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Via email to NASAAComments@nasaa.org

Amy Kopleton, Chair of the Broker-Dealer Market and Regulatory Policy and Review Project Group
Stephen Bouchard, Chair of the Broker-Dealer Section
North American Securities Administrators Association, Inc. (“NASAA”)
750 First Street NE, Suite 990
Washington, DC 20002

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

Dear Ms. Kopleton and Mr. Bouchard:

The Alternative and Direct Investment Securities Association (“ADISA”)¹ is writing to respond to the North American Securities Administrators Association, Inc. (“NASAA”) request for comment on Proposed Revisions to NASAA’s Dishonest or Unethical Business Practices of Broker-Dealers and Agents Model Rule (the “Proposal”).

ADISA’s membership includes retail broker dealers as well as managing broker dealers involved in the marketing of alternative investments, including non-listed REITs and BDCs, interval funds, closed end funds, and private placements, among others. As such, this ADISA membership constituency is particularly impacted by the Proposal.

The Proposal Creates Inconsistencies by Utilizing Terminology Which Differs from Reg BI.

The Proposal states that the revisions to the Model Rule are “*intended to update the model rule in light of the U.S. Securities and Exchange Commission’s 2019 adoption of Regulation Best Interest, 17 C.F.R. § 240.15l-1 (“Reg BI”), and other developments in the securities industry*” by adding a new Part 1d and Part 1e to NASAA’s Dishonest or Unethical Business Practices of

¹ ADISA (Alternative & Direct Investment Securities Association), is the nation’s largest trade association for the non-traded alternative investment space (i.e., retail vs. institutional). Through its 4,500 financial industry members (close to 900 firms), ADISA reaches over 220,000 finance professionals, with sponsor members raising in excess of \$200 billion in 2021-2 alone, serving more than 1 million investors. ADISA is a non-profit organization (501c6), registered to lobby, and also hosts a related 501c3 charitable non-profit (ADISA Foundation) assisting with scholarships and educational efforts.

Broker-Dealers and Agents Model Rule (the “Model Rule”) applicable to broker-dealers and corresponding cross references to Part 2f applicable to agents.

The SEC’s Regulation Best Interest (“Reg BI”) went into effect on June 30, 2020² after a significant proposal, comment and adoption process. The final rule release provides significant discussion regarding how the SEC dealt with different types of comments and concepts, which also serves to provide guidance to broker-dealers in their implementation of Reg BI. We note, however, that the SEC did not define the terms within Reg BI which the Proposal is defining and the Proposal utilizes terminology which differs from Reg BI.

The Proposal includes what practically operate as definitions (or at least greater specificity) of the following terms and phrases which are not themselves specifically defined in Reg BI: “place the financial or other interest of the broker-dealer or agent ahead of the interest of the retail customer”; “in the best interest of the retail customer”; and “costs.” Reg BI was written from the perspective of what actions broker-dealers must take to comply with the regulation, as opposed to the Proposal which states, with specificity not contained in Reg BI, what constitutes a violation of the Model Rule. In our view, without utilizing the exact language in Reg BI, there is the likelihood to create confusion and differing outcomes in interpretation and enforcement actions between the Proposal and Reg BI and effectively establish an expansion of what is required under Reg BI due to the specificity within the Proposal.

Some examples where the language of the Proposal would potentially conflict with or at least expand the language of Reg BI include:

- Part 1d1 of the Proposal, which states that “*The obligations set forth in this section cannot be satisfied through disclosures alone.*” Reg BI specifically contains the Disclosure Obligation, which when combined with appropriate actions under the Care Obligation, the Conflict of Interest Obligation and the Compliance Obligation, would allow for disclosure to satisfy the requirements under Reg BI under certain circumstances.
- Part 1d2 of the Proposal, which states that “*the broker-dealer or agent must make all reasonable efforts to avoid or **eliminate** conflicts of interest. Conflicts of interest that cannot reasonably be avoided or eliminated must be disclosed and mitigated.*” Reg BI contains the word ‘eliminate’ in two instances:
 - 240.15l-1(a)(2)(iii)(A) Conflict of interest obligation: “*Identify and at a minimum disclosure, in accordance with paragraph (a)(2)(i) [the Disclosure Obligation] of this section, or eliminate, all conflicts of interest associated with such recommendations.*”
 - 240.15l-1(a)(2)(iii)(D) Conflict of interest obligation: “*Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.*”

² Final Rule The Broker-Dealer Standard of Conduct, Rel. No. 34-86031 (June 5, 2019), available at [Regulation Best Interest: The Broker-Dealer Standard of Conduct \(sec.gov\)](#)

The Proposal thus emphasizes the concept of elimination in a way that is not contained within Reg BI. As such, the Proposal would expand broker-dealer obligations to eliminate conflicts of interest beyond what is required by Reg BI.


- Part 1d2a of the Proposal, which states that “*For purposes of this paragraph, mitigating a conflict of interest means **neutralizing** or reducing the potential for harm or adverse impact of the conflict of interest.*” By contrast, Reg BI does not contain the term neutralize or neutralizing.
- Part 1d3 of the Proposal, which states that “*...the broker-dealer or agent must use the care, skill and diligence that a person acting in a like capacity and familiar with such matters would use, taking into consideration all of the relevant facts and circumstances.*” Within 240.15l-1(a)(2)(ii), however, Reg BI utilizes the terms “reasonable due diligence, care and skill” and “reasonable basis to believe.” The language within the Proposal thus potentially infers a higher standard than that contained in Reg BI.
- Part 1d4 of the Proposal, which contains many examples of the term ‘costs,’ including tax considerations, which specificity is not contained in Reg BI. This inconsistency between the Proposal and Reg BI has the potential to create confusion and disparate enforcement results between the SEC and the States.

NASAA Should Avoid Conflicts by Utilizing the Exact Language of Reg BI.

Since the stated reason for the Proposal, at least as it relates to Part 1d of the Model Rule, is to “*update the model rule in light of the U.S. Securities and Exchange Commission’s 2019 adoption of Regulation Best Interest, 17 C.F.R. § 240.15l-1 (“Reg BI”),*” we recommend that the Proposal not be adopted as written. In the event NASAA feels it needs to incorporate a violation of Reg BI into the Model Rule, we recommend doing just that – through inserting the exact language of Reg BI or having Part 1d state ‘Making a recommendation to a retail customer in violation of Regulation Best Interest, 17 C.F.R. § 240.15l-1 (“Reg BI”).’ or similar language referencing Reg BI specifically, thus avoiding conflicts between the terminology contained within Reg BI and the Proposal. This approach would ensure that all interpretations would be based on the exact same terminology, alleviating the chance for differing interpretations and enforcement outcomes based on what might be considered by NASAA as even slightly different language.

ADISA certainly stands ready—as always—to assist further as might be needed. We appreciate the fine work NASAA and others do on behalf of the securities administrators, and we also appreciate the opportunity to contribute in any way you deem appropriate.

Sincerely,


Michael Underhill
President

cc: Drafting committee--ADISA’s Legislative & Regulatory Committee