



December 3, 2010

Via email to pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street, N.W.
Washington, D.C. 20006-1506

Re: FINRA Regulatory Notice 10-54

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association¹ (“**SIFMA**”) appreciates the opportunity to comment on the Financial Industry Regulatory Authority’s (“**FINRA**”) Regulatory Notice 10-54 (the “**Concept Proposal**”). The Concept Proposal asks whether FINRA members should be required to provide a disclosure statement to retail customers at or before the time the member commences a business relationship with such customer, and poses wide ranging questions about the nature and extent of this disclosure statement. SIFMA’s comments on the Concept Proposal are preliminary. We anticipate supplementing them (as discussed below) after further direction is provided by the Securities and Exchange Commission (“**SEC**”) in its study, or in response to any future specific rule proposal.

I. Introduction

A. *SIFMA Supports a Fiduciary Standard and Clear Disclosure of Conflicts*

As we noted in our comment letter on the SEC’s study required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**”), SIFMA supports the adoption of a uniform federal fiduciary standard of care for broker-dealers and investment advisers when providing personalized investment advice

¹ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

about securities to retail customers.² We share FINRA’s goal of ensuring that customers have useful information to help make investment decisions and to help understand the nature of their brokerage or investment advisory account. In fact, we note that today many broker-dealer firms provide written disclosure to retail customers at account opening that provide information on duties, conflicts of interest, and fees.

B. The Need For Consistency

Once the SEC concludes the Section 913 study noted above, it may exercise rulemaking authority granted to it under Dodd-Frank. Specifically, Section 913 of Dodd-Frank provides the SEC rulemaking authority to “address the legal standards of care for brokers, dealers and investment advisers” and further to establish a standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers to act in the best interest of the customer, and to disclose material conflicts of interest to such customers. Section 913 also specifically requires the Commission to “facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers and investment advisers, including any material conflicts of interest.” The standard of care also would require disclosure if a broker-dealer sells only a limited range of products.

Because, as the Concept Proposal itself recognizes, the SEC’s rulemaking responsibilities under the provisions of Dodd-Frank discussed above directly apply to the issues raised in the Concept Proposal, we believe that FINRA should refrain from issuing a more formal rule proposal until the SEC completes its study of the effectiveness of broker-dealer and investment adviser obligations, including whether a disclosure statement as envisioned by the Concept Proposal should be required. Otherwise, there is significant risk of inconsistency or duplication between the FINRA and SEC proposals, which will make it difficult to provide useful and coherent comment on these proposals. Even more problematic, the proposals could result in final rules that are not coordinated, thereby placing an undue time and cost burden on broker-dealers and, more importantly, without achieving our collective objective – namely, simple, uniform and clear disclosures for investors.

In light of the pending SEC actions that will address the issues raised in the Concept Proposal, and the Concept Proposal’s request for comment, we believe it is most

² See Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth Murphy, Secretary, SEC (Aug. 30, 2010), available at <http://www.sec.gov/comments/4-606/4606-2553.pdf>.

constructive at this stage to outline broad principles that we support and believe should be incorporated into any future rulemaking. We do not believe it would be cost-effective or useful to develop detailed comments on the disclosure questions posed in the Concept Proposal without the benefit of a clearer indication of the SEC's direction. We anticipate providing more detailed comments on the questions posed by the Concept Proposal after we have had a chance to consider the SEC's Section 913 study due to be published in January 2011 and related rulemaking. We look forward to working with FINRA as it considers the issues raised in the Concept Proposal.³

II. Broad Disclosure Principles

We believe that to be most effective in providing retail customers with important information about their relationship with a financial services provider, any future rule should incorporate the following principles.

- **Consistency.** As noted above, the regulators should coordinate their actions before issuing any proposals in this area. Given the leadership role assigned to the SEC, FINRA should wait for the SEC to complete its study under Dodd-Frank Section 913 and the rules it may adopt under Section 913, as well as for other relevant rules and studies to be completed.⁴ Once these studies are completed and rules are adopted, FINRA should ensure that any rules it proposes are consistent with SEC rules, and to the extent the SEC asks FINRA

³ We note that implementation of any new rules envisioned by the Concept Proposal would require the commitment of significant financial and personnel resources. To ensure that FINRA members are not unnecessarily required to incur these costs and commit these resources repeatedly, FINRA should avoid acting prematurely to ensure that any rules ultimately adopted take into account the industry's operational and practical concerns.

⁴ For example, other pending proposals and studies that should be considered by FINRA include amendments to broker-dealer confirmation rules, and the SEC study on the need for enhanced examination and enforcement resources for investment advisers. *See* SEC Amendments to Confirmation Rules, Exchange Act Release No. 62544 (July 21, 2010), 75 FR 47064 (Aug. 4, 2010); Dodd-Frank Section 914 (investment adviser examination and enforcement resources study).

In addition, we support FINRA's proposal of limiting the applicability of any new rules to retail customers, but we would also urge FINRA to consider exempting from any new rules retail customers that are participants in employer-sponsored benefit plans that are subject to Department of Labor disclosure rules. Similarly, limited purpose accounts, such as an employee stock plan service account, should not need to receive the same disclosure as a full service brokerage account, and disclosure requirements should be focused on the specific activities in which a firm is engaging or services a firm is offering for retail customers, particularly where multiple firms have different roles in the transaction, such as introducing and clearing broker-dealers and selling and wholesaling broker-dealers.

to draft the disclosure rules, consistent with Section 913. Retail customers will benefit from disclosure requirements that are thoughtfully developed and based on a consistent approach to providing useful disclosure.

- **Clear Disclosure.** Any new rules should require simple, plain-English disclosure to allow retail customers to make informed choices. We note that RAND Corporation has observed that there continues to be investor confusion despite existing disclosure requirements.⁵ Retail customers will benefit from disclosure that is concise, direct and avoids detail that overwhelms key facts.
- **A Layered Approach.** A layered approach to disclosure should be used to provide retail customers with the most relevant information at the time it is most important to their decision making, and therefore most likely to be read. Disclosure provided at account opening should clearly communicate significant types of potential conflicts of interest. Upfront disclosures at the inception of an account are far more effective than boilerplate disclosures made at the point-of-sale. More detailed disclosure, for example, that may be specific to only a limited subset of customers should be permitted to be made available on a website. In addition, any new requirements should build upon existing systems, such as FINRA's BrokerCheck database. Of course, there is no way to track prospective customers that do not make affirmative contact with a FINRA member. Thus, web-based disclosure should suffice for these prospective customers.
- **Web-Based Disclosure.** As noted above, we believe web-based disclosure is an effective manner to make information available to customers at a time that is most relevant to their investment decisions, and therefore can make disclosure a more useful tool for customers as they contemplate investment decisions. Web-based disclosure is also well adapted to providing layered disclosure that provides customers with precisely the level of detail they desire. Moreover, paper disclosures are easily discarded, and therefore easily forgotten. SIFMA has been a consistent advocate of the benefits of web-based disclosure for over five years.⁶ For those customers that are not comfortable with the web,

⁵ RAND Corporation, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers 19-20* (2008), available at http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

⁶ See, e.g., Letter from George R. Kramer, Vice President and Acting General Counsel, Securities Industry Association, to, Jonathan G. Katz, Secretary, SEC (April 12, 2004) (comments on proposed point of sale disclosure requirements for transactions in certain mutual funds), available at <http://www.sec.gov/rules/proposed/s70604/sia041204.pdf>; Letter from Elizabeth Varley, SIFMA, to

FINRA could require firms to provide paper disclosure to customers upon request. In addition, FINRA members could be required to remind retail customers periodically about the availability of this information. Thus, customers receive the benefits of targeted web-based disclosure and the option to receive paper if they prefer.

- **Updates.** Standards for updates to disclosures should be definitive and clear. Updates should be permitted to be made through an annual notification that provides a website address where specific changes to a firm's disclosure are highlighted.

III. Conclusion

We support FINRA's goal of developing standards for useful and clear disclosure that provide retail customers with important information about their relationship with a financial services provider. However, before taking any further action on the issues raised in the Concept Proposal, we urge FINRA to await the SEC's actions under Section 913 and other related provisions of Dodd-Frank. At that time, FINRA will be able to determine what additional rules would be most effective, and market participants will be able to provide comments that take into account the full scope of regulatory requirements applicable to their activities.

Sincerely yours,



Ira D. Hammerman
Senior Managing Director
and General Counsel

Department of Labor (July 24, 2007) (comments on request for information regarding fee and expense disclosures to participants in individual account plans), *available at* <http://www.sifma.org/issues/item.aspx?id=232>; Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to, Kim Allen, International Organization of Securities Commissions (Oct 2, 2008), *available at* <http://www.sifma.org/issues/item.aspx?id=355> (comments on IOSCO's point of sale disclosure issues paper).

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cc: Mary L. Schapiro, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Robert W. Cook, Director, Division of Trading and Markets
Jennifer B. McHugh, Acting Director, Division of Investment
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