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NASAA

September 24, 2015

Via email to e-ORI@dol.gov

Phyllis C. Borzi
Office of Regulations & Interpretations
Employee Benefits Security Administration
Attn: Conflicts of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue
Washington, DC 20210

Re: RIN 1210-AB32 – Definition of the Term "Fiduciary" – Conflicts of Interest Rule – Retirement Investment Advice, and related proposals published on April 20, 2015 in Volume 80 of the Federal Register; related comment letters submitted to the Department of Labor (April 20, 2015 to present) and statements made at the Public Hearing (August 10-14, 2015).

Dear Ms. Borzi,

The North American Securities Administrators Association, Inc. ("NASAA")[1] welcomes this opportunity to comment a second time on the Department of Labor ("the Department") Employee Benefits Securities Administration's ("EBSA") proposed rulemaking defining the term "fiduciary"[2] and related proposed rulemaking initiatives published alongside the fiduciary duty proposal, including the Best Interest Contract Exemption[3] ("BIC proposal") (collectively, "the EBSA proposal" or "the proposal" or "the proposed rule"). NASAA reiterates its position, articulated in its initial comment letter,[4] and, through this letter, updates the Department on state securities regulators' active enforcement programs and provides additional comments on the ongoing rulemaking, which is occurring pursuant to the Employee Retirement Income Security

[1] NASAA is the association of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum for these regulators to work with each other in an effort to protect investors at the grassroots level and to promote fair and open capital markets.
[2] 80 Fed. Reg. 21928 (April 20, 2015).
[3] 80 Fed. Reg. 21960 (April 20, 2015).
[4] Letter from William Beatty, NASAA President and Wash. Sec. Adm'r, to Phyllis C. Borzi, Assistant Sec'y, Emp. Benefits Sec. Admin. (July 21, 2015), *available at*: http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/2015-07-21-NASAA-Comment-to-DOL.pdf.

Act ("ERISA"). NASAA urges the Department to finalize the EBSA proposal making appropriate and limited changes to address workability concerns, as the proposal will serve to protect retirement investors in new and important ways.

As stated in NASAA's initial comment letter, we have long advocated for a true, undiluted, fiduciary duty standard applicable to broker-dealers when providing investment advice to customers. In this context, extending the fiduciary duty standard to broker-dealers would reflect the evolution in the delivery of financial advice to customers, where broker-dealers are acting as *de facto* investment advisers to retail customers. Investors continue to expect that their financial services professionals, whether broker-dealer agents, insurance agents or investment adviser representatives, act in their best interests. Currently, under the securities laws, investment adviser representatives are subject to a fiduciary duty. The SEC, under the grant of authority of Section 913 of the Dodd-Frank Act, has the discretion to ensure that the standard of care that broker-dealers owe to their customers be raised to a fiduciary standard on all account relationships, with very limited carve-outs for commissions and principal transactions, but has not initiated rulemaking. NASAA supports the Department's separate rulemaking, which would allow a significant subset of investor accounts to be subject to a heightened fiduciary duty.

The EBSA Proposal Would Broaden Applicability of Fiduciary Duty to a Greater Number of Investor Accounts and Result in Greater Investor Protection, Especially with Explicit Acknowledgement of the ERISA Savings Clause for State Securities Laws and Enforcement

By broadening the definition of investment advice and who is a fiduciary, the EBSA proposal would significantly raise the standard of care available for investors in retirement plans (or retirement investors). NASAA especially supports the proposed definition of investment advice also extending to IRAs, which are currently a widely used tool, but had not been considered extensively as part of the 1975 ERISA rulemaking.[5] Rolling over an IRA is a critical decision for an investor and therefore should be a transaction in the investor's *best interest* rather than, as it is currently, solely required to be an *adequate* transaction for the investor. Therefore, extending the definition of fiduciary duty pursuant to ERISA to include IRAs would ensure that these transactions, often undertaken by broker-dealers, would be subject to a best interest standard, rather than the current suitability standard broker-dealers are subject to under the securities laws.

As noted in NASAA's initial letter, rollovers and account transfers are an area where state securities regulators routinely see abuse. Furthermore, state securities regulators have active enforcement programs that contribute to investor protection and would supplement the few remedies available under the parallel structures of Title I of ERISA and Section 4975(e)(3)(B) of the Internal Revenue Code ("the Code"). NASAA continues to urge that the final adoption of the proposal include explicit acknowledgement of the ERISA Section 514(b)(2) savings clause for

[5] NASAA notes that IRAs contained only $3 billion in aggregate assets in 1975, in contrast to assets in IRAs totaling $7.6 trillion earlier this year. *See* Sabelhaus, John and Daniel Schrass. 2009. "The Evolving Role of IRAs in U.S. Retirement Planning." *ICI Research Perspectives* 15, no 3 (November), *available at* https://www.ici.org/pdf/per15-03.pdf; *see also ICI* "Retirement Assets Total $24.9 Trillion in First Quarter 2015," (June 24, 2015), *available at* https://www.ici.org/research/stats/retirement/ret_15_q1.

state securities laws and enforcement.[6] Such explicit acknowledgement of the savings clause will ensure that state enforcement actions remain available to protect ERISA investors.

The importance of maintaining state enforcement authority is demonstrated by the significant number of state enforcement actions taken in an effort to protect investors. Since NASAA submitted its initial comment letter, 2014 information regarding the active enforcement programs of state securities regulators has become available. In its most recent report on state securities enforcement activities, published earlier this week,[7] NASAA reported that 4,853 investigations conducted by state securities regulators across 49 jurisdictions in 2014 led to 2,042 enforcement actions, including administrative, civil, and criminal actions against more than 3,000 respondents or defendants. These actions targeted both registered and unregistered activity and resulted in state securities regulators levying $174 million in fines and penalties and the ordering of $405 million in restitution to investors. States also continue to serve a vital gatekeeper function by screening bad actors before they have a chance to conduct business with unsuspecting investors. A total of 2,857 securities licenses were withdrawn in 2014 as a result of state action and an additional 728 licenses were either denied, revoked, suspended or conditioned.

Extending the Implementation Period of the EBSA Proposal and Continued Regulatory Coordination will Address Investor Confusion Concerns

NASAA reiterates its appreciation that the Department has coordinated with the SEC as part of this rulemaking, and emphasizes the importance of continued coordination with both the SEC and state securities regulators. As evidenced from the testimony and comments, industry commenters noted concern about investor confusion should the EBSA proposal be finalized without significant revision or prior to the SEC extending a fiduciary standard of care to broker-dealers.[8] Regulatory harmony with the SEC should not delay the Department's rulemaking. Concerns stemming from investor confusion that might arise as the result of the Department's finalizing its best interests rule before the SEC can and should be addressed through continued coordination between the agencies, as well as state securities regulators.

With regard to industry commenters who express concerns regarding workability of the EBSA proposal, as is the case with any significant regulatory changes, there will be an adjustment period. NASAA urges the Department to parse workability concerns from the hyperbole of industry commenters who are opposing this important regulatory change that will better protect investors and ultimately raise confidence in the financial services advisory industry. To assist industry, however, NASAA recommends extending the currently proposed implementation period

[6] *See* Letter from William Beatty to Phyllis Borzi, *supra* note 4, at 4-5.
[7] *See* NASAA 2015 Enforcement Report, *available at* http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/08/2015-Enforcement-Report-on-2014-Data_FINAL.pdf.
[8] *See* U.S. Dept. of Labor, Emp. Benefits Sec. Admin., *Conflict of Interest Proposed Rule, Related Exemptions and Regulatory Impact Analysis Hearing*. Hearing, Aug. 10, 2015 (statement of Kenneth E. Bentsen, Jr., President and CEO, Sec. and Fin. Mkt. Ass'n), at 71-73, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf.

of eight months to 12 to 24 months,[9] noting that workability of the EBSA proposal will require industry members to make changes to processes and systems. NASAA also recommends extending the implementation period because it will allow for continued communication between industry members and the Department as implementation concerns are addressed, and will also allow firms to identify the most cost-effective way to continue servicing smaller accounts. A sufficient implementation period will bolster the positive impact of the EBSA proposal for retirement investors.

Finally, NASAA reiterates that the Department revise the proposal's endorsement that institutions entering into agreements with retirement investors would be able to include pre-dispute arbitration agreements with respect to individual contract claims. NASAA notes that other commenters have opposed adoption of pre-dispute binding arbitration agreements[10] and urges that adoption of the proposal prohibit pre-dispute binding arbitration agreements.

In closing, NASAA reiterates its support toward the Department's goal to enhance the standard of care available to retirement investors, as it is an important step in raising the standard of care available to retirement investors while paving the way for additional regulatory initiatives to raise the standard of care for investors in general.

Sincerely,

William Beatty
NASAA President
Washington Securities Administrator

[9] NASAA also recommends that, should industry firms require additional time to update systems in order to allow for implementation, the Department consider an additional extension of time for such specific purpose.

[10] *See* U.S. Dept. of Labor, Emp. Benefits Sec. Admin., *Conflict of Interest Proposed Rule, Related Exemptions and Regulatory Impact Analysis Hearing*. Hearing, Aug. 11, 2015 (statement of Joe Peiffer, President, PIABA), at 674, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript2.pdf. *See also* U.S. Dept. of Labor, Emp. Benefits Sec. Admin., *Conflict of Interest Proposed Rule, Related Exemptions and Regulatory Impact Analysis Hearing*. Hearing, Aug. 10, 2015 (statement of Shaun C. O'Brien, Assistant Policy Dir. for Health and Retirement, AFL-CIO), at 62-63, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript1.pdf.