submitted to Topaz Exchange electronically by its registered broker-dealer members, as well as from quotes submitted electronically by market makers.

A more detailed description of the manner of operation of Topaz Exchange's proposed system can be found in Exhibit E to Topaz Exchange's Form 1 application. The proposed rulebook for the proposed exchange can be found in Exhibit B to Topaz Exchange's Form 1 application, and the governing documents for both Topaz Exchange and ISE Holdings can be found in Exhibit A and Exhibit C to Topaz Exchange's Form 1 application, respectively. A listing of the officers and directors of Topaz Exchange can be found in Exhibit J to Topaz Exchange's Form 1 application.

Topaz Exchange's Form 1 application, including all of the Exhibits referenced above, is available online at *www.sec.gov/rules/other.shtml* as well as in the Commission's Public Reference Room. Interested persons are invited to submit written data, views, and arguments concerning Topaz Exchange's Form 1, including whether the application is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number 10–209 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number 10–209. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to Topaz Exchange's Form 1 filed with the Commission, and all written communications relating to the application between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number 10–209 and should be submitted on or before April 22, 2013.

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–05242 Filed 3–6–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69013; IA–3558; File No. 4–606]

Duties of Brokers, Dealers, and Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Request for data and other information.

SUMMARY: The Securities and Exchange Commission is requesting data and other information, in particular quantitative data and economic analysis, relating to the benefits and costs that could result from various alternative approaches regarding the standards of conduct and other obligations of broker-dealers and investment advisers. We intend to use the comments and data we receive to inform our consideration of alternative standards of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. We also will use this information to inform our consideration of potential harmonization of certain other aspects of the regulation of broker-dealers and investment advisers.

DATES: Comments should be received on or before July 5, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Submission:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number 4–606 in the subject line.

Paper Submission:

- Send paper submissions in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. All submissions should refer to File Number 4–606. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all submissions of data on the Commission's Internet Web site (*http://www.sec.gov*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. Please refer to the Appendix at the end of this release for instructions on submitting data and other information.

FOR FURTHER INFORMATION CONTACT: Jennifer Marietta-Westberg, Assistant Director, Matthew Kozora, Financial Economist, Division of Risk, Strategy and Financial Innovation, at (202) 551–6655; David W. Blass, Chief Counsel, Lourdes Gonzalez, Assistant Chief Counsel—Sales Practices, Emily Westerberg Russell, Senior Special Counsel, Daniel Fisher, Branch Chief, Leila Bham, Special Counsel, Division of Trading and Markets, at (202) 551–5550; Office of Chief Counsel, at (202) 551–6825 and Office of Investment Adviser Regulation, at (202) 551–6787, Division of Investment Management; Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

Discussion

I. Introduction

A. Background

Today, broker-dealers and investment advisers routinely provide to retail customers [1] many of the same services, and engage in many similar activities related to providing personalized investment advice about securities to

[1] For the purposes of this request for comment, and as noted in Part III below, the term ''retail customer'' has the same meaning as in Section 913 of the Dodd–Frank Wall Street Reform and Consumer Protection Act. Public Law 111–203, 124 Stat. 1376 (2010). Specifically, it means ''a natural person, or the legal representative of such natural person, who (A) receives personalized investment advice about securities from a broker, dealer or investment adviser; and (B) uses such advice primarily for personal, family, or household purposes.'' 15 U.S.C. 80b–11(g)(2).

retail customers.[2] While both investment advisers and broker-dealers are subject to regulation and oversight designed to protect retail and other customers, the two regulatory schemes do so through different approaches notwithstanding the similarity of certain services and activities.

Investment advisers are fiduciaries to their clients, and their regulation under the Investment Advisers Act of 1940 (''Advisers Act'') is largely principles-based. In contrast, a broker-dealer is not uniformly considered a fiduciary to its customers.[3] Broker-dealer conduct is subject to comprehensive regulation under the Securities Exchange Act of 1934 (''Exchange Act'') and the rules of each self-regulatory organization (''SRO'') to which the broker-dealer belongs. Both broker-dealers and investment advisers also are subject to applicable antifraud provisions and rules under the federal securities laws.

Studies suggest that many retail customers who use the services of broker-dealers and investment advisers are not aware of the differences in regulatory approaches for these entities and the differing duties that flow from them.[4] Some of these regulatory differences primarily reflect the different functions and business activities of investment advisers and broker-dealers (for example, rules regarding underwriting or market making). Other differences reflect statutory differences,[5] particularly when broker-dealers and investment advisers engage in the same or substantially similar activity (for example, providing personalized investment advice, including recommendations, about securities to retail customers).

Over the decades since the Advisers Act and Exchange Act were enacted, we have observed that the lines between full-service broker-dealers and investment advisers have blurred.[6] Investment advisers and broker-dealers, for example, provide investment advice both on an episodic and on an ongoing basis.[7] We have expressed concern when specific regulatory obligations depend on the statute under which a financial intermediary is registered instead of the services provided.[8]

In a staff study (the ''Study'') required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act''),[9] our staff made recommendations to us that the staff believed would enhance retail customer protections and decrease retail customers' confusion about the standard of conduct owed to them when their financial professional provides them personalized investment advice.[10] The staff made two primary recommendations in the Study. The first recommendation was that we 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 customers. The second recommendation was that we 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.[11]

[2] In 2006, the SEC retained the RANDCorporation's Institute for Civil Justice (''RAND'') to conduct a survey, which concluded that the distinctions between investment advisers and broker-dealers have become blurred, and that market participants had difficulty determining whether a financial professional was an investment adviser or a broker-dealer and instead believed that investment advisers and broker-dealers offered the same services and were subject to the same duties. RAND noted, however, that generally investors they surveyed as part of the study were satisfied with their financial professional, be it a representative of a broker-dealer or an investment adviser. Angela A. Hung, *et al., RAND Institute for Civil Justice, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* (2008) (''RAND Study'').

[3] A broker-dealer may have a fiduciary duty under certain circumstances. This duty may arise under state common law, which varies by state. Generally, courts have found that broker-dealers that exercise discretion or control over customer assets, or have a relationship of trust and confidence with their customers, are found to owe customers a fiduciary duty similar to that of investment advisers. *See, e.g., United States* v. *Skelly,* 442 F.3d 94, 98 (2d Cir. 2006); *United States* v. *Szur,* 289 F.3d 200, 211 (2d Cir. 2002); *Associated Randall Bank* v. *Griffin, Kubik, Stephens & Thompson, Inc.,* 3 F.3d 208, 212 (7th Cir. 1993); *MidAmerica Fed. Savings & Loan Ass'n* v. *Shearson/American Express Inc.,* 886 F.2d 1249, 1257 (10th Cir. 1989); *Leib* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 461 F. Supp. 951, 953–954 (E.D. Mich. 1978), *aff'd,* 647 F.2d 165 (6th Cir. 1981*).* For the staff's discussion of relevant case law see Study, *infra* note 10, at 54–55. *See also A Joint Report of the SEC and the CFTC on Harmonization of Regulation* (Oct. 2009), *available at http://www.sec.gov/news/press/2009/cftcjointreport101609.pdf* at 8–9 and 67.

[4] *See, e.g.,* RAND Study.

[5] Advisers Act Section 202(a)(11) defines ''investment adviser'' to mean ''any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.'' Advisers Act Section 202(a)(11)(C) excludes from the investment adviser definition any broker or dealer (i) whose performance of its investment advisory services is ''solely incidental'' to the conduct of its business as a broker or dealer; and (ii) who receives no ''special compensation'' for its advisory services. Broker-dealers providing investment advice in accordance with this exclusion are not subject to the fiduciary duty under the Advisers Act.

[6] *See Certain Broker-Dealers Deemed Not to be Investment Advisers,* Exchange Act Release No. 51523 at 3 and 37 (Apr. 12, 2005) (''Release 51523''). Many financial services firms may offer both investment advisory and broker-dealer services. According to data from the Investment Adviser Registration Depository as of November 1, 2012, approximately 5% of Commission-registered investment advisers reported that they also were registered as a broker-dealer, and 22% of Commission-registered investment advisers reported that they had a related person that was a broker-dealer. As of October 31, 2012, 755 firms registered with FINRA as a broker-dealer, or approximately 17.4% of broker-dealers registered with FINRA, were also registered as an investment adviser with either the Commission or a state. *See* Letter from Angela Goelzer, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Securities and Exchange Commission (Nov. 16, 2012). Further, as of mid-November 2012, approximately 41% of FINRA-registered broker-dealers had an affiliate engaged in investment advisory activities. *Id.* Many of these financial services firms' personnel may also be dually registered as investment adviser representatives and registered representatives of broker-dealers. As of October 31, 2012, approximately 86% of investment adviser representatives were also registered representatives of a FINRA-registered broker-dealer. *Id.*

[7] A broker-dealer that receives special compensation for the provision of investment advice would not be excluded from the definition of investment adviser. *See supra* note 5.

[8] In Release 51523, we engaged in an analysis and discussion of the history of the Exchange Act and Advisers Act. We explained that the Advisers Act was intended to regulate what, at the time that Act was enacted, was a largely unregulated community of persons engaged in the business of providing investment advice for compensation. *See* Release 51523 at 22.

[9] Publci Law 111–203, 124 Stat. 1376. Section 913 of the Dodd-Frank Act, among other things, required a study of the effectiveness of the existing legal or regulatory standards of care that apply when broker-dealers and investment advisers (and persons associated with them) provide personalized investment advice and recommendations about securities to retail customers. It also required the identification of any legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute.

[10] 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) (''Study''), *available at* www.sec.gov/news/studies/2011/913studyfinal.pdf. The views expressed in the Study were those of the staff and do not necessarily reflect the views of the Commission or the individual Commissioners. *See also* Statement by SEC Commissioners Kathleen L. Casey and Troy A. Paredes (Jan. 21, 2011) (''Statement'') (opposing the Study's findings and, among other things, stating that ''stronger analytical and empirical foundation than provided by the Study is required before regulatory steps are taken that would revamp how broker-dealers and investment advisers are regulated'').

[11] As discussed in more detail below, we have a variety of options relating to the staff's recommendations; we could take no action with regard to either, or could take action to implement one or both recommendations, either partially or wholly. The choice of whether and how to take an action with respect to the recommendations would consider the facts and circumstances of the marketplace at the time of the potential action, as well as the regulatory landscape existing at such

Continued

The staff explained that its recommendations were intended to address, 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.[12] The staff stated in the Study that retail customers should not have to parse legal distinctions to determine whether the advice they receive from their financial professional is provided in their best interests, and stated that retail customers should receive the same or substantially similar protections when obtaining the same or substantially similar services from financial professionals.[13] The staff further noted that the Commission could consider harmonization as part of the implementation of the uniform fiduciary standard or as separate initiatives.[14]

In preparing the Study's discussion of the benefits and costs of aspects of the staff's recommendations, the staff, among other things, considered comment letters that we received in response to an earlier request, and reiterated this request when meeting with interested parties, in order to better inform the Study.[15] Few commenters, however, provided data regarding the benefits and costs of the current regulatory regime or the benefits and costs likely to be realized if we were to exercise the authority granted in Section 913. This may be because most comments were made in advance of the Study's publication and could not be informed by the staff's specific recommendations.[16] Of the relatively few comments received after publication of the Study, one commenter expressed support for further economic analysis of the Study's recommendations and other approaches for Commission rulemaking, and offered to provide data and other information relating to implementing a uniform fiduciary standard of conduct.[17]

The Study recommended that we engage in rulemaking using the authority provided to us in Section 913 of the Dodd-Frank Act. The section grants us discretionary rulemaking authority under the Exchange Act and Advisers Act to adopt rules establishing a uniform fiduciary standard of conduct for all broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers.[18] That section further provides that such standard of conduct ''shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice'' and that the standard ''shall be no less stringent than the standard applicable to investment advisers under Sections 206(1) and 206(2) of the Advisers Act when providing personalized investment advice about securities.''

The Commission recognizes that Section 913 of the Dodd-Frank Act does not mandate that we undertake any such rulemaking, and the Commission has not yet determined whether to commence a rulemaking. We expect that the data and other information provided to us in connection with this request will assist us in determining whether to engage in rulemaking, and if so, what the nature of that rulemaking ought to be. Among other considerations, we are sensitive to the fact that changes in existing legal or regulatory standards could result in economic costs and benefits and believe that such costs and benefits must be considered in the economic analysis that would be part of any rulemaking under the discretionary authority provided by Section 913 of the Dodd-Frank Act. In considering the options for a potential standard of conduct applicable to broker-dealers and investment advisers providing personalized investment advice to retail customers, we will take into account existing regulatory obligations that apply today to broker-dealers and investment advisers.

If we determine to engage in rulemaking, furthermore, the rulemaking process would provide us the opportunity to request further data and other information on the range of complex considerations associated with any proposal implementing such a standard, including any potential costs and benefits associated with the rulemaking. The rulemaking process would also allow commenters to address the extent to which any proposal would further the goals highlighted by Section 913, including (1) preserving retail customer choice with respect to, among other things, the availability of accounts, products, services, and relationships with investment advisers and broker-dealers, and (2) not inadvertently eliminating or otherwise impeding retail customer access to such accounts, products, services and relationships (for example, through higher costs). We may also consider reassessing and potentially harmonizing certain of the other regulatory obligations that apply to broker-dealers and investment advisers where such harmonization is consistent with the mission of the Commission.

B. Overview of the Request for Additional Data and Other Information

We are requesting below additional public input to assist us in evaluating whether and how to address certain of the standards of conduct for, and regulatory obligations of, broker-dealers and investment advisers. Since publishing the Study, the staff has continued to review current information and available data about the current marketplace for personalized investment advice and the potential economic impact of the staff's recommendations to inform its consideration of any potential rulemaking with respect to the Study's recommendations. While we and our staff have extensive experience in the regulation of broker-dealers and investment advisers, the public can provide further data and other information to assist us in determining whether or not to use the authority

time (including, if applicable, any prior or contemporaneous actions which would impact the recommendations).

[12] Study at viii, x, 101, 109, and 166.

[13] Study at viii and 101.

[14] Study at 129.

[15] *Study Regarding Obligations of Brokers, Dealers, and Investment Advisers,* Exchange Act Release No. 62577 (July 27, 2010) (requesting comment from the public to inform the preparation of the Study). The Commission received over 3,500 comment letters before and after publication of the Study. The comment letters are available at www.sec.gov/comments/4–606/4–606.shtml.

[16] Before the Study was published, we received a comment describing results of a survey that had been conducted based on certain assumptions about a potential change in the standard of conduct, which differ from those set out in this request for information and data. The survey, for example, assumed that under a new standard of conduct, broker-dealer firms would no longer charge commissions and instead would only maintain fee-based accounts. *See* Oliver Wyman and Securities Industry and Financial Markets Association, *Standard of Care Harmonization Impact Assessment for SEC* (Oct. 27, 2010).

[17] Comment Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association (July 14, 2011) (''SIFMA Letter'') at 2. *But see,* Comment Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, *et al.,* (Mar. 28, 2012) (''Roper Letter'') (asserting adoption of a uniform standard could be implemented in a way that does not lead to reduced investor choice or product access).

[18] *See* Section 15(k) of the Exchange Act and Section 211(g) of the Advisers Act, each as added by Section 913 of the Dodd-Frank Act. Section 913 of the Dodd-Frank Act also added Section 15(l) of the Exchange Act and Section 211(h) of the Advisers Act to add discretionary authority to promulgate rules prohibiting or restricting certain broker-dealer and investment adviser sales practices, conflicts of interests, and compensation schemes that the Commission deems contrary to the public interest and the protection of investors. *See* Exchange Act each as added by Section 913 of the Dodd-Frank Act.

provided under Section 913 of the Dodd-Frank Act.

Data and other information from market intermediaries and others about the potential economic impact of the staff's recommendations, including information about the potential impact on competition, capital formation, and efficiency, may particularly help inform any action we may or may not take in this area. We also especially welcome the input of retail customers.

We are specifically requesting quantitative and qualitative data and other information and economic analysis (herein ''data and other information'') about the benefits and costs of the current standards of conduct of broker-dealers and investment advisers when providing advice to retail customers, as well as alternative approaches to the standards of conduct, including a uniform fiduciary standard of conduct applicable to all investment advisers and broker-dealers when providing personalized investment advice to retail customers. We recognize that retail customers are unlikely to have significant empirical and quantitative information. We welcome any information they can provide.

In this release, we discuss a potential uniform fiduciary standard of conduct and alternatives to that standard of conduct. A uniform fiduciary standard of conduct can be understood quite differently by various parties. In fact, public comments on such a standard have made widely varying assumptions about what a fiduciary duty would require. Comments have assumed, for example, that a uniform fiduciary duty would require all firms to, among other things: provide the lowest cost alternative; stop offering proprietary products; charge only asset-based fees, and not commissions; and continuously monitor all accounts.[19] These outcomes would not necessarily be the case. By contrast, many of the rules or other obligations discussed over the years for potential regulatory harmonization, such as recordkeeping, advertising, pay to play, and other obligations that currently apply to broker-dealers and investment advisers, are more specific. Accordingly, we believe that consideration of a uniform fiduciary standard of conduct would benefit from a set of assumptions and other parameters that commenters can use and critique in order to generate meaningful data and other information. The identification of particular assumptions or parameters, however, does not suggest our policy view or the ultimate direction of any action proposed by us.

We also request comment in this release on whether or to what extent we should consider making other adjustments to the regulatory obligations of broker-dealers and investment advisers, including regulatory harmonization. While this release addresses both a potential uniform fiduciary standard of conduct and regulatory harmonization more generally, and at times, discusses and requests comment relating to the potential interrelationship of the two, harmonization beyond a uniform fiduciary standard of conduct could be considered separately. As noted below, there are a variety of options relating to whether and how to act with respect to a potential uniform fiduciary standard of conduct or potential regulatory harmonization, including taking no action, taking action to implement one (either partially or wholly) and not the other, or taking action to implement both (again, either partially or wholly). In order to inform our consideration of all of these options, this release discusses both a potential uniform fiduciary standard of conduct and regulatory harmonization and encourages comment on the potential practical, regulatory, and economic effects that action or inaction with respect to one or both may have. For example, we request comment on the extent to which regulatory harmonization might address customer confusion about the obligations owed to them by broker-dealers and not investment advisers (or by investment advisers and not broker-dealers) even if a uniform fiduciary standard of conduct is implemented. We also request comment on the extent to which regulatory harmonization might result in additional investor confusion or otherwise negatively impact investors.

We request data and other information relating to the provision of personalized investment advice about securities to retail customers to better understand the relationship between standards of conduct and the experiences of retail customers. In particular, we seek data and other information regarding: (a) Investor returns generated under the existing regulatory regimes; (b) security selections of broker-dealers and investment advisers as a function of their respective regulatory regimes; (c) characteristics of investors who invest on the basis of advice from broker-dealers, invest on the basis of advice from an investment adviser, or invest utilizing both channels; (d) investor perceptions of the costs and benefits under each regime; and (e) investors' ability, and the associated cost to investors, to bring claims against their broker-dealer or investment adviser under their respective regulatory regimes.[20] We are also particularly interested in the activities, conflicts of interest[21] and disclosure practices of investment advisers and broker-dealers, as well as the economics of the investment advice industry and characteristics of the current marketplace. We also are asking for data and other information about the benefits and costs of the current set of regulatory obligations that apply to broker-dealers and investment advisers, and the benefits and costs of different approaches to harmonizing particular areas of broker-dealer and investment adviser regulation.

C. Suggested Guidelines and Considerations for Submissions of Data and Other Information

The data and other information requested in this document have the potential to be instructive in our determination of which, if any, new approach or approaches to consider implementing with respect to the regulatory obligations of investment advisers and broker-dealers. We welcome any relevant data and other information, as well as comment, in response to our inquiries below. Responsive data and other information would be more useful to us, however, if they are prepared and submitted in a consistent fashion. We set forth suggested guidelines (''Guidelines'') in the Appendix to this request for commenters to follow, where possible, in submitting data and other information. In particular, through the Guidelines, we request broker-dealers, investment advisers, and dually registered investment adviser/broker-dealers submitting comments to provide specific data and other information describing their businesses, retail customers, and retail customer

[19] *See also* SIFMA Letter, *supra* note 17, at 7 and 10 (recommending, among other things, that the Commission articulate a new uniform standard of conduct, applicable to both broker-dealers and investment advisers, to ''act in the best interest of the customer,'' while applying existing case law, guidance, and other legal precedent developed under Section 206 of the Advisers Act only to investment advisers, not broker-dealers) *compared with* the Roper Letter at 2 (recommending, among other things, that rather than replacing the current Advisers Act standard with something new and different, the Commission should extend the existing Advisers Act standard (currently applicable to investment advisers) to broker-dealers, while clarifying its applicability in the context of broker-dealer conduct).

[20] *See* Statement.

[21] In this request for information and data, we use the term ''conflict of interest'' to mean a material conflict of interest.

accounts. We also request that other commenters (*e.g.,* retail customers, academics, trade associations, and consumer groups) provide the information requested in the Guidelines to the extent applicable or appropriate. We especially welcome the input of retail customers.[22]

We are particularly interested in receiving data and other information that are empirical and quantitative in nature. We encourage all interested parties, however, to submit their comments, including qualitative and descriptive analysis of the benefits and costs of potential approaches and guidance. As stated above, we recognize that retail customers are unlikely to have significant empirical and quantitative information. We welcome any information they can provide. In addition, if commenters prefer to respond to only some of the requests for comment, they are welcome to do so.

We describe throughout this request for data and other information a series of assumptions that commenters may use in order to facilitate our ability to compare, reproduce, and otherwise analyze responses to our questions in a robust fashion. The discussion of these assumptions does not suggest our policy view or the ultimate direction of any proposed action proposed by us. If commenters believe that we should make additional or different assumptions as a further analytical step we invite them to do so and explain clearly the additional or different assumptions made, address why such assumptions are appropriate, and compare and contrast results obtained under such assumptions with results obtained under the assumptions specified in this request. If commenters wish to submit multiple sets of comments resting on different sets of assumptions, they may do so. Although we seek to obtain responses that we can compare, reproduce, and otherwise analyze in a robust fashion, we also wish to emphasize that commenters have flexibility to provide whatever data and other information they believe is important to provide.

Examples of data and other information sought include empirical data, detailed datasets on a particular topic, economic analysis, legal analysis, statistical data such as survey and focus group results, and any other observational or descriptive data and other information. Such data and other information can be quantitative, qualitative, or descriptive. Again, commenters are invited to provide any other information that they believe would be useful to us as we consider our options in this area.

Commenters should only submit data and other information that they wish to make publicly available. Commenters concerned about making public proprietary or other highly sensitive data and other information may wish to pool their data with others (*e.g.,* through a trade association, law firm, consulting firm or other group) and submit aggregated data in response to this request. While we request that commenters provide enough data and other information to allow us to compare, replicate, and otherwise analyze findings, commenters should remove any personally identifiable information (*e.g.,* of their customers) before submitting data and other information in response to this request.[23]

II. Request for Data and Other Information Relating to the Current Market for Personalized Investment Advice

We are requesting data and other information about the specific costs and benefits associated with the current regulatory regimes for broker-dealers and investment advisers[24] as applied to particular activities as a baseline for comparison, as described below. Accordingly, and in addition to the request for data and other information which follows in Parts III and IV below, we request data and other information relating to the economics and characteristics of the current regulatory regime, and other data and other information relating to investment adviser and broker-dealer conflicts of interest and the cost and effectiveness of disclosure. Many of the requests ask commenters to provide data and other information describing retail customer demographics and accounts; broker-dealer or investment adviser services offered to retail customers; security selections by or for retail customers; and the claims of retail customers in dispute resolution. We request commenters refer to the Appendix for the specific characteristics of each of these topics that are important to include when submitting data and other information. We also request commenters refer to other guidelines in the Appendix, particularly the request to provide background information and documentation to support any economic analysis.

To assist us in our analysis, we request that commenters provide the following:

1. Data and other information, including surveys of retail customers, describing the characteristics of retail customers who invest through a broker-dealer as compared to those who invest on the basis of advice from an investment adviser as well as retail customer perceptions of the cost/benefit tradeoffs of each regulatory regime.[25] Provide information describing retail customer accounts at broker-dealers and investment advisers, and the manner in which broker-dealers and investment advisers provide investment advice (*e.g.,* frequency, coverage (*i.e.,* account-by-account or relationship), and solicited or unsolicited). How do firms that offer both brokerage and advisory accounts advise retail customers about which type of account they should open? What are the main characteristics of each type of account? If possible, associate retail customer demographic information with account descriptions.

2. Data and other information describing the types and availability of services (including advice) broker-dealers or investment advisers offer to retail customers, as well as any observed recent changes in the types of services offered. Provide information as to why services offered may differ or have changed. Have differences in the standards of conduct under the two regulatory regimes contributed to differences in services offered or any observed changes in services offered? If possible, differentiate by retail customer demographic information.

3. Data and other information describing the extent to which different rules apply to similar activities of broker-dealers and investment advisers, and whether this difference is beneficial, harmful or neutral from the perspectives of retail customers and firms. Also, provide data and other information describing the facts and circumstances under which broker-dealers have fiduciary obligations to retail customers under applicable law, and how frequently such fiduciary

[22] This includes, where possible, information and data focusing on accounts that receive non-discretionary advice because they are most likely to be impacted by changes in the standard of conduct. *See* Guidelines in the Appendix.

[23] *Cf.* 17 CFR 248.3(u)(1) (defining for purposes of Regulation S–P, ''personally identifiable financial information'' as ''any information: (i) A consumer provides to you to obtain a financial product or service from you; (ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or (iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.'').

[24] Please see our staff's discussion in the Study about the existing regulatory structures for investment advisers and broker-dealers, and the general differences and similarities between the regulatory regimes. *See* Study at 14–46 (discussing investment adviser obligations) and 46–83 (discussing broker-dealer obligations).

[25] *See* Statement.

obligations arise. If possible, differentiate by retail customer demographic information.

4. Data and other information describing the types of securities broker-dealers or investment advisers offer or recommend to retail customers. To the extent commenters believe that differences in the standards of conduct under the two regulatory regimes contribute to differences in the types of securities offered or recommended, provide data and other information as to why the types of securities offered or recommended may differ. If possible, differentiate by retail customer demographic information.

5. Data and other information describing the cost to broker-dealers and investment advisers of providing personalized investment advice about securities to retail customers, as well as the cost to retail customers themselves of receiving personalized investment advice about securities. Describe costs in terms of dollars paid and/or time spent. Do differences in the standards of conduct under the two regulatory regimes contribute to differences in the cost of providing or receiving services? If possible, separate costs by service type, and differentiate by retail customer demographic and account information.

6. Data and other information describing and comparing the security selections of retail customers who are served by financial professionals subject to the two existing regulatory regimes.[26] If possible, associate retail customer demographic and account information with security selections, and identify whether initial retail customer ownership took place prior to opening the account and whether security selections were solicited or unsolicited.

7. Data and other information describing the extent to which broker-dealers and investment advisers engage in principal trading with retail customers, including data and other information regarding the types of securities bought and sold on a principal basis, the volume, and other relevant data points. For each type of security, compare volume and percentage of trades made on a principal basis against the volume and percentage of trades made on a riskless principal basis. Also, provide data and other information on the benefits and costs to broker-dealers and investment advisers of trading securities on a principal basis with retail customers, as well as the benefits and costs to retail customers to buying securities from or selling securities to a broker-dealer or an investment adviser acting in a principal capacity. To the extent possible, describe costs and benefits in terms of dollars paid and/or time spent (*e.g.,* any difference in price for a customer between a principal trade and a trade executed on an agency basis). Do differences in the two regulatory regimes contribute to any differences in the cost of trading securities on a principal basis? If possible, differentiate by retail customer demographic and account information.

8. Data and other information describing and analyzing retail customer returns (net and gross of fees, commissions, or other charges paid to a broker-dealer or investment adviser) generated under the two existing regulatory regimes.[27] If possible, provide security returns, associate retail customer demographic and account information with security positions, and identify whether the retail customer held these security positions prior to account opening and identify whether security selections were solicited or unsolicited. If security returns are not available, describe the type of securities held in the account and total account returns, including changes in account value and account inflows/outflows.

9. Data and other information related to the ability of retail customers to bring claims against their financial professional under each regulatory regime, with a particular focus on dollar costs to both firms and retail customers and the results when claims are brought.[28] We especially welcome the input of persons who have arbitrated, litigated, or mediated claims (as a retail customer, broker-dealer or investment adviser), their counsel, and any persons who presided over such actions. In particular, describe the differences between claims brought against broker-dealers and investment advisers with respect to each of the following:

a. The differences experienced by retail customers, in general, between bringing a claim against a broker-dealer as compared to bringing a claim against an investment adviser;

b. any legal or practical barriers to retail customers bringing claims against broker-dealers or investment advisers;

c. the disposition of claims;

d. the amount of awards, if any;

e. costs related to the claim forum, as it affects retail customers, firms, and associated persons of such firms;

f. time to resolution of claims;

g. the types of claims brought against broker-dealers (we welcome examples of mediation, arbitration and litigation claims);

h. the types of claims brought against investment advisers (we welcome examples of mediation, arbitration and litigation claims);

i. the nature of claims brought against broker-dealers as compared to the nature of claims brought against investment advisers (*e.g.,* breach of fiduciary duty, suitability, breach of contract, tort); and

j. the types of defenses raised by broker-dealers and investment advisers under each regime.

If possible, differentiate by retail customer demographic and account information.

10. Data and other information describing the nature and magnitude of broker-dealer or investment adviser conflicts of interest and the benefits and costs of these conflicts to retail customers. Also provide data and other information describing broker-dealer or investment adviser actions to eliminate, mitigate, or disclose conflicts of interest. Describe the nature and magnitude of broker-dealer or investment adviser conflicts of interest with the type and frequency of activities where conflicts are present, and describe the effect actions to mitigate conflicts of interest have on firm business and on the provision of personalized investment advice to retail customers.

11. Data and other information describing broker-dealer or investment adviser costs from providing mandatory disclosure to retail customers about products and securities. Describe costs in terms of dollars and, where cost estimates are not available, estimate time spent. If possible, differentiate by the form of disclosure (oral or written) and the amount of information the disclosure presents. Also, if possible, separate disclosure costs by associated activity.

12. Data and other information describing the effectiveness of disclosure to inform and protect retail customers from broker-dealer or investment adviser conflicts of interest. Describe the effectiveness of disclosure in terms of retail customer comprehension, retail customer use of disclosure information when making investment decisions, and retail customer perception of the integrity of the information. Please provide specific examples. If possible, differentiate by the form of disclosure (oral or written), the amount of information the disclosure presents, and retail customer demographic and account information. Also, if possible, measure disclosure effectiveness by associated activity.

[26] *Id.*

[27] *Id.*

[28] *Id.*

13. Identification of differences in state law contributing to differences in the provision of personalized investment advice to retail customers. Provide data and other information describing differences across states with respect to retail customer brokerage or advisory account characteristics, broker-dealer or investment adviser services offered and the types of securities they offer or recommend, and the cost of providing services to retail customers. Do differences in state law contribute to differences in the recovery of claimants? Do differences in state law contribute to differences in the mitigation or elimination of conflicts of interest? Provide information describing why. If possible, associate retail customer demographic information with account descriptions.

14. Data and other information describing the extent to which retail customers are confused about the regulatory status of the person from whom they receive financial services (*i.e.,* whether the party is a broker-dealer or an investment adviser). Provide data and other information describing whether retail customers are confused about the standard of conduct the person providing them those services owes to them. Describe the types of services and/or situations that increase or decrease retail customers' confusion and provide information describing why. Describe the types of obligations about which retail customers are confused and provide information describing why.

Provide explanations describing why responses to particular questions are not possible. Are there operational or cost constraints that make the data and other information unavailable? If so, please explain what they are. Also provide data and other information on other factors important in describing the current market for personalized investment advice that may aid or guide us in future analysis.

III. Request for Data and Other Information Relating to a Uniform Fiduciary Standard of Conduct and Alternative Approaches

We discuss below potential alternative approaches to establishing a uniform fiduciary standard of conduct for broker-dealers and investment advisers and request data and other information with respect to those approaches and their potential implications for the marketplace.[29] To be clear, the discussion of these potential approaches—including the identification of particular assumptions or alternatives—does not suggest our policy view or the ultimate direction of any proposed action by us. Furthermore, the approaches presented here are non-exclusive. As discussed above, this description of potential approaches is instead intended to (1) assist commenters in providing more concrete empirical data and other information and more precise comment in response to this request and (2) assist us in more readily comparing, reproducing, and otherwise analyzing data and other information provided by commenters.

We recognize that commenters may be able to provide additional data and other information that may be helpful to us under assumptions and alternatives that are different from, or in addition to, those presented under the various approaches described below. We invite commenters to explain clearly the different or additional assumptions and alternatives they provide, address why such assumptions and alternatives are appropriate, and compare and contrast results obtained under such assumptions and alternatives with results obtained under the assumptions or alternatives specified in this request.

We intend to use the data and other information provided to inform us about the current market for personalized investment advice about securities and how different approaches to establishing a uniform fiduciary standard of conduct on broker-dealers and investment advisers may impact retail customers, investment advisers and broker-dealers.

A. Initial Clarification and Assumptions

As an initial matter, to provide clarity to commenters and establish a common baseline of assumptions, we indicate that commenters should make the assumptions set forth below in considering our subsequent description of a possible uniform fiduciary standard of conduct when a broker-dealer or investment adviser provides personalized investment advice to a retail customer. However, as described above in the introduction to this Part III, the identification of particular assumptions does not suggest our policy view or the ultimate direction of any proposed action by us. We invite comment based on other assumptions chosen by commenters, and we invite comparisons between analyses made under assumptions chosen by commenters and analyses made under the assumptions—particularly alternatives to Assumption 1 and Assumption 8 below—we have set forth below.

1. Assume that the term ''personalized investment advice about securities'' would include a ''recommendation,'' as interpreted under existing broker-dealer regulation,[30] and would include any other actions or communications that would be considered investment advice about securities under the Advisers Act (such as comparisons of securities or asset allocation strategies). It would not include ''impersonal investment advice'' as that term is used for purposes of the Advisers Act.[31] The term ''personalized investment advice'' would also not include general investor educational tools, provided those tools do not constitute a recommendation under current law.[32]

2. Assume that the term ''retail customer'' would have the same meaning as in Section 913 of the Dodd-Frank Act, which is ''a natural person, or the legal representative of such natural person, who (1) receives personalized investment advice about securities from a broker or dealer or investment adviser; and (2) uses such advice primarily for personal, family, or household purposes.''[33]

3. Assume that any action would apply to all SEC-registered broker-dealers and SEC-registered investment advisers. To the extent commenters are of the view that the duty should be limited to a particular subset of SEC-registered broker-dealers or SEC-registered investment advisers or expanded to include all broker-dealers or investment advisers, commenters should explain how and why it should be limited or expanded, and include any relevant data and other information to support such an application.

4. Assume that the uniform fiduciary standard of conduct would be designed to accommodate different business models and fee structures of firms, and would permit broker-dealers to continue to receive commissions; firms would not be required to charge an asset-based fee. As provided in Section 913, ''[t]he receipt of compensation based on commissions, fees or other standard

[29] In Part IV, we discuss certain possible approaches for harmonizing certain other aspects of the regulation of broker-dealers and investment advisers.

[30] *See* Study at 124–125 (staff's discussion of what constitutes a ''recommendation'' under the broker-dealer regulatory regime).

[31] We have defined ''impersonal investment advice'' for certain purposes under the Advisers Act to mean ''investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts.'' 17 CFR 275.203A–3(a)(3)(ii). *See also* 17 CFR 275.206(3)–1; Study at 123 (staff's discussion of what constitutes ''impersonal investment advice'').

[32] *See* Study at 125 (staff's discussion of communications that generally would not constitute a ''recommendation'' under existing broker-dealer regulation).

[33] Sec. 913, Public Law 111–203, 124 Stat. 1376; 15 U.S.C. 80b–11(g)(2). *See also supra* note 1.

compensation for the sale of securities, for example, would not, in and of itself, be considered a violation'' of the uniform fiduciary standard of conduct.[34] Broker-dealers also would continue to be permitted to engaged in, and receive compensation from, principal trades. To satisfy the uniform fiduciary standard of conduct, however, assume that at a minimum a broker-dealer or investment adviser would need to disclose material conflicts of interest, if any, presented by its compensation structure.[35]

5. Assume that the uniform fiduciary standard of conduct would not generally require a broker-dealer or investment adviser to either (i) have a continuing duty of care or loyalty to a retail customer after providing him or her personalized investment advice about securities, [36] or (ii) provide services to a retail customer beyond those agreed to between the retail customer and the broker-dealer or investment adviser. Assume that the question of whether a broker-dealer or investment adviser might have a continuing duty, as well as the nature and scope of such duty, would depend on the contractual or other arrangement or understanding between the retail customer and the broker-dealer or investment adviser, including the totality of the circumstances of the relationship and course of dealing between the customer and the firm, including but not limited to contractual provisions, disclosure and marketing documents, and reasonable customer expectations arising from the firm's course of conduct.[37] Similarly, the uniform fiduciary standard of conduct would apply within the context of the scope of services agreed to between the customer and the broker-dealer or investment adviser, and would not generally require the broker-dealer or investment adviser to provide services beyond those agreed to through a contractual or other arrangement or understanding with the retail customer.

6. As discussed below, assume that the offering or recommending of only proprietary or a limited range of products would not, in and of itself, be considered a violation of the uniform fiduciary standard of conduct.[38]

7. Assume that Section 206(3) and Section 206(4) of the Advisers Act and the rules thereunder would continue to apply to investment advisers, and would not apply to broker-dealers.[39] Assume that to satisfy its obligations under the uniform fiduciary standard of conduct, however, a broker-dealer would need to disclose any material conflicts of interest associated with its principal trading practices.

8. Assume that existing applicable law and guidance governing broker-dealers, including SRO rules and guidance, would continue to apply to broker-dealers.

B. Discussion of a Possible Uniform Fiduciary Standard

Pursuant to Section 913 of the Dodd-Frank Act, ''[t]he Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers * * * shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.'' [40] We have not yet determined whether to exercise this authority. Section 913 also provides that any standard of conduct we adopt shall be no less stringent than the standard applicable to investment advisers under Sections 206(1) and 206(2) of the Advisers Act.[41] The Supreme Court has construed Advisers Act Sections 206(1) and 206(2) as requiring an investment adviser to fully disclose to its clients all material information that is intended ''to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.'' [42]

The Study recommended that we should engage in rulemaking to implement the uniform fiduciary standard described in Section 913 of the Dodd-Frank Act. The staff recommended that, in implementing the uniform fiduciary standard, we should address both components of the uniform fiduciary standard: a duty of loyalty and a duty of care. The staff also supported extending the existing guidance and precedent under the Advisers Act regarding fiduciary duty, which has developed primarily through Commission and staff interpretive pronouncements under the antifraud provisions of the Advisers Act, as well as through case law and numerous enforcement actions, to broker-dealers, where similar facts and circumstances would make the guidance and precedent relevant and justify a similar outcome.[43]

[34] *See* 15 U.S.C. 78o(k)(1); 15 U.S.C. 80b–11(g)(1).

We also note that nothing in Section 206(1) and 206(2) of the Advisers Act prohibits the receipt of transaction-based compensation, such as commissions. A person engaged in the business of effecting transactions in securities for the account of others, would however, absent an available exemption, be required to register as a broker-dealer. *See* Exchange Act Sections 3(a)(4) and 15(a); 15 U.S.C. 78c(a)(4) and 78o(a). *See also SEC* v. *Hansen,* [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,426 (S.D.N.Y. 1984) (stating that receiving transaction-based compensation is among the activities that indicate a person may be acting as a broker); *Mutual Fund Distribution Fees; Confirmations,* Exchange Act Release No. 62544 (July 21, 2010) (proposing rules governing ongoing mutual fund asset-based sales charges), n. 168 (''As a form of deferred sales load, all payments of ongoing sales charges to intermediaries would constitute transaction-based compensation. Intermediaries receiving those payments thus would need to register as broker-dealers under Section 15 of the Exchange Act unless they can avail themselves of an exception or exemption from registration. Marketing and service fees paid to an intermediary may similarly require the intermediary to register under the Exchange Act.'').

[35] *See* discussion *infra* Part III.B.1.

[36] *See* 15 U.S.C. 78o(k)(1) (''Nothing in this section [authorizing a uniform standard of conduct for the provision of personalized investment advice] shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.'').

[37] We understand that market participants generally have taken the view that the extent to which a continuing duty of loyalty or care exists under the Advisers Act depends on the scope of the relationship with the customer. They believe, for example, that investment advisers who act as financial planners generally would not have a continuing duty to a customer after providing the financial plan.

[38] *See* 15 U.S.C. 78o(k)(2) (''The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the [uniform standard of conduct for the provision of personalized investment advice.]'').

[39] Section 206(4) of the Advisers Act makes it unlawful for an investment adviser to ''engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative'' and authorizes the Commission ''by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.'' *See also infra* the discussion of principal trading and the inapplicability of Section 206(3) of the Advisers Act in Part III.B.1.

We have authority to adopt rules for broker-dealers that are substantially similar to those adopted under Sections 206(3) and 206(4) of the Advisers Act. For purposes of our request for information and data about a uniform fiduciary standard of conduct, we request that commenters assume that such rules will not be incorporated into such a standard of conduct. However, commenters may wish to express their views on whether the Commission should engage in rulemaking to impose such rules on broker-dealers as part of harmonization of the regulatory obligations of broker-dealers and investment advisers. *See* discussion *infra* Part IV.

[40] 15 U.S.C. 80b–11(g)(1); 15 U.S.C. 78o(k)(1).

[41] *Id.*

[42] *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 194 (1963).

[43] As discussed in more detail below, the Commission acknowledges that existing guidance and precedent under the Advisers Act regarding fiduciary duty turn on the specific facts and circumstances, including the types of services provided and disclosures made. Accordingly, the existing guidance and precedent may not directly apply to broker-dealers depending on the facts and circumstances.

We request data and other information on the benefits and costs of implementing the uniform fiduciary standard (as described below), entailing two key elements: a duty of loyalty and a duty of care. Our description below of a potential uniform fiduciary standard is only one example of how we could implement a uniform fiduciary standard designed to require broker-dealers and investment advisers to provide advice that is in the best interest of the customer. The discussion of the uniform fiduciary standard described below and the potential alternative approaches does not suggest our policy view or the ultimate direction of any proposed action by us. To obtain the most comparable and useful data and other information on a uniform fiduciary standard, however, we ask commenters to consider the uniform fiduciary standard as described below. We also discuss certain potential alternative approaches in the discussion below and request comment on those alternatives.

We recognize, among other things, that the list of potential options discussed below—including the uniform fiduciary standard of conduct, potential alternative approaches to the uniform fiduciary standard of conduct, and taking no action at this time—is not exhaustive, and that commenters may formulate additional alternative approaches. To the extent commenters are of the view that we should consider additional alternative approaches, we request they explain those approaches, address their reasons for recommending such approaches, and compare such approaches to the ones specified in detail below.

1. Uniform Fiduciary Standard of Conduct—the Duty of Loyalty

The duty of loyalty is a critical component of a fiduciary duty. As noted above, Dodd-Frank Section 913(g) addresses the duty of loyalty by providing: ''[i]n accordance with such rules [that the Commission may promulgate with respect to the uniform fiduciary standard] * * * any material conflicts of interest shall be disclosed and may be consented to by the customer.'' [44] The uniform fiduciary standard would be designed to promote advice that is in the best interest of a retail customer by, at a minimum, requiring an investment adviser or a broker-dealer providing personalized investment advice to the customer to fulfill its duty of loyalty. This would be accomplished by eliminating its material conflicts of interest, or providing full and fair disclosure to retail customers about those conflict of interest.[45] Commenters should assume that we would provide specific detail or guidance, summarized below, about complying with the duty of loyalty component of the uniform fiduciary duty. As described above in the introduction to this Part III, the identification of particular assumptions does not suggest our policy view or the ultimate direction of any proposed action by us. We invite comment on other assumptions and comparisons between analyses made under such other assumptions and analyses made under the assumptions set forth below.

1. *Assume that any rule under consideration would expressly impose certain disclosure requirements.* Assume that each broker-dealer and investment adviser that provides personalized investment advice about securities to a retail customer would be required to provide the following to that retail customer:

a. Disclosure of all material conflicts of interest the broker-dealer or investment adviser has with that retail customer. This requirement would reflect an overarching, general obligation to disclose all such conflicts of interest. Depending on the nature of the conflict and unless otherwise provided, this disclosure largely could be made through the general relationship guide described below.

b. Disclosure in the form of a general relationship guide similar to Form ADV Part 2A, to be delivered at the time of entry into a retail customer relationship.[46] The relationship guide would contain a description of, among other things, the firm's services, fees, and the scope of its services with the retail customer, including: (i) Whether advice and related duties are limited in time or are ongoing, or are otherwise limited in scope (*e.g.,* limited to certain accounts or transactions); (ii) whether the broker-dealer or investment adviser only offers or recommends proprietary or other limited ranges of products; (iii) whether, and if so the circumstances in which, the broker-dealer or investment adviser will seek to engage in principal trades with a retail customer. It also could include disclosure of other material conflicts of interest, such as conflicts of interest presented by compensation structures.[47]

c. Oral or written disclosure at the time personalized investment advice is provided of any new material conflicts of interest or any material change of an existing conflict.

2. *Assume that any rule under consideration would treat conflicts of interest arising from principal trades the same as other conflicts of interest.* Assume that such a rule would make clear that it would not incorporate the transaction-by-transaction disclosure and consent requirements of Section 206(3) of the Advisers Act for principal trading.[48] At a minimum, as with other conflicts of interest, the broker-dealer would be required to disclose material conflicts of interest arising from principal trades with retail customers.[49]

[44] 15 U.S.C. 80b–11(g)(1); 15 U.S.C. 78o(k)(1).

[45] The staff made a number of recommendations in the Study for the Commission to consider in implementing a duty of loyalty. First, the Study recommended that we should facilitate the provision of uniform, simple and clear disclosures to retail customers about the terms of their relationships with broker-dealers and investment advisers, including any material conflicts of interests. The Study identified a number of potential disclosures that the Commission should consider (*e.g.,* a general relationship guide akin to the new Part 2A of Form ADV, the form investment advisers use to register with the Commission and states, which is provided to advisory clients). *See* Study at 114–117. Second, the Study recommended that we should consider whether rulemaking would be appropriate to prohibit certain conflicts, to require firms to mitigate conflicts through specific action, or to impose specific disclosure and consent requirements. *Id.* Third, the Study recommended that we should address through guidance and/or rulemaking how broker-dealers should fulfill the uniform fiduciary standard when engaging in principal trading. *Id.* at 118–120.

[46] We note that FINRA has requested comment on a concept proposal to require the provision of a disclosure statement for retail customers at or before commencing a business relationship that would include many items of information analogous to what is required in Form ADV Part 2. FINRA Regulatory Notice 10–54, ''Disclosure of Services, Conflicts and Duties'' (Oct. 2010). Nothing in this request for information and data suggests that FINRA or any other regulatory body could or could not, or should or should not adopt rules or requirements that it determines are appropriate and that meet applicable legal standards.

[47] A general relationship guide could also include other disclosures, such as a firm's disciplinary history.

[48] Assume that the rule would not relieve an investment adviser from its obligations under Advisers Act Section 206(3). We note that we have the authority to apply similar requirements to broker-dealers. Also assume that the rule would not relieve an investment adviser who is also registered as a broker-dealer from its obligations to comply with Advisers Act Section 206(3) or the rules thereunder. *See* 17 CFR 275.206(3)–3T.

As stated above, we request that, for purposes of our request for information and data about a uniform fiduciary standard of conduct, commenters assume that we will not incorporate these obligations into the uniform fiduciary standard of conduct. However, commenters may wish to express their views, on whether the Commission should engage in rulemaking to impose such rules on broker-dealers as part of harmonization of the regulatory obligations of broker-dealers and investment advisers. *See* discussion *infra* Part IV.

[49] SRO rules currently impose requirements on broker-dealers when broker-dealers engage in principal trading. *See, e.g.,* NASD Rule 2440 (Fair Prices and Commissions); IM–2440–1 (Mark-Up Policy); IM–2440–2 (Mark-Up Policy for Debt Securities); NASD Rule 2310 (Suitability) (effective until July 9, 2012, when replaced by FINRA Rule 2111); NASD Rule 3010 (Supervision); NASD Rule 3012 (Supervisory Control System). As noted above,

3. *Assume that the rule would prohibit certain sales contests.* The rule would prohibit the receipt or payment of non-cash compensation (*e.g.,* trips and prizes) in connection with the provision of personalized investment advice about the purchase of securities.

2. Uniform Fiduciary Standard of Conduct—the Duty of Care

The duty of care is another critical component of the uniform fiduciary standard. We would specify, through the duty of care, certain minimum professional obligations of broker-dealers and investment advisers,[50] which would be designed to promote advice that is in the best interests of the retail customer. Commenters should assume, for purposes of this request for data and other information, that we would implement the duty of care by imposing on a broker-dealer or investment adviser, when providing personalized advice to a retail customer about securities, the uniform obligations described below. As described above in the introduction to this Part III, the identification of particular assumptions does not suggest our policy view or the ultimate direction of any proposed action by us. We invite comment based on other assumptions chosen by commenters, and we invite comparisons between analyses made under assumptions chosen by commenters and analyses made under the assumptions we have set forth below.

1. *Suitability obligations:* A duty to have a reasonable basis to believe that its securities and investment strategy recommendations are suitable for at least some customer(s) as well as for the specific retail customer to whom it makes the recommendation in light of the retail customer's financial needs, objectives and circumstances; [51]

2. *Product-specific requirements:* Specific disclosure, due diligence, or suitability requirements for certain securities products recommended (such as penny stocks, options, debt securities and bond funds, municipal securities, mutual fund share classes, interests in hedge funds and structured products);[52]

3. *Duty of best execution:* A duty on a broker-dealer and an investment adviser (where the investment adviser has the responsibility to select broker-dealers to execute client trades) to seek to execute customer trades on the most favorable terms reasonably available under the circumstances; [53] and

4. *Fair and reasonable compensation:* A requirement that broker-dealers and investment advisers receive compensation for services that is fair and reasonable, taking into consideration all relevant circumstances.[54]

3. Uniform Fiduciary Standard of Conduct—Application of Prior Guidance and Precedent Regarding Investment Adviser Fiduciary Duty

In the interests of increasing investor protection and reducing investor confusion, the staff recommended in the Study that the uniform fiduciary standard be no less stringent than the existing fiduciary standard for investment advisers under Advisers Act Sections 206(1) and 206(2).[55] Accordingly, the staff recommended that existing guidance and precedent under the Advisers Act regarding fiduciary duty should continue to apply to investment advisers and be extended to broker-dealers, as applicable, under a uniform fiduciary standard of conduct.

Application of this guidance and precedent turns on the specific facts and circumstances, including the types of services provided and disclosures made. We understand, accordingly, that existing guidance and precedent may not directly apply to broker-dealers depending on the facts and circumstances. Therefore, to aid commenters, we have identified below certain fiduciary principles that commenters should assume would continue to apply to investment advisers and be extended to broker-dealers. We also request commenters to identify specific citations to any case law and enforcement actions and other guidance under the Advisers Act regarding the fiduciary duty that they believe should or should not apply to broker-dealers when providing personalized investment advice about securities to retail customers.

For purposes of this request for data and other information, commenters should make the assumptions below regarding the application of prior guidance and precedent under a uniform fiduciary standard of conduct. As described above in the introduction to this Part III, the identification of particular assumptions does not suggest our policy view or the ultimate direction of any proposed action by us. We invite comment based on other assumptions chosen by commenters, and we invite comparisons between analyses made under assumptions chosen by commenters and analyses made under the assumptions we have set forth below.

1. *Allocation of investment opportunities:* A fiduciary's duty of loyalty generally would require a firm to disclose to a retail customer how it would allocate investment opportunities among its customers,[56] and between customers and the firm's own account; [57] for example, this disclosure could include, among other things, the firm's method of allocating shares of initial public offerings, as well as its method (*e.g., pro rata,* ''first in, first out'') of allocating out of its principal account to its customers when agency orders are placed on a riskless principal basis.

2. *Aggregation of orders:* A firm may aggregate or ''bunch'' orders on behalf of two or more of its retail customers, so long as the firm does not favor one

these requirements would continue to apply to a broker-dealer under a uniform fiduciary standard of conduct.

[50] The staff stated in the Study that the Commission could articulate and harmonize such professional standards by referring to, and expanding upon, as appropriate, the explicit minimum standards of conduct relating to the duty of care currently applicable to broker-dealers (*e.g.,* suitability (including product-specific suitability), best execution, and fair pricing and compensation requirements) under applicable rules. *See* Study at 50–53.

[51] *See* Study at 27–28 and 61–64 (discussing investment adviser and broker-dealer suitability obligations, respectively).

[52] *See id.* at 65–66 (discussing relevant rules imposing specific disclosure, diligence and suitability requirements for certain securities products).

[53] *See id.* at 28–29 and 69–70 (describing investment adviser and broker-dealer duties of best execution).

[54] *See id.* at 66–69 (describing broker-dealer obligations to charge fair prices, commissions, and other charges and fees).

[55] As explained above, guidance and precedent under Sections 206(3) and 206(4) of the Advisers Act, and the rules adopted under those sections, would not be part of the uniform fiduciary standard of conduct.

[56] The Commission has brought numerous enforcement actions alleging that investment advisers unfairly allocated client trades to preferred clients without making adequate disclosure. *See, e.g., Alpine Woods Capital Investors, LLC* and *Samuel A. Lieber,* Admin. Proc. File No. 3–14233 (Feb. 7, 2011) (finding the investment adviser violated Advisers Act Section 206(2) when it disproportionately allocated shares from an initial public offering to the advantage of the firm's two smallest mutual funds); *Nevis Capital Mgmt., LLC,* Investment Advisers Act Release No. 2214 (Feb. 9, 2004) (settled order); *The Dreyfus Corp., et al.,* Investment Advisers Act Release No. 1870 (May 10, 2000) (settled order); *Account Mgmt. Corp.,* Investment Advisers Act Release No. 1529 (Sept. 29, 1995) (settled order).

[57] The Commission has brought numerous enforcement actions alleging that investment advisers unfairly allocated trades to their own accounts and allocated less favorable or unprofitable trades to their clients' accounts. *See, e.g., Nicholas-Applegate Capital Mgmt.,* Investment Advisers Act Release No. 1741 (Aug. 12, 1998) (settled order); *Timothy J. Lyons,* Investment Advisers Act Release No. 1882 (June 20, 2000) (settled order); *SEC* v. *Lyons,* 57 SE.C. 99 (2003); *SEC* v. *Alan Brian Bond, et al.,* Litigation Release No. 18923 (Civil Action No. 99–12092 (S.D.N.Y.) (Oct. 7, 2004).

customer over another.[58] A firm would need to disclose whether and under what conditions it aggregates orders; [59] if the firm does not aggregate orders when it has the opportunity to do so, the firm would need to explain its practice and describe the costs to customers of not aggregating.[60]

C. Alternative Approaches to the Uniform Fiduciary Standard of Conduct

We identify below alternative approaches to the uniform fiduciary standard discussed above. In considering the alternatives, it would be helpful to obtain information about whether and, if so, how each alternative meets the goals of enhancing retail customer protections and decreasing retail customers' confusion about the standard of conduct owed to them when their financial professional provides them personalized investment advice. It would also be helpful to obtain information about the relative costs and benefits of these alternatives, including the extent to which one alternative may provide (1) greater benefits for the same or lower cost than other alternatives or (2) lower benefits for the same or higher cost than other alternatives. The identification of particular alternatives does not suggest our policy view or the ultimate direction of any proposed action by us.

Keeping in mind these goals, we request comment on the following alternative approaches, including the costs and benefits of each approach, as well as other approaches. We could:

1. Apply a uniform requirement for broker-dealers and investment advisers to provide disclosure about (a) key facets of the services they offer and the types of products or services they offer or have available to recommend; and (b) material conflicts they may have with retail customers, without imposing a uniform fiduciary standard of conduct.

2. Apply the uniform fiduciary standard of conduct discussed above on broker-dealers and investment advisers, but without extending to broker-dealers the existing guidance and precedent under the Advisers Act regarding fiduciary duty.[61] The existing guidance and precedent under the Advisers Act regarding fiduciary duty would continue to apply to investment advisers.

3. Without modifying the regulation of investment advisers, apply the uniform fiduciary standard discussed above, or parts thereof, to broker-dealers. This ''broker-dealer-only'' standard could involve establishing a ''best interest'' standard of conduct for broker-dealers, which would be no less stringent than that currently applied to investment advisers under Advisers Act Sections 206(1) and 206(2), when they provide personalized investment advice about securities to retail customers.

4. Without modifying the regulation of broker-dealers, specify certain minimum professional obligations under an investment adviser's duty of care (which are currently not specified by rule). As discussed above, any rules or guidance would take into account Advisers Act fiduciary principles, such as the duty to provide suitable investment advice (*e.g.,* with respect to specific recommendations and the client's portfolio as a whole) and to seek best execution where the adviser has the responsibility to select broker-dealers to execute client trades. These requirements could be similar to those rules currently applicable to broker-dealers, as described further in the Study.[62]

5. Consider following models set by regulators in other countries. For instance, the United Kingdom's Financial Services Authority (FSA) requires persons providing personalized investment advice to a retail client to act in the client's best interests, and has set limits on how investment advisers charge for their services, including prohibiting (a) the receipt of ongoing charges unless there are ongoing services, and (b) the receipt of commissions from those providing the investment advice.[63] Similarly, the Treasury of Australia imposed a best interest obligation on persons providing personal advice that would (a) require the provider of the advice to place a retail client's interests before its own,[64] and (b) prohibit the receipt of ''conflicted'' remuneration, such as commission payments relating to the provision of advice.[65] Further, the European Securities and Markets Authority (ESMA) published guidelines to clarify the application of certain aspects of its current Markets in Financial Instruments Directive (MiFID) suitability requirements (arising from both MiFID and the MiFID Implementing Directive).[66]

As described above in Part III.B, we invite comment on other potential alternative approaches not specified in this request for data and other information and comparisons between those alternative approaches and the potential uniform fiduciary standard of conduct and alternatives we describe above.

D. Preserving Current Standard of Conduct Obligations

Consistent with our discretionary authority under Section 913, we could also determine to take no further action at this time with respect to the standards of conduct applicable to broker-dealers and investment advisers; existing regulatory requirements would continue to apply. We request data and other information relating to the current market for personalized investment advice in Part II above. It generally would be helpful to obtain information about how taking no action would compare to a uniform fiduciary standard

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[58] The staff takes the position that an investment adviser, when directing orders for the purchase or sale of securities, may aggregate or ''bunch'' those orders on behalf of two or more of its accounts, so long as the bunching is done for the purpose of achieving best execution, and no customer is disadvantaged or advantaged by the bundling. *See* SMC Capital, Inc., SEC No-Action Letter (Sept. 5, 1995).

[59] The staff understands that, consistent with applicable law, broker-dealers currently only aggregate orders in limited circumstances, such as when orders are received outside of normal trading hours and aggregated in anticipation of execution when the market re-opens, or when the broker-dealer has discretion over the trade. Similarly, the staff recognizes that aggregation of orders may not occur frequently with regard to non-discretionary advisory accounts.

[60] *See* Item 12 of Form ADV Part 2A.

[61] The Securities Industry and Financial Markets Association suggested this approach. *See* SIFMA Letter, *supra* note 17.

[62] For a more detailed description of such requirements, see the Study at 61–70.

[63] *See* Financial Services Authority Handbook, Conduct of Business Sourcebook (''COBS''), 2.1.1, *available at http://fsahandbook.info/FSA/html/handbook/COBS/2/1* (FSA's ''client best interest rule''). *See also* COBS, 9.2.1(1), (2); COBS, 9.2.2 (requiring that a firm's recommendations be suitable and reasonable based on the client's risk profile). Effective in 2012, the FSA will require firms to disclose to retail clients the type (either ''independent'' or ''restricted'') and breadth of advice being offered (*e.g.,* limited to certain products or a comprehensive, fair and unbiased analysis of the relevant market). *See* COBS, 6.2A.5R, 6.2A.6R, *available at http://fsahandbook.info/FSA/html/handbook/COBS.* The Adviser Charging rules, also going into effect in 2012, will prohibit receipt of any remuneration for advice that is not disclosed and agreed upon in advance of the recommendation. *See* COBS, 6.1A.

[64] *See* The Corporations Amendment (Further Future of Financial Advice Measures) Act 2012, (''Financial Advice Measures''), *available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4739_aspassed/toc_pdf/11270b01.pdf;fileType=application%2Fpdf. See also* Australian Securities & Investments Commission, *Regulatory Guide 175: Licensing: Financial Product Advisers—Conduct and Disclosure 15* (2011), *available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg175-010411.pdf/$file/rg175-010411.pdf* (discussing the implied warranty, under the Australian Securities and Investments Commission Act 2001, to render advice through ''due care and skill'').

[65] *See* Financial Advice Measures.

[66] *See* Guidelines on certain aspects of the MiFID suitability requirements, ESMA, 2012, 387 (July 6, 2012), *available at http://www.esma.europa.eu/system/files/2012-387.pdf.*

of conduct and the alternative approaches described above. In particular, it would be helpful to obtain information about the costs and benefits of the current regulatory regime as compared to the uniform fiduciary standard of conduct and the alternative approaches described above. Such comparisons would be particularly helpful as commenters consider providing data and other information in connection with the requests specified in Part III.E below.

E. Request for Data and Other Information Relating to Changes in the Marketplace for Personalized Investment Advice Resulting from the Uniform Fiduciary Standard of Conduct and Alternative Approaches

The Commission requests the following data and other information relating to changes in the marketplace for personalized investment advice for retail customers that might occur as a result of implementing the uniform fiduciary standard of conduct and the alternative approaches described above. As noted above, in providing this data and other information, the Commission believes it would be useful to also obtain information about the benefits and costs of continuing the current regulatory regime, as requested in Part II above, as a baseline for comparing the uniform fiduciary standard of conduct and the alternative approaches. Accordingly, to the extent applicable, the Commission requests commenters to provide such comparisons. As in Part II, many of the requests ask commenters to provide data and other information describing retail customer demographics and accounts; broker-dealer or investment adviser services offered; financial securities; and the claims of retail customers in dispute resolution. We request commenters to refer to the Appendix for the specific characteristics of each of these topics that are important to include when submitting data and other information. We also request commenters refer to other guidelines in the Appendix, particularly the request to provide background information and documentation to support any economic analysis.

1. Commenters have highlighted several activities of broker-dealers and investment advisers that are most likely to be impacted by a uniform fiduciary standard for the provision of personalized investment advice about securities to retail customers: [67]

- Recommending proprietary products and products of affiliates;
- Engaging in principal trades with respect to a recommended security (*e.g.,* fixed income products);
- Recommending a limited range of products and/or services;
- Recommending a security underwritten by the firm or a broker-dealer affiliate, including initial public offerings;
- Allocating investment opportunities among retail customers (*e.g.,* IPO allocation);
- Advising on a trading strategy involving concentrated positions;
- Receiving third-party compensation in connection with securities transactions or distributions (*e.g.,* sales loads, ongoing asset-based fees, or revenue sharing); and
- Providing ongoing, episodic or one-time advice.

a. Provide comment on this list of activities. Does this list capture the activities of broker-dealers and investment advisers that would be most impacted by a uniform fiduciary standard of conduct when providing personalized investment advice about securities to retail customers?

b. Provide data and other information describing the likely benefits and costs for firms and retail customers from firms engaging in these activities under the uniform fiduciary standard of conduct and each of the alternative approaches discussed above. In particular, describe the cost to broker-dealers and investment advisers in terms of dollars and time spent from providing these activities to retail customers under the uniform fiduciary standard and each of the alternative approaches. Also provide data and other information describing the benefits and costs to firms and retail customers likely to result from voluntary actions firms may take that are not necessarily mandated by the relevant standard. If possible, separate costs by service type, and differentiate by retail customer demographic and account information.

c. Provide data and other information related to the nature and magnitude of conflicts of interest when firms engage in these activities under the uniform fiduciary standard and each of the alternative approaches discussed above. How would the uniform fiduciary standard or each of the alternative approaches increase or decrease broker-dealer or investment adviser conflicts of interest?

2. Provide data and other information describing the types and availability of services (including advice) and securities that broker-dealers or investment advisers would offer or recommend to retail customers under the uniform fiduciary standard and each of the alternative approaches discussed above. Would the application of a particular approach discussed above require a firm, or give a firm an incentive, to modify or eliminate current business practices? What would be the impact or potential impact of each approach discussed above on retail customer cost and access to personalized investment advice and to security offerings? How could such impact or costs be mitigated? Provide data and other information describing why the business practices would be so modified or eliminated, and whether retail customer access would change. Indicate whether business practices are transaction-specific, account-specific, customer-specific, or firm-wide. If possible, separate costs by service type and differentiate by retail customer demographic and account information.

3. Provide data and other information describing the security selections of retail customers under the uniform fiduciary standard and each of the alternative approaches discussed above. If possible, associate retail customer demographic and account information with security selections.

4. Provide data and other information related to the ability of retail customers to bring claims against their financial professional under the uniform fiduciary standard and each of the alternative approaches discussed above, with a particular focus on alternative forums and dollar costs to both firms and retail customers and the results when claims are brought. Describe disposition of claims, costs related to claim forum, time to resolution, and awards if any. If possible, differentiate by retail customer demographic and account information.[68]

5. Provide information, data and comment on the extent to which the uniform fiduciary standard and each of the alternative approaches discussed above affect investor protection and confusion investors have about the standard of conduct applicable to their financial professionals when providing personalized investment advice about securities.[69]

6. Provide information, data and comment on the costs and benefits to investment advisers and broker-dealers associated with implementing the uniform fiduciary standard and each of

[67] The inclusion of activities in this list does not necessarily reflect the Commission's belief that these activities will be impacted by a uniform fiduciary standard, see the discussion of clarifications and assumptions in the introductions to Part III and Part III.A.

[68] *See supra* Item 9(a)–(j) in Part II of this request for information and data.

[69] *See supra* note 2.

the alternative approaches discussed above. Discuss any changes investment advisers and broker-dealers would need to make to, among others, their customer documentation, internal controls, and training programs, as well as other changes they would need to make, and why.

7. Provide data and other information describing to what extent firms would rely on disclosure to comply with the uniform fiduciary standard and each of the alternative approaches detailed above. How would retail customers be expected to react to changes in practice and changes in disclosure? How do retail customers choose between a firm with disclosed conflicts and a firm whose business model does not involve the same conflict(s)?

8. Provide data and other information on how other aspects of the market for personalized investment advice would change if we adopt any of the alternative approaches discussed above. In particular, provide data about how the alternatives described above would impact the costs to retail customers and any associated effect on access to products and services. As stated above, specific information about the potential economic impact of the staff's recommendations, including information about the potential impact on competition, capital formation and efficiency, may particularly help inform any action we may take in this area.

9. Provide data and other information describing the benefits and costs related to alternative approaches to the standards of conduct other than those specified in this request for data and other information. Additional approaches and standards of conduct for persons providing personalized investment advice include but are not limited to those standards established under the laws of other countries.

10. Provide explanations describing why responses to particular questions are not possible.

F. Request for Data and Other Information Relating to Account Conversions

In 2007, as a result of the court decision in *Financial Planning Association* v. *SEC*[70] (''*FPA*''), broker-dealers offering fee-based brokerage accounts (*i.e.,* brokerage accounts in which the broker-dealer charged a single asset-based fee, instead of commissions, for its services) became subject to the Advisers Act with respect to those accounts; as such, those client relationships, which had previously been primarily subject to Exchange Act and SRO rules, became subject to the Advisers Act and the fiduciary duty thereunder. Business practices since *FPA* present an example from which to draw comparative costs and benefits differences between retail brokerage and advisory accounts, as well as the cost and benefit and potential consequences of imposing a fiduciary standard on broker-dealers. In 2007, our staff had estimated that there were over one million fee-based brokerage accounts, representing approximately $300 billion, many of which were converted to advisory accounts[71] or otherwise were transitioned back to traditional commission-based brokerage accounts. Broker-dealers that converted fee-based brokerage accounts to advisory accounts (especially those that converted to non-discretionary advisory accounts) and retail customers whose accounts were converted as a result of *FPA* are in a position to provide comparative cost and benefit data for retail brokerage and advisory accounts (for the firm and/or the retail customer), and therefore to provide cost and benefit data on the imposition of a fiduciary standard generally.

In addition, we are aware that some firms have made the decision to convert their retail brokerage accounts to advisory accounts outside of the specific context of *FPA.* We understand such account conversions may have occurred for a variety of reasons, including a firm's decision to change its business model. We similarly believe that firms that have engaged in such account conversions and retail customers whose accounts were converted are in a position to provide comparative cost and benefit data for retail brokerage and advisory accounts (for the firm and/or the retail customer), and therefore to provide cost and benefit data on the imposition of a fiduciary standard generally.

We recognize that any such data and other information relating to the conversion of brokerage accounts to advisory accounts, and the imposition of a fiduciary standard will only be an approximation of the costs and benefits of the uniform fiduciary standard described above. Specifically, the uniform fiduciary standard described above does not incorporate the entirety of the Advisers Act, whereas any brokerage accounts converted to advisory accounts would be subject to the Advisers Act as a whole. Accordingly, to the extent possible, we request that any such data and other information exclude costs and benefits associated with complying with aspects of the Advisers Act not included within the uniform fiduciary standard (such as sections 206(3) and 206(4) and the rules thereunder) or, if commenters are unable to exclude such costs, we request that they indicate that the data and other information include costs of complying with such sections and rules. Similarly, with respect to broker-dealers that converted fee-based brokerage accounts to advisory accounts as a result of *FPA,* we request that the data provided exclude to the extent possible, or at a minimum identify that, such data include costs (*e.g.,* legal and consulting fees, other costs) related to the uncertainty regarding the treatment of such accounts immediately following *FPA.*

We generally request data and other information on costs and benefits from or relating to: (1) Broker-dealers that converted fee-based brokerage accounts to advisory accounts as a result of *FPA;* (2) firms that independently determined to convert retail brokerage accounts to advisory accounts outside of the context of *FPA;* and (3) retail customers whose accounts were converted under either of these scenarios.[72] We also request certain data and other information on costs and benefits from firms and retail customers who did not convert brokerage to advisory accounts as a result of the *FPA* decision. In addition to the specific requests below, when providing this data and other information, we request commenters' responses be made, where possible, in compliance with the guidelines set forth in the Appendix, and also request commenters provide background information and documentation to support any economic analysis. We request commenters separate, if possible, all data and other information (including associated retail customer demographic information on the accounts) based on whether the account conversions resulted from *FPA* or whether the account conversions were voluntary.

1. Provide data and other information describing whether account conversions were in response to *FPA,* or to an independent determination by firms or

[70] *Financial Planning Association* v. *SEC,* 482 F.3d 481 (DC Cir. 2007). The court vacated Rule 202(a)(11)–1 under the Advisers Act which excepted broker-dealers from being classified as investment advisers based solely on their receipt of asset-based fees and in effect, exempted broker-dealers that offered these fee-based accounts from regulation as investment advisers.

[71] *Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 2653 at 4 (Sept. 24, 2007).

[72] We reiterate that the uniform fiduciary standard of conduct would not prohibit the receipt of commissions, or require conversion of accounts from brokerage to advisory.

retail customers. If the latter, provide data and other information describing factors contributing to the conversion of brokerage accounts to advisory accounts. Also provide data and other information about administrative costs and customer notifications arising from the transition from brokerage accounts to advisory accounts.

2. Provide data and other information describing retail customer accounts transitioning from brokerage accounts to advisory accounts including the amount of assets and securities held. Also, provide data and other information describing factors contributing to retail customers' decisions to convert to advisory accounts, including perceived costs and benefits of brokerage accounts and advisory accounts. If possible, associate retail customer demographic information with account descriptions.

3. Provide data and other information describing the factors contributing to broker-dealers' decision not to offer fee-based accounts, which would be advisory accounts, in response to *FPA.* In addition, provide data and other information describing retail customer accounts that were not transitioned from a brokerage account to an advisory account in response to *FPA* when the firm provided the customer the opportunity to transition, including the amount of assets and securities held. Also, provide data and other information describing factors contributing to retail customers' decisions not to convert to advisory accounts, including perceived costs and benefits of brokerage accounts and advisory accounts. If possible, associate retail customer demographic information with account descriptions.

4. Provide data and other information describing the impact of the account conversion on the types of services and securities dual registrants offer to retail customers transitioning from brokerage accounts to advisory accounts. Did the application of the Advisers Act require a firm, or give a firm an incentive, to modify or eliminate then-current business practices? Provide data and other information describing why the business practices were so modified or eliminated. Indicate whether business practices are transaction-specific, account-specific, customer specific, or firm-wide, and differentiate by retail customer demographic and account information.

5. Provide data and other information describing changes, if any, in the benefits and costs of providing services to retail customers transitioning from brokerage accounts to advisory accounts. Did retail customers transitioning accounts experience a change in costs? If possible, separate costs by service type, and differentiate by retail customer demographic and account information.

6. Provide data and other information describing changes, if any, to the security selections of dual registrants and the types of securities held by retail customers transitioning from brokerage accounts to advisory accounts. Also provide quantitative data and other information describing changes, if any, to the security returns (net and gross of fees) of retail customers transitioning accounts. If security returns are not available, describe total account returns, including changes in account value and the amount of account inflows/outflows. If possible, identify whether initial security ownership took place before the account transition and whether account selections were solicited or unsolicited, and differentiate by retail customer demographic and account information.

7. Provide data and other information describing changes, if any, to the ability of retail customers that transitioned from brokerage to advisory accounts to bring claims against their financial professional with a particular focus on dollar costs to the retail customer and the results when claims are brought. We especially welcome the input of persons who have arbitrated, litigated, or mediated claims (as a retail customer, broker-dealer or investment adviser), their counsel, and any persons who presided over such actions. In particular, describe changes for claims brought against broker-dealers and investment advisers with respect to each of the following:

a. the experience of retail customers, in general, between bringing a claim against a broker-dealer as compared to bringing a claim against an investment adviser;

b. any legal or practical barriers to retail customers bringing claims against broker-dealers or investment advisers;

c. the disposition of claims;

d. the amount of awards;

e. costs related to the claim forum, as it affects retail customers, firms, and associated persons of such firms;

f. time to resolution of claims;

g. the types of claims brought against broker-dealers (we welcome examples of mediation, arbitration and litigation claims);

h. the types of claims brought against investment advisers (we welcome examples of mediation, arbitration and litigation claims);

i. the nature of claims brought against broker-dealers as compared to the nature of claims brought against investment advisers (*e.g.,* breach of fiduciary duty, suitability, breach of contract, tort); and

j. the types of defenses raised by broker-dealers and investment advisers under each regime.

If possible, differentiate by retail customer demographic and account information.

8. Provide data and other information describing changes, if any, to the experiences of retail customers that were transitioned from brokerage to advisory accounts. Among other things, did retail customer satisfaction with their account change? If possible, control for retail customer demographic and account information.

9. Provide other data and other information describing the benefits and costs, if any, of transitioning retail customer brokerage accounts to advisory accounts. If possible, differentiate by retail customer demographic and account information. Also, provide data and other information describing the benefits and costs to firms or retail customers from the regulations prior to account conversion. Lastly, provide explanations describing why responses to particular questions are not possible.

IV. Request for Data and Other Information Relating to Potential Areas for Further Regulatory Harmonization

We seek data and other information on the nature and extent to which we should consider harmonizing the regulatory obligations of broker-dealers and investment advisers other than their standard of conduct. As stated above, in the Study the staff recommended that the Commission consider harmonizing certain regulatory requirements of broker-dealers and investment advisers where such harmonization appears likely to add meaningful investor protection, taking into account the best elements of each regime. We request that commenters, in particular, provide such data and other information regarding harmonizing some or all such obligations in situations where a broker-dealer and an investment adviser perform the same or substantially similar function, such as the provision of personalized investment advice about securities to retail customers where harmonization is consistent with the mission of the Commission.[73] We also are mindful that we should consider changes to the standard of conduct of broker-dealers and investment advisers within the context of the overall set of regulatory obligations that apply to those firms and the potential costs and benefits that may be associated with such changes. The extent to which the

[73] *See* Study at 129–139.

standard of conduct changes, for example, could result in certain other regulatory requirements no longer being workable in practice, or becoming unnecessarily duplicative of current requirements in whole or in part. Similarly, if we were to adopt a uniform fiduciary standard of conduct for broker-dealers and investment advisers, we should consider whether regulatory obligations that apply today to only one registrant class or the other would meaningfully enhance investor protections if applied uniformly to both.

In the Study, the areas the staff suggested the Commission consider for harmonization included advertising and other communications, supervision, licensing and registration of firms, licensing and continuing education requirements for persons associated with firms, books and records, and the use of finders and solicitors. The staff stated that this listing was not intended to be a comprehensive or exclusive listing of potential areas of harmonization.

We seek data and other information on these areas of potential harmonization, including with respect to the advantages and disadvantages of engaging in such harmonization. As we explained in Part I.B above, many of the areas the staff identified for potential harmonization are more specific than a uniform fiduciary standard of conduct. Accordingly, we do not provide an extensive discussion of the various options available for considering regulatory harmonization, which could generally include:

- Applying certain broker-dealer obligations to investment advisers, or vice versa;
- Eliminating certain obligations that apply to broker-dealers but not investment advisers, or vice versa;
- Creating new obligations that would apply to both broker-dealers and investment advisers; or
- Taking no further action at this time with respect to regulatory harmonization.

As discussed above, we believe that a broad consideration of harmonization of regulatory obligations is important in helping us assess whether and to what extent we should consider making adjustments to the other regulatory obligations of broker-dealers and investment advisers. We invite commenters to provide us with their views on the benefits and costs for different approaches for potential harmonization. For example, we request comment on the extent to which regulatory harmonization might address customer confusion about the obligations owed to them by broker-dealers and not investment advisers (or by investment advisers and not broker-dealers) even if a uniform fiduciary standard of conduct is implemented. We also request comment on the extent to which regulatory harmonization might result in additional investor confusion or otherwise negatively impact investors.

A. Potential Areas for Harmonization

In the Study, the staff recommended that the Commission consider whether to pursue various options for harmonizing investment adviser and broker-dealer regulation. As a preliminary matter, and in order to continue to evaluate the potential impact of harmonization, we are requesting data and other information on the potential harmonization of the non-exhaustive areas set forth below. These specific areas of potential harmonization largely reflect the areas of harmonization recommended by the staff in the Study. The staff's recommendations generally focused on adopting the existing elements of each regulatory regime that the staff believed are most effective in protecting retail customers, and the discussion below largely reflects these recommendations. We request comment on which of these areas, if any, the Commission should consider for harmonization, what harmonization in such areas should entail in practice, and the benefits and costs associated with such harmonization, including the extent to which such harmonization would increase or reduce retail customer confusion about the regulatory obligations of broker-dealer and investment advisers. We may consider harmonization of other areas not addressed below. Accordingly, we request comment on which areas, if any, the Commission should consider for harmonization, and what such harmonization should entail.

The identification of these areas below and the description of how harmonization may be accomplished are not intended to suggest a policy view of the Commission or the ultimate direction of any proposed action by the Commission. Indeed, the description of each area of potential harmonization below is but one example of many ways in which the Commission may harmonize regulation, should the Commission determine such harmonization is appropriate. We are cognizant that the Commission may decide not to pursue harmonization, may pursue harmonization in different areas, or pursue a different approach to harmonization in the areas identified by the Study, and we seek comment on such areas and approaches, including the associated benefits and costs.

We also seek comment as to whether harmonization in each area identified below or by a commenter as appropriate for such action should involve changing the existing standards of one regime to accomplish harmonization, or whether an entirely different requirement should be adopted for both investment advisers and broker-dealers.

We request data and other information, including whether meaningful investor protection would be enhanced, on the following potential areas of harmonization where existing investment adviser and broker-dealer obligations differ: [74]

1. *Advertising and Other Communications:* Advertising and other firm communications can have a significant impact on retail customers, as they can persuade customers to enter into relationships or engage in transactions. As noted in the Study, both investment advisers and broker-dealers are subject to general prohibitions on misleading communications, but specific content restrictions differ. The Study concludes that a significant difference between investment adviser and broker-dealer regulation regarding advertisements and other communications is that, under certain circumstances, a registered principal of the broker-dealer must approve a communication before distributing it to the public, and certain communications must be filed for review with the applicable regulatory body.[75]

While the Advisers Act does not specifically prescribe that a communication must be approved before distribution to the public, the Commission has stated that an adviser's compliance policies and procedures, at a minimum, should address, among others, the accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements.[76] We request data and

[74] For more information about the potential harmonization areas, see Study at 129–139.

[75] For the staff's discussion regarding potential harmonization of requirements related to advertising and other communications, see Study at 130–132.

[76] *See Compliance Programs of Investment Advisers and Investment Companies,* Investment Advisers Act Release No. 2204 (Dec. 17, 2003) (adopting Advisers Act Rule 206(4)–7) (''Compliance Rule'') (stating that ''[w]e expect that an adviser's policies and procedures, at a minimum, should address the following issues to the extent that they are relevant to that adviser: [* * *] [t]he accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements; [* * * and] [m]arketing advisory services, including the use of solicitors * * *''). For

other information on the enhancement to meaningful investor protection as well as the benefits and costs of harmonizing requirements relating to:

a. Advertisements and other customer communications, generally.

b. Developing similar substantive advertising and customer communications rules and/or guidance for broker-dealers and investment advisers regarding the content of advertisements and other customer communications for similar services? Please identify any particular rules that could be applied to both broker-dealers and investment advisers, and any rules that would not be appropriate to apply to both. If a particular rule would not be appropriate for both, why not?

c. Establishing consistent internal pre-use review requirements for investment adviser and broker-dealer advertisements, such as by requiring investment advisers to designate employees to review and approve communications and advertisements?

d. Imposing consistent pre- and post-use filing requirements for similar investment adviser and broker-dealer advertisements?

2. *Use of Finders and Solicitors:* The term ''finder'' is generally understood (for purposes of broker-dealer regulation) to mean an intermediary who receives a fee for ''finding'' potential investors for issuers seeking to sell securities. Similarly, a ''solicitor' is an intermediary used by advisers to ''solicit'' clients and prospective clients for advisory services. Intermediaries who ''find'' investors can have a significant impact on retail customers, as they can persuade investors to enter into relationships or engage in transactions. The regulation of these intermediaries differs. One who receives transaction-based compensation in connection with the sale of securities, including a finder, must register as a broker-dealer unless an exemption from registration is available. By contrast, while solicitors may fall within the definition of ''investment adviser'' under the Advisers Act, the Commission has taken the position that a solicitor who engages in solicitation activities in accordance with Rule 206(4)–3(a)(2)(iii) is an associated person of an investment adviser and is not required to register with the Commission as an investment adviser solely as a result of those activities.[77] An investment adviser that uses a solicitor's services must treat the solicitor as an associated person to the extent the solicitor acts as such for the adviser, and the adviser has a responsibility to supervise the solicitation activities.[78] In addition, the Advisers Act regulation focuses on disclosure to clients of the solicitor's material conflicts of interest.[79] We request data and other information on the enhancement to meaningful investor protection as well as the benefits and costs of harmonizing requirements relating to:

a. Harmonizing the existing regulatory requirements applicable to finders and solicitors, generally.

b. Establishing similar disclosure requirements regarding any conflict associated with the solicitor's and finder's receipt of compensation for referring a retail customer to an investment adviser or broker-dealer?

3. *Supervision:* Effective supervisory systems and control procedures are important investor protection tools, as they can help firms identify and prevent abusive practices. As the Study notes, while both broker-dealers and investment advisers are required to supervise persons that act on their behalf, broker-dealers are subject to more specific supervisory requirements, including rules that expressly require broker-dealers to, among other things, establish a supervisory system, conduct periodic inspections of branch offices and supervise outside business activities and private securities transactions of associated persons.[80] As discussed above, investment advisers are also required to adopt compliance policies and procedures, which generally would include policies and procedures for the supervision of persons associated with an adviser.[81] Further, the Advisers Act code of ethics rules (Advisers Act Rule 204A–1) specifically requires, among other things, that an investment adviser pre-approve acquisitions of securities in any initial public offerings or in limited offerings by certain of its investment advisory personnel. Investment advisers are also required to disclose to clients certain material outside business activities of their supervised persons.[82] We request data and other information on the enhancement to meaningful investor protection as well as the benefits and costs of harmonizing requirements relating to:

a. Harmonizing supervisory requirements of investment advisers and broker-dealers, generally.

b. Establishing a single set of universally applicable requirements versus scaling requirements based on the size (*e.g.,* number of employees or a different metric) and nature of a broker-dealer or an investment adviser? Please identify any particular requirements that should apply to both broker-dealers and investment advisers, and any requirements that should not apply to both, and why or why not. If requirements were scaled, what would be appropriate metrics and thresholds?[83]

4. *Licensing and Registration of Firms:* Broker-dealers and investment advisers register with the Commission and/or states using forms that are similar but separate. In addition, broker-dealers must, prior to commencing business, satisfy FINRA's membership application process, which aims to fully evaluate relevant aspects of applicants and to identify potential weaknesses in their internal systems, thereby helping to ensure that successful applicants would be capable of conducting their business in compliance with applicable regulation. Investment advisers are not subject to this type of review by the Commission. As stated in the Study, substantive review of investment adviser applications could improve investor protection as it could help prevent firms that are unprepared to engage in the advisory business or to meet the obligations they will be assuming under the federal securities laws from entering the advisory business. We request data and other information on the enhancement to meaningful investor protection as well as the benefits and costs of harmonizing requirements relating to:

this purpose, the Advisers Act requires an adviser to designate a chief compliance officer (''CCO''). The Commission has stated in the Compliance Rule that the CCO should be knowledgeable about the Advisers Act and have the authority to develop and enforce appropriate compliance policies and procedures for the adviser.

[77] *Requirements Governing Payments of Cash Referral Fees by Investment Advisers,* Investment Advisers Act Release No. 688 (July 12, 1979).

[78] *Id.* An investment adviser's supervision obligations are discussed below.

[79] For the staff's discussion regarding potential harmonization of requirements related to the use of finders and solicitors, see Study at 132–133.

[80] Existing broker-dealer supervisory obligations generally require firms to, among other things, establish and maintain a supervisory system for their business activities and to supervise the activities of their registered representatives, principals and other associated persons for purposes of achieving compliance with applicable securities regulations, including the rules relating to principal trades. *See* NASD Rule 3010. Moreover, broker-dealers are required to ''establish procedures for the review and endorsement by a registered principal in writing * * * of all transactions * * * of its registered representatives with the public relating to the investment banking or securities business of such member.'' NASD Rule 3010(d)(1).

[81] *See supra* note 77.

[82] *See* Part 2A of Form ADV.

[83] For the staff's discussion regarding potential harmonization of requirements related to supervision, see Study at 135–136.

a. Harmonizing the licensing and registration requirements applicable to firms, generally.

b. Harmonizing the disclosure requirements in Form ADV and Form BD to the extent they address similar issues.

c. Imposing a substantive review of investment advisers prior to registration similar to, or distinct from, the review applicable to broker-dealers.[84]

5. *Continuing Education Requirements for Persons Associated with Broker-Dealers and Investment Advisers:* Associated persons of broker-dealers are required to fulfill continuing education requirements. No such requirement exists for investment adviser personnel at the federal level, who instead must disclose to clients their education and business background. As noted in the Study, continuing education can help to further a regulatory goal that investors are served by professionals that are knowledgeable in current industry trends, practices and regulations.[85] We request data and other information on the enhancement to meaningful investor protection as well as the benefits and costs of harmonizing requirements relating to:

a. Harmonizing the continuing education requirements applicable to the associated persons of investment advisers and broker-dealers, generally.

b. Requiring associated persons of investment advisers to be subject to federal qualification examinations and continuing education requirements?

6. *Books and Records:* Books and records are important for firms to facilitate effective supervision and compliance, and for regulators to access information and verify the entity's compliance with applicable requirements. Broker-dealers are required to retain all communications received and sent, as well as all written agreements (or copies thereof), relating to a firm's ''business as such,'' [86] whereas advisers are required to retain a more limited set of records falling into specific enumerated categories. As noted in the Study, ''[t]hese differences limit the effectiveness of internal supervision and compliance structures and the ability of regulators to access information and verify the entity's compliance with applicable requirements.'' [87] We request data and other information on the enhancement to meaningful investor protection as well as the benefits and costs of harmonizing requirements relating to:

a. Harmonizing the recordkeeping requirements applicable to investment advisers and broker-dealers, generally.

b. Applying the ''business as such'' record retention standard to investment advisers?

7. *Other Potential Areas for Harmonization:* We request information and comment on whether there are other potential areas of harmonization where the nature of existing investment adviser and broker-dealer obligations differ and investor protection would be meaningfully enhanced. In particular, we request data and other information on the enhancement to meaningful investor protection as well as the benefits and costs of harmonizing requirements relating to:

a. Harmonizing a set of business conduct rules for both broker-dealers and investment advisers, where relevant to investment advisers' businesses.

b. Harmonizing other requirements for broker-dealers and investment advisers.

c. Establishing a single set of universally applicable requirements versus scaling requirements based on the size (*e.g.,* number of employees or a different metric) and nature of a broker-dealer or an investment adviser.

For each other potential area of harmonization addressed, please identify any particular requirements that should apply to both broker-dealers and investment advisers, and any requirements that should not apply to both, and why or why not.

B. Request for Data and Other Information Relating to Changes in the Marketplace for Personalized Investment Advice Resulting from Harmonization

The Commission requests the following data and other information relating to changes in the marketplace for personalized investment advice about securities for retail customers as a result of implementing each area of harmonization described above. In providing such data and other information, we request commenters follow the Guidelines found in the Appendix to this request for data and other information including the request therein for background information.

1. Provide data and other information on the benefits and costs to firms and retail customers, including synergies (*i.e.,* enhanced cost efficiencies for firms), specific examples of effects on investor protection, and potential barriers to entry (*i.e.,* cost prohibitions), which would result from harmonization of each of the areas identified above.

2. Provide data and other information about alternative approaches to harmonization that the Commission should consider, including options for reducing costs on broker-dealers and investment advisers while increasing the effective protection of retail customers.

3. Provide data and other information describing the impact or potential impact the implementation of the uniform fiduciary standard of conduct, or any of the alternative approaches discussed in Part III of this request for data and other information, would have on the benefits and costs to firms and to retail customers of each area of harmonization. Indicate, for example, whether harmonization of a particular area of regulation would impact the costs or benefits associated with complying with the uniform fiduciary standard and each of the alternative approaches discussed above. Also provide comment and data on whether the harmonization of one or more of the areas described above has any impact (*i.e.,* whether it enhances, detracts, or has no impact) on the implementation of the uniform fiduciary standard of conduct or any of the other approaches described in Part III of this request for data and other information.

4. For dual registrants, provide data and other information on any cost savings and potential retail customer benefit of having a consistent set of standards.

5. Provide data and other information describing the extent to which harmonization would increase or reduce retail customers' confusion about the regulatory status of the person from whom they receive financial services (*i.e.,* whether the party is a broker-dealer or an investment adviser) and provide information describing why. Provide data and other information describing the extent to which harmonization would increase or reduce retail customers' confusion about the types of obligations owed to them and provide information describing why.

By the Commission.

Dated: March 1, 2013.

Elizabeth M. Murphy,

Secretary.

APPENDIX: Suggested Submission Guidelines for Comments

This Appendix outlines the background and particular data and other information we request commenters to provide and the general guidelines we request commenters to follow when submitting data and other

[84] For the staff's discussion regarding potential harmonization of requirements related to licensing and registration of firms, see Study at 136–137.

[85] For the staff's discussion regarding potential harmonization of requirements related to continuing education requirements, see Study at 138.

[86] *See* Exchange Act Rules 17a–4(b)(4) and (b)(7); 17 CFR 240.17a–4(b)(4) and (b)(7).

[87] *See* Study at 139.

information. While we are particularly interested in receiving data and other information that is empirical and quantitative in nature, we welcome and encourage all interested parties to submit their comments, including qualitative and descriptive analysis of the benefits and costs of potential approaches and guidance. We ask that commenters provide only data and other information that they wish to make publicly available, and that commenters who may be concerned about making proprietary or other highly sensitive data and other information public may wish to pool their data with that of others (*e.g.,* through a trade association, law firm, consulting firm or other group) and submit aggregated data in response to this request for data and other information. While we request commenters to provide enough data and other information to allow the Commission to replicate findings, commenters should remove any personally identifiable information (*e.g.,* of their customers) before submitting data and other information in response to this request.[88] Commenters can submit data and other information using a sample of retail customers. We ask commenters to sample in a manner which is independent of retail customer characteristics, and to describe the sampling methodology including sample identification, data collection, and any other important factor in sample construction. Also, if possible, provide a description of the population of retail customers not included in the sample. We also ask commenters to provide a variable to allow the Commission to distinguish among accounts. The variable should not incorporate personally identifiable information, and can be as simple as a random number.

We ask commenters to provide a cover letter when submitting data files to the Commission. As part of the cover letter, we ask commenters to include documentation describing each field in the data files including the units of measurement (*e.g.,* percent, thousands, thousands of dollars, millions, millions of dollars), variable name, general and specific formats (*e.g.,* number, character, date, length of character field, format of date), and value if missing (*e.g.,* ''.'' or '' ''). Other important documentation includes an overall description of the dataset, the source of the information, and the time period of observations. We ask commenters to send the data on a physical storage medium such as a CD ROM or DVD, either in plain text or comma-separated values (csv) files. We also ask commenters to clearly label the physical storage medium, providing commenter name, date, and a short description of the data files. Commenters can submit more than one dataset if, for instance, the data is available on different systems or in different locations. In this case, we ask commenters to provide a variable in each dataset that links account information and that allows the Commission to distinguish among accounts. We also ask commenters to submit only one copy of the data files.

[88] *See supra* note 23.

A. Commenter Identification and Background

We request commenters to provide background information to add context to submissions and improve our understanding of the current marketplace:

1. Indicate your status (or the status of your organization if you are writing on behalf of an organization), as applicable, as a Commission-registered broker-dealer, Commission-registered investment adviser, associated person of a Commission-registered broker dealer or Commission-registered investment adviser, dually registered entity or individual, retail customer, or other (if other, please describe).

2. If you are (or are writing on behalf of) a broker-dealer, investment adviser, or dually registered investment adviser/broker-dealer, or associated person thereof, describe the firm's business, including number and type of business segments, sources and total amount of firm revenue, and the proportion of firm revenue attributable to retail customers.

3. If you are (or are writing on behalf of) a broker-dealer, investment adviser, or dually registered investment adviser/broker-dealer, describe the retail customer segment of the firm's business, including the number and type of accounts (brokerage or advisory), total asset value within each account type, and the proportion of retail customers to whom the firm provides personalized investment advice. If the firm is dually registered, also indicate the proportion of accounts (based on the number of accounts and total assets under management) that are advisory accounts and the proportion that are brokerage accounts, and of the advisory accounts, the proportion that are non-discretionary accounts. Also, if the firm is dually registered, indicate the proportion of retail customer advisory accounts and the proportion of brokerage accounts receiving personalized investment advice.

B. Requests for Specific Characteristic Information

We ask commenters to provide the following specific characteristics when providing data and other information describing retail customer demographics and accounts; broker-dealer or investment adviser services offered; securities; and the claims of retail customers in dispute resolution:

1. Retail customer demographic information—age, wealth, income, education, and risk profile.

2. Retail customer account information—general type (brokerage or advisory), specific type (*e.g.,* clearing, execution-only, full-service), amount of assets held, compensation arrangement (*e.g.,* fees, commissions) and amount, investment strategy, the date of account opening, and the state in which the account is held.

3. Broker-dealer or investment adviser services offered—type (*e.g.,* include trade execution; product, transaction, and asset allocation recommendations; and provision of customer-specific research and analysis).

4. Securities—type (*e.g.,* stocks, bonds, funds, options, structured products), CUSIP number or other standard identifier, investment rating (if any), and date of initial retail customer ownership.

5. Security Positions—long or short position, number of shares/units held, position value, and the currency of valuation.

6. Retail customer claims evidence—nature of claim, forum for claim, time to resolution, and outcome.

If providing aggregate data and other information, we ask that commenters fully describe the sample population, including the number of retail customers and total assets under management, retail customer demographics, account characteristics, and security characteristics.

C. Submission Guidelines for Economic Analysis

The market for personalized investment advice is difficult to analyze because of the number of factors that empirical tests must address in order to achieve definitive conclusions. While some reports and studies address the market for personalized investment advice, the difficulty to control for certain factors and/or insufficient documentation of the empirical sample and methodology results in interpretive difficulties. When submitting qualitative and quantitative economic analysis, we request commenters adhere to the following guidelines:

1. The analysis should focus on non-discretionary retail customer brokerage and advisory accounts. To the extent the analysis focuses on institutional investor accounts or discretionary accounts, if possible please specify this.

2. Identify and discuss all underlying assumptions, including actions that may be taken in response to a change in regulation. If providing quantitative analysis also clearly articulate empirical methodologies leading to analytical conclusions and provide tests statistics to validate claims. Isolate the additional benefits and costs from any additional assumptions made. If providing qualitative economic analysis also identify and discuss all supporting evidence.

3. Identify and distinguish initial benefits and costs (including those associated with transitioning from existing standards to potential new standards of conduct), and on-going benefits and costs. Also identify whether certain benefits and costs may decrease or increase over time. Indicate whether benefits and costs are transaction-specific, account-specific, business segment specific, or firm-wide. If possible, separate the benefits from the costs and isolate by activity and by account type. When describing transition costs, describe and explain any relevant actions that may be taken in response to a change in regulation, including possible ways to mitigate costs or increase benefits.

4. Describe the sample population, including the number of retail customers and total assets under management, retail customer demographics, and account characteristics. And, if possible, provide a description of the population of retail customers not included in the sample.

5. Submit data that would allow the Commission to replicate findings.

6. Identify which requested quantitative data, if any, is not possible, or would be

prohibitively costly, to provide, and explain why.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69017; File No. SR–CME–2013–01]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Regarding an Increase of CME Corporate Contribution to Interest Rate Swaps Financial Safeguards Package

March 1, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 1, 2013, Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which Items have been prepared primarily by CME. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CME proposes to amend rules related to its business as a derivatives clearing organization offering interest rate swap (''IRS'') clearing services. More specifically, CME proposes to increase CME's corporate contribution to the financial safeguards for IRS to $150,000,000.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME included statements concerning the purpose of, and statutory basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. CME has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4 .

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

CME is registered as a derivatives clearing organization with the Commodity Futures Trading Commission (''CFTC'') and currently offers clearing services for IRS. With this filing, CME proposes to increase CME's corporate contribution to the financial safeguards for IRS to $150,000,000. CME proposes to implement such amendments on March 1, 2013.

CME periodically assesses the structure of its financial safeguards packages. In assessing the financial safeguards available for IRS products, CME determined that an increase to the CME corporate contribution is appropriate. An amendment to CME Rule 8G802.B.1 is proposed which would reflect the increase in such contribution and an amendment to Rule 8G802.H is proposed which would reflect a conforming change to the CME contribution during an IRS Cooling Off Period.

CME notes that it has also submitted the proposed rule change that is the subject of this filing to its primary regulator, the CFTC, in CME Submission 13–045.

CME believes the proposed rule change is consistent with the requirements of the Act, including Section 17A of the Act. The proposed rule change involves improvements to CME's IRS product offering for investors because it increases the amount of financial resources available to support the default of an IRS Clearing member at CME and as such is designed to promote the prompt and accurate clearance and settlement of securities transactions and derivatives agreements, contracts and transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency and, in general, help to protect investors and the public interest. Furthermore, the proposed rule change is limited to the clearing of IRS (that is, swaps) and thus relate solely to the CME's swaps clearing activities pursuant to its registration as a derivatives clearing organization under the Commodity Exchange Act (''CEA'') and do not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service.

CME further notes that the policies of the CEA with respect to clearing are comparable to a number of the policies underlying the Exchange Act, such as promoting market transparency for over-the-counter derivatives markets, promoting the prompt and accurate clearance of transactions and protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has not solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CME–2013–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CME–2013–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and