



December 16, 2010

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Study on Enhancing Investment Adviser Examinations Under Section 914 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, File No. DF Title IX—Enhancing IA Examinations

Dear Ms. Murphy:

The Financial Planning Coalition (Coalition) thanks the Securities and Exchange Commission (Commission) for the opportunity to comment on the study mandated by Section 914 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).¹ The members of the Coalition are Certified Financial Planner Board of Standards, Inc. (CFP Board), the Financial Planning Association[®] (FPA[®]), and the National Association of Personal Financial Advisors (NAPFA).² The Coalition represents over 75,000 financial planners throughout the United States.

Section 914 of the Dodd-Frank Act requires the Commission to study “the need for enhanced examination and enforcement resources for investment advisers,” including “the extent to which having Congress authorize the Commission to designate one or more self-regulatory organizations to augment

¹ Pub. L. 111-203, 124 Stat. 1376 (2010).

² CFP Board is a non-profit organization that acts in the public interest by fostering professional standards in personal financial planning through setting and enforcing education, examination, experience, and ethics standards for financial planner professionals who hold the CFP[®] certification. CFP Board’s mission is to benefit the public by granting the CFP[®] certification and upholding it as the recognized standard of excellence for personal financial planning. CFP Board currently regulates over 62,000 CFP[®] professionals who agree, on a voluntary basis, to comply with our competency and ethical standards and subject themselves to the disciplinary oversight of CFP Board under a fiduciary standard of care. For more information on CFP Board, visit www.cfp.net.

FPA[®] is the leadership and advocacy organization connecting those who provide, support, and benefit from professional financial planning. FPA demonstrates and supports a professional commitment to education and a client-centered financial planning process. Based in Denver, Colo., FPA has close to 100 chapters throughout the country representing more than 24,000 members involved in all facets of providing financial planning services. Working in alliance with academic leaders, legislative and regulatory bodies, financial services firms, and consumer interest organizations, FPA is the community that fosters the value of financial planning and advances the financial planning profession. For more information on FPA[®], visit www.fpanet.org.

Since 1983, NAPFA has provided fee-only financial planners across the country with some of the strictest guidelines possible for professional competency, comprehensive financial planning, and fee-only compensation. With more than 2,200 members across the country, NAPFA has become the leading professional association in the United States dedicated to the advancement of fee-only comprehensive financial planning. For more information on NAPFA, visit www.napfa.org.

the Commission's efforts in overseeing investment advisers would improve the frequency of examinations of investment advisers."³ We do not believe that regulation of Commission-registered investment advisers should be turned over to a self-regulatory organization (SRO). The Commission has overseen the activities of investment advisers over the past seventy years, and the Dodd-Frank Act includes a number of provisions to increase the Commission's ability to do so going forward. We urge the Commission to determine it can adequately regulate investment advisers without delegating such responsibility to an SRO, especially the Financial Industry Regulatory Authority (FINRA). Limited resources are most efficiently put to use by dedicating them to an existing infrastructure, rather than investing a significant portion in building a new infrastructure, as would be needed for an SRO for investment advisers. We believe the Commission remains the best and most appropriate primary regulator for federally registered investment advisers.

I. The Dodd-Frank Act Provides the Commission with Adequate Resources to Regulate Investment Advisers

In the past several years, the Commission has not had the resources to examine Commission-registered investment advisers as often as is desirable. Currently, the Commission oversees 11,500 investment advisers and 7,800 mutual funds with approximately 460 examiners and accountants.⁴ The Coalition believes that provisions of the Dodd-Frank Act place the Commission in a better position today to enforce the Investment Advisers Act of 1940 (Advisers Act), and its rules and regulations thereunder, and to inspect and examine investment advisers registered with the Commission. The increase in the threshold for state-registered investment adviser jurisdiction from \$25 million to \$100 million in assets under management will decrease the number of Commission-registered investment advisers, and should significantly reduce the Commission's oversight burden, as approximately 4,000 investment advisers will move from Commission to state oversight. Moreover, the budget and staffing increases that the Commission has already received as a result of the financial crisis, and which the Commission has requested going forward, should allow the frequency of its investment adviser examinations to increase substantially.⁵ The Commission has sent Congress a justification report for FY 2011 requesting an increase to its overall budget from that for FY 2010.⁶ In particular, the Commission asked for an increase of 100 positions in the Office of Compliance, Inspections and Examinations (OCIE), its examination unit, "to significantly expand and enhance its oversight of registered advisers."⁷ Additionally, Section 991 of the Dodd-Frank Act allows the Commission to submit budget requests directly to Congress if it believes it needs additional resources.⁸ The Commission should assess its resource needs and request more from Congress if the Commission believes the current funding is insufficient.

³ 124 Stat. at 1830.

⁴ SECURITIES AND EXCHANGE COMMISSION, FY 2011 CONGRESSIONAL JUSTIFICATION IN BRIEF 5 (Feb. 2010), *available at* <http://www.sec.gov/about/secfy11congbudjust.pdf> [hereinafter SEC FY 2011 CONGRESSIONAL JUSTIFICATION].

⁵ The President's budget proposal for FY 2011 increases the Commission's budget by 12% (on top of a significant budget increase in FY 2010), which should provide the Commission with substantial additional staff resources for increasing investment adviser examinations.

⁶ SEC FY 2011 CONGRESSIONAL JUSTIFICATION, *supra* note 4.

⁷ *Id.* at 46.

⁸ Although the Coalition supported the Commission's request for self-funding authority, unfortunately this provision was not included in the final version of the Dodd-Frank Act.

The Coalition strongly urges the Commission to seek, and Congress to provide the Commission with, all the resources it needs to enhance its current direct oversight of Commission-registered investment advisers. We urge the Commission to dedicate those resources to invigorate a robust and effective examination and enforcement program for those investment advisers.

II. The Commission Is the Appropriate Regulator for Investment Advisers

Commission regulation of investment advisers has generally been effective at protecting investors over the past seventy years. Compared to the broker-dealer community, the investment adviser area has had relatively few problems.⁹ There is no reason for the Commission to change a policy of direct federal regulation that generally has been effective for such an extended period of time.

Because the Commission has been the sole federal regulator of investment advisers, it has a substantial, professional, and experienced staff of investment adviser examiners already in place. These examiners are located in every one of the Commission's regional offices as well as its headquarters. This examination staff already works closely with the Commission's Division of Investment Management, which has primary responsibility for issuing regulations concerning investment advisers, and the Commission's Division of Enforcement, which has a dedicated asset management unit that focuses on investigations of investment advisers. The fact that all three groups are located within the Commission makes each of them more effective than if the examination function were moved to a separate organization.

We believe it would be much quicker and more efficient to leverage the Commission's existing investment adviser examination staff, which is already fully conversant with all of the legal and regulatory issues that pertain to investment advisers, than to create an entirely new SRO from scratch to oversee investment advisers. The Commission can provide for increased examinations by hiring new examiners in the investment adviser area, which can be trained by existing experts on the Commission staff.¹⁰ The expansion of the Commission's existing investment adviser examination staff could start immediately. By contrast, an SRO could not be created until after a lengthy legislative process, which (especially in the current polarized political environment) could take a year or more, if it is successful at all. Even after that process, an SRO would have to obtain funding, lease offices, build information technology systems, appoint officers and senior staff, propose and adopt rules (which would be subject to Commission approval), create internal policies and procedures, and then hire an entire line-level staff.

III. The SRO Model Has Proven Problematic

While properly governed SROs have a place in the U.S. securities regulatory scheme,¹¹ we do not believe an SRO is the preferable approach for the oversight of investment advisers. Unlike broker-

⁹ There have been a number of repeated industry-wide scandals that have plagued the broker-dealer industry for at least the past twenty years (e.g., insider trading, penny stocks, limited partnerships, market-maker price-fixing, unsuitable mutual fund share classes, research conflicts of interest, auction rate securities, CDOs).

¹⁰ See *supra* note 7 and accompanying text.

¹¹ The Coalition does not oppose SROs as a general matter. During the legislative process on the Dodd-Frank bill, the Coalition advocated that Congress establish federal regulation of financial planners by allowing the Commission to recognize a financial planner oversight board that would set professional standards for, and oversee the activities of, individual financial planners. This oversight board is distinctly different from an SRO and more-closely aligned with a PCAOB model.

dealers, which have been regulated by SROs since the 1790s,¹² the investment adviser industry has been directly regulated by the Commission for more than seventy years. When the SEC recommended to Congress that it adopt what became the Advisers Act, it made a conscious and informed decision that an SRO model—which the SEC and Congress had relied on only the year before for over-the-counter broker-dealers—would not be as effective for investment advisers.¹³

Moreover, the effectiveness of the SRO model of regulation has been uneven at times: witness the conviction of NYSE President Richard Whitney for embezzlement in the 1930s;¹⁴ the collapse of regulation at the American Stock Exchange detailed in the Commission’s 1963 Special Study of the Securities Markets;¹⁵ the SROs’ failure to prevent the paperwork crisis of the late 1960s; Nasdaq’s failure to prevent price-fixing among market-makers¹⁶ and the collusion among the options exchanges to prevent multiple listing in the 1990s; the failure of the NYSE and regional exchanges to prevent off-floor trading by floor brokers¹⁷ and trading ahead by specialists¹⁸ early in this decade; and the failure by the NASD and Nasdaq to detect wash sales that benefitted those SROs in terms of market data revenues.¹⁹ These repeated problems, together with the conversion of many SROs to for-profit, shareholder-owned status, led the Commission to issue a Concept Release on SRO governance in 2004.²⁰ As the Commission recognized at that time, while SROs can be effective, they have inherent conflicts of interest that need to be addressed by carefully designed governance mechanisms. However, because of the press of other issues, the Commission has never been able to act on the issues in that Concept Release by adopting rules to address proper SRO governance and oversight. We suggest that the SEC should resolve the open issues concerning SRO governance and oversight before it applies the SRO model to an area in which it has never before been used.

Additionally, the proposal is designed to fill a gap and regulate an unregulated profession. Our leadership in this area culminated in Section 919C of the Dodd-Frank Act, which requires the Government Accountability Office to conduct a study on financial planners. *See* 124 Stat. at 1839–40. But we believe the existing SEC oversight of investment advisers generally has been effective, and the Commission should build on that oversight rather than attempting to shift it to an SRO.

¹² *See* Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. REV. 475, 480 (1984).

¹³ *See* John H. Walsh, *A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry*, 29 HOFSTRA L. REV. 1015, 1067 (2001) (citing SEC, Report on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services at 41 (1939), which stated that the advisory industry’s “voluntary efforts could not cope with the ‘most elemental and fundamental problem of the investment counsel industry—the investment counsel “fringe” which includes those incompetent and unethical individuals or organizations who represent themselves as bona fide investment counselors”).

¹⁴ *See* JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 156–79 (Aspen Pub. 3rd ed. 2003).

¹⁵ *See id.* at 281–86.

¹⁶ *See* In the Matter of National Association of Securities Dealers, Inc.; SEC Release No. 34-37538, August 8, 1996; Administrative Proceeding File No. 3-9056 (“21(a) Administrative Order”). *See also* Report and Appendix to Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and The Nasdaq Stock Market (August 8, 1996) and Exchange Act Release No. 37,538 (August 8, 1996) (“21(a) Report”). The undertakings were included in the SEC Order (“21(a) Report Undertakings”).

¹⁷ New York Stock Exchange, Inc., Exchange Act Release No. 41,574 (June 29, 1999).

¹⁸ New York Stock Exchange, Inc., Exchange Act Release No. 51,524 (Apr. 12, 2005).

¹⁹ *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 (“Exchange Act”) Regarding The Nasdaq Stock Market, Inc. (“Nasdaq”), as Overseen By Its Parent, The National Association of Securities Dealers, Inc. (“NASD”), Exchange Act Release No. 51,163 (Feb. 9, 2003).

²⁰ *See* Exchange Act Release No. 50,700 (Nov. 18, 2004).

Creating a new layer of bureaucracy and cost in order to improve the frequency of investment adviser examinations is not a wise use of limited regulatory resources. Aside from the additional infrastructure costs involved with creating an SRO oversight structure for investment advisers, outsourcing oversight could result in inconsistent or redundant regulation and enforcement (as both the SRO and the Commission interpret and enforce the relevant rules). Further, an SRO model would dilute accountability. Currently, depending on the size of the investment advisory firm, either state securities regulators or the SEC have the undivided responsibility for rulemaking, oversight, and enforcement for investment advisers. For the larger advisers, that means the Commission has exclusive jurisdiction and is accountable directly to the Congress (and thus to the general public). In contrast, an SRO is, to a significant extent, accountable to its members as well as the Commission. Efforts to insulate SROs from inappropriate influence from their members cannot fully counteract the fundamental conflict of interest in a membership organization.²¹

IV. FINRA Is Not the Appropriate Body to Oversee Investment Advisers

FINRA has suggested that it is capable of stepping in and taking responsibility for investment adviser oversight. The Coalition disagrees. We do not believe that outsourcing oversight to FINRA would benefit investors. FINRA is an SRO for broker-dealers, not investment advisers. It does not have any experience examining or enforcing the Advisers Act. More generally, FINRA does not have any experience interpreting and applying concepts of fiduciary duty, or enforcing a principles-based standard of care such as the one that applies to investment advisers. By contrast, FINRA's rules-based approach is designed for the oversight of salespeople, sales practices, products, and financial/operational concerns, and is focused on "market integrity." This regulatory approach and focus may be appropriate for the brokerage community, but is not as readily adaptable to investment advisers.

Moreover, we believe that giving FINRA the task of overseeing investment advisers would not result in any substantial savings of time. FINRA is still digesting NYSE Regulation and the SRO responsibilities that the regional and electronic exchanges have outsourced to it. Some three years after the NASD and NYSE Regulation merged their operations, FINRA is less than half-way through the process of harmonizing the NASD and NYSE rule books, with the most important rules yet to be addressed. FINRA will face substantial additional challenges in implementing the many new rules applicable to its core broker-dealer members under the Dodd-Frank Act. We believe it would be more effective to leverage the Commission's existing infrastructure for the examination of investment advisers than to attempt to create a new infrastructure at FINRA.²² NASAA, which represents the state regulatory

²¹ In contrast, the Coalition's proposed financial planner oversight board would not be a membership organization, which would limit potential conflicts of interest. *See supra* note 11.

²² The FINRA model is also very expensive, to the member firms and ultimately to investors. In 2008, FINRA collected about \$610 million in regulatory, assessment, and user fees from broker-dealers to run all its programs and expended more than \$788 million to run all programs. FINRA, 2008 ANNUAL REPORT, <http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p119061.pdf>. In its financial statements in the 2008 Annual Report, FINRA collected a little over \$157 million in user fees and over \$453 million in regulatory fees, which are fees to fund its regulatory activities, including the supervision and regulation of broker-dealers through examination, policy making, rulemaking, and enforcement activities. FINRA reported total expenses at \$965.4 million. Compare with FINRA's 2008 Form 990 Tax form available at <http://www.guidestar.org/FinDocuments/2008/521/959/2008-521959501-05858abb-90.pdf>. FINRA reported total revenues at over \$686 million and expenses at over \$788 million. These were the latest forms available to the public. These costs are ultimately borne by the investing public. If FINRA imposes a similar level of costs on investment advisers,

community, is on record as opposing the concept of granting FINRA authority over investment advisers.²³

To create an appropriately designed SRO for investment advisers, we believe FINRA would need to create a separately governed entity, with its own separate funding source, and separate governance input from the investment adviser community. Otherwise, there would be constant disputes about whether the broker-dealer funding sources were subsidizing the regulation of investment advisers, or vice-versa, and whether the organization as a whole was favoring one business model over another. The result would be the substantial infrastructure costs discussed above, with little synergy from FINRA's existing operations.

Should the Commission decide that investors would benefit from having an SRO examine and enforce rules for investment advisers, we strongly urge the Commission to consider how to establish the most effective model. We believe there are several distinct features the Commission should consider, including whether the oversight body should have as its exclusive mission the oversight of investment advisers, whether it should be statutorily required to have a Board of Directors comprised of a majority of public members, and whether it should be composed of a staff of investment advisory experts from industry and the public that would conduct examinations, investigations, and disciplinary proceedings. The Commission should also consider the extent to which the oversight body could benefit from the establishment of industry and public advisory groups that would provide input on its oversight functions. Finally, the oversight board should be self-funded through registration fees.

On balance, we believe the resources of taxpayers, investors, and the regulated community would be better utilized by enhancing the SEC's existing, experienced oversight function, not outsourcing the responsibility to an SRO to create an entirely new oversight structure.

* * *

we believe the inevitable result will be an increase in costs to investors, with a corresponding decrease in access for investors (especially middle income and beginning investors) to quality investment advice.

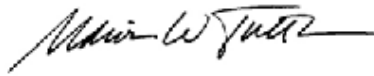
²³ Letter from David Massey, President, N. Am. Secs. Adm'rs Ass'n, N.C. Deputy Secs. Adm'r, to Elizabeth M. Murphy, Sec'y, Secs. and Exch. Comm'n (Nov. 22, 2010), <http://www.sec.gov/comments/df-title-ix/enhancing-ia-examinations/enhancingiaexaminations-20.pdf>.

We appreciate this opportunity to offer our views on the Commission's study under Section 914 of the Dodd-Frank Act. If you have any questions, please contact Marilyn Mohrman-Gillis, Managing Director, Public Policy and Communications, CFP Board, via telephone at (202) 379-2235 or via e-mail at mmohrman-gillis@cfpboard.org, or Dan Barry, Managing Director of Government Relations and Public Policy, FPA, via telephone at (202) 449-6343 or via e-mail at dan.barry@fpanet.org.

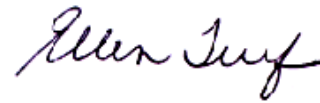
Respectfully submitted,



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cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner