STATEMENT OF
THE AMERICAN COUNCIL OF LIFE INSURERS
BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON FINANCIAL SERVICES
ON
CAPITAL MARKETS REGULATORY REFORM: STRENGTHENING INVESTOR PROTECTION, ENHANCING OVERSIGHT OF PRIVATE POOLS OF CAPITAL, CREATING A NATIONAL INSURANCE OFFICE

October 6, 2009

Statement Made by
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Vice President & Managing Counsel
Thrivent Financial for Lutherans on behalf of the American Council of Life Insurers

Mr. Chairman and Committee members: My name is Bruce Maisel, and I am Vice President and Managing Counsel of Thrivent Financial for Lutherans testifying on behalf of the ACLI. I greatly appreciate the opportunity to appear here before you to discuss strengthening investor protection.

The ACLI is the principal trade association for U.S. life insurance companies, and its 340 member companies account for 93% of total life insurance company assets, 94% of the life insurance premiums and 94% of annuity considerations in the United States. ACLI members are organized as public companies, fraternal benefit societies, and mutual companies.

Among those ACLI member companies is Thrivent Financial for Lutherans. Thrivent is a fraternal benefit society, a not for profit membership group for Lutherans with a mission of helping to provide financial security to our members and serving communities. In 2008, Thrivent's members provided over 21 million volunteer service hours and close to $310 million of fraternal assistance to communities nationwide. Federal law requires that fraternals like Thrivent offer our members insurance products regulated like those provided by commercial life insurers, including variable annuities and variable life insurance that are deemed to be securities and are regulated under federal law. As a fraternal group, Thrivent and our predecessor organizations, Lutheran Brotherhood and Aid Association for Lutherans, have been focused for over a century on serving our Lutheran members in a pro-consumer, fair, and transparent way.

I have worked in the financial services industry for 23 years, first as a registered representative and then as legal counsel at law firms and subsequently as in-house counsel at dually-registered investment advisory and brokerage firms.

Most recently, I have led a Working Group at the ACLI focused upon participating in, and contributing to, the dialogue regarding the a establishment of a harmonized standard of conduct for broker- dealers and investment advisers when they provide personalized investment advice about securities to retail investors.

As described in more detail below, while we support the establishment of a fiduciary duty for brokers, dealers and investment advisers, and harmonization of the regulation of brokers, dealers, and investment advisers, we do have some concerns with aspects of the proposed. Section 913 of the Investor Protection Act of 2009 ("Investor Protection Act") and the Discussion Draft on Investor Protection released on October 1, 2009 ("Discussion Draft").

The Working Group is focused on seeking to ensure that the establishment of a such a harmonized standard of conduct that will enhance retail investor protection while, at the same time, permit ACLI member companies to continue to meet investor needs across the broad economic spectrum.

Retail investors receive personalized investment advice about securities through numerous distribution channels and various means. Specifically, retail investors work with broker- dealers and investment advisers (and their respective securities licensed representatives) who provide personalized investment advice and offer only those proprietary and non-proprietary securities available for distribution by the particular broker, dealer or investment adviser.

In many cases, such broker-dealers and investment advisers provide advice about proprietary securities exclusively. In other cases, broker-dealers and investment advisers provide personalized advice about non-proprietary products. In still other cases, retail investors receive personalized advice about securities only and the investor may seek to implement that personalized investment advice about securities directly through product manufacturers. The Working Group sought to not advance one distribution channel or method as opposed to another.

We believe that the overriding goal of the establishment of a harmonized standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail investors must be tailored to reflect and preserve the various types of relationships that exist between a broker-dealer or investment adviser and the retail investor. By doing so, investor choice will also be preserved. We also believe that the harmonized standard and any subsequent rules promulgated by the Securities and Exchange Commission ("SEC") must, as similarly noted above, take in to consideration that broker-dealers and investment advisers (and their respective securities licensed representatives) typically may only provide investment advice about the particular securities that are available through their respective firms.

Given this reality, while we support the establishment of a harmonized standard of conduct, we are concerned by the suggestion that such a standard may only be met when investment advice is given "without regard to the financial or other interest of the broker,dealer, or investment adviser providing the advice…" As discussed in more detail below, such a concept is at odds with the fiduciary duty to which investment advisers are currently subject, and could have the unintended effect of "chilling" the provision of investment advice by broker-dealers and investment advisers, which would run counter to serving the investing public's needs. Such a concept is also at odds with the historical practices regarding securities distribution in which a broker-dealer enters into a contractual arrangement with a securities issuer to offer such securities for sale.

By addressing these and other concerns we note below[1], we believe that the establishment of a harmonized standard of conduct and any subsequent related rulemaking will result in broker-dealers and investment advisers enhancing their ability to: (1) meet the ever increasing retail investor needs across the broad economic spectrum of U.S. retail investors; (2) provide enhanced investor protections to those retail

[1] We have attached to this Statement a copy of our proposed revisions to Section 913 of the Investor Protection Act, which also includes a brief explanation of the intended purpose of our key proposed revisions.

investors; and (3) be part of a vibrant and growing financial services industry necessary to meet those ever increasing retail investor needs.

Accordingly, my testimony will focus upon the creation of a harmonized standard of conduct for broker-dealers and investment advisers when they provide personalized investment advice about securities to retail investors, and ways intended to ensure the harmonization of the enforcement and interpretation of such a standard of conduct.

The first part of my testimony addresses ACLI member firm registered representatives and investment advisory representatives and the circumstances under which they typically provide personalized investment advice about securities to retail investors. I then analyze the standard of care imposed under the current regulatory framework with respect to the provision of investment advice about securities to retail investors. The second part of my testimony analyzes: (1) recent efforts to harmonize the standard of care applicable to broker-dealers and investment advisers; and (2) ACLI's position regarding the harmonization of the standard of conduct and as reflected in the Investor Protection Act and the Discussion Draft.

Specifically, my testimony will highlight particular factors that we believe need to be addressed by any legislation imposing a harmonized standard of conduct. As I will discuss in detail below, the standard should:

- be targeted to personalized investment advice about securities.
- imposed with respect to dealings with retail investors.
- be one that requires broker-dealers and investment advisers that provide personalized investment advice about securities to retail investors, to act in the "best interests" of the retail investors.
- require broker-dealers and investment advisers, who provide personalized investment advice about securities to retail investors, to make full, balanced, fair, and timely disclosure including material conflicts so that retail investors can make informed investment decisions.
- be consistent with the long-standing relationships between retail investors and broker-dealers and investment advisers, as well as maintaining retail investor choice in the marketplace of financial service providers. We would urge that legislation not be advanced that requires that investment advice be given "without regard to the financial or other interest of the broker,dealer, or investment adviser providing the advice…" Rather, the focus, as noted immediately above, should be upon ensuring full, balanced, fair and timely disclosure about material conflicts of interest and other relevant information. .

Standard of Care Imposed Under the Current Regulatory Structure

Life Insurance Companies and their Representatives. Life insurance companies and their representatives have a direct and significant interest in investment adviser and broker-dealer regulation. In order to meet the varied needs of retail investors across the vast economic spectrum of U.S. investors as well as the demands of a highly competitive

marketplace, life insurance companies offer a wide range of financial products and services. Many of these products and services are subject to the federal securities laws, including broker-dealer regulation promulgated by the SEC and the Financial Industry Regulatory Authority ("FINRA") under the Securities Exchange Act of 1934 (the "1934 Act") and investment adviser regulation promulgated by the SEC under the Investment Advisers Act of 1940 (the "Advisers Act").

A principal element of insurance company product distribution involves eliciting customer needs and matching them with appropriate fixed insurance and annuity products. Similarly, many life insurance agents of affiliated broker-dealers provide essential retail investor needs analysis services in the sale of variable life and variable annuity products. Consistent with this retail investor needs-based approach, many of these broker-dealers offer a variety of other types of securities such as mutual funds, equities, and 529 Plans to meet the retirement, college savings and other investment needs of retail investors. Some life insurance representatives are also associated with registered investment advisers (often dually-registered affiliated broker-dealers and investment advisers) as a result of their functions and services they offer. Life insurance representatives are licensed and trained to offer insurance and annuity products, those other securities and increasingly investment advisory services, all based on the needs of the particular retail investor. In short, life insurers' products, functions, services and regulation fit within the scope of various initiatives that address broker-dealer and investment adviser standards of conduct.

In addition to broker-dealer, investment adviser and other securities regulation, life insurers must also fulfill a comprehensive set of state insurance laws and regulations in every U.S. jurisdiction. As a result, life insurers and their affiliates frequently find themselves subject to the overlapping requirements of the 1934 Act, the Advisers Act, and the insurance and securities regulations of the fifty states. Registered representatives working for broker-dealers affiliated with life insurance companies are not only a significant part of the broker-dealer industry, but in fact a majority of the industry. We believe that over 50% of FINRA's universe of approximately 675,000 registered representative work for broker-dealers affiliated with life insurance companies.

The Current Standard of Care Imposed upon Broker-Dealers and Investment Advisers. Today, broker-dealers and investment advisers are subject to different standards with respect to the duty of care that they owe to retail investors (and other investors) to whom they provide investment advice about securities.

The Advisers Act does not specifically set forth fiduciary requirements. The SEC recognized that an investment adviser managing assets for a fee owes a fiduciary duty to her clients as early as 1948 in the *Arleen Hughes* release, when the SEC stated that an investment adviser owes a client the duty "to act in the best interests of her clients and to make such recommendations as will best serve such interest." [2]The SEC also recognized

[2] In re Arleen W. Hughes, Exchange Act Release No, 4048, 27 S.E.C. 629, 1948 WL 29537 (Feb. 18, 1948).

that while a fiduciary should endeavor to avoid conflicts of interests, a fiduciary is able to mitigate conflicts of interest by making disclosure of the conflict and obtaining the client's "informed consent to such dealings." The SEC stated that "disclosures constitute a safeguard which the law imposes to prevent the possibility of abuse which is inherent in a situation presenting conflicts between a fiduciary's self interest and his loyalty to his principal." *Id.*

In the *SEC v. Capital Gains Research Bureau*[3] the Supreme Court ruled that investment advisers owe a fiduciary duty to investors. The Court noted that the Advisers Act reflects a congressional recognition of the "delicate fiduciary nature" of an investment advisory relationship and a congressional intent to eliminate or expose "all conflicts of interest which might incline an investment adviser— consciously or unconsciously— to render advice which was not disinterested." The *Capital Gains* Court held that this implicit common law fiduciary duty arises from Section 206, the Adviser Act's anti-fraud provision. It is important to note that the Court recognized that the Advisers Act did not go so far as to eliminate conflicts of interest , even though some had advocated for doing just that. Instead, the Court acknowledged that the SEC in *Capital Gains* sought only disclosure. To meet her fiduciary duty, the Court held that an investment adviser is required "to make full and frank disclosure of his practice of trading on the effect of his recommendation."

In contrast to investment advisers, broker-dealer registered representatives are not generally bound by any rule or other guidance that imposes a fiduciary obligation upon them. We note that in certain limited instances broker-dealers have, based on specific facts and circumstances, been deemed by court decisions as having a fiduciary duty to particular customers. However, in contrast to investment advisers, broker-dealer registered representatives are subject to a full panoply of rules and duties—including the duty to recommend to investors suitable securities.[4] These rules and duties are imposed by FINRA, the broker-dealer self-regulatory organization ("SRO").

Treatment of Broker-Dealers Under the Advisers Act. The question arises as to whether a broker-dealer should be subject to the Advisers Act fiduciary duty when it provides investment advice about securities to retail investors. .

By the very nature of their activity, virtually all broker-dealers and their registered representatives come within the broad sweep of the Advisers Act basic definition of an investment adviser: They are in the business of advising others for compensation as to the advisability of investing in securities. However, in recognition of the comprehensive regulation to which broker-dealers are subject, Adviser Act Section 202(a)(11)(C) provides an exclusion for "any broker or dealer whose performance of such [advisory]

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[3] 375 U.S. 180 (1963).

[4] While the Advisers Act does not expressly impose suitability requirement on investment advisers, such a requirement has been enforced by the SEC as implicit in the antifraud provisions of section 206. See e.g., In re Bing Sung, Investment Advisers Act Release No. 1814 (Aug. 12, 1999).

services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefore."

To rely on the broker-dealer exclusion, two tests must be satisfied: (1) the advice must be "solely incidental" to the firm's brokerage activities; and (2) the broker-dealer may not receive "special compensation" for the investment advice.

The past ten years have seen significant developments and challenges with respect to applying the broker-dealer exclusion to investment advice about securities provided by broker-dealers to retail investors. As investment advisers and broker-dealers began to offer increasingly similar and in certain instances virtually the same, services to retail investors, it became more difficult to establish a differentiation of broker-dealer versus investment adviser activities and functions. The SEC has previously tried to demarcate broker-dealer activity from investment adviser activity in an attempt to modernize the broker-dealer exclusion under the Advisers Act, but these efforts have not borne fruit and certain of them (e.g., viewing the provision of "financial planning" as a differentiation) have since been abandoned.

The RAND Report. In connection with its attempts to, among other things, better understand the practical ramifications to the U.S. retail investing public and the industry of the broker-dealer exclusion in the Adviser Act, the SEC engaged a third-party corporation to study the broker-dealer and investment advisory industries.[5] The study, which is typically referred to as the "RAND Report" examined how broker-dealers and investment advisers market and provide products and services to investors, and how investors understand the differences between investment advisers and broker-dealers. The chief purpose of the RAND Report was to provide the SEC with a description of the current state of the investment advisory and brokerage industries for its evaluation of the legal and regulatory framework applying to these industries.

The RAND Report was released in January 2008. In determining its findings, RAND gathered information using a variety of sources: a survey of both experienced and inexperienced investors; focus groups; interviews with interested parties and financial services firms; review of relevant literature; a review of samples of documentation used by investment advisers and broker-dealers; and a review of various regulatory filings.[6]

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[5] RAND Corporation Study on Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, available at www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

[6] Notably, the RAND Report concluded, among other things that investors, as a whole, do not understand the key distinctions between broker-dealers and investment advisers, and relationships among service providers. Also, investors, although having a general sense about the differences in services provided, are not clear about the varying legal duties of and standards imposed on broker-dealers and investment advisers. However, the Study concluded that despite the confusion that exists among investors, investors polled were generally satisfied with their own financial service providers, and in particular with the personal attention that they receive.

Harmonizing the Broker-Dealer and Investment Advisor Standard of Conduct

Calls for Harmonization. In 2009, efforts to demarcate broker-dealer activity from investment adviser activity gave way to calls from regulators and others to harmonize the regulatory structures applying to broker-dealers and investment advisers when providing personalized investment advice to retail investors. These calls were fueled in large degree by the Madoff scandal. Many have claimed that the scandal went undetected, at least in part, by a regulatory regime that calls for regulators to narrowly focus on either broker-dealer or investment adviser activity, as opposed to taking a more comprehensive approach.

Harmonization efforts have generally focused upon the establishment of a fiduciary duty for broker-dealers and advisers when providing personalized advice to retail investors. With respect to a harmonized standard of conduct, SEC Chairman Schapiro has stated that she believes that "all financial service providers that provide personalized investment advice about securities should owe a fiduciary duty to their customers or clients."[7] Previously, SEC Commissioner Elisse Walter stated that she believes that every financial professional should be subject to a uniform standard of conduct.[8] At that time, Commissioner Walter suggested that in developing a uniform standard of conduct, regulators should not dwell on the label to be placed on the standard. Commissioner Walter also noted that it is important that any standard be accompanied by business practice rules that provide practical guidelines regarding the standard's parameters. Commissioner Walter explained that what a particular fiduciary duty requires would depend on the functional role being performed by the financial professional. Specifically, she stated that "…what a fiduciary duty requires depends on the scope of the engagement. Thus, it will mean one thing for a mere order taker, another thing for someone who provides a one-time financial plan, and yet something else for someone who exercises ongoing investment discretion over an account."

Similarly, state securities regulators have urged the application of a fiduciary standard for broker-dealers providing investment advisory services. [9]

The Investor Protection Act of 2009 On June 17, 2009, President Obama announced that his Administration was "proposing a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression." [10] In turn, the U.S. Department of Treasury ("Treasury") released a White Paper which stated two general goals with respect to the regulation and oversight of

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[7] Speech by Chairman Mary Schapiro at the New York Financial Writers' Association Annual Awards Dinner (June 18, 2009)

[8] Speech by Commissioner Elisse Walter at the Mutual Fund Directors Forum Ninth Annual Policy Conference (May 15, 2009)

[9] NASAA Statement on *Obama Financial Regulatory Reform Proposals* (June 17, 2009).

[10] U.S. Treasury Department's White Paper, *Financial Regulatory Reform: A New Foundation* (the "Treasury Proposal").

broker-dealers and investment advisers: establishing a "fiduciary duty" for broker-dealers; and harmonizing the regulation of broker-dealers and investment advisers.

This was followed on July 10, 2009, with the Obama Administration, through the Treasury, submitting the above referenced proposed legislation to Congress the Investor Protection Act. For the most part, the provisions of the Investor Protection Act were outlined in Treasury's White Paper.

The Investor Protection Act would add a new Section 15(k) to the 1934 Act to articulate its view of the "fiduciary duty" owed by broker-dealers. Under proposed Section 15(k), the SEC may promulgate rules to provide that the standard of conduct for a broker-dealer "providing investment advice about securities to retail customers or clients" shall be "to act solely in the interest of the customer or client without regard to the financial or other interest of the" broker-dealer providing the advice. The Investor Protection Act provides similar language for such a duty to be imposed on investment advisers under the Advisers Act.

ACLI Position on a Harmonized Standard of Conduct; the applicable Sections of Investor Protection Act and the Discussion Draft. In the wake of the Madoff and other similar scandals, the ACLI appreciates the interest of the Administration, Congress and regulators in considering how the standards of conduct applicable to broker-dealers and investment advisors can be enhanced to improve investor protection.

As similarly noted above, we support the general concept of harmonizing standards of conduct so long as the resulting standard(s) accurately and appropriately reflect the nature of the services being rendered and the nature of retail investor relationships as well as preserving investor choice. We also support the general concept of rationalizing inconsistent broker-dealer and investment adviser rules, where appropriate.

Other factors that are relevant to the development of an appropriate harmonized standard of conduct include:

- Providing opportunity for the retail investor to make informed choice
- Assuring transparency regarding offered products and services
- Disclosing material conflicts of interest and other relevant information

With this background, as noted above, we believe that certain revisions to the Investor Protection Act, and as applicable, to the Discussion Draft are necessary to achieve a workable standard of conduct under which broker-dealers and investment advisers can continue to meet the ever increasing retail investor needs across the vast economic spectrum of U.S. investors.

Personalized Investment Advice. First, we believe it should be clear that any fiduciary duty should apply to "personalized" investment advice. "Personalized investment advice" is investment advice about securities that is provided to a retail investor based on the personal financial information provided by such retail investor, including the retail

investor's financial needs, investment objectives, risk tolerance and financial circumstances. [11] When brokers, dealers or investment advisers provide such impersonal investment advice about securities to retail investors, we believe there is no policy or other reason to shift or modify existing regulatory requirements. Examples of impersonal investment advice include a broker-dealer merely executing an order for a customer, references to securities at seminars to a broad audience of attendees and the distribution of marketing materials that reference certain securities.

Retail Investors. It should be clear that the harmonized standard is imposed with respect to dealings with retail investors. Use of the term retail investor (rather than retail "customer" or retail "client"), which is used throughout the Investor Protection Act, better reflects the status of the retail consumer that is the recipient of personalized investment advice about securities. It also helps to ensure consistency with other sections of the Investor Protection Act.

Best Interest of the Retail Investor. The standard that is advanced should be one that requires brokers, dealers or investment advisers that provide personalized investment advice about securities to retail investors, to act in the "best interests" of the retail investors. Such a standard of conduct is consistent with the apparent intent of the proposed legislation. Specifically, the standard of conduct is intended to enhance the standard of conduct currently generally required with respect to the provision of personalized investment advice about securities.

Full, Balanced, Fair and Timely Disclosure. It is important to note that a hallmark of the harmonized standard should be the requirement that brokers, dealers and investment advisers, who provide personalized investment advice about securities to retail investors, make full, balanced, fair and timely disclosure, including of material conflicts of interests and related information so that retail investors can make informed investment decisions. This standard of conduct is generally consistent with the duty that historically has been imposed on investment advisers pursuant to the Advisers Act. As such, the standard has been used by the SEC as the basis for imposing substantive obligations and prohibitions on investment adviser conduct and also to require investment advisers to disclose important information to clients, including information about material conflicts, often prior to the time an investment decision is made.

The SEC has consistently recognized that investment advisers mitigate conflicts of interest through disclosure so that clients can choose for themselves whether an investment adviser can meet their needs notwithstanding the existence of conflicts. The Advisers Act has never required that an adviser "act without regard to" their financial interests, as the SEC has recognized that disclosure is required regardless of whether the investment adviser's "sense of duty prevails over the motives of self-interest." Whether advice being given is influenced by self-interest is in many cases ultimately unknowable. Investment advisers, instead, have historically been and currently are required to make

[11] We note that the term "impersonal investment advice is defined under Advisers Act Rule 203A-3(a)(3)(ii) as "investment advisory services provided by means of written or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts."

disclosures of material conflicts of interests so that investors, including retail investors can decide for themselves whether a conflict of interest is so great as to prevent an investment adviser from offering objective advice. Essentially, those retail investors – with those essential disclosures typically made to the retail investor at or before entering in to the relationship with the investment adviser – are able to make informed investment choices. We believe that timely and robust disclosure should be the hallmark of a harmonized standard and that the standard should be extended to broker-dealers providing personalized investment advice to retail investors.[12]

ACLI Reaction to the Discussion Draft. We are pleased that the Discussion Draft has: (1) indicated that the harmonized standard should apply to retail investors receiving "personalized investment advice"; and (2) has recognized that the receipt by broker-dealers of commission-based compensation would not, in and of itself be a violation of the standard.

We also support the Discussion Draft's establishment of a "best interest" standard which, as discussed earlier, is consistent with the overall intent of this legislation and with longstanding Supreme Court and SEC views on an investment adviser's fiduciary duty.

As noted above, however, we strongly oppose the tying of acting in the best interest to the notion of acting "without regard to the financial or other interest of the broker,dealer, or investment adviser providing the advice…" As noted above, such a requirement is contrary with the fiduciary duty to which investment advisers are currently subject, and could have the unintended effect of "chilling" the provision of investment advice by broker-dealer, and investment adviser, which would run counter to serving the investing public. Such a requirement would also be at odds with basic notions of securities distribution, in which a broker-dealer enters into a contract with an issuer for that broker-dealer to act on behalf of such issuer. Also, as similarly noted above, it is, in many cases, ultimately unknowable whether investment advice is influenced by any self-interest.

It is also critical that any legislation recognize a broker-dealer's obligations to a securities issuer as expressed under a selling agreement under which the broker-dealer has a contractual and legal obligation to engage in selling efforts as an agent of for example, an insurance company, and gets paid by such issuer.

We are also concerned that the requirement of acting "without regard to" the financial interest of the broker-dealer or investment adviser be construed so broadly that it effectively requires no compensation be paid, or steps having to be taken to ensure that absolutely no disparity in compensation exists between similar, or even different, financial products.

As noted above, these issues are best left to effective, robust and timely disclosure, as has been the historical practice under the Advisers Act.

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[12] We note that many broker-dealers have already adopted similar, although not explicitly or otherwise required by law, disclosure approaches.

Once again, I appreciate be given the opportunity to appear before you today. The ACLI applauds the efforts of the Committee and we are committed to working towards strengthening investor protections. We believe that with the above noted modifications to the Investor Protection Act and the Discussion Draft, a harmonized standard of conduct and related rulemaking can result in broker-dealers and investment advisers enhancing their ability to: (1) meet the ever increasing retail investor needs across the broad economic spectrum of U.S. retail investors; (2) provide enhanced investor protections to those retail investors; and (3) be part of a vibrant and growing financial services industry necessary to meet those ever increasing retail investor needs.

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Section 913. ESTABLISHMENT OF A FIDUCIARY DUTY FOR BROKERS, DEALERS, AND INVESTMENT ADVISERS, AND HARMONIZATION OF THE REGULATION OF BROKERS, DEALERS, AND INVESTMENT ADVISERS.

(a) AMENDMENT TO SECURITIES EXCHANGE ACT OF 1934.---Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended by adding at the end the following new subsections:

(k) STANDARDS OF CONDUCT.—Notwithstanding any other provision of this Act or the Investment Advisers Act of 1940, the Commission may promulgate rules to provide, in substance, that the standards of conduct for all brokers, dealers, and investment advisers, in providing personalized investment advice about securities to retail investors, shall be to act in the best interest of the retail investor and to disclose to the retail investor, at or prior to the time such personalized investment advice about securities is provided, any material conflict between the interests of the broker, dealer, or investment adviser and the best interests of the retail investor related to the provision of such personalized investment advice. Any rules promulgated hereunder shall: (i) be tailored to reflect the various types of relationships that exist between a broker, dealer, or investment adviser and a retail investor in light of the nature of the personalized investment advice being provided and any related material conflicts of interest; and (ii) be designed to provide disclosure to allow the retail investor to make an informed decision with respect to the personalized investment advice being provided.

Purpose: Regarding the use of the term "personalized" investment advice," when brokers, dealers or investment advisers provide personalized investment advice about securities to retail investors they should be held to the same standard of conduct. "Personalized investment advice" is investment advice about securities that is provided to a retail investor based on the personal financial information provided by such retail investor, including the retail investor's financial

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Deleted: customer or client without regard to the financial or other interest of the broker, dealer or investment adviser providing the advice.

needs, investment objectives, risk tolerance and financial circumstances. We note that the term "impersonal investment advice is defined under Investment Advisers Act of 1940 ("Advisers Act") Rule 203A-3(a)(3)(ii) as "investment advisory services provided by means of written or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts." Accordingly, when brokers, dealers or investment advisers provide such impersonal investment advice about securities to retail investors, we believe there is no policy or other reason to shift or modify existing regulatory requirements. Examples of impersonal investment advice include a broker-dealer merely executing an order for a customer, references to securities at seminars to a broad audience of attendees and the distribution of marketing materials that reference certain securities. In each example, the broker-dealer would be providing impersonal investment advice about securities that does not purport to meet the objectives or needs of a specific investor(s).

Purpose: Regarding the use of the term retail "investors," that term is used throughout the Investor Protection Act of 2009 (the "Act") as well as in the title of the Act itself. Use of the term retail investor (rather than retail "customer" or retail "client") in this section better reflects the status of the retail consumer that is the recipient of personalized investment advice about securities. It also helps seek to ensure consistency with other sections of the Act.

Purpose: Regarding the inclusion of the phrase "best interest of the retail investor and to disclose to the retail investor…," for brokers, dealers or investment advisers that provide personalized investment advice about securities to retail investors, such a standard of conduct is consistent with the apparent intent of the proposed legislation. Specifically, the standard of conduct is intended to enhance the standard of conduct currently generally required with respect to the provision of investment advice about securities. It is important to note that a hallmark of the standard would be the requirement that brokers, dealers and investment advisers, who provide personalized investment advice about securities to retail investors, make full, balanced and fair disclosure including material conflicts so that retail investors can make informed investment decisions. This standard of conduct is generally consistent with the duty that historically has been imposed on investment advisers pursuant to the Advisers Act. As such, the standard has been used by the SEC as the basis for imposing substantive obligations and prohibitions on investment adviser conduct and also to require investment advisers to disclose important information to clients, including information about material conflicts, often prior to the time an investment decision is made.

Purpose: Regarding the SEC rulemaking process, language is intended to ensure that any SEC rulemaking to implement this section take into account that retail investors receive personalized investment advice about securities through numerous distribution channels and various means. In some cases, retail investors receive personalized investment advice through distribution channels that provide advice about a variety of proprietary and/or non-proprietary securities. In other cases, retail investors receive personalized advice about securities only and the investor may seek to implement that personalized investment advice about securities directly through product manufacturers. Any SEC rulemaking should not look to advance one distribution channel or method as opposed to

another. Rather, the overriding goal is to serve retail investors by imposing a harmonized standard across distribution channels or methods, tailoring the standard to the extent necessary to reflect the various types of relationships that exist between a broker-dealer or investment adviser and a retail investor. SEC rulemaking should also take in to consideration that brokers, dealers and investment advisers (and their respective securities licensed representatives) typically may only provide investment advice and offer those securities available for distribution by the particular broker, dealer or investment adviser.

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"(1) OTHER MATTERS.-The Commission shall-

"(1) take steps to facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers and investment advisers; and

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"(2) examine and, where appropriate, promulgate rules, including the establishment of duties regarding sales practices, conflicts of interest, and compensation practices for brokers, dealers, and investment advisers for the purpose of promoting the best interests of, and fair dealing with, retail investors. In doing so, the Commission shall tailor any such rules and duties to reflect the various types of relationships that exist between a broker, dealer or investment adviser and a retail investor in light of the nature of the personalized investment advice being provided and any related material conflict of interest."

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Purpose: Regarding the proposed requirement that the Commission examine and, where appropriate, promulgate rules, including the establishment of duties regarding sales practices, conflicts of interest and compensation, the language is intended to: (i) mirror the language included in an analogous section of the Consumer Financial Protection Agency Act of 2009

(specifically, Section 137(a)(2)(3)); (ii) reflect the proposed standard of conduct that all brokers, dealers, and investment advisers, in providing personalized investment advice about securities to retail investors, act in the best interest of the retail investor and to disclose to the retail investor, at or prior to the time such personalized investment advice about securities is provided, any material conflict between the interests of the broker, dealer, or investment adviser and the best interests of the retail investor related to the provision of such personalized investment advice; and (iii) require that any such promulgated rules or duties be tailored to reflect the various types of relationships that exist between a broker, dealer, or investment adviser and a retail investor in light of the nature of the personalized investment advice being provided and any related material conflicts of interest. Please also see the fourth "Purpose" paragraph that follows Section 913 (a)(k) above (that starts with the phrase "Regarding the SEC rulemaking process…") for additional information regarding, among other things, the various ways that brokers, dealers and investment advisers provide personalized investment advice about securities to retail investors.

(b) AMENDMENT TO INVESTMENT ADVISERS ACT OF 1940.-Section 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-11) is amended by adding at the end the following new subsections:

(f) STANDARDS OF CONDUCT.—Notwithstanding any other provision of this Act or the Securities Exchange Act of 1934, the Securities and Exchange Commission may promulgate rules to provide, in substance, that the standards of conduct for all brokers, dealers, and investment advisers, in providing personalized investment advice about securities to retail investors, shall be to act in the best interest of the retail investor and to disclose to the retail investor, at or prior to the time such personalized investment advice about securities is provided, any material conflict between the interests of the broker,

Deleted: customers or clients (and such other customers or clients as the Commission may by rule provide)

Deleted: solely

dealer, or investment adviser and the best interests of the retail investor related to the provision of such personalized investment advice. Any rules promulgated hereunder shall: (i) be tailored to reflect the various types of relationships that exist between a broker, dealer, or investment adviser and a retail investor in light of the nature of the personalized investment advice being provided and any related material conflicts of interest; and (ii) be designed to provide disclosure to allow the retail investor to make an informed decision with respect to the personalized investment advice being provided.

Deleted: customer or client without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.

"(g) OTHER MA TTERS.-The Commission shall-

"(1) take steps to facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers and investment advisers, including consultation with other financial regulators on best practices for consumer disclosures, as appropriate; and

Deleted: professional

"(2) examine and, where appropriate, promulgate rules including the establishment of duties regarding sales practices, conflicts of interest, and compensation practices for brokers, dealers, and investment advisers for the purposes of promoting the best interests of, and fair dealing with, retail investors. In doing so, the Commission shall tailor any such rules and duties to reflect the various types of relationships that exist between a broker, dealer or investment adviser and a retail investor in light of the nature of the personalized investment advice being provided and any related material conflict of interest."

Deleted: prohibiting

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Deleted:) that it deems contrary to the public interest and the

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