The International Association of Small Broker Dealers and Advisors

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The International Association of Small Broker-Dealers and Advisers,www.iasbda.com submits the following comments on the above referenced proposal. The proposal comes in the middle of a larger debate over whether all financial advisers should have a fiduciary duty to their customers and we do not understand the value of considering these changes outside of this broader context.

See
http://registeredrep.com/newsletters/wealthmanagement/fiduciary_sifma_fpa_ici_standard_of_care0411/
Furthermore we believe that the recommendation aspect of suitability has lost its meaning in the context of modern investing and communications technology. We believe the notice should at least ask for comment on this aspect of the rule especially in view of the fiduciary duty debate. We wish to make the following observations in this regard.

Retail investing through the internet should not be subject to any suitability test because of the objective absence of a recommendation.

Retail investing that occurs through a communication between an rr and customer has an implied recommendation because most customers believe their rep has a fiduciary duty. Unlike the waiver proposal for institutional customers, few firms are willing to ask their retail customers for such a waiver or to tell them that they take no responsibility for the trades discussed. There is no public interest served in having a debate over whether a trade was the firm's idea or the customer's idea or a combination resulting from an honest inquiry.. Our experience has been that there are very few big suitability cases brought but this discussion would be informed by discussing those brought over the last 15 years. The public interest will be served when an rr questions an unsolicited trade and in some cases refuses to execute it precisely because he knows the customer.The best demographic example is the 85 year old investor who likes to trade his account when the rep knows from the know your customer rule that he has limited assets and limited time with probable large health costs ahead of him. We believe that suitability must apply regardless of whether a recommendation occurs unless the trade is an internet trade. But we also believe that firms especially small firms need protection from unscrupulous customers and overly aggressive regulators. The SEC sets out an investment adviser's fiduciary duty as follows:

As an investment adviser, you are a “fiduciary” to your advisory clients. This means that you have a fundamental obligation to act in the best interests of your clients and to provide investment advice in your clients’ best interests. You owe your clients a duty of undivided loyalty and utmost good faith. You should not engage in any activity in conflict with the interest of any client, and you should take steps reasonably necessary to fulfill your obligations. You must employ reasonable care to avoid misleading clients and you must provide full and fair disclosure of all material facts to your clients and prospective clients. Generally, facts are “material” if a reasonable investor would consider them to be important. You must eliminate, or at least disclose, all conflicts of interest that might incline you - consciously or unconsciously - to render advice that is not disinterested. If you do not avoid a conflict of interest that could impact the impartiality of your advice, you must make full and frank disclosure of the conflict. You cannot use your clients’ assets for your own benefit or the benefit of other clients, at least without client consent. Departure from this fiduciary standard may constitute “fraud” upon your clients. As an investment adviser, you are a “fiduciary” to your advisory clients. This means that you have a fundamental obligation to act in the best interests of your clients and to provide investment advice in your clients’ best interests. You owe your clients a duty of undivided loyalty and utmost good faith. You should not engage in any activity in conflict with the interest of any client, and you should take steps reasonably necessary to fulfill your obligations. You must employ reasonable care to avoid misleading clients and you must provide full and fair disclosure of all material facts to your clients and prospective clients. Generally, facts are “material” if a reasonable investor would consider them to be important. You must eliminate, or at least disclose, all conflicts of interest that might incline you - consciously or unconsciously - to render advice that is not disinterested. If you do not avoid a conflict of interest that could impact the impartiality of your advice, you must make full and frank disclosure of the conflict. You cannot use your clients’ assets for your own benefit or the benefit of other clients, at least without client consent. Departure from this fiduciary standard may constitute “fraud” upon your clients (under Section 206 </cgi-bin/goodbye.cgi?www4.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000080---b006-.html> of the Advisers Act).

We believe that most brokers already believe that they meet this standard and are proud to do so. But there may be some unknown implications when this standard is applied to brokers who are not registered investment advisers. Therefore we believe that this standard would be most closely duplicated by eliminating the recommendation requirement for suitability as discussed above, once a broker enters into a conversation with a client for whom he has performed a know your customer analysis as he is required to do. While this would be a significant change from current practices it could be phased in for smaller investors defined as those with less than $100,000 at the firm. These customers do not generate significant income for the firm but are arguably the most vulnerable to unsuitable investments. These customers are also often referred to a call center by the large firms where a robust suitability analysis may not take place. By insisting that the firms know these customers from the onset of contact,Finra may place them in a vulnerable situation by continuing the recommendation aspect of the suitability analysis. It essentially says that no matter how dangerous or ill-advised the investment is, the firm is free to execute it. Thats not a consumer protection policy the industry needs to continue or be proud of.

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