December 13, 2024

Via E-Mail to: NASAAComments@nasaa.org, kopletona@dca.njoag.gov and jnix@ilsos.gov

North American Securities Administrators Association, Inc. (NASAA)
Attn: Amy Kopleton, Chair, Project Group, and James Nix, Chair, Broker-Dealer Section
750 First Street, N.E., Suite 990
Washington, D.C. 20002

Re: SIFMA's Additional Comments on NASAA's Re-proposal of Revisions to its Model Rule re: Dishonest Or Unethical Business Practices of Broker-Dealers and Agents

Dear NASAA, Ms. Kopleton, and Mr. Nix:

The Securities Industry and Financial Markets Association (***"SIFMA"***)[1] appreciates the opportunity to comment on the NASAA re-proposal of revisions to its model rule entitled, "Dishonest or Unethical Business Practices of Broker-Dealers and Agents" (the ***"Re-proposal"***).[2]

SIFMA and its members greatly appreciate the significant changes made by NASAA to the original Proposal in response to SIFMA's Original Comment and other industry commentary. The Re-Proposal hews much more closely to NASAA's stated intent to adopt and incorporate into state securities regulations Reg BI's heightened protections for retail customers. We are grateful for your diligence and ongoing coordination with industry throughout the process and particularly grateful for your thoughtful revisions.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed-income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit http://www.sifma.org.

[2] https://www.nasaa.org/wp-content/uploads/2024/11/FINAL_Request-for-Public-Comment_Amendments-to-DU-Nov.-2024.pdf. SIFMA's comment on the original proposal, https://www.nasaa.org/wp-content/uploads/2023/09/Request-for-Public-Comment-on-BD-Best-Interest-Model-Rule.pdf (the ***"Proposal"***) is available at https://www.sifma.org/wp-content/uploads/2023/12/SIFMA-comment-on-NASAA-model-rule-FINAL-12.1.2023.pdf (***"SIFMA's Original Comment"***).

With respect to the Re-proposal, the stated purpose is to amend the model rule to: (1) add a best interest standard in light of the SEC's Regulation Best Interest (***"Reg BI"***); and (2) prohibit misleading use of the title "advisor" or "adviser." While we appreciate the significant changes reflected in the Re-proposal, we recommend a few modest refinements to more closely align the model rule with Reg BI. Accordingly, we respectfully submit the following additional comments for your consideration.

I. The language in the new best interest standard should be fully-aligned with Reg BI.

The Re-proposal adds new Section 1.d. to add a new best interest standard to the model rule in light of Reg BI. Section 1.d. reads:

> *When making a recommendation to a retail customer, placing the financial or other interest of the broker-dealer, or agent**,** ahead of the interest of the retail customer, recommending an investment strategy involving securities (including account recommendations) or the sale or purchase of any security without a reasonable basis to believe that the recommendation is in the best interest of the retail customer based on the customer's investment profile and the potential risks, rewards, and costs associated with the recommendation, or otherwise failing to comply with the obligations set forth in Regulation Best Interest, as set forth in rule 17 C.F.R. § 240.15l-1, including, but not limited to 17 C.F.R. § 240.17a-14.*

While the foregoing language[3] incorporates many of Reg BI's provisions into the model rule, a more straightforward approach would be preferable because it would lead to greater uniformity among both states that adopt the model rule and states that adopt their own separate rules to incorporate Reg BI. As you know, since NASAA's model rule was initially proposed, several states have already incorporated, or proposed a rule to incorporate, Reg BI into their state rules in a very straightforward manner. Washington is the best example. This year, Washington adopted Reg BI under its "Dishonest and Unethical Business Practices of Broker-Dealers" section with the following simple sentence that elegantly hits the mark:

> *Making a recommendation of any security transaction or investment strategy involving securities (including account recommendations) to a retail customer if the recommendation does not comply with the obligations set forth in Regulation Best Interest….*[4]

SIFMA supports this language because it makes clear that compliance with Reg BI satisfies the state best interest standard. In addition, Texas has proposed, and Florida has

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[3] The Re-proposal states that this language is similar to language adopted in Ohio in 2021. *See* OAC Rule 1301:6-3-19, Deceptive practices and good business repute (Sep. 30, 2021), https://codes.ohio.gov/ohio-administrative-code/rule-1301:6-3-19#:~:text=dealer%20or%20salesperson%3B-,(6),-Place%20the%20financial. This language is also similar to language adopted in Colorado in 2023. *See* 3 CCR 704-1-51-4.7(C) at p. 40, https://drive.google.com/file/d/1yZjF6SapWTmCT0VwpQkb5n9yCMeVMNnN/view.

[4] *See* WAC 460-20C-210(4) and WAC 460-20C-220(9) (2024) at pp. 23, 28, https://dfi.wa.gov/sites/default/files/broker-dealer-adopted-rules.pdf.

adopted, rule language that takes a substantially similar approach.[5] The proposed Texas language reads:

> *Each dealer or agent, as defined by [State law cite], when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interests of the dealer or agent making the recommendation ahead of the interest(s) of the retail customer. The best interest obligation shall be satisfied if the dealer or agent complies with the obligations set forth in SEC Regulation Best Interest .....*[6]

Accordingly, we urge NASAA to adopt the Washington rule language cited above (or alternatively, to adopt the substantially similar Texas or Florida rule language) in lieu of the current language in section 1.d.

The current language in Section 1.d. differs from and excludes certain specific language that is contained in Reg BI. As a result, Section 1.d. may be subject to misinterpretation and/or misapplication in ways that diverge from and conflict with Reg BI. As an alternative to adopting the Washington proposed rule language – which is the cleanest and optimal approach – (or alternatively, to adopting the substantially similar Texas or Florida rule language), NASAA could also amend Section 1.d. to incorporate the precise missing language from Reg BI. As amended, Section 1.d. would read as follows, where the bold underlined edits represent language copied verbatim from Reg BI:[7]

> *When making a recommendation* ***of any securities transaction or investment strategy involving securities (including account recommendations)*** *to a retail customer, placing the financial or other interest of the broker-dealer, or* ~~*agent*~~***natural person who is an associated person of a broker-dealer making the recommendation,*** *ahead of the interest of the retail customer, recommending an investment strategy involving securities (including account recommendations) or the sale or purchase of any security without a reasonable basis to believe that the recommendation is in the best interest of the retail customer* ***at the time the recommendation is made*** *based on the customer's investment profile and the potential risks, rewards, and costs associated with the recommendation, or otherwise failing to comply with the obligations set forth in Regulation Best*

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[5] *See* 49 TexReg 8797, 8821-8822 (Nov. 8, 2024), https://www.sos.state.tx.us/texreg/pdf/backview/1108/1108prop.pdf; and 50 FAR 9 (Jan. 12, 2024), Rule 69W-200.002(30) at p. 95, https://www.flrules.org/Faw/FAWDocuments/FAWVOLUMEFOLDERS2024/5009/5009doc.pdf.

[6] 49 TexReg 8797, 8821-8822 (Nov. 8, 2024), https://www.sos.state.tx.us/texreg/pdf/backview/1108/1108prop.pdf.

[7] Reg BI, 17 C.F.R. § 240.15l-1(a), https://www.ecfr.gov/current/title-17/chapter-II/part-240/subpart-A/subject-group-ECFR4744c3e48c41cdb/section-240.15l-1.

Interest, as set forth in rule 17 C.F.R. § 240.15l-1, including, but not limited to 17 C.F.R. § 240.17a-14.

The foregoing edits – particularly the first one (*"of any securities transaction or investment strategy involving securities (including account recommendations)"*) – would better align the model rule with Reg BI as well.

Finally, we appreciate that the Re-proposal removed the definition of "retail customer" which was inconsistent with the definition of retail customer in Reg BI.[8] As currently drafted, however, the model rule now includes over a dozen separate instances of the term "customer" whereas the term "retail customer" only appears in the new Reg BI section. This situation could create confusion or result in misapplication of the term "retail customer." To avoid these potential pitfalls, we recommend that the preamble to the model rule amendment specify that terms not otherwise defined shall have the meaning as defined in Reg BI.

II. The new titling provision should confirm that compliance with Reg BI's titling provisions constitutes compliance with the model rule.

The Re-proposal adds new Section 1.e., a titling provision, which prohibits:

"*Using a title, purported credential, or professional designation containing any variant of the terms "adviser" or "advisor" without licensure as either an investment adviser or an investment adviser representative, unless otherwise permitted by law."*

This provision may be applied more narrowly than Reg BI to the extent it strictly prohibits use of the term "advisor" or "adviser" unless the individual is licensed (i.e., registered) as an investment adviser or investment adviser representative. Reg BI, on the other hand, applies more broadly because it also permits associated persons of a broker-dealer who are supervised persons (i.e., employees) of an investment advisor to use the title "advisor" or "adviser."[9]

We assume that the titling provision was not intended to apply more narrowly than and thus in conflict with Reg BI. Accordingly, we request that NASAA modify the titling provision to clarify that associated persons of a broker-dealer who are supervised persons (i.e., employees) of an investment advisor may use the title "advisor" or "adviser." In addition, NASAA should clarify in the Re-Proposal that the final clause of the titling provision (i.e., "unless otherwise permitted by law") specifically includes Reg BI and recognizes that Reg BI permits associated persons of a broker-dealer who are supervised persons of an investment advisor to use these titles.

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[8] 17 C.F.R. § 240.15l-1(b)(1).

[9] Reg BI Adopting Release (***"Adopting Release"***), https://www.sec.gov/files/rules/final/2019/34-86031.pdf, at pp. 157 - 158.

III. The Re-proposal should avoid federal preemption risks for states under Reg BI and NSMIA.

As the SEC explained, "the preemptive effect of [Reg BI] on any state law governing the relationship between regulated entities and their customers would be determined in future judicial proceedings based on the specific language ***and effect*** of that state law."[10] (Emphasis added). As discussed above, we believe that the language of both the re-proposed best interest standard and titling provision could be interpreted and applied in a manner that conflicts with Reg BI, in which case a court would likely find that the Re-proposal is preempted by Reg BI.

In addition, with respect to the titling provision, to the extent it is applied by a state securities regulator in a manner that is narrower than Reg BI (i.e., by prohibiting associated persons of a broker-dealer who are supervised persons (i.e., employees) of an investment advisor to use the title "advisor" or "adviser"), then the titling provision would also be preempted by the National Securities Market Improvement Act (***"NSMIA"***).[11] NSMIA preempts state securities regulators from, among other things, creating new recordkeeping requirements that differ from, or are in addition to, the requirements under the federal securities laws. NSMIA not only limits state regulations that *directly* impose new or different recordkeeping requirements, but also state regulations that by their nature require BDs to make and keep new or different records than those required by federal law or FINRA rules.[12]

In this case, individuals who now use the titles "advisor" or "adviser" as associated persons of a broker-dealer who are also supervised persons (i.e., employees) of an investment advisor (as permitted by Reg BI) would be required to use a *different* title in their oral and written communications with their customers relating to their business as such. Broker-dealers would be required to make and keep a record of all such communications. Such records would necessarily differ from the records they are required to keep under Reg BI (when not subject to the state model rule's titling provision), where the use of such titles is permissible. Consequently, the application of the titling provision in this narrower manner would also be preempted under NSMIA and would be subject to legal challenge on that basis as well.

For the foregoing additional reasons, we urge NASAA to adopt our recommended changes and clarifications to conform the Re-proposal to the requirements of Reg BI and NSMIA.

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[10] Adopting Release at p. 43 and p. 514, fn 1163.

[11] 15 U.S.C. § 78o(i)(1) ("No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish . . . making and keeping records . . . requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements [under federal securities laws].").

[12] *See* Exchange Act Rule 17(a)-4, requiring broker-dealers to keep a record of *"all communications … by the member … relating to its business as such…"* (emphasis added). 17 CFR §§ 240.17a-4(b)(4).

IV. The final model rule should include an ERISA savings clause.

The original Proposal contained an Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq., savings clause that read:

> *Nothing in this section shall be construed to apply to a person acting in the capacity of a fiduciary to an employee benefit plan, its participants, or its beneficiaries, as those terms are defined in the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq.*[13]

The ERISA savings clause, however, was excluded from the Re-proposal without explanation. Accordingly, we respectfully request that NASAA reinsert the ERISA savings clause in the final revisions to the model rule.

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If you have any questions or would like to further discuss these issues, please contact the undersigned at 202-962-7300.

Sincerely,

Kevin M. Carroll
Deputy General Counsel
SIFMA

cc: David Saltiel, Acting Director, Division of Trading and Markets, SEC
Emily Russell Westerberg, Chief Counsel, Division of Trading and Markets, SEC
Michael A. Macchiaroli, Associate Director, Division of Trading and Markets, SEC

[13] Proposal, Section 1d(7), at pp. 7 – 8, 12.