No. 09-6207

United States Court of Appeals for the Tenth Circuit

ROBERT L. THOMAS and AMANDA THOMAS,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY
and METLIFE SECURITIES, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Oklahoma,
Civil Action No. 07-cv-0121
Hon. Stephen P. Friot

Brief for *Amicus Curiae* American Council of Life Insurers in Support of Appellees

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae The American Council of Life Insurers ("ACLI") is a non-profit corporation. It does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurers ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 340 member companies conducting business in all 50 states. ACLI member companies account for 93% of the total assets, 94% of the life insurance premiums, and 94% of the annuity considerations in the United States among legal reserve life insurance companies. ACLI often files amicus briefs in cases, like this one, that involve issues of substantial importance to its members.

Life insurance companies offer a wide range of financial products and services to assist consumers in their retirement, estate, tax, and financial planning needs, including variable life and variable annuity products. While many of these products and services are subject to the comprehensive state laws and regulations governing the insurance industry specifically, therefore, many of these products and services are also subject to the federal securities laws. Indeed, ACLI estimates that more than 50% of the Financial Industry Regulatory Authority ("FINRA")'s list of registered representatives work for broker-dealers affiliated with life insurance companies.

The responsible distribution of insurance products necessarily involves the identification of financial products that meet the needs of particular customers. Numerous federal and state laws *require* insurance providers to inquire about and consider a consumer's needs and objectives, financial resources, capacity for understanding, and risk tolerance before recommending a particular insurance policy. Such inquiries and their resulting recommendations have, to the extent that they involve securities, long been considered part of basic brokerage services. Thus, while investment advice offered in connection with the sale of certain insurance products may be governed by the extensive requirements applicable to *both* broker-dealers *and* insurance providers, such advice has not previously been deemed to trigger the fiduciary and other obligations applicable to investment advisers.

In the aftermath of the recent financial crisis, many have questioned the continued wisdom of the current bifurcated approach to regulation of broker-dealers and investment advisers. Indeed, the House of Representatives recently passed legislation that would create a harmonized fiduciary standard for broker-dealers and investment advisers when they are providing securities-related

investment advice to retail investors, and a similar bill may be considered by the Senate in the coming months. Because any such change in the law would significantly impact the life insurance industry, ACLI has participated actively in this legislative process.[1] And although ACLI supports in principle the harmonization of the rules governing brokers, dealers, and investment advisers, it strongly believes that any such departure from the existing regulatory system requires careful consideration and important policy judgments uniquely within the province of the legislature.

The plaintiffs, however, ask this Court to construe existing law in a manner that blurs the well-established distinction between investment advisers and broker-dealers. If adopted, their interpretation would radically change the current regulatory framework, upset settled expectations, and produce unintended consequences that would harm consumers as well as the insurance industry. ACLI thus respectfully submits this amicus brief, pursuant to the

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[1] *See, e.g.*, *Capital Markets Regulatory Reform: Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office: Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. (Oct. 6, 2009) (statement of the ACLI), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/maisel_testimony.pdf.

accompanying motion, to explain the broader legal context and the practical importance of the issue before this Court, and to urge that it affirm the judgment of the district court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Consistent with well-established industry understanding and practice, the district court held below that advisory services offered "in connection with" or "attendant to" traditional broker-dealer activities, absent "special compensation," are subject to the regulations that govern broker-dealers under the Securities Exchange Act of 1934 ("Exchange Act")—not those applicable to investment advisers under the Investment Advisers Act of 1940 ("Advisers Act"). The plaintiffs ask the Court to upend this longstanding regulatory scheme and adopt an interpretation of the Advisers Act that would subject broker-dealers offering anything but "minor" or "inconsequential" investment advice to the fiduciary and disclosure standards currently applicable only to investment advisers.

MetLife's brief persuasively demonstrates the errors underlying plaintiffs' interpretation of the Advisers Act and, in keeping with its role as *amicus curiae*, ACLI will not repeat those arguments. Rather, ACLI invites the Court to consider the larger legal framework

in which the statutory provision at issue operates, as well as the potential unintended consequences of a decision to adopt the plaintiffs' position.

The plaintiffs' interpretation of the Advisers Act's "broker-dealer exception," if accepted by this Court, would inappropriately expand the application of the Advisers Act to activities long considered an integral part of the broker-dealer business. Such a result would contravene the intent of Congress, which opted to govern the advisory activities of broker-dealers and investment advisers under two separate and distinct regulatory regimes. It would also upset settled industry expectations and increase the cost (and potentially reduce the provision) of investment services—adversely affecting financial professionals, consumers, and the financial markets as a whole.

Although certain consumer advocates have called for such legislative changes and related regulatory reform in the aftermath of the greatest economic crisis since the Great Depression, a judicial decision to impose the Advisers Act's requirements upon basic broker-dealer activities would constitute a major upheaval in existing law. It would also require difficult and complex policy judgments

that should be made prospectively by Congress, not retrospectively by the courts. Accordingly, ACLI urges this Court to reject the plaintiffs' novel interpretation of the Advisers Act and affirm the judgment of the district court.

ARGUMENT

I. Plaintiffs' Interpretation Would Depart Dramatically From The Regulatory Scheme Established By Congress.

A. The Statutory Framework for Regulation of Broker-Dealers and Investment Advisers

Much of the financial regulatory structure that exists today originated as a legislative response to the stock market crash of 1929 and the ensuing Great Depression. *See, e.g.*, *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 483 (D.C. Cir. 2007). The Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), in particular, reflected the legislature's attempt to eliminate abusive practices in the securities industry that were believed to have contributed to the financial crisis. *Id.* Administered by the then-newly created Securities & Exchange Commission ("SEC"), the Securities Act governed the issuance, registration, and initial distribution of securities on the primary market. The Exchange Act, in turn, set forth sweeping new rules regulating the

trading of securities on the secondary market, establishing various disclosure requirements, anti-fraud provisions, and a detailed regulatory oversight structure governing brokers and dealers. *See* 15 U.S.C. §§ 78a et seq.

While the Securities Act regulated issuers and the Exchange Act regulated broker-dealers, it soon became clear that Congress had left a sizeable "regulatory gap" in the laws governing certain aspects of the financial industry. *See Certain Broker-Dealers Deemed Not To Be Investment Advisers*, 70 Fed. Reg. 20,424, 20,429-30 (Apr. 19, 2005) (hereinafter "*Certain Broker-Dealers*"). Although registered broker-dealers who offered investment advice as part of the traditional package of brokerage services were subject to extensive regulation and oversight under the Exchange Act, other "persons engaged in the business of providing investment advice for compensation" *outside* of the broker-dealer context remained "largely unregulated." *Id.* These so-called "investment advisers," "counselors," or "portfolio managers" could monitor their clients' funds, provide tips and personalized investment advice, and even exercise discretion over their clients' investment portfolios essentially free of statutory or regulatory constraints. As Congress soon recognized,

"'[v]irtually no limitations or restrictions exist[ed] with respect to the honesty and integrity of individuals who may solicit funds to be controlled, managed, and supervised."' *Fin. Planning Ass'n*, 482 F.3d at 484 (quoting S. Rep. No. 76-1775, at 21-22 (1940)).

To fill this "regulatory gap," Congress enacted the Investment Advisers Act of 1940 (54 Stat. 847, codified as amended, 15 U.S.C. §§ 80b-1–80b-21) ("Advisers Act"). The Advisers Act imposed upon "investment advisers"—broadly defined as "any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities," 15 U.S.C. § 80b-2(a)(11)—a variety of specific obligations, including custody-of-assets regulations, advertising restrictions, and disclosure requirements. It also prohibited "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," 15 U.S.C. § 80b-6(2)—a standard subsequently held to impose a broad fiduciary duty upon investment advisers. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963).

Promulgated only a few years after the Securities Act and the Exchange Act, the Advisers Act was not intended to supplant the

existing and detailed regulatory structures that governed securities issuers and broker-dealers. Tellingly, Congress applied the terms of the Advisers Act only to investment *advisers*, not investment *advice*. Recognizing that its broad definition of "investment adviser" encompassed a number of entities offering investment advice that were already subject to extensive regulation, moreover, Congress provided explicit exceptions for banks, bank holding companies, and certain other enumerated professionals, such as lawyers and accountants, "whose performance of such [investment advisory] services is solely incidental to the practice of [their] profession." 15 U.S.C. § 80b-2(a)(11)(A) & (B).

B. The Broker-Dealer Exception

Well aware that broker-dealers provide a substantial amount of investment advice in the ordinary course of their business (indeed, it had regulated such activities under the Exchange Act only six years earlier), Congress also included broker-dealers in its list of advisory professionals excepted from the scope of the Advisers Act. *See Certain Broker-Dealers*, 70 Fed. Reg. at 20,432. Rather than simply mention them along with lawyers and accountants in Subsection 202(a)(11)(B), however, Congress crafted a specific "broker-

dealer exception"—Subsection 202(a)(11)(C)—limited to those broker-dealers who provide investment advice "solely incidental to the conduct of [their] business as a broker or dealer *and* who receive[] no special compensation therefor." 15 U.S.C. § 80b-2(a)(11)(C) (emphasis added).

The purpose of this two-pronged limitation was not, as the plaintiffs contend, to ensure that the Advisers Act applied broadly to "all brokers who provide investment advice," unless that advice was minor or insignificant. *See* Thomas Br. at 22-23, 29. As the SEC has explained, the Advisers Act was not meant to superimpose an additional set of regulations upon broker-dealers providing investment advice solely in connection with brokerage activities already governed by the Exchange Act. *See Certain Broker-Dealers*, 70 Fed. Reg. at 20,431. Rather, the two-pronged test was intended to clarify that broker-dealers providing investment advice *outside* the context of a traditional brokerage transaction could no longer do so without regulation. *Id.* at 20,428-31.

Indeed, at the time of the statute's enactment, brokerage firms often divided themselves into two distinct departments: one providing traditional brokerage services, for which customers paid a

transaction-based commission, and one providing independent advisory services, for which clients paid a separate fee (typically a percentage of their assets under management). *Certain Broker-Dealers*, 70 Fed. Reg. at 20,428-31. Although professionals in both departments offered significant investment advice in the regular course of business, the Exchange Act regulated only the former. Congress thus excepted broker-dealers from the Advisers Act's requirements "insofar as their advice is merely incidental to brokerage transactions for which they receive only brokerage commissions." *Fin. Planning Ass'n*, 482 F.3d at 485 (quoting S. Rep. No. 76-1775, at 22; H.R. Rep. No. 76-2639, at 28); *see also Certain Broker-Dealers*, 70 Fed. Reg. at 20,428-31. This carefully crafted provision furthered Congress's intent to plug the holes in the existing consumer protection regime while avoiding excessive and potentially inconsistent regulation of broker-dealers. *See Certain Broker-Dealers*, 70 Fed. Reg. at 20,428-31.

For the last seventy years, therefore, the law governing financial professionals has "drawn a line between investment advisers and broker-dealers," with the activities of broker-dealers regulated primarily under the Exchange Act and the activities of investment

advisers regulated primarily under the Advisers Act. Jill E. Fisch, *Fiduciary Duties and the Analyst Scandals*, 58 ALA. L. REV. 1083, 1094 (2007). Throughout this time, the line has been relatively easily drawn: Broker-dealers must comply with the Advisers Act only when (and to the extent that) they offer investment advice *separate and distinct from* their traditional package of brokerage services or charge separately for that advice—even if they are dually registered as an investment adviser. *See, e.g.*, 17 C.F.R. pt. 276. The district court's decision, which maintains this bright line, is wholly consistent with Congress's carefully calibrated regulatory structure, as well as the longstanding expectations and practices of the securities industry.

II. On Balance, Interpreting The Scope Of The Advisers Act To Encompass All But "Minor" Or "Inconsequential" Advice By Broker-Dealers Would Actually Harm Consumers.

The plaintiffs ask the Court to jettison this well-established interpretation of the broker-dealer exception and to adopt an entirely new approach to determining who is an investment adviser. Under their reading of the statute, any broker-dealer who renders more than "minor, inconsequential, or non-central" advice in connection with a securities transaction becomes an "investment adviser," sub-

ject to the fiduciary duty and regulatory strictures provided in the Advisers Act. *See* Thomas Br. at 26. Because investment advice given by a broker-dealer "*almost always*" plays "more than just a minor or insignificant role in a customer's decision" to purchase a security, however, such an interpretation would subject traditional brokerage activities—long considered to be outside the scope of the Advisers Act—to an entirely new set of overlapping and potentially inconsistent regulatory requirements. JA 713 (emphasis added); *see also* Thomas Br. at 32 (quoting this statement by the district court and asserting that it was "precisely what Congress intended"). Moreover, as the plaintiffs offer no objective *ex ante* means of ascertaining whether advice is "minor," "inconsequential," or "non-central to the transaction," their interpretation would force broker-dealers to determine the rules and duties with which they must comply on an ad hoc, case-by-case basis. Furthermore, this *ex ante* judgment would be subject to *ex post* second-guessing—most likely through fact-intensive litigation.

The SEC previously has rejected such an interpretation of the statute because it would "extend the Act to most full-service broker-dealers"—a result it viewed as in "conflict with the purpose of the

statutory exception." *See Certain Broker-Dealers*, 70 Fed. Reg. at 20,434. This Court similarly should decline to disturb the legislature's careful balance between investor protection, on the one hand, and the harms of duplicative and inconsistent regulation, on the other. In addition to flouting Congressional intent, adopting the plaintiffs' interpretation would inject substantial uncertainty into well-settled industry practice, increase the costs of doing business, and ultimately harm consumers.

A. Application of the Advisers Act To Broker-Dealers Is Not Necessary To Ensure Consumer Protection

The plaintiffs contend that all financial professionals offering more than "minor" or "inconsequential" investment advice should be subject to the Advisers Act's broad fiduciary duty, even if they are engaging in traditional broker-dealer activity. The Advisers Act's fiduciary standard, however, flows in large part from the fact that investment advisers, unlike broker-dealers, often are entrusted with discretionary authority over their clients' funds—and accordingly have a broad obligation to exercise that discretion in the client's best interest. *See, e.g.*, *Certain Broker-Dealers*, 70 Fed. Reg. at 20,440 (noting that the Advisers Act should govern financial pro-

fessionals that maintain discretionary authority over their clients' accounts because of the "'special trust and confidence inherent' in [the] relationship"); Ira D. Hammerman, General Counsel, Securities Industry Ass'n, *Comments Re: Release No. IA-2278*, *Certain Broker-Dealers Deemed Not To Be Investment Advisors*, at 4 (Sept. 22, 2004), *available at* www.sec.gov/rules/proposed/s72599.shtml (hereinafter "SIA Comments") (same). Broker-dealers, by contrast, generally do not exercise such discretionary authority.

Contrary to the plaintiffs' suggestion, however (*see* Br. at 30-34), the absence of a general "fiduciary duty" for broker-dealers does not excuse them from regulatory oversight. The reality is precisely the opposite. Broker-dealers and their registered representatives are subject to a full panoply of rules and duties under the Securities Exchange Act, the SEC's accompanying regulations, the rules of several different self-regulatory organizations such as FINRA, and numerous state laws. They must comply, *inter alia*, with extensive "suitability" and "know-your-customer" requirements. They must disclose information related to potential conflicts of interest on a transaction-by-transaction basis. They also must comply with numerous bonding, net capital, and custody-of-assets re-

quirements, mandatory supervisory and compliance reviews of marketing material, and frequent examinations by multiple regulators. In many cases, the consumer-protection rules governing broker-dealers are even more extensive than those provided by the Advisers Act. *See* SIA Comments at 4-5.

Regulatory oversight is particularly extensive for broker-dealers affiliated with insurance companies, who must comply with both federal securities laws and state insurance laws. Because individual variable life insurance contracts and variable annuities are considered "securities" under the Exchange Act, they are subject to the general requirements of broker-dealers; they are also subject to NASD Rule 2821,[2] an even more demanding variable annuity-specific suitability rule. Moreover, variable life insurance contracts and variable annuities are also considered "insurance products," and thus are comprehensively regulated by insurance-specific rules in every U.S. jurisdiction.[3] Indeed, insurance-affiliated broker-

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[2] *See* SEC Release No. 34-56375 (Sept. 7, 2007), *available at* http://www.sec.gov/rules/sro/nasd/2007/34-56375.pdf.

[3] *See, e.g.*, National Ass'n of Ins. Comm'rs ("NAIC"), Model Laws: Regulations and Guidelines, *available at* http://www.naic.org/documents/committees_models_table_of_contents.pdf (model rules governing agent solicitations, disclosures, and suitability practices

dealers arguably face more layers of regulation than any other actors in today's financial services marketplace.

B. Application of the Advisers Act To Traditional Broker-Dealer Activities Would Have Serious Adverse Consequences

Consumer-protection devices undoubtedly are important, particularly in the current economic climate. In ACLI's view, however, any incremental consumer protection that might be gained by applying the Advisers Act's fiduciary standard and other requirements to broker-dealers would be far outweighed by the costs of doing so. Superimposing the Advisers Act's requirements upon broker-dealers already governed by the Exchange Act could result in more than unnecessary and duplicitous regulation; it could also have numerous unintended consequences for the securities industry, consumers, and the financial markets as a whole.

Financial professionals, particularly those affiliated with insurance companies, must invest significant time and substantial resources in simply complying with the currently applicable com-

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focused on information gathering); *see also* Carl B. Wilkerson, *Covering All the Bases: An Integrated Approach to Suitability*, Association of Life Insurance Counsel Proceedings (May 2002) (discussing various state insurance law provisions governing suitability in the sale of insurance products).

plex regulatory structures. They must develop disclosure forms, record-keeping policies, training and licensing programs, accounting mechanisms, advertising materials, distribution methods, review procedures, and compliance regimes specific to the applicable regulatory landscape. They must consider the regulatory structure in both product development and product pricing. Furthermore, they must allocate legal defense funds or purchase liability insurance based upon the estimated extent of their liability exposure. Unpredictable and duplicative regulation would greatly increase these transaction costs, and ultimately the costs of investment services.

Moreover, duplicative, overlapping and excessive regulation could reduce the effectiveness of devices intended to protect consumers. For example, insurance brokers are required to make certain disclosures at the point of sale. Investment advisers, however, must provide their disclosures prior to entry into the advisory relationship. Much of the information contained in the standard investment adviser disclosure form (the ADV, Part II), such as the detailed description of how the adviser exercises her trading discretion, is entirely inapplicable to the traditional brokerage relation-

ship. *See* John H. Schaefer, President and COO of Morgan Stanley, Comments Re: Release No. IA-2278, *Certain Broker-Dealers Deemed Not to Be Investment Advisers*, at 6 (Feb. 7, 2005), *available at* www.sec.gov/rules/proposed/s72599.shtml (hereinafter "Morgan Stanley Comments"). If broker-dealers were unable to determine whether they were acting as "investment advisers" until after a transaction was complete, however, they would be forced to make both required disclosures. *Id.* Inundating consumers with multiple, lengthy, and potentially inconsistent disclosures actually risks *increasing* investor confusion.

Similarly, application of the Advisers Act's restrictions on principal trading to broker-dealers who (arguably) provide more than "minor" investment advice would seriously reduce the efficiency of brokerage transactions. To prevent self-dealing, Section 206(3) of the Act prohibits an investment adviser from effecting transactions on behalf of (or with) a client while acting either as a principal for his own account or as a broker for another account. 15 U.S.C. § 80b-6(3). This restriction can be overcome, but only through specific disclosures coupled with written consent by the client prior to

completion of the trade.[4] *See* 17 C.F.R. pt. 276. If applied in the traditional brokerage context, therefore, this rule would necessarily result in poorer quality of executions for customers and reduced efficiency in the U.S. financial markets as a whole. *See* Morgan Stanley Comments, at 7.

Finally, introducing uncertainty into the applicable regulatory regime could actually reduce the amount of low-cost investment advice available to retail investors. In the ordinary course of business, life insurance brokers can be expected—indeed, are required—to conduct a detailed inquiry into a prospective customer's current financial picture and future financial goals. Under NASD Rule

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[4] Although Section 206(3) provides some relief from these restrictions for dually registered individuals "not acting in an advisory capacity," the lack of a bright line between "minor" and "non-minor" investment advice would nevertheless force broker-dealers to obtain transaction-by-transaction consent—or eliminate principal trading altogether—out of fear that they might have (or might be alleged to have) accidentally crossed the line between broker-dealers and investment advisers. Similarly, although the SEC has enacted a temporary rule that permits dually registered individuals to obtain oral rather than written client consent in certain, extremely limited circumstances, experience has shown that this does little to reduce the time and effort required to comply. *See* Morgan Stanley Comments, at 9.

2310,[5] a broker-dealer may not recommend a particular security unless she has reasonable grounds to believe it is "suitable" for the investor. NASD Rule 2821, which, as noted above, applies to sellers of variable annuities, requires broker-dealers to inquire into a customer's age, annual income, financial situation and needs, investment experience, investment objectives, intended use of the variable annuity, investment time horizon, existing investment and insurance holdings, liquidity needs, liquid net worth, risk tolerance, tax status, and other information before recommending a particular security. The Insurance Marketplace Standards Association ("IMSA"), an ethical organization for life insurers, further emphasizes need-based selling in its Code and Principals of ethical market conduct in the sale of insurance products.

Under the plaintiffs' interpretation, therefore, merely making the inquiries necessary to comply with mandatory suitability requirements could subject broker-dealers to the standards that govern investment advisers. Moreover, because whether investment advice is "minor" or "inconsequential" to a transaction can be de-

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[5] *See* Conduct Rule 2310, FINRA Manual (2009), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3638.

termined only *after* that transaction is complete, broker-dealers could insulate themselves from the onerous requirements of the Advisers Act only by reducing the amount of basic financial advice that they provide. As many have noted, "[c]lients would not be well-served by any lack of clarity that forces their brokers to withhold valued advice." Morgan Stanley Comments, at 7; *see also Certain Broker-Dealers*, 70 Fed. Reg. at 20,437 ("If a broker could give advice only infrequently (unless it registered under the Advisers Act), customers could not obtain advice in connection with each transaction they propose to make, even if that advice is simply seeking assurances of the wisdom of the proposed transaction."). This Court should not adopt a standard that results in the *reduced* availability of basic, low-cost financial advice for retail investors—particularly at a time when the complexity and individualized nature of financial needs, an aging U.S. population increasingly dependent upon investments for retirement, and an ever-broadening array of available financial services makes analysis and advice about products and service choices increasingly valuable.

III. Any Decision To Impose A Fiduciary Duty Upon Traditional Broker-Dealers Must Be Made By Congress, Not The Courts.

To the extent that there are legitimate arguments in favor of imposing a fiduciary duty upon broker-dealers offering all but "minor" or "inconsequential" investment advice, moreover, this is a fundamental policy judgment that must be made by Congress, not the courts.

In the wake of the recent Ponzi schemes, other investment scandals, and the general economic turmoil facing investors, a diverse array of voices have joined in calling for reform in the regulatory structure governing the financial industry. Many view the inconsistent rules applicable to broker-dealers and investment advisers to be one area in need of transformation. *See, e.g.*, Elisse B. Walter, *Regulating Broker-Dealers & Investment Advisers: Demarcation or Harmonization?*, 35 IOWA J. CORP. L. 1 (2009), *available at* www.sec.gov/news/speech/2009/spch050509ebw.htm.

Although many argue that changes are needed, however, there is little consensus on the specifics of the reform. Some have argued, like the plaintiffs, that the existing regulatory structure governing investment advisers should be applied to broker-dealers;

others have argued that the dual system should be scrapped altogether and re-built from the ground up. Some have advocated a rule-based regulatory approach; others have advocated a broad fiduciary standard. Some have placed an emphasis on substantive restrictions; others have emphasized disclosure. One thing is clear, however: such decisions are fundamental to our nation's economic policy, and they should be made by the branch of government that has been elected and entrusted with policy decisions.

Indeed, Congress is currently considering these very questions. On December 11, 2009, after months of contentious debate, the House of Representatives passed the "Wall Street Reform and Consumer Protection Act of 2009," H.R. 4173, 111th Cong. (2009). Senator Dodd has drafted a similar bill that may soon be introduced in the Senate. *See* Kristen McNamara, *Groups Urge Broader Use Of Fiduciary Standard*, WALL ST. J., Jan. 11, 2010. If enacted, these bills would amend the Advisers Act and the Exchange Act to impose a fiduciary standard upon both investment advisers and broker-dealers to the extent that they provide investment advice. (Of course, the fact that Congress is considering legislative *amendments* to impose the very same standard that the plaintiffs contend

already applies strongly suggests that their interpretation of existing law is incorrect.)

These bills have been highly controversial, in no small part because of the potential adverse consequences of imposing additional and arguably unnecessary transaction costs upon the investment system. Deciding the course of reform that best balances the goals of investor protection and market efficiency is necessarily the province of Congress, not the courts. The Court should reject the plaintiffs' interpretation, which contravenes Congressional intent and seventy years of industry practice, and affirm the judgment of the district court.

CONCLUSION

For the foregoing reasons, as well as those in MetLife's brief, ACLI urges that this Court affirm the district court's judgment.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) the undersigned counsel for the *amicus curiae* hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4426 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii); and

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Dated: January 19, 2010.

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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned certifies that, (1) all required privacy redactions have been made; (2) the native PDF format version of this brief that was filed using the ECF filing system is an exact copy of the hard copies of this brief that are being submitted to the Clerk; and (3) the native PDF format version of this brief that was filed using the ECF filing system was scanned for viruses with the most recent version of Symantec Antivirus (version 10.1.4.4000, scan engine 91.2.0.30), and, according to that program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that all parties listed below will receive a copy of the foregoing document filed electronically with the United States Court of Appeals for the Tenth Circuit, with notice of case activity to be generated and ECF notice to be sent electronically by the Clerk of the Court. A copy will be mailed Via Certified Mail to those who do not receive ECF notice from the Clerk of the Court.

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