

Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0609

1688

February 3, 2005

**RE: File No. S7-25-99**

Dear Mr. Katz:

As long time financial planners, we've followed the current debate with interest, concern and confusion. We have a very simple belief; namely all members of the financial advisory world, who provide financial advice to clients, should do so guided by fiduciary principals. As such, we are very appreciative of the effort the Commission has and continues to expend on the issue of broker-dealer exclusion from the Investment Advisors Act. However, we do have serious concerns regarding the preliminary conclusions reached by the Commission as reflected in SEC Release 34-50980; IA-2340; File No. St-25-99 dated 11 January 2005 and Mr. Paul Roye's 22 December 2004 Opening Statement at the Commission.

Our concerns relate to the public's understandable confusion regarding the fundamental concepts of trust, duty and responsibility. There is a long legislative history regarding these issues (e.g., ERISA, and Prudent Investor Acts) and, as

professionals in the financial services world, we are nonplussed by the raucous debate over what we believe to be patently obvious. Anyone offering financial advice to a client, for which they expect to be compensated, regardless of his or her title, nature of employment, form of compensation, disclosure documents or business structure, should be held to the very simple standard of “placing the client’s interest first.”

Applying this notion to the current debate, leads me to the following conclusions:

- The regulation of retail advisory services should be resolved in favor of investor protection.<sup>1</sup>

The Introduction to the SEC Web Site titled “Who We Are, What We Do,” states “The primary mission of the U.S. Securities and Exchange Commission is to **protect investors** and maintain the integrity of the securities markets.” There is no substantive argument supporting the position that even the most generous inclusion of advisors under the mandates of the Investment Advisors Act would threaten the integrity of the securities markets.

- The contentious issue of “solely incidental to,” should be interpreted in a manner consistent with that of a prudent retail investor, not an attorney specializing in securities law. The current debate over the meaning of “solely incidental to,” verges on the absurd.

Based on personal experience, we recognize and acknowledge that, during the era of fixed commissions, brokers often provided substantive advice to their brokerage clients. However, the advice was unquestionably and unambiguously directed toward the generation of specific and finite brokerage services (i.e., buying or selling specific securities).

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<sup>1</sup> September 22, 2004 letter submitted to the Commission by Timothy P. Pinnington, Vice Chair & Chief Operating Officer, on behalf of T.D. Waterhouse.

Also based on our experience, we recognize the obvious reality that today, in many cases, neither the presentation nor the substance of the advice offered is “solely incidental to brokerage activities”. This is not an issue related to either the form of compensation (i.e., fees or commission) or the nature of the account (i.e., discretionary or non-discretionary). The question is, how would a prudent retail investor interpret the purpose and importance of the advice? Although numerous prior examples have been provided regarding this issue,<sup>2</sup> it is so critical to the debate and, we believe, provides such obvious examples of intent, that we offer the following excerpts from current web sites of well respected financial services firms<sup>3</sup>:

#### Morgan Stanley

##### *Planning*

*Careful planning is key to achieving your financial goals. Whatever your goals may be – from sending children to college and retiring comfortably to passing your hard-earned estate assets on to loved ones- our Financial Advisors will evaluate your situation and help you determine which strategies are right for you.*

##### *Financial Planning*

*And your Financial Advisor can work with you through the years, analyzing your goals, timeframes and tolerances for investment risk and discussing how you might update your plans as your circumstances, needs and goals change. This can help you stay on top and on track.*

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<sup>2</sup> For example, see the September 20, 2004 letter submitted to the Commission by Barbara Roper, Director of Investor Protection, Consumer Federation of America.

<sup>3</sup> We wish to emphasize that the inclusion of examples from any particular firm should in no way be interpreted as a criticism of the firm. In fact, we believe that the descriptions of advice reflected in these excerpts reflect well on the professionalism of the firms. That’s why they were selected. Our issue is with the current regulatory environment, not the firms.

## Smith Barney

### *Making Plans*

*Developing a financial plan. Developing a financial plan to live by. At Smith Barney, we view them as one and the same. In fact, it's what your Financial Consultant is trained to do. He or she helps you clarify your goals and concerns, decide what your financial priorities should be, and then helps you design a flexible-enough financial strategy.*

## UBS

### *Advice. Insight. Choices*

*"As a Financial Advisor, my goal is to help clients realize their financial objectives and live their dreams. It takes time to understand what each client's needs and goals are so that we make the appropriate investment choices, for today and for tomorrow. And that's what separates us from all the rest."*

*The relationship between you and your Financial Advisor is at the heart of our consultative process. Only after he or she understands your long-term needs and risk tolerance can a customized asset allocation plan be developed for you. This plan serves as the roadmap as you pursue your wealth management goals.*

No reasonable person can argue, at least with a straight face, that the descriptions above would lead an investor to believe that the advice is "solely incidental" to brokerage services. All of the disclosures in the world<sup>4</sup> will not change this reality.

The following is a succinct description of the transition of advice from "solely incidental," to today, when advice is central to the relationship:

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<sup>4</sup> Even if read by investors, a debatable point

## Merrill Lynch

### *The Value of Advice*

*It **used to be** that stocks and bonds were enough. **But it's different now.** You need advice that looks at your complete financial life to help you achieve your goals. Trusted guidance should be an expectation, and you'll get nothing less from a Merrill Lynch Financial Advisor [Society emphasis]*

*We See Your Financial Life in Total<sup>SM</sup>  
Total Merrill<sup>SM</sup> is the power of all that is possible from a relationship with Merrill Lynch – a relationship that provides you with a lifetime of personalized solutions based on your total financial picture.*

Today's regulatory environment is not just an issue for traditional full service financial services firms. Even highly respected and ethically pristine "discount brokerage" firms, attempting to distinguish between "advice" and "incidental" must resort to bizarre machinations in their presentation of services to clients.<sup>5</sup>

## Charles Schwab

### *Choose the service that meets your unique needs*

*Get advice that fits your investing style and put your plan into action with our range of advice services.*

- *Schwab Private Client<sup>TM</sup> 1 – For clients with larger and more complex portfolios, an ongoing comprehensive advice relationship that provides an enhanced level of service and guidance on a variety of investment needs.*

*Footnote 1 You must have a brokerage account to receive these services. Your account will be a nondiscretionary brokerage account and not an investment advisory account*

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<sup>5</sup> Once again, it is important to note that this example is in no way intended to be a criticism of Charles Schwab (in fact, our firm is a very pleased Schwab customer).

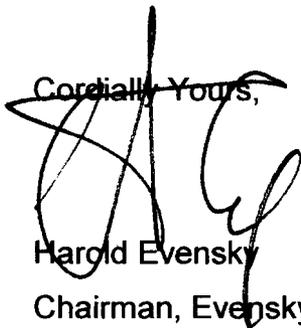
*regulated under the Investment Advisors Act of 1940. Investment advice offered is solely incidental to Schwab's broker-dealer services.*

We do not believe that even the most prudent investor would be able to parse the meaning of the firm's offering of "ongoing comprehensive advice" with the footnote's qualifications of "nondiscretionary" and "solely incidental."

## CONCLUSION

We believe that the debate over the regulation of retail investment advisory services should be resolved in favor of investor protection. We believe that the proposed regulation does not adequately protect individual investors. We support the continuance of traditional brokerage services, under current regulations, independent of the compensation structure, in those cases that relate solely to traditional transaction based services. However, we believe that the Commission should adopt the common sense requirement that **anyone** presenting themselves to the public as an advisor, consultant, planner or other advice related title, should be required to do so under an obligation to "place the client's interest first."

~~Cordially Yours,~~

A handwritten signature in black ink, appearing to read "Harold Evensky", written over the crossed-out text "Cordially Yours,".

Harold Evensky  
Chairman, Evensky & Katz