July 25, 2019

Via Electronic Filing

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Re: Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

Dear Secretary Galvin:

The Investment Adviser Association[1] (**IAA**) appreciates the opportunity to comment on the Massachusetts Securities Division's (**Division's**) preliminary solicitation of public comments on its proposed regulation regarding fiduciary duty (**Proposal**).[2] The IAA's members are exclusively investment adviser firms registered with the SEC under the Investment Advisers Act of 1940 (**Advisers Act**) and are thus all "federal covered advisers," as defined under the Massachusetts Uniform Securities Act (**Securities Act**).[3] The Proposal would "apply a fiduciary conduct standard on broker-dealers, agents, investment advisers, and investment adviser representatives when dealing with their customers and clients, respectively."[4] Under the Proposal, "[f]ailing to act in accordance with a fiduciary duty to a customer or client when providing investment advice or recommending an investment strategy, the opening of or

[1] The IAA is a not-for-profit association dedicated to advancing the interests of investment adviser firms registered with the Securities and Exchange Commission (**SEC**). The IAA's member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information please visit our website: www.investmentadviser.org.

[2] *See* https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm (**Statement on Preliminary Solicitation**) and Proposed 950 CMR 12.207.

[3] M.G.L. c. 110A, § 401(o).

[4] Statement on Preliminary Solicitation.

transferring of assets to any type of account, or the purchase, sale, or exchange of any security"[5] would be deemed "dishonest or unethical conduct or practices in the securities business."[6]

The Proposal would apply to any "adviser," which is defined as "any person, including persons registered or excluded from registration under [the Securities Act], who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase and sale, whether through the issuance of analyses or reports or otherwise. It is a rebuttable presumption that such term includes all investment advisers and investment adviser representatives, as well as other persons who charge fees based on assets under management or portfolio performance for rendering investment advice."[7] The Securities Act, which governs the regulation of investment advisers in Massachusetts, appropriately defines "investment adviser" to exclude federal covered advisers.[8] Based on the language in the Proposal, the Securities Act, and the National Securities Markets Improvement Act of 1996 (**NSMIA**), discussed below, we read the term "adviser" not to include federal covered advisers. The Securities Act also defines "investment adviser representative" to include employees or persons associated with federal covered advisers, but only subject to the limitations of NSMIA outlined in Section 203A of the Advisers Act.[9] Therefore, the term "adviser" in the Proposal may include investment adviser representatives of federal covered advisers only as permitted by Section 203A of the Advisers Act.

We assume that the Division, if it proceeds with a rulemaking in this area, will do so in compliance with NSMIA. Title III of NSMIA, the Investment Advisers Supervision Coordination Act (**Coordination Act**), broadly preempts state regulation of SEC-registered investment advisers.[10] States retain some limited authority over SEC-registered advisers, only in that they may: (i) require the registration, licensing, or qualification – and related payment of state filing fees – of any individual investment adviser representative with a place of business in the state; (ii) require the filing of documents filed with the SEC, but only for notice purposes; and (iii) investigate and bring enforcement actions against SEC-registered advisers for fraud or

[5] Proposed 950 CMR 12.207(b)1.

[6] Proposed 950 CMR 12.207(b).

[7] Proposed 950 CMR 12.207(a). This language is identical to that used in 950 CMR 12.205(9), which outlines fraudulent practices and dishonest or unethical practices.

[8] M.G.L. c. 110A, § 401(m)(2).

[9] M.G.L. c. 110A, § 401(n)(B).

[10] *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Rel. No. IA-1633 (May 14, 1992) (**1997 Release**), at text accompanying n. 146, available at https://www.sec.gov/rules/final/ia-1633.txt.

deceit.[11] States may *not* adopt any regulations, interpretations, or guidance that would have the effect of substantively regulating SEC-registered investment advisers.

Nor may states indirectly regulate activities of SEC-registered advisers by deeming violations of state requirements related to business conduct to be fraudulent unless the conduct involved would be fraudulent even if the state requirements did not exist.[12] The SEC has explicitly asserted that states are precluded from "indirectly regulating the activities of [SEC]-registered advisers by applying state requirements that define 'dishonest' or 'unethical' business practices unless the prohibited practices would be fraudulent or deceptive absent the requirements."[13]

Application of the Proposal to SEC-registered advisers would be contrary to the preemption provision of the Coordination Act and would frustrate the purpose of NSMIA to prevent "overlapping and duplicative regulation."[14] Application of the Proposal to investment adviser representatives of SEC-registered advisers would also be indirect substantive regulation of SEC-registered advisers, and would similarly be contrary to NSMIA. The Division appears to recognize federal preemption in that the Proposal does not apply to a fiduciary, participant, or beneficiary of an employee benefit plan, due to preemption under the Employee Retirement Income Security Act of 1974 (**ERISA**), and it also provides that it should not be construed to establish requirements for broker-dealers or their agents that differ from, or are in addition to, those included in a section of the Securities Exchange Act of 1934 that was added by NSMIA. While the Proposal does not include a reference to preemption under the Advisers Act, this likely reflects a recognition that, under the preemption provisions in NSMIA, the Proposal may not extend to SEC-registered advisers and their representatives.

The focus of the Proposal is on the standards applicable to broker-dealers, and, in that context, it describes the "need for a conduct rule mandating that investment advice must be provided under a fiduciary standard." We believe that extending the Proposal to SEC-registered advisers and their representatives will not add to the protection of Massachusetts investors since these advisers and their representatives are already subject to a broad and overarching fiduciary

[11] Advisers Act Section 203A(b).

[12] The Coordination Act includes a savings clause that explicitly preserves antifraud investigation and enforcement authority for states. The SEC has made clear its view that the very fact of the savings clause manifests Congress's intent that other authorities, including the authority to adopt any conduct regulations, are preempted. *See* 1997 Release.

[13] 1997 Release at text accompanying n. 152.

[14] 1997 Release, at text accompanying n. 156.

duty that applies to their entire advisory relationship with each of their clients, as was recently reaffirmed by the SEC.[15]

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We appreciate your consideration of our comments on this important issue. Please contact the undersigned at (202) 293-4222 if we may provide any additional information or assistance in this regard.

Respectfully,

/s/ Gail C. Bernstein
General Counsel
Investment Adviser Association

cc: SEC Chairman Jay Clayton
SEC Commissioner Robert J. Jackson Jr.
SEC Commissioner Hester M. Peirce
SEC Commissioner Elad L. Roisman
SEC Commissioner Allison Herren Lee
Dalia Blass, Director, SEC Division of Investment Management

[15] *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Rel. No. IA-5248 (June 5, 2019), *available at* https://www.sec.gov/rules/interp/2019/ia-5248.pdf.