



May 9, 2017

The Honorable Irene Bustamante Adams  
Chair, Assembly Committee on Commerce and Labor  
401 S. Carson St., Room 4108  
Carson City, NV 89701

**RE: SB 383 (Oppose) – Revises provisions governing financial planners.**

Dear Chair Bustamante Adams:

The Securities Industry and Financial Markets Association (SIFMA)<sup>1</sup> is a national trade association which brings together the shared interests of hundreds of broker-dealers, banks and asset managers, many of whom have a presence in Nevada. We are writing to express serious concerns regarding SB 383, which would remove the exemption for broker-dealers (B-Ds) and investment advisers (IAs) from the definition of “financial planner” in NRS 628A, thereby extending financial planner-specific duties and liabilities to already robustly-regulated B-Ds and IAs.

NRS 628A was enacted in the mid-1990’s to regulate unregulated individuals who held themselves out as financial planners. B-Ds and IAs and their agents were expressly excluded, as were lawyers and accountants. B-Ds and IAs were and remain heavily regulated by several federal and state agencies – including the Securities and Exchange Commission (“SEC”), the Financial Industry Regulatory Authority (“FINRA”), the Department of Labor (“DOL”), and the Nevada Secretary of State. This bill would undermine the original intent of NRS 628A and bring Nevada law into conflict with the robust web of federal regulation already in place.

Specifically, SB 383 would place three unnecessary, duplicative and confusing obligations on B-Ds. It would: 1) hold B-Ds and IAs to a new, redundant standard; 2) establish a new state court right of action against B-Ds; and 3) require B-Ds and IAs to maintain errors and omissions (“E&O”) insurance. We strongly urge you to consider the following issues as you review this bill.

**I. SB 383 would place a new, state-specific standard of action on B-Ds that is unnecessary and would create several problems under existing law.**

- Financial planners perform a different function than B-Ds and IAs. Financial planners structure detailed plans for clients that cover a wide range of topics, including investment management, cash flow management, insurance planning, retirement planning, tax planning, and estate planning. B-Ds and IAs have a substantially narrower focus. They have different functions and should be treated differently.

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<sup>1</sup> SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over \$2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over \$16 trillion in assets and managing more than \$62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA has offices in both New York and Washington, D.C. For more information, visit <http://www.sifma.org>.

- B-Ds and IAs are already required to act in their client's best interests. IAs are subject to a fiduciary duty under Section 206 of the Investment Advisers Act of 1940, as interpreted by the U.S. Supreme Court in *SEC v. Capital Gains Research Bureau*. While B-Ds are subject to suitability requirements, FINRA has made clear that, under that standard, B-Ds must act in their customer's best interests. SB 383 thus provides additional regulation without providing additional benefits.
- Duplicative regulation would create consumer confusion, legal conflicts and compliance challenges. If SB 383 is enacted, it is possible that B-Ds could have three or more fiduciary duties when dealing with the same client: a federal duty when discussing retirement accounts and both a FINRA standard and a state financial planner fiduciary duty standard when discussing non-retirement accounts. This is confusing to both the broker and the client.
- A uniform fiduciary standard is best achieved through the SEC. Under Section 913 of The Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress granted the SEC complete rule-making authority to establish a uniform fiduciary standard for B-Ds and IAs. That authority remains in effect and has not been withdrawn or modified. Explicit congressional intent is to create a uniform federal standard, and state-specific standards would conflict with that intent.
- State-specific fiduciary standards are not the answer. SIFMA has long supported a federal uniform fiduciary standard of conduct for B-Ds and IAs. State-specific standards would create significant expense and compliance burdens without providing additional benefit.
- States are preempted from imposing new recordkeeping requirements. 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 Securities and Exchange Act. SB 383 would likely require B-Ds and IAs to maintain new records to demonstrate compliance with the "financial planner" standards and thus could be pre-empted.

## **II. SB 383 would create a new right of action in state court that would conflict with the existing regulatory regime**

NRS 628A provides that, "[i]f loss results from following a financial planner's advice ... the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney's fees."

Expanding this provision to include B-Ds would be highly problematic, as virtually all B-D disputes with customers are contractually mandated to be resolved in FINRA's arbitration forum, as permitted by U.S. Supreme Court precedent and consistent with FINRA rules. The new proposed right of action would conflict with this existing regulatory regime.

**III. SB 383 would require B-Ds and IAs to maintain burdensome E&O insurance intended to cover a far broader range of activity than B-Ds and IAs engage in.**

Currently, NRS 628A requires financial planners to “maintain insurance covering liability for errors or omissions or a surety bond to compensate clients for losses actionable pursuant to this chapter, in an amount of \$1,000,000 or more.” However, this insurance is generally intended to cover a far broader range of activity than B-Ds and IAs engage in, and would unnecessarily subject them to new burdens and cost.

While many B-Ds and IAs do have this type of insurance, not all do. The SEC and FINRA, the primary regulators of B-Ds and IAs, have intentionally chosen to not require E&O insurance. In 2013-2014, FINRA studied the issue of whether it should require firms to purchase insurance specifically intended to cover their arbitration claims.

According to a FINRA spokeswoman, “We researched various types of coverage in this area and found that insurance underwriters didn’t necessarily want to cover ‘higher’ risk firms, precisely the ones about which we are most concerned. We found that if an underwriter was to cover those firms, and would spread the risk across all firms, the cost became prohibitively high.”<sup>2</sup> In fact, in recent years, it has been reported that E&O insurance costs and deductibles have skyrocketed, which would make the mandating of such insurance even more burdensome.<sup>3</sup>

For the above reasons, SIFMA urges you not to enact SB 383. We appreciate your willingness to consider this very important issue. If you have any questions, or if there is any further information we can provide, please contact me at 212-313-1311.

Sincerely,



Kimberly Chamberlain  
Managing Director & Associate General Counsel  
State Government Affairs

CC: Members, Assembly Committee on Commerce and Labor  
Senate Majority Leader Aaron D. Ford

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<sup>2</sup> “Finra Won’t Force Brokers to Insure Against Legal Awards,” FA Magazine, October 6, 2014. Available at: <http://www.fa-mag.com/news/finra-won-t-force-brokers-to-insure-against-legal-awards-19428.html>.

<sup>3</sup> “E&O Insurance: Cost and Deductibles Skyrocket,” ThinkAdvisor, August 30, 2013. Available at: [http://www.thinkadvisor.com/2013/08/30/eo-insurance-cost-and-deductibles-skyrocket?page\\_all=1&slreturn=1493740159](http://www.thinkadvisor.com/2013/08/30/eo-insurance-cost-and-deductibles-skyrocket?page_all=1&slreturn=1493740159).