June 14, 2019

Via 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 of Broker-Dealers and Investment Advisers (Proposal Number: PRN 2019-044); Proposed New Rule N.J.A.C. 13:47A-6.4[1]

Dear Mr. Gerold:

The Securities Industry and Financial Markets Association ("SIFMA")[2] appreciates the opportunity to comment on the above-captioned proposed regulations (the "Proposal"). SIFMA represents the interests of more than 340 broker-dealers ("BDs"), investment advisers ("IAs"), and asset managers operating in the U.S. and global capital markets. Many of our members do business and serve retail investors in the state of New Jersey.[3]

The finance and insurance industry has roughly 200,000 employees in the state of New Jersey and accounts for almost 5% of all employment in the state. Every dollar spent in the securities industry in New Jersey generates an additional $1.22 for the state economy, and every job in the

[1] Available at: https://www.njconsumeraffairs.gov/Proposals/Pages/bos-04152019-proposal.aspx.

[2] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[3] Most SIFMA members who serve retail investors are dually registered as both BDs and IAs, or provide services through separate but affiliated registered BDs and IAs and dually-licensed representatives, thereby giving investors choice about the level of service and how to pay for it. Notwithstanding the distinctions between an IA's and a BD's standard of conduct, BDs are generally subject to more extensive regulation and more frequent examination and enforcement by the U.S. Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"). *See* Morgan, Lewis & Bockius LLP, *Current Regulatory Regime Comprehensively Protects Investors and Preserves Investor Choice*, at p. 17 (March 2015), available at https://www.morganlewis.com/-/media/files/publication/morgan-lewis-title/white-paper/im_whitepaper_dolretirementinitiative_march2015.ashx.

securities industry generates an additional 1.34 jobs statewide.[4] The Proposal would represent a fundamental change in the way the securities sector operates in the state and would fundamentally alter its relationship with the millions of investors within the state.

SIFMA supports strong conduct standards for BDs and IAs that are designed to both enhance investor protection and preserve investor access to transaction-based advice and a variety of investment products. For that reason, we support the SEC's recently promulgated, comprehensive, federal regulations that meaningfully raise conduct standards for BDs when providing personalized investment advice about securities to retail customers.[5]

To best protect investors and avoid investor confusion, the optimal approach is to defer to the uniform, nationwide, heightened, best interest standard for BDs which is embodied in the SEC's now final Reg BI. A state-by-state approach, on the other hand, would result in an uneven patchwork of laws that would be duplicative of, different than, and possibly in conflict with federal standards.[6] It would also heighten investor confusion.

A state-by-state approach also runs a significant risk of imposing regulations that are sufficiently costly, burdensome and/or difficult to implement such that firms would be incentivized to: (i) recommend clients who still want access to advice to consider moving their brokerage accounts to fee-based accounts (Though clients may choose to make such a move, doing so may ultimately be more costly for certain investors.); (ii) scale back brokerage services to execution only (i.e., do not provide brokerage advice); (iii) raise prices to cover their higher costs; and/or (iv) discontinue service to BD accounts altogether.

As detailed herein, the Proposal would impose on BDs: an onerous ongoing fiduciary duty under certain circumstances; an impossible "best of" standard for recommendations of account-types, asset transfers, purchases, sales or exchanges of securities, and transaction-based compensation; and a fiduciary duty that extends to recommendations about opening or transferring assets to a specific account type (which would be duplicative of Reg BI,[7] as well as the most recent SEC interpretive guidance for IAs).[8]

The proposed fiduciary duty also fails to address whether certain common brokerage activities, such as principal trading, would be permissible under the Proposal. Absent specific, clarifying guidance, such failure could result in New Jersey investors being unable to purchase New Jersey issuers' municipal bonds, or participate in IPOs in their brokerage account. Nor would firms be able to recommend affiliated products, such as a bank sweep program. Because the Proposal,

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[4] RIMS II Multipliers, Table 3.5, 4.5.

[5] SEC Regulation Best Interest, Release No. 34-86031; File No. S7-07-18 (June 5, 2019), available at https://www.sec.gov/rules/final/2019/34-86031.pdf (the "Adopting Release"); and SEC Form CRS Relationship Summary, Release No. 34-86032; File No. S7-08-18 (June 5, 2019), available at https://www.sec.gov/rules/final/2019/34-86032.pdf (collectively, "Reg BI").

[6] State regulation also raises numerous federal preemption issues, discussed in **<u>Appendix A</u> – Federal Preemption**.

[7] Adopting Release at pp. 85, 96, 98.

[8] SEC Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248, File No. S7-07-18 (June 5, 2019), available at https://www.sec.gov/rules/interp/2019/ia-5248.pdf.

unlike Reg BI, does not specifically address these common brokerage activities, firms may seek to limit their risk by curtailing or even ceasing these beneficial investor offerings to New Jersey residents.

The Proposal would thus generally incentivize firms to curtail their brokerage services in New Jersey. As a result, many New Jersey investors would lose access to valuable brokerage services and advice. Brokerage advice incidental to a transaction is often more appropriate for, among others: investors with modest balances, for whom a brokerage account is typically more cost-effective; buy-and-hold investors who do not trade frequently; and investors who do not want to pay for, or cannot afford the cost of, ongoing advice and monitoring through a fee-based advisory account.

Moreover, many of these same investors, particularly middle-class Americans, would not qualify for fee-based accounts, and so would lose access to advice altogether.[9] The Proposal should be substantially revised to avoid these negative consequences. For all the foregoing reasons, we respectfully offer the following comments and recommendations for your consideration.

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Table of Contents

Page No.

1. ***Reevaluate in light of Reg BI*** – The Bureau should pause its process, review Reg BI, and reevaluate its Proposal in light of Reg BI..........5

2. ***Ongoing fiduciary duty*** – The duration of the duty for BDs should be limited to the point in time when a recommendation is made; an ongoing fiduciary duty for BDs is inconsistent with the federal securities laws..........6

3. ***"Best of" standard*** – The "best of" standard for account types, securities, and transaction-based compensation is impossible to satisfy and should be stricken..........8

4. ***Recommendations about account types and transfers*** – The Proposal should not extend to recommendations about account types or transfers..........11

[9] Similar consequences were associated with the U.S. Department of Labor's Fiduciary Rule (the "DOL fiduciary rule") where our industry experienced a significant migration of brokerage retirement accounts to fee-based account and a contraction of service offerings. *See* **Appendix B – Economic Impact / Empirical Studies** (providing quantitative data and findings documenting these consequences).

5. ***Duty of loyalty*** – The duty of loyalty should: (i) strike the "without regard to…" formulation and use the SEC's formulation instead; (ii) provide additional guidance on the types of products and compensation that are permissible; and (iii) clarify the disclosure obligation...............................11

6. ***Duty of care*** – The duty of care should provide additional guidance on how to assess and balance cost considerations...14

7. ***Negative consequences for investor choice*** – The Proposal would accelerate the move from brokerage to fee-based accounts, significantly reducing the availability of securities brokerage services in New Jersey……………………………….…………………………..15

8. ***Application to "clients"*** – The Proposal should explicitly limit its application to retail investors who are legal residents of New Jersey or who reside in New Jersey…………………..…………………………16

9. ***Scope of employee benefit plan exclusion*** – The Proposal should Expand the scope of the employee benefit plan exclusion…………………………………16

10. ***Effective date*** – The Proposal should specify an appropriate future effective date, and provide for a sufficient implementation period prior to such date.……………………………..…..16

<u>Appendix A</u> – Federal Preemption………………………………………………………18

1. Because the Proposal, as applied to SEC-registered IAs ("RIAs"), is preempted in its entirety by NSMIA, all references to state regulation of RIAs in the Proposal should be stricken..………………………………18
2. The Proposal suffers from additional preemption and other legal infirmities that make the regulations invalid and ultimately unenforceable.…………………………………………………19
3. The Proposal imposes new and different book and record keeping requirements for BDs that are preempted by NSMIA and should be eliminated……………………………………………….…20

<u>Appendix B</u> – Economic Impact / Empirical Studies…………………..………………22

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1. *Reevaluate in light of Reg BI* – The Bureau should pause its process, review Reg BI, and reevaluate its Proposal in light of Reg BI.

As discussed above, on June 5, 2019, the SEC passed Reg BI, thereby creating a new, nationwide, heightened standard of conduct for BDs that are member firms of FINRA or another SRO. Under Reg BI, a BD making a personalized recommendation to a retail customer in a brokerage account involving a securities transaction or an investment strategy must act in the client's best interest, without placing its financial or other interest ahead of the client's interest. That best interest obligation requires a BD to, among other things: (1) disclose all material facts about the scope and terms of the relationship and all material facts relating to conflicts of interest; (2) exercise diligence, care, and skill, including understanding the risks, reward and costs associated with a recommendation; and (3) mitigate under various circumstances, and eliminate in specific instances, conflicts of interest associated with the recommendation.

SIFMA generally supports Reg BI because it: (i) raises the bar from the existing FINRA suitability standard and incorporates fiduciary principles; (ii) adds meaningful new investor protections; (iii) preserves investor choice and allows investors to continue to receive advice through the brokerage model, and allows BDs to continue to receive commissions for executing transactions; (iv) applies broadly to all retail customer accounts, including retirement accounts; and (v) allows the primary federal securities regulatory agency – the SEC – to enforce a uniform standard, not only across the industry, but also across the country.

Moreover, while the best interest obligation under Reg BI applies at the time of the recommendation, the obligation is fundamentally consistent with the fiduciary obligation imposed on an investment adviser when providing personalized investment advice about securities to a client.[10]

Based on the foregoing, we urge the Bureau to pause its rulemaking process, review Reg BI, and reevaluate its Proposal before deciding whether it is necessary to proceed with an additional state regulation. Doing so would give the Bureau an opportunity to determine if there are material gaps between Reg BI and the Bureau's proposed regulation.

In the preamble to the Proposal, the Bureau states that "[t]he Bureau believes that the SEC Regulation Best Interest does not provide sufficient protections for New Jersey investors." The Bureau made that conclusory statement, however, without the benefit of the final Reg BI text, which includes numerous, substantive changes and provisions intended to benefit investors and which, including the preamble, runs for 771 pages.[11] Moreover, the Bureau fails to identify any

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[10] Adopting Release at p. 13 ("The [SEC] has crafted Regulation Best Interest to draw on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers.").

[11] Given the volume of Reg BI, we remain in the process of reviewing the final rules. We reserve the right to provide further comments on the Proposal following the completion of our review of Reg BI. We also recommend that the Bureau establish a separate and additional public comment period to collect fresh perspectives on the Proposal based upon the final version of Reg BI.

specific aspect of Reg BI that does not provide sufficient protections; nor does the Bureau identify any particular "protection" that is being compromised for New Jersey investors.

Likewise, the Bureau fails to articulate how its proposed "fiduciary duty" standard provides actual, tangible protections that Reg BI lacks. Instead, the Bureau simply states, in conclusory fashion, and without any analysis of Reg BI or its alleged shortcomings, that a fiduciary duty standard should be imposed. Accordingly, if the Bureau nevertheless decides to proceed with the Proposal, then the Proposal should be revised to clarify that firms that comply with Reg BI shall be deemed in compliance with the New Jersey standard.

2. *Ongoing fiduciary duty* – The duration of the duty for BDs should be limited to the point in time when a recommendation is made; an ongoing fiduciary duty for BDs is inconsistent with the federal securities laws.

Under the FINRA suitability rule and Reg BI, the duration of a BD's suitability or best interest obligation is limited to the point in time when a recommendation is made.[12] FINRA's rules require that BDs establish a reasonably designed, risk-based, supervisory system and procedures to supervise recommended transactions and investment strategies.[13]

Under the Proposal, however, the text of the rule states, "[i]f a broker-dealer or agent also provides, in any capacity, investment advice to the customer, the fiduciary duty shall be deemed an ongoing obligation to that customer."[14] The preamble to the Proposal states that this rule text is intended to impose an ongoing fiduciary duty in a brokerage account in situations where a dual registrant acts as both an IA and a BD to the same customer.

Notwithstanding the preamble's explanation, however, the rule text can actually be read much more broadly to mean that even if a BD is not dually registered, or the customer does not have an IA account, if the BD provides any investment advice, then the fiduciary duty is ongoing. Accordingly, at a minimum, as a matter of clarity, the rule text should be revised to conform and agree with the language in the preamble.

Yet, even if the rule text was so conformed – such that with respect to dually-registered individuals and firms with customers who maintain both a brokerage and an advisory account, "the fiduciary duty [in the BD account] shall be deemed an ongoing obligation to that customer" – it would remain problematic. As a practical matter, this requirement would impose on dually registered BDs a new duty to monitor the ongoing performance of a customer's brokerage

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[12] The term "recommendation" has the meaning long-interpreted and applied under FINRA rules and broker-dealer regulation generally. *See* FINRA Rule 2111 (Suitability) FAQ, available at http://www.finra.org/industry/faq-finra-rule-2111-suitability-faq. Factors that are considered when determining whether a broker-dealer has made a recommendation include whether the communication "reasonably could be viewed as a 'call to action'" and whether it "reasonably would influence an investor to trade a particular security or group of securities." *See* FINRA Notice to Members 01-23, *Suitability Rule and Online Communications* (April 2001), available at http://www.finra.org/industry/notices/01-23.

[13] FINRA Rule 3110 (Supervision), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11345.

[14] Proposal at Section 13:47A-6.4(a)1.ii.

accounts, as well as the factors establishing suitability for the client,[15] in cases where the customer also maintains an investment advisory account. This would be required even if the customer did not ask the broker to do so and did not want to pay the prospective additional cost associated with monitoring their brokerage account.

Many customers understand that, for some of their assets, it makes sense to pay an ongoing fee for the additional services an advisory account can provide. They also make a rational decision not to enroll certain accounts or assets in what is often a more expensive investment advisory program. For example, some clients might favor a buy-and-hold, longer-term strategy in an IRA and thus, make the choice to maintain that IRA in a brokerage account without paying an ongoing advisory fee.

Notably, FINRA's supervision rules do not require ongoing monitoring of brokerage accounts. Rather, FINRA's supervision rules require firms to establish a reasonably designed, risk-based, supervisory system and procedures – which are subject to FINRA examination – to supervise episodic transactions that are executed in a brokerage account at the direction of the customer.

Moreover, there is no basis in the securities laws for effectively imposing a presumption that dually registered BDs or dually licensed representatives shall be deemed to be acting in an advisory capacity in servicing their brokerage accounts – or that a firm that carries a customer's advisory accounts should be deemed to be acting as an IA for that customer's brokerage accounts.[16]

BDs do not have supervisory systems or procedures – or a compensation structure – in place to provide continuous and ongoing monitoring of securities purchased, sold, or held due to recommendations made in their BD accounts. If BDs were forced to provide such monitoring, they would be unable to do so in a BD account without completely re-engineering existing supervisory systems and procedures, and at significant cost.

As the SEC explained in its recent interpretive guidance, providing continuous monitoring in a brokerage account would *not* be consistent with the "solely incidental" prong of the broker-dealer exclusion from the definition of investment adviser, and thus would subject the BD to the Advisers Act.[17] Thus, BDs would be required to either recommend that their BD brokerage clients who want to maintain access to advice move to fee-based advisory accounts (which can

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[15] FINRA Rule 2111 (Suitability), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859.

[16] The SEC's long-standing view is that a dual registrant is an IA solely with respect to those accounts for which it provides advice or receives compensation that subjects it to the Investment Advisers Act of 1940 (the "Advisers Act"). *See* 83 FR 21574, 21596; Adopting Release at p. 35. Reg BI addresses this issue directly by requiring the firm to disclose the capacity in which a dual registrant is acting. *See* 83 FR at 21596; Adopting Release at pp. 188 – 190.

[17] SEC Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, Release No. IA-5249 (June 5, 2019), at. p. 21, available at https://www.sec.gov/rules/interp/2019/ia-5249.pdf.

be more expensive), if appropriate, or cease servicing those brokerage accounts entirely.[18] That outcome would be a major disservice to the hundreds of thousands of New Jersey investors who hold BD accounts today and who want to continue to receive episodic brokerage advice.

The ongoing fiduciary duty provision is also problematic because in many cases it would apply to BD accounts where no recommendation is made at all (e.g., an unsolicited transaction or a self-directed account). In these instances, the BD has not engaged in any conduct that should be subject to a fiduciary duty at all, much less an ongoing fiduciary duty.

In self-directed brokerage accounts, for example, individual investors, pursuant to written contracts with the BD, conduct their own trading in securities without the expectation of investment recommendations. Firms in this space, however, usually employ registered representatives to handle phone calls from, and provide concierge services to, self-directed investors; but no investment advice is rendered by these employees. Since the Proposal fails to link the application of the fiduciary duty to the rendering of investment recommendations, self-directed BDs may become subject to the Proposal's fiduciary duty merely because a customer may maintain both an advisory account at an affiliated advisor of the BD and a brokerage account on the self-directed platform.

Thousands of middle-income investors in New Jersey make occasional purchases of mutual funds with the assistance of a BD and hold them in their BD accounts. Many of these investors do not need, nor are they willing or able to pay for, a more extensive fiduciary relationship. New Jersey's overbroad fiduciary duty, however, would cause some BDs to consider limiting brokerage services to New Jersey clients, thereby requiring many of these investors of modest means to purchase additional services. In this regard, the Proposal undermines investor choice of and access to the level of services that they want and currently enjoy.

Point-in-time duration. Accordingly, we recommend that the Proposal conform the duration of the duty to be consistent with current FINRA rules and Reg BI, which provide that a BD's best interest obligation applies at the point in time when a recommendation is made.

Unsolicited transactions, self-directed accounts, no recommendations. In addition, we recommend that the Proposal include an explicit exemption from the fiduciary duty for unsolicited transactions and self-directed accounts (even where the customer maintains both investment advisory and self-directed accounts), and to BDs that do not make securities recommendations to retail customers at all (e.g., clearing firms, etc.).

3. *"Best of" standard* – The "best of" standard for account types, securities, and transaction-based compensation is impossible to satisfy and should be stricken.

The Proposal requires that a recommended security or account type must be "the best of the reasonably available options" and that any transaction-based fee received by the BD must be

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[18] *See supra* note 9 (Similarly, the DOL's fiduciary rule directly caused the migration of brokerage retirement accounts to fee-based accounts, and a marked contraction of service offerings). *See also* **Appendix B – Economic Impact / Empirical Studies** (providing quantitative data and findings documenting these consequences).

both "reasonable"[19] and "the best of the reasonably available fee options…."[20] No such "best of" standard exists under current federal securities laws, nor are we aware of any other fiduciary law that imposes a similar standard. In fact, federal agencies and securities regulators have generally accepted the fact that it is not possible to definitively identify a single "best" option without the benefit of hindsight, essentially rendering the standard unattainable and impossible to satisfy.[21]

Specifically, the "best of" standard is deficient and unworkable in the following respects:

- ***Securities*** – The Proposal fails to recognize that there is no such thing as the "best" security in most cases. Is it the security with the lowest cost, the highest return, the lowest risk, the most liquidity, the most market makers, the most research analysts covering it, or some combination thereof? And, how does one account for the customer's preference, as set forth in the customer account profile? This standard is unworkable and would invite '20-20 hindsight analysis' that would inevitably identify a different security that has performed better (using whatever criteria is selected) over time.[22]
    - The Proposal also fails to define what securities are "reasonably available." Is it limited to the universe of securities offered by the firm, or is it limited to the perhaps even more limited universe of securities offered by the individual representative (e.g., bonds, proprietary products, etc.)? Or is it the universe of all possible securities that *could* be offered by a firm even if it chooses not to? If it is not so limited, then what specifically is the obligation of the BD or IA to recommend from among "reasonably available options" (e.g., Does "reasonably available" include every publicly offered option? Every U.S. based option? Every option with sufficient liquidity? Every option with no up-front sales charges, or below a certain fee level?)?

- ***Account types*** – By imposing a "best of" standard on account types, the Proposal again invites a '20-20 hindsight' review of existing BD and IA accounts to assure they remain

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[19] FINRA rules already require that BD commissions and fees be fair and reasonable. *See* FINRA Rules 2100 et seq. Accordingly, we recommend that the Proposal adopt the definition and interpretation of "reasonableness" as set forth under FINRA rules and associated guidance.

[20] Proposal at Section 13:47A-6.4(b)2.i and (b)3.

[21] Both the SEC and FINRA have long recognized that there is no single "best" security recommendation, which is a core tenet of modern portfolio theory. *See, e.g., SEC Beginner's Guide to Asset Allocation, Diversification and Rebalancing*, available at https://www.sec.gov/reportspubs/investor-publications/investorpubsassetallocationhtm.html. *See also FINRA's Diversifying Your Portfolio*, available at http://www.finra.org/investors/diversifying-your-portfolio. Even the DOL conceded as much in connection with its now vacated fiduciary rule. *See* Preamble to the BIC Exemption, 81 Fed. Reg. at 21,029 ("… the [DOL] also confirms that the Best Interest standard does not impose an unattainable obligation on Advisers and Financial Institutions to somehow identify the single 'best' investment for the Retirement Investor out of all the investments in the national or international marketplace, assuming such advice were even possible."), available at https://www.federalregister.gov/documents/2016/04/08/2016-07925/best-interest-contract-exemption.

[22] Even the DOL fiduciary rule stated that "an Adviser and Financial Institution do not have to recommend the transaction that is the lowest cost or that generates the lowest fees without regard to other relevant factors." 81 FR 21,030 (April 8, 2016).

the “best” account type.[23] What does “best” account type mean when comparing brokerage to investment advisory? Is it based on the range of services or products that are offered in investment advisory as compared to brokerage?

  - Moreover, if a firm transfers a customer’s assets from a BD to an IA account, for example, would that prove that the BD account was not the “best” and thus trigger a fiduciary duty violation as it relates to all prior transactions in the BD account?

  - Similarly, if a firm transfers a customer’s assets from an IA to a BD account, as required by SEC regulations for clients who don’t trade for an extended period of time, for example, would that prove that the IA account was not the “best” and thus trigger a fiduciary duty violation?

  - If a firm does not offer both BD and IA accounts, is it exempt from this particular provision? If not, what does the term “reasonably available” require of firms that only offer a single account type? If a firm does not offer both account types, does a BD/IA need to turn away clients if a BD/IA account, respectively, is not the “best” account type for the customer?

- ***Transaction-based fees*** – Similar to the account-type provision, the Proposal fails to specify how to determine that transaction-based fees are the “best” or even what other fee options – other than fee-based accounts – are “reasonably available.”

  - Does this provision impose a duty to analyze each transaction to compare the fees of that transaction versus what a client could have been paying in an alternate fee arrangement at the firm? If so, BDs would have to supervise potentially millions of trades on a trade-by-trade basis to determine whether the commission was actually “best.” That is clearly an unreasonable supervisory burden.

  - What if someone trades significantly more or less than expected, thereby changing their fee calculus over time? What if certain share classes with different fee amounts are only available for purchase in certain account types?

  - Does “reasonably available” mean that a firm must match the discounts offered by every competitor?

  - Can a BD discount a transaction for a customer and not another customer for the same security, but have that discounting decision be based on relationship pricing? Is New Jersey banning the use of discounting commissions? If not, how exactly can a BD meet the duty of loyalty regarding discounting?

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[23] Moreover, the language of the rule is so broad (i.e., “any type of account”) that it would apply to more than just recommendations about commission and fee-based accounts; it would presumably require, for example, that if a BD recommended a retirement account, then it would need to be “the best” account type (as among traditional, Roth, etc.).

Eliminate "best of" standard. For the foregoing reasons, the Proposal should eliminate the vague, unreasonable and unworkable "best of" standard for account types, securities, and transaction-based compensation.

4. *Recommendations about account types and transfers* – The Proposal should not extend to recommendations about account types or transfers.

Under the Proposal, the scope of the fiduciary duty extends to recommendations about "the opening of, or transfer of assets to, any type of account…."[24] Firms, however, are already required to exercise reasonable care in recommending account types. Today, both the SEC and FINRA regularly examine for account type recommendations, including recommendations to roll over or transfer assets from an ERISA account to an IRA.[25]

Moreover, the new, federal, best interest obligation explicitly applies to BDs' recommendations about *account types* (even if there is not a recommendation of a securities transaction) and *IRA rollovers* (regardless of whether it is tied to a specific securities transaction).[26] Consistently, the SEC also extended IAs' fiduciary duty to include advice about account types and whether to roll over assets from one account (e.g., a retirement account) into another.[27]

Thus, it would be duplicative and unnecessary, and would not provide any additional investor protection benefit to either prospective or existing customers, to extend the Proposal's fiduciary duty to recommendations about account types and transfers. In fact, doing so could have the opposite effect on investor protection; the Proposal would thereby impose a competing standard – subject to differential interpretation and application from the federal standards – such that BDs and IAs would likely be discouraged from advising their New Jersey customers (and prospective customers) to switch account types, or transfer accounts, when in fact such switches and transfers may be appropriate.

Do not apply to account types or transfers. For these reasons, we recommend that the scope of the Proposal's fiduciary duty for BDs should not apply to recommendations about account types or transfers.

5. *Duty of loyalty* – The duty of loyalty should: (i) strike the "without regard to …" formulation and use the SEC's formulation instead; (ii) provide additional guidance on the types of products and compensation that are permissible; and (iii) clarify the disclosure obligation.

a. "Without regard to …" The Proposal's duty of loyalty requires that recommendations be made "without regard to the financial or any other interest of the [BD]

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[24] Proposal at Section 13:47A-6.4(a) and (b)2.i.

[25] *See, e.g.,* FINRA Regulatory Notice 13-45 (reminding firms of their responsibilities when recommending a rollover or transfer of assets in an employer-sponsored retirement plan to an individual retirement account ("IRA"), or marketing IRAs and associated services), available at http://www.finra.org/industry/notices/13-45.

[26] Adopting Release at pp. 85, 96, 98.

[27] SEC Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248, File No. S7-07-18 (June 5, 2019), available at https://www.sec.gov/rules/interp/2019/ia-5248.pdf.

…"[28] Notably, in Reg BI, the SEC replaced the foregoing phrase with the phrase "without placing the financial or other interest … ahead of the interest of the retail customer."[29] The SEC did so out of concern that the "without regard to" language could be inappropriately construed to require a BD to eliminate *all* of its conflicts (which is impossible) and because the SEC believed that its own formulation appropriately reflects the underlying intent of the "without regard to" formulation." We agree.

The "without regard to" formulation lacks clarity. The SEC formulation does not. The SEC formulation accomplishes the same purpose as the "without regard to" formulation, but with greater clarity and less confusion about the expectations associated with the obligation. For these reasons, we recommend that the Proposal strike the "without regard to" formulation and replace it with the SEC's formulation.

b. Principal transactions, affiliated and proprietary products, and limited range of products. Neither the preamble nor the text of the Proposal make any reference to recommendations of principal transactions, affiliated or proprietary products, or making a recommendation based on a limited range of products. Both Congress in the Dodd-Frank Act[30] and the SEC in Reg BI,[31] however, explicitly call-out these categories of recommendations as ones that may well be consistent with a fiduciary and/or best interest standard, respectively.

Given the Proposal's "without regard to" clause and its disallowance of disclosure to satisfy the duty of loyalty, the Proposal's failure to address these specific types of recommendations raises concerns and creates uncertainty about whether these types of recommendations would breach the Proposal's fiduciary duty. Yet, these types of transactions are not only critical to the operation of our securities markets but also represent a clear benefit to retail investors. For example, principal transactions provide the customer the ability: to buy and sell in brokerage accounts initial public offerings (IPO) shares (including recent IPOs for New Jersey issuers like Hertz and Prudential Financial) where the BD was part of the underwriting syndicate; to purchase municipal bonds issued by New Jersey and its municipalities; and equally important, to sell back to the brokerage firm products such as structured notes, and thereby facilitate liquidity.[32]

Accordingly, we recommend that the Proposal be amended, consistent with Reg BI, to explicitly acknowledge that: it does not prohibit recommendations of principal transactions, affiliated or proprietary products, or from among a limited range of products; that such recommendations do not presumptively breach the proposed fiduciary duty; and that the "best

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[28] Proposal at Section 13:47A-6.4(b)2.

[29] 83 FR 21586; Adopting Release at pp. 62 – 67.

[30] Dodd-Frank Act, § 913, available at http://www.dodd-frank-act.us/Dodd_Frank_Act_Text_Section_913.html.

[31] 83 FR 21586, 21609, and 21620; Adopting Release at pp. 175, 188 – 190.

[32] Notably, even the DOL fiduciary rule recognized the importance of maintaining the availability of principal transactions. *See, e.g.,* Proposed Principal Transactions Prohibited Transaction Exemption, available at https://content.next.westlaw.com/Document/I4a2c375ce85611e498db8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1.

of" and "reasonably available" standards discussed above do not apply to such recommendations.

c. Direct and indirect compensation. In its preamble, the Bureau expressed concern about "harmful incentives" such as "sales contests" that "encourage and reward conflicted advice." 51 N.J.R. 494. To address that concern, the Proposal included Section (b)2.i, which establishes a presumption of a breach of the duty of loyalty, if the BD either offers or receives "direct or indirect compensation" for recommending the opening of or transfer of assets into 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."[33] 13:47A-6.4(b)(2)(ii).

Given that this provision is specifically targeted to "harmful incentives" such as "sales contests," the Proposal should be revised to specify the particular incentives that trigger a breach, and should include a cross-reference to Reg BI which requires firms to eliminate sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or specific types of securities within a limited period of time.[34]

The Proposal should also be revised to specify the many other forms of unobjectionable "direct or indirect compensation" that would not trigger a breach, including rewards for gathering and growing assets, for example, whether in the form of recruiting bonuses or as part of annual compensation – which are fundamental to our industry's compensation structure.

d. Disclosure obligation. The Proposal's duty of loyalty also states that "disclosing a conflict of interest in and of itself …" does not presumptively satisfy the duty.[35] The essential purpose of disclosure under the federal securities laws is to facilitate meaningful and informed choice by retail investors. Effective disclosure allows a retail client to evaluate a proposed transaction with the benefit of all relevant and material information necessary to make a well-informed choice about whether to execute that particular transaction.

Accordingly, and generally speaking, a fiduciary adviser under the Advisers Act may rely upon disclosure and the customer's consent to satisfy his or her fiduciary duty.[36] Similarly, under Reg BI, an associated person of a BD can satisfy his or her Disclosure Obligation by providing, prior to or at the time of a recommendation, in writing, full and fair disclosure of all *material*[37] facts relating to the scope and terms of the relationship, and all *material* facts relating to conflicts of interest associated with the recommendation.[38] Separately, under Reg BI, a BD firm has a Conflict of Interest Obligation to establish, maintain, and enforce written policies and procedures reasonably designed to identify and (i) *disclose* all conflicts of interest associated with

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[33] Proposal at Section 13:47A-6.4(b)2.i.

[34] Adopting Release at pp. 337, 352.

[35] Proposal at Section 13:47A-6.4(b)2.ii.

[36] See *Amendments to Form ADV*, Advisers Act Rel. No. 2711 (Mar. 3, 2008).

[37] Adopting Release at pp. 199, 201 (as the term materiality is defined in the Supreme Court's *Basic v. Levinson* decision).

[38] Adopting Release at pp. 130 – 195.

recommendations (in accordance with the Disclosure Obligation), (ii) *mitigate* conflicts that create an incentive for a BD's associated person to place the interest of the BD or associated person ahead of the interest of the customer, (iii) disclose any material limitations on securities or products that may be recommended (e.g., limited product menu, proprietary products only, etc.) and *mitigate* by preventing such limitations from causing the BD to place its interest ahead of the customer; and (iv) *eliminate* sales contests sales contests, bonuses, and non-cash compensation that are based on the sale of specific securities or specific types of securities within a limited period of time.[39]

Consistent with current federal securities laws and Reg BI, the Proposal should: (i) strike the provision in 13:47A-6.4(b)(2)(ii) that "[t] here shall not be a presumption that disclosing a conflict in and of itself shall satisfy the duty of loyalty"; (ii) clarify that disclosure obligations are limited to *material* conflicts of interest (as such term was defined by the U.S. Supreme Court in *Basic v. Levinson*) thereby making the Proposal consistent with Reg BI; and (iii) explicitly state that the disclosure obligation of an associated person of a BD is satisfied by satisfying the Disclosure Obligation under Reg BI.

6. *Duty of care* – The duty of care should provide additional guidance on how to assess and balance cost considerations.

The Proposal's duty of care (like the duty of loyalty, discussed above) requires a consideration of costs. It states that "a [BD] shall make a reasonable inquiry, including risks, ***costs***, and conflicts of interest related to the recommendation..." (emphasis added).[40]

Likewise, Reg BI's Care Obligation explicitly requires that costs be considered. The SEC explained that costs are generally one of many important factors to consider when determining whether the recommendation is in the best interest of the customer If choosing among "identical securities" available, it would be inconsistent to recommend the more expensive alternative for the customer. When choosing among reasonably available alternatives, the BD would need a reasonable basis to believe the higher cost was justified based on other factors (such as the product's investment objectives, characteristics, volatility, etc.).[41]

The Proposal, however, provides no such guidance on how to consider and address cost. As a result, it creates uncertainty about the Bureau's expectations in this regard. Under the Proposal, for example, must BDs recommend the lowest cost option without regard to other factors (which would probably not be in the customer's best interest), or inform the customer of its availability, or canvass all possible lowest cost options before making a recommendation, in order to satisfy the duty of care?

Based on the foregoing, we recommend that the Proposal be amended to provide additional guidance on how to assess and balance cost considerations, consistent with the guidance set forth in Reg BI.

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[39] Adopting Release at pp. 302 – 352.

[40] Proposal at Section 13:47A-6.4(b)1.i.

[41] *See* 83 FR 21612; Adopting Release at p. 249.

7. ***Negative consequences for investor choice*** **– The Proposal would accelerate the move from brokerage to fee-based accounts, significantly reducing the availability of securities brokerage services in New Jersey.**

The Proposal imposes on BDs, among other things, an onerous, ongoing, fiduciary duty under certain circumstances; and an impermissibly vague "best of" standard for account types, securities, and transaction-based compensation, among numerous other issues and concerns.

The foregoing conditions would create strong incentives for firms to (i) recommend clients who want continued access to advice to consider switching from brokerage accounts to fee-based accounts (where such moves are appropriate), (ii) scale back brokerage services to execution only (i.e., do not provide brokerage advice or other brokerage services in New Jersey), (iii) raise prices to cover the higher costs, and/or (iv) discontinue service to BD accounts in New Jersey (i.e., terminate their relationship with the client).[42] The Proposal may also create an incentive for BDs to limit what is available on their platforms in order to control what products or offerings are deemed "reasonably available," and facilitate comparison of securities and ultimately the selection of the "best" security. Notably, such an outcome would only further limit investor choice.

These are all potential outcomes that Reg BI is explicitly intended to *avoid*. BD accounts represent an important choice for retail investors – often the less expensive choice – and provide access to affordable advice, particularly for smaller, buy-and-hold investors. For that reason, the SEC recognizes that these type accounts should be maintained and encouraged, not stamped out by problematic regulations.[43]

In addition, the Bureau should carefully consider the negative impact of its Proposal on the offering and servicing of specialized BD accounts in New Jersey, including 529 college savings plans, Coverdell education savings accounts, and UTMA/UGMA custodial accounts, which serve specific, beneficial purposes and may not be offered or available in fee-based advisory accounts.

Furthermore, while the Proposal provides an exemption for ERISA fiduciaries and providing investment advice to financial institutions or persons with at least $50 million, it does not exclude investment advice under the federal securities laws for an IA who is not acting as an ERISA fiduciary. Plan fiduciaries are responsible for evaluating the risks and performance of the investments and potential investments for their retirement plan.

Service providers and advisors assist plan fiduciaries by providing them with education and information about investment options that may meet their needs, which is not typically considered to be acting as an ERISA fiduciary. Under the Proposal, providing such education and information on security products may be considered to be providing investment advice. Based upon this potential legal risk, plan fiduciaries in New Jersey under $50 million dollars

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[42] *See* **Appendix B** (providing quantitative data and findings documenting these consequences).

[43] Adopting Release at pp. 6, 17, 21 – 23.

may no longer receive such services, thereby unnecessarily curtailing the level of services that plan fiduciaries currently enjoy to assist them in determining which investment options best meet their plan's needs. This outcome could put plan fiduciaries under $50 million at a disadvantage in fulfilling their fiduciary responsibilities.

8. *Application to "clients"* – The Proposal should explicitly limit its application to retail investors who are legal residents of New Jersey or who reside in New Jersey.

Given the harmful consequences detailed above, it is important that firms have the ability to limit the application of the Proposal to retail customers who are legal residents of New Jersey or who reside in New Jersey. A BD or IA who has a place of business in New Jersey should not owe the fiduciary duty imposed by the Proposal to all of their clients, regardless of whether those clients have any nexus to New Jersey. Moreover, the New Jersey fiduciary duties may be inconsistent with the duties owed to the client in their state of domicile. Accordingly, we recommend that the Proposal be revised to explicitly limit its application to retail investors who are legal residents of New Jersey or who reside in New Jersey.

9. *Scope of employee benefit plan exclusion* – The Proposal should expand the scope of the employee benefit plan exclusion.

The exclusion in Section 13:47A-6.4(d) should be expanded to include a person acting in a fiduciary capacity to an employee benefit plan, its participants or beneficiaries, whether or not the plan is subject to ERISA (thereby including governmental plans and non-electing church plans). For example, for over a decade, BDs have been acting as fiduciaries to participants in non-ERISA plans when providing in-plan investment allocation advice and have been managing any related conflicts, including in connection with proprietary investments, by relying on the guardrails set forth in the DOL Advisory Opinion 2001-09A (aka the "SunAmerica Opinion"). Those guardrails include getting authorization from a plan sponsor and sourcing the advice through an independent third-party expert.

10. *Effective date* – The Proposal should specify an appropriate future effective date, and provide for a sufficient implementation period prior to such date.

The final section of the Proposal's rule text states that "[t]he provisions of this section shall take effect on (90 days from the effective date of this new rule)." This appears to state that the new rule would become applicable 90 days after publication as a final rule.

Ninety days is an insufficient transition period. Firms will require a significantly longer implementation period and thus a much later, more reasonable future effective date.

As discussed, the Proposal requires significant revision as it is currently unworkable, unreasonable, and raises many new issues for BDs and IAs, including establishing supervisory systems to address the ongoing monitoring for clients with both brokerage and investment advisory accounts. In order to comply with the Proposal's new requirements, firms would need to develop significant new infrastructure and policies and procedures, which would be a complex and resource intensive undertaking, particularly considering the range of business models that

would be subject to the proposed regulations. Firms would also need sufficient time to implement training programs and to build systems to comply with the prospective new regulations, including those necessary to create new books and records.[44]

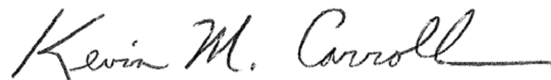
Alternatively, firms would also need sufficient time to identify whether and how to scale back all or a portion of their business activity in New Jersey in order to comply with the new regulations. Since there is currently no grandfathering provision in the Proposal, BDs and their representatives cannot limit their fiduciary duty by ceasing to make recommendations to existing New Jersey brokerage account clients. Firms will therefore need time to determine whether to scale-back or terminate these relationships.

Based on the foregoing, we recommend that the Bureau provide an implementation period of at least 18 months, followed by an initial effective date thereafter (the "Effective Date"). We further recommend that the Proposal provide for grandfathering such that the provisions of the Proposal do not apply to a firm's customers and their accounts existing prior to the Effective Date.

* * *

We appreciate the opportunity to comment and your consideration of our views. If you have any questions or require any additional information, please feel free to contact us: Kevin Carroll, kcarroll@sifma.org, and Nancy Lancia, nlancia@sifma.org.

Sincerely,



Kevin M. Carroll
Managing Director & Associate General Counsel, SIFMA

[44] *See* discussion of federal preemption issues, *infra* **Appendix A**.

APPENDIX A – Federal Preemption

The Proposal suffers from a number of federal preemption and other legal infirmities including without limitation the following:

1. As applied to SEC-registered IAs ("RIAs"), the Proposal is preempted in its entirety by NSMIA.

Congress enacted the National Securities Markets Improvements Act ("NSMIA") in 1996 to promote efficiency in the financial markets by eliminating the dual system of state and federal registration of securities and securities professionals.[45] With respect to RIAs specifically, NSMIA added section 203A(b)(1) to the Advisers Act which states:

> No law of any state or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person (A) that is registered under section [203] as an investment adviser, or that is a supervised person of such person, except that a State may license, register or otherwise qualify an investment adviser representative that has a place of business located within that State; or (B) that is not registered under [Section 203] because that person is excepted from the definition of an investment adviser under section [202(a)(11)].[46]

In the Rules Implementing Amendments to the Advisers Act, the SEC explained that Section 203A(b)(1), as amended by NSMIA, preempts not only a state's specific registration, licensing, and qualification requirements, but also all regulatory requirements imposed by state law on RIAs relating to their advisory activities or services, except those provisions relating to enforcement of anti-fraud prohibitions.[47]

The rule text of the Proposal simply uses the term "adviser." Consistent with NSMIA, the Proposal should use the term "investment adviser" and define it to mean New Jersey state-registered investment advisers who are not RIAs.

To the extent the Proposal is intended to apply to RIAs, the Proposal imposes numerous new requirements that differ from the federal securities laws, including without limitation an

[45] Pub. L. No.. 104-290, 110 Stat. 3416 (1996).

[46] 15 U.S.C. §80b-3a(b)(1).

[47] Rules Implementing Amendments to the Investment Advisers Act of 1940, Release No. IA–1633, File No. S7–31–96, (May 22, 1997), available at https://www.govinfo.gov/content/pkg/FR-1997-05-22/pdf/97-13284.pdf ("On its face, section 203A(b)(2) preserves only a state's authority to investigate and bring enforcement actions under its antifraud laws with respect to Commission-registered advisers. The Coordination Act does not limit state enforcement of laws prohibiting fraud. Rather, states are denied the ability to reinstitute the system of overlapping and duplicative regulation of investment advisers that Congress sought to end." (text at nn.155-56)).

impossible "best of" standard for account-types, securities, and transaction-based compensation[48] and thus, the Proposal is preempted in its entirety by NSMIA.

2. The Proposal suffers from additional preemption and other legal infirmities that make the regulations invalid and ultimately unenforceable.

The Proposal suffers from additional preemption and other legal infirmities including but not limited to the following:

- NSMIA/Exchange Act. See discussion in Section 3 below.

- Express and Conflict Preemption – Advisers Act / Exchange Act. The Proposal directly conflicts with the Advisers Act and Exchange Act, and/or interfere with the achievement of federal objectives in those Acts.

- Commerce Clause of the Constitution. The imposition of a fiduciary duty under the Proposal is unconstitutional because it imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits.

- New Jersey Administrative Procedure Act ("New Jersey APA"), N.J. Stat. § 52:14B-1, et seq. The Proposal violates the New Jersey APA on the following grounds, among others:

    - It fails to include "[a] description of the … record-keeping … requirements being proposed for adoption" and "[a]n estimate of the initial capital costs and an estimate of the annual cost of complying with the rule…." NJRS 52:14B-19.

    - It fails to include "a cost-benefit analysis that supports the agency's decision to impose the [fiduciary] standard…." NJRS 52:14B-23.

- No private right of action. The Proposal should explicitly clarify that it does not create a private right of action. To the extent it does, it is expressly preempted by the Federal Arbitration Act because it restricts the enforcement of arbitration agreements commonly found in BDs' and (and sometimes in IAs') customer agreements, and is also contrary to and preempted by the Advisers Act, which prohibits New Jersey's imposition of a private right of action against RIAs.

The foregoing preemption and other legal infirmities render the proposed regulations as drafted invalid and ultimately unenforceable.

[48] The preamble to the Proposal states that "With respect to investment advisers and investment adviser representatives, proposed new N.J.A.C. 13:47A-6.4 does not exceed Federal standards." This statement is simply not accurate.

3. The Proposal imposes new and different book and recordkeeping requirements for BDs that are preempted by NSMIA and should be eliminated.

NSMIA added Section 15(i)(1) to the Exchange Act which states:

> No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, *making and keeping records*, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers *that differ from, or are in addition to, the requirements in those areas established under* [the Exchange Act]" (emphasis added).[49]

The Proposal imposes on BDs (and in many cases, IAs) the following new books and records requirements, among others, that differ from, or are in addition to, those imposed by federal law and/or FINRA rules:

- Ongoing fiduciary duty. Under the Proposal, with respect to dually-registered individuals and firms with customers who maintain both a brokerage and an advisory account, BDs owe an ongoing fiduciary duty to the customer in the brokerage account. Under current FINRA rules and Reg BI, however, BD conduct standards apply only at the point of recommendation and not beyond. By subjecting dually-registered BDs to an ongoing fiduciary duty – and thus a new duty to monitor the performance of an account, the Proposal would require BDs to develop new supervisory systems and procedures, and make and keep new records to document compliance with the new requirement.

- The "best of" standard. The Proposal requires that a recommended security or account type must be "the best of the reasonably available options" and that any transaction-based fee received by the BD must be "the best of the reasonably available fee options…."[50] Under current federal securities laws, no such "best of" standard exists. BDs would need to develop new supervisory systems and procedures to address this new standard, and make and keep new records to document compliance with it.

- Duty of loyalty. The Proposal's duty of loyalty requires, among other things, that recommendations be made "without regard to the financial or any other interest of the [BD] …" and that disclosure of conflicts of interest does not presumptively satisfy the duty. Again, these standards are new and different than those currently applicable under the federal securities laws. BDs would need to develop new supervisory systems and procedures to address these new standards, and make and keep new records to document compliance with them.

NSMIA not only limits state regulations that *directly* impose new or different recordkeeping requirements, but also state regulations that by their nature require BDs to make and keep new or

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[49] 15 U.S.C. §78o(i)(1).

[50] Proposal at Section 13:47A-6.4(b)2.i and (b)3.

different records than those required by federal law and FINRA rules.[51] Thus, any state regulations that impose new or different standard of conduct requirements on BDs, including those enumerated above which would require new supervision obligations and compliance procedures, would in turn trigger new or different record-keeping obligations, which would in turn be subject to express federal preemption under NSMIA.

Although the Proposal states that "[n]othing in this section shall be construed to establish any … making and keeping of records … requirements for [BDs] … that differ from, or are in addition to, the requirements of [NSMIA],"[52] this provision does not relieve the Bureau of, or legally insulate it from, its obligation to avoid imposing, directly or indirectly, NSMIA-preempted books and records requirements. As currently drafted, the Proposal cannot be reconciled with NSMIA and therefore would be unlikely to survive a legal challenge on NSMIA grounds.

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[51] *See* Exchange Act Rule 17(a)-4, requiring broker-dealers to keep a record of *"all communications ... by the member ... relating to its business as such…"* (emphasis added). 17 CFR §§ 240.17a-4(b)(4).

[52] Proposal at Section 13:47A-6.4(e).

APPENDIX B – Economic Impact / Empirical Studies

In support of its economic impact analysis, the Proposal cites a study published in the Journal of Financial Planning entitled, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, by Michael Finke, Ph.D., CFP, and Thomas P. Langdon, J.D., LL.M., CFP, CFA (the "Finke Langdon study").

The Finke Langdon study explored the proposed application of a universal fiduciary standard and the impact on the financial adviser industry. The study surveyed registered representatives of broker-dealers in four states that impose a common law fiduciary duty on the provision of investment advice to retail investors, and in states that do not impose such a duty. The study concluded that "[e]mpirical results provide no evidence that the broker-dealer industry is affected significantly by the imposition of a stricter legal fiduciary standard on the conduct of registered representatives."

We do not believe the Finke Landon study has any relevance whatsoever to the Proposal.

- First, the study surveyed only 207 registered representatives – a very small sample size – and asked them generally leading questions (e.g., "Do you offer your clients a choice of financial products that meet their financial needs and objectives?").

- Second, the existing state common law fiduciary duties in the four states (California, Missouri, South Carolina, South Dakota) are principles-based and developed by judge-made law. Those state duties are markedly different that the regulatory standard set forth in the Proposal, which as described above contains numerous requirements that are new and/or different than existing federal securities laws.

- Third, the survey recipients did not respond with respect to the Proposal, which did not exist when they were surveyed. They responded with respect to a "universal fiduciary standard" – which is completely different from what is evolving. Our industry is facing multiple different and competing standards including the SEC's Reg BI, the CFP fiduciary standard, and numerous state standards, including Nevada and New Jersey, and probably others. That adds an entirely new dimension to the economic impact on our industry.

- Fourth, the study's conclusion – implicitly suggesting that the BD industry would not be affected significantly by the Proposal – is simply wrong in the circumstances we face here. We have a very good idea of the negative economic and client service consequences that will flow from the Proposal because we observed similar negative consequences as firms responded to the DOL fiduciary rule (summarized in the studies below).

Accordingly, we direct the Bureau's attention to the following empirical studies which include quantitative data and findings relevant to the Proposal.

NERA Economic Consulting, *Comment on the Department of Labor Proposal and Regulatory Impact Analysis* (July 17, 2015)[53]

- Investors select the fee model (commission versus fee) that best suits their own needs and trading behavior, according to account-level data. Investors who expect to trade often rationally choose fee-based accounts, and those who do not trade often are likely to choose commission-based accounts.[54]
- The evidence shows that commission-based accounts and fee-based accounts exhibit similar performance and returns.[55]
- If the costs associated with maintaining commission-based accounts become too high for firms, then many investors would lose access to advice, because many commission-based account balances are too small for advisory accounts.[56]
    - Using a conservative minimum account balance of $25,000, over 40% of commission-based accounts would be unable to open fee-based account.[57]
    - Using a $50,000 threshold, over 57% of accounts would not meet minimum balance requirements for fee-based accounts.
    - If the threshold is $75,000, then two-thirds of account holders would be left without any professional advice.
- Losing access to advice would detrimentally impact individual investors because individual investors make systematic errors when investing on their own.[58]
- The benefits of financial advisors include: (i) their ability to help investors stop making investment mistakes, (ii) portfolio allocations that are more diversified and closer to model portfolios, (iii) tax minimization, (iv) increased savings, and (v) economies of scale with respect to the cost of information.[59]

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[53] *Available at* https://www.sifma.org/wp-content/uploads/2017/05/nera-analysis-comment-on-the-department-of-labor-proposal-and-regulatory-impact-analysis.pdf.

[54] *Id.* at 6-7.

[55] *Id.* at 10-11.

[56] *Id.* at 9.

[57] *Id.* at 12 (citing 76 Fed. Reg. 66136, 66151, Investment Advice – Participants and Beneficiaries (October 25, 2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-26261.pdf).

[58] *Id.* at 13-16 (citing 76 Fed. Reg. 66136, 66153 – 54, Investment Advice – Participants and Beneficiaries (October 25, 2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-26261.pdf).

[59] *Id.* at 17-21.

Deloitte, ***The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors*** **(August 9, 2017)**[60]

- 53% of study participants eliminated or limited access to brokerage advices services as part of their approach for complying with the DOL Fiduciary Rule.[61]
- The shift of retirement assets to fee-based or advisory programs has accelerated as a result of the elimination or limitation of brokerage advice services.[62]
- DOL Fiduciary Rule implementation and ongoing compliance efforts have caused significant operational disruption and increased costs for financial institutions.[63]

Oliver Wyman, SIFMA, ***Standard of Care Harmonization, Impact Assessment*** **for** ***SEC*** **(October 2010) ("OW Study")**[64]

- 95% of households hold commission-based accounts, whereas only 5% of households hold fee-based accounts.[65]
- Fee-based services are 23 – 27 basis points more expensive than brokerage.[66]
- For an investor with $200,000 in assets, the cost of shifting to fee-based pricing would reduce returns by more than $20,000 over a 20-year horizon.[67]
- Access to investment products offered on a principal basis (*i.e.*, corporate and municipal securities) is more affordable through commission-based accounts, particularly for small investors.[68]

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[60] *Available at* https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf.

[61] *Id.* at 5, 11.

[62] *Id.* at 5, 12.

[63] *Id.* at 6, 17-24.

[64] *Available at* https://www.sifma.org/wp-content/uploads/2017/05/study-standard-of-care-harmonization-impact-assessment-for-sec.pdf.

[65] *Id.* at 4.

[66] *Id.*

[67] *Id.*

[68] *See* Oliver Wyman, SIFMA supplement to SEC (Nov. 17, 2010), *available at* https://www.sifma.org/resources/submissions/sifma-submits-comments-to-the-sec-on-study-regarding-obligations-of-brokers-dealers-and-investment-advisers/.