4245 North Fairfax Drive
Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

July 5, 2013

Via E-Mail

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

RE: File Number 4-606
Duties of Brokers, Dealers, and Investment Advisers
Request for Data and Other Information

Dear Ms. Murphy:

The National Association of Plan Advisors ("NAPA") would like to thank the U.S. Securities and Exchange Commission (the "SEC" or "Commission") and its staff ("Staff") for the time and effort it has expended studying the issues surrounding the standards of conduct and other obligations of broker-dealers and investment advisers (together "Investment Professionals"). NAPA welcomes the opportunity to provide our responses to the questions raised in the March 1, 2013 request for data and other information (the "RFI").[1]

NAPA is a national organization of retirement plan advisors. It is a sister organization to the American Society of Pension Professionals & Actuaries ("ASPPA") and together we have over 15,000 members, approximately 6,000 of whom are retirement plan financial advisors. NAPA's mission is to be a leader in the evolution of the national retirement system to improve transparency, effectiveness and governance in an effort to improve retirement outcomes for participants. NAPA's core purpose is to enhance retirement security in America by focusing on high quality, professional advice to retirement plans and their participants. NAPA members pledge to comply with all requirements relating to retirement plans and to maintain ethical standards in their representation of plan sponsor and participant clients.

[1] SEC Release No. 34-69013; IA-3558; File No. 4-606.

SUMMARY

The following is a summary of our recommendations which are described in greater detail in the **Discussion** section that follows.

I. **A Uniform Fiduciary Standard for Broker-Dealers and Investment Advisers will Actually Cause More – not Less – Confusion for Investors -** The Commission should not implement the Staff's recommended "uniform fiduciary standard" for broker-dealers and investment advisers because such a standard would effectively result in a non-uniform "uniform fiduciary standard" leading to significantly increased confusion for retail customers when selecting an Investment Professional.

II. **Improved Disclosure Will Better Serve Investors** – The Commission should instead require Investment Professionals to provide retail customers with clear and concise pre-engagement disclosures designed to assist retail customers in the selection of Investment Professionals.

III. **Coordination with ERISA Disclosure Requirements is Critical** – The Commission should take the lead to ensure that consistent disclosures are provided by Investment Professionals to protect retail customers' access to investment advice, regardless of the method by which their investment accounts are taxed.

DISCUSSION

I. A Uniform Fiduciary Standard for Broker-Dealers and Investment Advisers will Actually Cause More – not Less – Confusion for Investors

The RFI was developed, in part, from a study (the "Study") [2] completed by the Staff pursuant to section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[3] As part of the Study, the Staff made two primary recommendations with the stated goal of "address[ing], among other things, retail customer confusion about the obligations broker-dealers and investment advisers owe to those customers, and to preserve retail customer choice without decreasing retail customers' access to existing products, services, service providers or compensation structures."[4]

To address retail customer confusion, the first Staff recommendation was that the Commission "engage in rulemaking to implement a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail

[2] 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* (Jan. 2011), available at www.sec.gov/news/studies/2011/913studyfinal.pdf.

[3] Pub. L. No. 111-203, 124 Stat. 1376. Section 913 of the Dodd-Frank Act required a study of the effectiveness of the existing legal or regulatory standards of care that apply Investment Professionals provide personalized investment advice and recommendations. Staff was also required to identify any legal or regulatory gaps, shortcomings or overlaps in the current legal or regulatory standards that should be addressed by rule or statute.

[4] SEC Release No. 34-69013; IA-3558, Page 7.

customers."[5] Unfortunately, establishing "a uniform fiduciary standard for broker-dealers and investment advisers" within the parameters of the Dodd-Frank Act will actually cause increased confusion among retail customers when selecting Investment Professionals. As discussed below, the Dodd-Frank Act provides for significant differences between broker-dealers and investment advisers that would not change as a result of this recommendation.[6] The end result would be a non-uniform "uniform fiduciary standard."

Two of the key differences between broker-dealers and investment advisers are: (a) the methods by which they are paid, and (b) the responsibilities regarding monitoring (or not monitoring) investment performance. Investment advisers (those who are not also broker-dealers) generally are paid in one of four ways: (1) a percentage of the value of the assets they manage; (2) an hourly fee; (3) a fixed fee; or (4) a combination of any of these methods.[7] Broker-dealers, on the other hand, generally are paid a commission on each buy or sell transaction for a security.[8] In addition, investment advisers (who are fiduciaries under current SEC rules) have a duty to monitor[9] the performance of the investments they recommend to retail customers, whereas broker-dealers (who are not fiduciaries under current SEC rules) do not have a duty to monitor[10] the performance of the investments they recommend to retail customers.[11]

These significant differences would not change if the Commission implemented a "uniform" fiduciary standard of conduct. Specifically, section 913(g) of the Dodd-Frank Act provides that "the receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer."[12] In addition, the Study states that the proposed uniform fiduciary standard would "not require broker-dealers to have a continuing duty of care or loyalty to a retail customer after providing personalized investment advice."[13] In other words, under the Study's recommendation, the broker-dealer would continue to have no duty to monitor the performance of investments it recommends to retail customers (regardless of whether the broker-dealer has an on-going relationship with the retail customer). Again, the end result would be a non-uniform "uniform fiduciary standard," causing additional confusion for retail customers.

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[5] SEC Release No. 34-69013; IA-3558, Page 6.
[6] *See*, Section IV.B., page 109 of the Study (stating "The Staff also contemplates that the uniform fiduciary standard would be an overlay on top of the existing investment adviser and broker-dealer regimes and would supplement them, not supplant them… Therefore, investment advisers and broker-dealers would continue to be subject to their current regulatory requirements, and the Commission would consider as a part of implementing the uniform fiduciary standard whether to impose additional requirements…").
[7] *See, Investment Advisers: What You Need to Know Before Choosing One*, SEC publication, modified August 7, 2012.
[8] *See,* Section II.A.2., pages 10-11 of the Study (stating "Generally, the compensation in a broker-dealer relationship is transaction-based and is earned through commissions, mark-ups, mark-downs, sales loads or similar fees on specific transactions, where advice is provided that is solely incidental to the transaction.").
[9] *See,* Section 206 of the Investment Advisers Act of 1940 (the "Advisers Act") and related guidance.
[10] *Id.*
[11] Of course, either of these Investment Professionals would have a duty to the monitor the performance of investments they recommend under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), if they were fiduciaries of an ERISA-covered employee benefit plan. ERISA §404(a)(1)(B).
[12] Pub. L. No. 111-203, 124 Stat. 1376; *see also,* Section IV.C.1., page 113 of the Study.
[13] Section IV.C.1., page 113 of the Study; *see also,* Pub. L. No. 111-203, 124 Stat. 1376.

In the marketplace today, a key point of differentiation for investment advisers who are subject to an SEC fiduciary standard (as compared to non-fiduciary broker-dealers) is that they provide conflict-free advice by not accepting commissions and that they have a responsibility to monitor the recommended investments. Labeling both traditional fiduciary investment advisers and commission-based broker-dealers as fiduciaries will only further obfuscate the differences.

How would retail customers know which kind of fiduciary to engage under the proposed uniform fiduciary standard? Should they engage the kind of fiduciary that cannot be paid on a commission-basis, but has a duty to monitor the performance of investments that it recommends? Or, should they engage the kind of fiduciary that can be paid on a commission-basis, but does not have a duty to monitor the performance of the investments that it recommends? Further, how could Investment Professionals explain the differences in the two types of fiduciaries to retail customers in a way that would permit the retail customers to make an informed decision when selecting a fiduciary under the non-uniform "uniform fiduciary standard"? There are no clear answers to these questions.

NAPA recommends that the Commission should not implement the Staff's recommended "uniform fiduciary standard" for broker-dealers and investment advisers because such a standard would effectively result in a non-uniform "uniform fiduciary standard" leading to significantly increased confusion for retail customers when selecting an Investment Professional.

II. Improved Disclosure Will Better Serve Investors

NAPA is strongly in favor of the Staff's goal of "address[ing], among other things, retail customer confusion about the obligations broker-dealers and investment advisers owe to those customers, and to preserve retail customer choice without decreasing retail customers' access to existing products, services, service providers or compensation structures." [14] However, instead of adopting a non-uniform "uniform fiduciary standard" (discussed above), it is NAPA's position that the better way to accomplish this goal is through the implementation of a robust disclosure regime that would draw parallels to the one now used by the Department of Labor (the "DOL") for 401(k) plans.[15] Such an approach would permit Investment Professionals to provide easily-understood information in a consistent and comparable format, using a layered approach that would increase the ability of retail customers to make informed decisions when selecting an Investment Professional.

In order for a disclosure to be useful, it must be concise, understandable, and comparable and should be made available to a retail customer when he or she is still comparison shopping for investments and Investment Professionals. With this in mind, NAPA recommends a short, single-page disclosure with an attached glossary of terms. The disclosure should provide answers to the following questions about the Investment Professional's "status, services and compensation":

[14] *See,* SEC Release No. 34-69013, *supra,* note 4.

[15] The DOL recently concluded three separate regulatory initiatives designed to enhance disclosures at every stage. The first initiative involved changes to the Form 5500 Schedule C which required expanded disclosure to DOL of compensation paid by the plan to service providers. The second initiative directs certain "covered service providers" to furnish disclosures (primarily related to the service provider's status, services and compensation) to "responsible plan fiduciaries." See 29 CFR §2550.408b-2 (the "Fiduciary Disclosure Rules"). The third initiative directs plan fiduciaries to make disclosures (primarily plan-related and investment-related information) to a plan's participants and beneficiaries. See 29 CFR §2550.404a-5 (the "Participant Disclosure Rules").

Status

1. Is the Investment Professional a broker-dealer or an investment adviser?
2. Is the Investment Professional subject to a fiduciary duty?
    a. If yes, does the Investment Professional have a duty of loyalty to the retail customer?
    b. If yes, does the Investment Professional have a duty to monitor the investments it recommends to the retail customer?
3. Is the Investment Professional subject to a suitability standard?

Services

4. What services will be provided to the retail customer?
5. Which of the services provided will be subject to a fiduciary duty?

Compensation

6. Will the Investment Professional receive any indirect compensation?
    a. If yes, what forms of indirect compensation (e.g., commissions, 12b-1 fees, or revenue sharing) may the Investment Professional receive?
    b. If yes, what is an estimate of the amount of indirect compensation the Investment Professional expects to receive based upon the advice being provided?[16]

In addition, the disclosure should:

1. Be set up as a standardized "check-the-box form" (e.g., "check here if you are an investment adviser") that the Investment Professional can customize to describe his or her business model.
2. Allow a retail customer to understand and compare the status, services and compensation across and among Investment Professionals.
3. Include an attached glossary of terms, written in an easy to understand manner, explaining the terms and concepts used on the form.[17]
4. Include a Website address where retail customers can find a more complete description of the services the Investment Professional may provide and a detailed, searchable explanation of the amount of any indirect compensation an Investment Professional may receive in relation to the advice he or she provides to the retail customer, as well as the factors used to determine that amount.[18]

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[16] Because the actual dollar amount of indirect compensation generally will not be known ahead of the transaction, an Investment Professional should provide a range of indirect compensation that he or she expects to receive and the source of that compensation.

[17] At a minimum, the glossary should contain definitions of the terms "broker-dealer", "investment advisor" and "fiduciary duty", as well as descriptions of the types of indirect compensation an Investment Professional may receive.

[18] The Website should provide the dollar amount of any indirect compensation received by the Investment Professional or be set up in such a way that an investor can determine this amount on his or her own.

NAPA recommends that the Commission require Investment Professionals to provide retail customers with clear and concise pre-engagement disclosures designed to assist retail customers in the selection of Investment Professionals.

III. Coordination with ERISA Disclosure Requirements is Critical

The second recommendation in the Staff's Study was that the Commission should "consider harmonizing certain regulatory requirements of broker-dealers and investment advisers where such harmonization appears likely to enhance meaningful investor protection, taking into account the best elements of each regime."[19] Such harmonization should come in the form of the Commission ensuring that the DOL's disclosure requirements are compatible with the Commission's disclosure requirements (discussed above) because there is no sound policy reason for differentiating between the disclosure requirements based on how the recipient's account is being taxed. This is particularly important with respect to individual retirement accounts ("IRAs"), which may be a critical element of an investor's accumulated assets that should be consider by an Investment Professional as part of the wealth management process.

On October 22, 2010, the DOL published proposed rules that expanded the circumstances under which a person would be considered to be fiduciary, under ERISA Section 3(21),[20] by reason of giving investment advice to an employee benefit plan or to a plan's participants.[21] The proposed rule would have replaced the existing "5-part test," established by the DOL in 1975 and replaced it with a two-pronged approach that would have brought more non-fiduciary parties within the reach of ERISA Section 3(21).[22] In addition, the rule would have, for the first time, imposed ERISA's fiduciary duty rules on Investment Professionals providing investment advice to investors in IRAs.

On September 19, 2011, the DOL announced that it would withdraw and later re-propose the rule. As of the writing of this letter, the DOL has not yet released a revised proposal. In recent comments on the matter, Assistant Secretary of Labor for the DOL's Employee Benefits Security Administration ("EBSA"), Phyllis C. Borzi, indicated that the DOL was still working on the matter and that a re-proposed rule was still at least a couple of months away.[23]

Under ERISA's fiduciary duty rules, a fiduciary generally cannot be paid on a commission basis unless an exemption applies. This is because commission-based compensation gives the fiduciary the opportunity to impact how much it gets paid and that is considered a conflict of interest (even if the commission-based compensation arrangement is disclosed to the recipient of the investment advice).[24] The amount of retirement assets held in IRAs, much of it overseen by Investment Professionals who are paid on a commission basis, has increased significantly since the mid-1970s.[25] As a result, NAPA and its members are concerned that - without proper coordination - the regulatory

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[19] SEC Release No. 34-69013; IA-3558, Pages 6-7.
[20] 29 CFR §2510.3-21.
[21] 75 FR 65263 (Oct. 22, 2010).
[22] 40 FR 50842 (Oct. 31, 1975).
[23] At the date of this letter, the Office of Management and Budget website indicates the proposal had not yet been filed for OMB review, which typically takes 90 days. See http://www.reginfo.gov/public/.
[24] ERISA §406(b).
[25] 75 FR 65263 (Oct. 22, 2010).

requirements of the SEC and the DOL will result in retail customers not receiving assistance from their trusted Investment Professionals based on whether their accounts are after-tax retail accounts or tax-favored IRAs. This is an arbitrary distinction that will only lead to more confusion.

For example, Rita (a retail customer) has maintained an IRA and an after-tax retail investment account with Brad (a Broker-Dealer) for many years. Under current SEC and DOL rules, Brad can provide investment advice and wealth management services to Rita (taking into account the assets in both accounts) and be paid on a commission basis. However, if the DOL's "no commissions" rule under ERISA were adopted and applied to Brad in relation to Rita's IRA, then Rita will no longer be permitted to receive investment advice and wealth management services from Brad regarding her IRA even though she would still be able to receive such services from him regarding her after-tax retail investment account. This outcome would cause unnecessary confusion to retail customers like Rita and would be detrimental to their ability to successfully save for retirement because retail customers and their trusted Investment Professionals need to be able to consider all of their assets as part of the wealth management process.

NAPA recommends that the Commission take the lead to ensure that consistent disclosures are provided by Investment Professionals to protect retail customers' access to investment advice, regardless of the method by which their investment accounts are taxed.

NAPA welcomes the opportunity to discuss these issues with you. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs, or Ronald J. Triche, Assistant General Counsel and Director of Government Affairs, at (703) 516-9300. Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
ASPPA, CEO/ Executive Director, NAPA

/s/
Craig P. Hoffman, Esq., APM
General Counsel

/s/
Ronald J. Triche, Esq., APM,
Director, Government Affairs

/s/
Judy A. Miller, MSPA
Executive Director, ACOPA

/s/
Pete K. Swisher, CPC, QPA, TGPC
Chair, NAPA Government Affairs Committee

/s/
Jeff A. Acheson, QPFC
Vice-Chair, NAPA Government Affairs Committee