

June 12, 2020

Mr. Kenneth Haim  
New York State Department of Law  
Investor Protection Bureau  
28 Liberty Street, 21<sup>st</sup> Floor  
New York, NY 10005

**Re: Proposed Revisions to 13 N.Y.C.R.R. Part 11**

Dear Mr. Haim:

The Investment Adviser Association<sup>1</sup> (IAA) appreciates the opportunity to comment on the New York Department of Law’s (Department’s) proposed amendments to Part 11 of Title 13 of the New York Codes, Rules and Regulations (N.Y.C.R.R.) regarding investment advisers.<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 “federally covered investment advisers,” as defined in Section 11.12(b) of Title 13 of the N.Y.C.R.R. The Department has proposed amendments to require investment adviser representatives to meet examination requirements and register with the State. Our substantive comments focus on the definition of “investment adviser representative,” the application of the rule to supervisors and principals, and the need for a longer transition period. We also have a technical comment to update the name of the IAA in Section 11.7(b).

**Definition of Investment Adviser Representative**

We assume that the Department, if it proceeds with a rulemaking in this area, will do so in compliance with the National Securities Markets Improvement Act of 1996 (NSMIA).<sup>3</sup> Under NSMIA, States may: (i) require the registration, licensing, or qualification – and related payment of state filing fees – **of any investment adviser representative who has a place of business**

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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 Text of Revised Regulations at <https://ag.ny.gov/sites/default/files/full-text-13nyccr11.pdf> (Proposed Rule Text); and Proposed Rule Making in New York State Register, pgs. 8-10 (Apr. 15, 2020), at <https://www.dos.ny.gov/info/register/2020/041520.pdf> (Proposal).

<sup>3</sup> Pub. L. No. 104-290, 110 Stat. 3416.

**located within that State;** (ii) require the filing of documents filed with the SEC, such as Form ADV, but only for notice purposes; and (iii) investigate and bring enforcement actions against SEC-registered advisers for fraud or deceit.<sup>4</sup>

Rule 203A-3(a) under the Advisers Act defines “investment adviser representative” as a supervised person of the investment adviser:

- (i) Who has more than five clients who are natural persons (other than a natural person who is a qualified client as described in Rule 205-3(d)(1) under the Advisers Act); and
- (ii) More than ten percent of whose clients are natural persons (other than a natural person who is a qualified client as described in Rule 205-3(d)(1) under the Advisers Act).

A supervised person is not an investment adviser representative under Rule 203A-3(a) if the supervised person:

- (i) Does not on a regular basis solicit, meet with, or otherwise communicate with clients of the investment adviser; or
- (ii) Provides only impersonal investment advice.

The proposed definition of “investment adviser representative” in Section 11.12(i) differs from the definition of “investment adviser representative” in Rule 203A-3(a). Under the proposed definition:

Investment adviser representative shall mean a natural person representing an investment adviser, solicitor or federally covered investment adviser in doing any of the acts that define an investment adviser under GBL § 359-eee(1)(a), including such acts for a federally covered investment adviser, except for natural persons who represent a federally covered investment adviser and do not have a place of business within the state. Any natural person supervising any investment adviser representative is deemed to be an investment adviser representative and is subject to the same examination and registration requirements under this part.

Under NSMIA, the Department may only require registration for investment adviser representatives of federally covered investment advisers that fall within the Advisers Act Rule 203A-3(a) definition. In order to make the definition of “investment adviser representative” in Section 11.12(i) consistent with that in Rule 203A-3(a), we request that the Department add the following language to its definition of investment adviser representative:

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<sup>4</sup> See Advisers Act Section 203A(b) (emphasis added).

With respect to any federally covered investment adviser, an investment adviser representative is a person who meets the definition of investment adviser representative in Rule 203A-3(a) under the Investment Advisers Act of 1940 (17 CFR 275.203A-3(a)) and who has a “place of business,” as defined in Rule 203A-3(b) under the Investment Advisers Act of 1940 (17 CFR 275.203A-3(b)), in the state.

### **Application of the Proposed Rule Text to “Supervisors” and “Principals” of Investment Adviser Representatives of Federally Covered Investment Advisers**

Certain provisions of the Proposed Rule Text would also purport to apply to “supervisors” and “principals” of investment adviser representatives of federally covered investment advisers. NSMIA allows the registration, licensing, or qualification of investment adviser representatives of federally covered investment advisers, but does not mention “supervisors” or “principals.” Depending on the facts, a supervisor or principal of a federally covered investment adviser may or may not satisfy the definition of “investment adviser representative” in Rule 203A-3(a). A State may only require registration, licensing, or qualification of such supervisors that are themselves investment adviser representatives, as defined in Rule 203A-3(a) under the Advisers Act. In order to be consistent with NSMIA, we request the following amendments to the proposed language:<sup>5</sup>

Section 11.4(c) Where registration required: All investment adviser representatives ~~and supervisors thereof~~ for a federally covered investment adviser must apply for registration in connection with their representation.

Section 11.4(f)(2) Updates and Amendments: An investment adviser representative of an investment adviser who is required to register in this jurisdiction, including supervisors thereof and principals, and investment adviser representatives of federally covered investment advisers, must file Form U4 or U5, as appropriate, on CRD/IARD and must amend such forms in accordance with FINRA instructions;

Section 11.6(a) Investment adviser examination requirements: Every investment adviser representative, and every principal and supervisor of an investment adviser representative of an investment adviser or solicitor who is required to register in this jurisdiction, and every investment adviser representative of a federally covered investment adviser ~~including persons representing solicitors, and every supervisor of any investment adviser representative~~, who is a natural person and does not qualify for a waiver pursuant to section 11.7, must take and receive a passing grade within two (2) years prior to the date of filing registration information pursuant to section 11.4(c) on:....

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<sup>5</sup> The underlined text reflects recommended additional text and the text that is struck out reflects text that we believe should be deleted. Only the sentences of each provision with recommended additions or deletions are noted.

We understand that investor protection is a key concern behind the Proposal. SEC-registered advisers and their representatives are already subject to a broad investor-protective fiduciary duty, which extends to their entire advisory relationship with their clients, in New York and elsewhere. As the SEC recently reaffirmed in its interpretive release regarding the fiduciary duty under the Advisers Act, advisers are fiduciaries under the Advisers Act and their overarching fiduciary duty to act in the best interest of their clients “encompasses both the duty of care and the duty of loyalty.”<sup>6</sup>

### **Compliance Schedule**

The Compliance Schedule in the Proposal states that the proposed regulatory revisions will go into effect 60 days after publication in the New York State Register. In order to provide sufficient time for registration and examination of investment adviser representatives, we request a transition period of at least one year. This is particularly important in light of the challenges presented by COVID-19.

### **Update IAA Name**

Section 11.7(b) provides a waiver from the examination requirement for any natural person who currently holds certain designations in good standing, including, in Section 11.7(b)(5), the Chartered Investment Counselor (CIC) designation awarded by “the Investment Counsel Association of America, Inc.” We ask that you replace the quoted text with the IAA’s current name, “the Investment Adviser Association.”<sup>7</sup>

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<sup>6</sup> *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Rel. No. IA-5248 (June 5, 2019), at text accompanying n. 23, available at <https://www.sec.gov/rules/interp/2019/ia-5248.pdf>.

<sup>7</sup> The IAA changed its name in 2005 from the Investment Counsel Association of America, Inc. to the Investment Adviser Association. We have separately provided you with additional information regarding the name change.

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We appreciate your consideration of our comments. 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

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