



ABELE OFFICE PARK
10 EMERSON LANE
SUITE 801-3
BRIDGEVILLE, PA 15017

866. 390. 5080
412. 221. 8954 FAX

[fi360.COM](http://fi360.com)

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December 27, 2010

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, Duties, and Conflicts

Dear Ms. Asquith,

Fiduciary360 (“fi360”)¹ appreciates the opportunity to comment on Regulatory Notice 10-54, FINRA’s concept proposal to require member firms to provide a written statement to retail customers at or prior to the start of a business relationship. We applaud FINRA for its foresight in considering this issue in light of regulatory initiatives and changes mandated by the Dodd-Frank Wall Street Reform and Investor Protection Act (“Dodd-Frank Act”). We believe that disclosures can be valuable to investors in evaluating services and products provided by investment professionals. We would note, however, that there are several limitations to the effectiveness of written and electronic disclosures, as further discussed below. In addition, while it is helpful to introduce the concept for industry and investor review, as a preliminary matter we do not believe that FINRA should propose a specific rule until after the Securities and Exchange Commission (“SEC”) acts on various disclosure and other requirements in the coming months.

As FINRA is well aware, among the critical reports the SEC is required to deliver to Congress in late January is its study of the obligations, including the standards of care, of broker-dealers and investment advisers. In addition, we note that SEC Commissioners have spoken in favor of extending the fiduciary standard of care to broker-dealers providing personalized investment

¹ Fi360 offers a full circle approach to investment fiduciary education, practice management, and support. Our mission is to promote a culture of fiduciary responsibility and improve the decision making processes of investment fiduciaries, including investment advisors, managers, and stewards. With legally substantiated Practices as our foundation, we offer training, tools, and resources in support of that mission. We manage the Accredited Investment Fiduciary® (AIF®) and Accredited Investment Fiduciary Analyst™ (AIFA®) designation programs. AIF designees receive training that provides a unique comprehensive overview of fiduciary standards of excellence, asset allocation, preparation of investment policy statements, manager search and due diligence, performance measurement, and other related subjects. AIFA designee training builds on that foundation and prepares students to provide Fiduciary Assessments to institutions. At present, there are over 4,500 active AIF and AIFA designees.

advice to retail investors.² Therefore, any disclosure requirements should take into account both a firm's and its representatives' status as fiduciaries.

In this regard, we would note that written or electronic disclosure requirements under the securities and other laws do not alleviate a fiduciary from its other regulatory obligations; nor does disclosure that is signed, sealed and perfunctorily delivered to the investor serve as an adequate remedy in managing conflicts of interest. In particular, a fiduciary has a duty of care to ensure it acts in a client's best interest and a duty to act in utmost good faith to ensure the client fully understands any conflict and that the client's economic interest comes first. We also note that even in the absence of a fiduciary duty for broker-dealers, a focus on disclosure can allow a registered representative to press the limits of a suitability standard by shifting the decision-making burden back to the investor. As discussed further herein, a multitude of studies confirm that most investors are not properly equipped to understand investing fundamentals or the legal obligations of their primary advisor.

Moreover, beyond the intrinsic limitations of disclosure, there is also growing evidence that disclosures are not as effective as regulators would like to believe.³ For example, at a recent conference, both Professor Robert Prentice of the University of Texas and Professor Daylian Cain of Yale University noted that greater disclosure does not increase ethical behavior.⁴ Moreover, not even the most sophisticated investors access all of the information available to them; and when investors do read information, they do not necessarily understand all of it.⁵ Therefore, FINRA must take care to properly balance the role of disclosures with other regulatory requirements that may provide greater investor protections.

With regard to the disclosure framework, we note that the concept proposal is in many ways similar to the disclosures that investment advisers have been required for decades to provide under Part II (and new Part 2) of Form ADV. In this regard, we believe that FINRA should take

² See e.g., Luis A. Aguilar, SEC Comm'r, *An Insider's View of the SEC: Principles to Guide Reform*, Address before the Berkeley Center for Law, Business and the Economy, University of California at Berkeley (Oct. 15, 2010), available at http://www.sec.gov/news/speech/2010/spch101510laa.htm#P51_14250; Mary L. Schapiro, SEC Chairman, *Remarks at CFA Institute 2010 Annual Conference* (May 18, 2010), available at <http://www.sec.gov/news/speech/2010/spch051810mls.htm>; Elisse B. Walter, SEC Comm'r, *Plans and Prospects for Financial Regulatory Reform*, Address before the UC San Diego Economics Roundtable (Apr. 23, 2010), available at <http://www.sec.gov/news/speech/2010/spch042310ebw.htm>.

³ See, e.g., Sunita Sah, George F. Loewenstein & Daylian M. Cain, *The Burden of Disclosure* (May 1, 2010), available at SSRN: <http://ssrn.com/abstract=1615025>; see also Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for Its Future*, 51 DUKE L.J. 1397 (2002).

⁴ See John E. Girouard, *New Rules Mean Investment Advisors May Have a Lot of Explaining To Do* (Nov. 17, 2010), available at <http://blogs.forbes.com/advisor/2010/11/17/new-rules-mean-investment-advisors%E2%80%A8may-have-a-lot-of-explaining-to-do%E2%80%A8/>; Kathleen McBride, *Fiduciary Forum Offers Advice to the SEC*, ADVISOR ONE (Sept. 27, 2010), available at <http://www.advisorone.com/article/fiduciary-forum-offers-advice-sec-0?page=0,1#>.

⁵ See Elizabeth MacBride, *What we all feared: 'Better' disclosure yields worse results, according to Yale professor's study*, RIABIZ (Sept. 27, 2010), available at <http://www.riabiz.com/a/2322116>.

into account the fact that more than one-third of its affiliated representatives are dually registered as investment adviser representatives⁶ and are already required to deliver Part 2 of Form ADV to prospective and current customers. Therefore, a rule that is not coordinated with other rulemakings of the SEC risks overwhelming investors with redundant information while adding a new costly burden to FINRA members. We urge FINRA to factor these burdens into any new proposed rules and to consider alternatives, such as a default requirement for delivering disclosures to those customers who do not already receive Part 2 or disclosing services not included on Part 2 as an addendum.

In addition, should FINRA choose to propose new disclosure requirements, we encourage you to make any new rules as consistent as possible with SEC disclosure requirements for investment advisers. As the RAND Report and other studies have demonstrated through consumer focus groups, investors are increasingly finding it difficult to distinguish between broker-dealers and investment advisers and the services they provide.⁷ This difficulty has increased in light of the steady migration of brokerage firms to a fee-based advisory model over the last fifteen (or more) years.

To avoid further confusion and/or asymmetry in the marketplace, we believe that investors should receive consistent disclosure for similar products and services.⁸ For example, we note that FINRA's concept release does not call for delivery to customers of critical background information on their primary advisor, such as other business activities, professional designations, and additional compensation, as is required on Part 2b of Form ADV. While it is true that investors can access information on BrokerCheck that can also be found on Part 2b, such as disciplinary history, we believe that this is not an adequate substitute given the additional burden placed on the investor to pro-actively seek the information. We also believe that the form and timing of delivery of any disclosures proposed and adopted by FINRA should be as consistent as

⁶ FINRA industry statistics currently indicate there are approximately 636,340 registered securities representatives, of which some 241,431 are dually registered as investment adviser representatives. See About the Financial Industry Regulatory Authority, <http://www.finra.org/AboutFINRA/index.htm> (last visited Dec. 27, 2010); Investment Adviser Registration Depository data provided to fi360 by the North American Securities Administrators Association (last updated October 2010).

⁷ Angela A. Hung et. al., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers 105-113,117 (2008), http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf; see also CFA/AARP/NASAA/Industry Survey Finds Most Investors Mistakenly Think Financial Professionals, Insurance Agents Already Held to Fiduciary Duty; 91 Percent Support Even-Handed Regulatory Approach From SEC (Sept. 15, 2010), available at http://www.hastingsgroup.com/fiduciarysurvey/docs/091510Fiduciary_survey_news_%20release.html

⁸ This would be consistent with the SEC's efforts to seek greater consistency in the regulation of broker-dealers and investment advisers who provide similar advisory services, as well as the mandate under Section 913 of the Dodd-Frank Act for the SEC to identify gaps, shortcomings, or overlaps in the current legal or regulatory standards for broker-dealers and investment advisers. See Mary L. Schapiro, SEC Chairman, Testimony on Implementation of the Dodd –Frank Wall Street Reform and Consumer Protection Act by the U.S. Securities and Exchange Commission, Before the United States Senate Committee on Banking Housing, and Urban Affairs (Sept. 30, 2010), available at <http://www.sec.gov/news/testimony/2010/ts093010mls.htm>.

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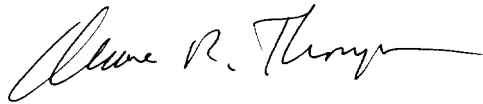
possible with Form ADV requirements, again to ensure that investors' interests are properly protected.

We truly appreciate the opportunity to provide our views on these important issues. Please do not hesitate to contact us if you have any questions or would like additional information.

Sincerely,



Blaine F. Aikin
CEO



Duane Thompson
Senior Policy Analyst



Kristina A. Fausti
Director of Legal and Regulatory Affairs