

## Statement of Lisa Bleier

### On Behalf of the Securities Industry and Financial Markets Association

#### To the Maryland Financial Consumer Protection Commission

October 10, 2018

Thank you very much for the opportunity to speak today on behalf of the Securities Industry and Financial Markets Association (“SIFMA”).<sup>1</sup> SIFMA represents the shared interests of hundreds of securities firms, banks and asset managers, many of whom have a strong presence in Maryland – in fact, there are more than 100,000 individuals employed in the Finance and Insurance industries in the state. We appreciate this opportunity to speak on a potential state-specific conduct standard for broker-dealers.

SIFMA has publicly advocated for a heightened standard of conduct for broker-dealers since prior to the passage of Dodd-Frank. It is important that any heightened standard of conduct apply uniformly nationwide and not be limited to specific accounts or products. For these reasons, SIFMA strongly supports SEC efforts to establish a best interest standard for broker-dealers and has serious concerns about any state-specific duties. We encourage you to consider the following as you think about moving forward with a state-specific duty of conduct for broker-dealers:

- A Nationwide Standard of Conduct is Best Achieved through the SEC. The SEC is close to finalizing a new heightened standard of conduct for broker-dealers (Regulation Best Interest) that will apply to investment advice they provide about all products in all accounts. This new robust standard of conduct will raise the standard owed to clients and establish a uniform regulatory regime for all broker-dealers across the United States.
- The issue of terminology. The term “fiduciary,” in and of itself, has little meaning. A “fiduciary duty” under the Investment Advisers Act is very different from a “fiduciary duty” under ERISA or the “fiduciary duty” owed to clients by their lawyer. It is worth noting that the Fifth Circuit Court of Appeals did throw out the DOL’s new definition of fiduciary, in part noting that the definition of investment advice fiduciary had been well established over the preceding 40 years. I would also note that the fiduciary term under ERISA only applies in the ERISA context – which means it is limited in its impact. Instead, if you look to the standard that the SEC is working on, you can see that it is much broader.

The SEC’s heightened “Best Interest” standard would apply across all accounts and products and will likely simplify a very complicated issue for investors. The DOL’s attempted change would have only applied to a narrower space – meaning investors could have two very different standards that would apply in the same conversation with the same advisor, depending on which part of an individual’s overall account one was discussing at the time.

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<sup>1</sup> 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 for 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>.

- A State “Patchwork” of Laws Would Result in Confusion and be Unfair to Investors. One state (Nevada) has enacted a statutory state-specific heightened conduct standard for broker-dealers but has not released regulations to date. Meanwhile, other states have introduced “fiduciary duty” proposals that would either change the conduct standard or disclosure requirements. We are concerned that a state by state approach would subject financial professional and firms to a confusing and potentially contradictory array of requirements and further muddy the waters for investors trying to determine their relationship with their broker. If an investor moves between states or switches advisors, the investor could find themselves in an entirely different relationship – from different disclosures to different standards of conduct – even if both advisors are designated a “fiduciary.”

Furthermore, while adhering to a standard of conduct that significantly exceeds FINRA’s suitability requirements is manageable (and supported by SIFMA and its member firms), attempting to put in place systems to effectively track, monitor and supervise 50 different standards of conduct would be nearly impossible for broker-dealers and very confusing for investors.

- States Will Have to Navigate a Host of Legal Issues. Section 103 of the National Securities Markets Improvement Act of 1996 (“NSMIA”) expressly preempts states from enacting regulations that impose new or different recordkeeping requirements than those established under the Exchange Act. The new Nevada law is a great example, as it will likely require broker-dealers and investment advisers to maintain new records to demonstrate compliance with the “financial planner” conduct standards and thus could be pre-empted.

In fact, drafting implementing regulations to avoid federal preemption has proven difficult in Nevada. Nevada enacted legislation that became effective in July 2017. In October 2017, the Nevada Secretary of State held a workshop to solicit early comments on a potential draft of regulations. One year later, no draft has been released. The matter is incredibly complicated and, as evidenced by efforts at the federal level at both the Department of Labor and the Securities and Exchange Commission, it has taken the better part of a decade to see real progress. That progress is happening now. Any state regulations would be required to walk an impractical, opaque line to both implement the law as drafted and avoid federal preemption or other legal challenges

- The DOL’s Vacated Rule is not the Right Standard to Use Here. Because one of the focuses of today’s hearing is the DOL’s rule which was invalidated by the Fifth Circuit Court of Appeals, I would like to at least briefly mention some of the flaws of that rule, so the Commission will understand why we would not recommend replicating that rule. To comply with the DOL rule, fitting within the structure of ERISA, meant that firms would have had to limit an investors’ ability to work with a broker and limit the investment options and funds for that retirement investor. We actually saw this when part of the rule went into effect - firms started to make these changes which drove more firms to a fee-based business model, which results in leaving lower and middle-market investors without the same access to financial products or advice.

We also saw significant reduction in the number of mutual funds offered to retirement investors. It is worth noting that these changes were made in many cases just to the choices for IRA owners because the DOL rule could only impact this part of the market. It returns us to the big picture, and where I began my testimony – that the SEC is the best agency to act on this issue.

In conclusion, the specific obligations and restrictions that come with standards that are created state by state are the problem with moving forward on a state-specific proposal, not the standard of conduct being discussed here today or at the federal level with the SEC. As I've noted above, establishing a state-specific heightened standard of conduct is highly problematic. It is problematic from an investor protection point of view. It is problematic from an industry compliance point of view. It is problematic from a legal point of view. Yet, it's not the actual heightened standard of conduct that is the problem – it is the specific rights, obligations and requirements on broker-dealers that causes the greatest confusion and concern. SIFMA supports broker-dealers being held to a higher-standard in their dealings with clients but must oppose any attempt to undermine the federal prerogative to create a specific, uniform, nationwide set of rules and restrictions.

Thank you for your consideration of our comments – we hope to continue to work with you on this issue. If there is any additional information we can provide, please contact SIFMA's local representative Chris DiPietro at 410-243-5782 or [chris.dipietro@live.com](mailto:chris.dipietro@live.com), or my colleague Nancy Lancia at 212-313-1233 or [nlancia@sifma.org](mailto:nlancia@sifma.org).