October 11, 2013

Via Electronic Filing

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

Re: **Recommendations of the Investor as Purchaser Subcommittee re: Broker-Dealer Fiduciary Duty; (SEC Investor Advisory Committee; File No. 265-28)**

Dear Ms. Murphy:

On October 1, 2013, the Investor as Purchaser Subcommittee (the "Subcommittee") of the SEC's Investor Advisory Committee (the "Committee") posted to the Committee's website a draft document containing findings and recommendations (the "Recommendations") [1] on how the SEC should implement a uniform fiduciary standard for broker-dealers and investment advisers when providing personalized investment advice to retail customers.

The Securities Industry and Financial Markets Association ("SIFMA")[2] appreciates the opportunity to respond to the Recommendations. Many if not most of the Recommendations are in accord with SIFMA's views on how to implement Dodd-Frank § 913, and how to do so in a manner that preserves the broker-dealer business model.

In a few places, however, the Recommendations are incongruous with the intent and requirements of § 913; incongruous with preserving the broker-dealer business model; and incongruous with an intent to maintain forward progress under § 913. These incongruities may be attributable to the fact that the Subcommittee (and indeed, the Committee) does not have a single broker-dealer representative. A representative from our industry could provide the necessary perspective to help generate more practical, consensus-based recommendations that would benefit all parties, but most particularly retail investors.

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[1] See https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf.

[2] 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.

The following summarizes where the recommendations work, and where they fall short:

1. § 913 should be implemented through rulemaking under the Exchange Act for broker-dealers. SIFMA strongly agrees with recommendation 1.b., which provides that the SEC should implement § 913 through rulemaking under the Exchange Act for broker-dealers. The rules would include an obligation to act in the best interests of the customer; would be sufficiently flexible to adapt to the broker-dealer business model, without limiting investor choice; and would provide adequate guidance on how to comply with the new standard before it becomes effective.[3]

2. § 913 rulemaking should require broker-dealers to provide customers with uniform, plain English disclosures. SIFMA also strongly agrees with recommendation 2, which provides that investors should receive up-front disclosures, similar to Form ADV, Part 2, about potential conflicts of interest, compensation arrangements, the scope of services, and other important details about the customer relationship. We detailed our support for such disclosure in our most recent § 913-related submission to the SEC.[4]

3. The SEC's § 913 cost-benefit analysis need *not* show that investors are being harmed under the current suitability standard.

Here's where we diverge. The Subcommittee states that it is essential that the SEC's § 913 cost-benefit analysis acknowledge the harms that can result from advice delivered under the current, broker-dealer suitability standard. The alleged harms include: (i) an investor mistakenly believing that a financial advisor is acting in his best interest, when that is not the case, and thereby receiving advice that carries additional costs and risks; and (ii) failure to receive ongoing account supervision.

First, there is no evidence that investors are being harmed by the current suitability standard. Second, there could never be an empirical showing of whether or not suitability-based advice harms investors because there are too many independent variables, including investors' *choice* to follow the advice or not, and the *quality* of the advice given, regardless of the best intentions of the giver. *Thus, imposing a "harm" requirement would only serve as an insurmountable obstacle to implementing § 913 – which seems contrary to the Subcommittee's stated goal.*

Moreover, a "harm" requirement is entirely unnecessary. The SEC need only weigh the costs and benefits. Our industry has already outlined the prospective substantial costs, and expressed our willingness to bear them. The benefits are clear. Implementing § 913 would: (i) establish a uniform, high standard, whereas today there are two different standards, (ii) ensure that broker-

[3] *See, e.g.*, SIFMA framework for rulemaking under § 913, available at http://www.sifma.org/issues/item.aspx?id=8589934675.

[4] SIFMA comment to SEC re: § 913 cost-benefit analysis and data, available at http://www.sifma.org/issues/item.aspx?id=8589944317.

dealers continue to focus on serving their clients' best interests; (iii) help reduce retail client confusion over what standard of conduct to expect from their financial advisor; and (iv) contribute to a heightened sense of trust and confidence in our industry and its professionals.

4. § 913 should not be abandoned in favor of an approach that Congress considered and rejected – namely, tinkering with the broker-dealer exemption.

The subcommittee's primary recommendation – recommendation 1.a. – is that the SEC should not follow what § 913 requires, but should strike out on its own and write rules to narrow the broker-dealer-exemption under the Advisers Act, so that broker-dealers could no longer offer retirement planning or investment planning services to their clients.

First, in reviewing options to establish a uniform fiduciary standard, Congress considered, but rejected, making changes to the broker-dealer exemption.[5] Instead, through § 913, Congress required rulemaking under the Exchange Act for broker-dealers. It would be inappropriate for the SEC to circumvent Congress' intent and express mandate under § 913 by tinkering with the broker-dealer exemption.[6]

Second, Congress has already specifically addressed when a broker-dealer should be exempted from the requirements of the Advisers Act in the statute itself.[7] Consequently, the U.S. Court of Appeals for D.C. recently held that the SEC exceeded its authority when it adopted a rule to *expand* the broker-dealer exemption for firms that offered fee-based accounts.[8] The Court would likely also find that the SEC exceeded its authority by proposing a rule to *narrow* the exemption in the manner suggested by the Subcommittee.

Finally, as a practical matter, by precluding broker-dealers from relying on the exemption when they provide retirement planning or investment planning services, this proposal would unnecessarily subject broker-dealers to both FINRA regulation and the Advisers Act for advice in connection with a securities transaction for which they receive a commission. More profoundly, the proposal would completely foreclose broker-dealers from the retirement planning and investment planning businesses – businesses in which broker-dealers have served clients for many decades. Only investment advisers could then engage in those businesses. Such

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[5] Letter from Congressman Barney Frank to Chairman Mary Schapiro (May 31, 2011) ("If Congress intended the SEC to simply copy the [Advisers] Act and apply it to broker-dealers, it would have simply repealed the broker-dealer exemption – an approach Congress considered but rejected.").

[6] Likewise, there is no leeway to impose on broker-dealers, as the Subcommittee suggests, a continuing duty to monitor accounts. Broker-dealers owe no such duty now, and § 913 explicitly states that they will owe no such duty under the new uniform standard. Congress has clearly spoken on this point and the SEC's mandate is to abide it.

[7] Section 202(a)(11) of the Advisers Act (exempting broker-dealers from registering as investment advisors if the "performance of [advisory] services is solely incidental to the conduct of his business as a broker or dealer and [the broker-dealer] receives no special compensation therefor.").

[8] *Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007).

an approach would be grossly anti-competitive and unfair, and completely out of line with § 913's promise of a business model neutrality.

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In sum, while there are many useful and productive comments among the Recommendations, there are also a few fundamentally flawed suggestions that have the potential to stymie forward progress under § 913 and subvert the thoughtful roadmap set by Congress to implement it. Thus, we urge the Subcommittee to revisit and reconsider these particular suggestions before presenting the final Recommendations to the Committee for consideration.

Please contact the undersigned at kcarroll@sifma.org, 202-870-8124, if you would like to further discuss these issues.

Sincerely yours,

Kevin M. Carroll

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Managing Director and
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cc: Mary Jo White, Chair, SEC
Luis A. Aguilar, Commissioner
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