AMERICAN BENEFITS COUNCIL

December 4, 2023

Submitted via email to NASAAcomments@nasaa.org

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

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

Dear Sir or Madam:

On 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 ("proposed model rule").

Our comments are aimed at addressing the interaction of the proposed model rule and the Employee Retirement Income Security Act of 1974 (ERISA). In our view, if finalized and adopted by states, the proposed model rule would be preempted by ERISA to the extent that it relates to an ERISA-covered retirement plan, because the proposal's carveout for ERISA is limited to ERISA fiduciaries. The congressional intent underlying ERISA's express preemption provision is that rules like the proposed model rule are a major threat to the workability of employee benefit plans maintained by large multi-state plan sponsors. This is the case because states adopting the proposed model rule, or requirements like it, would create rules relating to employee benefit plans that are different from ERISA and from the rules that apply in states that do not adopt the proposed model rule.

To avoid these issues, the Council urges NASAA to fully exclude ERISA-covered plans, participants, and beneficiaries from the scope of any final model rule. We believe that this approach would be consistent with sound public policy and would avoid ERISA preemption of state rules that impose duties on financial professionals with regard to their interactions with ERISA-covered plans, participants, and beneficiaries.

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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 nearly 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. This 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 and powerful 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. ERISA creates its own comprehensive regime for determining who is a fiduciary, its own fiduciary standard of care, and applicable enforcement mechanisms.[2] 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."[3] A state law has an impermissible connection with a plan if the law governs a central matter of plan administration or interferes with nationally uniform plan administration.[4] A state regulation purporting to define when a fiduciary relationship exists would fall under the umbrella of ERISA's preemption provision, which the Supreme Court has emphasized is "deliberately expansive."[5]

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[1] ERISA § 514(a).

[2] *See, e.g.*, ERISA §§ 3(21), 404, 501, 502.

[3] *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).

[4] *Gobeille*, 577 U.S. at 320.

[5] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (internal citations omitted).

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."[6] In contrast with the expansive nature of ERISA preemption, courts have interpreted the savings clause as providing a very narrow carve-out. The Supreme Court has held that the savings clause is not applicable unless a state insurance law is (1) "specifically directed toward" the regulation of insurance and (2) the state law "substantially affect[s] the risk pooling arrangement between the insurer and the insured."[7] Thus, the insurance carve-out from ERISA preemption would not extend to protect state rules seeking to regulate advice regarding insurance products that relate to an ERISA-covered plan.

Applying similar logic to the carve-out for securities and banking regulation, it is difficult to argue that ERISA's savings clause would protect the proposed model rule. This is because the kind of rules envisioned by the proposed model rule focus on the provision of investment advice, rather than the regulation of insurance, banking, or securities.

ERISA PREEMPTS NASAA'S PROPOSED MODEL RULE

The proposed model rule states 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. Despite the proposed model rule's effort to clarify that it does not supplant the fiduciary duties that apply in ERISA plan recommendations, the proposal would nevertheless have a significant impact on ERISA plans and, therefore, would be preempted under ERISA.

The proposed model rule, if finalized and adopted by states, would interfere with a central matter of 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. In that instance, because the broker-dealer is *not* an ERISA fiduciary, the proposed model rule's exemption for ERISA fiduciaries would not apply, and the proposed model rule would impose new obligations on the broker-dealer. Thus, an entirely new set of rules would apply to, for example, the call centers that serve millions of ERISA plan participants. This would have an outsized impact on ERISA plan administration, which, as discussed above, is explicitly forbidden by the statute's preemption provision.

The proposed model rule would also impermissibly interfere with nationally uniform plan administration because it would affect the operations of plans that function on a national or regional level by subjecting them to rules that are inconsistent

[6] ERISA § 514(b)(2).

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

between states. If each state was allowed to separately regulate employee benefit plan fiduciaries, national or regional plans would be required to comply with the most stringent state rule, which could cause them to constantly modify their plan operations as states adopt or amend their regulations. This could, for example, cause an entire national plan to be modified because one city adopted a new, more stringent rule than had previously existed, followed by many other modifications as other states or cities adopt slightly different rules.

Lastly, a recent decision by the Massachusetts Supreme Judicial Court to uphold a 2020 Massachusetts regulation imposing a fiduciary duty on broker-dealers that provide investment advice to retail customers in the state would not protect the proposed model rule from potential invalidation as preempted under ERISA.[8] In its decision, the Massachusetts court did not consider the issue of whether the Massachusetts regulation was preempted by ERISA. Thus, this case is not a basis for concluding that a state regulation similar to the proposed model rule, with similar carveouts for ERISA fiduciaries, can withstand a challenge on preemption grounds. If ERISA preemption had been considered by the court, the likely outcome would be that the regulation would have been struck down because of its clear interference with ERISA plans.

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Thank you for considering the Council's comments on the proposed model rule. If you would find it helpful to discuss any of these matters with us, please contact me at 202-289-6700 or at 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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[8] *Robinhood Fin., LLC v. Sec'y of the Commonwealth*, 492 Mass. 696 (Mass. 2023). 950 MASS. CODE REGS. § 12.200 et seq.