AMERICAN BENEFITS COUNCIL

December 19, 2024

Submitted via email to nasaacomments@nasaa.org

North American Securities Administrators Association, Inc.
Broker-Dealer Section
Market and Regulatory Policy and Review Project Group

Re: Proposed Amendments to NASAA Model Rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents

Dear Sir or Madam:

The American Benefits Council ("the Council") appreciates the opportunity to comment on the proposed revisions to the North American Securities Administrators Association, Inc. (NASAA) model rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents ("2024 proposed model rule"). Similar to our comments responding to the model rule published by NASAA in 2023 ("2023 proposal"), our comments on the 2024 proposed model rule focus exclusively on the proposal's interaction with the Employee Retirement Income Security Act of 1974 (ERISA) and its far-reaching preemption provision.

As discussed more fully below, the Council strongly believes that NASAA's model rule should fully exclude recommendations relating to ERISA-covered plans, participants, and beneficiaries. Accordingly, the Council: (1) supports the elimination of the provision in the 2023 proposal that limited its ERISA carveout to ERISA fiduciaries; and (2) urges NASAA to include in the final model rule an express ERISA preemption provision that carves out all recommendations relating to ERISA-covered plans.

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the

world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

BACKGROUND ON ERISA PREEMPTION

For 50 years under ERISA, employers that sponsor a retirement plan have been subject to the statute's single federal statutory and regulatory regime, rather than a multitude of regimes under state laws that would vary from state to state. To achieve its goal of protecting employee benefit plans from potential plan design and operational disruptions that could be caused by varying state regimes, Congress included in ERISA an explicit and far-reaching preemption provision. ERISA's preemption provision states that, except as otherwise provided by law, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[1] This express preemption language reflects Congress' unambiguous intent for the federal government to regulate all matters relating to employer-sponsored retirement plans, including any standards triggered by the provision of investment advice.

As ERISA's preemption provision explicitly provides, states are not permitted to add new or additional requirements if the states' rules "relate to" an employee benefit plan. The Supreme Court has on multiple occasions held that ERISA's preemption provision preempts state laws that have an "impermissible connection with ERISA plans," i.e., the law governs a central matter of plan administration or interferes with nationally uniform plan administration.[2]

ERISA also contains a "savings clause," under which the statute's preemption provision does not "exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."[3] Courts have interpreted the savings clause as providing a very narrow carveout,[4] and therefore the savings clause would not protect, for example, state insurance, banking, or securities rules seeking to regulate the provision of investment advice that relates to an ERISA-covered plan.

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[1] ERISA § 514(a).

[2] *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016). *See also Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S.Ct. 474, 476, 479 (2020).

[3] ERISA § 514(b)(2).

[4] *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003).

THE COUNCIL SUPPORTS THE REMOVAL OF THE FLAWED FIDUCIARY CARVEOUT

In 2023, NASAA published proposed revisions to the model rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents. That 2023 proposal included a provision stating that "[n]othing … 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" ERISA.

As we noted in our prior comments,[5] while the 2023 proposal attempted to clarify that the rule would not supplant the duties that apply to ERISA fiduciaries, the proposal would nevertheless have interfered with ERISA plan administration in a manner that is impermissible under ERISA's preemption provision. For example, broker-dealers may provide recommendations to an ERISA plan or participant but not act as an ERISA fiduciary. Because the broker-dealer is not an ERISA fiduciary in that situation, the 2023 proposal's exemption for ERISA fiduciaries would not have applied, which would have imposed new obligations on the broker-dealer. This would have meant that a new set of rules would apply to, for instance, the call centers that serve ERISA plan participants, which would disrupt nationally uniform plan administration.

The Council strongly supports the removal of this flawed carveout because, despite its reference to ERISA fiduciaries, it would not have prevented the 2023 proposal from relating to employee benefit plans in ways that are preempted by ERISA.

THE FINAL RULE SHOULD INCLUDE AN EXPRESS ERISA PREEMPTION PROVISION

While the removal of the flawed carveout is a significant improvement, we are urging NASAA to add to the final version of its model rule an *express* preemption provision that explicitly carves out all recommendations relating to ERISA-covered plans. We are requesting this addition because, in the absence of such a provision, the final model rule would be preempted insofar as it relates to an employee benefit plan.

Consider, for example, a state that adopts its own interpretation of the standards outlined in the U.S. Securities and Exchange Commission's Regulation Best Interest ("Reg BI") for regulating broker-dealers in the state, which the 2024 proposed model rule generally incorporates. With respect to ERISA plans, Reg BI – a federal regulation – applies. A state law, however – even one that follows the language of

[5] The Council's comments are available at https://www.nasaa.org/wp-content/uploads/2023/09/retirement_broker-dealers_nasaa_comment-letter120423.pdf.

Reg BI – cannot apply to ERISA plans. If the state attempts to apply its rule to an ERISA plan operating in the state, this would be preempted because the state rule would impose separate requirements on ERISA plans and would interfere with ERISA plan administration.

ERISA's far-reaching preemption provision does not provide an exception for state laws that mirror or incorporate federal laws. If it did, state regulators could deputize themselves to enforce federal laws that relate to employee benefit plans. This cannot be the case.

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Thank you for considering the Council's comments on the 2024 proposed model rule. If you have any questions or if we can be of further assistance, please contact me at 202-289-6700 or ldudley@abcstaff.org.

Sincerely,

Lynn Dudley
Senior Vice President, Global Retirement and Compensation Policy

cc: Amy Kopleton, Broker-Dealer Market and Regulatory Policy and Review Project Group Chair, KopletonA@dca.njoag.gov

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