March 1, 2019

Ms. Diana Foley
Office of the Secretary of State
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:

This letter provides the comments of the National Association of Insurance and Financial Advisors-Nevada (NAIFA—Nevada) and the National Association of Insurance and Financial Advisors (NAIFA) on the draft fiduciary duty regulations referenced above (the Draft Regulations). NAIFA-Nevada members and their fellow NAIFA members in other states assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, retirement planning, multiline, and financial advising and investments.

Both NAIFA-Nevada and NAIFA participated in and are signatories to the joint trade associations comment letter recently submitted to you regarding the Draft Regulations. In addition to the comments and concerns addressed in that letter, NAIFA-Nevada and NAIFA herein provide the following additional comments:

1. Adoption of the Draft Regulations Would Harm Main Street Investors

The market most NAIFA Nevada and NAIFA members serve consists of small and mid-sized investors-- the average "Janes and Joes" also known as "Main Street America." This market is not served by most investment advisers, investment adviser representatives, or other financial services firms.

The likely result of the adoption of the strict fiduciary duty found in the Draft Regulations—along with the responsibilities and increased operating costs that would accompany such a duty—would be that many financial professionals would no longer serve clients with modest or moderate means. This would be one consequence of the movement by many firms from a commission-based business model to a fee-based model that goes hand-in-hand with the adoption of a strict fiduciary duty standard. The reason for this is that most fee-based firms have substantial minimum asset requirements for their clients—often $250,000, $500,000 or higher—which are beyond the means of most clients of NAIFA members.

The unintended consequences of the proposed fiduciary duty regulation would be reduced access to the products, advice and services which Nevadans rely upon for financial security and adequate retirement savings.

2. NAIFA-Nevada and NAIFA Recommend that Section 5 (4) of the Draft Regulations be Deleted.

This section would prohibit persons who use certain titles or descriptive terms from being eligible for the exemptions found in sections 5 (1-3) of the Draft Regulation or from qualifying for or relying on the Episodic Fiduciary Duty Exemption. NAIFA-Nevada and NAIFA urge the Securities Division to withdraw these proposed titling restrictions for broker-dealers and sales representatives.

Terms such as "advisor" and "adviser" are used throughout the financial services industry, and restricting the use of these words for a single segment of financial professionals will create an unfair bias against broker-dealers and their sales representatives.

Many financial professionals are recognized as and/or refer to themselves as "advisors/advisers". These words are used by professionals who offer advice on any number of financial topics, including: college funding, Social Security filing strategies, home ownership and other real estate decisions, risk management (e.g., long-term insurance products like life, disability, and long term care), tax and cash flow/management, estate planning, charitable giving, employee benefits elections, career/retirement decisions, and accounting. The effect of the proposed provision would be to restrict the use of "advisor/adviser" and the other titles specified in draft Section 5 (4) only by broker-dealers and their sales representatives, and not for any other financial professionals rendering any of these other types of financial advice.

Ultimately, restricting the use of "advisor/adviser" and other titles by broker-dealers and their sales representatives while those words are still broadly available to all other financial professionals will *not* lead to less consumer confusion. The words are simply too generic and widely used, and the restriction likely will lead to more consumer confusion in the broader financial services space, not less.

In a related manner, the ubiquitous use of the titles referenced in draft section 5 (4) in financial services also calls into question a fundamental premise underlying this section – that consumers somehow associate the use of the terms "advisor/adviser" with a particular type of licensing/registration or standard of care. In fact, such an association is highly unlikely, given the variety of financial professionals publicly marketing themselves in this way. It is far more likely, we believe, that consumers understand "advisor/adviser" to mean someone who – at a purely functional level – provides advice about financial issues, not necessarily specific to investments or to the specific securities laws under which he or she may be registered.

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We emphasize that the Division's jurisdiction is limited to securities-licensed professionals and therefore it cannot impose a more general prohibition on use of "advisor/adviser" and other titles upon the larger financial services space. The result, however, of imposing such a prohibition on broker-dealers and their sales representatives alone is to create consumer confusion and competitive advantages/disadvantages in the marketplace – a prospect we believe the Division wishes to avoid.

A significant percentage of financial professionals providing brokerage services currently use "advisor" or "adviser" in their title. These firms and professionals have long-standing relationships with their clients and established marketing and sales practices/materials, and adoption of this provision will negatively impact them vis-à-vis other professionals who do not have to comply with this provision. There also will be significant loss of brand value and recognition built up by these businesses. Simply put, regulation should not provide a competitive advantage – or impose a competitive *disadvantage* – for one market segment over another.

To the extent the Division feels more clarification is needed around titles using "advisor/adviser," such clarification would best be provided through clear disclosures that explain the individual's actual duties, obligations, and business arrangements, rather than a broad limitation that is tantamount to a prohibition on use of these generic words.

In the event the Division ultimately does finalize proposed Section 5 (4), we urge the Division to at least provide additional clarification regarding the ability of sales representatives to continue to use firm and trade association names that may include "advisor" or "adviser." For example, many NAIFA members include the NAIFA name (National Association of Insurance and Financial Advisors) and logo on their business cards, email signature blocks, etc., to show their affiliation with the organization. We request clarification that so long as an individual's name or title does not contain the terms specified in draft Section 5 (4), those individuals would not be subject to section 5 (4) simply due to their using the NAIFA name and logo on client communications.

3. <u>NAIFA-Nevada and NAIFA Request Clarification of the Scope of the Regulations</u>

The bill SB 383, from the 2017 legislative session, as passed and now codified at NRS 628A.010 specifically states:

"'Financial planner' means a person who for compensation advises others upon the investment of money or upon provision for income to be needed in the future, or who holds himself or herself out as qualified to perform either of these functions, ***<u>but does not include: …A producer of insurance licensed pursuant to chapter 683A</u>***

of NRS *…whose advice upon investment or provision of future income is incidental to the practice of his or her profession or business."* (emphasis added)

To the extent that the proposed regulation leaves any ambiguity as to the legislature's intent to exclude the described category from the application of this regulation, it would exceed legislative intent and could invalidate the regulation. We recommend that this exclusion be specifically incorporated into the proposed regulations.

In addition, in order to give clear direction as to what is "incidental", we have previously suggested that the Division articulate a comparable standard to what the legislature adopted for the modified business tax on financial institutions NRS 363.050(2)(d). We would suggest the following:

"If the revenue to the producer licensed under NRS 683A attributable to investment advice is less than 50% of his or her total revenue from activity under such license, it shall be deemed incidental."

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We appreciate your consideration of this letter and our comments; if you have any questions please contact James Wadhams at jwadhams@fclaw.com or Gary Sanders at gsanders@naifa.org .

Sincerely,

Donna Tatro Saarem
President, NAIFA-Nevada

Gary A. Sanders
Counsel and Vice President, Government Relations--NAIFA