

***Submitted via electronic mail to: <http://www.regulations.gov>***

November 16, 2007

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Jeffrey Stoltzfoos  
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Department of the Treasury  
1500 Pennsylvania Avenue  
Washington, DC 20220

***Re: Review by Treasury Department of Regulatory Structure Associated with  
Financial Institutions***

Dear Messrs. Ugoletti and Stoltzfoos:

The Financial Planning Association (“FPA”®)<sup>1</sup> is pleased to submit comment on the notice and request for comments in connection with the Department of Treasury’s (“Treasury” or the “Department”) review of the regulatory structure associated with financial institutions. Although financial planners are largely identified with regulation as investment advisers, many also hold other securities or insurance licenses, and work in banks, trust companies and credit unions.

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<sup>1</sup> The Financial Planning Association® is the largest organization in the United States representing financial planners and affiliated firms, with approximately 28,500 individual members. FPA is incorporated in Washington, D.C., with administrative headquarters in Denver.

## Overview

FPA agrees with the premise that the regulatory structure, imperfect as it may seem today, has served the country well over the course of its history. However, as noted in the Department's request for comments, most of the basic regulatory structure was established decades ago and no longer reflects today's market reality. We believe that examination of those structures, along with ways to improve efficiency, reduce overlap and strengthen consumer and investor protections is warranted, and specifically, that regulatory reform for advice-givers is long overdue.

In many ways, financial planners reflect the tremendous diversity within the financial services industry in the way retail advisory services are delivered to the public. As a result, they are often subject to widely disparate regulatory structures.

Although there is no universally accepted definition, a "financial planner" may be described as "someone who prepares individualized analyses of financial position and family situation, who assists in determining economic goals, and who formulates plans for clients to achieve their economic goals."<sup>2</sup> In qualitative terms, FPA describes financial planning to consumers as "the process of wisely managing a person's finances in order to achieve lifetime dreams and goals while helping to negotiate the financial barriers that arise in every stage of life."<sup>3</sup> The CFP Board of Standards, Inc. ("CFP Board"), which tests and set standards for 56,000 certificants in the United States, defines financial planning as a six-step process that

typically includes, but is not limited to...six elements: establishing and defining the client-planner relationship, gathering client data including goals, analyzing and evaluating the client's financial status, developing and presenting financial planning recommendations and/or alternatives, implementing the financial planning recommendations and monitoring the financial planning recommendations.<sup>4</sup>

Recognizing the broad subject areas on which the Department is soliciting views, our own comments are limited to the problems that we see with respect to the delivery of financial planning services under the current regulatory structure.

***Question 1.2. Over time, there has been an increasing convergence of products across the traditional "functional" regulatory lines of banking, insurance, securities and futures. What do you view as the significant market developments over the past two decades...and please describe what opportunities and/or pressures, if any, these developments have created in the regulation of financial institutions?***

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<sup>2</sup> John P. Moriarty & Curtlan R. McNeily, "Regulation of Financial Planners, 2.01, 2-1 (West Group, Securities Law Series, vol. 19, 2001).

<sup>3</sup> <http://www.fpanet.org/public/tools/financialplannerhelp.cfm>.

<sup>4</sup> See Terminology section of "Code of Ethics and Professional Responsibility," CFP Board of Standards, Inc., at <http://www.cfp.net/downloads/COE.pdf>.

We believe the lines between financial institutions began to blur about three decades ago. In the early 1970s the lines between banking, insurance, brokerage and investment advice in the marketplace were still relatively clean, the titles used by retail agents reflected their role in the industry, and federal laws enacted in response to the Great Depression appeared to maintain their relevance to market practices.

For example, in the 1970s there were very few insurance agents licensed to sell mutual funds, brokerage firms did not own proprietary mutual funds, and custodial and wealth management services of trust companies and bank trust departments catered to the wealthy. Financial planning as a separate and distinct discipline was just beginning to emerge as a process of providing comprehensive advice that cut across traditional regulatory lines for brokerage, insurance and investment services, and across demographic lines by serving middle to upper income households. Consumer demand resulted in many financial planners holding three separate licenses in order to provide comprehensive advice. This same situation is largely true today for many planners and an increasing number of financial services firms.<sup>5</sup>

In the 1980s, with the deregulation of many industries, there was an explosion of products and services available to the public. Another significant, but largely unknown factor to the public, was the compression of commission revenue that started when Congress eliminated fixed trading commissions on May 1<sup>st</sup>, 1975, a practice that had been in place for some 183 years. This became known in the brokerage industry as “May Day,” resulting in the creation of discount brokerage firms. It also spurred the growth of independent advisory firms by enabling them to manage client assets at reasonable fees without the additional compliance and commission costs associated with a brokerage environment.

In the late 1990s, the pressure on commission margins accelerated when Internet trading made trading margins nominal, and forced wirehouses and other large brokerage firms to turn increasingly to a fee-based income model that placed a premium on financial advice, not brokerage execution.<sup>6</sup>

Other trends emerged as well over the last two decades, including a “retirement revolution” in which the defined benefit pension model began to fade as a preferred choice of employers, replaced by 401(k) and other defined contribution plans. IRA assets, for example, increased from \$1.1 trillion in 1994 to \$4.2 trillion by the end of last year; and defined contribution plans recorded similar asset growth to the point where in the first quarter of 2007, retirement savings accounted for 40 percent of all household

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<sup>5</sup> FPA membership reflects this licensing trend. Approximately 41 percent of FPA members are affiliated with SEC-registered investment adviser firms and 25 percent are registered with state securities administrators. Approximately 51 percent of individual members are affiliated with broker-dealers, and 58 percent hold insurance licenses. A smaller number are affiliated with depository institutions or licensed as attorneys providing estate planning services.

<sup>6</sup> See SEC staff comments regarding marketing of advisory services by brokerage firms: “We have observed that some broker-dealers offering these new accounts have heavily marketed them based on the advisory services provided rather than the execution services, which raises troubling questions as to whether the advisory services are not (or will be perceived by investors not to be) incidental to the brokerage services.” SEC Release No. Release Nos. 34-42099; IA-1845; File No. S7-25-99, Nov. 1999.

assets in the United States.<sup>7</sup> American workers were forced to choose between making their own critical, long-term investment decisions for retirement or retaining a financial adviser. The latter preference has created a tremendous demand for retail advice in the marketplace. With the new emphasis on objective advice rather than product solutions, the blurring of the traditional lines of business between sales and advisory services began and continues today as insurance and stock brokers reinvent themselves as financial planners or financial consultants.

**As a result, we believe that the most important market development over the past two decades has been the steady increase in firms offering comprehensive advice to the public – advice that cuts across regulatory lines -- while remaining subject to inconsistent standards of care.**

Unfortunately, the Depression-era laws did not anticipate the attendant conflicts with a single firm cross-selling multiple products and services to the same client. Nor did the Gramm-Leach-Bliley Act of 1999 (“GLB Act”), while embracing the concept of functional regulation, address the conflicts of cross-selling by affiliates of a holding company. Most federal and state statutes governing the sale of products do not rely on fiduciary standards of care and offer little in the way of disclosure of conflicts. Under the *caveat emptor* approach taken by broker-dealer and insurance rules, for example, the customer is presumed to understand the sales role and divided loyalties of the agent in selling a product, notwithstanding a new emphasis in marketing that implies a fiduciary relationship.<sup>8</sup> What this means is that the consumer is on their own in evaluating the ever-changing basis of their legal relationship with a financial conglomerate.

Not surprisingly, this new emphasis on advice instead of products, coupled with the use of new, and sometimes misleading professional titles in selling product across functional lines, has become extremely confusing for consumers.<sup>9</sup> By the early 1990s, the old labels of “broker,” “life agent,” and “account representative” began to morph into “financial advisor” and “financial consultant,” along with a host of misleading senior advisor designations that are currently the subject of intensive regulatory focus. To make things even more complicated, many of the investment products sold to the public are ‘hybrids’ covered under different laws, such as variable annuities, or the common industry sales practice of heavily marketing equity indexed annuities as risk-free investments when in fact regulators consider these to be insurance products.<sup>10</sup>

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<sup>7</sup> Oct. 18, 2007 release, Investment Company Institute, at [http://ici.org/stats/res/1retmrkt\\_update.pdf](http://ici.org/stats/res/1retmrkt_update.pdf).

<sup>8</sup> See Statement of SEC Chairman William Donaldson, Open Meeting of April 6, 2005, in which an exception from the Adviser Act for fee-based brokerage services was adopted by the Commission: “Should broker-dealers who provide investment advice but who are excepted from the Investment Advisers Act nonetheless be subject to the fiduciary obligations imposed by that Act on investment advisers?” at <http://www.sec.gov/news/speech/spch040605whd-bd.htm>.

<sup>9</sup> See “Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures,” *Report to the Securities and Exchange Commission, March 10, 2005*, by Siegel & Gale, LLC, Gelb Consulting Group, Inc., e.g., “Respondents in all focus groups were generally unclear about the distinctions among the titles *brokers*, *financial advisors/financial consultants*, *investment advisers*, and *financial planners*,” at <http://www.sec.gov/rules/proposed/s72599/fcprt031005.pdf>.

<sup>10</sup> See, e.g., NASD investor alert on equity indexed annuities, June 30, 2005, at <http://www.finra.org/InvestorInformation/InvestorAlerts/AnnuitiesandInsurance/Equity-IndexedAnnuities-AComplexChoice/p010614>:

Market conduct rules only began to change in the last 10 years after systemic abuses came to light. The former NASD, recently renamed Financial Services Regulatory Authority (“FINRA”), began to adopt new suitability and disclosure rules based on the complexity of the product sold.<sup>11</sup> The National Association of Insurance Commissioners (“NAIC”) only in the past several years has begun to establish suitability rules in connection with the sale of annuity products.<sup>12</sup> However, sometimes the regulatory jurisdiction is left up to a state to decide.<sup>13</sup>

Although the GLB Act was supposed to retain functional regulation even as it permitted the creation of financial holding companies, the new law did not address the regulatory conflicts associated with the delivery of financial advice that crossed regulatory lines.<sup>14</sup> Many of the current regulatory structures continue to reflect the laws of agency that divide the loyalty of the agent between the firm and the client, instead of mandating a fiduciary relationship with the client. A classic example involves financial planners, who are not regulated *per se* as financial planners, either on the state or federal levels. Typically, in their role as registered investment advisers, financial planners are required to act in a fiduciary capacity in providing advice.<sup>15</sup> However, they may change regulatory “hats” if the client wishes to have them implement certain elements of the plan on their behalf, in which instance they convert into insurance agents or brokers, whose regulatory frameworks do not require fiduciary conduct.

The FPA believes financial planners and others who hold out as financial experts or who provide material elements of financial planning to their clients should be held to a

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“Why an Alert on Equity-Indexed Annuities? Sales of *equity-indexed annuities (EIAs)* have grown considerably in recent years. Although one insurance company includes the word “simple” in the name of their product, EIAs are anything but easy to understand. One of the most confusing features of an EIA is the method used to calculate the gain in the index to which the annuity is linked. To make matters worse, there is not one, but several different indexing methods. Because of the variety and complexity of the methods used to credit interest, investors will find it difficult to compare one EIA to another.

Before you buy an EIA, you should understand the various features of this investment and be prepared to ask your insurance agent, broker, financial planner, or other financial professional lots of questions about whether an EIA is right for you.”

<sup>11</sup> See, e.g., “Fee-Based Account Questions and Answers,” NASD Notice to Members (“NTM”) 03-68, November 2003; “Special Notice to Members, Sales Material for Municipal Securities,” (i.e. 529 college education savings plans), March 2003; “Joint Statement of NASD and State Regulators in Support of Annuities Suitability Rule,” May 8, 2007, and NTM 04-45.

<sup>12</sup> In 2003, the National Association of Insurance Commissioners proposed a model regulation for adoption of suitability standards in annuity transactions with seniors. See [http://www.naic.org/Releases/2003\\_docs/senior\\_protection\\_annuity.pdf](http://www.naic.org/Releases/2003_docs/senior_protection_annuity.pdf). In 2006, the model was amended to apply to annuity transactions with all persons, regardless of age.

<sup>13</sup> The definition of “security” in Uniform Securities Act of 2002 [as amended], a model state securities law adopted by the National Conference of Commissioners on Uniform State Law, provides for optional inclusion of “variable annuities” as part of the definition, even though it is deemed a “security” by the SEC. See Sec. 102 (28)(B), at <http://www.law.upenn.edu/bl/archives/ulc/securities/2002final.htm>.

<sup>14</sup> See, e.g., SEC rule “Certain Broker-Dealers Deemed Not to be Investment Advisers,” 17 CFR Part 275 [Release Nos. 34–51523; IA–2376; File No. S7–25–99].

<sup>15</sup> See *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963).

fiduciary standard. This standard of care is not reflected in most regulatory structures.<sup>16</sup> In some sectors of the financial services industry, a financial plan is often viewed internally as a marketing product designed to get the client in the door, and then used as a handy research tool to cross-sell products to the client. As the convergence of products and services continues to increase, FPA believes that a single, uniform standard of client care is needed to provide for an objective, client-centered process to protect the public and the integrity and reputation of professional advice-givers.

***Question 1.2.1. Does the ‘functional’ regulatory framework under which banking, securities, insurance and futures are primarily regulated by respective functional regulators lead to inefficiencies in the provision of financial services?***

Regulators today are increasingly attempting to harmonize their efforts in overseeing the services provided by financial conglomerates. However they are often constrained by statute in doing little more than essentially referring cases across jurisdictions. Today there is little in the way of evidence or studies demonstrating that harmonizing state and federal regulation through joint examinations, sweeps and training has resulted in increased efficiencies in the delivery of financial services, reduction of compliance costs, or savings passed on to consumers.

Notwithstanding these efforts, the current framework continues to result in redundant licensing and compliance costs for firms providing comprehensive retail advice and sometimes needless filings with the states even when they are not involved in merit review.<sup>17</sup> Due to the increased number of hybrid products in the marketplace, products are sometimes subject to two regulatory structures even though these products are designed for a single client solution, a common example being variable annuities as a retirement planning option. Insurance agents, for example, must carry at least two licenses when selling variable annuities. And, as noted earlier, financial planners may hold as many as three separate licenses to advise and implement retirement planning solutions for their clients. A single license for financial planners offering recommendations on a broad range of financial services products or strategies across regulatory lines would make sense, subject to appropriate training, examination, ethics and continuing education requirements.

Conversely, some industries have sought and successfully secured exemptions for new advisory services that were not contemplated under their original charter. For example, several years ago the federal regulator of credit unions determined that certain financial advisory services were a functional part of what credit unions were always allowed to provide to credit union customers,<sup>18</sup> while the recent federal banking relief law<sup>19</sup>

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<sup>16</sup> Although case law may impose fiduciary duties in the financial services industry in a fact specific situation, a broad fiduciary duty to retail clients generally exists only with respect to investment advisers under the Employer Retirement Income Security Act of 1974; the Investment Advisers Act of 1940 and similar state statutes; for activities of bank trust departments and other depository institutions; in a limited number of states that impose fiduciary requirements on broker-dealers, but not at the federal level; and none for insurance producers under state law.

<sup>17</sup> See National Securities Markets Improvement Act of 1996 (“NSMIA”), Pub. L. No. 104-290. States were preempted from merit review of mutual fund registrations by NSMIA but nonetheless permitted to continue to collect filing fees.

<sup>18</sup> Federal Credit Union Incidental Powers Activities; 12 CFR Part 721, 2001.

permitted an exception from registration as an investment adviser for savings banks that provide financial planning and other services. Even though the GLB Act was intended to continue to permit functional regulation, industry pressures to cross-market other services have resulted in exemptions by rule or legislation. This, of course, tends to break down the original purpose for functional regulation, and while it may result in compliance savings, in appropriate exemptions from functional regulation may also erode consumer protection.

**Question 1.3. What should be the key objectives of financial institution regulation? How could the framework for the regulation of financial institutions be more closely aligned with the objectives of regulation?**

A 2004 report by the General Accountability Office (“GAO”) concluded regulation of the financial services industry is not working as efficiently as it should on a strategic level. GAO noted that while the U.S. regulatory framework has contributed to development of its capital markets and the national economy, it nonetheless “does not facilitate the monitoring of risks across firms and markets, and does not provide for a proactive, strategic approach to system wide issues.”<sup>20</sup> We agree with this assessment.

Although much of the GAO report focused on the regulatory system’s need to respond effectively to global market conditions, it also made specific recommendations to Congress for modifications of internal regulatory structures. Among these recommendations were:

- Consolidating the regulatory structure within the functional areas of banking, securities, insurance and futures, in part through integration of state and federal regulation; and
- Moving to a regulatory structure based on regulation by objective, or a “twin peaks” model that would establish one entity overseeing safety and soundness of financial institutions, and the other ensuring compliance with marketing and point of sale practices.

We believe that these two recommendations have strong merit and should receive further consideration by Congress and the relevant federal and state agencies.

**Twin Peaks Model.** With respect to the twin peaks model, creation of a point of sale entity governing the sale of products seems obvious. However, the GAO report did not address the important distinction between product sales advice and independent, professional advice with respect to the same products. We believe there should be a clear distinction drawn between point of sale “sales” and point of sale “advice” in regulating retail sales and marketing practices. Existing laws are no longer adequate to ensure consumer protection without commensurate fiduciary protections for advisory services that extend beyond product-specific advice. Among all of the financial industry scandals in the early part of the decade that tested existing regulatory structures, the

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<sup>19</sup> See “Financial Services Regulatory Relief Act of 2006, S. 2856, as enacted, Sec. 401, Parity Under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940.

<sup>20</sup> See “Industry Changes Prompt Need to Reconsider U.S. Regulatory Structure,” GAO report to the Senate Committee on Banking, Housing and Urban Affairs, Oct. 6, 2004, at 113.

Advisers Act stands out as a structural framework that experienced little or no systemic problems because of its broad fiduciary and disclosure requirements. Indeed, over the past 67 years the Advisers Act has served as a professional model for the financial services industry by incorporating fiduciary standards similar to those of the medical, accounting and legal professions. Over these years, there has been little in the way of systemic problems or the need for investigations by Congress regarding this approach to advisory regulation, unlike other areas of the financial services industry.

Another way of looking at a potential “twin peaks” model of regulation for the financial services industry is in drawing comparisons to the delivery of medical advice and products within the healthcare industry. State boards of medicine oversee the conduct of doctors (which is largely principles-based regulation), and a federal agency (the Food and Drug Administration) oversees the soundness and safety of the products that doctors recommend to their clients.

***Question 1.3.4. In recent years, debate has emerged about “more efficient” regulation and the possibility of adopting a “principles-based” approach to regulation, rather than a “rules-based” approach. Others suggest that a proper balance between the two is essential. What are the strengths, weaknesses and feasibility of such approaches, and could a more “principles-based” approach improve U.S. competitiveness?***

We believe that a principles-based approach must strike a careful balance with a rules-based approach. We would ask, for example, if a purely principles-based regulation had been in place during the securities analyst scandals of 2002, would the NASD and SEC have been able to detect the problems with investment banking conflicts that contributed to the most severe market correction in nearly 70 years? Would a principles-based approach in lieu of accounting rules have avoided the devastating losses to investors of Enron and a record number of 330 publicly traded companies restating their past earnings disclosures? While no one can say for certain, we are skeptical that a stand alone, principles-based regulation could be applied successfully to all regulatory structures.

Having reservations with a pure principles-based approach, though, we believe a proper balance between principles and rules could work well in the delivery of retail advice to the public, roughly similar to the standards that are in place for well-established, state-licensed professions. In the private sector, we point to the CFP Board of Standards’ *Standards of Professional Conduct* as a proven example of principles combined with specific rules of conduct that could serve the financial services industry. More recently the CFP Board rules of conduct were amended to incorporate a broad fiduciary requirement applicable to most activities of a financial planner.<sup>21</sup> The principles are general statements expressing the ethical and professional ideals CFP certificants are expected to display in their professional activities. As such, the principles are aspirational in character and provide a source of guidance for certificants. However, the principles form the basis for administering the CFP Board’s *Rules of Conduct, Practice Standards* and *Disciplinary Rules*, and these documents together reflect the CFP Board’s recognition of certificants’ responsibilities to the public, their clients,

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<sup>21</sup> See <http://www.cfp.net/certificants/conduct.asp> for additional information.

professional colleagues, and employers. We believe that with respect to retail advisory services, a principles and rules-based approach could work well in serving both the public and the financial services industry.

***Question 1.3.5. Would the U.S. financial regulatory structure benefit if there was a uniform set of basic principles that were agreed upon and adopted by each financial services regulator?***

We draw an important distinction between the benefits of a uniform set of principles and a uniform set of rules. It is highly questionable whether a uniform set of principles could work well across various regulatory lines. The problem comes in interpreting broad-based principles by a number of different regulators and the rules that flow from the principles. In practice, we believe that financial conglomerates as well as financial planners with multiple licenses, anticipating substantial benefits from harmonization across regulatory lines, would be sorely disappointed. Regulatory redundancy that is similar, but not uniform, is of little use to an industry relying on clarity in rules for compliance and liability purposes.

It would make far more sense, and be far more efficient, to establish a single regulator to oversee functional advisory activities in the point of sale area, rather than assume different regulators will apply general principles in a uniform manner.

***Question 1.4. Does the current regulatory structure adequately address consumer or investor protection issues? If not, how could we improve our current regulatory structure to address these issues?***

The current regulatory structure does not adequately address consumer issues. As noted earlier, there is no uniform standard of accountability in the sale of products or advice within the financial services industry. A unified regulatory structure that established standards of care for objective advice across industry sectors, and advanced the concept of a client-centered advisory process, would be of tremendous importance in addressing the core question of investor protection.

**Transparency.** One of the problems with inefficient regulation today has to do with the “barnacles” of new disclosure requirements that have grown over the years, partly as a result of privacy requirements in the GLB Act, and partly as a regulatory response to abusive sales practices. Over time, we find little evidence to suggest that the piling on of new disclosures has enhanced consumer protection. Alternatively, the regulatory structure could be significantly improved if regulators were to adopt more stringent training and experience requirements, as well as a fiduciary duty of loyalty, that shifts much of the burden of disclosure to the individual adviser. By mandating fiduciary conduct, regulators would not need to constantly react with new rules that contribute to the blizzard of disclosures overwhelming consumers today.

**Competency.** Another problem is the absence of uniform training or competency standards for advice-givers. Current regulatory structures generally do not mandate specific training or competency requirements for individual agents or advisors. Little or no competency training is required under the Advisers Act or under banking laws, and exams and continuing education requirements for insurance and stockbrokers are

inadequate in keeping up with the ever-changing and increasing complexity of new products offered to consumers. As a result, regulators keep adding new suitability and supervisory requirements for specific products when appropriate training would avoid the need for additional rules. By way of analogy, doctors are responsible for keeping up to date on new medications and studies involving drugs previously approved by the FDA. They must also be re-certified every five years by boards of medicine to maintain their competency. The FDA may issue advisories regarding side effects or health problems associated with certain medical products, just as FINRA or other regulators may issue alerts about unique suitability problems with certain investment or insurance products. However, unlike financial services regulators, the FDA does not mandate supervision of a doctor in prescribing a product to a patient. The trade off in regulatory terms is training and professional review, rather than intensive auditing and supervision.

As noted earlier, the private sector offers professional certifications, such as the CERTIFIED FINANCIAL PLANNER™ designation to require competency testing, experience, and disciplinary review. However, while an estimated 250,000 persons provide financial planning advice in the U.S., only 56,470 are certified as financial planners.<sup>22</sup> More study needs to be done regarding the harm to a client through incompetent advice than through fraud, particularly over the long-term. Some examples of incompetent advice that are not addressed within the current regulatory structure are failure to provide appropriate tax or charitable planning recommendations with respect to the sale of securities or other real property, ensuring that the correct beneficiaries are listed on account forms, carefully monitoring rollovers of retirement assets that may inadvertently trigger tax consequences, reminding clients to periodically review wills and life, property and disability insurance coverage, and ensuring that a trust is properly funded.

***Question 1.5. What role should the States have in the regulation of financial institutions? Is there a difference in the appropriate role of the States depending on financial system protection and investor protection aspects of regulation?***

States traditionally have been more sensitive to consumer concerns, and have the ability and local knowledge to protect the public at the point of sale. However, given the national presence of many financial conglomerates, non-uniform state regulation, even within the same industry, tends to make interstate business more costly. We point to the “twin peaks” concept as a model where the states could have an appropriate oversight role in point of sale regulation. In other words, consider a model where large financial institutions are regulated on the federal level, and licensing and market conduct rules set for individual agents and advisers on the state level. To a certain extent, this is already the model followed by the securities industry, although there are nonetheless redundant layers of oversight that complicate the existing structure.<sup>23</sup>

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<sup>22</sup> CFP Board data, at <http://www.cfp.net/media/profile.asp#link4>.

<sup>23</sup> For example, market conduct rules for broker-dealer agents are promulgated by FINRA and reviewed by the SEC. Brokers must be licensed by FINRA as well as each state in which they do business. Surprise audits of a broker-dealer firm may be conducted by any one of the three regulators, as well as enforcement actions.

A state role comes with a large caveat, however. We remain concerned that the current ‘state’ of state regulation hasn’t changed much over the years, with compliance costs continuing to mount for firms of all sizes doing business in more than one state. If states were subject to uniform standards of care for retail sales and advice, along with licensing reciprocity for individual agents, such reform would help significantly in protecting the public and improving efficiency in state regulation. One approach to encouraging uniform regulation on the state level without federal preemption of state authority might be establishment of an interstate compact by Congress that permits the states to promulgate national rules but then requires each state to enforce them in a uniform manner.

***Question 2.1.6. What are the key consumer protection elements associated with products offered by depository institutions? What is the best regulatory enforcement mechanism for these elements?***

Although depository institutions generally have a fiduciary duty to their clients under federal and state banking and trust company laws, there are no competency and disclosure standards associated with the advice provided to retail clients. Nor are there any clear standards of care for paid solicitations such as disclosure of the details of a referral arrangement under the Advisers Act.<sup>24</sup>

***Question 2.23. Should the States continue to have a role (or the sole role) in insurance regulation? Does the current structure work? How could that structure be improved?***

We believe that the federal government should have an expanded role in the regulation of insurance companies to preserve institutional solvency and for reinsurance purposes due to catastrophic losses from natural disasters or terrorism. We believe that point of sale regulation and individual producer registration could allow for optional state or federal licensing. With respect to professional advice on risk management issues – separate from the sales activities of insurance agents – we refer back to the need for standards such as those developed by the CFP Board of Standards for comprehensive advice. These standards, in connection with other aspects of financial planning activities, could be regulated on the state level by a professional financial planning board, or by a similar, professional regulator on the federal level. The establishment of a professional board should be predicated on covering all aspects of financial planning, not just insurance advice.

***Question 2.3.4. What is the optimal role for the States in securities and futures regulation?***

As noted earlier, we believe that institutional solvency and product review is best left to federal oversight, and market conduct to the states, provided that appropriate licensing reciprocity and uniform standards are mandated by Congress.

***Question 2.3.5. What are the key consumer/investor protection elements associated with products offered by securities and futures firms? Should there***

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<sup>24</sup> § 275.206(4)-3, known as the “solicitor’s rule,” or cash payments for client solicitations.

***be a regulatory distinction among retail, wholesale, commercial and hedging customers?***

Yes, there should be clear regulatory distinctions between retail clients and other types of financial services customers. We have already outlined our interest in seeing professional standards required for financial planners and others who provide comprehensive advice to the public. However, we wish to make it clear that advice associated with the sale of a product to retail clients would not necessarily need to meet the same standards of care, so long as the role of the salesperson was properly disclosed and that the sales agent was restricted from using misleading titles or providing advice for compensation outside of his specific area of product sales.

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Thank you for the opportunity to provide an overview of certain issues related to the notice for comment by Treasury. If you require additional information or clarification, please don't hesitate to contact me at 202-449-6341 or [duane.thompson@fpanet.org](mailto:duane.thompson@fpanet.org).

Very truly yours,

A handwritten signature in cursive script, reading "Duane R. Thompson". The signature is written in black ink and includes a long horizontal flourish at the end.

Duane R. Thompson  
Managing Director