



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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By Email to: DCAProposal@dca.lps.state.nj.us

Christopher W. Gerold
Bureau Chief
New Jersey Bureau of Securities
153 Halsey Street, 6th Floor
Newark, New Jersey 07101

Re: Fiduciary Duty Rule Proposal Request for Comment

Mr. Gerold:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to the April 15, 2019, Fiduciary Duty of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives rule proposal (the “Rule Proposal”) published by the New Jersey Bureau of Securities (the “Bureau”).² NASAA has long advocated for raising the standard of care for broker-dealers when they make investment recommendations to customers while maintaining a strong fiduciary duty standard for investment advisers.³ NASAA applauds the Bureau’s efforts in this regard and supports New Jersey’s right to protect its investors.

The Bureau issued the Rule Proposal in response to a September 17, 2018, request from Governor Murphy.⁴ Governor Murphy said about his request, “New Jersey is pursuing state-level

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Rule Proposal is available at: <https://www.njconsumeraffairs.gov/Proposals/Pages/bos-04152019-proposal.aspx>.

³ See, e.g., Letter from NASAA Present Michael Pieciak to Diana J. Foley (Mar. 7, 2019), <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Nevada-Comment-Letter-3-7-2019.pdf>; Letter from NASAA President Joseph P. Borg to Brent J. Fields (August 23, 2018), <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Reg-BI-Comment-Letter-8-23-2018.pdf>; Letter from NASAA President William Beatty to Brent J. Fields (July 21, 2015), <http://www.nasaa.org/wp-content/uploads/2011/07/2015-07-21-NASAA-Comment-to-SEC-re-coordination-with-DOL.pdf>; Letter from NASAA President A. Heath Abshure to Elizabeth M. Murphy (July 5, 2013), <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Fiduciary-Duty-Letter-final-07052013.pdf>.

⁴ See Governor Murphy Marks 10-Year Anniversary of 2008 Financial Crisis by Announcing Plan to Require NJ Financial Industry to Put Customers’ Interests First (Sept. 17, 2018), <https://nj.gov/governor/news/news/562018/approved/20180917c.shtml>.

regulatory reforms that would enhance the integrity of its financial services industry by holding every investment professional to the highest standard under the law.”⁵

Overview of the Rule Proposal

The Rule Proposal would make it a dishonest or unethical business practice within the meaning of the New Jersey Securities Act for a broker-dealer, broker-dealer agent, investment adviser, or investment adviser representative who is registered or required to be registered with the state to recommend a security or investment strategy to a retail customer that is not the best of the reasonably available options.⁶ The Rule Proposal would do so by implementing a statutory fiduciary duty on these persons⁷ and, in accordance with common law, stating this fiduciary duty includes both a duty of care and a duty of loyalty. The Rule Proposal sets forth to whom the duty will be owed, the duration of the duty, and states that this duty will be presumptively breached by “offering, or receiving, direct or indirect compensation to or from the broker-dealer, its agent, or adviser for recommending the opening of, or transfer of assets to a specific type of account, or the purchase, sale, or exchange of a specific security that is not the best of the reasonably available options.”⁸

The Bureau sets out its intention that the Rule Proposal establish a higher duty of care than the duties that will be owed under the U.S. Securities and Exchange Commission’s Regulation Best Interest proposal. The Rule Proposal states:

The Bureau believes that the SEC Regulation Best Interest does not provide sufficient protections for New Jersey investors. The Bureau believes that imposing a fiduciary duty standard for broker-dealers, investment advisers, agents, and investment adviser representatives protects investors against the abuses that can result when financial professionals place their own interests above those of their customers, will help to reduce investor confusion, and will work to foster public confidence in the financial profession. . . . As several commenters have noted in their comments to the SEC’s proposed Regulation Best Interest, this standard is purportedly greater than that of the suitability rule but is less than that of a fiduciary duty. Accordingly, should the SEC adopt Regulation Best Interest, the Bureau’s proposed new rule will exceed this standard.⁹

⁵ *Id.*

⁶ *See* N.J.S.A. §§ 49:3-53(a)(3), -58(a)(2)(vii).

⁷ *See* Rule Proposal, §§ 13:47A-6.4(a)(1), -6.4(a)(2).

⁸ *See id.*, § 13:47A-6.4(b)(2)(i).

⁹ *See id.*

The Rule Proposal Complies With the Limited Preemptive Impact of NSMIA on the Differing Broker-Dealer and Investment Adviser Regulatory Structures

We expect members of the financial services industry and their associations will submit comment letters urging the Bureau to make further revisions to the Rule Proposal because of supposed preemption by various federal laws and/or SEC pronouncements including the National Securities Markets Improvement Act of 1996 (“NSMIA”).¹⁰ However, a reading by the industry of broad preemption of state authority in the federal securities laws is simply an overreach.

In the field of securities law, state laws are preempted only to the extent they conflict with the federal securities laws.¹¹ This is made explicit through, for example, Section 28(a) of the Securities Exchange Act of 1934, which states: “Except as otherwise specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations under this chapter.”¹² Under basic conflict preemption principles, a state law is invalid only if “compliance with both federal and state requirements is impossible” or if the state law “poses an obstacle to the accomplishment of Congress’s objectives” in enacting the federal law.¹³ The Rule Proposal is a valid exercise of state regulatory authority because it will not be impossible to comply both with the Rule Proposal and the federal securities laws nor does the Rule Proposal pose an obstacle to Congress’s objectives in the federal securities laws.

The Securities Act of 1933 and the Securities Exchange Act of 1934 contain broad anti-preemption provisions to uphold state regulatory authority.¹⁴ Congress has preempted some state securities regulatory authority, most notably through NSMIA. But Congress intended NSMIA to have limited preemptive impact. In particular, after NSMIA, states retain freedom to regulate broker-dealers except in the areas of “capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements.”¹⁵ The Rule Proposal does not tread upon these forbidden areas, remaining entirely neutral with respect to NSMIA and, in particular, broker-dealer recordkeeping. Furthermore, broker-dealers already owe fiduciary duties at common law in some circumstances; for instance, broker-dealers generally owe fiduciary duties to customers under federal and state law when they exercise

¹⁰ See National Securities Markets Improvement Act of 1996, Pub. Law 104-290, 110 Stat. 3416.

¹¹ *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1106 (4th Cir. 1989) (*en banc*), (“It is well-settled that federal law does not enjoy complete preemptive force in the field of securities.”).

¹² 15 U.S.C. § 78bb(a)(1) (2018).

¹³ *Whistler Invs. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1166 (9th Cir. 2008).

¹⁴ These provisions are in Section 18 of the Securities Act (see 15 U.S.C. § 77r(c)(1)) and Section 28 of the Securities Exchange Act (see 15 U.S.C. § 78bb(a)(1)).

¹⁵ See NSMIA § 103.

discretion over customer accounts or otherwise assume positions of trust and confidence with respect to a client.¹⁶

The Rule Proposal Will Benefit New Jersey Investors

In closing, we applaud the Bureau's work to strengthen protections for New Jersey investors, as NASAA has long advocated raising broker-dealer standards of care.¹⁷ Investor protection should always be the *sine qua non* of securities regulation and the Rule Proposal should curb abusive sales practices perpetrated on New Jersey investors. The Bureau will likely receive objections to the Rule Proposal from the securities industry; however, we must remember the securities industry has proven itself adaptive and can accommodate these new regulations.

Sincerely,



Michael Pieciak
NASAA President
Commissioner, Vermont Department of
Financial Regulation

¹⁶ See, e.g., *United States v. Skelly*, 442 F.3d 94, 98 (2d Cir. 2006); *Dimsey v. Bank of N.Y.*, 831 N.Y.S.2d 359, 342 (N.Y. Sup. Ct. 2006).

¹⁷ E.g., Letter from NASAA President Michael Pieciak to Brent J. Fields (Feb. 19, 2019), <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Reg-BI-Supplemental-Comment-Letter-021919.pdf>; Letter from NASAA President Joseph P. Borg to Brent J. Fields (Aug. 23, 2018), <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Reg-BI-Comment-Letter-8-23-2018.pdf>; Letter from NASAA President William Beatty to Phyllis C. Borzi (Jul. 21, 2015), <http://www.nasaa.org/wp-content/uploads/2011/07/2015-07-21-NASAA-Comment-to-DOL.pdf>; Letter from NASAA General Counsel Rex A. Staples to Employee Benefit Securities Administration (Mar. 15, 2011), http://www.nasaa.org/wp-content/uploads/2011/07/7-DOLCommentLetter_0352011.pdf.