

# SECURITIES ARBITRATION COMMENTATOR

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## NEW SUITABILITY AND FIDUCIARY STANDARDS FOR FINANCIAL ADVISERS UNDER THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT AND FINRA RULES

by Barry R. Temkin and Michael R. Koblenz\*

### Introduction

Securities regulations governing the conduct of registered broker-dealers and their relationships with their customers are undergoing a major overhaul. The U.S. Securities and Exchange Commission has recently approved revisions of the Financial Industry Regulatory Authority's (FINRA) "Know Your Customer" and "Suitability" rules, which go into effect on October 7, 2011. In addition, on January 21, 2011, the SEC released the report of its long-awaited and much-publicized study recommending a uniform fiduciary standard for the conduct of registered representatives and investment advisers.<sup>1</sup> This study was required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. In light of these developments, it is worth examining the scope of the new FINRA suitability rules, and their impact on the proposed universal fiduciary standard for registered representatives and investment advisers.

There are numerous categories of financial licensees with FINRA and/or the SEC. Many of these categories overlap, and it is not unusual for FINRA registrants to hold multiple licenses. Generally speaking, the term "broker" has historically referred to registered representatives associated

with securities broker-dealers who typically charge their retail customers on a commission basis. Registered representatives make recommendations and execute trades for customers who pay their firms commissions. These brokers have not, historically, been held to a fiduciary standard unless they have written discretion to manage their customers' funds.<sup>2</sup>

Investment advisers advise investors about securities. Investment advisers are registered with and supervised by the SEC or state securities regulators, and typically enter into money management agreements in which they are paid management fees that are either fixed fees or a percentage of the funds under management.<sup>3</sup> Some financial advisers are both brokers and investment advisers. Investment advisers have been historically held to a fiduciary standard.

Investment advisers have a fiduciary obligation to act in the best interests of their clients and to place their clients' interests before their own.<sup>4</sup> As part of the fiduciary duty to clients, "an adviser has an affirmative obligation of utmost good faith and full and fair disclosure of all material facts to clients."<sup>5</sup> Thus, investment advisers must disclose to their customers any

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facts that might cause them to render anything but disinterested advice.

The fiduciary standard includes the duty of care and loyalty to the adviser's customers. The duty of loyalty requires an investment adviser "to act in the best interests of clients and to avoid or disclose conflicts."<sup>6</sup> The duty of customer loyalty prohibits an adviser from putting its interests or those of its firm ahead of its clients.<sup>7</sup> An advisor is also required to provide clients and prospective clients with an account opening document, before or upon entering a contract, which sets forth disclosures of risks and the rights of each party.<sup>8</sup> The duty of care mandates an adviser to "make a reasonable investigation to determine that the adviser is not basing its recommendations on materially inaccurate or incomplete information."<sup>9</sup> This duty obligates investment advisers to "seek best execution for their clients' securities transactions when they have the responsibility to select broker-dealers to execute client trades."<sup>10</sup>

**The New FINRA Suitability Rules**

Most customer complaints against registered representatives and broker-dealers are arbitrated before FINRA

Dispute Resolution, and tend to fall into four broad categories: suitability, churning, unauthorized trading and misrepresentation.<sup>11</sup> While there is considerable overlap, most garden-variety customer arbitrations involve at least some claim of suitability.

Registered representatives' recommendations to their customers are governed by the suitability rule, also known as the "know your customer" rule. The current suitability rule is codified in FINRA (formerly NASD) Rule 2310, which is closely related to former New York Stock Exchange Rule 405(1). These rules have recently been revised and expanded into new FINRA Rules 2090, "Know Your Customer," and 2111, "Suitability."<sup>12</sup>

FINRA's current suitability rule, Rule 2310, requires registered representatives to have "reasonable grounds" to believe that a recommendation is suitable based upon any facts the customer has disclosed about her needs.<sup>13</sup> It also requires FINRA members to make "reasonable efforts" to obtain the financial status, tax status, investment objectives, and other "reasonably" related information about a customer prior to executing any transactions on behalf of that customer.<sup>14</sup>

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Effective October 7, 2011, new FINRA Rule 2090 requires member firms to:

use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer.<sup>15</sup>

According to FINRA, the “essential facts” for the purpose of Rule 2090 are those necessary to: (1) effectively service the customer’s account; (2) act in accordance with any special handling instructions for the account; (3) understand the authority of each person acting on behalf of the customer; and (4) comply with applicable laws, regulations, and rules.<sup>16</sup>

While member firms have long been expected to know their customers, the requirement that they retain their customers’ “essential facts” is new. FINRA’s supplementary material for the new rule—including a regulatory notice—does not elaborate on this new mandate or explain what constitutes proper retention of customer information. It does appear, however, that the onus is on the member firm to document, with contemporaneous records, adequate background information under the know your customer rule. Moreover, the new rule explicitly obligates the member firm to undertake due diligence to understand the authority of a trustee, guardian, co-account holder or other person acting on behalf of the customer.

New Rule 2111 shifts the suitability focus from individual purchases to investment strategy, by requiring that registered representatives and member firms:

have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member

or associated person to ascertain the customer’s investment profile.<sup>17</sup>

FINRA suggests, in a regulatory notice accompanying new Rule 2111, that the term “investment strategy” should be interpreted broadly to encompass the “explicit recommendation to hold a security.”<sup>18</sup> In other words, a registered representative’s explicit recommendation to hold a security is encompassed by the new suitability rule. This new provision represents an expansion of existing case law, which does not generally impose liability on a registered representative for recommending that a customer merely hold a security.<sup>19</sup> However, the rule does not contemplate holder liability absent an explicit recommendation to hold a security; otherwise a recommendation which was reasonable when made could result in unlimited future liability in the event of a market downturn many years later.

This raises the question of what constitutes a recommendation. FINRA Regulatory Notice 11-02, which accompanies the new suitability rule, provides examples of communications between brokers and customers that are not considered recommendations, so long as they do not include a recommendation of particular securities. Communications that would escape the purview of the new rule are:

- (1) general financial and investment information (such as basic investment concepts and estimates of future retirement income needs).
- (2) descriptive information about an employer-sponsored retirement or benefit plan and investment options under such plans.
- (3) asset allocation models accompanied by appropriate disclaimers.
- (4) interactive investment materials incorporating any of the other types of information already mentioned.<sup>20</sup>

The new know your customer rule also expands the types of information that registered representatives must consider in their suitability analysis. The categories of information that brokers now must consider as part of the customer’s “investment profile” are the customer’s: (1) age; (2) financial situation and needs; (3) tax status; (4) investment objectives; (5) investment experience; (6) investment time horizon; (7) liquidity needs; (8) risk tolerance; and (9) any other information the customer might disclose. Current Rule 2310 only requires consideration of four items: the customer’s financial status, tax status, investment objectives, and “other information used or considered to be reasonable . . . in making recommendations.”<sup>21</sup>

FINRA Regulatory Notice 11-02 posits three aspects of suitability obligations.<sup>22</sup> These are the “reasonable-basis obligation,” the “customer-specific obligation,” and the “quantitative obligation.” Although FINRA does not clearly outline these obligations in the body of the rule itself, the supplemental commentary accompanying the rule explains them.<sup>23</sup>

Reasonable-basis suitability requires a registered representative to have a “reasonable basis to believe, based on reasonable diligence,” that a recommendation is “suitable for at least some investors.” While FINRA advises that “what constitutes reasonable diligence will vary” according to the situation, reasonable diligence means an understanding of “the risks and rewards” of the security or recommended strategy.<sup>24</sup> In other words, any recommendation must be plausibly suitable for at least some investors.

Customer-specific suitability, as the name suggests, requires a broker to “have a reasonable basis” to believe that a recommendation is “suitable for a particular customer based on that customer’s investment profile.”<sup>25</sup> This

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includes the customer's experience in the markets; net worth and directions given to the registered representative. Thus, the recommendation must be suitable for that individual customer.

"Quantitative suitability" applies when a broker has "actual or de facto control" over a customer account, and requires that such a broker "have a reasonable basis for believing that a series of transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer's investment profile."<sup>26</sup> This concept would capture claims of undue concentration or excessive account activity.

Even with the changes in the new suitability rules, what is properly "suitable" and worthy of a broker's recommendation will not necessarily be synonymous with the customer's stated desires. FINRA notes, in its January 2011 Regulatory Notice, that "it is well settled that a 'broker's recommendations must be consistent with his customer's best interests' and are 'not suitable merely because the customer acquiesces in [them].'"<sup>27</sup>

### **The Proposed Fiduciary Standard for Registered Representatives**

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was signed into law.<sup>28</sup> Section 913(b) of Dodd-Frank required the SEC to conduct a study evaluating the effectiveness of the existing legal and regulatory standards of care for financial advisers, broker-dealers, and associated persons.<sup>29</sup> Among the fourteen issues Dodd-Frank specifically mandated the SEC to study were: (1) the effectiveness of the existing legal and regulatory standards of care for brokers, investment advisers, and associated persons; (2) whether the existence of different standards of care causes confusion for retail customers; and (3) whether the SEC should conduct rulemaking to address the current legal and regulatory standards in place.<sup>30</sup> As expected, the SEC report, released on January

21, 2011, recommends adoption of a uniform fiduciary standard for both investment advisers (who are currently held to such a standard) and registered representatives (who currently are not).

The SEC study gauged the perceptions of retail customers by soliciting public comment from, and focus-group testing of, investors and investor advocates.<sup>31</sup> The SEC reports that retail customers are confused by the roles of investment advisers and broker-dealers, especially about the different standards of care applicable to financial advisers and broker-dealers.<sup>32</sup> This misunderstanding is "compounded by the fact that retail customers may not necessarily have the sophistication, information, or access needed to represent themselves effectively in today's market and to pursue their financial goals."<sup>33</sup> The report concludes that "it is important that retail investors be protected uniformly when receiving personalized investment advice or recommendations about securities regardless of whether they choose to work with an investment adviser or a broker-dealer," and recommends that the SEC implement "a uniform fiduciary standard of conduct that is no less stringent than currently applied to investment advisers."<sup>34</sup>

The debate over extending fiduciary standards to retail registered representatives has been brewing for some time. Investor advocates, predictably, have urged a fiduciary standard for years. Claimants' lawyer Seth Lipner, a founder of the Public Investors Arbitration Bar Association (PIABA), argues that the new FINRA suitability rule "doesn't go far enough."<sup>35</sup> Imposing a fiduciary standard would have the effect of holding brokers accountable for acting in the best interests of their clients, particularly when it conflicts with the brokers' own interests.<sup>36</sup> Other investor advocates have similarly complained that the suitability rule fails to police conflicts in which brokers' financial interest

influences or drives their investment recommendations.

As one critic complains: "The broker is free to recommend inferior options that compensate the broker more generously, rather than what's best for the investor."<sup>37</sup> Claimants' advocates urge that, "among other things, a fiduciary [standard] would, e.g. prevent securities firms from selling investment products that a firm created or for which it is receiving extra compensation."<sup>38</sup> Further, Lipner argues that new FINRA Rule 2111 does not expressly apply to non-investment products, such as buying real estate or certain non-security insurance policies, nor does it "provide greater guidance on the meaning of the important predicate 'recommendation,'" which is not defined by either the rule or supplemental material.<sup>39</sup>

Surprisingly, the securities industry has not uniformly opposed the new proposed uniform fiduciary standard. According to *Financial Adviser Magazine*, the Securities Industry and Financial Markets Association (SIFMA) endorses the adoption of a fiduciary standard for brokers.<sup>40</sup> There is concern among the broker-dealer community, however, that a fiduciary standard of care should be crafted carefully to account for the unique role of registered representatives. Although it supports the adoption of a fiduciary standard, SIFMA is "worried . . . that the SEC could write the standard in a way that upends brokers' business model."<sup>41</sup>

RBC Wealth Management CEO John Taft, a SIFMA spokesperson, expressed his concern "that the federal fiduciary standard of care [should] preserve investor choice and investor access to a broad range of products and services."<sup>42</sup> *Investment News* reports that some brokers warn that "a fiduciary standard would force them to dump less profitable clients or adopt a fee-only business model."<sup>43</sup> After-all, a fee-based compensation structure makes well-heeled customers more

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attractive than middle-class earners. In addition, broker dealers are concerned that imposition of a fiduciary standard could hamper the promotion and sale of the firm's own products. As SIFMA board member Chet Helck asks, "If you can't sell your products to your customers, who do you sell them to?"<sup>44</sup>

Some SEC officials have similarly expressed misgivings about the proposed fiduciary standard. SEC Commissioners Kathleen L. Casey and Troy A. Paredes issued a statement, accompanying the agency's January 21 report, dissenting that the SEC study "does not adequately recognize the risk that its recommendation [that the standards for brokers and investment advisers be "harmonized"] could adversely impact investors."<sup>45</sup> These two commissioners warn that, because of regulatory burdens on financial professionals, investors may have "fewer broker-dealers and investment advisers to choose from, may have access to fewer products and services, and may [lead to investors paying] more for the services and advice they do receive."<sup>46</sup>

Indeed, the January 2011 SEC report explicitly anticipates potential increased costs to broker-dealers in complying with a new standard. The more obvious examples are initial costs of compliance, such as amending disclosures, training, policies, and monitoring procedures, as well as preparing new account documentation.<sup>47</sup> Based on these costs, the report explains,

In general, to the extent costs were to increase for broker-dealers, and assuming their brokerage accounts in question remained commission-based and the trading frequencies in those accounts did not change, one would expect the profitability to the broker-dealer of such commission-based accounts to decrease.<sup>48</sup>

Other potential outcomes considered by the report include the possibility that broker-dealers would choose to reregister as investment advisers,

thereby converting brokerage accounts into advisory accounts subject to advisory fees, or that broker-dealers may unbundle their services and instead provide them through affiliates or third parties, further resulting in increased costs.<sup>49</sup> Significantly, the SEC report suggests that any increased costs associated with the new standard, for example, increased costs of insurance for the firm, would ultimately be passed on to the firm's customers:

[T]o the extent that broker-dealers respond to a new standard by choosing from among a range of business models. . . certain costs might be incurred, and ultimately passed on to retail investors in the form of higher fees or lost access to services and products. Any increase in costs to retail investors detracts from the profitability of their investments.<sup>50</sup>

**Implementation of the Fiduciary Standard**

And then there's the question of what a fiduciary standard would look like and how it would impact the new suitability rules. The recent consolidation of the FINRA suitability rules makes it unlikely that the SEC would substantially modify the suitability requirements if it does impose a fiduciary standard on FINRA member firms and associated persons. How, then, will the imposition of a fiduciary standard upon registered representatives affect suitability analysis? Will a registered representative's recommendations have to be really, really suitable? Or rather, will a fiduciary standard result in a two-step analysis for evaluating the propriety of broker recommendations, with the first step being an analysis of suitability and a second step to determine whether the broker's fiduciary duty was breached?

An individual recommendation, for example, could be suitable for the customer, but still not be as beneficial as other possible alternatives. Imposition of a fiduciary standard could potentially elevate the debate

at an arbitration beyond "was the recommendation reasonable?" to "was it the best recommendation for the customer?" Moreover, the fiduciary standard encompasses a weighing of conflicts of interest. These issues will need to be addressed as the law develops.

How, too, should the SEC go about implementing a universal fiduciary standard considering that registered representatives are bound by suitability requirements and regulated by FINRA, but investment advisers are not? This is especially significant given the SEC's suggestion that a universal standard is necessary to correct the confusion that exists among the public as to the difference in standards for brokers and investment advisers.<sup>51</sup> This confusion may depend on the changing role of registered representatives and investment advisers -- and which investment professionals are actually making recommendations to buy, sell or hold securities.

The "uniform standard" may not be a two-way street. In fact, it may not make sense. To the extent that investment advisers and registered representatives have different jobs and serve different functions, it may not alleviate confusion to apply the same legal standard to their conduct. For example, an adviser who didn't think that she was recommending the purchase, sale or holding of an individual security might be understandably perplexed to find herself forced to defend a suitability claim under the new suitability rules.

One suggested partial solution to the problem of investor confusion would be to move oversight of financial advisers to FINRA, as the SEC is currently considering.<sup>52</sup> This idea, however, is causing concern among financial advisers, accountants, and state securities regulators, who have written the SEC to oppose the move.<sup>53</sup> The Wall Street Journal quotes SEC Commissioner Luis Aguilar as warning that such a move would

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"amount to outsourcing the SEC's regulatory mission and would be more costly than increasing the SEC's resources to oversee advisers."<sup>54</sup>

The American Institute of Certified Public Accountants further warns, somewhat unfairly, that FINRA has a "perfunctory approach to enforcement" and that the agency might be biased against investment advisers during compliance exams.<sup>55</sup> FINRA, however, maintains that oversight would be improved under its SRO jurisdiction.<sup>56</sup> Requiring investment advisers to register with FINRA might well subject them to FINRA Conduct Rules-- including the obligation to arbitrate customer disputes.

**Conclusion**

Regardless of the path that the SEC takes in harmonizing the obligations of FINRA registered representatives and financial advisers, some developments appear to be trending in the regulatory environment. The new FINRA suitability rules create and expand existing obligations to customers; as a result, the arguments available to claimants' counsel in consumer arbitrations have been expanded. In addition, broker-dealers and registered representatives can expect an increase in claims as the publicity of these new rules convince more investors (and their attorneys) that they may have stronger cases than they might have had before the effective date of the 2011 suitability rules. There is also likely to be an increase in the number of awards for claimants. Finally, arbitration hearings will become more complex in order to adjudicate and determine multileveled suitability claims.

**Endnotes**

<sup>1</sup> Jessica Holzer, *SEC Study Lifts Bar for Brokers*, Wall Street Journal, Jan. 24, 2011, at C4; Study on Investment Advisers and Broker-Dealers, <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>

<sup>2</sup> *See de Kwiatkowski v. Bear Stearns & Co.*, 306 F.3d 1293, (2d Cir. 2002); Barbara Black and Jill Gross, *Making it Up as They Go Along: The Role of Law in Securities Arbitrations*, 23 Cardozo L. R. 991(2002).

<sup>3</sup> <http://www.sec.gov/investor/pubs/invadvisers.htm>

<sup>4</sup> <http://www.sec.gov/divisions/ocie/advltr.htm>

<sup>5</sup> <http://www.sec.gov/divisions/ocie/advltr.htm>

<sup>6</sup> Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers

106 (2011), <http://www.sec.gov/news/studies/2011/913studyfinal.pdf> [hereinafter SEC Report].

<sup>7</sup> *Id.* at 112.

<sup>8</sup> *Id.* at 114.

<sup>9</sup> *Id.* at 121.

<sup>10</sup> *Id.* at 121.

<sup>11</sup> *See* Black and Gross, *supra* note 2, Cardozo L. R. at 1008-09. In addition, with some exceptions, FINRA rules do not permit arbitration of class action claims, which remain, for the most part, litigated in courts. *See, e.g.*, Barry R. Temkin and Robert Goodman, *Labor and Employment in the Securities Industry*, 38 Sec. Reg. L. J. 371 (2010), available at <http://www.moundcotton.com/publications/articles/labor-and-employment-in-the-securities-industry>.

<sup>12</sup> FINRA Regulatory Notice 11-02, Know Your Customer and Suitability, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf>; see also, Seth Lipner, *FINRA's New Suitability Rule Doesn't Go Far Enough*, Forbes.com, Oct. 26, 2010, <http://www.forbes.com/2010/10/26/suitability-rule-sec-intelligent-investing-finra.html>.

<sup>13</sup> NASD Rule 2310(a).

<sup>14</sup> *Id.* at (b).

<sup>15</sup> FINRA Regulatory Notice 11-02, Know Your Customer and Suitability, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf>

<sup>16</sup> <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf>

<sup>17</sup> Know Your Customer and Suitability, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf> (emphasis added).

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

<sup>20</sup> Know Your Customer and Suitability, *supra* note 16, at 11-12, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf>

<sup>21</sup> NASD Rule 2310(b), www.Finra.org.

<sup>22</sup> Know Your Customer and Suitability, *supra* note 16, at 12; <http://www.finra.org/Industry/Regulation/Notices/2011/P122779>.

<sup>23</sup> The supplementary commentary to the new rules is printed just after each rule listed in Appendix A to Regulatory Notice 11-02, available at <http://www.finra.org/Industry/Regulation/Notices/2011/P122779>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 13.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 7 n.11 (citing *Dane S. Faber*, Securities Exchange Act Release No. 49216, 2004 SEC LEXIS 277, at \*23-24 (Feb. 10, 2004)).

<sup>28</sup> SEC Report, *supra* note 3, at 1, <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>

<sup>29</sup> *Id.*, <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>

<sup>30</sup> *Id.* at 1-4, <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>

<sup>31</sup> *Id.* at 94-101, <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>

<sup>32</sup> *Id.* at 101.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Seth Lipner, *FINRA's New Suitability Rule Doesn't Go Far Enough*, Forbes.com, Oct. 26, 2010, <http://www.forbes.com/2010/10/26/suitability-rule-sec-intelligent-investing-finra.html>.

<sup>36</sup> Jessica Holzer, *SEC Study Lifts Bar for Brokers*, Wall Street Journal, Jan. 24, 2011, at C4.

<sup>37</sup> Suzanne Barlyn, *What's No. 1 for Brokers?* Wall Street Journal Online, Dec. 6, 2010, <http://online.wsj.com> (last visited Jan. 21, 2011).

<sup>38</sup> Seth Lipner, *FINRA's New Suitability Rule Doesn't Go Far Enough*, Forbes.com, Oct. 26, 2010, <http://www.forbes.com/2010/10/26/suitability-rule-sec-intelligent-investing-finra.html>.

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<sup>39</sup> *Id.*

<sup>40</sup> *Brokers, Advisors Spar Over Fiduciary Standard*, Financial Advisor News, Aug. 17, 2010, <http://www.fa-mag.com/fa-news/5920-brokers-advisors-spar-over-fiduciary-standard.html>. See also, Suzanne Barlyn, *What's No. 1 for Brokers?* Wall Street Journal Online, Dec. 6, 2010, <http://online.wsj.com>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Mark Schoeff, *Battle Lines Drawn After SEC Backs Fiduciary Standard*, Investment News, Jan. 22, 2011, <http://www.investmentnews.com/article/20110122/FREE/110129976>.

<sup>44</sup> Suzanne Barlyn, *What's No. 1 for Brokers?* Wall Street Journal Online, Dec. 6, 2010, <http://online.wsj.com>.

<sup>45</sup> Statement by SEC Commissioners: Statement Regarding Study On Investment Advisors And Broker-Dealers, Commissioners Kathleen L. Casey & Troy A. Paredes, January 21, 2001, available at <http://www.sec.gov/news/speech/2011/spch012211kcltap.htm>.

<sup>46</sup> *Id.*

<sup>47</sup> SEC Report, *supra* note 3, at 156.

<sup>48</sup> *Id.* at 158.

<sup>49</sup> *Id.* at 159.

<sup>50</sup> *Id.* at 162.

<sup>51</sup> Jessica Holzer, *SEC Study Lifts Bar for Brokers*, Wall Street Journal, Jan. 24, 2011, at C4.

<sup>52</sup> Jessica Holzer, *Adviser Deal Eludes SEC*, Wall Street Journal, Jan. 11, 2011, at C7.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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