sifma
Invested in America

May 26, 2017

The Honorable Brian Sandoval
Office of the Governor
State Capitol Building
101 N. Carson Street
Carson City, NV 89701

RE: SB 383 (Veto Request) – Revises provisions governing financial planners.

Dear Governor Sandoval:

The Securities Industry and Financial Markets Association (SIFMA)[1] 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 respectfully request that you veto SB 383, as amended, which would remove the exemption for broker-dealers (B-Ds), investment advisers (IAs) and sales representatives 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. Moreover, a new federal DOL fiduciary rule has a June 9th applicability date.

This bill would undermine the original intent of NRS 628A, create unnecessarily duplicative regulation and bring Nevada law into conflict with the robust web of federal regulation already in place. Specifically, it would hold B-Ds and IAs to yet another fiduciary standard that would be defined via rulemaking by the Securities Administrator. It would also create a new state court right of action that would conflict with the existing regulatory regime. 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

[1] 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.

planning, and estate planning. B-Ds and IAs have a substantially narrower focus. They have different functions and should be treated differently.

- 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 broker-dealers are bound by a suitability standard under FINRA Rule 2111, it is required that "[a] broker's recommendations […] be consistent with his customer's best interests, and he or she […] abstain from making recommendations that are inconsistent with the customer's financial situation."[2]

  FINRA has expanded on this requirement, stating that, "the suitability requirement that a broker make only those recommendations that are consistent with the customer's best interest prohibits a broker from placing his or her interests ahead of the customer's interest."[3] FINRA has also provided examples where advisors violated this requirement and were held accountable by the courts.[4] Given these requirements, SB 383 would place additional regulation on B-Ds without providing any additional benefit to consumers.

- Duplicative regulation would create consumer confusion, legal conflicts and compliance challenges. With DOL's new fiduciary rule taking effect on June 9th, it is possible that B-Ds could have three or more different best-interest standards when dealing with the same client: a FINRA best-interest standard, a state financial planner fiduciary duty standard, and a DOL federal fiduciary standard when discussing retirement accounts. Moreover, because of the specific rulemaking authority granted to the Administrator of the Securities Division, the state financial planner fiduciary duty for B-Ds and IAs could be different than the existing financial planner fiduciary duty standard under NRS 628A. These different standards are unnecessarily 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

---

[2] In the Matter of the Application of Dane S. Faber, Exchange Act Release No. 49216 (Feb. 10, 2004) (emphasis added).
[3] FINRA Regulatory Notice 12-25.
[4] Ibid. *See also* Belden, 56 S.E.C. at 504-05, 2003 SEC LEXIS 1154; Epstein, 2009 SEC LEXIS 217; Sathianathan, 2006 SEC LEXIS 2572; Howard, 55 S.E.C. at 1100, 2002 SEC LEXIS 1909; Curtis I. Wilson, 49 S.E.C. 1020, 1022, 1989 SEC LEXIS 25, 1989, aff'd, 902 F.2d 1580 (9th Cir. 1990); Stephen T. Rangen, 52 S.E.C. 1304, 1311, 1997 SEC LEXIS 762, at *19 (1997).

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.

For the above reasons, SIFMA urges you to veto 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,

Kim Chamberlain
Managing Director & Associate General Counsel
State Government Affairs