

December 19, 2024

**Via electronic submission to [NASAAComments@nasaa.org](mailto:NASAAComments@nasaa.org)**

cc: [kopletona@dca.njoag.gov](mailto:kopletona@dca.njoag.gov) and [jnix@ilsos.gov](mailto:jnix@ilsos.gov)

North American Securities Administrators Association, Inc.  
750 First Street, N.E., Suite 990  
Washington, D.C. 20002

Attn: Amy Kopleton, Chair of Project Group  
Jim Nix, Chair of Section

**Re: PROPOSED AMENDMENTS TO THE NASAA MODEL RULE, DISHONEST OR  
UNETHICAL BUSINESS PRACTICES OF BROKER-DEALERS AND AGENTS**

Dear Ms. Kopleton and Mr. Nix:

The Financial Services Institute (“FSI”)<sup>1</sup> appreciates the opportunity to comment on the Proposed Amendments to the North American Securities Administrators Association (“NASAA”) Model Rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents (“Business Practice Rule”)<sup>2</sup> developed by NASAA’s Market and Regulatory Policy and Review Project Group of the Broker-Dealer Section (“Project Group”) (“Proposal” or “Proposed Rule”).

The Proposal notes that the proposed amendments are “intended to update the model rule in light of the Securities and Exchange Commission’s... Regulation Best Interest... and other developments in the securities industry.” Regulation Best Interest (“Reg BI”)<sup>3</sup> became effective on June 30, 2020, after having been adopted by the Securities and Exchange Commission (“SEC”) the previous year.

The Proposal goes on to outline the two main purposes of the proposed amendments to the Business Practice Rule:

- (1) add a best interest conduct standard applicable to broker-dealer and agents in light of Reg BI; and

---

<sup>1</sup> The **Financial Services Institute (FSI)** is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has successfully promoted a more responsible regulatory environment for more than 100 independent financial services firm members and their 160,000+ affiliated financial advisors – which comprise over 60 percent of all producing registered representatives. We effect change through involvement in FINRA governance as well as constructive engagement in the regulatory and legislative processes, working to create a healthier regulatory environment for our members so they can provide affordable, objective advice to hard-working Main Street Americans. For more information, please click [here](#).

<sup>2</sup> [https://www.nasaa.org/wp-content/uploads/2024/11/FINAL\\_Request-for-Public-Comment\\_Amendments-to-DU-Nov.-2024.pdf](https://www.nasaa.org/wp-content/uploads/2024/11/FINAL_Request-for-Public-Comment_Amendments-to-DU-Nov.-2024.pdf)

<sup>3</sup> 17 C.F.R. § 240.15I-1

(2) prohibit misleading uses of the title “advisor” or “adviser.”

Amendments intended to incorporate Reg BI into the Business Practice Rule were initially proposed by NASAA on September 5, 2023.<sup>4</sup> Following a 90-day comment period, the Project Group undertook a review of the comments submitted, including those of FSI,<sup>5</sup> and considered them when drafting the present Proposal.

FSI greatly appreciates the Project Group’s deliberate consideration of the comments, and the substantial changes made to the proposal reflecting those comments. We also appreciate the Project Group’s intent, as we understand it, to conform the Proposal and therefore the Business Practice Rule to Reg BI, helping ensure that state regulators could enforce the federal best interest standard at the state-level.

As discussed below, FSI supports regulation that ensures states can enforce Reg BI standards in a consistent and uniform manner. Such regulation provides important, consistent protection for investors with standards that are clearly understood by regulators, financial professionals, and firms. We continue to believe that the simplest way to achieve this result with no ambiguity, is a straightforward incorporation by reference to the Code of Federal Regulation (“CFR”) citation for Reg BI. Many states have for years incorporated federal regulations by simply citing the CFR. For those states in particular, we have some concerns about including regulatory language beyond a simple citation for reasons elaborated on below.

Notwithstanding this preferred approach, we understand the Project Group’s Proposal reflects an intent to align with Reg BI and avoid divergence. Further, we do not believe the proposal can be reasonably interpreted to differ from Reg BI.

Consequently, FSI generally supports the Project Group’s proposal as a model that states can use. We continue to advocate that the more uniform and effective path is a simplified incorporation by reference, where possible. In jurisdictions that cannot incorporate by reference, the Project Group’s proposal allows for Reg BI to be incorporated with uniformity. We also respectfully request that, when the proposal is adopted, NASAA includes commentary that more explicitly and directly states that the intent of the amendments to the Business Practice Rules is to incorporate Reg BI by reference and should be interpreted and enforced consistently with Reg BI. This will further support uniformity.

### **Background on FSI Members**

FSI is an advocacy association comprised of members from the independent financial services industry. The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are more than 160,000 independent financial advisors, which account for approximately 53 percent of all producing registered representatives.<sup>6</sup> These financial advisors are self-employed independent

---

<sup>4</sup> [Request-for-Public-Comment-on-BD-Best-Interest-Model-Rule.pdf](#)

<sup>5</sup> [Comment-NASAA-Reg-BI-Model-12-04-23-1.pdf](#)

<sup>6</sup> Cerulli Associates, Advisor Headcount 2016.

contractors, rather than employees of the Independent Broker-Dealers (“IBD”). FSI’s IBD member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. The majority of FSI’s IBD member firms have affiliated Registered Investment Advisors (“RIAs”) and are thus dually registered. FSI also has some Independent RIA members as well. FSI members make substantial contributions to our nation’s economy.

According to Oxford Economics, FSI members nationwide generate \$35.7 billion in economic activity. This activity, in turn, supports 408,743 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly \$7.2 billion annually to federal, state, and local government taxes.<sup>7</sup>

Independent financial advisors are small-business owners and job creators with strong ties to their communities. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI members and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals.

## **Discussion**

### **I. Uniformity and Consistency**

Uniformity in law and regulation and consistency in interpretation and enforcement is broadly beneficial to investors, regulators and registrants. Most importantly, investors are best served when standards are uniform and applied evenly and consistently, including across jurisdictions. In this way they enjoy the same protections as similarly situated investors and can better understand the obligations that are owed to them. Likewise, it can be beneficial to regulators to apply commonly understood standards insofar as it facilitates compliance by regulated professionals and firms, facilitates cooperation and coordination among regulators, and limits opportunity for regulatory arbitrage among regulated professionals and firms.

For decades, the states and NASAA have supported uniformity through the enactment of the Uniform Securities Acts and the promulgation of model regulations, along with many other cooperative initiatives.

As initially proposed, the Business Practice Rule amendment was comprised of three revisions. Revision #1 sought to incorporate the core principles of Reg BI; Revision #2 was “intended to define, clarify, or simply emphasize an obligation or component of Reg BI that was functionally incorporated via the first revision;” and Revision #3 sought to prohibit misleading uses of the “advisor” and “adviser” titles.

FSI is pleased that Revision #2 was excluded from the revised proposal, in contrast to the initial September 2023 proposal. We appreciate our concerns that Revision #2 would have the opposite result were considered and taken into account by the Project Group. The proposal as

---

<sup>7</sup> Oxford Economics for the Financial Services Institute, The Economic Impact of FSI’s Members (2020).

currently offered is more consistent with the commitment to uniformity, including with the Project Group's stated intent "to update the model rule in light of the U.S. Securities and Exchange Commission's ("SEC") 2019 adoption of Regulation Best Interest."

## II. Incorporation by Reference

When seeking to incorporate or conform to an existing statute or regulation, we believe that the simplest and most effective approach is to refer to the relevant statutory or regulatory citation. State and federal legislation and regulations rely on such referential citations extensively. This helps avoid ambiguity or potential conflicting interpretation.

Incorporation by reference is a common practice among states. Recently, Washington State incorporated Reg BI with a simplified reference to the CFR.<sup>8</sup> Florida's Rules of Conduct rely heavily on incorporating federal regulation by reference.<sup>9</sup>

FSI's preference for a simple incorporation by reference may best be illustrated by Colorado's rule adopting Reg BI.<sup>10</sup> While we are not aware of any particular problems arising regarding the Colorado rule, the structure of it serves as a useful example of why FSI supports the simple incorporation approach.

Like the Project Group's proposed model, the Colorado rule adopted some of the language from Reg BI, in addition to citing the CFR. The rule deems it an "unfair and dishonest" practice to:

*"Mak[e] a recommendation to a retail customer, that places the financial or other interests of the dealer or the salesperson ahead of the interest(s) of the retail customer, recommending the sale or purchase of any security without a reasonable basis to believe that the recommendation is in the best interests of the retail customer based on the customer's investment profile and the potential risks, rewards, and costs associated with the recommendation, or otherwise fail to comply with the obligations set forth in Regulation Best Interest, as set forth in rule 17 C.F.R. 240.15I."*

The language of the Proposed Rule tracks closely, though not precisely, with two parts of Reg BI. Insofar as the Colorado rule replicates elements of Reg BI, the substantive obligations are not concerning. However, even minor deviations hold the potential for confusion, non-uniform interpretation, and regulatory risk for financial professionals and firms.

While such concerns may not seem significant, they are underscored by the fact that the following subsection of the Colorado rules incorporates seven SEC rules by simply referencing CFR citations, and a later subsection incorporates FINRA rules by reference, with no additional language. Therefore, the concern is that by layering regulatory language over the citation when other sections utilize simple incorporation by reference, the Colorado rule invites one to consider that the language has some meaning or application beyond the cited reference. We do not

---

<sup>8</sup> WAC 460-20C-210(4) and the unethical practice for salespersons at WAC 460-20C-220(9)

<sup>9</sup> F.A.C. 69W-600.012. [69W-600.012 : Rules of Conduct - Florida Administrative Rules, Law, Code, Register - FAC, FAR, eRulemaking](#)

<sup>10</sup> 3 CCR 704-1, Chapter 2, Section 51-4.7. [3 CCR 704-1 Adopted Redlined Approved 2.1.2023.pdf - Google Drive](#)

believe Colorado's intent is to diverge from Reg BI and are using this solely as an illustrative example of our concerns.

Additionally, section 51-2.2 of Colorado's rules provide that "if any SEC Rule or regulation incorporated in these Rules is amended by the SEC... such subsequent amendment may apply to the Rule provided that the Securities Commissioner does not commence Rule making proceedings within ninety (90) days of the effective date of any such amendment." Therefore, investors and financial professionals can have confidence that when the SEC amends a regulation which Colorado has incorporated by reference, the SEC and Colorado will not be applying different, potentially conflicting requirements. But Colorado's approach to Reg BI, which includes language in addition to the citation, leaves open the potential for misalignment in the future, much as with the Proposal.

We nevertheless appreciate that certain jurisdictions could benefit from model language such as the Proposal if they cannot directly adopt Reg BI by reference. We provide the above as an illustration of potential present or future misalignment that concerns us.

### III. Use of the Term "Adviser" or "Advisor" Without Licensure

The proposed amendments to the Business Practice Rules also include a provision barring the use of the terms "adviser" or "advisor" in a title of designation, unless the person is licensed as a registered investment adviser (RIA) or investment adviser representative (IAR). An exception is included where the law otherwise permits such use.

FSI appreciates the important investor protection purpose of this component of the Proposal and supports the adoption and enforcement of the rule to protect investors from misleading representations. We understand, however, that some financial professionals may hold such a credential, designation, or title but do not directly interact with retail investors.

The Proposal clearly reflects that the goal of this particular amendment is investor protection. Among the references indicating that the purpose is to protect investors from being misled (all emphasis added):

- The amendment is "a prohibition against **misleading use** of the professional title 'advisor' or 'adviser.'"
- "This section prevents broker-dealers and agents from **misleading investors** regarding the professional capacity in which their services are provided."
- "The Project Group finds the addition helpful to **ameliorate investor confusion**"
- "The Project Group believes it is a deceptive and unethical practice for broker-dealers to **mislead investors** into believing the broker-dealers are acting in a fiduciary capacity with an ongoing duty of loyalty through misuse of the 'advisor' and 'adviser' title."

Given the intent of this component of the Proposal, we would expect that use of the titles by financial professionals or firms that are not licensed as IARs or RIAs would be a violation only in instances where such use is misleading to retail investors. For example, if a non-RIA/IAR financial professional holds a designation or a title including the term "advisor" or "adviser," she

would not be in violation of the rule unless she represented herself (also known as “holding out”) using those terms in communications with retail investors.

On this issue, the SEC’s approach is instructive. A significant section of the SEC’s Reg BI Adopting Release discusses this very issue and investor protection implications.<sup>11</sup> The SEC, like the Project Group, recognized the goal of protecting retail investors from misleading representations, but also recognized that in some circumstances not involving retail investors, use of the terms may not be inappropriate. As a result the SEC determined that it could provide robust and appropriate protection by considering use of the terms without licensing as an RIA/IAR as a presumptive violation of the Disclosure Obligation in Regulation BI but nevertheless did not “not expressly prohibit[ ] the use of these names and titles by broker-dealers because we recognize that some broker-dealers use them to reflect a business of providing advice other than investment advice to retail clients.”<sup>12</sup>

In the interests of investor protection and uniformity, we respectfully suggest that the Project Group make clear that the amendment should be interpreted and applied consistently with Reg BI and its Adopting Release.

#### **IV. Conclusion**

FSI appreciates the Project Group providing this opportunity to submit comments on the revised proposal of amendments to the Business Practice Rules. We recognize the significant and thoughtful work of the Project Group in developing the proposed amendments and its consideration of earlier comments, including those of FSI, is appreciated. The changes to the proposal were substantial and meaningful, and were achieved without compromising investor protection.

We believe the process and proposal reflect a clear intent to adopt Reg BI in the states in furtherance of investor protection. FSI supports that goal. While the amendments achieve that purpose, we believe there is some room to remove any possible ambiguity:

- States should incorporate Reg BI by reference, simply by citing to the CFR, where possible;
- NASAA should explicitly and directly state that the amendments to the Business Practice Rule should be understood to adopt Reg BI in the states in form and substance and should be interpreted consistently with Reg BI;
- NASAA could clarify the amendment regarding the use of titles to ensure consistency with Reg BI, or at least explicitly state such intent.


---

<sup>11</sup> Release No. 34-86031; File No. S7-07-18 (pp. 149-159) [Regulation Best Interest: The Broker-Dealer Standard of Conduct](#)

<sup>12</sup> Id. at 158.

Thank you in advance for considering our comments. If you have questions about anything in this letter, or if we can be of any further assistance in connection with this rulemaking, please feel free to contact my colleague Dan Barry at [dan.barry@financialservices.org](mailto:dan.barry@financialservices.org) or (202) 517-6464.

Respectfully submitted,

A handwritten signature in blue ink that reads "Robin M. Traxler". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robin Traxler  
Senior Vice President, Policy & Deputy General Counsel