Marcia E. Asquith
Office of the Corporate Secretary, FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 10-54
Disclosure of Services, Conflicts, and Duties

Dear Ms. Asquith:

Thank you for the opportunity to comment on Regulatory Notice 10-54 regarding a rule proposal requiring a disclosure statement to retail investors upon commencing a business relationship. I am an attorney whose practice is primarily dedicated to representing investors against brokerage firms. While I support the spirit of the rule, I am opposed to the rule proposal.

The proposed rule contemplates providing customers with "an upfront disclosure document that sets forth in plain English a firm's accounts and services, its associated conflicts of interest and any limitations on duties owed to the customer." The proposal suggests that this would be a similar concept to a customer of an investment advisory receiving the firm's Form ADV at the commencement of a relationship. I support providing disclosure to clients, but I feel that such a form would only be used to hurt clients in the long-run.

Unfortunately, I feel that the proposed rule will have some adverse consequences for the typical retail brokerage customer. When a customer opens a brokerage account, he or she is required to sign a number of lengthy, convoluted, pre-printed forms, many times in a matter of minutes without a real chance to review (or more importantly, to adequately understand) the documents they are signing. If the customer later sues the brokerage firm for inappropriate conduct, the firm will likely use this form to shield themselves from liability.

It is akin to having a customer sign a disclosure form stating that they received, read, and understood a prospectus to a particular investment. The average retail brokerage customer does not understand the legalese and industry terminology of most prospectuses that would allow them to fully comprehend the risks of the investments before them. However, that customer is required to sign such a disclosure form, or else they are not allowed to invest in this particular security that the broker recommends to them as suitable and appropriate.

Moreover, allowing the brokerage firms to outline "any limitations on duties owed to the customer" is a farce. Of course, the brokerage firms would use this as an opportunity to disclaim many of their long-held duties to the customer. For example, the proposal suggests that the firm discloses that it takes no responsibility for the propriety of unsolicited orders. However, the SEC has held that even if a client suggests that the broker engage in aggressive and speculative trading, the broker is obligated to counsel the client in a manner consistent with the client's financial situation. See *In re John M. Reynolds*, 50 S.E.C. 805, 807 (1992).

Similarly, the proposal suggests that the firm discloses that it does not assure the ongoing suitability of a particular investment. To the contrary, fiduciaries do have such a duty. See *Leib*

v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F.Supp. 951, 953 (E.D. Mich. 1978) (holding that a broker who handles a discretionary account must "keep [the customer] informed regarding the changes in the market which affect his customer's interest and act responsively to protect those interests"). It should also be noted that FINRA has explored holding retail brokers to a fiduciary standard, so this rule proposal would be in conflict. When a firm provides investment advisory services in addition to its brokerage services, or at least holds itself to the public in such a manner, it creates fiduciary duties in itself. See *Geman v. S.E.C.*, 334 F.3d 1183, 1189 (10th Cir. 2003). Likewise, in revising the suitability rules, FINRA recently stated that suitability obligations also apply to recommendations to hold onto securities. See Amendment No. 1 to SR-FINRA-2010-039 (released Oct. 21, 2010) (proposing that the Supplementary Materials to the suitability rule specify that "the rule would cover an explicit recommendation to hold a security or securities").

These are all post-recommendation duties that a broker would have. Allowing brokerage firms to outline their supposed duties would only be used to confuse and mislead customers and dissuade them bringing a lawsuit in the event wrongful conduct is committed. Essentially, the customer would be deceived regarding the duties of the firm by what would likely be a self-serving document created by the firm.

In sum, while I favor meaningful disclosure, I can only see this proposed disclosure requirement as an opportunity for industry members to protect themselves from wrongful conduct and to further mislead the investing public. As a result, I oppose this rule proposal. Thank you again for the opportunity to comment on this proposal.

Sincerely,

David Neuman