A.1026 (Dinowitz)

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BILL

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SUBJECT

Broker Fiduciary Disclosure

DATE

May 26, 2021

OPPOSE

The Business Council opposes A.1026 (Dinowitz), which would mandate new disclosures by institutions and individuals that provide investment advice.

Under this legislation, investment advisors not currently subject to a fiduciary standard would be required, at the outset of the client relationship, to specifically disclose to clients, orally and in writing, that they are not fiduciaries. The specific disclosure must state: "I am not a fiduciary. Therefore, I am not required to act in your best interest, and am allowed to recommend investments that may earn higher fees for me or my firm, even if those investments may not have the best combination of fees, risks, and expected returns for you." Investment advisors that the bill specifically requires to make this disclosure include: "brokers," "dealers" "financial advisors," "retirement planners," or any advisor whose title would suggest expertise in financial planning, retirement planning or investments.

We find this bill troubling for two reasons. First, it is unnecessary because the statement that it requires to be made is inaccurate when it comes to most financial advising professionals, almost all of whom fall under the general antifraud provisions of the Investment Advisers Act of 1940. This act, albeit indirectly, prescribes a federal fiduciary standard for all investment advisers, regardless of their registration status with the SEC. The Supreme Court in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) recognized that the Advisers Act reflects "a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."

Given that almost all advisors would already be captured under the Advisors Act's umbrella of anti-fraud provisions, a disclosure of this nature is unnecessary. Further, and our second point of opposition to this bill, is that the language of the mandated disclosure, "I am not a fiduciary. Therefore, I am not

required to act in your best interest, and am allowed to recommend investments that may earn higher fees for me or my firm, even if those investments may not have the best combination of fees, risks, and expected returns for you," is inaccurate, inflammatory and would needlessly scare clients.

This fiduciary disclosure rule is simply unnecessary. Assets are already overwhelmingly flowing to low-cost index funds and firms that hold to fiduciary standards of care. Increased transparency on the institutional level and investor education make it redundant and more likely to cause anxiety than offer any protections.

For these reasons, The Business Council of New York State, Inc. opposes A.1026 (Dinowitz).