



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

750 First Street N.E., Suite 1140
Washington, D.C. 20002
202/737-0900
Fax: 202/783-3571
www.nasaa.org

July 26, 2019

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: 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 June 14, 2019, Preliminary Solicitation of Public Comments: 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.³ NASAA applauds the Division’s efforts in this regard and supports Massachusetts’s right to protect its investors.

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/fiduciaryconductstandardidx.htm>.

³ See, e.g., Letter from NASAA President Michael Pieciak to Christopher W. Gerold (June 3, 2019), <http://www.nasaa.org/wp-content/uploads/2011/07/NJ-Comment-Letter-6-3-2019.pdf>; Letter from NASAA President 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 Abshire to Elizabeth M. Murphy (July 5, 2013), <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Fiduciary-Duty-Letter-final-07052013.pdf>.

Overview of the Rule Proposal

The Rule Proposal would make it a dishonest or unethical business practice within the meaning of the Massachusetts Uniform Securities Act, M.G.L. ch. 110A, 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 customer that is not the best of the reasonably available options.⁴ For recommendations made pursuant to transaction-based compensation, fees paid to the broker-dealer or adviser also must be the best of the reasonably available remuneration options for the customer.⁵ These duties would be owed primarily to retail investors, as the Rule Proposal excludes certain institutions – banks, broker-dealers, investment advisers or institutional buyers – from the scope of the proposal.⁶ Guidance on the Rule Proposal furthermore makes clear that the duties it proposes would apply to recommendations regarding the selection of account types, such as recommendations regarding IRA rollovers.⁷

The Division's guidance on the Rule Proposal explains that the proposal is necessary to protect Massachusetts investors as the Securities and Exchange Commission's recent enactment of Regulation Best Interest "fails to establish a strong and uniform fiduciary standard" and "contradicts years of data gathered by studies and reports on disclosure and the conduct standards applicable to broker-dealers."⁸ The Division expressed that Regulation Best Interest will help with relationship and conflict disclosures but that "it cannot replace a clear fiduciary standard of conduct, which is the basis for the Division's proposal."⁹ To that end, the Division also set out a list of enforcement actions it has taken over the years highlighting the harm that can result from conflicts of interest.¹⁰

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 Division to withdraw or revise the Rule Proposal because of supposed preemption by various federal laws and/or SEC pronouncements, including the

⁴ See Rule Proposal, § 12.207-(c)(2)(i).

⁵ See *id.*, § 12.207-(c)(2)(ii).

⁶ See *id.*, § 12.207-(d).

⁷ See <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm>.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.* (identifying enforcement actions brought by the Division related to broker-dealer sales contests, churning, unsuitable security sales, and failures to supervise).

National Securities Markets Improvement Act of 1996 (“NSMIA”).¹¹ 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.¹² 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.”¹³ 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.¹⁴ The Rule Proposal is a valid exercise of state regulatory authority because it would not be impossible to comply both with the Rule Proposal and the federal securities laws, and nor would 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.¹⁵ 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.”¹⁶ The Rule Proposal would 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 discretion over customer accounts or otherwise assume positions of trust and confidence with respect to a client.¹⁷

¹¹ See National Securities Markets Improvement Act of 1996, Pub. Law 104-290, 110 Stat. 3416.

¹² *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.”).

¹³ 15 U.S.C. § 78bb(a)(1) (2018).

¹⁴ *Whistler Invs. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1166 (9th Cir. 2008).

¹⁵ 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)).

¹⁶ See NSMIA § 103.

¹⁷ 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).

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The Rule Proposal Would Benefit Massachusetts Investors

In closing, we applaud the Division's work to strengthen protections for Massachusetts investors. Investor protection should always be the *sine qua non* of securities regulation and the Rule Proposal would curb abusive sales practices in the state. The Division will likely receive objections to the Rule Proposal from the securities industry; however, we must remember the securities industry has proven itself adaptive and could accommodate these new regulations.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Pieciak", with a stylized, cursive script.

Michael Pieciak
NASAA President
Commissioner, Vermont Department of
Financial Regulation