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December 19, 2024

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

Re: **Proposed Revisions to NASAA Model Rule re: Dishonest or Unethical Business Practices of Broker-Dealers and Agents**

Dear Ms. Kopleton and Mr. Nix:

Please allow this to serve as comments from Cetera Financial Group ("Cetera") with respect to proposed revisions to the NASAA Model Rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents (the "Model Rule"). (We will refer to the proposed revisions to the Model Rule herein as the "Proposal"). The stated intent of the Proposal is to incorporate provisions of SEC Regulation Best Interest ("Reg. BI")[1] into the Model Rule. We will offer comments on specific aspects of the Proposal below, but we believe that the terms represent a significant improvement over the prior version which was published in 2023.[2]

Cetera is the corporate parent of five broker-dealers and two investment advisers. Through our nearly 12,000 financial professionals, we provide securities brokerage and investment advisory services to more than 1 million customers and do business in all 50 states. The majority of our representatives provide both securities brokerage and investment advisory services to customers, and often provide both types of services to the same households. Our customers are primarily individuals and small businesses saving and investing for retirement, education funding, and creating financial legacies for their families.

Cetera is a strong proponent of Reg. BI and the best interest standard that it establishes. We believe it strikes the appropriate balance between investor protection and investor choice, with sufficient flexibility to allow providers of investment advice to offer services through multiple business models and product offerings based on customer objectives and circumstances.

[1] 17 CFR Section 240.15l-1, effective September 10.
[2] https://www.nasaa.org/wp-content/uploads/2023/09/Request-for-Public-Comment-on-BD-Best-Interest-Model-Rule.pdf.

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Reg. BI applies to all investment recommendations made by broker-dealers to retail customers for household use. Given that, we do not believe that the Proposal creates any incremental protection for investors. Perhaps more importantly, adoption of any standard that is not literally identical to Reg. BI creates the risk of inconsistent or conflicting regimes applicable to the same individuals performing the same activities. That has the inevitable effect of creating confusion, increasing cost and complexity for providers of investment advice, and increasing cost and reducing access to investment advice for investors.

The legal standards applicable to providers of securities brokerage and investment advisory services are different. A primary goal of Reg. BI was to bring those standards into closer alignment, while recognizing that there are differences between the nature of the services provided, compensation methods, and management of conflicts of interest. As NASAA and the Project group consider changes to the Model Rule relating to conduct standards for broker-dealers and agents, they should have two primary goals:

- Recognize how Reg. BI creates and enforces conduct standards applicable to broker-dealers and investment advisers, particularly in how those standards differ; and

- Promote the greatest possible degree of uniformity between Reg. BI, the Model Rule, and regulations adopted by various states.

With those goals in mind and subject to our comments below, we support adoption of the Proposal as a reasonable method to accomplish the stated goals of the Proposal. We suggest the following changes:

1. The language in the Proposal creating a best interest standard should be more consistent with Reg. BI and regulations of other states that have already adopted similar regulations.

The Proposal adds new Section 1.d., which creates a best interest standard. Section 1.d. includes language from Reg. BI, but it is not identical. In addition, we note that at least three states have already adopted or proposed regulations seeking to add the standards in Reg. BI to their regulations. (To date, they include Washington[3], Colorado[4], and Texas[5].) The approach of all of these states was to simply incorporate the provisions of Reg. BI by reference and create a regime in which the best interest obligation is satisfied if the broker-dealer or agent complies with the provisions of Reg. BI. The notice accompanying the Proposal notes that a similar regulation was adopted in Ohio in 2021.[6]

Utilizing the incorporation by reference approach is more likely to accomplish the key goal of creating and maintaining uniformity with Reg. BI and among the several states. The text of proposed Section 1.d. differs from and excludes certain specific language in Reg. BI. As a result, Section 1.d. may be subject to interpretations that diverge from or conflict with Reg BI. We note

[3] See WAC 460-20C-210(4) and WAC 460-20C-220(9) at p. 23,28.
[4] See 3CCR 704-1-51-4.7(C).
[5] See 49 TexReg 8797, 8821-8822 (November 8, 2024).
[6] See OAC Rule 1301:6-3-19.

that Reg. BI consists of only a few pages of text, but its specific provisions are explained in several hundred pages of commentary from the SEC[7], in addition to a considerable volume of subsequent guidance from the SEC staff. We suggest that simply incorporating the provisions of Reg. BI by reference would make clear the intention of all states adopting the Proposal to interpret it in the same way as the SEC has interpreted Reg. BI.

2. The provisions relating to the use of titles including "advisor" or "adviser" should be amended to be fully consistent with Reg. BI and SEC guidance.

The Proposal adds new Section 1.e., which prohibits use of titles, purported credentials, or professional designations containing any variant of the terms "adviser" or "advisor" without licensure as either an investment adviser or an investment adviser representative. This provision appears to originate from the Reg. BI requirement that broker-dealers and representatives accurately disclose the capacity in which they are acting (broker-dealer, investment adviser, or other) when making investment recommendations to customers. It is designed to assure that the customer understands the role of the firm or agent with respect to an investment recommendation, which is an appropriate requirement. However, Reg. BI does not explicitly prohibit the use of the titles "adviser" or "advisor" in all instances in which the agent or firm is not licensed as an investment adviser. Instead, it creates a presumption that use of those titles would violate the requirement to disclose the capacity in which the firm or agent is acting. The SEC recognized that there might be instances in which a blanket prohibition would not be warranted, stating that:

> "Although using these names or titles creates a presumption of a violation of the Disclosure Obligation in Regulation Best Interest, we are not expressly prohibiting 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. A clear example is a broker-dealer (or associated person) that acts on behalf of a municipal advisor or commodity trading adviser, or as an advisor to a special entity, as these are distinct advisory roles specifically defined by federal statute that do not entail providing investment advisory services. ***We also recognize that a broker-dealer may provide advice in other capacities outside the context of investment advice to a retail customer that would present a similarly compelling claim to the use of these terms. In these circumstances, firms and their financial professionals may in their discretion use the terms "adviser" or "advisor."*** [8] (Emphasis added, footnotes deleted.)

There may be relatively few instances in which a broker-dealer or agent could overcome the presumption with respect to the use of these titles, but Reg. BI specifically recognizes that such circumstances may exist. Section 1.e. should be amended to be fully consistent with Reg. BI and allow exceptions under appropriate circumstances.

We would also note that, to the extent that the restriction on usage of titles is applied by a state securities regulator in a manner that is narrower than Reg. BI (for example, by prohibiting associated persons of a broker-dealer who are supervised persons of an investment advisor to use

[7] See SEC Release 34-86031 ("the Adopting Release"), 84 FR 39178, effective September 10, 2019.
[8] Adopting Release ("Adopting Release") at 158.

the title "advisor" or "adviser"), it would also be preempted by the National Securities Market Improvement Act ("NSMIA").[9] NSMIA prohibits state securities regulators from creating new recordkeeping requirements that differ from or are in addition to the requirements of 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 broker-dealers to make and keep new or different records than those required by federal law or FINRA rules. In this case, individuals who use the titles "advisor" or "adviser" as associated persons of a broker-dealer who are also supervised persons of an investment advisor or provide services in some other capacity would be required to use a different title in their oral and written communications with their customers relating to their business. Broker-dealers would be required to make and keep a record of all such communications, which would necessarily differ from the records they are required to keep under Reg. BI. Consequently, the application of the titling provision in the manner set forth in the Proposal would be preempted under NSMIA and would be subject to legal challenge on that basis.

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We appreciate the opportunity to comment on the Proposal and commend the Project Group and Broker-Dealer Section for their careful review of the comments received in connection with the earlier version and the significant improvements that resulted. If we may offer any further information or assistance, please feel free to contact me.

Sincerely,

Mark Quinn
Director of Regulatory Affairs
Cetera Financial Group

[9] Pub. Law 104-290. October 10, 1996.