



CENTER FOR CAPITAL MARKETS  
COMPETITIVENESS

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May 16, 2019

Vanessa Countryman  
Acting Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: Regulation Best Interest** (Securities Exchange Act Release No. 83062 (Apr. 18, 2018)) (File No. S7-07-18); **Form CRS Relationship Summary** (Securities Exchange Act Release No. 83063 (Apr. 18, 2018)) (File No. S7-08-18); and **Proposed Commission Interpretation Regarding Standard of Conduct of Investment Advisers; (Investment Advisers Act Release No. 4889 (Apr. 18, 2018)) (File No. S7-09-18)**

Dear Secretary Countryman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("CCMC") appreciates the Securities and Exchange Commission's ("SEC") engagement with stakeholders on its proposals regarding the standards of conduct for investment advisers and broker-dealers. We are writing to express our concern with state proposals to establish fiduciary or best interest standards of conduct conflicting with the SEC's regulatory actions. Accordingly we respectfully request the SEC reiterate that Federal securities laws preempt such state regulation.

The CCMC has previously commented on the SEC's proposals on August 7, 2018 and September 5, 2018. We have stated that the SEC is the appropriate lead Federal agency in this area because of their mandate of investor protection, competition and capital formation. As a result we have supported the SEC's efforts to preserve investor access to various types of advice and investment products, improve investor understanding of their choices, and protect investors from bad actors. We look forward to the SEC finalizing the Best Interest rule that will benefit and protect all investors across the country.

However, in recent months, several states have proceeded with proposing their own fiduciary standards or best interest standards of conduct for broker-dealers and

investment advisors. If permitted, these state efforts would result in a patchwork of potentially conflicting state and federal regulations, harming investors and sowing confusion in the marketplace. We are concerned that such a patchwork of conflicting standards will run counter to the reasoned judgments and determinations that the SEC makes in adopting its final rules. Accordingly, we ask the SEC to state that such state efforts are preempted by federal securities law.

### **Recent State Proposals and NSMIA Preemption**

This year alone, two states have proposed broad, new, uniform fiduciary standards of conduct for broker-dealers and registered investment advisors. As we explain below, neither proposal is an anti-fraud regulation of the kind permitted by federal securities law. Instead, both are entirely new, comprehensive regulations that would require keeping new records to demonstrate compliance, exactly the kind of burdensome state actions that are preempted by the National Securities Markets Improvement Act of 1996 (“NSMIA”).

#### **Nevada**

On January 18, 2019, the Nevada Securities Division proposed sweeping new fiduciary regulations establishing fiduciary duty regulations for broker-dealers and investment advisers. While the Proposal in Sec. 10.2 states that it is to be “interpreted and applied in harmony with [NSMIA],” merely stating this intention will not prevent federal preemption given the new requirements that are at the core of the proposed rule.

NSMIA preempts regulatory requirements imposed by state law on SEC-registered advisers relating to their advisory activities or services, except those provisions relating to the enforcement of anti-fraud prohibitions, notice filings, and fees permitted under the Investment Advisors Act of 1940. NSMIA also prohibits state entities from establishing “...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...[emphasis added]” the Federal requirements. NSMIA was specifically passed by Congress to restrict the ability of states to add regulatory requirements that burden financial professionals and increase costs to consumers. It is important to note that a specific standard of care is not automatically an anti-fraud provision—fraud is already prohibited for all financial professionals regardless of their different standards of care.

The Nevada proposal would result in new financial responsibility and record-keeping requirements for broker-dealers. The standard insurance and professional responsibility coverages for broker-dealers and registered representatives exclude fiduciary acts. It will be necessary for these entities to obtain new insurance or similar coverages, incurring a new financial responsibility.

More significantly, the proposal would require making and keeping records not currently required under Federal law, especially with respect to the receipt of transaction-based compensation. Under the proposed regulation, virtually all recommendations would result in an ongoing obligation to monitor and advise clients. To do this (or to make even a one-time fiduciary recommendation if there were no ongoing monitoring obligation), the fiduciary must collect and document all relevant information about the client, collect and document all relevant information about the investments considered for recommendation, and document how the advisor took all of this relevant information into account in developing the recommendation and acting solely in the client's interest.

The proposal would also deem fiduciary advice to include acts that are not recommendations of securities, such as recommending other advisors. In making a referral to another provider, the current provider would have to collect and consider all relevant information regarding such referrals (and while the proposal does not specify what these may be, some possible factors could be whether the recommended advisor is an affiliate, whether compensation is received for the referral, the qualifications and disciplinary history of the recommended advisor, the fees charged by recommended advisor, etc.). Such documentation, whether expressly required by the proposal or not, is inherent in the nature of a fiduciary obligation. Whether it would be the Nevada Securities Division, an arbitrator, or a court reviewing the actions of a broker-dealer in a dispute, the broker-dealer must create and keep such documentation in order to show its compliance with the proposal.

Finally, even where a broker-dealer is not subject to the proposal, records must be retained to prove that it does not apply. Sec. 9 of the proposal states that "a broker-dealer and sales representative shall each be presumed to owe a fiduciary duty to the client...[and each has] the burden of proving in an arbitration, civil or administrative hearing, that an exemption to the fiduciary duty exists." In other words, the proposal would impose on all broker-dealers and sales representatives a requirement to keep records necessary to show that the proposal would not apply.

In sum, the practical effect of the Nevada proposal is to require the kinds of burdens that NSMIA preempts states from imposing.

### New Jersey

On April 15, 2019, the New Jersey Bureau of Securities (“Bureau”) issued a proposal to establish a uniform fiduciary duty for broker-dealers, investment advisers, and investment adviser representatives. Similar to Nevada’s proposal, the Bureau recites in the proposal that it will not require recordkeeping or other requirements beyond Federal law. However, just as with Nevada, it is difficult to see, in practice, how the proposal would not in fact go beyond Federal requirements, implicating NSMIA preemption.

Moreover, in its proposal, the Bureau explicitly states that its proposal will go beyond the scope of the SEC’s proposal: “Should the SEC adopt Regulation Best Interest, the Bureau’s proposed new rule will exceed this standard.” A state law that exceeds the SEC’s standard, including the corresponding Federal requirements that the SEC will impose, must trip NSMIA preemption.

### **SEC Best Interest Regulations**

The SEC’s best interest regulations would serve and protect all investors in every state throughout the United States. Fiduciary or best interest standards adopted on a state-by-state basis likely will materially conflict with each other, as well as with Federal standards, making it very difficult for financial professionals to serve their clients. The increased compliance burdens and risks will increase costs and reduce access, especially for small account consumers.

States should not undermine the judgment, expertise, and authority of the SEC as the primary regulator, particularly for national markets. The SEC’s Best Interest proposal, which is expected to be completed shortly, represents an effort to provide comprehensive regulation of financial assistance and investment advice that will better protect consumers, and preserve retail consumer choice and access to different financial professional service models. This includes the brokerage “pay as you go” model widely used by consumers with small account balances. We are encouraged that the Best Interest proposals recognize the need to preserve transaction-based payment models for financial services that better serve the needs of consumers, especially those with small account balances.

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Therefore, in the interest of investors, the SEC should reiterate the purpose and scope of NSMIA preemption, as described above. In light of this, state fiduciary proposals such as those in Nevada and New Jersey would be preempted by law.

Thank you for the continued opportunity to provide feedback on these important regulations.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' followed by a long, sweeping horizontal stroke.

Tom Quaadman