December 4, 2023

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North American Securities Administrators Association
750 First Street, N.E., Suite 990
Washington, D.C. 20002

Re: Proposed New Model Regulations Under NASAA's Business Practices Rule.

Dear Ms. Kopleton and Mr. Bouchard:

On behalf of Raymond James Financial, Inc. and its subsidiary broker-dealers and investment advisers ("Raymond James" or "the firm"), I appreciate this opportunity to provide comments on the above-referenced proposal by the North American Securities Administrators Association ("NASAA") to add new regulations to its model Business Practices Rule.[1]

We join in the letters filed by the Securities Industry and Financial Markets Association ("SIFMA") and other commenters who have described how the proposal's wording contradicts Securities and Exchange Commission ("SEC") Regulation Best Interest ("Reg BI"), which it purports to incorporate. As those commenters have also noted, the proposal may be adopted or interpreted in different ways across multiple jurisdictions, leading to diverging regulatory systems.

We write separately to highlight some of the ways the proposal deviates from Reg BI, promotes inconsistent regulation among jurisdictions, and creates uncertainties that would harm investors and capital markets. We are concerned that the net effect of the regulations would be a patchwork of regulatory schemes that are inconsistent with federal standards, a shift to business models that avoid state oversight, less competition among firms, and increased costs for investors.

I. The Proposal Would Create New Regulations That Conflict With Reg BI.

At the outset, we note that this is not a proposal to codify or reflect Reg BI. It is actually a proposal to adopt eight new regulations that are inconsistent with Reg BI. If the proposal were only a straightforward effort to implement Reg BI on the state level, it could be accomplished easily through incorporation by reference. Indeed, the State of Florida's Office of Financial

[1] Request For Public Comment: Proposed Revisions To NASAA's Dishonest Or Unethical Business Practices Of Broker-Dealers And Agents Model Rule (Sept. 5, 2023).

Regulation has already proposed to do so.[2] A similar approach by NASAA would be swift, non-controversial, and would have the advantage of automatically incorporating court decisions or SEC actions that interpret, re-interpret or revise Reg BI in the future.[3]

But instead of incorporating Reg BI by reference, the proposal would add eight lengthy sections and subsections to NASAA's current model rules. These new regulations diverge from Reg BI in many respects. SIFMA's comment letter provides a full listing of these differences, but we believe the following examples demonstrate how disruptive the proposal would be.

A. Scope of Reg BI vs. Scope of the Proposed Regulations.

SEC Regulation BI applies when a broker-dealer or agent makes a "recommendation" to a retail investor. It does not apply to unsolicited transactions. When it first proposed and ultimately adopted Reg BI, the SEC reviewed court decisions, as well as precedent established in its own decisions and decisions by the Financial Industry Regulatory Authority ("FINRA").[4] The SEC confirmed that "in accordance with existing broker-dealer guidance and case law," the question of "what constitutes a recommendation is highly fact-specific."[5] To this end,

> [f]actors considered in determining whether a recommendation has taken place include whether the communication 'reasonably could be viewed as a "call to action" and "reasonably would influence an investor to trade a particular security or group of securities." The more ***individually tailored*** the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a 'recommendation.'[6]

Compare this "individually tailored / call to action" standard with proposed model Regulation 1.d.(5). Here, NASAA would state that merely "featuring or promoting" an account type, security, or strategy is itself a recommendation.

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[2] Florida Office of Financial Regulation, Notice 27425991 (Aug. 10, 2023) ("The purpose and effect is to amend the existing rules to incorporate by reference the current versions of general industry standards, to include Regulation Best Interest (17 C.F.R. §240.15l-1) as an incorporated industry standard … .") https://flrules.org/Gateway/View_notice.asp?id=27425991).

[3] The request for comment indicates that certain aspects of the proposal are intended to translate guidance from the SEC and its staff into regulatory rule text. But guidance in statements such SEC Staff FAQs does not have the effect of a rule or regulation, and "create no new or additional obligations for any person." *See* SEC Staff Bulletin: *Standards of Conduct for Broker Dealers and Investment Advisers Account Recommendations for Retail Investors,* n. 1 (https://www.sec.gov/tm/iabd-staff-bulletin).

[4] *See Regulation Best Interest*, 83 FR 21574, 21593 (May 9, 2018) (citing *Michael F. Siegel*, SEC Rel. No. 34-58737, at 21–27 (Oct. 6, 2008) (sustaining NASD findings) (applying FINRA's guiding principles to determine that a recommendation was made), *aff'd in relevant part, Siegel v. SEC*, 592 F.3d 147 (D.C. Cir. 2010), *cert. denied*, 560 U.S. 926 (2010); *In re Application of Paul C. Kettler*, SEC Rel. No. 34-31354 at 5, n.11 (Oct. 26, 1992).

[5] *Regulation Best Interest: The Broker-Dealer Standard of Conduct,* 84 FR 33318, 33335 (July 12, 2019).

[6] 84 FR 33318, 33335 (July 12, 2019) (emphasis added).

> If the broker-dealer or agent utilized any means, method or mechanism to feature or promote an account type, specific security or investment strategy to a retail customer, whether directly or through a third-party, then that transaction will not be deemed an unsolicited transaction, but rather will be deemed a recommendation … .[7]

Thus, under the proposed regulation, a broker-dealer could be deemed to have issued a recommendation merely by advertising the fact that it offers a certain account type. Further, notwithstanding the SEC's guidance to the contrary, educational communications, such as descriptions of employer-sponsored retirement plans, could also be deemed recommendations.[8]

It would be impossible for broker-dealers to comply with this standard. Under Reg BI, a broker-dealer or agent must exercise diligence to understand a retail investor's investor profile before providing a recommendation.[9] If the definition of a "recommendation" is broadened as proposed here, a firm would have to collect and analyze an investor's profile data *before* that investor reads about an account type featured on the firm's website. Likewise, a broker-dealer would have to analyze an investor's profile before providing access to a library of research reports for any of its self-directed account holders, or providing educational information about investment strategies. Since compliance would not be possible, broker-dealers would be forced to cease providing such information. Thus, investors would be deprived of useful information, and an essential means to distinguish among investment services providers.

Proposed model regulation 1.d.(5) is fundamentally inconsistent with Reg BI and case law, as well as interpretations and guidance issued by the SEC and FINRA. Accordingly, we urge NASAA to revise the proposed model rules to conform to the established interpretation of the term "recommendation."[10]

B. Forbidding Disclosure To Address Conflicts.

Proposed model regulation 1.d.(1) states that "[t]he obligations set forth in this section cannot be satisfied through disclosure alone." NASAA's request for public comment states that "this incorporates SEC guidance from the Adopting Release (and repeated elsewhere)." However, it does not cite any SEC statements to support that assertion.

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[7] Request for Public Comment at 6-7.

[8] 84 FR 33318, 33337-33338 (July 12, 2019).

[9] 17 CFR 240.15l-1(a)(2)(ii)B).

[10] The proposal suggests that the term "recommendation" should be broadened in light of "the advent of fintech and … sophisticated algorithmic digital engagement practices … ." Request for Public Comment at 7. Yet the proposal would apply to far more than electronic interactions, and provides no justification for a break with judicial, SEC and FINRA precedent. The SEC statement cited by NASAA as a basis for this re-definition is an unapproved proposal that has received extensive criticism. *See e.g.,* Barbara Comstock and William P. Barr, "Gary Gensler's Plan to Control Information," *The Wall Street Journal* (Sept. 10, 2023) (https://www.wsj.com/articles/gary-genslers-plan-to-control-information-sec-financial-regulation-firms-investors-technology-market-927579dc); Letter from Melissa MacGregor and Kevin Ehrlich, SIFMA re: SEC Rel. No. IA-635334 (*Conflicts of Interest Associated with the Use of Predictive Data Analytics*) (Oct. 10, 2023) (https://www.sec.gov/comments/s7-12-23/s71223.htm).

In fact, Reg BI recognizes that its requirements may be met by providing disclosures. It requires a broker-dealer to maintain policies and procedures designed to "identify and at a minimum *disclose*, … or eliminate, all conflicts of interest associated with" any recommendations.[11] The policies and procedures also must be designed to "identify and *disclose* any material limitations placed on the securities or investment strategies … that may be recommended … and any conflicts of interest associated with such limitations."[12] When it adopted Reg BI, the SEC stated that "rather than requiring mitigation of all firm-level financial incentives, we have determined to refine our approach by generally allowing firm-level conflicts to be generally addressed through disclosure."[13] Similarly, SEC staff guidance on Reg BI issued in 2020 confirms the following:

> The Conflict of Interest Obligation includes an overarching requirement to establish, maintain, and enforce reasonably designed policies and procedures to identify and, at a minimum, disclose, in accordance with the Disclosure Obligation, or eliminate all conflicts of interest associated with the recommendation. Pursuant to this overarching requirement, elimination of conflicts of interest is one method of addressing the conflict, in lieu of disclosure, which broker-dealers may find appropriate in certain circumstances even when not required by Regulation Best Interest.[14]

It is therefore surprising to read the proposal's statement that Reg BI and the SEC do not permit disclosure as a means of compliance – apparently even for the most transparent, easily understood conflicts. We urge NASAA to remove section 1.d.(1) from the proposed regulation in order to avoid confusion and to promote consistency with the federal standard.

C. Presumption of Violations for Compensation Permitted Under Reg BI.

Under proposed model rule 1.d.(2)b., a broker-dealer or agent will be presumed to be in violation when it "rewards the broker-dealer or agent with additional cash or non-cash compensation beyond the sales commission as the result of that recommendation." This effectively prohibits any compensation other than commissions, because a firm would have to prove a negative. Specifically, the firm would bear the burden of proof in litigation – brought in any jurisdiction, at any time – to show that the compensation did not result in a recommendation that was not in the investor's best interest. Rather than face such uncertainty and risk, firms would revert to a commission-only model.

This is not what Reg BI or any SEC statement requires. In fact, the SEC's Adopting Release confirms that certain forms of compensation "present less risk that the incentive would compromise compliance," including non-commission "compensation practices based on, for

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[11] 17 CFR 240.15l-1(a)(2)(iii)(B).

[12] 17 CFR 240.15l-1(a)(2)(iii)(C) (emphasis added).

[13] 84 FR 33318, 33390 (July 12, 2019).

[14] SEC Division of Trading and Markets, *Frequently Asked Questions on Regulation Best Interest: Conflict of Interest Obligation* (Posted January 10, 2020) (https://www.sec.gov/tm/faq-regulation-best-interest).

example, total products sold, or asset growth or accumulation, and customer satisfaction."[15] Due to its disruptive effects and its inconsistence with the federal standard, this aspect of the proposal should be eliminated.

D. Promotion of Inconsistent Regulations.

The Proposal invites state and local regulators to "pick and choose" different sections and subsections of the proposed regulations on an "all, some or none" basis.

Historically, one of NASAA's primary purposes has been to promote consistent, uniform regulations. NASAA describes itself as "[a]dvocating [for] passage of strong, sensible, and consistent state securities laws and regulations."[16] The proposal undermines this purpose by inviting each NASAA member to adopt individually varying provisions, so that rules diverge across state borders.

There are serious drawbacks to this mix and match approach. Broker-dealers would have to implement different compliance and supervisory systems for business in each state. They may elect to cease providing or sharply limit brokerage services in states that have overly burdensome variations of the model rules. This would have knock-on effects as some states would experience lower participation in capital markets, or concentration of their investing citizens' business in a smaller number of the largest firms. Finally, in today's increasingly mobile society, an investor's transactions could become subject to different standards depending on their location at the time, resulting in confusion among investors, broker-dealers and agents.

Similar effects can already be seen as various states diverge from each other in their efforts to either restrict or promote investments based on social or environmental goals. As this process unfolds, investment firms have found that their compliance requirements are becoming inconsistent, and their abilities to offer services are becoming more uncertain. We urge NASAA not to permit this trend to extend further.

E. Clarification of Reference to Regulation Best Interest.

Finally, we note that the "or otherwise" wording in Section 1d. of the proposal invites misinterpretation. In Section 1d., the draft provides that the following shall be deemed a violation:

> When making a recommendation to a retail customer, placing the financial or other interest of the broker-dealer or agent ahead of the interest of the retail customer, recommending an investment strategy or the sale or purchase of any security without a reasonable basis to believe that the recommendation is in the best interest of the retail customer based on the customer's investment profile and the potential risks, rewards, and costs associated with the recommendation, or otherwise failing to comply with the obligations set forth in Regulation Best Interest … .

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[15] 84 FR 33318, 33396 (July 12, 2019).

[16] *Our Role: Putting Investors First,* NASAA website (https://www.nasaa.org/about/our-role/).

We interpret the phrasing that precedes "or otherwise failing to comply with the obligations set forth in Regulation Best Interest" as explicatory. We do not understand those phrases to establish any requirements that stand separate and apart from Regulation Best Interest, and NASAA's description of the proposal does not indicate that this is intended. Nevertheless, we believe that confusion could be avoided, and the proposed rules would be easier to understand, if the words that precede "failing to comply …" were eliminated.

II. Consequences of Divergence From a Uniform Federal Standard.

The above are only a few examples of the ways that the proposal differs from Reg BI, as interpreted by the SEC and its staff. SIFMA's letter details even more. The proposed new regulations would be broader in scope than Reg BI (*e.g.*, by expanding the definition of a "recommendation") and more restrictive than Reg BI (*e.g.*, by eliminating disclosure as a means of compliance and by restricting compensation to commissions). Taken as a whole, they would force broker-dealers and agents to re-evaluate their operations and consider whether to shift to different models that would serve fewer investors and cost more to provide.

A limited number of broker-dealer firms may determine that the increased litigation and compliance risks of the proposed rules would require them to cease providing educational information about investments or different types of investment accounts. Such firms would operate more like "execution-only" firms, with few agents, and little to no guidance provided to investors. We believe that most investors would be reluctant to invest through a firm that provides little more than a portal.

Other firms and their agents are more likely to determine that the new regulations are pushing them to adopt the business model of an investment advisory firm. But the fees charged by investment advisers are not suited to the purposes of many investors. For most "buy and hold" investors, or investors that seek simple portfolios (such as bond ladder arrangements), a commissioned-based brokerage account is far more cost-effective than an advisory account that charges fees based on assets under management. In addition, most advisory firms require substantial minimum account balances before they accept a client. Many investors would be unable to open such an account.

As a result, investors who need guidance but who have smaller amounts of assets may be left without options. They would include a large number of new savers, and individuals in underserved or small communities. It would be better to retain current structures (or revise them incrementally) than to force such radical changes on the marketplace for investment services.

Finally, we note that the incentive to adopt an advisory model and avoid state agent / broker-dealer regulation would have negative implications for market oversight. If firms and their personnel shift their businesses to federally-regulated investment advisory operations, state and local regulators would lose substantial visibility into the status of investors from their jurisdictions. In addition, the funding to support state investor protection programs that is provided by agent and broker-dealer registrations and renewals may be significantly reduced.

III. The Proposed Regulations and Their Consequences Cannot Be Supported by NASAA's Reg BI Reports.

Reg BI was adopted by the SEC in consideration of the need to preserve investors' ability to choose between investment advisory accounts and full service or self directed brokerage accounts. The SEC proposed it in 2018, reviewed thousands of comments and studies, conducted economic analyses, and approved it over a year later in 2019. The regulation went into effect at the end of June in 2020. This reflects the SEC's deliberate, methodical and careful approach to making significant regulatory changes.

As noted above, NASAA's proposal would fundamentally change the markets for investment services. To support it, NASAA has only proffered two reports: its Phase II(A) and Phase II(B) Reports on Reg BI Implementation. However, the Phase II(A) Report "failed to follow eight widely-accepted survey research standards and best practices," as found by Greenwald Research, an independent, established expert in research and survey methodologies.[17] As a result of these flaws, which included a failure to allow respondents to accurately report their answers, "questionnaires and reports indicat[ing] a pre-determined agenda," and "several mischaracterizations of survey results," the conclusions expressed in the Phase II(A) report "should not be considered as a basis for action by the SEC or other policymakers."[18]

The Phase II(B) Report, for its part, ignored the identified shortcomings of the prior report. Moreover, as stated by NASAA itself, both reports concentrate on just four categories of investment products.[19] None of them are among the most commonly held investments: stocks, bonds, and mutual funds. It is not appropriate to create new regulations for all investment offerings based on flawed studies of just four types. We believe that a more focused approach that addresses the particular characteristics of those products would benefit investors more than the all-encompassing standard that has been proposed.

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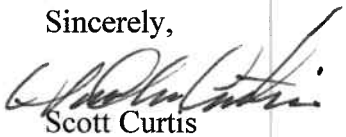
We appreciate this opportunity to provide our comments on the proposal. Should NASAA or any of its members have any questions, please do not hesitate to contact me.

Sincerely,



Scott Curtis

President, Private Client Group
Raymond James Financial, Inc.

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[17] Greenwald Research, *Analysis of NASAA Reg BI Surveys*, at 4 (FEB. 2022) (https://greenwaldresearch.com/wp-content/uploads/2022/02/Analysis-of-NASAA-Surveys-on-Reg-BI-Greenwald-Research-2.22.pdf).

[18] *Id. at* 5, 14, 2.

[19] *See* NASAA National Exam Initiative Phase II(B) Report (Sept. 2023) at 1 ("Both the Phase I and Phase II (A) exam initiatives focused on four types of complex, costly, risky products."). In the Phase II(B) examinations "examiners used a common set of examination modules that focused on the same four product types … ." *Id at* 2.