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December 18, 2024

Sent by email to nasaacomments@nasaa.org

Mr. Jim Nix
Broker-Dealer Section Chair
North American Securities Administrators Association, Inc.

Ms. Amy Kopleton
Broker-Dealer Market and Regulatory Policy and Review Project Group Chair
North American Securities Administrators Association, Inc.

RE: Revised proposed revisions to NASAA's model rule on Dishonest or Unethical Business Practices Of Broker-Dealers And Agents (the "Business Practices Rule")

Dear Mr. Nix and Ms. Kopleton:

On behalf of a group of firm clients, including brokerage firms, mutual funds, insurance companies, asset managers, and banks, I am writing to provide comments on the revised proposed revisions to NASAA's model rule on Dishonest or Unethical Business Practices Of Broker-Dealers And Agents (the "Business Practices Rule") that were issued on November 4, 2024. We very much appreciate the opportunity to comment on the revised proposal and we appreciate NASAA's continued commitment to working with stakeholders to refine the proposal.

As discussed below, this letter focuses primarily on the continuing need for a broad exemption for ERISA plans to address the ERISA preemption concerns that are raised by the revised proposal, if adopted by any state. In addition, we ask that the prohibition on the use of certain titles be clarified to conform to Reg BI, rather than going much further, as it currently does.

As part of NASAA's current effort to revise its Business Practices Rule, NASAA initially issued proposed revisions to the rule on September 5, 2023. We submitted comments on the initial proposal on October 13, 2023.[1] In that comment letter, we focused on the near inevitability of a successful preemption lawsuit – under NSMIA and conflict preemption -- invalidating some or all of the proposal if it were to be adopted by any state. Those preemption concerns stemmed in large part from the fact that NASAA's initial proposal went far beyond the national regime for

[1] https://www.nasaa.org/wp-content/uploads/2023/09/NASAA-letter-00405541.pdf

regulating the standards of care that apply to broker-dealers as embodied in the U.S. Securities and Exchange Commission's Regulation Best Interest ("Reg BI").

In the revised proposal issued on November 4th, NASAA acknowledged the comments it received by removing the portion of its initial proposal that was particularly problematic and replaced it with language that, except as importantly noted below, incorporates Reg BI. This change is a material improvement over NASAA's initial proposal and, if the title-related issues described below are fixed, could on its face alleviate the conflict preemption and NSMIA preemption concerns that we described in detail in the Appendix to our October 13, 2023 letter. We very much appreciate NASAA's changes to the revised proposal after working with the industry regarding the practical application of Reg BI and applicable standards of conduct.

As noted above, however, our focus in this letter is on the need to address the ERISA preemption concerns that are raised by the revised proposal. This letter also includes recommendations for some additional title-related changes to the revised proposal to better reflect NASAA's stated intention of updating the Business Practices Rule in light of Reg BI.

ERISA preempts the revised proposal's application to ERISA plans.

The Employee Retirement Income Security Act of 1974 ("ERISA") is a comprehensive federal statute regulating employer-sponsored retirement and welfare benefit plans. When Congress passed ERISA, it included an explicit and far-reaching preemption provision. According to that provision, and except as otherwise provided by law, title I and title IV of ERISA "*shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan*" (emphasis added).[2]

Because of ERISA's express preemption provision, if NASAA's revised proposal is adopted by any state, it would be invalidated by a court as expressly preempted to the extent the rules relate to an employee benefit plan. If a state law relates to an ERISA plan, that state law is preempted regardless of whether it is based on a federal law or not. So, with respect to an ERISA plan, Reg BI applies, but any state law does not apply even if the state law follows the language of Reg BI. This prevents end runs around ERISA preemption, which could occur, for example, if a state adopts its own interpretation of Reg BI for purposes of applying its rule and then attempts to apply that interpretation in the context of an ERISA plan, such as in the case of rollover advice to an ERISA plan participant. The revised NASAA proposal would clearly be preempted with respect to ERISA plans.

In the initial proposal released on September 5, 2023, NASAA appeared to have sought to avoid ERISA preemption by making the proposed changes inapplicable to persons acting as "fiduciaries" within the meaning of ERISA, a term that has a very special and limited scope under U.S. Department of Labor regulations. As we noted in our comments on NASAA's initial proposal, however, that purported savings clause would not avoid ERISA preemption because

[2] ERISA § 514.

ERISA's preemptive power does not depend on whether a regulated party is an ERISA fiduciary.[3]

NASAA's revised proposal omits the problematic ERISA fiduciary exemption language that was previously proposed. However, instead of replacing the problematic language with a workable exemption, the revised proposal leaves the ERISA preemption concerns unaddressed. We therefore urge NASAA to add a broad provision exempting the rule's applicability to ERISA plans by including the following language within Part 1.d.:

> ***Nothing in this section shall be construed to apply to recommendations relating to an employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA).***

Use of titles: the proposal goes well beyond Reg BI

The revised proposal contains a prohibition against the following in new Part 1.e.:

> 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.

Reg BI, on the other hand, contains no such blanket prohibition, but instead establishes some very reasonable and appropriate exceptions to a general adverse presumption against the use of such titles, credentials, or designations.[4] This aligns with current state practices, which recognize the use of certain designations and credentials and also recognize that the use of "advisor" is not exclusive to those with an IAR license. For example, an individual can use the title "municipal advisor" without being an IAR because they are otherwise appropriately licensed. We ask that the phrase "unless otherwise permitted by law" in Part 1.3. be clarified by (1) stating that the exceptions in Reg BI apply and (2) adding at the end "***or credentialing organization***" in order to make it clear that current state-specific recognitions apply to the revised proposal.

It should also be clarified that the title rule only applies to a financial professional to the extent that such title is used in an interaction with a retail customer. Otherwise, again, the proposal is going beyond Reg BI without clear justification.

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[3] *See Faulman v. Sec. Mut. Fin. Life Ins. Co.*, 353 Fed. Appx. 699, 702 (3d Cir. 2009) (explaining that ERISA fiduciary status is only one of several factors used to determine whether claims "relate to" an ERISA plan for preemption purposes); *Glaziers and Glassworkers Union Loc. No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1185 (3d Cir. 1996) (even if a defendant is not an ERISA fiduciary, "state law claim[s] may 'relate to' an ERISA plan and be preempted").

[4] 84 Fed. Reg. 33,350-33,354 (July 12, 2019).

Sincerely,

Kent A. Mason
Davis & Harman LLP

Cc:

All state regulators

Joseph Brady, Executive Director, NASAA

Vince Martinez, General Counsel, NASAA