



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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January 7, 2020

By Email to: securitiesregs-comments@sec.state.ma.us

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Re: Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

To Whom It May Concern:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to the December 13, 2019, Request for Comment on the Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (the “Rule Proposal”) published by the Massachusetts Securities Division (the “Division”).²

NASAA has long advocated for raising the standard of care for broker-dealers when they make investment recommendations to retail customers while maintaining a strong fiduciary duty standard for investment advisers. NASAA supported the Division’s preliminary rule proposal issued last summer (the “Preliminary Rule Proposal”)³ by letter to the Division on July 26, 2019.⁴ NASAA reaffirms the comments in our previous comment letter and provides additional comments here in response to the Division’s formal Rule Proposal.

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.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryruleidx.htm>.

³ The Preliminary Rule Proposal is available at:
<https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm>.

⁴ See Letter from NASAA President Michael Pieciak (Jul. 26, 2019), available at <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/preliminarycomments/2019-07-26-North-American-Securities-Administrators-Association.pdf>.

Overview of the Rule Proposal

The Rule Proposal would impose a fiduciary duty on broker-dealers, broker-dealer agents, investment advisers, and investment adviser representatives when making investment recommendations to retail customers and other non-institutional investors. The Rule Proposal would apply this duty to transactions involving securities, commodities or insurance products and make this duty enforceable through the existing dishonest or unethical business practices mechanisms in the Massachusetts Uniform Securities Act, M.G.L. ch. 110A. The proposal sets out when the fiduciary duty will apply and outlines the obligations imposed by the duty's component care and loyalty obligations. The proposal also would impose this fiduciary duty upon securities professionals that use any of several enumerated terms in their professional titles. In a slight departure from the Preliminary Rule Proposal, though, the Rule Proposal would not require that a recommendation be the "best of the reasonably available options." In sum, the Rule Proposal would serve the interest of investors and reaffirm that broker-dealers and investment advisers must make recommendations without regard to their own financial interests.

NASAA Supports the Rule Proposal

The Rule Proposal is a reasonable and workable enhancement to investor protection for the citizens of Massachusetts. And, for the reasons outlined in our July 16 comment letter, the Rule Proposal is well within the Division's authority to pursue and is not preempted by federal law.⁵ We offer the following additional comments on certain aspects of the final Rule Proposal.

First, the Rule Proposal request for comment noted that several commenters on the Preliminary Rule Proposal "wrote that variable annuities and insurance products are not within the jurisdiction of the Division and that the Proposal should expressly state it does not apply to annuities."⁶ The Division disagrees and would include commodities and insurance products within the scope of the new fiduciary duty.⁷ The Division is entitled to do so. Although these products are not expressly covered by M.G.L. c. 110A, securities regulators are entitled to enforce broker-dealer and investment adviser conduct standards regarding these other products. This principle has been affirmed recently by authorities such as the Illinois Supreme Court.⁸

Second, NASAA supports the Division's clarification of the obligations associated with using various professional titles in the Rule Proposal. The U.S. Securities and Exchange Commission ("SEC") in its recently promulgated Regulation Best Interest precluded the use of the professional title "adviser" (or "advisor") by a broker-dealer agent who is not also registered as an

⁵ See Letter from NASAA President Michael Pieciak, *supra* note 4, at 2-3.

⁶ See Rule Proposal, Request for Comment, at 6.

⁷ *Id.*


⁸ See *Van Dyke v. White*, 131 N.E.3d 511 (Ill. 2019) (holding, in relevant part, that the Illinois securities department had authority to investigate annuity sales by a state-registered investment adviser notwithstanding that annuities are not securities under Illinois law).

investment adviser or investment adviser representative.⁹ The SEC did not, however, restrict the use of other, similar titles, notwithstanding that NASAA had encouraged the SEC to do so.¹⁰ Under the Rule Proposal, a broker-dealer agent using certain titles such as “financial planner” or “portfolio manager” will be subject to a fiduciary duty the same as if the individual had called himself or herself an “adviser.” This is appropriate, as retail investors should not be expected to infer that an “adviser” owes a materially different legal duty of care and loyalty than a “financial planner,” “portfolio manager” or similarly titled financial professional.

Third, the request for comment noted complaints from commenters that a separate fiduciary rule in Massachusetts will create a “patchwork” or “regulatory labyrinth” of securities regulation across the country.¹¹ This criticism misses the mark by ignoring basic principles of federalism. As the U.S. Supreme Court has long recognized, a virtue of federalism is that “a single courageous State may . . . serve as a laboratory[] and try novel social and economic experiments without risk to the rest of the country.”¹² Through the Rule Proposal, the Division is exercising its legitimate authority on behalf of the citizens of Massachusetts to regulate securities activities in the state. As long as the Rule Proposal does not conflict with federal law – and it does not, it is merely another manifestation of the American system of governance.¹³

Investor protection should always be the *sine qua non* of securities regulation. The Rule Proposal would be a strong deterrent to abusive sales practices and is well within the Division’s scope of regulatory authority. We applaud the Division’s work to strengthen protections for Massachusetts investors and encourage adoption of the Rule Proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "CH Gerold", with a stylized flourish at the end.

Christopher Gerold
NASAA President
Chief, New Jersey Bureau of Securities

⁹ See Regulation Best Interest, SEC Release No. 34-86031, at 149 (Jun. 5, 2019), available at <https://www.sec.gov/rules/final/2019/34-86031.pdf> (“we presume that the use of the term “adviser” and “advisor” in a name or title by (1) a broker-dealer that is not also registered as an investment adviser or (2) an associated person that is not also a supervised person of an investment adviser, to be a violation of [Regulation Best Interest]”).

¹⁰ See Letter from NASAA President Joseph Borg Re: Regulation Best Interest, p. 17 (Aug. 23, 2018), available at <https://www.sec.gov/comments/s7-07-18/s70718-4259557-173080.pdf>.

¹¹ See Rule Proposal, Request for Comment, at 3.

¹² *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015), citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹³ As explained in NASAA’s comment letter on the Preliminary Rule Proposal, federal law – including the National Securities Markets Improvement Act of 1996 – does not preempt state securities regulation except in very limited, well-defined areas. The Rule Proposal does not breach these standards. See Letter from NASAA President Michael Pieciak, *supra* note 4, at 2-3.