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March 1, 2019

Via email to dfoley@sos.nv.gov
Ms. Diana Foley
Nevada Secretary of State Office
Securities Division
2250 Las Vegas Boulevard North
Suite 400
North Las Vegas, NV 89030

RE: Comment on Draft Regulations to be added to Chapter 90 of the Nevada Administrative Code– Fiduciary Duty Regulations

Dear Ms. Foley:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules which govern the conduct of those who provide advice to investors.

On January 19, 2019, the Office of the Secretary of State, Securities Division ("the Division"), issued proposed Draft Regulations to be added to Chapter 90 of the Nevada Administrative Code pertaining to laws set forth in Nevada Revised Statutes ("NRS") Chapters 90 and 628A (the "Draft Regulations"). The Draft Regulations were promulgated pursuant to Nevada Senate Bill 383 (79th Session 2017) ("SB 383"), which amended NRS Chapter 628A to impose a fiduciary duty on broker-dealers, sales representatives and investment advisers, and authorized the Division to adopt regulations defining the acts, practices or courses of business that constitute violations of that duty.

PIABA has long advocated for a true fiduciary standard for brokers who provide investment advice to their clients and therefore fully supports the implementation of the Draft Regulations, with minor modifications, suggested below. Consistent with numerous studies, including the Securities and Exchange Commission's findings in 2011, we believe that a uniform fiduciary duty applicable to all financial intermediaries who

provide investment advice would eliminate confusion and best protect investors.[1] We also believe that the fiduciary duty should: 1) arise whenever a financial or investment recommendation is made, 2) apply to all forms of financial advice, and to all customers; and 3) last throughout the duration of the advisor-customer relationship. The Division's proposed Draft Regulations provide many of these protections.

I. The Draft Regulations Substantially Implement the Purpose of SB 383 to Impose and Enforce a Fiduciary Duty on Broker-Dealers and Their Sales Representatives as well as Investment Advisers

A. PIABA Supports the Draft Regulations' Provision of a Uniform Fiduciary Duty for All Customers

The Draft Regulations implement SB 383 to the extent it imposes a uniform fiduciary duty among broker-dealers and their sales representatives as well as investment advisers. A statewide uniform fiduciary standard will provide substantial protections for Nevada investors. As the Staff of the Securities and Exchange Commission concluded after conducting a study of this issue required under the Dodd-Frank Act: "it is important that retail investors be protected uniformly when receiving personalized investment advice or recommendations about securities regardless of whether they choose to work with an investment adviser or brokerage firm. It is also important that the personalized securities advice to retail investors be given in their best interests, without regard to the financial or other interest of the financial professional, in accordance with a fiduciary standard."[2]

The importance of a fiduciary standard is borne out by the fact that most retail customers do not understand the differences between investment advisers, who are subject to a fiduciary standard under federal law, and brokerage firms, who are not. In fact, most retail investors think that their individual financial advisor is a fiduciary – regardless of whether that person is a representative of a brokerage firm or an investment advisory firm.[3] The industry is well aware of this confusion. In a survey open to all brokers,

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[1] SEC, *Study on Investment Advisers and Broker-Dealers* ("SEC Study") (Jan. 2011), available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf. The SEC reviewed two studies which it sponsored (the "Seigel & Gale Study" and the "RAND Report"), and a study conducted by Consumer Federation of America. The SEC Study found that, based on the comments, studies and surveys it had reviewed, investors did not understand the differences between investment advisers and broker-dealers. The SEC determined that this misunderstanding is compounded by the fact that many retail investors may not have the "sophistication, information, or access needed to represent themselves effectively in today's market and to pursue their financial goals." *Id.* at 101.

[2] SEC, *Study on Investment Advisers and Broker-Dealers* ("SEC Study") (Jan. 2011), available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf. The SEC reviewed two studies which it sponsored (the "Seigel & Gale Study" and the "RAND Report"), and a study conducted by Consumer Federation of America. The SEC Study found that, based on the comments, studies and surveys it had reviewed, investors did not understand the differences between investment advisers and broker-dealers. The SEC determined that this misunderstanding is compounded by the fact that many retail investors may not have the "sophistication, information, or access needed to represent themselves effectively in today's market and to pursue their financial goals." *Id.* at 101.

[3] *See* Spectrum Group, Fiduciary – *Do Investors Know What it Means* (2015), available at http://spectrum.com/Content_Whitepaper/fiduciary.aspx.

investment advisers, and insurance consultants and producers, 97 percent of them said: "investors don't understand the differences between brokers and investment advisers."[4]

Much of this confusion is caused by the financial industry itself. Brokers spend exorbitant amounts on advertising telling investors that they put the interests of customers ahead of their own. Brokers encourage investors to trust them, saying they will provide *advice* and *guidance*. One leading brokerage firm emphasizes the advice and guidance it provides:

> Advice that's all about you and what you need is what UBS does best. It starts with a plan that we develop together—as part of a strategy for managing your wealth and pursuing your personal goals for every part of your life, at every stage of your life. It's what we call: Advice. Beyond investing.[5]

Charles Schwab tells investors, "Let us help plan your financial future."[6] Merrill Lynch says, "Your advisor will help guide you, making adjustments as your needs change."[7] Brokers use the language of fiduciaries to gain the trust and confidence of customers, yet then claim not to have a fiduciary obligation when one is breached.[8]

We further support the Division's application of the Draft Regulations to protect all investors, regardless of their wealth, sophistication or status as an individual or a legal entity. Brokers frequently disclaim any fiduciary duties to pension funds and institutional investors. However, pension funds and institutional investors manage pools of capital which hold the retirement savings for millions of individuals.[9] The individual beneficiaries of pension funds and institutions are often unsophisticated people of modest means who have minimal outside assets and no control over how their retirement assets are managed. As

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[4] *See* fi360-ThinkAdvisor, *Trustworthy Advice and Individual Investors: Will Regulators Act in Investors' Best Interest?* (Aug. 2013), available at http://www.fi360.com/uploads/media/fiduciarysurvey_resultsreport_2013.pdf; *see also* fi360-ThinkAdvisor, Seeking Trustworthy Advice for Institutional Investors – Financial Intermediaries Indicate Strong Support for Fiduciary Standard (Feb. 2015), available at http://www.fi360.com/uploads/media/2015fiduciarysurvey.pdf.

[5] UBS, *Wealth Planning*, available at https://www.ubs.com/us/en/wealth/planning.html (last visited Nov. 23, 2018) ("UBS Wealth Planning").

[6] Charles Schwab, *Investing Based on Your Goals*, available at https://www.schwab.com/public/schwab/investing/invest.html (last visited Nov. 11, 2018) ("Schwab Investing Based on Your Goals").

[7] Merrill Lynch, *Working with Us*, available at https://www.ml.com/working-with-merrill-lynchfinancial-advisor.html (last visited Nov. 11, 2018).

[8] *See* PIABA, *Major Investor Losses due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty; Misleading Ads Fuel Confusion, Underscore Need for Fiduciary Standard* (Mar. 25, 2015) (the "PIABA Study"), available at https://piaba.org/system/files/pdfs/PIABA%20Conflicted%20Advice%20Report.pdf.

[9] Tamar Frankel, *The Regulation of Brokers, Dealers, Advisers and Financial Planners*, 30 Rev. Banking & Fin. L. 123, 129-30 (2011). Professor Frankel also observes that institutional investors are "not much better off than individuals with respect to understanding some complex investments." *Id*. at 130.

such, a broker who misleads a pension fund or institutional investor can do substantial damage, without the impacted individuals ever knowing or having control over what was done.[10]

Additionally, brokerage firms regularly disclaim their duties to customers whose retirement accounts or income may qualify them as "accredited investors" under federal securities laws. An "accredited investor" is a natural person with assets worth more than one million dollars.[11] Many retirees, having saved their entire lives or purchased property that has substantially appreciated in value over time, meet the financial definition of accredited investor. However, those retirees often have only a limited understanding of investments and do not have the sophistication to evaluate the types of investments sold to individuals meeting the accredited status. Moreover, those retirees are often not able to recover if they suffer significant losses from risky investments. Simply put, all customers deserve investment advice that is in their best interests, as the Draft Regulations provide.

B. PIABA Supports the Draft Regulations' Exclusion of Dually Registered Firms and Individuals From the "Episodic Fiduciary Duty Exemption"

We further support the Draft Regulations to the extent that they exclude dually registered financial professionals (broker-dealers who are also registered as investment advisers) from the "episodic fiduciary duty exemption" under Section 2. Under that exemption, brokers are exempted from an ongoing fiduciary obligation, unless the broker is also a registered investment adviser. Holding dually registered firms and financial professionals to a uniform higher fiduciary standard at all times is appropriate. Customers of dually registered firms often open "brokerage" accounts and "investment advisory" accounts with the same person at the same time. The customers are typically given a sheaf of paperwork, much of it in small print, in which the firm attempts to disclaim its duties for brokerage accounts. Customers rarely read these materials. They do not understand that their financial advisor may claim that the fiduciary duty he owes to the customer only covers the investment advisory account, and nothing else. Neither the firm, nor the financial professional, should be allowed to "switch hats" depending on the particular account or transaction they are handling for the investor. We therefore believe it is essential that the Final Rule maintain the exclusion from the episodic fiduciary duty exemption for dually registered financial professionals.

C. PIABA Supports Imposing a Fiduciary Duty for All Forms of Financial and Investment Advice

PIABA supports the Draft Regulations' application of a fiduciary standard to financial and investment advice regardless of the type of advice, type of account, or manner in which the broker is compensated. There is no reason why a broker's duty should be any less to a customer who pays commissions than it is to a

[10] *Id*. at 130.

[11] Rule 501 under Regulation D defines accredited investor as "[a]ny natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000" (excluding primary residence), or whose income exceeds $200,000 per year, or joint income with that person's spouse exceeds $300,000 per year. 17 C.F.R. §230.501 (a)(5) and (a)(6).

customer who pays an account management fee. In either scenario, the customer is reasonably trusting and relying upon the broker's advice.

Similarly, the broker's duty should not depend on the type of brokerage account that is opened. Brokers often argue that there can be no fiduciary duty unless the broker has discretion to trade the customer's account without prior approval. That is not consistent with the common law of fiduciary relationships. The reality of the marketplace is that the vast majority of customers trust, rely upon, and follow their broker's advice. Indeed, that is the very reason customers come to a financial advisor – to get expert, trustworthy investment advice.

PIABA further supports the application of a fiduciary standard to any brokerage firm or representative who uses the titles of advisor, adviser, financial planner, financial consultant, retirement consultant, retirement planner, wealth manager, or counselor as well as any term of a similar nature. Brokerage firms frequently cloak their representatives with titles like these because they suggest the individuals are trustworthy and/or fiduciaries. However, in disputes with customers, those same firms routinely claim that their representatives with fiduciary-sounding titles are merely salespeople.[12] Imposing a fiduciary duty simply requires brokerage firms to fulfill the reasonable expectations of customers created by advertising and fiduciary-sounding titles such brokers often hold.

D. PIABA Supports Imposing a Fiduciary Duty As to Recommendations to Purchase Insurance Products When Made by Brokers and/or Investment Advisers

PIABA supports the application of a fiduciary standard to the sale of insurance products, such as fixed (equity) indexed annuities. Many brokerage firm representatives, who are also licensed insurance salesmen, sell fixed indexed annuities to customers. Such products are being sold for investment purposes, not for insurance benefits. Yet, sellers of those insurance-like products are not required to put a customer's interest ahead of their own. A customer sitting with a brokerage firm representative may not understand – and often does not read – the language in fixed indexed annuity applications and contracts. Often customers are misled to believe that the products are market investments. The express inclusion of advice or recommendations regarding insurance products into the Final Rule will protect customers from brokerage firm representatives and investment advisers who use insurance products to gouge customers.

E. PIABA Supports the Presumption of Fiduciary Duty

PIABA strongly supports the language in Section 9 of the Draft Regulations, which creates a presumption that a brokerage firm has a fiduciary duty to his or her client. Section 9 also places the burden of proving, in an arbitration, civil or administrative hearing, that an exemption to the fiduciary duty exists upon the brokerage firm. Such presumptions will provide critical protection for Nevada investors.

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[12] *See* Consumer Federation of America and Americans for Financial Reform, *Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways* (January 18, 2017), available at https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf.

Under many state laws, the burden is on the customer to prove that the brokerage firm owed the client a fiduciary duty. In order to satisfy that burden of proof, customers generally have to introduce expert testimony that the broker was acting as a fiduciary. Brokerage firms may rebut the testimony with testimony of their own employees – rather than expert testimony. That is not an option for a customer who is not employed in the brokerage industry.

By shifting the burden of proof to the brokerage firm, a customer would be relieved of the need to establish a fiduciary duty through expert testimony. If a brokerage firm denies it was a fiduciary, the brokerage firm would have the burden of proof. The brokerage firm could call an expert or seek to meet its burden through testimony of its own employees. A customer could choose to call an expert to testify or could simply cross examine the broker witnesses.

PIABA also supports the proposed rule's presumption that an investment adviser that is also a brokerage firm is acting in its investment advisory capacity. As discussed above, dually-registered firms and individuals frequently argue that the conduct that caused the customer's losses was undertaken in a non-fiduciary capacity – as a brokerage firm. Establishing a fiduciary duty for brokers will save customers the time and expense of litigating this issue.

II. PIABA's Proposed Modifications to the Draft Regulations Will Further Strengthen Investor Protection

As discussed above, PIABA strongly supports the approach and language of the Draft Regulations. There are a few suggestions we wish to propose which PIABA believes are consistent with the Draft Regulations and will provide important protections to investors.

A. The Final Rule Should Add Certain Types of Financial Recommendations to the Definition of "Investment Advice"

PIABA supports the Division's approach to define "investment advice." Section 4 of the Draft Regulations describes a wide range of conduct and advice commonly provided by brokerage firms and their sales representatives, and investment advisers, to investors. There are, however, several critically important areas of investment advice regularly provided by these financial professionals that were not included in the definition. These include: (1) advising a client to roll over a defined contribution plan (such as a 401(k)) into a newly opened IRA at the broker's firm; (2) advising a client to take a lump cash payment in lieu of a pension plan; (3) advising a client to take an early retirement; (4) and advising a client to open a brokerage or advisory account with the firm. These recommendations are necessary precursors to a broker taking control of assets, which can then be invested through the broker's firm. These recommendations can, and often do, have devastating consequences for investors.

Many older investors seek investment advice when considering when to retire and whether to take a lump sum payment in lieu of a defined benefit pension. These investors place themselves in what they believe are the capable and trustworthy hands of a financial expert. The business of older investors is valuable, so brokers may provide this kind of advice free of charge in order to get the investor's business. When a broker

recommends to an investor that they retire early and/or elect a lump sum payment in lieu of a defined benefit pension, the investor believes that the broker is putting their interests ahead of his own. That is often not the case. An investor could suffer devastating losses that they will never be able to recover by retiring too early, and/or by cashing out a defined benefit pension, as well as from investing in high-fee and high-risk investment products.

Our members have handled cases which involved recommendations to take early retirement, cash in a defined benefit plan, and invest those funds into high cost, complex variable annuities. By cashing out the defined benefit, the pensioner/investor forever loses a secure benefit that would have provided a guaranteed lifetime income.

For example, in the late 1990's and early 2000s, broker "SK", who was a registered representative but not an investment adviser, gave "retirement planning" seminars onsite at Pacific Bell offices throughout Northern California for Pacific Bell retirees who had been offered early retirement packages. At these seminars and in one-on-one meetings which followed the seminars, SK advised the prospective retirees to take the early retirement packages, elect a lump sum payout in lieu of a pension, and invest the lump sums through the brokerage firm with whom she was affiliated. SK told the prospective retirees that her investment prowess would produce an income stream that was larger than their pensions, but just as safe, while also allowing them to leave an inheritance for their loved ones. SK then recommended to the early retirees that they invest those lump sums into variable annuities, and earned substantial commissions from those sales. SK did not disclose the amount of commissions she received. In a published case in 2015, the California Court of Appeals, First Appellate District, held that the same fiduciary standard[13] which governed investment recommendations also applied to SK's advice to take early retirement and elect the lump sum because such advice constituted personalized financial advice about retirement planning.[14] There is no question that similar conduct could take place in Nevada.

In short, it is important to recognize that certain financial recommendations, including recommendations to take early retirement, elect a lump sum in lieu of a pension, roll over a 401(k), and/or open brokerage accounts with the firm, although not recommendations to buy specific securities, are necessary precursors to a broker or adviser obtaining control of assets. As such, those recommendations should trigger the same fiduciary duties as the specific securities recommendations which inevitably follow.

It is equally essential to recognize that brokers do not merely pick investments or devise investment strategies. On the contrary, brokers often purport to offer retirement planning advice and/or a wide spectrum of financial advice and services. This is borne out by firm advertising. In a study conducted by PIABA in 2015, PIABA examined the websites of nine different brokerage firms, including Allstate, UBS,

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[13] In California, brokers and broker-dealers are fiduciaries, although the scope of the fiduciary duty varies depending upon the facts. (*Ashburn v. AIG Financial Advisors, Inc.,* 234 Cal. App.4th 79, 100-101(2015); *Brown v. Wells Fargo Bank, N.A.,* 168 Cal. App.4th 938, 959-961 (2008); *Duffy v. Cavalier*, 215 Cal. App.3d 1517, 1539-1540 (1989); *Hobbs v. Bateman Eichler, Hill Richards, Inc.,* 164 Cal. App.3d 174, 201 (1985); *Twomey v. Mitchum, Jones, & Templeton, Inc.,* 262 Cal. App.2d 690, 698, 708-710, 720-722 (1968).

[14] *Ashburn v. AIG Financial Advisors, Inc.,* 234 Cal. App.4th 79, 100-101 (2015).

Morgan Stanley, Berthel Fisher, Ameriprise, Merrill Lynch, Fidelity, Wells Fargo, and Charles Schwab. PIABA found that the firms' advertising presents the image that the firms are doing far more than simply recommending a specific investment or investment strategy.[15] The following examples are illustrative.

Ameriprise:

Personalized advice and recommendations on an ongoing basis

Perhaps the best thing about working with a personal financial advisor is that your financial plan is custom made for you. The financial advisor you choose to work with knows all about you. When and if you experience a life change, your priorities shift or you have a pressing financial question, you can contact your advisor for information and financial advice that's meaningful to you. You may meet a few times during a year and have several discussions. Your advisor will make every effort to be available to you when needed.[16]

Wells Fargo:

The center of the Wells Fargo homepage features the statement: "Helping Clients Succeed Financially. We provide advice and guidance to help maximize all elements of your financial life, whenever and however you need it." A prospective client who clicks on the "Why Invest With Us" tab will find the following statement under the "Our Advisors" heading: "A Financial Advisor can provide the advice and guidance you need to focus on your short- and long-term goals while navigating life's financial opportunities and turning points. Start planning now for the future. Choose a Financial Advisor from the firm that lives and breathes a client-centered approach to advice."[17]

Charles Schwab:

The homepage of the firm's website features the question: "How will you help me with my financial goals?" The answer, in big, bold font: "A Schwab Financial Consultant can help you create a plan tailored to your needs." It continues: "It starts with a conversation and a fresh perspective, discussing your long- and short-term goals. We evaluate your current investments then create specific recommendations." The website describes the benefits of meeting with a financial consultant this way: "Your Financial Consultant can work with you to create a holistic plan with specific investment recommendations and a clear explanation of the benefits and risks….Your plan will reflect your priorities, from retirement income and estate planning to insurance and debt management. And you can meet regularly to keep your plan up to date as your life evolves.[18]

Given the foregoing, we believe that the definition of "investment advice" should be modified to include the following: (1) advising a client to roll over a defined contribution plan (such as a 401(k)) into a newly opened IRA at the broker's firm; (2) advising a client to take a lump cash payment in lieu of a pension plan;

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[15] *See* PIABA Study, *supra* n. 8.

[16] *Id.* at 11.

[17] *Id.*

[18] *Id.* at 7.

(3) advising a client to take an early retirement; and (4) advising a client to open a brokerage or advisory account with the firm.

B. The Final Rule Should Include a Definition of "Fiduciary Duty"

PIABA supports the language in Section 8 of the Draft Regulations, which set out specific instances of conduct that would constitute a breach of fiduciary duty, while not limiting the rule to those listed instances. Specifying examples of the type of conduct that constitutes a breach of fiduciary duty will assist arbitrators or other adjudicators in reaching decisions in many cases. For example, the Draft Regulations expressly provide that violations of applicable FINRA and other self-regulatory organization rules, charging unreasonable fees, and putting the firm's interests ahead of the customer's interest are all a breach of fiduciary duty. Arbitrators often see evidence of this type of misconduct in cases.

However, we believe that the Final Rule should also include a specific definition of "fiduciary duty." While Section 1 imposes a fiduciary duty on all broker-dealers, sales representatives and investment advisers providing investment advice, the term "fiduciary duty" is not expressly defined in the Draft Regulations. Instead, Section 1 of the Draft Regulation references new NRS Chapter 90.575 and 628A.020. However, neither of the referenced Chapters actually defines "fiduciary duty." NRS Chapter 90.575 provides the specific prohibition that the broker "shall not violate the fiduciary duty toward a client imposed by NRS 628A.020." That section, in turn, sets forth the "Duties of a Financial Planner," which states:

> A financial planner has the duty of a fiduciary toward a client. A financial planner shall disclose to a client, at the time advice is given, any gain the financial planner may receive, such as profit or commission, if the advice is followed. A financial planner shall make diligent inquiry of each client to ascertain initially, and keep currently informed concerning, the client's financial circumstances and obligations and the client's present and anticipated obligations to and goals for his or her family.

NRS 628A.020.

Although the duties set forth in this section are important, there is no language requiring the duties typically associated with that of a fiduciary, specifically, the duty of care and the duty of loyalty. The Nevada Supreme Court adopted the general definition of a fiduciary under the Restatement (Second) of Torts, which provides that a "fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."[19] In the context of providing financial advice, former Nevada state Senator and current Nevada Attorney General Aaron Ford, explained that financial professionals "should put their clients' needs before their own."[20] These concepts are not expressly reflected in NRS 628A.020.

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[19] *See Stalk v. Mushkin*, 199 P. 3d 838, 843 (Nev. 2009)(*quoting* Restatement (Second) of Torts § 874 cmt. a (1979)).

[20] R. Steyer, *Expanded Fiduciary Law in Nevada Could Have Wider Impact*, Pensions & Investments (Sept. 18, 2017), available at: https://www.pionline.com/article/20170918/PRINT/170919850/expanded-fiduciary-law-in-nevada-could-have-wider-impact.

PIABA is also concerned that NRS 628A.020 relies primarily on a disclosure obligation. The concern is that a brokerage firm will argue that it did not violate any fiduciary duty because it provided the investor with a detailed disclosures of fees and costs. However, there are numerous studies showing that lack of financial literacy and cognitive biases, among other factors, greatly diminish the effectiveness of written disclosures.[21] Retail customers often receive voluminous written materials when making a securities transaction, including account opening documents, prospectuses, and contracts. The volume of paperwork is equivalent to the documentation one receives when closing a real estate transaction. The experiences of our members and their clients reflect that retail investors frequently become overwhelmed by the information and will simply rely on what their broker tells them. In such cases, the disclosure is no longer a resource for the investor, but instead, a basis to excuse the brokerage firm's misconduct.

The recently released RAND Corporation report on investor testing of the Securities and Exchange Commission's proposed Client Relationship Summary under its proposed Regulation Best Interest ("RAND report"),[22] provides compelling evidence which reinforces PIABA'S concerns about the efficacy and limits of disclosure. The RAND report confirms previous surveys and studies that show investors (even those with some investment experience) do not have a meaningful understanding of the differences between brokerage and advisory accounts, or the differences between the standards governing investment advice. Importantly, the RAND report also illustrates that written disclosure is largely ineffective in helping retail investors understand these differences. The written responses to specific questions about the disclosures reveal that a significant number of participants did not understand important sections of the form, and still had a general misunderstanding of the different standards governing investment accounts and financial professionals. The responses were even higher for the "Fees and Costs" and "Conflicts of Interest" sections, with approximately 35 percent of respondents describing these sections as "difficult" or "very difficult" to understand. The RAND report also reflects that many of the participants were unable to synthesize and apply the information.[23]

Given the legislature's intent to apply a true fiduciary duty on brokerage firms and sales representatives, equivalent to that held by investment advisers under the law, the Division should include a definition of the term that reflects the essential duties of care and loyalty:

***Duty of Care*:** The duty of care should require brokers to act with the care, skill, prudence and diligence, under the circumstances then prevailing, that a reasonably prudent person acting in a like capacity would use in connection with providing investment advice, based on the investment objectives, risk tolerance, financial circumstances, and needs of the investor, without regard to the financial or other interests of the broker. This duty would require the investment advice to not only be suitable, but to also be the best

[21] PIABA August 11, 2017 Comment Letter to Chairman Clayton's Request for Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers, at 18- 19 (citations omitted).

[22] Angela A. Hung, et al., Investor Testing of Form CRS Relationship Summary, Prepared for United States Securities and Exchange Commission, RAND Corporation, November 2018, https://www.sec.gov/comments/s7-07-18/s70718-4628415-176399.pdf.

[23] *Id.* at 47-48.

possible advice given the circumstances. Investment costs must be a factor in determining what investment is best for a client, as well as investment objectives, risk and liquidity. This standard is similar to the fiduciary standard which was enacted by the Department of Labor in 2016 with respect to retirement accounts, after several years of study.

***Duty of Loyalty*:** The duty of loyalty should require the mitigation or elimination of conflicts of interest. Incentives which encourage brokers to engage in conduct that they would not otherwise engage in should be prohibited. Brokers should not be paid differential compensation that is dependent on the product recommended. Commissions should be leveled so that the incentive to recommend one product over another is eliminated. This will ensure that a broker considers the needs of his clients, rather that his own pecuniary interest. In addition, sales contests should be eliminated because they encourage brokers to put their own interests ahead of their clients'.

C. The Final Rule Should Clarify that Harmed Investors Have a Private Right of Action

The Draft Regulations do not explicitly include a private right of action for investors who have suffered losses resulting from their broker's violation of his or her fiduciary obligation. A fair reading of SB 383 supports the conclusion that an investor may bring an action against brokers who have violated their fiduciary duty. Specifically, by amending NRS 628A.010 to include broker-dealers and sales representatives within the definition of "financial planner," an aggrieved investor could arguably bring a civil action pursuant to NRS 628A.030, *Liability of Financial Planner*. That section provides: "[i]f loss results from following a financial planner's advice under any of the circumstances listed in susbsection 2 [Duties of a Financial Planner], the client may recover from the financial planner in a civil action the amount of economic loss and all costs of litigation and attorney' fees."

However, given the breadth of the Draft Regulations, including a list of the conduct that constitutes "investment advice" (in Section 4) and conduct that constitutes a breach of the fiduciary duty (in Section 8), the Division should include in any final regulation express language providing for a private right of action for violation of standards set by the new regulations. There are several important reasons why an express provision within the new regulations would better protect investors.

First, allowing for a private right of action is consistent with the overarching goal of state and federal securities laws and regulations --which is to protect the investing public. A private right of action would provide firms with a strong incentive to adopt and implement policies and procedures to ensure that financial professionals are adhering to a fiduciary duty and to carefully police conflicts of interest.

Additionally, a private right of action is also consistent with the enabling statute. Section 1.7 of SB 383 amended NRS Chapter 90 to provide the Division with authority to "prescribe means reasonably designed to prevent broker-dealers, sales representatives . . . from engaging in acts, practices and courses of business defined as a violation of such fiduciary duty." *See also* SB 383, Legislative Counsel's Digest (Section 1.7 of the bill authorized the Division to "adopt regulations . . . prescribing means to prevent violations of that fiduciary duty"). Private actions can and regularly do supplement the state and federal agencies' public

enforcement efforts, including in States which hold brokers to a fiduciary standard.[24] Similarly here, a private right of action can serve as a powerful tool to encourage compliance with the new rules and, when violated, supplement the state's enforcement efforts.[25]

Finally, a fiduciary relationship is that of the highest trust and confidence as between a financial advisor and an investor. Whenever that trust is broken, investors should have their own ability to pursue a private right of action in order to prevent the fiduciary standard from becoming meaningless.

PIABA strongly believes that the Division should clearly provide for a private right of action, so that investors can take action against brokers who violate the new regulations on their own behalf.

Conclusion

PIABA supports the Bureau's efforts to heighten the duty of brokers who provide investment advice to their customers. PIABA urges the Bureau to adopt a broad, uniform fiduciary standard applicable to all financial professionals who provide investment advice to investors. PIABA thanks the Bureau for the opportunity to comment on this important issue.

Very truly yours,

Christine Lazaro
PIABA President

[24] *See* Richard B. Stewart and Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1214 (1982).

[25] Private remedies are a necessary adjunct to the basic legal structure of the securities laws. Customers may bring an action under Sections 11 (civil liability for false registration statement) and 12 (civil liability for false statements in prospectuses and communications) of the Securities Act of 1933, 15 U.S.C. §§ 77k and 77l, respectively; and under Sections 21D (private securities litigation), 21F (securities whistleblower incentives and protection), and 29 (manipulative and deceptive devices) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u-4, 78u-6 and 78j, respectively. Additionally, investors can arbitrate a broad range of state, federal and regulatory securities violations under the rules promulgated by the FINRA if the underlying contract so provides or the customer demands it. FINRA Rule 10300 *et seq.* The final Nevada regulations should recognize these well-established means of protection for private investors.