

Via electronic submission to NASAAComments@nasaa.org
cc: kopletona@dca.njoag.gov and stephen.bouchard@dc.gov

December 19, 2024

Re: Proposed Revisions to NASAA's Model Rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents dated November 4, 2024 (the "Proposal")

Members of the Broker-Dealer and Regulatory Policy and Review Project Group and the Broker-Dealer Section:

The Institute for Portfolio Alternatives (IPA) appreciates the opportunity to comment on the Proposal. The IPA represents sponsors and distributors of alternative products, including non-listed REITs and business development companies, interval funds, and tender-offer funds.¹

Last year, the IPA commented on an earlier version of the Proposal. In that comment letter, we objected to various provisions in the 2023 Proposal that would have conflicted with the Securities and Exchange Commission's (SEC) Regulation Best Interest (Reg BI) and interfered with ongoing federal regulatory initiatives. We appreciate NASAA's willingness to consider our and other stakeholders' comments and to amend the Proposal so that it better comports with federal requirements.

We continue to strongly recommend that NASAA adopt a clean incorporation of Reg BI into the Model Rule. By doing so, NASAA would avoid any confusion about whether the language in the Model Rule conflicts with Reg BI as interpreted by the SEC. To that end, we urge NASAA to include the following recommendations in its final rulemaking:

Include Language Similar to Washington State's Pre-Existing, Effective Best Interest Standard

In October 2024, Washington state adopted language that would make it a dishonest or unethical practice for a broker-dealer or agent to make a recommendation of any

¹ The IPA advocates for increased investor access to portfolio diversifying investment strategies, accompanied by straightforward disclosure about their risks and benefits and strong investor protection from inappropriate sales practices. Our members include asset management companies, wire house broker-dealers, independent and regional broker-dealers, registered investment advisers, law firms, accounting firms, transfer agents, valuation firms, due diligence firms, and technology firms.

security transaction or investment strategy involving securities to a retail customer “if the recommendation does not comply with the obligations set forth in Regulation Best Interest (17 C.F.R. 240.121-1 as amended effective September 10, 2019).”² We strongly encourage NASAA to adopt similar language, which will help avoid ambiguity as states interpret and adopt the Rule.

We also note that Texas has recently proposed adoption of a substantively identical provision.

Reinstate Savings Clause for ERISA Plan Recommendations

NASAA’s Reg BI proposal from last year included a savings clause that would have helped our members clarify that any principles incorporated in the Business Practices Rule do not apply to or supplant the fiduciary duties that apply to ERISA plan recommendations. We strongly encourage NASAA to reinstate this provision.

Restrict Improper Use of the Designations “Adviser” and “Advisor”

The titling provision would diverge from Reg BI and existing state titling practices, causing confusion in the industry and among investors.

The SEC’s general prohibition of the use of the term “adviser” and “advisor” appears in its adopting release to Reg BI but not in the text of the rule itself. The SEC permits individuals who are not investment adviser representatives to use the title “adviser” or “advisor” when they are acting in a role specifically defined by federal statute that does not entail providing investment advisory services to retail customers, or in other capacities outside the context of investment advice to a retail customer. For example, these individuals may use the term when acting as a municipal advisor, a commodity trading advisor, or an advisor to a special entity.

By contrast, the Proposal would seem to prohibit these legitimate uses of the term “adviser” or “advisor.” We strongly recommend that NASAA delete this provision and, as recommended above, simply adopt a clean incorporation of Reg BI similar to Washington State. By doing so, NASAA would avoid any confusion that the current provision would cause.

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² WAC 460-20C-210 and WAC 460-20C-220

The IPA appreciates the opportunity to comment on the Proposal and thank you for considering our recommendations. Please contact Jeff Evans, IPA's director of government affairs and policy, at jevans@ipa.com or 202-548-7185, if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Anya Coverman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Anya Coverman
President & CEO
Institute for Portfolio Alternatives