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Submitted electronically

October 10, 2013

Investor Advisory Committee
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number 265-28; Recommendation of the Investor as Purchaser Subcommittee Broker-Dealer Fiduciary Duty

Dear Committee Members:

fi360, Inc. ("fi360")[1] is pleased to support the recommendations of the Investor as Purchaser Subcommittee (the "Subcommittee") with respect to imposing a fiduciary standard on securities brokers providing personalized investment advice to retail customers.[2] The comments that follow are intended to supplement fi360's earlier views on this matter.[3] We are limiting our comments to Recommendation 1, although we are also generally supportive of the need to update the disclosure format under Recommendation 2 prior to adopting a fiduciary standard for brokers.

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[1] fi360 provides fiduciary training services and other resources to the financial services industry; it also administers the Accredited Investment Fiduciary® (AIF®) and Accredited Investment Fiduciary Analyst® (AIFA®) designation programs. At present, there are more than 6,200 active AIF and AIFA designees.

[2] *Recommendation of the Investor as Purchaser Subcommittee, Broker-Dealer Fiduciary Duty*, available at http://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf (last reviewed Oct. 4, 2013).

[3] fi360's earlier comments on this subject include letter from Byron F. Bowman, Senior Vice President and General Counsel, to the SEC, dated July 8, 2013, regarding *Duties of Brokers, Dealers and Investment Advisers,* available at http://www.sec.gov/comments/4-606/4606-3142.pdf (last reviewed Oct. 3, 2013); letter from Blaine F. Aikin, CEO, to the SEC, dated Nov. 13, 2012, *Temporary Rule Regarding Principal Trades with Certain Advisory Accounts,* available at http://www.sec.gov/comments/s7-23-07/s72307-38.pdf (last reviewed Oct. 3, 2013; letter from Aikin to certain Members of Congress, dated Aug. 16, 2012, concerning *SEC and DoL Coordination on Fiduciary Rulemaking,* available at *http://www.fi360.com/uploads/media/fiduciaryrulemaking_congressionalletter_081612.pdf;* (last reviewed Oct. 3, 2013); and letter from Aikin to the SEC, dated Dec. 20, 2010, regarding *Temporary Rule Regarding Principal Trades with Certain Advisory Accounts,* available at http://www.sec.gov/comments/s7-23-07/s72307-32.pdf (last reviewed Oct. 3, 2013).

Background

The Subcommittee's first alternative ("Alternative A"), would narrow the broker-dealer exception[4] from registration under the Investment Advisers Act of 1940 ("Advisers Act") by restoring functional regulation of investment advice while preserving reasonable safe harbors for brokers who do not engage in or hold themselves out to the public as providing advisory services.

The Subcommittee's second alternative recommendation ("Alternative B") would require a principles-based fiduciary standard for brokers and investment advisers no less stringent than the existing standard under the Advisers Act, consistent with the authority granted to the SEC under Section 913 of the Dodd-Frank Act ("Dodd-Frank").

In light of the limited safe harbors created under Dodd-Frank for the sale of proprietary products, as well as receipt of commissions under a fiduciary standard, Alternative B would attempt to strike a balance between the fiduciary's duty of loyalty to act in the client's best interest by fully disclosing such conflicts and appropriately managing them.

As a part of this approach, the Subcommittee also recommends that the Securities and Exchange Commission (the "SEC" or "Commission") fulfill its mandate under Dodd-Frank to examine and promulgate rules prohibiting certain sales practices and other conflicts of both brokers and investment advisers that are contrary to the public interest.

fi360 Supports Alternative A of Recommendation 1

In terms of implementing a fiduciary standard for brokers, fi360 urges the Investor Advisory Committee ("Committee") to support Recommendation 1 and more specifically, Alternative A. A version of Alternative A was considered in the early legislative drafting of Dodd-Frank; and given the widely diverging views over the scope of a new uniform standard for brokers and investment advisers, narrowing the existing broker-dealer exemption deserves a fresh look by the Commission.

We believe that Alternative A is the most cost-effective and pragmatic solution available to policymakers for a number of compelling reasons discussed below. We urge the full Committee to support this option by requesting the SEC undertake such a rulemaking at its earliest available opportunity.

[4] The exemption for brokers under Section 202(a)(11)(C) of the Advisers Act states: "[A]ny broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."

1. **Brokers providing personalized investment advice to retail clients act as investment advisers and should be subject to Advisers Act jurisprudence, rules and guidance.**

   First and foremost, it should be kept in mind that brokers providing personalized advice today act in an advisory capacity and, therefore, functionally serve as investment advisers. In their capacities as brokers, they no longer provide solely incidental investment advice in connection with securities transactions. One has to look no further than recently updated FINRA rules expanding suitability criteria to include investment strategies and a 'best interest' obligation to find practices more commonly found in a financial planning or investment adviser engagement.[5] In the presence of inaction by the Commission, FINRA appears to have partially filled the fiduciary void on the broker side.

   New Fiduciary Rule Not Required

   Section 913(g) of Dodd-Frank permits the Commission under Section 211 of the Advisers Act to adopt a fiduciary standard "no less stringent than the standard applicable to investment advisers." Section 211 provides the agency with the authority to make and amend rules necessary to exercise its functions and powers under the Advisers Act, and with respect to a fiduciary rulemaking, is limited only by the broad anti-fraud provisions under sections 206(1) and (2). These are the key sections of the Advisers Act from which principles-based regulation of fiduciary advisers is drawn. These sections provide the Commission with broad authority to prohibit investment advisers from defrauding clients or prospective clients, or from engaging in any practice that operates as a fraud or deceit. Nowhere in Dodd-Frank does it stipulate that the Commission is required to promulgate a *new* fiduciary standard separate from the existing one.

   In addition, the concerns expressed by the brokerage industry with preserving its ability to conduct principal trades, receipt of commission and the sale of proprietary products under a fiduciary standard could be addressed in supplemental guidance under the Advisers Act for dual registrants.

   The Migration of Brokers

   Although the Subcommittee suggests that "the roles of some broker-dealers and investment advisers have converged," we believe a more accurate description would be a migration of brokers to the investment adviser space. A similar overlap in advisory services at brokerage houses occurred during the Great Depression and prior to legislative enactment of the Advisers Act,[6] but it was not a convergence. The question

[5] FINRA Rule 2111, *Suitability,* and related guidance, available at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=14960&element_id=9859&highlight=2111#r14960 (last reviewed Oct 7, 2013).

[6] *See, e.g.* Laby, Arthur, *Reforming the Regulation of Broker-Dealers and Investment Advisers,* 65 THE BUSINESS LAWYER 395 (2010), at 400-403 (commenting on broker-dealers establishing special investment management departments prior to 1940).

of whether the two shall meet somewhere in the middle is not mere semantics but rather an important point in determining whether broker and investment adviser rules need to be melded together or whether brokers have simply adopted the advisory business model as commission revenue dries up. Today we find no statistical or even conjectural evidence of "convergence." Rarely do we see investment advisers opening new broker-dealers. The reverse is true. The number of brokerage firms has diminished steadily over the years while the number of advisory firms and assets under management has dramatically increased. Functional regulation is most effective if applied evenly and the best solution is reflected in Alternative A.

2. **Brokers are already subject to a common-law fiduciary standard under securities laws for certain advisory activities, and as dual registrants.**

Securities brokers providing personalized investment advice have been subject to a common-law fiduciary standard for decades.[7] According to a recent study by Texas Tech University, brokers are generally held to a fiduciary standard for all of their advisory activities in four states; to varying degrees in 32 others; and in virtually all 50 states when holding trading authority over retail client accounts. The study found little variance between fiduciary and non-fiduciary states in terms of available services.[8]

Additionally, many broker-dealers already operate in the fiduciary space as dually registered investment advisers (RIAs). A significant number of investment adviser representatives, about nine out of 10, are dually registered as agents of broker-dealers.[9] Most broker-dealers with concerns over the costs and application of a fiduciary standard have a wealth of compliance experience in this area. Moreover, steady increases in the number of brokerage firms registering as investment advisers and asset aggregation under the Advisers Act provide additional evidence of this delicate juggling act in regulation. For example, assets managed by investment adviser affiliates of broker-dealers today range from 20 to 50 percent of a dual registrant's overall assets.[10] A part

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[7] *See*, e.g., Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* ("913 Study")(Jan. 2011), at iv. "While broker-dealers are generally not subject to a fiduciary duty under the federal securities laws, courts have found broker-dealers to have a fiduciary duty under certain circumstances," available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf (last reviewed Oct. 4, 2013).

[8] Finke, Michael S. and Langdon, Thomas Patrick, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice* (March 9, 2012), at 9, 12-14. Available at SSRN: http://ssrn.com/abstract=2019090 or http://dx.doi.org/10.2139/ssrn.2019090 (last reviewed Oct. 4, 2013). The Finke-Langdon research was funded in part by a contribution from fi360.

[9] See, e.g., 913 Study, Supra note 7, at iii. "…[A]pproximately 88% of investment adviser representatives are also registered representatives of broker-dealers," available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf (last reviewed Oct. 4, 2013).

[10] *See*, e.g., Vasan, Paula, "Dually Registered vs. Hybrid Advisors: Do You Know the Difference?" *Financial Planning*, available at http://www.financial-planning.com/blogs/dually-registered-vs-hybrid-advisors-2686104-1.html (last reviewed Oct. 4, 2013).

of this increase in assets can be attributed to a decision by the U.S. Court of Appeals for the D.C. Circuit in 2007[11] to vacate an SEC exemptive rule for brokers on the grounds that the agency exceeded its exemption authority under the Administrative Procedure Act by allowing brokers to accept asset management fees in lieu of commissions for their investment advice.

Consistent with the Court's view that the Commission not *expand* the broker exclusion beyond the SEC's legislative authority, the Commission now has new legislative authority that would permit it to *narrow* the broker exclusion consistent with the Subcommittee's Alternative A.

And finally, regarding the costs of coping with a new compliance framework, broker-dealers have proven their resilience in adjusting to regulatory changes and accepting principles-based regulation as fiduciaries.[12] It is highly unlikely that they will walk away from or shun the $54.8 trillion investment advice market[13] if a fiduciary standard is also applied to advisory activities of brokers.

3. **Narrowing the broker-dealer exemption will avoid creation of a new layer of regulation and loopholes for the securities industry; and avoid higher compliance costs.**

Based on the SEC's request earlier this year for quantitative data[14] compliance costs under a newly promulgated fiduciary standard would be significant, particularly for registered investment advisers.[15] These costs would inevitably be passed on to

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[11] *Financial Planning Association v. SEC*, 482 F.3d 481, 492 (D.C. Cir. 2007).

[12] *See*, e.g., letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to the SEC, dated July 5, 2013, regarding *Duties of Brokers, Dealers and Investment Advisers* (providing commentary on the experience of dually registered financial planners), at 2, available at http://www.sec.gov/comments/4-606/4606-3119.pdf (last reviewed Oct. 4, 2013), at 2. And letter from Financial Planning Coalition to the SEC, dated July 5, 2013, same Release (providing commentary on transition of fee-based brokerage accounts to Advisers Act jurisdiction), at 19-20, available at http://www.sec.gov/comments/4-606/4606-3126.pdf (last reviewed Oct. 4, 2013).

[13] Form ADV data compiled by NRS and the Investment Adviser Association, "2013 Evolution Revolution – A Profile of the Investment Adviser Profession" October 2013, at 4, available at https://www.investmentadviser.org/eweb/docs/Publications_News/Reports_and_Brochures/IAA-NRS_Evolution_Revolution_Reports/evolution_revolution_2013.pdf?gen=emma131003 (last reviewed Oct. 4, 2013).

[14] SEC Release No. 34-69013 et al, *Duties of Brokers, Dealers and Investment Advisers*, March 1, 2013, available at http://www.sec.gov/rules/other/2013/34-69013.pdf (last reviewed Oct. 4, 2013).

[15] *See*, e.g., Waddell Melanie, "Brokers willing to pay up for fiduciary standard: SIFMA," *ThinkAdvisor,* July 8, 2013 (noting a commenter's estimated $1 billion compliance cost for RIAs under SEC scenarios); reprinted in *Benefitspro* available at http://www.benefitspro.com/2013/07/08/brokers-willing-to-pay-up-for-fiduciary-standard-s?t=voluntary&ref=desktoplink (last reviewed Oct. 7, 2013).

consumers or reduce investor choice by forcing small adviser firms to merge or go out of business.

A body of rules, no-action letters, and interpretative guidance has been carefully developed over decades under the Advisers Act and rely heavily on legal precedent. There is no way that the SEC could avoid inconsistent standards of conduct for investment advice if it were to agree with the brokerage argument that such precedent should not apply to brokers under a new 'uniform' standard.[16]

Careful Consideration Required for Alternative B

We wish to make clear that Alternative B under Recommendation 1 is a viable option, but only if the uniform fiduciary standard is not diluted in a way that accommodates broker-dealer conflicts at the expense of investor protection. We share many of the same reservations expressed by the Subcommittee in this regard. To elaborate on our specific concerns, fi360 believes that mere disclosure of conflicts in a prospectus or customer agreement form is not a sufficient remedy and could lead to a fiduciary breach absent informed consent. Notwithstanding the utility value of disclosure, it is not a catch-all remedy. Under Dodd-Frank financial intermediaries must "act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice."[17]

In practical terms, this means that, at a minimum, disclosure in a professional engagement is always a two-step process. At or prior to the client engagement, general disclosure of conflicts should be made so that the prospective client can make an informed decision on whether to hire the broker or investment adviser. The second step is prompt disclosure of a conflict at the point of an investment recommendation. Additional documentation of the discussion with the client is needed to fulfill the fiduciary duty of loyalty and ensure that a prudent process is followed. In light of the SEC's financial literacy study[18] confirming investor confusion over job titles and a failure to understand basic investing concepts, disclosure remedies should encompass a much broader dimension.

As noted by the Subcommittee, the SEC also should address the problem of 'title creep,' or use of misleading titles, over the last two decades. If it is hesitant to do so without empirical evidence, it can easily confirm the transition from functional titles as salesperson to that of trusted adviser through a basic content analysis study of broker ads. The Commission is to be

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[16] *See, e.g.,* Letter from IRA Hammerman, Senior Managing Director and General Counsel, SIFMA, to the SEC, dated July 14, 2011, regarding the framework for a fiduciary duty, at 11, available at http://www.sec.gov/comments/4-606/4606-2952.pdf (last reviewed Oct. 7, 2013). *See*, *also* Aikin, Blaine, fi360, "The Shape of Things to Come under a Uniform Fiduciary Standard for Brokers and Advisors," *Investments & Wealth Monitor*, September/October 2012 edition, at 17 (chart comparing non-fiduciary activities of a broker, that are subject to a fiduciary duty under the Advisers Act.

[17] Dodd-Frank Act, Sec. 913(g)(1).

[18] SEC staff, *Study Regarding Financial Literacy Among Investors,* August 2012, available at http://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf (last reviewed Oct. 7, 2013).

commended for looking at misleading senior designations and others used in the securities industry. However, it can do still more to curb abuse with titles that suggest a position of trust and objectivity, but also shroud the conflicts inherent in the dual role of product purveyor.

Conclusion

For these reasons and many others posed by advocates of the traditional Advisers Act standard, which has been tested in the courts and refined over many decades, we believe prompt action by the Commission is long overdue. And the most appropriate course is to narrow the broker exemption under Alternative A.

We recognize that the debate over a fiduciary standard has been prolonged by the SEC's need to undertake extensive reform after the 2008 market crisis. However, five previous SEC chairs have had the opportunity to take decisive action on a highly visible issue that has been around for more than a decade, but failed to do so. We, therefore, commend the Subcommittee for its perseverance in highlighting the critical role that fiduciaries continue to serve in the securities industry and society as a whole.

Should the Commission adopt the Subcommittee's recommendation under Alternative A, it would perform a long overdue administrative action by narrowing the broker exemption and restoring functional oversight of investment advice under the Advisers Act.

We would be happy to answer any questions that the Committee may have with respect to the information presented in this letter.

Very truly yours,

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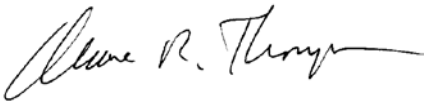

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