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Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC. 20549-0609

Re: File Number S7-25-99
Release Nos. 34-50980; IA-2340

Dear Mr. Katz:

We appreciate the opportunity to comment on the proposal by the Securities and Exchange Commission ("Commission" or "SEC") to adopt Rule 202(a)(11)-1 (the "Proposed Rule") under the Investment Advisers Act of 1940 ("Advisers Act"), in the form published for comment in Release No. 34-50980 on January 6, 2005 ("Release").

UBS Financial Services Inc. ("UBSFS" or "we") is one of the leading securities firms in the United States. We are registered with the SEC as both a broker-dealer and as an investment adviser, and are a member of all principal U.S. securities and commodities exchanges and the National Association of Securities Dealers, Inc. ("NASD"). We serve the investment and capital needs of individual, corporate and institutional investors. The primary focus of our business historically has been providing high quality, comprehensive brokerage services to investors, through our registered representatives or "Financial Advisors." In recent years, in response to investor demand, we have begun offering separate, fee-based investment advisory services to investors, as a registered investment adviser.

Given our broad securities and advisory practice, the Commission's Proposed Rule affects various parts of UBSFS. We therefore write this letter to support important aspects of the Proposed Rule, but also to identify certain aspects of the Proposed Rule that are not necessary to address legitimate investor protection concerns and could instead have a negative impact on investors and certain capital markets.

Our Views on the Proposed Rule

We strongly support the position that a registered broker-dealer can offer its customers brokerage services on an asset-based fee basis without becoming subject to the terms and conditions of the Advisers Act. We therefore endorse the Commission's objective of clarifying the scope of the broker-dealer exclusion from the definition of the term "investment adviser" in Section 202(a)(11)(C) of the Advisers Act (sometimes referred to herein as the "Broker-Dealer Exclusion"), and believe two provisions of the Proposed Rule will be helpful, for the reasons set forth at the end of this letter.

However, we are concerned that in pursuing a worthy objective and recognizing the benefits to clients of expanded product options, the Commission is proposing certain measures which, if adopted, would foreclose or limit the benefits and choices afforded to investors through discretionary brokerage accounts and financial planning services. We respectfully submit some alternatives for the Commission's consideration.

1. Financial Planning

As indicated above, we are registered both as a broker-dealer and an investment adviser. When we act as a full-service broker-dealer, we do not simply take customers' orders and execute securities transactions for them. Most of our customers seek out advice about how to invest their brokerage account assets, and, to the best of our ability, we endeavor to provide sound advice on this and related aspects of their financial needs. We take our obligation "to know our customers" and our suitability obligations seriously. Therefore, we encourage our Financial Advisors to assist our customers to identify their overall financial needs and goals and to create investment strategies that are reasonably designed to pursue those goals, and then to execute against that plan. We periodically have the client assess the extent to which the plan is implemented, and determine whether the plan remains sensible or requires modification. This ongoing advice and assistance to our brokerage customers is an integral part of our full brokerage service, along with transaction executions, custody, record keeping, tax reporting, providing account statements and account performance reviews, and we do not charge separate or additional fees for it.

Our fee-based investment advisory services, which include financial planning, are separate and distinct from our brokerage services and we charge separate advisory fees for them. We are careful to make sure that our investment advisory clients also understand the capacity in which we will act for them, and make this plain in our account agreements and through the written and other information we provide to them explaining our services. We offer these fee-based services in compliance with the Advisers Act and other relevant rules and regulations.

The Commission has asked whether broker-dealers should be permitted to continue to provide financial planning services as part of their overall brokerage services to customers and, to the extent a financial plan includes investment advice, to treat that advice as incidental to the firm's brokerage services. We believe it important that broker-dealers be encouraged, not discouraged, from using financial planning to better serve their brokerage customers. Accordingly, where no separate, additional fee is charged for a financial plan and the broker-dealer in offering the

service does not represent itself or "hold out" as an investment adviser, the provision of such services should not subject the broker-dealer to regulation under the Advisers Act.

We view financial planning as a tool that can help us better serve our brokerage customers; it is an analysis that is part of the suitability determination and we believe that it is in our customers' best interests to use it. As we pointed out above, at UBSFS we encourage our Financial Advisors to assist our brokerage customers to identify their overall financial needs and goals and to implement investment strategies that are reasonably designed to meet those goals. We do so, because we strongly believe that this is in the best interests of our customers and because we recognize that financial planning can play an important part in our ability to determine investment strategies that are appropriate, and to identify specific investments that are suitable, for each customer, in light of the individual's goals, needs and financial circumstances. For this reason, we offer basic financial planning reports to our customers as part of our brokerage services, for no separate or additional charge. We also offer more sophisticated or specialized financial planning as an investment advisory service, for which we charge a separate fee.

Financial planning focuses on an investor's total financial situation and general goals. These goals can be general investment, retirement, education funding, and estate planning, among others. Thus, although most financial plans contain some elements of investment advice, planning analysis and recommendations cover a variety of other topics that do not involve general or specific investment advice at all and for which investment adviser regulation is neither appropriate nor required.

The level of analysis and scope of financial planning services can and does differ, depending on the needs of the particular investor and whether a fee is charged. We have basic reports that can be made available to any brokerage customer, free of charge. More complex and in-depth reports are available for a separate fee, and we treat these fee-based financial planning programs as investment advisory services and the investors who elect to use these services as investment advisory clients of our firm.

Our fee-based financial planning services vary in scope and complexity, according to the needs of the particular client. We can analyze an issue related to retirement funding, or conduct an in-depth review. Our services may include analyzing the client's net worth; stock option strategies; asset allocation strategies; insurance (including group and individual policies); retirement planning; disability planning; survivor planning; and estate planning (including estimating gross estate, estate tax issues, analyzing the impact of establishing a foundation or trust and forecasting assets available to surviving heirs). We also may assist our client with data gathering, reviewing complex financial documents, coordination with other service providers and the presentation of written reports.

We are careful to clearly delineate our role as an investment adviser and to specify the duration of our engagement in our contracts with clients, our marketing materials and the disclosure brochures that we provide each client. Our fee-based financial planning services commence when we and our client have signed a written agreement and end when we deliver the plan to the client. We do not require the client to implement any part of the plan through UBS-FS or any of our affiliates. The client, at his or her option, may choose not to implement the plan at all or may

implement it through another financial institution.

In offering our fee-based financial planning services, we believe we are holding ourselves out as offering investment advice, for separate, additional compensation, and we therefore treat our fee-based financial planning services as investment advisory services. We provide these fee-based services as a registered investment adviser, and comply with all laws and rules that apply to us when we act in that capacity.

We consider the more limited, basic financial planning service that we offer our brokerage customers for no fee to be incidental to our brokerage services. We view this service as an important and integral part of the services that we, as a registered broker-dealer, make available to our customers, and a valuable tool that can help guide our Financial Advisors in making recommendations that are in each customer's best interests.

We urge the Commission to take the same view. Broker-dealers should be encouraged, not discouraged, to make financial planning tools available to their customers and registered representatives. Brokerage firms are far less likely to do this if offering financial planning services for no separate, additional fee will subject them to Advisers Act regulation. This would be an unfortunate result and one that is not in the best interests of investors.

2. Enhanced Disclosure to Investors is Appropriate

We support the SEC's proposal to require a broker-dealer to provide clear and prominent disclosure making plain to investors when an account is a brokerage account and is not an investment advisory account, in situations where the broker-dealer's compensation is fee or asset-based rather than commissions or other transaction-based compensation.

This proposal is consistent with our firm's current policy and practices and we have no objections to strengthening the disclosure provided to investors to avoid the possibility of any confusion. If specific new disclosures are required, however, we urge the Commission to make clear in the rule or in the adopting release that a broker-dealer need not amend all existing customer contracts and account documents to incorporate the required new disclosure but instead may satisfy its disclosure obligations to then current customers by sending each customer a letter or other written notice setting forth any additional information that may be needed. Accounts established after the effective date of the rule would include the new disclosure required by the rule.

We also support the proposal to require that this disclosure include a brief explanation of the differences between the customer's rights and the broker-dealer's obligations in respect to a brokerage account as compared to an investment advisory account. We agree that requiring a long or detailed written explanation of the differences is unlikely to be an effective way to communicate the desired information to most investors. We therefore support the proposal that investors be provided a telephone number to call to discuss these differences and ask any questions they may have.

We suggest, however, that the rule permit the “person to call” to be identified by his or her title or department, rather by name. This would allow a firm to avoid the unnecessary expense of having to reprint forms, sales materials and advertising, whenever there is a personnel change, and also could be more useful to a customer who may want to ask questions some time after they open an account and likely will look to their existing account documents for the number to call.

3. The Commission Should Codify Certain of its Prior Interpretations of Section 202(a)(11)

We also support the Commission’s proposal to codify its prior interpretations that—

- a broker-dealer registered with the Commission is an investment adviser solely with respect to those accounts for which it provides investment advisory services or receives investment advisory compensation (Proposed Rule 202(a)(11)-1(c)); and
- a broker-dealer will not be deemed to have received “special compensation,” within the meaning of Section 202(a)(11) of the Advisers Act solely because the broker-dealer charges different commissions, mark-ups or mark-downs or similar fees for its brokerage services to different customers (Proposed Rule 202(a)(11)-1(a)(2)).

We agree that charging discounted or varying rates of commissions or fee- or asset-based compensation in lieu of transaction-based compensation for brokerage services should not be deemed to change traditional brokerage services into investment advisory services. We believe that the availability of fee-based brokerage, discounted commissions and, for “do it yourself” investors, electronic trading options, has benefited investors, by providing a greater range of brokerage services from which to choose and offering lower-cost options for obtaining all or some of those services. In addition, while fee-based brokerage programs are certainly not right for every customer, we agree with the conclusions of the Tully Report¹ that fee-based brokerage arrangements can better align the interests of broker-dealers and their customers and eliminate the temptation for a registered representative to focus on generating transaction-related compensation instead of focusing on what is in the best interests of the investor.

It makes no sense to take the position that a broker-dealer is receiving “special compensation” for the investment advice component of traditional, full brokerage services simply because a firm offers different levels of brokerage service at different prices. Instead, the Commission’s focus should be on (a) whether a broker-dealer is in fact charging additional or extra compensation for specific advisory services that are above and beyond what the broker-dealer offers to other brokerage customers and (b) whether the broker-dealer is marketing the service as an investment advisory service.

¹ Report of the Committee on Compensation Practices (April 10, 1995) (“Tully Report”).

4. "Holding Out"

The Commission expressly requested comment on the question whether broker-dealer marketing materials emphasizing the advice component of brokerage services, particularly where the broker-dealer is also offering fee-based brokerage arrangements, has contributed to investor confusion about whether the offered services are investment advisory services, or simply brokerage services that include the integral component of advice traditionally provided by full service broker-dealers. The Commission also raised the question whether broker-dealers should be permitted to continue to refer to their registered representatives as "financial consultants" or "financial advisors" (which is the title used by registered representatives of UBSFS).

Implicit in these questions is the assumption that investors are confused. We do not agree that this is the case. As noted above, we take great care to be sure that our brokerage customers and investment advisory clients are not confused or misled as to the nature of the different services we offer and the accounts they maintain with us. To the extent that there is any validity to these concerns, we believe that the most appropriate and cost-effective way to resolve them is through disclosure, along the lines proposed by the Commission.

With respect to the use of titles like "financial advisor" by registered representatives of a broker-dealer, the fact is that this term accurately describes what many registered representatives do: give financial advice to their brokerage customers as part and parcel of their brokerage services. This has long been the case in the brokerage industry as a whole and at UBSFS in particular. We hope this continues to be what we and our registered representatives do for our customers. Sound financial advice is what investors want and need to guide them in our complex financial markets.

We note that our representatives do not use the title "investment adviser," despite the fact that many of them are qualified and licensed as investment adviser representatives.

Registered investment advisers should not have sole rights to use words like "financial" or "advisor" to describe the work they do, just as members of financial planner trade associations should not have sole rights to use terms like "financial planning" to describe their services. These are generic terms that describe what many persons in the financial services industry actually do, including banks, trust companies, broker-dealers, insurance companies and insurance agents, real estate professionals, accountants, commodity professionals, financial planners, investment advisers, pension consultants and tax and trusts and estate lawyers, to name a few.

The title "financial advisor" cannot reasonably be said to be "holding out" as an investment adviser or otherwise misleading when used by the registered representative of a broker-dealer. Use of such titles is subject to New York Stock Exchange review and approval and, as noted above, is an apt description of what our registered representatives do when providing brokerage services to our customers.

Moreover, the Commission should carefully consider the potential consequences of restricting the use of generic titles in the financial services industry. As the Commission is well aware, there are no standards or qualifications as to education, training or experience that a person must

meet to become a registered investment adviser or to “hold out” as a financial planner. And registration as an investment adviser or calling one’s self a financial planner, carries with it no qualitative or quantitative requirements as to the quality, nature or scope of services that an investment adviser or financial planner will provide or is capable of providing. If the Commission seeks to limit the use of such titles, it will be forced to consider the need to set substantive standards for the persons entitled to use them. We do not think that this is an area of regulation where the Commission should venture absent clear, documented necessity.

5. Discretionary Brokerage Accounts

A. Discretionary Brokerage Accounts For Institutional Investors Should Not Be Subject to the Advisers Act.

The Commission proposes to subject all discretionary brokerage accounts to the Advisers Act. We recommend that the Commission exempt from its proposed rule specified sophisticated investors, in particular institutional accounts (as defined in NASD Rule 3110(c)(4)). Such a carve out is consistent with other securities rules and regulations which recognize the sophistication and investment experience of these investors, is necessary for broker dealers to continue to provide services demanded by these investors, and will help avoid potential negative effects in certain fixed income capital markets.

The NASD definition of an institutional account in Rule 3110(c)(4) is incorporated into the NASD’s discretionary account Rule 2510 and includes: (a) banks, savings and loan associations, insurance companies, and registered investment companies; (b) registered investment advisors (registered under either the Advisers Act or applicable state law); and (c) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least \$50 million. We believe that customers of this type are sufficiently sophisticated and knowledgeable enough to provide reasonable, knowing consent to a broker-dealer over a brokerage account, and do not need any incremental protection that might exist in the Advisers Act.²

The securities laws are replete with important examples of regulatory regimes that contain clear distinctions between the protections that are sensible for retail investors and the lesser protections that are sensible for institutional investors. For example, Rule 144A under the Securities Act of 1933, as amended (the “Securities Act”), provides a safe harbor from Securities Act registration requirements for re-sales of certain restricted securities to qualified institutional investors. In proposing Rule 144A, the Commission recognized that certain protections otherwise afforded to investors under the securities laws may not be necessary for sophisticated institutional investors.³ Similarly, in adopting Rule 15a-6, which among other things, permits unregistered foreign broker-dealers to engage in transactions with QIBs, the Commission stated that it “continues to believe that institutions with this level of assets are more likely to have the

² NYSE Rule 408.11 provides a similar definition.

³ “The key to the analysis of proposed Rule 144A is that certain institutions can fend for themselves and that, therefore, offers and sales to such institutions do not involve a public offering.” Securities Act Release No. 6806 (Oct. 25, 1988).

skills and experience to assess independently the integrity and competence of the foreign broker-dealers providing this access. Moreover, these larger institutions have greater ability to demand information demonstrating the financial position of the foreign broker-dealer.”⁴

The self-regulatory organizations have taken a similar approach. For example, the NASD’s Suitability Rule (2310(b)) creates specific information gathering requirements that broker-dealers must satisfy before executing a transaction recommended to most “non-institutional” customers. The NASD, however, adopted a different standard for institutions (NASD IM-2310-3). In approving these different standards, the Commission stated that the “NASD acknowledges, as does the Commission, that the relationship between a broker-dealer and an institutional customer generally may be different in important respects from the relationship a broker-dealer has with a non-institutional investor”.⁵ Similarly, NASD Rule 2211 provides separate standards for the review of institutional sales material. The Commission approved this Rule, and stated that it “believes that the proposed treatment of ‘Institutional Sales Material,’ . . . adequately balances the needs of members to contact sophisticated institutional investors without being subjected to pre-use approval and filing requirements, while still providing protection to ensure that inappropriate materials do not reach retail customers without first being reviewed for content by the NASD.”⁶ Finally, the MSRB has stated that “there is considerable merit in differentiating between customers with differing degrees of sophistication”, and has created a class of sophisticated institutional investors (“Sophisticated Municipal Market Professionals”) who, for example, were permitted to seek access to electronic trading platforms that are not available to retail investors due to customer protection concerns.⁷

The area of discretionary brokerage should not be an exception to the general treatment of institutional investors under the securities laws. Institutional investors are sufficiently sophisticated to create tailored, individualized discretionary grants to a broker dealer, specifying the permissible investment types, including credit quality, issuer and sector concentration, final maturity and duration. They can assess and monitor the broker dealer’s performance relative to the grant of discretion. They can easily move to another firm—broker dealer or investment advisor—if they are unsatisfied with performance or service. They often use sophisticated counsel to negotiate on their behalf to make sure that their rights are protected.⁸

The protection for institutional investors contained in the Proposal is not only unnecessary, it comes at a significant cost to those investors. Most importantly, if discretionary brokerage accounts become subject to the Advisers Act, the significant limitations placed on the execution

⁴ Securities Exchange Act Release No. 27017 (July 11, 1989), 54 Fed. Reg. 30013, 30027 (July 18, 1989).

⁵ Securities Exchange Act Release No. 37588 (August 20, 1996), 61 Fed. Reg. 44100, 44111 (August 27, 1996).

⁶ Securities Exchange Act Release No. 47820 (May 9, 2003), 68 Fed. Reg. 27116, 27124 (May 19, 2003).

⁷ Interpretive Notice Filed Concerning the Application of Board Rules to Transactions with Sophisticated Municipal Market Professionals, January 25, 2002, available at <http://www.msrb.org/msrb> 1/archive/SMMPNoticeJan02.htm

⁸ While we believe that it is unnecessary to apply the Advisers Act to discretionary brokerage accounts for institutional investors, we also firmly hold that a broker-dealer should have the controls required by the existing, applicable federal securities laws, and that it should disclose the potential conflicts inherent in principal trading.

of principal trades will cause significant harm to institutional investors and could negatively affect certain fixed income markets.⁹ Institutional clients come to a broker-dealer in part because of the broker-dealer's ability to execute trades on a principal basis, without imposing on the client the time and logistical requirements associated with the need to pre-approve each trade. This is particularly important in the fixed income markets where many securities trade on a principal basis. This can include situations involving original issuance, for example the auctions for, or the re-marketing of, auction rate securities.¹⁰ It can also include secondary market trading where the absence of general liquidity in certain markets makes principal trading essential. There is no valid reason to limit a broker-dealer's ability to provide such institutional customers with the product and liquidity they desire when necessary and appropriate, merely because the customer has granted the broker-dealer discretion.

As a corollary, there is also no valid reason to deny the marketplace (issuers, holders and broker-dealers alike) from access to the liquidity provided by these institutional investors by making principal trading difficult, inefficient and therefore less likely to occur. The Commission rightfully asks whether the Proposed Rule will affect the capital markets. We believe that it could and that institutional customers are less likely to participate in certain markets, for example, auction markets, if they must reallocate resources from other corporate functions to the review and pre-approval of principal trading opportunities. We respectfully submit that since the Advisers Act protections are not necessary for these clients, the Commission can avoid this unintended, negative impact on certain fixed income markets.

In sum, sophisticated institutional investors neither require nor demand the incremental additional protections of the Advisers Act. To the contrary, these investors can and do make the informed decision to delegate discretion often pursuant to a defined investment policy statement. They do so to obtain securities offered on a principal basis and to pay traditional brokerage charges. They are capable of monitoring, and are expected to monitor, the broker dealer's performance for conformance with the grant of discretion. We respectfully suggest that for this class of clients, the protections of the Advisers Act are unnecessary, are inconsistent with the general framework for handling such investors under the securities laws, would harm institutional clients by denying them an investment platform which they find desirable, and could negatively affect certain fixed income markets.¹¹

⁹ Section 206(3) prohibits an adviser from "acting as principal for his own account, knowingly to sell any security to or purchase any security from a client . . . without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."

¹⁰ For example, in a Dutch Auction, the issuer is typically a municipality or closed end bond fund. The customers, however, purchase the auction securities on a principal basis, from the broker-dealer acting as underwriter or remarketing agent.

¹¹ We ask the Commission to consider, by way of example, the impact on the corporate cash management business at broker dealers if discretionary accounts for institutional investors are made subject to the Advisers Act. Looking forward, a corporation that might have chosen to grant discretion to a broker dealer in order to, among other things, gain access to fixed income products (and auction preferred shares) that are offered on a principal basis will effectively no longer have this choice. They would be denied this choice even though: (a) they are recognized as sophisticated, and are not confused as to the broker-dealer's role; (b) they would receive disclosures on principal trading; (c) they would establish limits on discretion through written investment policies; (d) they would receive reporting consistent with a broker-dealer's obligations under the federal securities laws; (e) the broker-dealer would

B. The Commission Should Permit Blanket Consent for Certain Principal Trades and Types of Securities if it Applies the Advisers Act to Discretionary Brokerage Accounts for Institutional Investors.

We believe strongly, for the reasons articulated above, that the Commission should not include discretionary brokerage accounts for institutional clients in the coverage of the Advisers Act. If the Commission should nonetheless determine to proceed, then we respectfully request that the Commission should take action to limit application of the prohibition on principal trades under Section 206 of the Advisers Act to transactions only with those advisory clients that are in need of its protections. This could be done by crafting an exemption from the requirement to obtain prior client consent for each principal trade, for institutional investor clients and/or certain security types, for example auction rate preferred securities, variable rate demand notes, auction rate certificates or other instruments typically used by sophisticated institutions to manage their cash.

We have already discussed the importance to institutional clients of access to products on a principal basis. We want to underscore here the practical difficulty and burden of requiring institutional clients to pre-approve every trade. Many of these institutional customers either do not have the time to provide trade-by-trade consent, do not wish to be contacted each time an investment opportunity arises, and/or may not be able or available to receive information and constantly communicate with their broker-dealer. This is particularly true for securities offered within specified time frames, such as auction securities, and while this pre-trade approval process occurs, suitable opportunities in the marketplace can disappear. Not surprisingly, this is one of the core reasons that such clients grant broker-dealers discretion in the first place.

We support appropriate disclosure to the client, and the need for the consent to be in writing. We would support the Commission if it required specific disclosure at the time of contract, and additional disclosure on a confirmation. We also note that the restrictions and requirements that currently apply to discretionary accounts under broker-dealer regulations would continue to apply even with the blanket consent,¹² plus any additional protections that the Commission incorporates into this area by having the Advisors Act apply. Given the investor involved, the instruments involved, and the regulatory regime that already governs the conduct, there is no reason to prevent institutional customers and their broker-dealer from agreeing on a blanket basis, on whatever terms and conditions are agreed to by the parties, that principal transactions are permissible for the account.

need to have in place the controls applicable to discretionary accounts that are required by the federal securities laws; and (f) the institutional investor should have in place its own controls to monitor broker dealer performance against the grant of discretion. We respectfully submit that the Commission does not need to write this Rule so broadly as to sweep in activity of this type in order to address the concern that discretionary accounts for retail investors should be subject to the Advisors Act.

¹² See, e.g., NASD Rule 2520 (Discretionary Accounts; NYSE Rule 408 (Discretionary Power in Customers' Accounts).

6. The Definition of "Investment Discretion" Is Overbroad

We disagree with the proposal to incorporate the broad definition of "investment discretion" found in Section 3(a)(35) of the Exchange Act to, in effect, define what constitutes "investment advice" that must be regulated under the Advisers Act and draw a "bright line" between brokerage services and investment advice.

The Section 3(a)(35) definition of "investment discretion" was developed for a special purpose and is not useful in drawing a line between legitimate brokerage services and investment advisory services. It was added to the Exchange Act in 1975, along with Section 13(f), for the purpose of gathering information about the portfolio holdings and transactions of institutional investment managers that exercise discretion over accounts holding publicly-traded U.S. equity securities. But when taken out of this context and used to define what is "not solely incidental to brokerage services," this very broad definition results in overly narrowing the list of services that are "solely incidental to brokerage services." The proposed definition picks up virtually any exercise of discretion by a broker-dealer, no matter how limited in scope or duration (such as account rebalancing to conform to pre-selected asset allocation targets, discretion to trade granted temporarily while a customer is on vacation or out of the country on business, limited discretion as to the time when or the price at which to execute a customer's order and certain bulk exchanges of money market mutual funds pursuant to negative consent letters.)

We respectfully submit that any rule that the Commission adopts in this area should not turn solely on one factor, such as investment discretion. Instead, it should be based on an analysis of all relevant facts, including the receipt of special, additional compensation from the client for providing investment advice, the nature and extent of the service provided, and how the service is "held out" or represented to investors by the broker-dealer. It also should be consistent with the broker-dealer exclusion in Advisers Act Section 202(a)(11) and reflect both elements of the statutory test for determining eligibility for the exclusion, i.e., (1) that the service be "solely incidental" to brokerage services and (2) that the broker-dealer's compensation for the service be what the broker-dealer charges or earns when effecting transactions for other – but not all -- customers on an agency or principal basis.

One way to accomplish this would be to replace the language in paragraph (b) of the Proposed Rule in its entirety with the following:

A broker-dealer provides investment advice that is not solely incidental to the conduct of its business as a broker or dealer, when (a) pursuant to contract with a customer, the broker-dealer has and continuously and regularly exercises sole authority to decide what securities shall be purchased or sold for an account of the customer, other than on a temporary or limited basis, and (b) the broker-dealer receives additional, fee-based compensation for exercising such authority, that is, compensation based on the amount of assets held in the account.¹³

¹³ We note that this particular definition, if adopted, is another way to create the carve out for institutional investors identified above, although the scope of this section is broader than just institutional investors.

7. Costs and Benefits of the Proposed Rule

For the reasons given above, we support many aspects of the Proposed Rule, but do not believe that the public interest will be served by subjecting all discretionary brokerage accounts and all financial planning services to the jurisdiction of the Advisers Act. To the contrary, in these areas, we believe that the public interest will not be served by an additional layer of regulation, by limiting access to fixed income capital markets products, or by granting one segment of the industry—financial planners—their desired exclusive right to provide financial planning services and call themselves financial planners. We urge the Commission to make sure the final Rule is not anticompetitive, beyond the scope of its jurisdiction, or otherwise imposes unnecessary but real costs on broker-dealers—a possibility if the Proposed Rule is adopted in its entirety.

Very truly yours,

James D. Price
Executive Vice President

cc: The Honorable William H. Donaldson
The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Cynthia A. Glassman
The Honorable Harvey J. Goldschmid
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