

March 23, 2020

*Via Electronic Filing (zfmorton@securities.ok.gov)*

Oklahoma Department of Securities  
City Place  
204 North Robinson Ave., Suite 400  
Oklahoma City, OK 73102-7001  
Attn: Ms. Faye Morton, General Counsel

**Re: 2020 Notice of Rulemaking Intent, Title 660 Department of Securities,  
Chapter 11. Oklahoma Uniform Securities Act of 2004**

Dear Ms. Morton:

The Investment Adviser Association<sup>1</sup> (IAA) appreciates the opportunity to comment on the Oklahoma Department of Securities' (Department's) Notice of Rulemaking Intent.<sup>2</sup> The IAA represents the interests of investment advisers that are registered with the SEC under the Investment Advisers Act of 1940 (Advisers Act). All of the IAA's members are "federal covered investment advisers," as defined in the Oklahoma Uniform Securities Act of 2004 (Securities Act).<sup>3</sup> Our comments apply to proposed amendments to Subchapter 7, which applies to investment advisers and investment adviser representatives.

The Department has proposed amendments to Section 660:11-7-42 (Standards of Ethical Practice), including the addition of a fiduciary duty. Paragraph (b) of this section begins with "[a]n investment adviser or investment adviser representative shall not engage in dishonest or unethical practices including, although not limited to, the following:." The Department proposes to add "[f]ailing to act in accordance with a fiduciary duty to a client" as the first of the listed prohibited practices. "Investment adviser," as defined in the Securities Act, does not exclude

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<sup>1</sup> The IAA is the largest organization dedicated to advancing the interests of investment advisers registered with the Securities and Exchange Commission (SEC). For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. 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 [www.investmentadviser.org](http://www.investmentadviser.org).

<sup>2</sup> See 2020 Notice of Rulemaking Intent, Title 660 Department of Securities, Chapter 11. Oklahoma Uniform Securities Act of 2004, available at <https://www.securities.ok.gov/Act-Rules/Rulemaking/2020/Chapter-11/>. The proposed amendments to Section 660.11-7-42 (Standards of Ethical Practice) are available at <https://www.securities.ok.gov/Act-Rules/Rulemaking/2020/Chapter-11/660%2011-7-42%20Standards%20of%20Ethical%20Practice%20Amended.pdf>.

<sup>3</sup> Section 1-102.8. of the Securities Act.

federal covered investment advisers.<sup>4</sup> “Investment adviser representative,” as defined in the Securities Act, includes “an individual employed by or associated with an investment adviser or federal covered investment adviser.”<sup>5</sup> The Department proposes amending paragraph (a) of Section 660:11-7-42 to state that “[t]he standards set forth in this Section apply to federal covered investment advisers only to the extent that the conduct alleged is fraudulent or deceptive or if application is permitted by the National Securities [Markets] Improvement Act of 1996 (Pub. L. No. 104-290) [NSMIA].”

We appreciate that the Department proposes to update paragraph (a) to exclude federal covered investment advisers from the standards in this section, except as permitted by law. Since paragraph (b) includes both “investment advisers” and “investment adviser representatives,” however, we ask that the Department update the language in paragraph (a) to include “investment adviser representatives” of federal covered investment advisers as well. Because application of the section to investment adviser representatives of SEC-registered advisers would be indirect substantive regulation of SEC-registered advisers, it would be contrary to NSMIA except as permitted by that statute.<sup>6</sup>

We also suggest removing the language regarding fraudulent or deceptive conduct from paragraph (a) because, under Title III of NSMIA,<sup>7</sup> states already retain authority to investigate and bring enforcement actions against SEC-registered advisers for fraud or deceit.<sup>8</sup> Therefore,

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<sup>4</sup> Section 1-102.17. of the Securities Act.

<sup>5</sup> Section 1-102.18. of the Securities Act.

<sup>6</sup> 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. 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.” *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Rel. No. IA-1633 (May 14, 1997) (**1997 Release**), at text accompanying n. 152, available at <https://www.sec.gov/rules/final/ia-1633.txt>.

<sup>7</sup> The Investment Advisers Supervision Coordination Act (**Coordination Act**).

<sup>8</sup> Advisers Act Section 203A(b). States also may 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 and require the filing of documents filed with the SEC, but only for notice purposes. 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*. We note that certain sections of Subchapter 7 apply to “investment advisers” and “investment adviser representatives.” We assume that the substantive provisions apply to federal covered investment advisers and their representatives only to the extent permitted by NSMIA.

such conduct would be captured in the language “to the extent that application is permitted by [NSMIA],” and the additional language is redundant.

For these reasons, we ask that the final section state that:

“The standards set forth in this Section apply to federal covered investment advisers and investment adviser representatives of federal covered investment advisers only to the extent that application is permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).”

We note that Oklahoma investors served by SEC-registered advisers and their representatives already benefit from a broad and overarching fiduciary duty that applies to their entire advisory relationship, as was recently reaffirmed by the SEC and recognized by the Massachusetts Securities Division in its final fiduciary rule.<sup>9</sup>

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<sup>9</sup> 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>. The Massachusetts Securities Division (**Division**) recently noted that commenters wrote that “federally-registered advisers and their representatives are already held to a fiduciary standard,” and that “including them within the scope of the Proposal may create unintended consequences.” Following recommendations from commenters, including the IAA, the Division did not include SEC-registered advisers and their investment adviser representatives in its final fiduciary conduct standard. See *Adopting Release Re Amendments to Standard of Conduct Applicable to Broker-Dealers and Agents – 950 Mass. Code Regs. 12.200*, available at <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Adopting-Release.pdf>. See also Letter from Gail C. Bernstein, General Counsel, Investment Adviser Association, to the Office of the Secretary of the Commonwealth, Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (January 6, 2020), available at [https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/Comment\\_Letter\\_Compendiums/2020/January\\_6\\_2019\\_-\\_Investment\\_Adviser\\_Association\\_Comment\\_Letter\\_-\\_MA\\_Fiduciary\\_Conduct\\_Standard.pdf](https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/Comment_Letter_Compendiums/2020/January_6_2019_-_Investment_Adviser_Association_Comment_Letter_-_MA_Fiduciary_Conduct_Standard.pdf).

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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 Hester M. Peirce  
SEC Commissioner Elad L. Roisman  
SEC Commissioner Allison Herren Lee  
Dalia Blass, Director, SEC Division of Investment Management