March 1, 2019

Ms. Diana Foley
Nevada Secretary of State's Office
Securities Division
2250 Las Vegas Boulevard North
Suite 400
North Las Vegas, Nevada 89030

RE: January 18 Request for Comment on Draft Regulations pertaining to Nevada Revised Statutes 90.575, 628.010 and 628.020, as modified by Senate Bill No. 383

Dear Ms. Foley:

We the undersigned trade associations appreciate the opportunity to comment on your draft fiduciary duty regulations. We collectively represent a broad cross section of the financial services industry, and many of our members do business and serve retail investors in Nevada. While many of us have sent separate letters, we thought it was important to highlight some key universal concerns.

Specifically, as you move from draft regulations to a formal rule proposal, we would encourage you to consider the following:

1. The SEC is Close to Finalizing Its Own Regulation Best Interest Standard ("Reg BI"). As you well know, the SEC is developing a uniform, nationwide, heightened best interest standard of conduct for broker-dealers ("BDs"). We believe a national standard provides enhanced investor protection, avoids investor confusion, and is much easier to administer and operationalize than an uneven patchwork of state laws.

   It is our understanding that a final SEC rule may be published before the fourth quarter of 2019. Given how close Reg BI is to completion, we would encourage you to await the final federal rule before moving forward with your own. This would ensure that your regulations do not unnecessarily duplicate or conflict with the federal standard. If you decide not to wait on the SEC, we would suggest you clarify that firms that comply with Reg BI, once adopted, will be deemed to be fully compliant with the Nevada law.

2. The Draft Regs Continue to Raise Pre-Emption and Other Legal Concerns. We believe the draft regulations have both pre-emption issues and legal deficiencies. We find there to be conflicts with the National Securities Markets Improvements Act ("NSMIA"), the Advisers Act, the Employee Retirement Income Security Act of 1974 ("ERISA") and the Federal Arbitration Act, among others.

   We previously raised NSMIA concerns in our early letters[1] to the Division and in subsequent testimony. Unfortunately, the draft regulations do not alleviate these concerns.

   Specifically, the State is pre-empted from imposing regulatory requirements on Registered Investment Advisers as its jurisdiction is limited to enforcement of antifraud provisions.[2] The law and draft regulations go well beyond the State's legal authority.

   The State is also pre-empted from imposing different or additional recordkeeping requirements.[3] The draft regulations would impose new recordkeeping requirements on BDs. For example, the draft regs require a number of additional disclosures, such as "gains," "all risks" and "all features" of a product, and "all information" regarding a potential conflict of interest. BDs will need to develop new supervisory systems and make and keep new records to document compliance with these requirements. This triggers a new or different record-keeping obligation which is pre-empted under NSMIA.

   The draft regulations state that they should be "interpreted and applied in harmony with [NSMIA]." This simply is not possible as the regulations are currently drafted.

3. The Draft Regulations Would Likely Accelerate the Move from Brokerage to Fee-Based Accounts. The draft regulations impose a presumption that a BD owes a fiduciary duty and characterize many routine client interactions as triggering such a duty. Dual registrants are also presumed to be acting as an IA or IAR and are subject to a continuous fiduciary duty for which there is no exemption. These conditions will likely encourage firms to re-evaluate their brokerage services. BD accounts represent an important, cost-conscious choice for retail investors and provide access to affordable advice, particularly for smaller, buy-and-hold investors. We would encourage you to strike the presumptions for BDs and dually-registered firms in the draft regulations.

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[1] See: Final Joint Trades Pre-Proposal Letter, Aug. 25, 2017; Joint Letter to Administrator Foley, June 23, 2017.

[2] 15 U.S.C. §80b-3a(b)(1). Rules Implementing Amendments to the Investment Advisers Act of 1940, Release No. IA–1633, File No. S7–31–96, (May 22, 1997), available at https://www.govinfo.gov/content/pkg/FR-1997-05-22/pdf/97-13284.pdf ("On its face, section 203A(b)(2) preserves only a state's authority to investigate and bring enforcement actions under its antifraud laws with respect to Commission-registered advisers. The Coordination Act does not limit state enforcement of laws prohibiting fraud. Rather, states are denied the ability to reinstitute the system of overlapping and duplicative regulation of investment advisers that Congress sought to end." (text at nn.155-56)).

[3] Section 15(i)(1) of the Securities Exchange Act of 1934 precludes a State from enacting regulations relating to the making and keeping of records "that differ from, or are in addition to, the requirements in those areas established under [the Exchange Act]" (emphasis added). 15 U.S.C. §78o(i)(1). In addition, under the Exchange Act, Rule 17(a)-4 requires BDs to keep a record of "all communications … by the member … relating to its business as such…." 17 CFR §§ 240.17a-4(b)(4).

4. Institutional Investors and Sophisticated Governmental Entities Should Be Expressly Excluded. The draft regulations make no distinction between natural persons, institutional investors, and certain sophisticated governmental entities despite the foundational differences between these groups – including but not limited to their varying needs and levels of sophistication. We believe the clear intent of the new law was to protect retail investors and therefore respectfully request that the Division explicitly state that the fiduciary duty applies for the benefit and protection of "retail investors" as defined by FINRA rules.[4]

5. Annuities Are Properly Excluded from the Regulation. Section 4 defines "investment advice" that would be subject to the proposed fiduciary standard. Subsection (1)(l) applies the proposed fiduciary rule to those "providing advice or a recommendation regarding an insurance product or an investment by comparison to a security, or that includes the buy, sale, or hold of a security." The Nevada securities code excludes all fixed insurance products from the definition of the term "security."[5] The proposed regulation does not change that important provision. The Nevada insurance code grants the insurance commissioner exclusive authority to regulate the issuance and sale of variable products.[6] The proposed regulation does not alter this calculus either. The proposed regulation, therefore, does not, subject traditional recommendations about insurance products to a fiduciary duty. As such, we interpret Subsection (1)(l) to mean that advice or a recommendation regarding an insurance product will be "investment advice" only if: (i) the insurance product is recommended by comparison to a security; or (ii) the advice or recommendation relating to an insurance product includes advice or a recommendation to buy, sell, or hold a security.

   When the legislature enacted SB 383 into law, it left intact the exclusion for insurance producers from the definition of financial planner. This demonstrates legislative recognition that recommendations by insurance producers about insurance products are outside the scope of rulemaking granted the securities administrator in Chapters 90 and 628A of the Nevada Revised Statutes concerning fiduciary matters.

   Further, life insurance companies and their associated persons currently comply with a comprehensive array of regulation administered by state insurance departments, the SEC, the

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[4] FINRA Rule 2210(a)(6) defines a "retail investor" as "any person other than an institutional investor." An "institutional investor," in turn is defined in Rule 2210(a)(4) to include, among others, any "institutional account." The term "institutional account" is defined in Rule 4512(c) as "the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million."

[5] *See* NRS 90.295, which expressly defines "security" to exclude "an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in lump sum or periodically for life or some other specified period."

[6] The U.S. Supreme Court determined that variable annuities have both insurance characteristics that are subject to state insurance regulation and securities characteristics that are subject to Federal securities regulation. (See, SEC v. Variable Annuity Life Insurance Company, 359 U.S. 65 (1959) We also encourage review of NRS 688A.390(4) which states that, "Notwithstanding any other provision of law, the [Insurance] Commissioner has sole authority to regulate the issuance and sale of variable contracts, and to issue such reasonable rules and regulations as may be appropriate […]"

Department of Labor, FINRA and various state securities divisions and departments. Quite simply, the insurance industry distribution and sales process is one of the most heavily regulated of the financial services available in the marketplace today. It is important for Nevada regulators to carefully consider the extensive regulatory framework governing fixed and variable annuities to avoid redundant and potentially conflicting standards. [7] Collectively, this body of laws provides significant consumer protection. Additional layering of regulation thwarts effective, efficient regulation.

6. The Regulations Should Limit the Law's Scope to Customers with Nevada Domiciles. The regulations should expressly state that the law applies to retail customers who reside in Nevada. BDs or IAs who operate in Nevada should not owe these additional fiduciary duties to out-of-state clients.

7. The Regulations Should Not Impose an Ongoing Fiduciary Duty on Broker-Dealers and Their Agents. Both the FINRA suitability rule and Reg BI limit the duration of the suitability or best interest obligation to that point in time when the recommendation is made. The draft regulations would, in most instances, create an ongoing fiduciary duty which would, among other things, require monitoring the performance of customer accounts. While the drafts regulations do contain an episodic exemption, the overly broad definition of investment advice and the exclusion for representatives that use certain words in their title mean that the exemption will seldom if ever be used.

8. The Exemptions to the Fiduciary Duty Standard Are Too Narrow. While we appreciate that there are exemptions to the fiduciary duty standard, the exemptions seem to be overtaken by the exceptions. For example, the exemption is not available to the many representatives who use "adviser" or other terms in their title. Moreover, because all BDs have contractual relationships with their clients, they will not be able to claim the unsolicited transaction exemption.

9. The Breach of Fiduciary Duty List is Overly Broad. Section 8 provides a detailed list of when a fiduciary duty is breached. We believe the list should be substantially narrowed. For example, a breach occurs if the representative violates a FINRA rule or fails to disclose "all information regarding a potential conflict of interest" without regard to materiality. The unlettered catch-all phrase beginning with "This list is not all inclusive" is also problematic as it is does not give fair notice of what constitutes a breach under the new standard.

10. Final Regulations Should Include a Reasonable Implementation Period and Effective Date. It will take substantial time for firms to develop infrastructure, policies and procedures and training programs for any new regulations. We respectfully suggest an implementation period of at least 18 months, with an initial effective date thereafter.

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[7] A detailed discussion on the comprehensive scope of regulations governing fixed and variable annuities appears in the appendix to ACLI's submission on the 2015 DOL Conflicts of Interest Rule, beginning at page 58. *See* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00621.pdf. *See also* Wilkerson, *Regulatory Retrospective: A Refresher on Selected Federal Securities Law Standards Governing Broker-Dealers and Investment Advisers Distributing Insurance Products While the Courts and the Trump Administration Sort Out the Status of the Department of Labor's Fiduciary Rule*, Association of Life Insurance Counsel Annual Meeting, (April 28, 2017), http://c.ymcdn.com/sites/www.alic.cc/resource/collection/AEED83CB-8E2F-43C8-9E7A-8A5138B2BD73/5.1.17%20DOL%20Update%20-%20Wilkerson.pdf.

The above represents what we believe to be some key problems with the draft regulations. We appreciate the opportunity to provide input, and we thank you for your time and consideration.

Sincerely,

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