



Insured Retirement Institute



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

VIA ELECTRONIC MAIL

February 24, 2020

To: State Securities Regulators & Members of the NASAA Reg BI Implementation Committee

Subject: NASAA Reg BI Board Committee Implementation Survey

Dear State Regulator:

We are writing to you as one of the state regulators who has recently issued the Reg BI coordinated examination survey (Survey). We feel it is important and necessary to share with you some of the many concerns we have received from our members regarding their ability to timely and comprehensively complete the Survey. We respectfully request that you consider these concerns, and suspend your request until after these concerns can be adequately addressed.

Recognizing your jurisdiction's rights, obligations and authority to protect its citizens, we stand ready to offer constructive dialogue with industry representatives to help explain our members' concerns with the Survey, in its current form. We are certain that we can work with you and your colleagues on a constructive path forward that more effectively and accurately accomplishes your regulatory goals, while protecting confidentiality of trade secrets, efficiently using firm resources and allowing firms reasonable time to respond.

Each of our various concerns is outlined below:

Unrealistic Timeframe

We understand that responses are required within 14 days and it is estimated that it will take "approximately one hour" to complete the 69 questions and requests. Our members have reasonable concerns here.

- **Estimated of One Hour to Complete the Survey Does Not Reflect Actual Time and Resources:** Our members are highly regulated institutions and take all requests from their regulators very seriously and the Survey is no exception. Our members are reporting that a high-level scoping review of the questions (without research to answer any) has generally exceeded this 1-hour review estimate. Add in the fact that some firms operate multiple business divisions, platforms and channels, comprised of 100s or 1,000s of representatives and differing product mixes, a thorough and thoughtful approach to answering the Survey could reasonably entail 10s or even 100s of hours. Thus, given the 1- (or even 2-) hour estimate to complete this extensive Survey request, we believe there may be a disconnect between what is being asked versus the survey's intended purpose.
- **14-Day Mandatory Response Time Presents Challenges:** Given the complexity, specificity and number of direct questions around current and historic sales practices of specific types of products and related disclosures and activities, going back decades (and in some cases centuries), we understand meeting this deadline will be unreasonably challenging. We also understand that your jurisdiction, and other jurisdictions, will not grant extensions if requested. Again, given the 1-hour estimate to complete, we request clarity as to the intended purpose of the Survey.

Stated Purpose of the Survey and Regulatory Authority

The transmittal email does not mention the purpose of the Survey, and provides that the request is being done under the regulators' general authority to examine books and records. We note our concerns and proposed solutions below

- **Purpose:** The use of the term "survey" implies the concept of collecting information but the use of "Examination Demand: Response Required" language in the subject line of some transmittal emails implies this Survey effort could be an examination/enforcement initiative. In fact, it very much appears to be an examination sweep as opposed to a simple survey. We understand that at least one jurisdiction has threatened to initiate on-site examinations of any recipient that does not respond by the Survey's deadline. Clarification of the legal and procedural posture of this inquiry would be appreciated by our members.
 - For illustrative purposes, we ask you to compare this effort to past industry survey efforts by NASAA members. In 2014, nine jurisdictions surveyed state investment adviser registrants regarding cybersecurity readiness practices.¹ We understand from the disseminated report that there was additional transparency with which the survey tool was framed and flexibility provided to participating jurisdictions in how they chose to collect the information.²

¹ The report is available [on the NASAA website](#)

² Relevant text from the cybersecurity readiness report (Emphasis added): "Through the use of a template survey, the [cybersecurity survey] pilot project sought to **elicit information to better understand** the technology and data practices of state-registered investment advisers; how these advisers communicate with clients; and what types of policies and procedures these advisers currently maintain. The pilot project also focused on specific uses of technology and websites, with a **goal of understanding the safeguards used by state-registered investment advisers to protect client information; to inform state**

- **Authority:** Although the transmittal email provides that the request is being made in a coordinated fashion with other jurisdictions, neither the email nor the Survey identify whether data is to be solely limited to activities within the requesting jurisdiction or to include data across state lines. Our members have questions regarding regulators' actual authority under applicable authorizing statutes to be able to request such broad and open-ended information. Our members require time to consider these issues and how they may file their responses.

Confidentiality of Information Sought in Survey

Although the transmittal email refers to states having an agreement to share information, with the goal of maintaining confidentiality, the language used is "should preserve the confidentiality." As much of the information being requested is viewed as confidential trade secrets and commercial or financial information³, our members are extremely concerned with maintaining confidentiality.

- **Should vs Will:** The requesting regulator must ensure that it "will preserve" as opposed to "should preserve" the confidentiality of such information and data.
- **SurveyMonkey:** The platform used to collect the information, SurveyMonkey, is a commercial platform, with no assurances of being able to maintain the confidentiality of the highly sensitive information. Consider the SurveyMonkey platform as compared to the SEC's Accellion tool, which is designed for collection of highly sensitive regulatory information. Our members are deeply concerned, without further assurances from the regulator, with putting such sensitive information into the hands of such a general commercial platform and in fact, we have heard from some members that their own internal data privacy controls will not allow them to submit the requested information to SurveyMonkey.
- **State Authority:** Moreover, we understand that most documents and information obtained by state agencies are subject to state public records laws unless a specific exemption applies. We request that you provide the specific public records exemption that will apply to the Survey responses and supplemental records in your jurisdiction.

Lack of Workable Format and Ambiguities

While we greatly appreciate the NASAA task force's efforts to make completion of the Survey efficient by posing many yes/no questions and radio box input, the use of a one-size fits all template survey limited to required radio box inputs will lead to faulty, inaccurate and non-

examination programs; and to identify national cybersecurity trends relevant to state-registered investment advisers. States participating in the pilot project used the survey as part of their examinations and audit inspection programs or as a separate survey or document request tool. The survey allowed states participating in the pilot program to collect information on either an identifiable or anonymous basis. Some states sent the survey to a limited number of investment advisers registered in their states while others sent it to all of the investment advisers registered in their states. About half of the survey responses collected were collected on an anonymous basis initially, while the remainder were collected in an identifiable setting, whether through examinations or a document request. Several states also made the optional request that investment advisers submit relevant policies and procedures. Nine states reported a subset of the investment adviser firms' responses to NASAA on a non-identifiable basis."

³ For example, Question 9 requests total revenue and net profit or loss.

uniform answers and data sets. Moreover, the survey is extensive and contains many terms and concepts that are undefined, open to different interpretations and, at times, overlapping. The ambiguity in terms, combined with the Survey format that prohibits explanations and clarifying remarks (and applicable limitations), is viewed by members as leading to potentially misleading, incomplete and non-responsive answers. Below is merely a sampling (and by no means all) of the concerns, in the words of our members:

- The term “sales contest” is not defined. Does it include general commissions or increased grid payouts?
- What are “private securities”? Do they include non-traded REITs?
- For questions that cover the time period of “ever,” does it truly cover activities of 10, 15, 25, 50, 100 or more years ago? Some institutions have long histories.
- “Non-cash compensation” is primarily a broker-dealer term. The concept was just recently introduced for investment advisers in the recent solicitation and advertising rule proposal.⁴
- “Liquidity Needs” and “Concentration Limits” are relative terms that do not have a single, commonly understood meaning and can be defined through federal or state requirements. Moreover, we question how these concepts relate to each other? See Question 24.
- What is the definition of a “retail customer” and how does it differ from an “investor customer”? Should we look to Reg BI for definitions?
- The questions that require numeric answers do not permit estimates or information based on best knowledge.
- E&O Insurance questions do not discuss or consider firms that self-insure.
- What is meant by “generic disclosures”? Does this include marketing or similar materials?
- In Question 22-25, what are “formal limitations”? Does this refer to written policies and procedures, or would consideration of these factors in suitability determinations qualify?
- In Question 38, what does “fees charged for various asset classes” mean?
- In Question 54, what does “Neutralize cost to customer where differential compensation is utilized” mean?

If different respondents interpret terms in varying ways, the information you glean from responses will essentially be meaningless and a waste of resources. Therefore, we request that it is in both your interest and our members’ to provide clear definition of the terms used in the Survey so there is a shared understanding of the meaning and implications of those terms.

⁴ See <https://www.sec.gov/rules/proposed/2019/ia-5407.pdf>.

Product-Specific Questions

Also very concerning to our members is the fact that many of the questions indicate a bias against specific product types such as private securities, non-traded REITS, leveraged or inverse ETFs, and variable annuities.⁵ There are no provisions of Reg BI limited to specific types of securities and none specific to non-traded REITs. Indeed, the Commission went to great lengths to make Reg BI product agnostic and, therefore, equally applicable to all products. The product-specific nature of many of the questions suggests that the states are targeting specific product types for an unstated purpose. Given the Survey's stated purpose of assessing firms' preparations for Reg BI implementation and Reg BI's deliberately non-product-specific focus, our members request clarification as to the reason your Reg BI survey is so focused on matters that are not dealt with in Reg BI itself.

Allocation of Resources and Fundamental Fairness

Many of our members are in the process of revising and restructuring their businesses and systems for the June 30, 2020 Reg BI compliance date, in addition to their general daily operations. Understandably, there is much concern among our members about the allocation of resources necessary to complete the Survey. By requiring a response within this short period of time, the survey is taking resources away from firms' Reg BI compliance efforts. The personnel responsible for the very compliance efforts you purport to be examining readiness for are those who will be pulled away from those efforts to undertake completion of the Survey. Our members are committed to be responsive and compliant with all of their regulators (including in regard to the Survey) and want to ensure that they are in a reasonable position to do so.

Conclusion

Our members are very concerned that as it currently stands, the information collected from the Survey will be inconsistent, incomplete and generally meaningless on an aggregated basis without further dialogue between the NASAA task force members, including you and your colleagues in your jurisdiction, and industry stakeholders, to clarify the requests and scope. They are also concerned the data collected may be used for other than authorized purposes. In light of these concerns, we respectfully request on behalf of our members that your jurisdiction and other members of the NASAA task force initiate a dialogue with industry representatives to discuss improvements to the survey. In the meantime, we urge your jurisdiction to suspend the due date for the responses, allowing time for clarification of the information sought.

⁵ For example, Questions 19 - 36 of the survey.

Sincerely,

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