FINANCIAL PLANNING COALITION

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

Re: SEC Request for Data and Other Information, Duties of Brokers, Dealers and Investment Advisers, File No. 4-606

Ladies and Gentlemen:

The Financial Planning Coalition ("Coalition") submits this comment letter in response to the Securities and Exchange Commission's ("SEC" or "Commission") request for data and other information concerning a potential uniform fiduciary standard of conduct for both broker-dealers and investment advisers, when providing personalized investment advice to retail customers.[1] The Financial Planning Coalition is comprised of the Certified Financial Planner Board of Standards ("CFP Board"), the Financial Planning Association ("FPA"), and the National Association of Personal Financial Advisors ("NAPFA").[2] The Financial Planning Coalition is united in its belief that financial planning services should be delivered to the American public under standards that ensure competency and fiduciary accountability.

The Financial Planning Coalition appreciates the continued efforts of the SEC to move forward towards a uniform fiduciary standard of care for both broker-dealers and investment advisers,

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[1] Exchange Act Release No. 69013 (Mar. 1, 2013) (the "Request for Information" or "RFI").

[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 68,000 CFP® professionals who agree, on a voluntary basis, to comply with its 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 nearly 100 chapters throughout the country representing more than 23,000 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.

when providing advice to retail customers. We recognize that in light of recent court decisions, it is important for the SEC to develop a strong factual record concerning the costs and benefits of such a uniform fiduciary standard. The RFI is an important step to complete this process.

The Coalition strongly urges the SEC to adopt a uniform fiduciary duty standard that would apply to both broker-dealers and investment advisers, when providing personalized investment advice to retail customers, as contemplated by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The fiduciary standard should be no less stringent than the existing fiduciary duty standard under the Investment Advisers Act of 1940 (the "Advisers Act"). This standard should be based upon the core principle that, when providing personalized investment advice to retail customers, a financial adviser (however registered) always must act in the best interests of those customers. The SEC should adopt this uniform fiduciary standard immediately. It is not necessary for the SEC to harmonize other aspects of broker-dealer and investment adviser regulation before acting to adopt a uniform fiduciary standard. The SEC should not delay the adoption of a uniform fiduciary standard while it considers harmonization initiatives.

The cornerstone of the fiduciary duty standard under the Advisers Act is the duty of a financial adviser to act only in the best interests of the client. As the Commission itself stated in 2010 when it adopted amendments to Form ADV: "Under the Advisers Act, an adviser is a fiduciary *whose duty is to serve the best interests of its clients*, which includes an obligation not to subrogate clients' interests to its own."[3] The Commission has regularly cited this "best interests of the client" standard in other releases.[4] The SEC Staff Study on Investment Advisers and Broker-Dealers ("2011 Staff Study") mandated by Section 913 of the Dodd-Frank Act began its discussion of investment advisers by stating that "An investment adviser is a fiduciary *whose duty is to serve the best interests of its clients.*"[5]

The "best interest of the customer" standard should be the key feature of any uniform fiduciary standard of care. However, the RFI does not adequately recognize this central concept. The RFI defines fiduciary duty in terms of a duty of loyalty and a duty of care. While the RFI suggests that these duties may promote the best interests of the customer, in fact this formulation has it exactly backwards. The key concept, and the building-block, for any fiduciary duty standard must be the best interests of the customer. Any application of the fiduciary standard can only flow from this basic principal.

The Coalition is concerned that the assumptions presented in the RFI are not consistent with this standard.[6] Indeed, the standard contemplated in the RFI is little more than the existing broker-

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[3] Investment Adviser Act Rel. No. 3060 at p.3 (July 28, 2010) (emphasis supplied).

[4] *See, e.g., Proxy Voting by Investment Advisers*, Advisers Act Release No. 2106 (Jan. 31, 2003).

[5] 2011 Staff Study at iii (emphasis supplied). The 2011 Staff Study is available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[6] We recognize that the RFI cautions readers that the various assumptions it contains should not be construed as the positions of the SEC or even its staff, and we hope that the SEC and its staff in fact are willing to reconsider those assumptions in light of the comments it receives on the RFI.

dealer suitability standard supplemented by some conflict of interest disclosures and would be substantially less stringent than the fiduciary duty standard currently imposed on investment advisers under the Advisers Act. For that reason, we believe the standard contemplated in the RFI assumptions would be inconsistent with Section 913, which requires that a uniform standard be "no less stringent" than the existing Advisers Act fiduciary duty standard.

We oppose the approach contemplated in the RFI assumptions because it would significantly weaken the fiduciary standard for SEC-registered investment advisers while adding few meaningful new protections for retail customers. We urge the SEC to propose a uniform fiduciary duty standard consistent with the principle clearly stated in Section 913 of the Dodd-Frank Act that any new standard for broker-dealers must require them to act in the best interests of the retail customer. We believe it is vital that the SEC get this critical investor protection issue right, and – nearly three years after the passage of the Dodd-Frank Act – that it do so promptly.

We have provided, as Attachment A, a study by the Aité Group, which supports the conclusion that a uniform fiduciary standard will benefit retail customers and their financial advisers, and will not impose significant costs. In summary, financial advisers at broker-dealers and at investment advisers who deliver services to their customers under a fiduciary standard find that they experience stronger asset growth, stronger revenue growth, and obtain a greater share of client assets than those that provide services primarily under a non-fiduciary model. Financial advisers who deliver services under a fiduciary standard also do not spend any more of their time on compliance or other back-office tasks. An article by Professors Michael Finke and Thomas Langdon, The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice,[7] reaches similar conclusions. The Finke and Langdon study finds no statistically significant difference in the ratio of registered representatives to total households in states in which broker-dealers have a full fiduciary duty, a limited fiduciary duty, or no fiduciary duty to customers. This study demonstrates that applying a uniform fiduciary duty standard on broker-dealers will have little if any effect on the availability of investment advice to customers, including customers with moderate levels of income or assets. Finally, data from Cerulli Associates concerning the conversion of non-fiduciary fee-based brokerage accounts to fiduciary, non-discretionary advisory accounts in 2007 shows that a fiduciary standard will impose little if any additional cost or burden. Cerulli data shows there is already a strong industry trend towards providing investment advice on a fiduciary basis, and that the costs of such a transition will not be significant.[8] The relevant data thus strongly supports the adoption of a uniform fiduciary standard.

[7] The Finke and Langdon study is available in the Journal of Financial Planning at http://www.fpanet.org/journal/TheImpactoftheBrokerDealerFiduciaryStandard/.

[8] Cerulli Associates, Cerulli Quantitative Update: Advisor Metrics (2012).

I. The RFI Is Missing Key Elements of the Fiduciary Duty Contained in the Advisers Act.

A. The Dodd-Frank Act Explicitly Adopts the "Best Interest of the Customer" Standard in Section 913

The Dodd-Frank Act mandates that any rulemaking adopting a uniform standard must incorporate a "best interest of the customer" requirement. Section 913(g) of the Dodd-Frank Act specifically amends Section 211 of the Advisers Act to state that:

> The 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 (and such other customers as the Commission may by rule provide), *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.*

(emphasis supplied).[9] The latter part of the highlighted language is as important as the first part. The core standard must be a "best interests of the customer" standard. But that standard also must be without regard to the financial interests of the fiduciary. In other words, the fiduciary has an obligation to maximize the customer's interest; if the fiduciary has a choice between two similar alternatives, it must choose the one that is most advantageous to the client, without regard to which option is more financially beneficial to the fiduciary.[10] Indeed, the plain language of the statute indicates that the fiduciary should not consider its financial interests at all when it is providing advice to a retail customer.

Section 913(g) of the Dodd-Frank Act further provides that:

> Such rules shall provide that such standard of conduct shall be *no less stringent than the standard applicable to investment advisers* under section 206(1) and (2) of this Act when providing personalized investment advice about securities[.][11]

[9] Section 913 also amends Section 15 of the Exchange Act, applicable to broker-dealers, to provide that:

> [T]he Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940.

By incorporating this reference to Section 211 of the Advisers Act, the Act thereby incorporates the same "best interests of the customer" standard placed in Section 211 at exactly the same time.

[10] We recognize that cost is only one aspect of determining what products or services are in the best interests of the customer. Under some circumstances a fiduciary might recommend a higher-cost product, for example if it has important features unavailable in lower cost products. But as between products with similar features, ordinarily a fiduciary would be required to advise the customer to purchase the lower-cost alternative.

[11] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Section 913(g) (emphasis supplied), available at http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

Section 913(g) also states that "the standard of conduct for such broker or dealer with respect to such customer *shall be the same as* the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940."[12]

Section 913(f) grants the SEC very broad rulemaking authority to adopt a standard of care for broker-dealers and investment advisers. However, when read with Section 913(g), the rulemaking grant is best understood as not intending that the SEC adopt a "fiduciary lite" standard for broker-dealers, or to adopt a uniform fiduciary standard for both broker-dealers and investment advisers that is less stringent than the standard that currently applies to investment advisers. Section 913 also gives the Commission discretion whether or not to adopt a uniform fiduciary standard. However, if the SEC does adopt a uniform standard, that standard should be a fiduciary duty premised on a "best interests of the customer" standard, that is no less stringent than that which already applies to investment advisers. As discussed further below, we believe that the RFI does not fully reflect this clear and unambiguous direction.[13]

B. The RFI Does Not Reflect Key Elements of a Fiduciary Duty Standard

There are key substantive elements to a "best interests of the customer" fiduciary standard that are not discussed at all in the RFI. For example, a fiduciary has a duty of care to obtain and to maintain the relevant knowledge and expertise necessary to provide the services that fiduciary offers to clients. As the 2011 Staff Study expressed it, an adviser must "make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information."[14] This duty extends beyond investigating particular securities and includes having a reasonable basis for the asset allocations and investment strategies that the fiduciary recommends to clients, as well as a duty to become and to remain well informed about market conditions and developments. In the investment context, the fiduciary standard has been summarized as a "prudent investor" standard: the fiduciary "shall invest and manage [client] assets as a prudent investor would . . . [and] shall exercise reasonable care, skill, and caution."[15] This substantive standard of care expressed in the state uniform prudent investor rule is not expressed at all in the RFI. Any uniform fiduciary standard of care should include these key elements of knowledge, expertise and prudent management.

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[12] *Id.* (emphasis supplied).

[13] Section III.C of the RFI requests comment on several alternative approaches that would not result in a uniform fiduciary standard for broker-dealers and investment advisers, or that would result in a fiduciary standard less stringent than that currently applicable to investment advisers. In our view, these alternatives are all inconsistent with Section 913(g).

[14] 2011 Staff Study at 22, citing e.g., Proxy Voting by Investment Advisers, Advisers Act Release No. 2106 (Jan. 31, 2003).

[15] *See* National Conference of Commissioners on Uniform State Laws, Uniform Prudent Investor Act at § 2 (1994), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upia94.pdf.

C. Disclosure Alone Is Not Sufficient to Satisfy a Fiduciary Duty Standard

The RFI appears to reflect the view that the primary goal of a uniform fiduciary standard should be avoiding customer confusion between investment advisers and broker-dealers, and that this goal can be met primarily by providing greater disclosure. We agree that eliminating customer confusion would be one important benefit of a uniform fiduciary standard. And we agree that many broker-dealers, who are not now subject to a comprehensive disclosure requirement analogous to Form ADV for investment advisers, could do a better job of disclosing their conflicts of interest.[16] However, addressing customer confusion and disclosing conflicts of interest are not the only goals that the SEC should seek to achieve. In fact, customer confusion was only one of fourteen different factors (and not even the first) that the Dodd-Frank Act directed the SEC to consider in its study of the uniform standard of care issue. The Act directed the SEC to consider the benefits and harms to investors more generally, including making regulation more effective, filling gaps in regulation, avoiding fraud, and increasing the availability of quality investment advice. The SEC's goal, as expressed in Section 913(f), is to act "in the public interest and for the protection of retail customers." Disclosure is a tool to help fiduciaries manage conflicts of interest, but the end goal is to promote investor protection.

Disclosure of conflicts of interest, while a beneficial step, is not necessarily sufficient by itself to meet a fiduciary duty standard. Once again, the touchstone of fiduciary duty analysis is whether or not, despite a conflict of interest, the fiduciary is acting in the best interests of the customer. The purpose of a fiduciary duty standard is not simply to disclose conflicts of interest, but, to the extent feasible, to eliminate or manage those conflicts of interest. Fiduciaries with a conflict of interest may, even subconsciously, be tempted to benefit themselves at the expense of their clients.[17] The Commission staff long has held that disclosure alone is not sufficient to discharge an investment adviser's fiduciary duty; rather, the key issue is whether the transaction is in the

[16] FINRA, registered with the SEC as the self regulatory organization ("SRO") for all broker-dealers with retail customers, has proposed a conflict of interest disclosure requirement for broker-dealers at account opening. FINRA Regulatory Notice 10-54, "Disclosure of Services, Conflicts and Duties" (Oct. 2010). However, FINRA has not yet submitted that proposal to the SEC for approval.

[17] As the Supreme Court stated in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 188 (1963) (citations omitted, emphasis supplied), citing the SEC study that led to the adoption of the Advisers Act:

> The report reflects the attitude -- shared by investment advisers and the Commission -- that investment advisers could not "completely perform their basic function -- furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments -- *unless all conflicts of interest between the investment counsel and the client were removed*." The report stressed that affiliations by investment advisers with investment bankers, or corporations might be "an impediment to a disinterested, objective, or critical attitude toward an investment by clients . . . ." This concern was not limited to deliberate or conscious impediments to objectivity. Both the advisers and the Commission were well aware that whenever advice to a client might result in financial benefit to the adviser -- other than the fee for his advice -- "that advice to a client might in some way be tinged with that pecuniary interest [whether consciously or] subconsciously motivated . . . ." The report quoted one leading investment adviser who said that he "would put the emphasis . . . on subconscious" motivation in such situations. It quoted a member of the Commission staff who suggested that a significant part of the problem was not the existence of a "deliberate intent" to obtain a financial advantage, but rather the existence "subconsciously [of] a prejudice" in favor of one's own financial interests.

best interest of the client.[18] Disclosing a potential conflict of interest does not relieve a fiduciary from making the judgment that the transaction actually is in the best interests of the client. And fiduciaries ordinarily may not receive compensation from third parties (such as revenue sharing) because receipt of fees from a third party necessarily conflicts with the fiduciary's duty of loyalty to the customer.[19] For this reason, investment advisers typically credit Rule 12b-1 or other fees they receive from mutual fund companies against the advisory fees they receive from the customer (or, alternatively, rebate the fees to the customer). Disclosure of third-party compensation does not cure the violation of the duty of loyalty.

Moreover, consent is only informed if the customer has the ability fully to understand and to evaluate the information. Many complex products (such as collateralized mortgage obligations, structured products, options, security futures, alternative investments, and the like) are appropriate only for sophisticated and experienced investors. It is not sufficient for a fiduciary to make disclosure of potential conflicts of interest with respect to such products. The fiduciary must make a reasonable judgment that the customer is fully able to understand and to evaluate the product and the potential conflicts of interest that it presents – and then the fiduciary must make a judgment that the product is in the best interests of the customer.

II. The Commission Should Modify the Assumptions about a Uniform Fiduciary Standard Presented in the RFI.

A. The RFI Makes Flawed Assumptions About a Fiduciary Standard

The RFI, in Section III.A, makes a series of assumptions about the content and application of a fiduciary standard. Unfortunately, many of these assumptions are flawed or at least incomplete, either because they do not meet the "no less stringent" test of Section 913 of the Dodd Frank Act, or because they are otherwise inconsistent with the language of Section 913. As written, the assumptions seek to minimize the effect of a fiduciary standard on the existing operations of broker-dealers who are currently providing advice. The fiduciary standard should not be adapted

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[18] *See* Rocky Mountain Financial Planning, Inc. (pub. avail. Feb. 28, 1983):

> We do not agree that "an investment adviser may have interests in a transaction and that his fiduciary obligation toward his client is discharged so long as the adviser makes complete disclosure of the nature and extent of his interest." While section 206(3) of the Investment Advisers Act of 1940 ("Act") requires disclosure of such interest and the client's consent to enter into the transaction with knowledge of such interest, the adviser's fiduciary duties are not discharged merely by such disclosure and consent. The adviser must have a reasonable belief that the entry of the client into the transaction is in the client's interest. The facts concerning the adviser's interest, including its level, may bear upon the reasonableness of any belief that he may have that a transaction is in a client's interest or his capacity to make such a judgment.

Similarly, the Commission staff has long found that hedge clauses in investment advisory agreements may be impermissible even if the client agrees and even if, read literally, nothing in the hedge clause was affirmatively misleading. *See* Heitman Capital Management, LLC (pub. avail. Feb. 12, 2007) (discussing previous no-action requests concerning hedge clauses and announcing staff would not entertain future requests on the subject).

[19] A fiduciary may permissibly pay a referral fee to a third party, subject to the full and fair disclosure required by Advisers Act Rule 206(4)-3.

to work with all existing broker-dealer practices. Rather, some existing broker-dealer practices likely will need to be modified to comply with the fiduciary standard. The starting point should not be what assumptions will allow broker-dealers to continue all their existing operations unchanged, but what assumptions will provide the greatest benefit to investor protection.

While the Coalition agrees that a uniform fiduciary duty standard should be business-model neutral, the key point is that the standard must reflect the "best interests of the customer." This standard is inherently a "facts and circumstances" test, and, like any principles-based standard, cannot be reduced to a set of definitive, hard-and-fast rules. As the courts have held in the related area of fraud, too definitive a set of hard-and-fast rules would simply provide a roadmap for future violators.[20] The very strength of the fiduciary duty standard is its flexible, remedial nature. *Capital Gains*, 375 U.S. at 195. The SEC should resist calls to abandon the case-by-case, facts-and-circumstances approach to fiduciary duty law in favor of specific, rigid rules.

Assumption 1. We urge the SEC to interpret the term "personalized investment advice about securities" broadly. For example, an "introductory discussion" intended to lead to personalized advice should be included. Any advice about non-securities products (such as equity indexed or fixed annuities) in the context of a broader discussion in which securities are discussed as an alternative should be included. Similarly (per FINRA rules adopted last year), advice to hold (rather than buy or sell) existing securities positions should also be included. Asset allocation advice and advice from investment analysis tools should also be deemed personalized investment advice, if they are personalized for a retail customer and provide advice about investment steps the customer should undertake. Moreover, the focus of Assumption 1 on whether there has been a "recommendation" is the wrong focus. The key analysis should whether the advice constitutes "personalized investment advice."

Assumption 2. Section 913(f) explicitly gives the SEC authority to adopt rules to protect both "retail customers" and "such other customers as the Commission may by rule provide." The SEC should seek comment on whether the definition of "retail customers" is sufficiently broad to capture all of the situations that the Dodd-Frank Act intends or that the public interest would support. For example, the SEC should seek comment on whether the definition should include a revocable trust or family limited partnership set up for the benefit of an individual or family, which are common estate planning tools in many states.

Assumption 4. We agree that under Section 913 the SEC should not mandate any particular business model or compensation standard. But it is important to give full effect to Section 913's qualification that a business model or compensation structure should not "in and of itself, be considered a violation." This language necessarily means that in some circumstances, a specific business practice could in fact be a fiduciary violation if it is not in the customer's best interests. The SEC should be careful not to provide blanket immunity where the Dodd-Frank Act clearly intends that there be a case-by-case, customer-by-customer analysis. For example, the SEC should make it clear that a fiduciary must recommend to the customer the most advantageous

[20] "Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition." *Stonemets v. Head*, 154 S.W. 108, 114 (Mo. 1913). But as the courts have consistently held, general principles such as those prohibiting breach of fiduciary duty or fraud are fully consistent with the requirements of fair notice. *Valicenti Advisory Services, Inc. v. SEC*, 198 F.3d 62, 66 (2d Cir. 1999).

available combination of products and account structures. In a case where the fiduciary has both fee-based and commission-based accounts, it must recommend the most advantageous structure to the customer, based on, among other things, the customer's anticipated level of trading activity and product needs. For example, the fiduciary may not be able to recommend a fee-based account where the fiduciary anticipates that the customer is likely to trade so infrequently that a commission-based account would be less expensive.[21] The fiduciary also must make the fundamental judgment that any product or account structure is in the best interests of the customer. For example, the fiduciary could not recommend that the customer open an account with minimum fees that would quickly deplete the account, even if that were the only account structure offered by the fiduciary.

Assumption 5. Section 913(g) of the Dodd-Frank Act states that a uniform fiduciary standard will not always require a broker-dealer or registered representative to have a continuing fiduciary duty to a customer after providing that customer with investment advice.[22] Assumption 5 of the RFI would convert this statutory provision into a general rule: that generally a fiduciary would have no continuing duty to customers, and that generally the existence of such a duty would be a matter of contract. The RFI's assumptions go much further than the Act or sound policy should allow. We agree that under Section 913, a fiduciary can give one-time "snapshot" advice to a customer, and the fiduciary would not thereby have a continuing duty to that customer. But we do not agree that "no continuing duty" should be the general rule. The existence of a continuing fiduciary duty should be a facts and circumstances determination, based on the totality of the circumstances. In many cases there is and should be a continuing duty. For example, to the extent a fiduciary provides ongoing advice to a customer, the fiduciary duty remains, and the fiduciary cannot "switch hats" to become a salesperson with no obligation to act in the customer's best interests. Similarly, a fiduciary cannot contract out of a fiduciary obligation to a customer. If the nature of the broker-dealer's services contradicts its characterization in the agreement, then the actual services provided, and not the language of the agreement, must determine the nature of the legal duties that apply.[23]

The RFI cites as an example of its proposed general rule that "market participants generally have taken the view" that financial planners do not have a continuing duty to customers after providing a financial plan.[24] This is inconsistent with the *Standards of Professional Conduct*

[21] During the time that broker-dealers offered fee-based brokerage accounts, FINRA performed a sweep of brokerage firms and imposed fines of $7.4 million and restitution of $9.5 million to broker-dealers that had improperly recommended fee-based accounts to customers who would have been better off in commission-based accounts. *See* http://www.sec.gov/comments/4-606/4606-2861.pdf.

[22] The precise language of Section 913 is "Nothing in this section 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." This language does not change the general principle that when giving advice (in each instance, or on a continuing basis), the broker-dealer or registered representative is subject to the fiduciary standard of care, and does not prevent the SEC from clarifying under what circumstances a continuing duty should exist.

[23] Moreover, if a fiduciary is not assuming a continuing duty to monitor, it must fully and fairly disclose that fact, and the resulting limitations of its advice, to the customer. In addition, the fiduciary must make the fundamental judgment that the services (as limited) are in the best interests of the customer.

[24] RFI at p.28 n.37.

established by CFP Board for the financial planning profession. CFP® professionals, once they have provided financial planning services or material elements of financial planning to customers, thereby become fiduciaries to those customers, and all subsequent services to those customers must be provided on a fiduciary basis.[25]

Further, as the SEC has long maintained and should reconfirm, a broker-dealer is always a fiduciary when it is handling a trade order for a customer (whether or not the broker-dealer solicited that order), and must seek the best terms reasonably obtainable for that customer without regard to its own financial interest.[26] The broker-dealer does not lose its fiduciary status when handling orders for customers, just because the trade execution occurs after it has provided the advice.[27] Similarly, a broker-dealer retains fiduciary status when it is conducting its post-trade supervision of trades and recommendations; the fact that the advice has already been provided does not relieve it of its obligation to have reasonably designed policies and procedures to supervise its activities, even if some of that supervision occurs after the fact.[28] Also, if the broker-dealer maintains an account for the customer, at a minimum the broker-dealer has an obligation to monitor the account for unauthorized trading or unauthorized withdrawals as required by the Commission's anti-money-laundering rules,[29] and for identity theft "red flags" as required by the recent identify theft red flags rule.[30] These are fiduciary obligations to every customer for whom a broker-dealer holds an account, these duties cannot be waived by contract, and the SEC should make these obligations clear and explicit.

Assumption 6. We agree that under Section 913, offering proprietary products or a limited set of products does not "in and of itself" violate a fiduciary duty. But these limitations must have meaning, and in some cases, offering a proprietary product or a limited product set could be a

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[25] The CFP Board of Standards considers the following factors, among others, in determining whether a CFP® professional is engaged in financial planning: the client's understanding and intent in engaging the certificant; the degree to which multiple financial planning subject areas are involved; the comprehensiveness of data gathering; and the breadth and depth of recommendations. Once the CFP® professional is determined to have provided financial planning services to a customer, then the CFP® professional is a fiduciary for all subsequent services provided to that customer.

[26] *See Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 135 F.3d 266 (3d Cir. 1998) (en banc), *cert. denied*, 525 U.S. 811 (1998).

[27] Moreover, any account over which a broker-dealer or investment adviser has investment discretion is *per se* a fiduciary account, and the broker-dealer or investment adviser has a non-waivable ongoing fiduciary obligation to monitor such an account. *See, e.g.*, Interpretative Rule Under the Advisers Act Affecting Broker-Dealers, Inv. Adv. Act Rel. No. 2652 (Sept. 24, 2007) (available at http://www.sec.gov/rules/proposed/2007/ia-2652.pdf). This is true whether the customer has expressly granted investment discretion, or whether under the facts and circumstances of the particular relationship, the broker-dealer or investment adviser has *de facto* investment authority over the account. *See, e.g., Lieb v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951 (E.D. Mich. 1978).

[28] *See* Exchange Act Section 15(b)(4)(E) (broker-dealer duty of reasonable supervision).

[29] The relevant anti-money-laundering rules, which the SEC enforces as they apply to both broker-dealers and investment advisers, are collected at http://www.sec.gov/about/offices/ocie/amlsourcetool.htm.

[30] *See* Identity Theft Red Flags Rules, Exchange Act Rel. No. 69,359 (April 10, 2013).

violation of a fiduciary duty. Simply disclosing the fact that the fiduciary offers a limited product set is not necessarily sufficient to satisfy this obligation. The fiduciary always has the fundamental obligation to determine that its advice is in the best interests of the client – and in some cases a fiduciary may be required to conclude that it does not offer *any* products that are in the best interests of the client. In order to satisfy its fiduciary obligations, a fiduciary offering a proprietary product must consider how that product compares to other products reasonably available in the market, even if not offered by the fiduciary.[31] A fiduciary always must be able to conclude that the proprietary product is in the best interests of the customer, as compared to other products reasonably available in the market, in order to recommend it to that customer. For example, a firm that only offers high-cost tax-deferred variable annuities with steep early surrender charges simply could not offer that product to a client seeking to invest an already tax-deferred account such as an IRA or 401(k), or to an elderly client in a low tax bracket with short-term liquidity needs and no need for tax deferral. The "proprietary/limited product" exception cannot be allowed to subsume the fundamental principle that the fiduciary's advice must be in the best interests of the client.

Assumption 7. Similarly, while we agree that principal trading is not "in and of itself" a fiduciary violation, the test must be what is in the best interests of the client. First, we suggest that the SEC should carefully examine firms' compliance with its temporary rule for principal trades with certain advisory clients (Advisers Act Rule 206(3)-3T). The SEC should determine how and whether broker-dealers are meeting their obligations under section 206 (1) and (2) of the Advisers Act, as required by section (b) of the temporary rule.

In addition, we suggest that the SEC provide guidance on when and how a fiduciary can engage in principal trading consistent with the fiduciary standard. While principal trading is not always "in and of itself" a fiduciary violation, we urge the Commission to recognize that there are situations where engaging in principal trading with a customer would be a fiduciary violation; otherwise, the "in and of itself" language will have been read out of the rule. SEC guidance could include requiring a fiduciary: 1) to disclose to customers in advance its principal trading policies and practices; 2) to disclose how the terms of principal trades compare to other trades available in the market (even if not offered by the fiduciary), either generally or on a trade-by-trade basis; 3) to limit principal trades to certain types of securities or market conditions; 4) to have robust duties of best execution and fair pricing; 5) to be able to demonstrate after the fact that the principal trade occurred on the best available terms for the customer, and 6) to be able to conclude that each principal trade is in the best interests of the client.

We do not believe the assumption that investment advisers would continue to be subject to Section 206(3), but broker-dealers would not be subject to that requirement, is consistent with the "no less stringent" standard in Section 913. Section 913(g) mandates that "the standard of conduct for such broker or dealer with respect to such customer *shall be the same as* the standard of conduct applicable to an investment adviser." Applying Section 206(3) to investment advisers but not to broker-dealers cannot be squared with the requirements of Section 913(g). We

[31] We agree that a fiduciary need not research every competitive product potentially available anywhere in the market; however, the fiduciary must make a reasonable effort to become generally aware about products relevant to the customer's decision in order to give the customer informed advice about that product.

recognize that Section 913 does not authorize the Commission to apply Section 206(3) to broker-dealers. Therefore, the Commission should apply its guidance on when and how a fiduciary can engage in principal trading to both broker-dealers and investment advisers.[32]

While we agree that some of the rules adopted under Section 204 parallel existing broker-dealer rules, that is not true for all of those rules. For example, there is no broker-dealer rule requiring the voting of proxies in the best interests of customers comparable to Investment Adviser Act Rule 206(4)-6. Moreover, Adviser Act Rule 206(4)-5 concerning investment adviser political contributions differs in material respects from the comparable broker-dealer rule set forth in MSRB Rule G-37. We urge the SEC to scrutinize carefully the differences between the Section 204 investment adviser rules and existing broker-dealer rules and to examine, after the fiduciary standard is adopted, whether or not any rules under Section 204 need to be harmonized with broker-dealer rules.

Assumption 8. Once the SEC adopts a uniform fiduciary standard, we urge the SEC to direct FINRA and the other SROs to review all of their rules to assure that they reflect a fiduciary standard. Although FINRA has taken some initial steps toward a "best interests of the customer" standard, for example in the conflicts disclosure proposal contained in FINRA Regulatory Notice 10-54 and in the commentary to its recent suitability rule in Regulatory Notice 12-55, we believe it is likely there are substantial additional changes that would be necessary to bring FINRA's rules to a full fiduciary standard.

B. An Alternative Set of Assumptions Would Provide a Better Basis for a Uniform Fiduciary Standard

The Coalition has offered an alternative set of core assumptions concerning a uniform fiduciary standard. These alternative core assumptions are contained in the Coalition's March 28, 2012 letter to the Commission[33] and are reiterated briefly as follows:

1) The basic fiduciary standard for all brokers, dealers and investment advisers, when providing personalized investment advice about securities to retail customers, should be based on the best-interest language in Section 913 of the Dodd-Frank Act. The Commission must give effect to the portion of the standard which provides that the duty is "*without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice*." Thus, while the statute is not intended to prohibit the existence of conflicts of interest, it is intended to ensure that any recommendations are free from bias resulting from those conflicts. In other words, fiduciaries cannot satisfy their duties merely by disclosing their conflicts and obtaining customer consent. They must not allow those conflicts to adversely affect their recommendations.

2) The fiduciary standard should be no less stringent than the standard applicable to investment advisers under Sections 206(1) and (2) of the Advisers Act. What this means is that, if brokers

[32] The SEC has already provided such guidance for some advisory accounts in Advisers Act Rule 206(3)-3T, and we note that it may use its exemptive authority in Advisers Act Section 206A.

[33] A copy of the March 28, 2012 letter is available at http://www.cfp.net/docs/public-policy/sec_4-604_comments.pdf?sfvrsn=2.

and advisers are engaged in similar conduct, they should be subject to the same standards. It does not follow that the obligations of brokers and advisers will always be identical, only that any differences in obligations will be driven by differences in the particular activities in which the fiduciary engages. The only way to achieve a standard that is both no weaker than the existing standard under Sections 206(1) and (2) of the Advisers Act and the same for brokers and advisers is to apply the existing legal precedent and guidance under the Advisers Act fiduciary duty standard to all fiduciaries when they are providing similar services, supplemented but not supplanted by guidance specific to the application of the fiduciary duty to brokerage activities.[34]

3) We agree that material conflicts of interest should be disclosed in advance and may be consented to by the customer. In addition to disclosing conflicts and obtaining customer consent, the broker or adviser would be required under a fiduciary standard to appropriately manage those conflicts. And, as discussed above, the obligation to give advice in the best interests of the customer would still apply; it could not be disclosed or consented away. While the existence of conflicts may not in and of themselves violate a fiduciary duty, it is always the fiduciary's obligation to assure that the advice is in the best interests of the customer – and in some cases the existence of conflicts may mean that the fiduciary cannot make that "best interests" judgment.[35]

4) Although the fiduciary duty should permit advice regarding a discrete transaction without necessarily triggering a continuing duty to monitor, the existence of a continuing duty is not exclusively a matter of written customer agreement. The facts and circumstances of the relationship, which include but are not limited to the customer agreement, will determine the extent to which a continuing duty exists. If the fiduciary continues to have a relationship with the customer that involves personalized financial advice, then he or she remains a fiduciary to the customer and cannot contract out of those obligations.

C. The Duties of Loyalty and Care Set Forth Must Fully Capture the Existing Fiduciary Duty Standard in the Advisers Act

The Coalition agrees that, as the Commission has long stated, fiduciaries have both a duty of loyalty and a duty of care. However, we believe that the articulation of these duties in the RFI is not fully consistent with the concept of fiduciary duty as explained by the Commission and applied by the courts under the Advisers Act and otherwise. As discussed above, the fundamental precept of fiduciary duty, and one expressly incorporated into Section 913, is a duty

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[34] The CFP Board of Standards has already provided guidance about compliance with fiduciary standards to CFP® professionals, many of whom work at broker-dealers and all of whom are held to a fiduciary standard when providing financial planning services. The SEC may find this guidance helpful in implementing a fiduciary standard.

[35] As the Supreme Court recognized, in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 550 n.14 (1961) (citations omitted): "The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them."

to act in the best interests of the customer. The duty of loyalty is where the "best interests of the customer" standard should be articulated.[36]

Duty of Loyalty. While we agree that full and fair disclosure such as that provided by the Form ADV is an element of the duty of loyalty, disclosure alone is not sufficient. Receipt of third-party compensation violates the duty of loyalty, and this violation is not cured by disclosure. Moreover, as discussed in more detail above, the fiduciary always must be able to conclude that, after disclosure, it is acting in the best interests of the clients, without regard to its own financial interests. Thus, for example, even if a fiduciary discloses that it has a limited product set, or that it engages in principal trading, the fiduciary still must be able to conclude that its limited product set, or its principal trades, are in the best interests of the customer.

We do agree with the RFI that sales contests are inconsistent with fiduciary standards (in particular the duty of loyalty). Indeed, we suggest this standard should apply both to sales contests awarding non-cash compensation (such as trips or prizes) as suggested in the RFI, but also to sales contests awarding cash compensation. We also agree with the RFI that fiduciaries must adopt, implement and disclose policies for allocation of investment opportunities as well as trade allocation. Today investment advisers typically have and disclose these policies, but broker-dealers often do not.

Duty of Care. While we agree that the duty of care is an important element of fiduciary duty, we do not believe that the RFI's explanation of the duty of care is sufficient or complete. The RFI explains the duty as a combination of four obligations familiar in the broker-dealer regulatory context: suitability, product-specific regulation, best execution, and fair and reasonable compensation. But as the courts have repeatedly held,[37] suitability is a different standard than a fiduciary standard. Many investments might be "suitable" for a given customer while only a much smaller number would be in the best interests of the customer. For example, for a customer seeking to save for a retirement anticipated in ten years, a broker-dealer might approve a variable annuity, a single target date mutual fund, a portfolio of open-end mutual funds, or a portfolio of ETFs or a separately managed account as "suitable" for meeting that goal. But for any given customer, only a smaller subset of these options is likely to meet a "best interests of the customer" fiduciary standard. We submit that analogizing a fiduciary standard to a suitability standard represents a fundamental misunderstanding of fiduciary obligations and the clear intent of the Dodd-Frank Act.

D. The Alternatives Discussed in the RFI Are Not Consistent with Section 913(g)

The Coalition does not believe that any of the five alternatives to a uniform fiduciary standard discussed in the RFI are consistent with Section 913(g) or would be desirable from a policy perspective. As discussed above, we believe the best understanding of Section 913(g) is that the

[36] The RFI, at p.31, indicates that a duty of loyalty "would be designed to promote advice that is in the best interest of the retail customer." This formulation has it exactly backwards: a fiduciary duty requires that the fiduciary act in the best interests of the customer. The duty of loyalty supports the obligation to act in the best interests of the customer (without regard for the financial interests of the fiduciary), not vice-versa.

[37] *See de Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293 (2d Cir. 2002) (collecting cases).

SEC can either adopt a uniform fiduciary standard that is "no less stringent" than the existing Investment Adviser Act standard, or it can do nothing and perpetuate the status quo. It would be inconsistent with Section 913(g) for the Commission to adopt a non-fiduciary or "fiduciary lite" standard. While we understand that the Commission may need to consider alternatives for cost-benefit purposes, including even those that are inconsistent with the statutory language, we believe a uniform fiduciary standard is the appropriate policy and legal choice.

The starting point for the uniform standard discussion has been the consistent finding that customers do not understand or are confused by the different standards by which broker-dealers and investment advisers are evaluated, and customers believe that both broker-dealers and investment advisers should be required to adhere to the same standard of conduct. The January 2011 Staff Study characterized as "robust" and "recent" the evidence in support of this conclusion.[38] The 2011 Staff Study cited investor comment letters received during the preparation of the Study, as well as the Commission's 2004 Siegel & Gale Study,[39] its 2008 RAND Study[40] and a 2010 study submitted by the Financial Planning Coalition as well as other consumer advocacy, state regulatory and industry groups,[41] all of which had reached exactly the same conclusion. The disclosure only, "fiduciary lite" or non-fiduciary alternatives would not address the fundamental difference in investor protection standards that every relevant study has found to exist, and which customers find so confusing.

Both a fiduciary standard for broker-dealers without the guidance and precedent under the Advisers Act, and a broker-dealer-only fiduciary standard, would fail to meet the "no less stringent" requirement in Section 913(g). As a result, those alternatives would not be consistent with the Dodd-Frank Act. Moreover, these alternatives would not provide broker-dealers with the guidance they have requested. Nor would these alternatives allow customers to understand the protections they are receiving or how those protections differ from those they receive when relying on an investment adviser.

Adding new regulatory requirements to investment advisers without modifying the regulation of broker-dealers would not address any of the goals of Section 913. First it would not meet the "no less stringent" standard and thus is not consistent with Section 913(g). It would not provide investors who rely on broker-dealers with any additional protections and would not address any

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[38] 2011 Staff Study at p.93-101.

[39] Siegel & Gale, LLC/Gelb Consulting Group, Inc., Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures (Mar. 5, 2005) ("SGG Report"). The SGG Report is available at http://www.sec.gov/rules/proposed/s72599/focusgrp031005.pdf

[40] Angela A. Hung, et al., RAND Institute for Civil Justice, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers (2008).

[41] *See* letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, et al., dated Sept. 15, 2010 (submitting the results of a national opinion survey regarding U.S. investors and the fiduciary standard conducted by ORC/Infogroup for the Consumer Federation of America, AARP, the North American Securities Administrators Association, the Certified Financial Planner Board of Standards, Inc., the Investment Adviser Association, the Financial Planning Association and the National Association of Personal Financial Advisors).

of the many sales practice issues that have affected the broker-dealer industry. Nor would it address the differences in treatment between broker-dealers and investment advisers that customers have found so difficult to understand or justify.

The foreign standard of care examples provided by the RFI would remove rather than manage some conflicts of interest. While these approaches may have investor protection benefits, they would involve limits on commission payments that are in conflict with the requirements of Section 913(g), which provides that receipt of commissions, standing alone, is not a violation of fiduciary duty under the Act. While we understand that the Commission may have to consider alternatives as part of its cost-benefit analysis, we believe that the uniform fiduciary standard set forth in Section 913(g) is the preferred option to benefit investors without, as discussed further in Part V below, imposing undue costs or burdens on customers or on financial services firms.

III. The SEC Should Address Investment Adviser/Broker-Dealer Rule Harmonization After it Adopts a Uniform Fiduciary Standard of Care

In the view of the Coalition, it is neither necessary nor desirable to harmonize broker-dealer and investment adviser regulation in order to adopt a uniform standard of care. The two issues are conceptually distinct, and each should be analyzed on its own merits. The standard of care is a relatively simple concept to adopt and apply, and it will have immediate benefits to customers. Harmonization, by contrast, is a more time-consuming process requiring the comparison and evaluation of many different rules. The NASD and NYSE Regulation merged in 2007 and announced an intention to harmonize their rule books, and today in 2013, many of their most important rules still have not been harmonized. There is no reason to postpone the evident benefits of a uniform standard of care, with the resulting elimination of customer confusion, while awaiting the results of what is certain to be a multi-year harmonization analysis.

The test for rulemaking set forth in Section 913(f) is that the SEC should consider "rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide)." This is exactly the test the SEC should use for considering harmonization initiatives – is each harmonization initiative in the best interests of retail customers? In some cases, harmonization may be in the best interests of customers; in other cases it may not be, but in either case, the conclusion is logically independent of the decision concerning the uniform standard of care. Indeed, Section 913(g) itself appears to contemplate a two-step process: the first step (for broker-dealers and for investment advisers, respectively) is for the SEC "to establish a fiduciary standard" or a "standard of conduct", and then the second step is that the Commission may address "other matters" such as rulemakings to address disclosure, sales practices, conflicts of interest and compensation. There is nothing in the Dodd-Frank Act that requires the Commission to address harmonization at the same time it addresses the basic standard of care.

As many commentators have observed, investment adviser regulation tends to be "principles-based" with a foundation in basic fiduciary duty obligations and the requirements to adopt a compliance program and a code of ethics tailored to the business of the specific investment adviser. By contrast, broker-dealer regulation tends to be "rules-based" with a large number of specific proscriptions that apply to all broker-dealers. The overwhelming majority of the harmonization section of the RFI presumes that current broker-dealer requirements should be extended to investment advisers, for example with respect to principal review and filing of advertisements and sales literature, supervision requirements for principals, licensing and registration of individuals and firms, use of finders and solicitors, continuing education and books and records requirements, among other issues.[42] In fact, we believe that the more principles-based approach to investment adviser regulation historically has been at least as effective at preventing sales practice problems as the more rules-based approach to broker-dealer regulation. For each of at least the past ten years, the SEC's own enforcement cases have shown more cases brought against broker-dealers and their associated persons than against investment advisers, and this does not even count the more than 1,000 cases per year brought by FINRA and other SROs against broker-dealers and their associated persons.[43] While it is certainly possible that the best interests of customers would be served by expanding some specific broker-dealer regulations, we do not believe the case has been made that broker-dealer regulations have been more effective than investment adviser regulations, or that there should be a wholesale application of broker-dealer regulations to the investment advisers.

Moreover, applying many of these broker-dealer regulatory requirements to investment advisers necessarily would impose new costs on investment advisers. Many of the questions asked in the RFI concern whether increased costs will make it more difficult to provide investment advice to entry-level and middle-income investors. There are current business models in which investment advisers successfully are able to provide services to these types of investors.[44] But harmonization as contemplated by the RFI could make the cost and availability problem worse. In any event, because application of a uniform standard of care and harmonization are legally and logically distinct issues, each should be evaluated separately on their own merits. By assuming a set of harmonization initiatives that are likely to increase costs, we believe the RFI may have the effect of biasing the entire analysis against the adoption of a uniform standard.

Similarly, the RFI's requests for data about dispute resolution also are not logically related to the question of a uniform fiduciary standard of care. Both broker-dealers and investment advisers can and do use mandatory predispute arbitration agreements.[45] There is nothing about a uniform

[42] By contrast, the harmonization discussion in the RFI contains little if any discussion of applying investment adviser regulations to broker-dealers, nor does it seem to contemplate repealing broker-dealer regulations that may be superfluous under a fiduciary duty standard.

[43] *See* FINRA, 2012: FINRA Year in Review (noting 1541 enforcement actions in 2012) (available at http://www.finra.org/Newsroom/NewsReleases/2013/P197624).

[44] There are a variety of investment advisory firms today that provide services to middle-income and beginning investors under a fiduciary standard, using different business models. Although the Coalition does not endorse any particular firm or business model, the existence (and success) of these firms disproves the argument that fiduciaries invariably limit their business to high net-worth clients. For example, LearnVest pairs retail customers with CFP® professionals to provide financial plans subject to a fiduciary standard at a start-up cost of as low as $89 and a monthly fee of $19. *See* https://www.learnvest.com. Similarly, the Garrett Planning Network provides fee-only financial planning on a fiduciary basis to retail clients across the country. *See* http://garrettplanningnetwork.com/. These firms demonstrate that it is possible to offer investment advice to middle-income investors under a fiduciary standard of care.

[45] Earlier this year, FINRA announced it would open its arbitration forum to disputes between investment advisers and customers who have signed predispute arbitration agreements. *See* FINRA, Guidance on Disputes between

fiduciary standard that dictates how disputes about that standard should be resolved. Although we agree that dispute resolution is an important issue, it should be analyzed separately from the uniform standard of care issue. The Dodd-Frank Act itself separates the issues of a uniform fiduciary standard (in Section 913) from mandatory predispute arbitration (in Section 921). There is no reason for the SEC to link these two distinct legal and policy issues. We urge the Commission to treat those two issues separately, and not to delay adoption of a uniform fiduciary standard of care while it considers unrelated issues about dispute resolution.

IV. The Relevant Data Supports the Adoption of a Uniform Fiduciary Standard

For the reasons discussed below, the Coalition believes that the benefits to investors of adopting a uniform fiduciary standard are very significant, and the costs of such a conversion would be minimal. As studies commissioned by the SEC have repeatedly found, there is substantial investor confusion with the current difference in standards of care, and investors consistently believe investment advisers and broker-dealers should be held to the same standard of care. Because investment advisers already operate under a fiduciary standard of care, there should be no new costs to them associated with a uniform fiduciary standard of care.[46] And we believe that the evidence discussed below indicates that the cost to broker-dealers of a uniform fiduciary standard of care when giving personalized advice to retail customers should be minimal.

The very detailed data requested in the RFI generally is not available to third parties outside of financial services firms themselves. As such, it is very difficult for investors, customers or their advocates to provide this data. Moreover, because of the amount and complexity of the data requested, only the very largest financial services firms are likely to have access to the data and to be able to devote the resources to make that data available. A small investment adviser serving retail customers is unlikely to be able to have the time and resources available to gather and sort data in the way requested by the RFI, and this fact alone has the potential to skew the data submitted to the SEC. We urge the SEC to make available in the public file any data provided by financial services firms, so that third parties can analyze and comment on that data.

A. The Conversion of Fee-Based Brokerage Accounts to Fiduciary Accounts Shows that a Fiduciary Standard Need Not Increase Costs or Decrease Services

The Coalition agrees with the RFI that the conversion of fee-based brokerage accounts (operated under a non-fiduciary standard) to nondiscretionary advisory accounts (operated under a fiduciary standard) after the decision in *Financial Planning Assn. v. SEC*,[47] provides very useful data about the potential impact of a fiduciary duty standard. It is our understanding that almost all of the data about this conversion is within the possession of a small number of financial

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Investors and Investment Advisers who are not FINRA-regulated firms (Jan. 13, 2013) (available at http://www.finra.org/arbitrationandmediation/arbitration/specialprocedures/p196162).

[46] This conclusion assumes that, for the reasons discussed above, the SEC considers its harmonization initiatives separately from the adoption of the uniform fiduciary standard. Some of the harmonization initiatives likely would impose additional costs on advisers, and the SEC should consider each of those initiatives on its own merits.

[47] 482 F.3d 481 (D.C. Cir. 2007).

services firms that held the majority of accounts subject to this conversion.[48] The industry data indicates that the number of these accounts, and the assets in the accounts, have grown dramatically since the conversion. Cerulli Associates found that, even after the broad market declines of 2008, the client assets in non-discretionary advisory accounts rose by almost 75% from approximately $329.6 billion at the end of the conversion process in 2007 to $574 billion in Q3 2012.[49] Meanwhile, the level of fees charged to customers for this service model at the major national firms has stayed flat or decreased since 2007. In sum, the experience of converting fee-based (non-fiduciary) brokerage accounts to non-discretionary advisory (fiduciary) accounts demonstrates that the expense of operating under a fiduciary model has not prevented the number of accounts and level of assets in those accounts from continuing to grow.

We note that during the time the SEC was seeking comment on the fee-based brokerage rule, some representatives of the broker-dealer industry argued that the result of the SEC failing finally to adopt the rule:

> would likely work to the disadvantage of customers, who, as a result, could face increased costs or who could lose their chosen forms of brokerage accounts to the extent their broker-dealer determined not to continue to provide those forms of accounts rather than effect such conversion [to advisory accounts].[50]

During the pendency of the FPA's suit against the fee-based brokerage rule, the same broker-dealer industry representatives argued that:

> The forced closure of this brokerage pricing avenue would be a major loss of client choice and a significant diminution in both pricing and account management flexibility that clients have come to expect and enjoy.[51]

The Chairman emeritus of one of the largest U.S. broker-dealers argued in 2007:

> The decision by the U.S. Court of Appeals earlier this year to vacate the provisions of SEC Rule 202 which effectively permitted fee-based brokerage accounts, if allowed to stand without remedy, would be an incredible public disservice, resulting in fewer

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[48] At the time of the conversion, the SEC estimated that there were approximately one million fee-based brokerage accounts with approximately $300 billion in assets that would be eligible for conversion to non-discretionary advisory accounts. Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Inv. Adv. Act Rel. No. 2653 (Sept. 30, 2007). Most of those accounts were held at a small number of large national broker-dealers, with an estimated total of over $100 billion (or more than one-third) at the largest single firm, Merrill Lynch. See Jane J. Kim, "Moving Past Fee-Based Accounts," Wall St. J. (Sept. 22, 2007) (available at http://online.wsj.com/article/SB119042522780135867.html).

[49] Cerulli Associates, Cerulli Quantitative Update: Advisor Metrics, Exhibit 11.02 (2012).

[50] Letter from Ira D. Hammerman, Senior Vice President and General Counsel, Securities Industry Association, to the SEC, February 7, 2005, at 18 (available at: http://www.sec.gov/rules/proposed/s72599/sia020705.pdf).

[51] Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to the SEC, June 27, 2007, at 2 (available at http://www.sec.gov/comments/s7-23-07/s72307-8.pdf).

> choices, higher costs and greater obstacles for individual investors in managing their finances.[52]

We could offer many additional quotes to the same effect. In fact, none of the parade of horribles presented by some members of the broker-dealer industry actually occurred. Those firms were able to transition their fee-based brokerage accounts to advisory accounts subject to a fiduciary standard of care.[53] Since 2007, those accounts have continued to multiply and grow in size without growing in cost or decreasing in flexibility. The Commission should be similarly skeptical today of those who argue that a fiduciary standard of care would impose crushing costs or deprive customers of relevant choices.

B. The Aité Study Confirms that a Fiduciary Standard Will Not Harm Retail Customers or the Financial Advisers Who Serve Retail Customers

We are submitting as Attachment A to this letter a study conducted for the Coalition by the Aité Group, which supports the conclusion that a uniform fiduciary standard will benefit retail customers and their financial advisers, and will not impose significant costs. The Aité Group surveyed 498 different financial advisers selected from a panel of financial advisers put together by Research Now.[54] The findings of the study are explained in more detail below, but in summary, those financial advisers (both at broker-dealers and at investment advisory firms) who deliver services to their customers under a fiduciary standard found that they experience stronger asset growth, stronger revenue growth, and obtain a greater share of client assets than those that provide services primarily under a non-fiduciary model. The findings also show that the fiduciary financial advisers do not spend any more of their time on compliance or other back-office tasks. In short, transitioning to a fiduciary model is not likely to have a negative effect on broker-dealer financial advisers; quite to the contrary, it is likely to improve their relationships with their customers and the quality of advice to those customers.

These financial advisers surveyed by the Aité Group all work primarily with individual investors, and are split among a variety of business models, including independent investment advisory firms, wirehouse broker-dealers, bank-affiliated broker-dealers, insurance-affiliated broker-dealers, online broker-dealers, introducing broker-dealers and non-wirehouse self-clearing broker-dealers. All of the financial advisers surveyed have Series 6, 7, 65 or 66 licenses.[55] A majority of the financial advisers associated with broker-dealers also hold investment advisory licenses, while 40% of the financial advisers at investment advisory firms also hold broker-dealer licenses.[56] Of the financial advisers at broker-dealers, substantial numbers indicate that a

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[52] Letter from Daniel P. Tully, Chairman Emeritus, Merrill Lynch, to the SEC, June 21, 2007, at 1 (available at http://www.sec.gov/comments/s7-23-07/s72307-6.pdf).

[53] In fairness, since the passage of the Dodd-Frank Act, the primary broker-dealer trade association, SIFMA, has dropped its former opposition to the adoption of a uniform fiduciary duty standard.

[54] The Aité Group survey methodology is summarized on slides 3-4 of Attachment A.

[55] *See* Attachment A, slide 5

[56] *See Id.,* slide 7.

primary source of compensation is investment advisory fees; in other words, they are already fully familiar with working as fiduciaries.[57]

Of the financial advisers surveyed by the Aité Group, over two-thirds of the financial advisers associated with investment advisers, and more than half of the financial advisers associated with broker-dealers believe that a fiduciary standard is the appropriate standard of care for dealing with retail customers.[58] The financial advisers associated with investment advisers strongly believe that fiduciary standard would benefit investors and would not result in more costs. Most of the financial advisers associated with broker-dealers also believe that a fiduciary standard would benefit investors, and only small percentages believe the costs would be substantial (these financial advisers were more likely to state that they do not know if there would be additional costs).[59] Substantial numbers of the financial advisers associated with broker-dealers do not disclose all types of conflicts of interest to their clients (for example, those relating to proprietary products, or to products that were suitable but had higher costs than other competitive products), or do not seek consent from their customers for those conflicts of interest.[60] Both of these findings suggest tangible benefits to a fiduciary standard, which would require full disclosure of and client consent to these conflicts of interest.

Of the financial advisers associated with broker-dealers, 28% report that more than half of their customer assets are already being managed on a fiduciary basis. And 17% of the financial advisers associated with broker-dealers deliver an annual financial plan to a majority of their clients under a fiduciary standard. (We will refer to these two groups together as "fiduciary registered representatives.") Between the financial advisers associated with investment advisory firms, and these fiduciary registered representatives who are delivering fiduciary-level services to more than half of their clients, a majority of the financial advisers surveyed are delivering services under a fiduciary standard most of the time.[61]

In the Aité Group survey, both the financial advisers associated with investment advisory firms, and the fiduciary registered representatives report that they have achieved higher customer asset growth since 2007 than the financial advisers at broker-dealers who primarily work on a non-fiduciary, commission basis.[62] Similarly, both the financial advisers associated with investment advisory firms, and the fiduciary registered representatives report that they have achieved stronger revenue growth since 2007 than the financial advisers at broker-dealers who primarily work on a non-fiduciary, commission basis.[63] Moreover, both the financial advisers associated

[57] *See Id.*, slide 8. Approximately 40% of the RIA financial advisers receive at least 5% of their compensation from brokerage commissions, which shows that the overlap between the two business models is substantial. Id. at slide 9.

[58] *Id.* at slide 11.

[59] *Id*. at slides 12-13.

[60] *Id.* at slides 14-16

[61] *Id.* at slides 17-20.

[62] *Id.* at slide 22.

[63] *Id.* at slide 23.

with investment advisory firms, and the fiduciary registered representatives report that they have obtained a larger portion of their clients' investable assets (higher "wallet share") since 2007 than the financial advisers at broker-dealers who primarily work on a non-fiduciary, commission basis.[64] Finally, the financial advisers who had transitioned their practices over the past five years towards more fiduciary business (from less than 40% fiduciary revenues to more than 50% fiduciary revenues over that time period), reported a variety of benefits both to their clients and themselves, notably including more holistic advice across a larger share of their clients' assets.[65]

Financial advisers who work primarily under a fiduciary standard do report as a benefit that they are able to work with more high net-worth clients. However, there is no statistically significant difference between the fiduciary and non-fiduciary financial advisers in terms of working with middle-income clients (those with less than $100,000 in investable assets).[66] In other words, while access to investment advice for middle income clients is an issue in both fiduciary and non-fiduciary business models, the evidence does not support any conclusion that a fiduciary standard would make that issue worse. Moreover, financial advisers who work primarily under a fiduciary standard actually report spending slightly less time on compliance issues than do financial advisers who work primarily under a non-fiduciary, commission-based standard. This fact indicates that transitioning to a fiduciary standard is not likely to impose significant new costs on financial advisers.[67] And financial advisers who work primarily under a fiduciary standard report spending more of their time working on investment management and financial planning issues than do financial advisers who work primarily under a non-fiduciary, commission-based standard. In other words, working at a fiduciary standard results in more time working for the benefit of customers.[68]

In sum, the Aité Group survey indicates that moving to a uniform fiduciary standard likely will result in financial improvement for the practices of the financial advisers who adopt that standard, as well as increasing the quality of the advice they are able to deliver to customers. Moreover, the evidence does not support that moving to a fiduciary standard will increase the compliance costs of those financial advisers or have any impact on the availability of financial advice to middle-income customers. We believe this data supports the adoption of a uniform fiduciary standard; such a standard will be a substantial net benefit both to retail customers and to the financial advisers who serve those retail customers, at little to no additional cost.

[64] *Id.* at slide 24.

[65] *Id.* at slide 25.

[66] *Id.* at slides 26-27.

[67] *Id.* at slides 28-29. Time reported being spent on account set-up, which might be considered a compliance-related task, also is slightly higher for the non-fiduciary financial advisers at broker-dealers.

[68] *Id.*

C. The Finke and Langdon Study Confirms that a Uniform Fiduciary Standard Will Not Affect the Availability of Investment Advice to Retail Customers

When considering data relevant to uniform fiduciary standard issue, we urge the Commission to consider carefully the article by Professors Michael Finke and Thomas Langdon, The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice.[69] Professors Finke (of Texas Tech University) and Langdon (of Roger Williams University) compared the availability of broker-dealer services in the several states that already hold broker-dealers to a full fiduciary standard when dealing with all customers (California, Missouri, South Carolina and South Dakota), with those states that do not hold broker-dealers to a fiduciary standard (14 states), and states that hold broker-dealers to a limited fiduciary standard in certain circumstances (typically where there is a relationship of trust and confidence with the customer). We believe the Finke and Langdon article is the most relevant academic study addressing the uniform fiduciary standard issue. The study finds that a fiduciary duty has no measurable effect at all on the availability of broker-dealer services to retail customers.

The Finke and Langdon study sorts states by the existence, non-existence or limited existence of a broker-dealer fiduciary duty. They then adjusted for New York state which, because it is the location of the major stock exchanges and the headquarters of the major national broker-dealers, has a disproportionate share of the nation's broker-dealer registered representatives. When comparing the ratio of registered representatives to total households among states within the three fiduciary regimes, they found the saturation rate to be almost identical between fiduciary, limited fiduciary, and non-fiduciary states.[70] They then compared a moderate-size state with strict fiduciary regulation (Missouri) with non-fiduciary and limited-fiduciary states of a similar population, and also found a strong similarity among states with similar incomes.[71] A multivariate analysis of broker saturation that controls for fiduciary and non-fiduciary regulation as well as state mean income found no significant fiduciary effect, even with New York included as a non-fiduciary state.[72]

Professors Finke and Langdon also interviewed broker-dealer registered representatives in the full fiduciary duty states and the non-fiduciary duty states. They found no statistically significant difference in the ability of those two sets of registered representatives to service customers with less than $75,000 in income, or customers with low or moderate levels of assets.[73] This demonstrates that a uniform fiduciary standard would not have any effect on the ability of middle-income investors to obtain investment advice. Indeed, the study found no statistically significant differences between the responses of the two sets of broker-dealer registered representatives in fiduciary and non-fiduciary states to any of the questions they asked

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[69] The Finke and Langdon study is available in the Journal of Financial Planning (July 2012) at http://www.fpanet.org/journal/TheImpactoftheBrokerDealerFiduciaryStandard/.

[70] *Id.* at Table 2.

[71] *Id.* at Table 3.

[72] *Id.* at Table 4.

[73] *Id.* at Table 1.

those registered representatives. Moreover (although this issue is not addressed in the Finke and Langdon study), we are not aware of a single U.S. broker-dealer that charges retail customers different levels of commissions, costs or fees based on the state in which the customer lives. The fact that broker-dealers charge customers the same amounts in fiduciary, limited fiduciary and non-fiduciary states is also strong evidence that a uniform fiduciary standard will not have any cost impact on the delivery of investment advice to retail customers.

In short, the Finke and Langdon study provides compelling evidence that applying a uniform fiduciary duty standard to broker-dealers will have no effect on the availability of advice to customers. Today, the ratio of registered representatives to total households shows no statistically significant difference in states in which broker-dealers have a full fiduciary duty, a limited fiduciary duty, or no fiduciary duty to customers. Nor will a fiduciary duty cause any change in the availability of financial advice to customers with moderate levels of income or assets. When weighed against the significant benefits to customers, the lack of any demonstrable costs should argue in favor of the SEC moving rapidly to adopt a uniform fiduciary standard.

D. Data from Cerulli Associates Demonstrates a Strong Trend to Serving Customers on a Fiduciary Basis Under the Advisers Act Standard

Recent industry data indicates that there has been a continuing trend of financial services professionals shifting from non-fiduciary positions at broker-dealers to fiduciary positions, either at broker-dealers or registered investment advisers. According to data collected by Cerulli Associates, from the 2007 through 2011, the number of broker-dealer registered representatives (other than those with dual IA/BD registrations) dropped by nearly 26,000. By contrast, in the same time frame, the number of investment adviser representatives grew by more than 6,000, and the number of dual registrants (registered representatives holding both investment adviser and broker-dealer licenses) grew by almost 5,000, with the dual registrants showing the highest annual growth rate.[74] During the same time period, the assets held by clients of broker-dealer registered representatives (other than those with dual IA/BD registrations) dropped slightly, while the assets held by clients of investment adviser representatives grew at an annual rate of over 8%, and the assets held by clients of dual registrants grew at an annual rate of nearly 16%.[75] Cerulli projects these trends to continue through at least 2014.[76] If it were substantially more costly to provide investment advice under a fiduciary standard, or if customers did not perceive there to be benefits to a fiduciary standard, one would expect (at best) that the relative numbers of non-fiduciary and fiduciary professionals and their assets would have remained static. These trends indicate that not only is it possible for financial services professionals to provide investment advice under a fiduciary standard, but in fact there is already significant momentum in the marketplace toward such a standard.

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[74] Cerulli Associates, Cerulli Quantitative Update: Advisor Metrics, Exhibit 1.02 (2012).

[75] *Id.* at Exhibit 1.03.

[76] *Id*. at Exhibits 4.06 and 4.07.

V. Conclusion

The Coalition believes that a uniform fiduciary standard should apply to all investment advice provided to retail customers, whether that advice is delivered by an investment adviser or a broker-dealer. That standard must be "no less stringent" than the fiduciary standard that already applies to investment advisers, and should incorporate and apply through SEC guidance the applicable law and precedent developed under the Advisers Act. The SEC need not, and should not, delay this important goal until it has harmonized all investment adviser and broker-dealer rules. The relevant data persuasively support the conclusion that a uniform fiduciary standard will not impose undue costs or burdens on customers or on financial services firms. In addition, the experience of the fee-based brokerage account conversion, the Aité Group survey data submitted with this letter, and the Finke and Langdon study all point to exactly the same conclusion. The Commission should promptly exercise the rulemaking authority provided in Section 913(g) of the Dodd-Frank Act. We look forward to continuing to work with the Commission to achieve this important investor protection goal.

Respectfully submitted,

Kevin R. Keller, CAE	Lauren Schadle, CAE	Geoffrey Brown, CAE
Chief Executive Officer	Executive Director/CEO	Chief Executive Officer
CFP Board	FPA®	NAPFA

CFP BOARD
CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

FPA
FINANCIAL PLANNING ASSOCIATION

NAPFA
THE NATIONAL ASSOCIATION OF PERSONAL FINANCIAL ADVISORS

Attachment A

Aité Fiduciary Study Findings

June 2013

PARTNER. ADVISOR. CATALYST.

Fiduciary Study Findings

For CFP® Board

June 2013

Summary of Major Findings

- Business models cut across regulatory worlds; close to 60% of registered representatives (RRs) are licensed as investment advisors who are subject to a fiduciary standard and almost half of registered representatives indicate receiving compensation from assets under management and/or advice fees.
- Most RRs and Registered Investment Advisors (RIAs) agree that a fiduciary standard of care is appropriate for financial services providers who deliver personalized investment advice.
- While over 60% of registered representatives disclose at least one type of conflict of interest, there are opportunities to increase adoption of specific disclosures, particularly when registered representatives recommend products that have a higher sales commission compared with similar products (40% of registered representatives indicate disclosing this type of conflict of interest).
- Of the registered representatives who disclose at least one type of conflict about half (52%) ask their clients for their informed consent of conflicts of interest.
- Dually registered representatives are more likely to ask their clients for their informed consent of conflicts compared to registered representatives who are only registered with FINRA.
- Almost one-third of registered representatives state that their practice manages assets as a fiduciary (recurring, fee-based service) for over half of client assets.
- Separately, almost 20% of registered representatives indicate that their practice delivers financial plans under a fiduciary agreement to over half of clients who receive advice over the course of a year.
- These registered representatives who deliver services under a fiduciary standard of care for a majority of clients are referred to as fiduciary registered representatives for purposes of this analysis.
- Fiduciary registered representatives represent 32% of the registered representatives and RIAs included in the analysis.

Summary of Major Findings

- Fiduciary registered representatives and RIAs experienced stronger client asset growth and revenue growth over the last five years than registered representatives who do not deliver fiduciary services to a majority of clients.
- Based on qualitative feedback from registered representatives and RIAs who transitioned from a commission-based practice to a fee-based practice (at least half of client assets managed for a recurring AUM-based fee), the impact of managing more client assets as a fiduciary resulted in gains in client wallet share and drove the practice to deliver more holistic advice.
- Registered representatives who adopt a fiduciary model with a majority of clients spend a similar percentage of time (average time of client-facing practice members) on key wealth management activities, such as financial planning and investment management, as do other registered representatives.
- In addition, these two RR groups spend a similar percentage of time on compliance activities across RR types and RIAs (5% of time for Fiduciary RRs vs. 8% of time for other RRs).
- The representation of mass-market clients across the two registered representative groups is equally low, ranging from 5% to 10%. This indicates that the lack of in-person advisory services available to mass-market clients is an industry-wide problem that is not likely to be exacerbated by the adoption of a fiduciary model.

Study Objectives

- The goal of this study is to estimate the benefits and costs to the financial advisory industry of a uniform fiduciary standard applied to the delivery of personalized investment advice. The study accomplishes this by:
  - Gathering the perspectives of registered investment advisors (RIAs) and registered representatives of broker-dealers on the benefits and costs of a potential uniform fiduciary standard (qualitative assessment)
  - Assessing current conflict-of-interest disclosure practices across registered representatives, who are currently under no legal obligation to avoid or disclose conflicts of interest
  - Comparing the businesses of fiduciaries (see definition below) and non-fiduciaries based on the performance of their practice over the last five years (asset, revenue and share of wallet), their ability to serve mass-market clients, and the time they spend on compliance and non-client-facing activities
- Fiduciary practices analyzed include RIA practices (fiduciary by law under the Investment Advisers Act) and a subset of registered representative practices that deliver financial planning under a fiduciary agreement to over half of clients and/or provide recurring investment management services for an AUM-based fee (considered fiduciary investment management) for over half of client assets
- These practices are compared against registered representative practices that deliver commission-based services following a suitability standard of care to a majority of clients.

Study Methodology – Survey Design, Fielding and Data Analysis

- The data gathered for this analysis comes from an online survey designed by Aite Group with input from CFP Board.
- Aite Group worked with The Logit Group Inc. to program and host the survey; the RIAs and registered representatives were sourced from a panel managed by Research Now.
- The survey was fielded in March 2012 and gathered detailed information on 498 registered representatives and RIAs who work within the full-service arm of wealth management firms and have dedicated relationships with all, or at least some, clients.
- Aite Group senior analyst Sophie Schmitt conducted the data analysis in collaboration with quantitative analyst Judith Fishman.
- Given the number of RIAs surveyed, the differences discussed in this report for this group have an 11-point margin of error at the 95% confidence level (except where noted).
- Given the number of registered representatives of broker-dealers surveyed, the differences discussed in this report for this group have a 4.6 point margin of error at the 95% confidence level (except where noted).

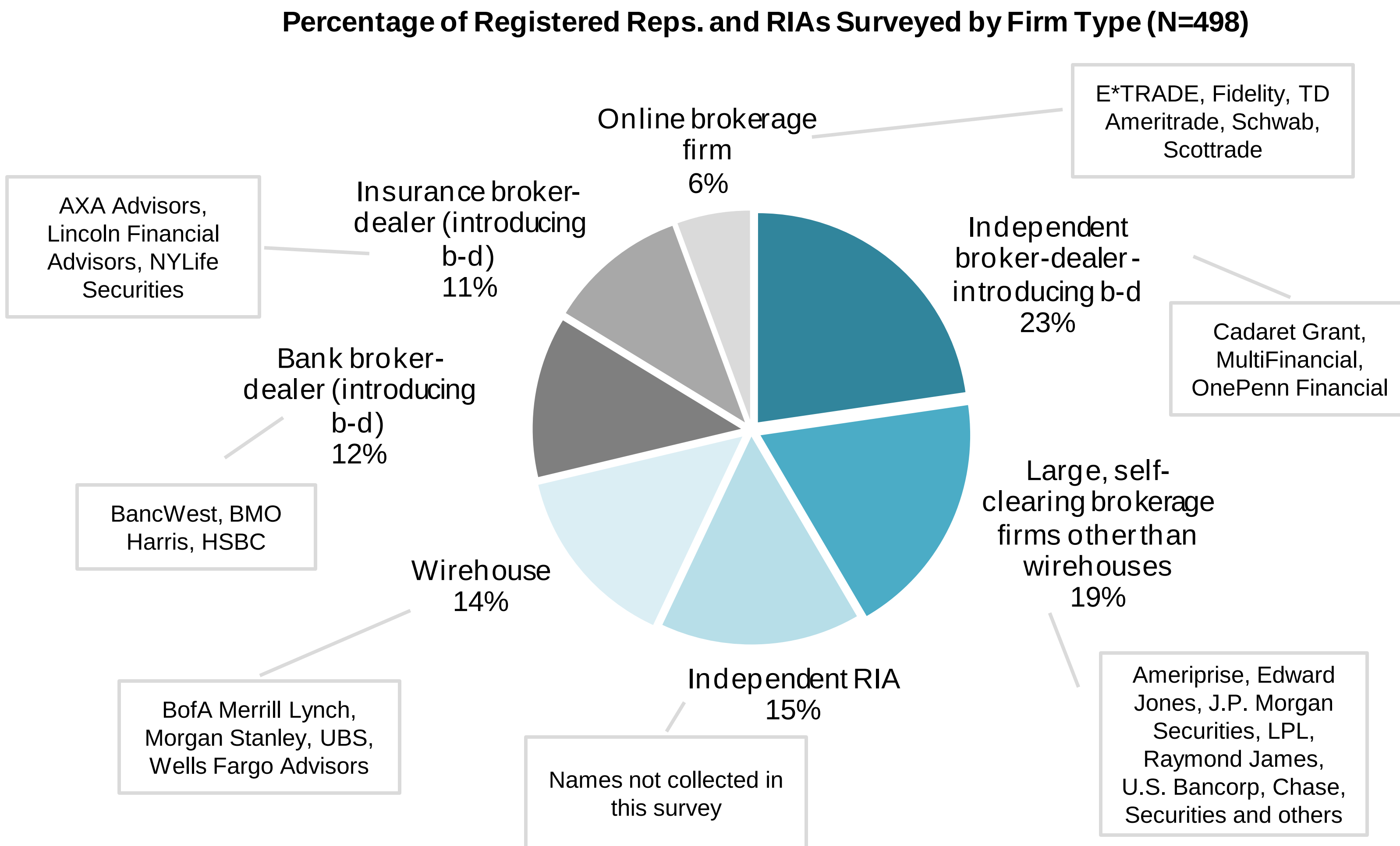
Study Methodology – Registered Rep. and RIA Sample Selection

- Participation in the survey was open to registered representatives and RIAs that:
  - Work primarily with individual clients and their families
  - Indicate that they are registered with either FINRA, the SEC, or both
  - Hold at least one of the following licenses: Series 6, Series 7, Series 65 or Series 66

- With the information gathered on the practices of these surveyed registered reps. and RIAs, the analysis excludes registered representatives and RIAs who:
  - Work in call-centers, or their firm's "direct" channel
  - Are in non client-facing or support/operational roles
  - Have no dedicated, ongoing client relationships

- Registered representatives surveyed work for broker-dealers and hold a Series 6 or a Series 7 license, which allows them to sell suitable investment solutions to retail investors based on investors' investment objectives, financial situation, risk tolerance, and other considerations (see FINRA 2111).
- Many registered representatives surveyed also hold a Series 65 or Series 66 license, which allows them to deliver financial planning and/or manage investments for a recurring AUM-based fee following a fiduciary standard of care.
- RIAs must have a Series 66 or 65 license; they follow a fiduciary duty when working with clients, which means that they place their clients' interests ahead of their own under all circumstances.

Distribution of Registered Representatives and RIAs Surveyed by Firm Type



Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Advisor Population Overview: Licenses, Registration, and Primary Compensation

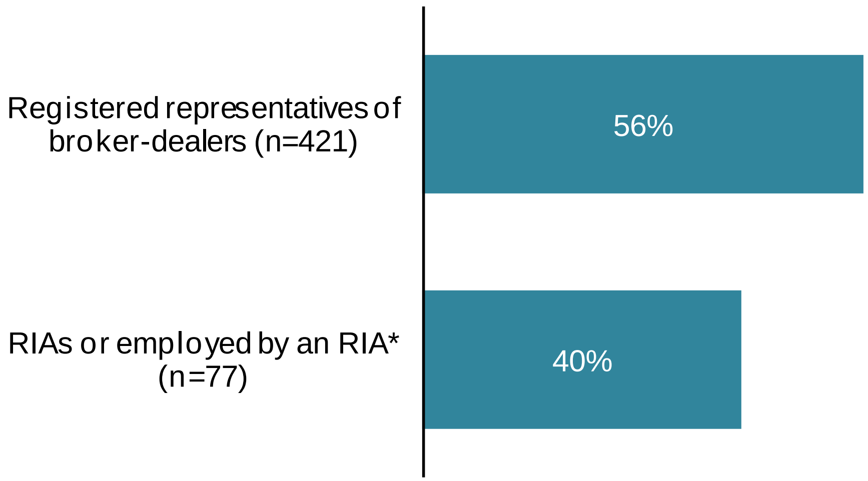
Key Finding #1:
Business models cut across regulatory worlds; close to 60% of registered representatives are licensed as investment advisors who are subject to a fiduciary standard and almost half of registered representatives indicate receiving compensation from assets under management and/or advice fees.

Over Half of Registered Reps. and 40% of RIAs Are Licensed Both as a Broker and an Investment Advisor

- Over half of registered representatives have an investment advisor license (Series 66 or 65).
- 40% of investment advisors surveyed (who work for RIAs) have a registered representative license (Series 7, primarily).

Q. Which of the following licenses do you have? (Series 6,7,66,65,63,3,24 etc.)
Q. Are you registered with the following regulatory bodies? (FINRA, the SEC)

Percentage of Registered Representatives and RIAs Who Are Dually Licensed (Series 7 and Series 66 or 65) and Dually Registered (FINRA/SEC) (N=498)



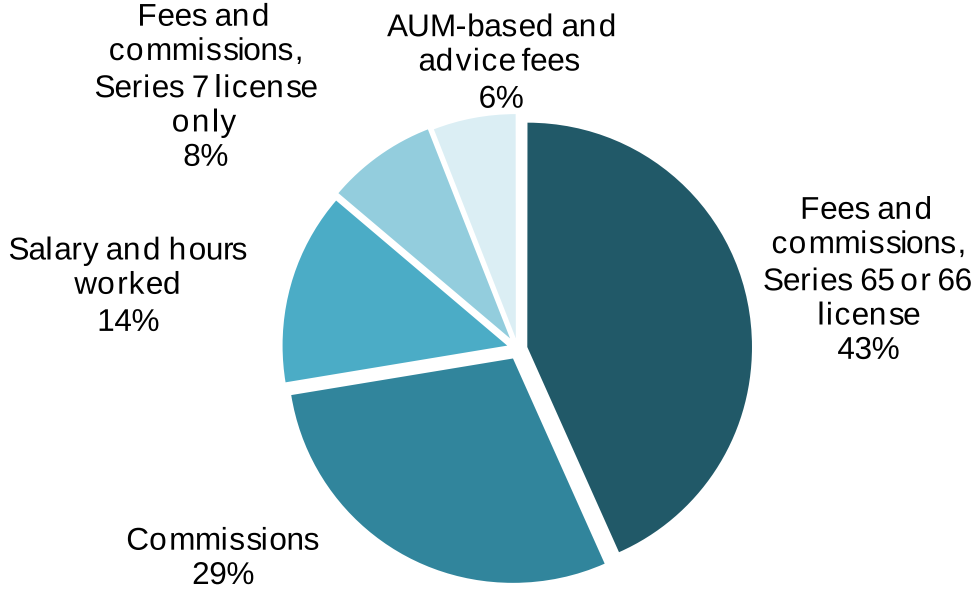
*Advisors who state that they work for an RIA and that their primary source of compensation is from assets-under-management –based fees and/or advice fees.

Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Over Half of Registered Representatives Earn AUM/Advice Fees

- Over half of registered representatives (RRs) receive compensation from AUM-based and/or advice fees primarily (57%).
- RRs who earn fees and commissions and who have a Series 66 or 65 (43%) have experience delivering fiduciary investment management services.
- RRs who earn fees primarily are already acting as a fiduciaries most of the time.

Q. What is your compensation primarily based on? (Registered representatives of broker-dealers only, n=421)

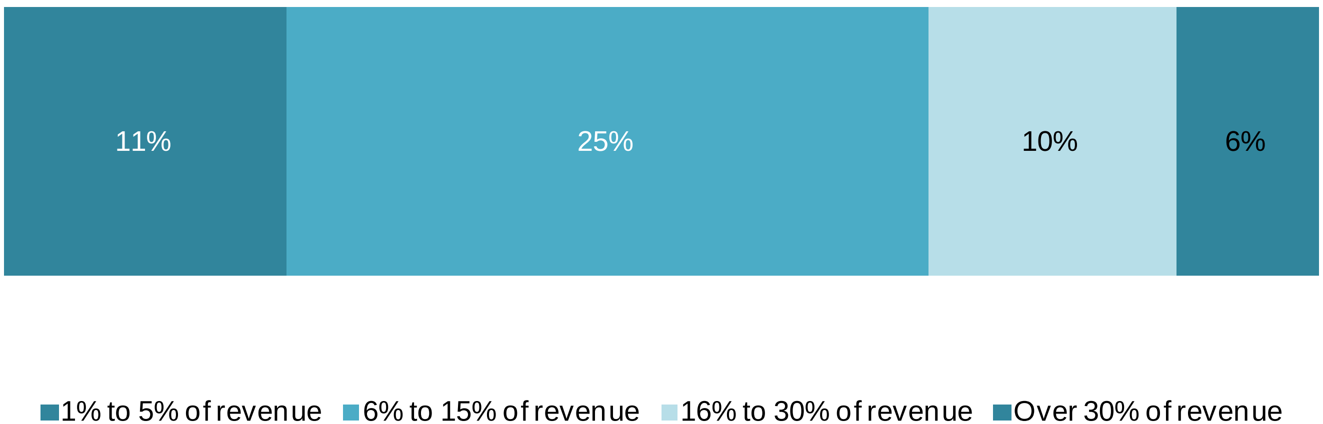


Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Meanwhile, Many RIA Firms Generate Some Revenue from Investment Commissions

- Over half of RIA businesses derive some of their revenue from the sale of commission-based investment products.
- Approximately 40% of RIAs surveyed indicate that investment commission-based business represents over 5% of revenue.

Q. What percentage of your practice's revenue/production of the last 12 months comes from investment commission-based business? (RIA practices only, n=71)



Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

RR and RIA Perspectives on the Uniform Fiduciary Standard

Key Finding #2:

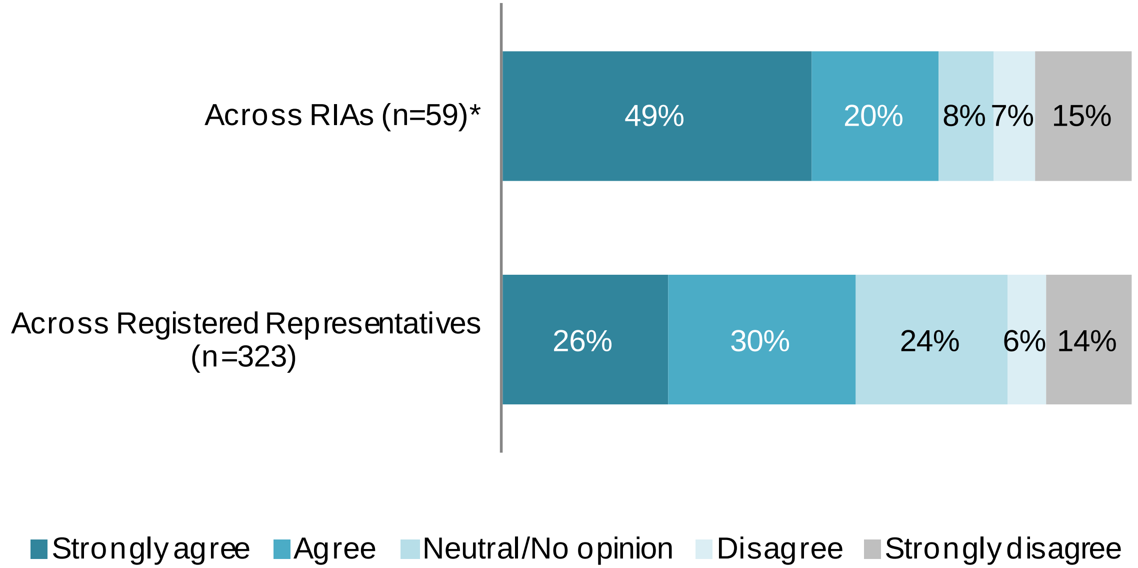
Most RRs and RIAs agree that a fiduciary standard of care is appropriate for financial services providers who deliver personalized investment advice.

The primary benefit is better alignment of representative and investor interests.

Over Half of Registered Representatives and More Than Two-Thirds of RIAs Believe the Fiduciary Standard Is Appropriate

…. a similar proportion of RRs and RIAs (around 20%) disagree and strongly disagree that a fiduciary standard of care is appropriate for all financial services providers

Q. What is your opinion of the following statement? A fiduciary standard of care is appropriate for all financial services providers who deliver personalized investment advice to retail investors.



**49% is statistically significantly higher than 26%*

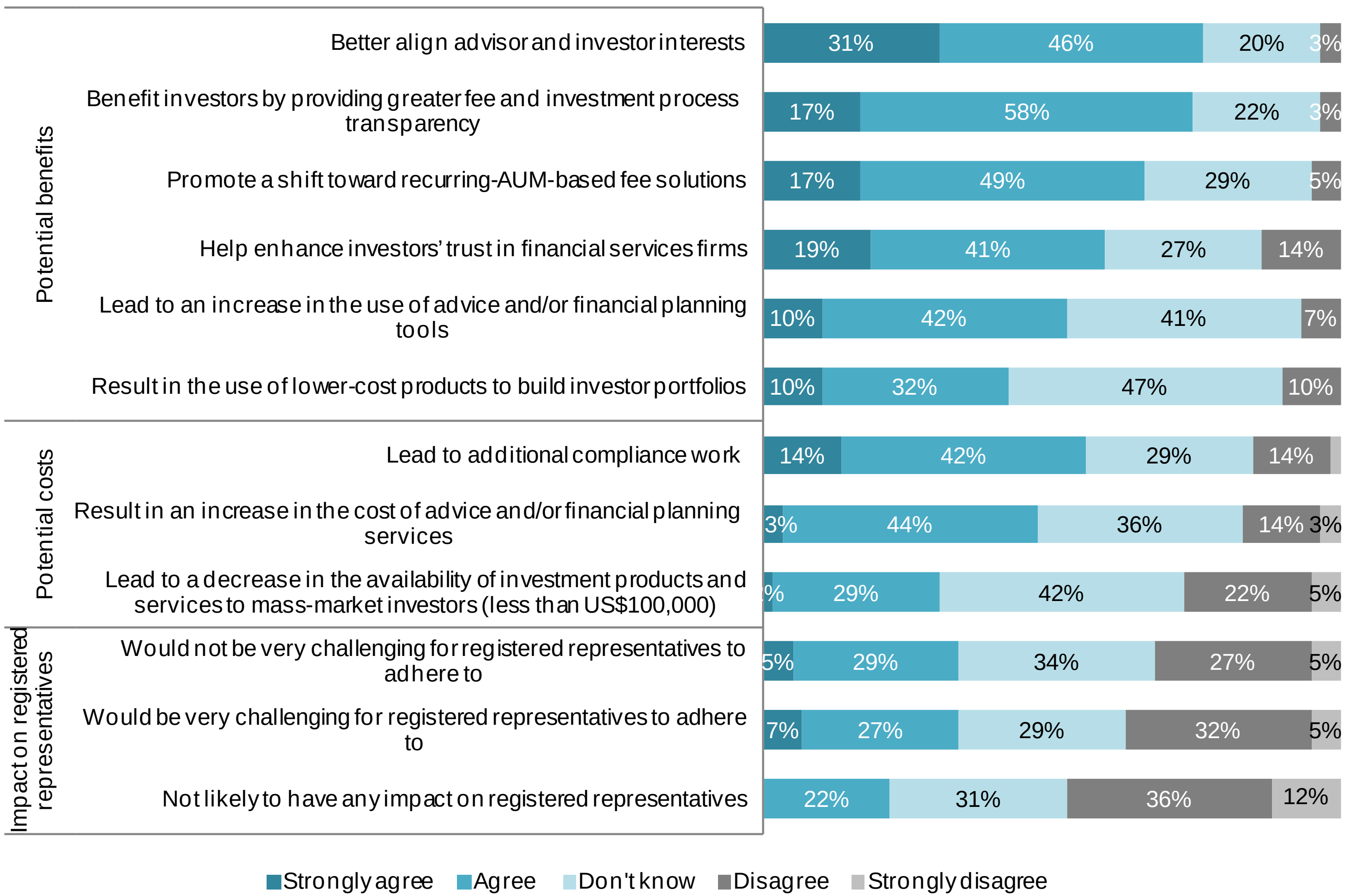
Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

More RIAs Recognize the Benefits of a Uniform Fiduciary Standard Than the Costs

#1 benefit is greater alignment between advisor (provider) and investor interests

Even among RIAs, a lot of unknowns/ uncertainty about impact

Q. Please indicate your level of agreement with each statement below:
"A uniform fiduciary standard for registered representatives and RIAs would ... "
(Answers from RIAs; n=59)



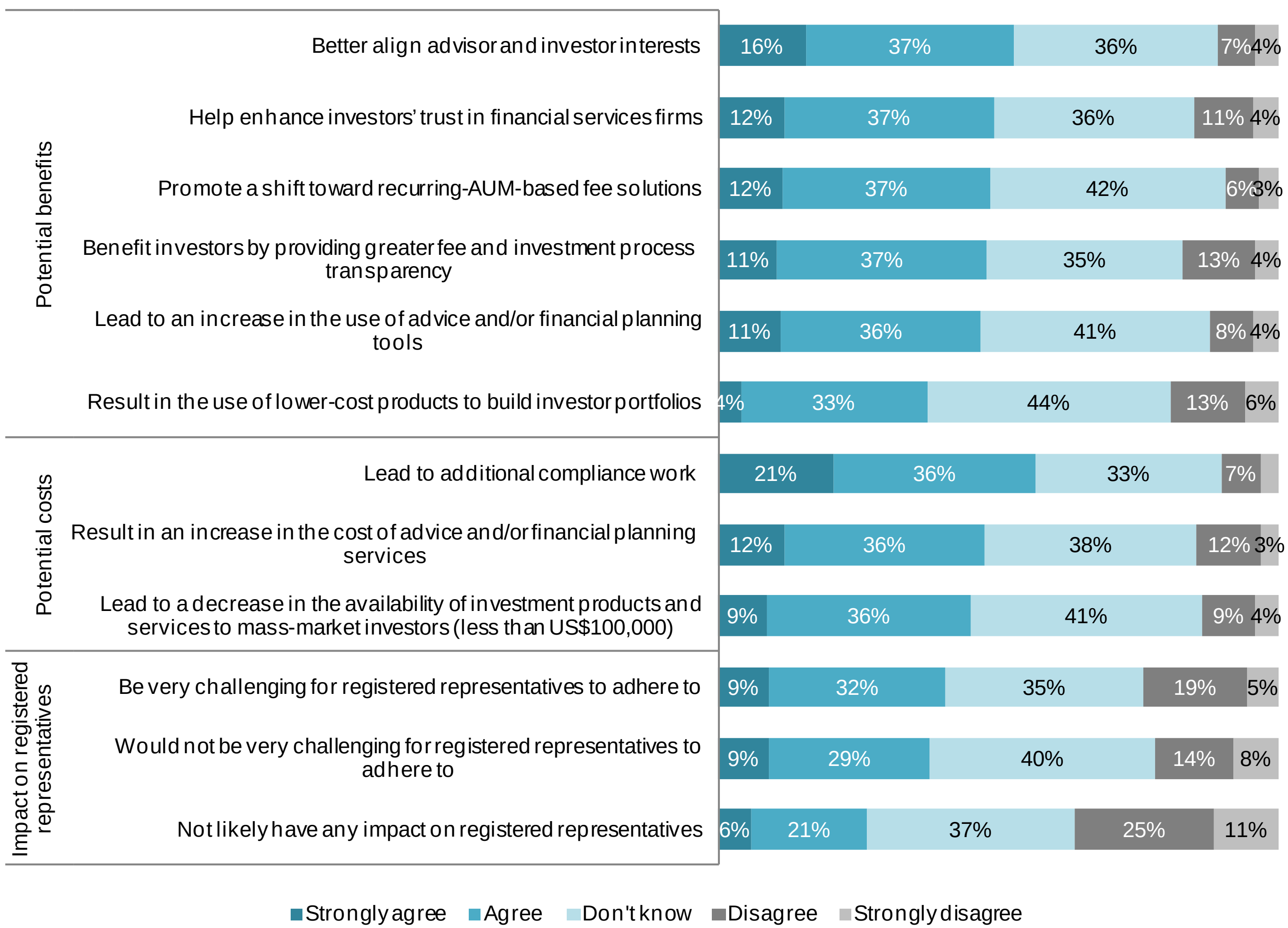
Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Registered Representatives are as Likely to Recognize the Benefits of a Fiduciary Standard as They Are the Costs

Fewer than 20% disagree /strongly disagree with benefits

The most frequently cited cost relates to compliance; close to 60% of registered representatives agree that the fiduciary standard will "lead to additional compliance work."

Q. Please indicate your level of agreement with each statement below:
"A uniform fiduciary standard for registered representatives and RIAs would..."
(Answers from Registered Representatives; n=319)



Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Registered Representative Adoption of Fiduciary Practices— *Disclosures of Conflicts of Interest*

Key Findings #3:

- While **over 60% of registered representatives disclose at least one type of conflict of interest**, there are opportunities to increase adoption of specific disclosures, particularly when registered representatives recommend products that have a higher sales commission compared with similar products.

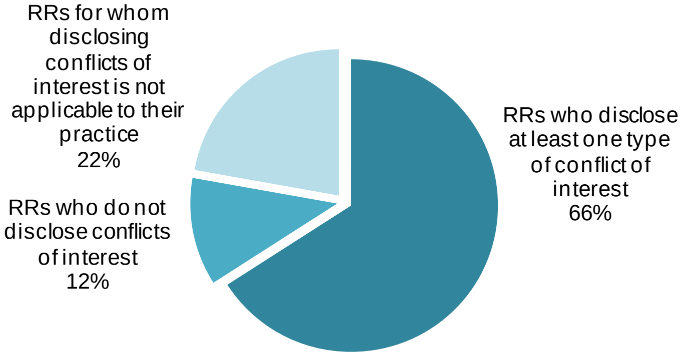
- Of the registered representatives who disclose at least one type of conflict **about half (52%) ask their clients for their informed consent** of conflicts of interest.

- Dually registered representatives are more likely to ask their clients for their informed consent of conflicts compared to registered representatives who are only registered with FINRA.

Conflicts of Interest Disclosure Practices

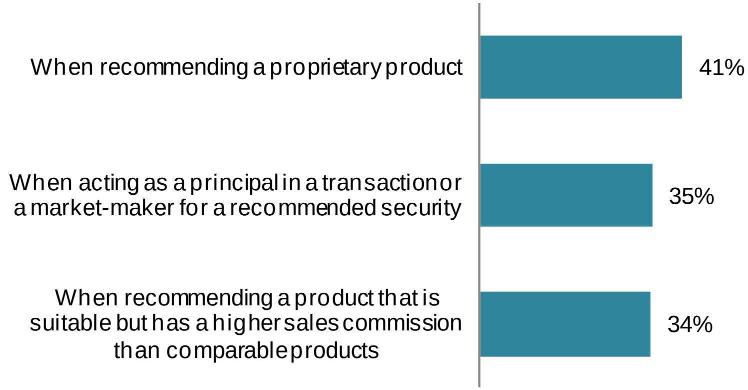
Registered Representatives Who Disclose Conflicts of Interest to Clients

Q. Under which of the following circumstances do you disclose conflicts of interest verbally or in writing to clients?
(Registered Representatives who disclose any type of conflict of interest to clients, either verbally or in writing; n=311)



Types of Conflicts of Interest Disclosed

Q. Under which of the following circumstances do you disclose conflicts of interest verbally or in writing to clients ?
(Registered representatives ;n=311)



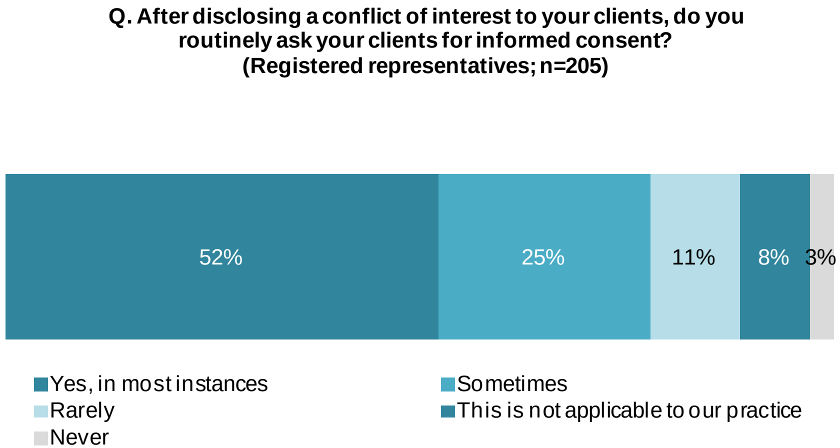
- The practice of disclosing conflicts of interest is already well adopted by broker-dealers (over 60% indicate disclosing at least one type of conflict of interest).

Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

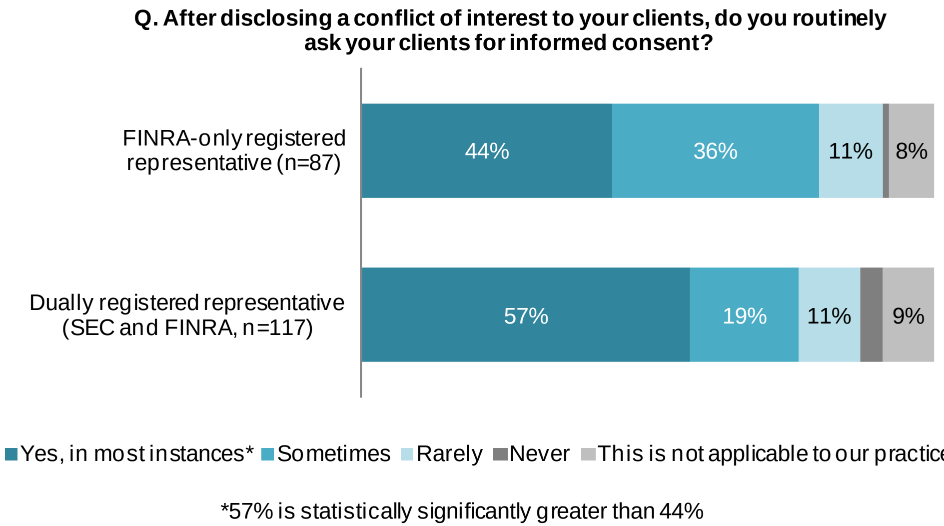
- While over 60% disclose one type of conflict of interest, less than half disclose conflicts of interest when recommending proprietary products or products that are suitable but have a higher sales commission compared to similar product types.
- This indicates that there are opportunities to improve transparency and disclosure practices through a potential uniform fiduciary standard for the benefit of investors.

Asking Clients for Informed Consent to Conflicts of Interest

Registered Reps Who Disclose Conflicts of Interest to Clients



Registered Reps Who Disclose Conflicts of interest to Clients by Type of Registration



- There is already good adoption of the fiduciary practice of asking clients for their informed consent of conflicts of interest among registered representatives (just over half of registered representatives who disclose one or more types of conflicts of interest to clients ask their clients for their informed consent in most instances).

- Dually registered representatives are more likely to ask their clients for their informed consent of conflicts of interests as they are legally required to do so when they act as fiduciaries.

Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

RR Adoption of Fiduciary Services

Key Findings #4:

- **Almost one-third** of registered representatives state that their practice **manages assets as a fiduciary** (recurring, fee-based service) for **over half of client assets.**

- Separately, **almost 20%** of registered representatives indicate that their practice **delivers financial plans under a fiduciary agreement to over half of clients** who receive advice over the course of a year.

- These registered representatives are referred to as **fiduciary registered representatives** for purposes of this analysis.

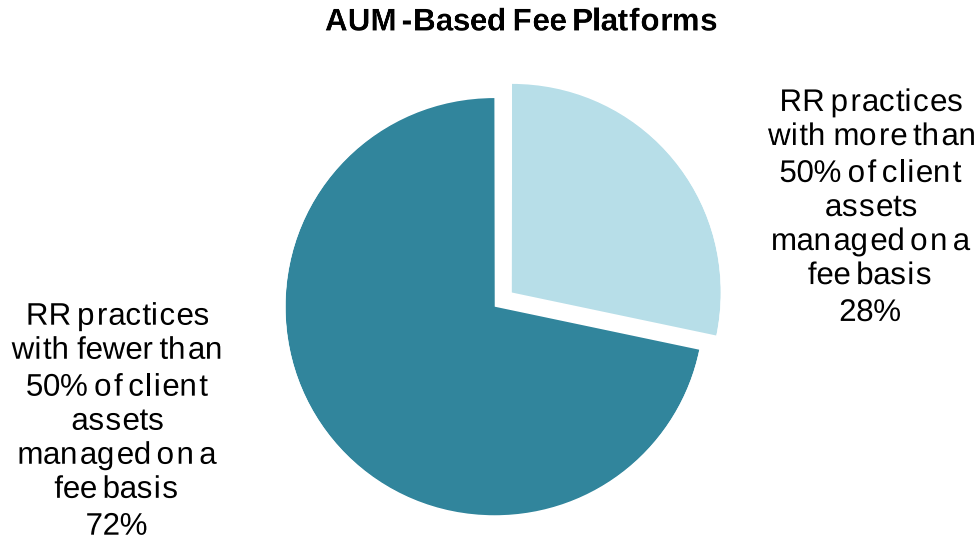
- Fiduciary registered representatives represent **32% of the registered representatives and RIAs** included in the analysis.

Investing as a Fiduciary—Fee-Based Investment Management

Almost **one-third of registered representatives** surveyed indicate that their practice manages over half of client assets for an AUM-based fee.

For this analysis, these RR practices are considered **investment management fiduciaries.**

Q. Roughly what percentage of your practice's client assets is invested across each type of platform? (Please add up to 100%)



Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

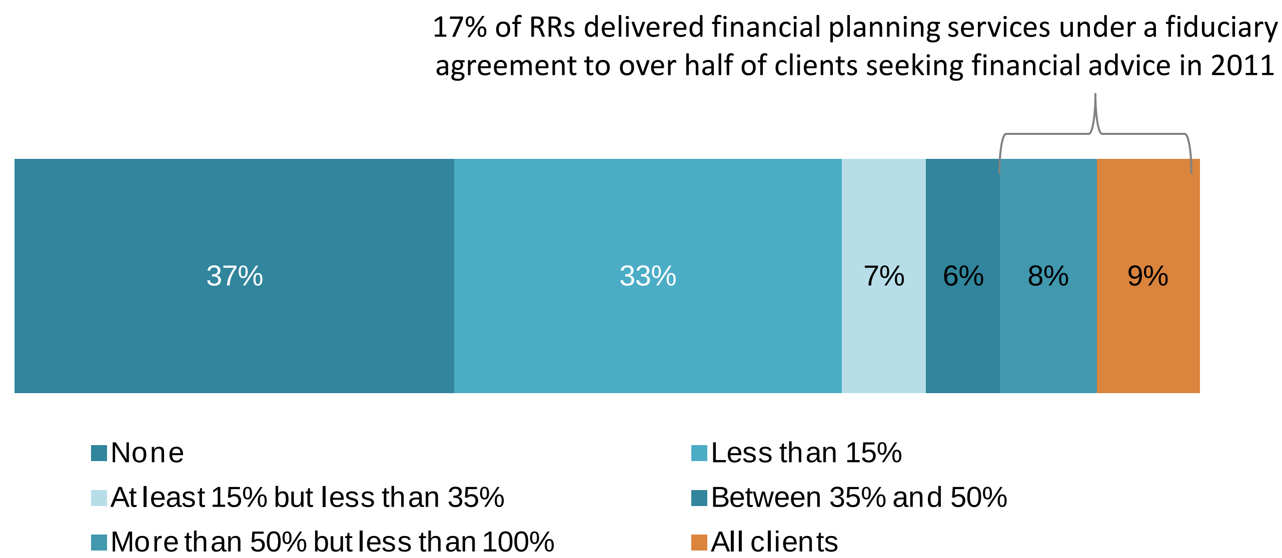
Registered Representatives Who Deliver Financial Plans as a Fiduciary

Combination of two questions:

- Of the clients that your practice serviced in 2011, what percentage signed a written agreement, other than a broker-dealer account-opening agreement, prior to receiving advice or financial planning services?
- **Multiplied by:**
- Of the clients who signed a written agreement prior to receiving advice or financial planning services, what percentage signed a written agreement specifying a fiduciary relationship?

- **17% of registered representatives** indicate that their practice delivered advice or financial planning services under a fiduciary agreement to more than 50% of clients in 2011.
- For the purposes of this analysis, these representatives are considered **financial planning fiduciaries.**

Percentage of Clients Receiving Advice or Financial Planning Services in 2011 Under a Fiduciary Agreement (n=321)

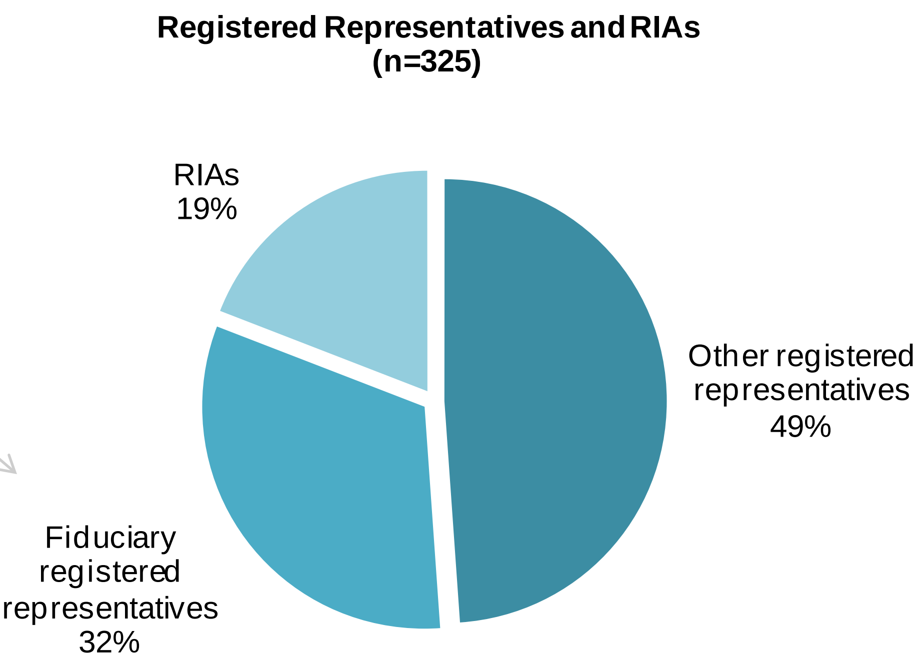


Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Segmentation of Registered Representatives Based on Delivery of Fiduciary Services

- **One-third** of the RRs and RIAs surveyed consist of registered representatives who provide fiduciary services to a majority of clients, either managing investments for an AUM-based fee or providing financial planning under a fiduciary agreement. This group is referred as "**fiduciary registered representatives.**"

- **Half of the population surveyed** provides mostly commission-based services and follows a suitability standard of care when delivering security recommendations. These registered representatives are referred to as **"other registered representatives."**



Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

The Benefits of a Fiduciary Model on Practice Performance

Key Findings #5:

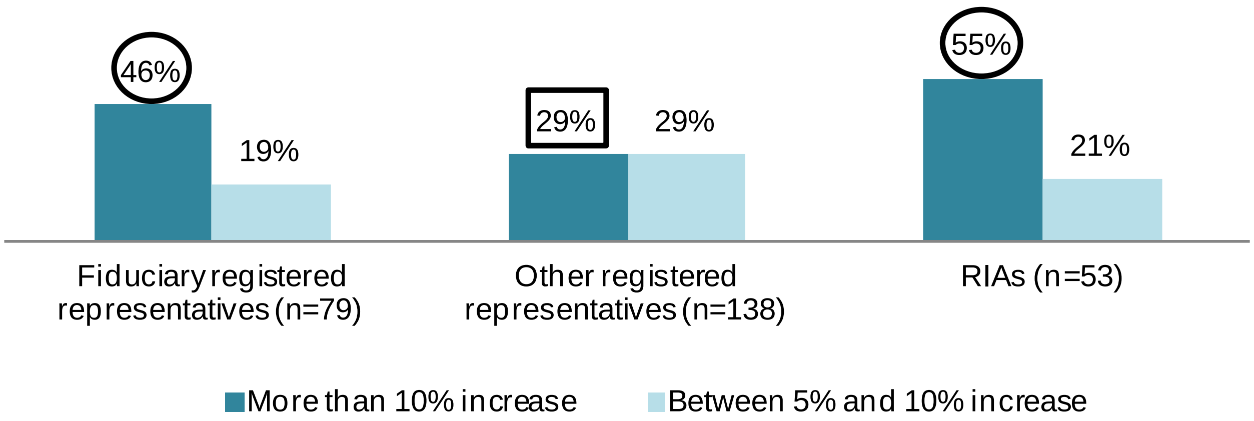
- Fiduciary registered representatives and RIAs experienced stronger client asset growth and revenue growth over the last five years than registered representatives who do not deliver fiduciary services to a majority of clients.

- Based on qualitative feedback from registered representatives and RIAs who transitioned from a commission-based practice to a fee-based practice (at least half of client assets managed for a recurring AUM-based fee), the impact of managing more client assets as a fiduciary resulted in gains in client wallet share and drove the practice to deliver more holistic advice.

RIAs and Fiduciary Registered Reps. Experienced Stronger Asset Growth vs. Other RRs

Over half of RIAs and almost half of registered representative fiduciaries generated double-digit client asset growth over the last five years, whereas just under one-third of other registered representatives did the same.

Q. What average annual change has your practice seen over the last 5 years (since 2007) for the following annual metrics? (Annual change in client assets, advisors with at least 5 years of experience)



Percentages outlined by circles differ significantly from the percentage outlined by a square

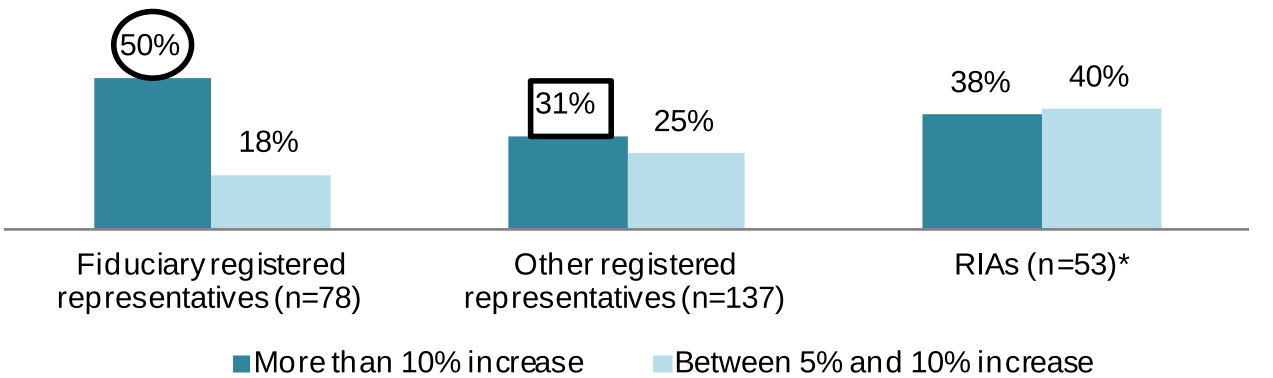
Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Fiduciary Registered Reps. Generated Stronger Revenue Growth vs. Other RRs

Half of fiduciary registered representatives achieved double digit revenue growth over the last five years while one-third of other registered representatives achieved this same level of growth.

A larger percentage of RIAs achieved 5% revenue growth or higher compared to other registered representatives.

Q. What average annual change has your practice seen over the last 5 years (since 2007) for the following annual metrics?
(Annual change in revenue for advisors with at least 5 years of experience)



The percentage outlined by a circle differs significantly from the percentage outlined by a square

**78% of investment advisors with RIAs generated revenue growth of at least 5% , significantly more than the 56% of other registered representatives.*

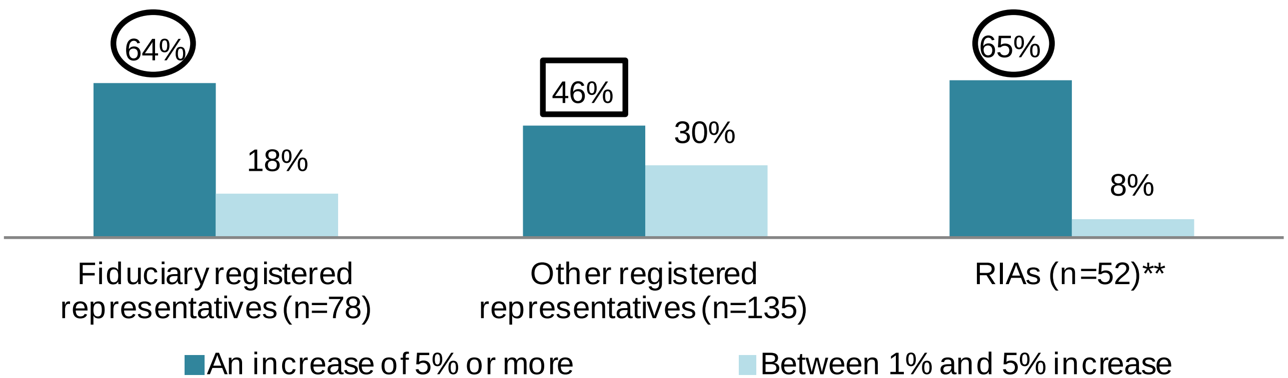
Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Fiduciary Registered Reps. Grew Investment Wallet Share by More Than Other Registered Reps.

64% of fiduciary registered reps. and 65% of RIAs attracted an additional 5% or more of their clients' investments to the practice annually over the last five years.

46% of other registered representatives reported the same performance.

Q. What average annual change has your practice seen over the last 5 years (since 2007) for the following annual metrics? (Annual change in investment wallet share,* advisors with at least 5 years of experience)



**Investment wallet share is the percentage of clients' total investment holdings with the practice*

Percentages outlined by circles differ significantly from the percentage outlined by a square
***65% is significantly larger than 46% at the 90% confidence level*

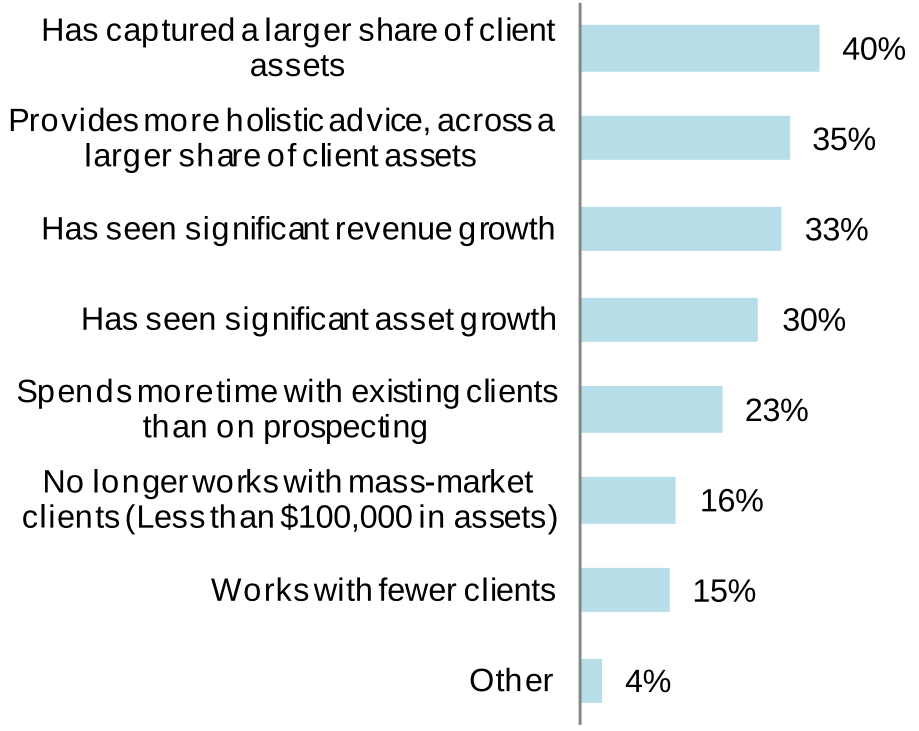
Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

RRs and RIAs Who Transitioned From Mostly Commission-Based Business to Mostly Fee-Based Business Over Past Five Years

These individuals report that the largest impact from the transition has been on share of wallet followed by the scope of advice provided (more holistic).

Only 16% cite no longer working with mass-market clients (overall, 5% of this group's clients are mass market).

What impact has the growth in fee-based business had on your practice? My practice… (n=81)*



*Registered representatives and RIAs who went from managing less than 40% of client assets for a recurring AUM-based fee to managing at least half of client assets in this way over a period of five years.

Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Impact of the Fiduciary Model on Ability to Attract HNW Clients and Address the Needs of Mass Market Clients

Key Findings #6:

- Fiduciary registered representatives are more likely to attract and work with high-net-worth and ultra-high-net-worth clients relative to other registered representatives (25% of clients vs. 15% of clients).

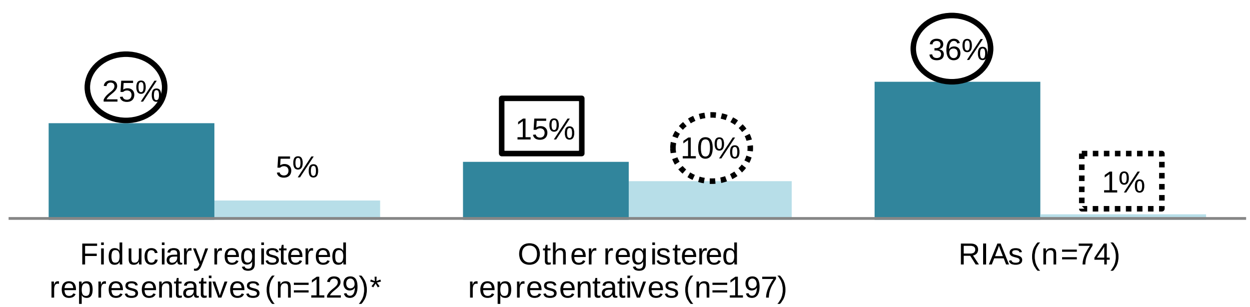
- The representation of mass-market clients across these two registered representative groups is equally low, ranging from 5% to 10%. This indicates that the lack of in-person advisory services available to mass-market clients is an industry-wide problem that is not likely to be exacerbated by the adoption of a fiduciary model.

Fiduciary Registered Reps. More Likely to work with HNW Clients Relative to Other RRs, but as Likely to Work with Mass-Market Clients

A larger percentage of clients of fiduciary registered representatives and RIAs are high-net-worth and ultra-high-net-worth compared to clients of other registered representatives.

Fiduciary registered representatives and other RRs work with an equally low percentage of mass-market clients, 5% and 10%, respectively.

Q. Please provide an approximate percentage breakdown of your practice's clients by wealth segment



- Median high-net-worth (US$1 million to US$9.99 million) and ultra-high-net-worth clients (US$10 million+) as a percentage of total clients
- Median mass-market clients (less than US$100,000) as a percentage of total clients

Percentages outlined by circles differ significantly from percentages outlined by squares in each category

**% of mass-market clients (5%) is not significantly different from 10% (other registered representatives)*

Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs

Impact of the Fiduciary Model on RR and RIA Time Allocation

Key Findings #7:

- Registered representatives who adopt a fiduciary model with a majority of clients spend a similar percentage of time (average time of client-facing practice members) on key wealth management activities, such as financial planning and investment management, as do other registered representatives.

- There are also minimal differences in time spent on compliance across RR types and RIAs; RRs who deliver fiduciary services to less than half of clients report spending the most time on compliance (8%).

Allocation of Time Spent Is Similar Across Models

For team practices, responses are based on a combination of the following two questions:

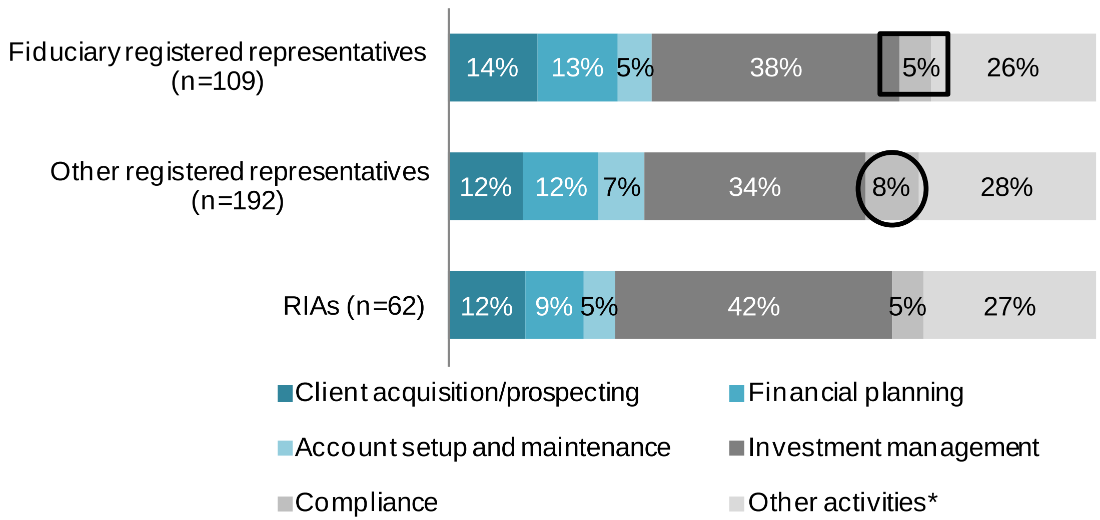
1. Please allocate the percentage of time you spend on each task?

2. You mentioned before that other people work with you in your practice; please allocate the percentage of time they spend per month on each task

Responses were weighted base on the number of client-facing professionals in the practice

Fiduciary registered representatives spend 5% of their time on compliance directly, while other registered representatives spend 8% of their time on compliance.

Allocation of Time Spent by Practice Members



Percentage outlined by a cirlce differs significantly from percentage outlined by a square at the 90% confidence level

**Other activities consist of: performance reporting, data reconciliation, customer service (check requests etc.), fee billing, and general administration)*

Source: Aite Group March 2012 survey of 498 U.S. registered representatives and RIAs