs—particularly holders of the small-and medium sized IRAs served by Primerica representatives –need to save more.

- (1) This letter from Primerica to the Department of Labor represents the untruths perpetuated by the brokerage, planning and insurance sales forces to retain access to a very profitable market segment that is simply skimming dollars from American’s life savings to put in their pockets, without adding any bona fide professional advice.

The investment advice industry has grown since the early 1980’s, without thought by regulators as to the quality of advice provided, the costs of this advice, embedded conflicts in this advice and fair and just legal recourse to the retirement saver, when their life savings have been harmed.

It is time for a new model of investment professional to deliver professional quality advice, based on the Investment Advisers Act of 1940 fiduciary standard to every American retirement plan. The current brokerage model is obsolete and cannot support the level of professional advice that American’s retirement savings deserve.

[PETITION FOR IMMEDIATE REGULATORY ACTION FOR SEC RULE CHANGES TO REESTABLISH THE ORIGINAL CONGRESSIONAL INTENT FOR A CLEAR DICHOTOMY BETWEEN "SALESPERSON" AND "INVESTMENT ADVISER" UNDER THE INVESTMENT ADVISERS ACT OF 1940]

In creating the regulatory environment and fiduciary standards as mandated by Dodd Frank Section 913, the Department of Labor and the SEC have no choice but to act in the best interest of American's retirement savings accounts, not in the interests of the brokerage, insurance and planning sales forces.

The SEC must:

- Insist there is but one professional, with a new designation, that will provide investment advice for a fee, based on a standard imposed by the Advisers Act and reinforced by the DOL ERISA standards. Stockbrokers, such as Primerica representatives, will have to forgo the easy income stream from the IRA sector or move from salesperson to SEC registered investment adviser with the new professional certification, mandating experience, education and professional fiduciary standards, by the SEC and Department of Labor.
- Eliminate the blurred rule of "salesperson" as fiduciary for those retirement savers that cannot afford a fee for retirement investment advice. There will be new education initiatives that the "advice" they are receiving is from a sales person and is "buyer beware." However at the same time, public education on investing small retirement amounts will be widely available. Pro bono services by professional SEC Advisers will be available. Retired SEC registered investment professionals will staff non-profit retirement advice services. Retirement savers will be advised that once retirement accounts grow over \$25,000, it may be worth while to pay a fee to a SEC registered investment adviser.
- Prevent the design of an entirely "conflicted" professional advice industry for the small amount of retirement savers that cannot pay for the advice is not in society's best interest. As in other industry's that is the role of pro-bono work, private non-profits and public education. The SEC must seek to understand from The Derivative Project and other retail retirement investors how disclosure of conflicts will never happen. It is an industry and a culture that is not based on trust and ethics. It is a sales culture that cannot be changed through "disclosures." This is an industry that has clearly demonstrated that are not to be trusted to disclose material facts or will only do so in a manner that is obtuse and incomprehensible to the retail retirement investor.
- Create a private right of action for every retirement account for access to the Federal or state courts if an investor's accounts have been breached under any securities laws. ERISA currently has a private right of action for 401k's and all retirement accounts, including IRAs and SEPs, must have this right, for the safety of American's retirement savings. There is absolutely no fundamental difference to the need for high-quality advice for an individual who uses an IRA or a SEP, to that of a 401k or 403B. The brokerage industry is simply demanding that those that must use IRAs have a lower standard of investment advice and no legal avenue for disputes, other than FINRA.

FINRA has demonstrated they are conflicted, without a shadow of a doubt. FINRA's lack of enforcement of current fiduciary standards and through its lack of enforcement of the Court mandated fiduciary standard in Wrap Accounts in their arbitration hearings is enough for the SEC to demand fundamental change in through immediate elimination of mandatory arbitration and securities law oversight. FINRA

has demonstrated that they place the brokerage industry's profit model over the legal rights of the IRA holder.

The brokerage and planning industry's conscious decision to create confusing titles and thousand of meaningless certifications to obfuscate the distinct roles of IAA of 1940 Advisers and sales persons is the reason the SEC and the Department of Labor must be certain there is absolutely no further blurring of the roles.

Brokerage and Financial Planning Salespersons are not professionals, such as a professional doctor or lawyer.

A February 2012 article by Blaine F. Aikin, chief executive of *Fiduciary360 LLC* discussed why "advisers" are not currently professionals. As Mr. Aikin states, it is contrary to the concept of a fiduciary professional to wear two hats as proposed by both SIFMA and the brokerage/financial planning groups and the Consumer Federation of America/Fund Democracy, as depicted in their March 28, 2012 letter to Chairwoman Schapiro.

"First, their (CPA's) adherence to fiduciary principles is a prerequisite under the conventional definition of a profession, which places the client's interests first and demands that a professional not be an agent of his or her company.

Second, professionals have obligations to one another.

They are expected to advance the art and science of what they do and bring credit or at least do no harm to the reputation of their chosen vocation. Codes of conduct defend the integrity and public reputation of the profession.

Enforcement of professional codes helps prevent the value of the services of true professionals from being eroded by those operating at lower standards of ethics and competence, and encourages people to seek professional services.

The highest professional obligation is to recognize that society must be able to depend on professionals to adhere to high universal standards of competence and ethics.

By definition, a profession is a vocation involving specialized skill and knowledge that is used to provide disinterested counsel and services for compensation without the expectation of other business gain. Also by definition, professional responsibility entails the legal and moral obligation to apply that specialized knowledge for the benefit of clients and the wider society without causing any injury to either.

Thus, when we talk about someone being a "true professional," we mean that the practitioner adheres to fiduciary principles and observes his or her obligations to the profession and society."

As this article highlights, the SEC has no choice but to reaffirm the Congressional intent for a dichotomy between salesperson and Adviser and move swiftly to develop the professional curriculum, education and standards for the new profession of "SEC registered investment adviser" that provides professional advice to American's retirement accounts, subject to strict new licensing curriculum, education, experience and new professional standards and ethics. There can no longer be multiple certifications for IAA of 1940 Advisers.

[PETITION FOR IMMEDIATE REGULATORY ACTION FOR SEC RULE CHANGES TO REESTABLISH THE ORIGINAL CONGRESSIONAL INTENT FOR A CLEAR DICHOTOMY BETWEEN "SALESPERSON" AND "INVESTMENT ADVISER" UNDER THE INVESTMENT ADVISERS ACT OF 1940]

It is time to Re-establish the Original Congressional Intent of the Investment Advisers Act of 1940

Congress created the distinction between salesperson and investment advisers following the 1929 Crash. Congress has no other choice than to reaffirm that distinction following the loss of over \$2 trillion dollars of American retirement savings during the 2008-2009 financial crisis. Endowments, charitable organizations, pension funds and retirement accounts were all adversely impacted, needlessly.

- (1) There was a brokerage, planning and insurance profit model, including dually registered Wrap Accounts that was in direct conflict to existing securities laws, the Investment Advisers Act of 1940.
- (2) Material conflicts of interest prevented common sense during changing global economic scenarios. A fiduciary must act with prudence. To hedge a portfolio, prior to an impending financial crisis or during the crisis is acting with prudence. To ignore capital market tools available for over 25 years, to protect an IRA account, is imprudent and a material breach of the Investment Advisers Act of 1940.
- (3) Material conflicts of interest in Adviser payouts, such as no payments if the Adviser moves a client to cash, or less income to the "Adviser" if he moves the client to bonds from equities, are a significant and material breach of the Investment Advisers Act of 1940 and a cause of the severity of losses in American retirement accounts in 2008-2009.
- (4) With the advent of 401K's and IRA's a "planning" industry has developed to "advise" retirement savers, including a non-regulated "planning" industry that created confusing designations, experience levels and education for salespersons providing advice to retirement investors. Congress and the SEC have a clear duty to end this confusion for retirement savers, created by an unregulated "planning" industry. "Certified Financial Planners (CFP's) and advisors associated with the Financial Planning Industry (FPA) may or many not have the standards, training and years of experience to act as true fiduciary investment advisers, as envisioned by the original Congressional intent of the Advisers Act. There is a blurring of roles of salesperson and SEC registered investment adviser. Many "planners" are in the category of "salesperson" as defined by the Advisers Act.
- (5) It is incumbent on Congress and the SEC to establish a single professional certification for the investment management advice industry to any retirement account. "Planning" and "brokerage" salespersons can no longer hold themselves out as "SEC registered investment advisers." Bokers will be forced to choose to pursue to become the new SEC Professional Investment adviser whose standards are yet to be mandated. Dual roles as broker and Adviser will no longer exist. It must be clear to any retirement account saver, that one has the option of choosing to have "conflicted" advice from a salesperson or one may choose advice from a professional, as defined by the SEC. There cannot be any further blurring of the role, due to the past abuses by the planning and brokerage industry towards the retirement saver.

Americans have lost their hard-earned life savings and suffered greatly due to needless conflicts of interest, misrepresentation as to role of salesperson and Adviser Act fiduciary and lack of enforcement of existing securities' laws passed by Congress to protect society's interests overall.

The path is clear and straightforward for Congress, the Department of Labor and the SEC:

Enforce the Congressional intent, following the Great Depression, to ensure there is a clear dichotomy between salesperson and investment adviser. This would include:

- ❖ A single licensing exam for SEC registered investment advisers for any retirement account –pension, 401K, IRA, etc., with **one** designation, universally understood and comparable to the bar or medical exam.
- ❖ Mandated years of curriculum, education and mandated experience in global capital markets, including derivatives and financial statement analysis to create a new standard of professionalism for the SEC Registered Investment Advisor to any retirement plan.
- ❖ Stockbrokers would be just that, salespersons in conformance with the original Congressional intent of the Advisers Act. The suitability standard would remain applicable to stockbrokers, salespersons.
- ❖ Eliminate FINRA as overseer of any SEC registered investment advisor subject to the fiduciary standard. The SEC would be the overseer of the Professional Investment Advisory industry, with a private right of action to any retirement investor, 401K or IRA. Thus rogue broker sales practices are made clear in a court of law and no longer hidden in mandatory arbitration “kangaroo” courts.
- ❖ Ban Wrap Accounts, “dually registered”, immediately for every retirement account and any account that requires a strict fiduciary.
- ❖ Only the new SEC registered investment adviser professional may charge a fee for financial advice, just as a doctor or lawyer cannot practice without appropriate licensing. If an individual seeks to pay a fee for how to budget, how to set goals and how to “plan” for retirement, that service is completely distinct from the SEC registered investment advice for a fee business model. These services cannot include an investment advice component. A SEC registered investment adviser professional under the new licensing requirements will only provide investment advice for a fee. Sales of brokerage and “financial planning” services may no longer be comingled with strict fiduciary investment advice to eliminate all confusion for American retirement savers.

The objective of moving to one SEC licensed professional is it will be clear in every retirement investors mind what professional is deemed by the SEC to have the education and training to provide advice for a fee. Products sold by SEC Advisers can no longer be conflicted and include any type of commission or revenue sharing. Their revenue stream is limited to the fees charged for investment advice. If a retirement investor cannot afford to pay for the advice, he will seek out non-profits that will be staffed with retired SEC Advisers.

The brokerage industry, the planning industry and the insurance industry as they exist now for retirement savers will in several years cease to exist. The investment advice role that salespersons have played will be replaced by:

- SEC Professionally Licensed Advisers who charge a fee for retirement investment advice, with no commissions from any product
- Discount brokerages, such as Schwab, E Trade and Fidelity where retirement savers can choose to manage their own retirement savings and execute their own trades, without professional advice
- Private non-profits, staffed with retired SEC Advisers, will provide pro-bono advice to those that cannot afford to hire a SEC registered investment adviser professional.

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ADVISERS ACT OF 1940]**

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Congress recently requested a cost-benefit analysis of imposing a strict fiduciary standard as proposed by the Department of Labor, comparable to that of ERISA. The costs and losses to American’s retirement savings far outweigh the continuation of an obsolete profit model for the brokerage industry. The benefits of a highly trained, creative, curious and thoughtful SEC Investment Adviser Professional in today’s global capital markets advising Americans on the best and wisest investment of savings is long overdue. The benefits to society of non-conflicted, professionals advising the trillions of dollars in American’s retirement savings are immeasurable.

The brokerage industry has stated their profit model cannot service the small IRA with an ERISA type fiduciary standard. They demanded that Congress ask the Department of Labor for a cost/benefit analysis of this standard. The Department of Labor responded by asking the securities industry to provide information on performance and fees on IRA’s. The brokerage industry responded they could not calculate that and cannot provide that information to the Department of Labor. That is a very telling statement that the SEC cannot ignore.

Here is an excerpt from a recent article, by Ron Lieber, “**Financial Advice for Those With Small Nest Eggs**”, from the January 13, 2012 *New York Times*:

“When Merrill Lynch recently discouraged its thundering herd of brokers from taking on new clients with under \$250,000 in assets available for investing, it wasn’t a big surprise. But Merrill’s decision to tell its brokers that they might not get paid if they persisted in working with such people reflects one of the sorriest truths of the financial services industry: Nobody has figured out a way to consistently give large numbers of people reasonably priced financial advice across all areas of their life and to do so in an ethical manner.”

Congress, the SEC and the Department of Labor can no longer choose an obsolete profit model that harms society overall and places hard-earned retirement savings in the hands of salespersons with limited knowledge of global capital markets in the 21st Century, who are conflicted, not fiduciaries and were not trained and educated to prevent trillions of dollars in losses in American’s retirement savings during the most recent financial crisis.

Capitalism dictates fair, just and simple rules that are equitably enforced, if it is to survive. Just as commercial banks are demanding more simplified rules and government regulation concerning the Volcker Rule, retail retirement investors request straight forward simple and clear fiduciary rules and enforcement, so the brokerage industry can no longer obfuscate the true intent of laws to suit their profit models, as they have done with dually registered Wrap Accounts.

The needless loss of over \$2 trillion dollars of American’s retirement savings during the 2008-2009 is the foundation for the mandate to Congress and the SEC to take immediate action to restore the original Congressional intent of the Investment Advisers Act of 1940. The ability of FINRA to obfuscate clear SEC rulings to benefit the brokerage industry and eliminate legal rights of retail retirement savers is cause for swift and immediate action by Congress and the SEC.

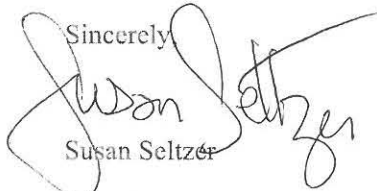
The abuse of retail retirement savers’ legal rights in dually registered Wrap Accounts demonstrates, without exception the culture of a salesperson’s role is completely incompatible with the requisite role of a fiduciary professional Adviser.

It is time for the SEC to ban dually registered Wrap Accounts and move to a new vision of a professional fiduciary, all with the same designation, who will mobilize American's retirement savings into the sectors that will rebuild an economy that was severely harmed by an industry that placed their personal profit motives over the good of the growth of the U.S. economy overall. The SEC and Congress must take swift action to restore IRA/SEP retirement investor 's legal rights, eradicated so unconscionably by FINRA, as agent for the brokerage industry. This must include an immediate ban on mandatory arbitration for any retirement account and a right of private action for any retirement account.

All shareholders want growth in profits, but not brokerage profits that serve to destroy the foundation of a civil society, by ignoring fundamental laws, rights and responsibilities. FINRA's and the brokerage's industry's actions toward retail retirement investors demonstrate a move to lawlessness that threatens our society's very core.

Thank you for your consideration of this Petition.

Sincerely,

A handwritten signature in black ink that reads "Susan Seltzer". The signature is written in a cursive style with a large, looping initial "S".

Susan Seltzer

President

The Derivative Project

CC:

The Honorable Mary L. Schapiro

The Honorable Elisse B. Walter

The Honorable Luis A. Aguilar

The Honorable Troy Paredes

The Honorable Daniel M. Gallagher

Robert W. Cook, Division of Trading and Markets

Eileen Rominger, Division of Investment Management

The Honorable Secretary of Labor Hilda L. Solis