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NASAA

October 26, 2009

The Honorable Barney Frank
Chairman
Financial Services Committee

The Honorable Spencer Bachus
Ranking Member
Financial Services Committee

The Honorable Paul E. Kanjorski
Chairman
Capital Markets, Insurance and
Government Sponsored Enterprises
Subcommittee

The Honorable Scott Garrett
Ranking Member
Capital Markets, Insurance and
Government Sponsored Enterprises
Subcommittee

U.S. House of Representatives
Washington, D.C. 20515

U.S. House of Representatives
Washington, D.C. 20515

Re: October 1, 2009 Discussion Draft of the Investor Protection Act (to be reported as H.R. 3817)

Dear Chairmen Frank and Kanjorski, Ranking Members Bachus and Garrett, and Members of the Committee:

The members of the North American Securities Administrators Association (NASAA)[1] appreciate your continued efforts aimed at strengthening protections for investors. In that regard, I write to express the support of NASAA for the Discussion Draft of the Investor Protection Act ("Discussion Draft") and to urge you to consider revisions to strengthen the investor protection provisions of the Discussion Draft.

Section 103. Fiduciary Duty

NASAA joined with six organizations to express our support for language in the legislation that requires broker-dealers providing investment advice be subject to the same fiduciary duty currently applicable to investment advisers. Section 103 of the Discussion Draft addresses this issue. Our views regarding Section 103 are expressed in the joint letter, a copy of which is attached.

[1] The oldest international organization devoted to investor protection, the North American Securities Administrators Association, Inc., was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, the U.S. Virgin Islands, Canada, Mexico and Puerto Rico. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

Section 201. Mandatory Arbitration

It is a common industry practice for financial services intermediaries - broker-dealers and investment advisers - to include in their customer agreements a mandatory predispute arbitration provision that forces public investors to submit all disputes that they may have with the firm and/or its associated persons to arbitration. NASAA believes the "take-it-or-leave it" clause in client contracts is inherently unfair to investors, and that it is time to end mandatory, industry-run arbitration. State securities regulators support the intent of Section 201 to address concerns with the current mandatory arbitration system. However, the current language in Section 201 only provides an option for the Securities and Exchange Commission ("SEC") to consider rules to prohibit the use of these oppressive clauses in customer contracts. Instead, we believe the legislation should **require** that the SEC prohibit mandatory, predispute arbitration thereby providing investors with a meaningful choice between binding arbitration and civil litigation. We suggest the following amendment to both Sections 201 (a) and (b):

> "AUTHORITY TO RESTRICT MANDATORY PREDISPUTE ARBITRATION. – The Commission shall, within one year of enactment of this Act, prohibit agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors."

Section 206. Aiding and Abetting Authority

One of the purposes of the Securities Act of 1933 and the Investment Advisers Act of 1940 was to establish higher standards of conduct in the securities industry than already existed in common law. Sections 206 and 207 of the Discussion Draft do much to further this purpose by explicitly providing the SEC the authority to prosecute those secondary actors who aid and abet violations of these Acts. However, NASAA believes that the interests of investors would be best served by amending Sections 206(b) and (c) and 207(f) to remove the language, "brought by the Commission." By expressly stating "brought by the Commission", the language may inadvertently be read as an implicit exclusion of private rights of action. If aiding and abetting liability is not restored by Congress, innocent victims of investment fraud will be left without a remedy against the entities or persons that assisted in perpetrating the fraud.

Section 304. Commission Organizational Study and Reform.

Section 304 of the Discussion Draft mandates an independent study to examine the internal operations, structure, funding, and the need for comprehensive reform of not just the SEC but other entities relevant to the regulation of securities. NASAA fully supports the idea of such a study; however, the circulated manager's amendment to this section suggests that the study will be limited to the SEC and its "reliance on self-regulatory organizations (SROs)." NASAA is concerned that these proposed changes are attempts to limit the scope of the study to the SEC without a robust review of the operation of SROs. Given the extent of the damage caused to investors by both the Madoff and Stanford scandals – both of which had firms that were members of an SRO – we believe it would be imprudent to limit the scope of the study. We support the Sec. 304 language in the Discussion Draft and believe that an independent

examination of both the SEC and SROs be conducted to identify reforms and recommend further improvements designed to ensure superior investor protection.

On a related matter, NASAA opposes efforts to expand the jurisdiction and authority of private, membership organizations into an area that is more appropriately the province of government. State securities regulators believe the regulation of investment advisers is the responsibility of state and federal governments accountable to the investing public. An SRO is inappropriate for investment advisers because it embodies a flawed approach to regulation – SROs are inherently conflicted and are not independent. The solution to investment adviser regulations is to ensure that both state and federal regulators are adequately funded to carry out their regulatory responsibilities.

We appreciate this opportunity to share our views on the Investor Protection Act, and we look forward to continuing our work with you as Congress reshapes our financial regulatory landscape. If you have any questions, or if NASAA can be of assistance in any manner, please do not hesitate to contact me or Deborah House, NASAA's Director of Policy at 202-737-0900.

Sincerely,

Denise Voigt Crawford

Denise Voigt Crawford
Texas Securities Commissioner and
NASAA President

BY FACSIMILE

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Dear Chairmen Frank and Kanjorski, Ranking Members Bachus and Garrett, and Members of the Committee:

As you prepare to consider the Investor Protection Act, the undersigned organizations write to express our support for inclusion of a strong provision to ensure that all those who offer investment advice are held to the highest standard – the Investment Advisers Act fiduciary duty. We greatly appreciate the improvements that have been made to Section 103, including changes that recognize that a fiduciary must act in the *best* interests of his or her client, and as contained in the October 19 manager's amendment, an attempt to clarify that any rules promulgated to carry out this mandate must establish a standard that is at least as high as the fiduciary obligations that currently exist under the Investment Advisers Act. While we would have preferred an approach that did not amend the Advisers Act, but rather simply held brokers to the Advisers Act fiduciary duty, we believe that, properly implemented, these provisions should go a long way toward eliminating investor confusion and abuse that is the inevitable result when financial intermediaries who use similar titles and offer apparently identical services are allowed to do so under different legal standards.

We are concerned, however, that certain provisions of the current draft may leave room for the fiduciary duty to be watered down.

- First, we are concerned that when describing standards of conduct, the phrase "when providing personalized investment advice" might be used to argue that "hat switching" by brokers is allowed. By "hat switching" we are referring to the common practice where the same financial intermediary provides investment advice under a fiduciary duty and then executes the recommended transactions under a lower suitability obligation. Brokers have consistently sought to limit the fiduciary duty so that it would not apply to the sales recommendations intended to implement the advice. We realize the difficulty in drafting legislative language that precludes this possibility entirely, but we would appreciate anything the Committee can do to make clear that such an interpretation is not supported under the legislation.

- Second, the language requiring rulemaking by the Securities and Exchange Commission ("SEC") references personalized advice to retail clients. Currently, an adviser's fiduciary duty under the Advisers Act does not vary depending on the type of client served. We do not believe it is appropriate to have different standards for different types of clients. All investors receiving personalized investment advice should benefit from the protections of the Advisers Act fiduciary duty. At a minimum, we would appreciate anything you can do to clarify that the legislation does not in any way limit the fiduciary duty an investment adviser owes to *all* of its clients.

- Third, we are concerned that the clarifying language which states that the standards adopted under the legislation should be "at least as high" as those currently applied under the Advisers Act is only included in that portion of the legislation that amends the Advisers Act. This could lead some to conclude that the rules for brokers could meet a lower threshold, undermining the intent to ensure that, where the advisory services are comparable, the standards will be the same. Again, we urge you to preclude that outcome by clarifying that this interpretation is not permissible under the legislation.

Finally, we urge you to oppose any amendments that would weaken this section of the legislation, in particular by creating a new federal standard to replace the well-established Advisers Act fiduciary duty. The broker-dealer and insurance communities have sought just such an amendment, which would not only weaken this legislation's investor protections but would also undermine the protections currently afforded by the Advisers Act by substituting a lowest common denominator standard for the existing fiduciary duty. Contrary to brokerage and insurance industry claims, the existing fiduciary duty for investment advice is easily adaptable to the many different contexts in which investment advice is offered. Its facts and circumstances-based approach offers exactly the sort of principles-based regulation these industries have claimed to favor. To the degree that there is any need to clarify how fiduciary obligations apply in different circumstances, these can be addressed through rules.

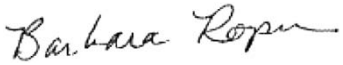
One particularly harmful amendment is being circulated by the American Association of Life Underwriters ("AALU"). That amendment would limit the definition of "investment advice" to situations in which commissions are not part of the fee paid to the service provider. In effect, this amendment would allow brokers to provide investment advice under the lower suitability standard. It would also restrict the options available to investors by eliminating the ability of investors to receive a combination of fee-based investment

advice and commission-based implementation all subject to a fiduciary duty. We urge you to strongly oppose this or any similar amendment that may be offered.

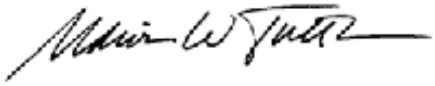
We greatly appreciate your attention to our concerns as well as everything you have already done to advance this important legislation.

Respectfully,

Kevin R. Keller, CAE
Chief Executive Officer
CFP Board



Barbara Roper
Director of Investor Protection
CFA



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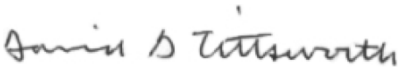

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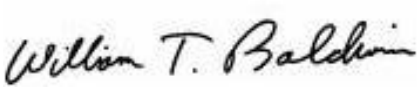

William T. Baldwin, JD
Chief Executive Officer
NAPFA