

June 14, 2019

Via Electronic Filing

Mr. Christopher W. Gerold
Bureau Chief
Bureau of Securities
153 Halsey Street, 6th Floor
P.O. Box 47029
Newark, NJ 07101

Re: Fiduciary Duty Rule Proposal (PRN 2019-044)

Dear Mr. Gerold:

The Investment Adviser Association¹ (**IAA**) appreciates the opportunity to comment on the New Jersey Bureau of Securities' (**Bureau's**) Rule Proposal regarding fiduciary duty (**Proposal**).² The Proposal describes amendments "to establish, by regulation, the common law fiduciary duty and apply it to broker-dealers and agents, and to codify it for investment advisers and investment adviser representatives." Under the Proposal, it would be a dishonest or unethical business practice for failing to act in accordance with a fiduciary duty when "providing investment advice or recommending to a customer an investment strategy, the opening of, or transfer of assets to, any type of account, or the purchase, sale, or exchange of any security."

As we discussed in our December 2018 comment letter on the related Pre-Proposal,³ the IAA's members are exclusively investment adviser firms registered with the SEC under the Investment Advisers Act of 1940 (**Advisers Act**). Recognizing the division of jurisdiction over investment advisers between the SEC and the states codified in Title III of the National Securities Markets Improvement Act of 1996 (**NSMIA**), the Investment Advisers Supervision Coordination Act (**Coordination Act**), New Jersey regulations regarding dishonest or unethical

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 Fiduciary Duty of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives Rule Proposal, PRN 2019-044, available at <https://www.njconsumeraffairs.gov/Proposals/Pages/bos-04152019-proposal.aspx>.

³ See Comment Letter from Gail C. Bernstein, IAA General Counsel, to Christopher W. Gerold (Dec. 13 2018), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/December_13_2018_-_IAA_Letter_on_NJ_Fiduciary_Pre-Proposal.pdf.

business practices apply to SEC-registered investment advisers only where “the conduct alleged is fraudulent or deceptive, or to the extent permitted by [NSMIA].”⁴

The Proposal applies to “advisers,” which include both “[an] investment adviser as defined in N.J.S.A. 49:3-49(g) and [an] investment adviser representative as defined in N.J.S.A. 49:3-49(s).”⁵ The term “investment adviser” under N.J.S.A. 49:3-49(g)(2)(vii) does not include an SEC-registered investment adviser. The term “investment adviser representative” under N.J.S.A. 49:3-49(s) includes an individual “who has a place of business located in this State and is employed by or associated with” an SEC-registered investment adviser.

As you know and as the New Jersey Uniform Securities Laws and current regulations reflect, the Coordination Act broadly preempts state regulation of SEC-registered investment advisers.⁶ We believe that the application of a fiduciary rule to investment adviser representatives of SEC-registered advisers would be indirect substantive regulation of SEC-registered advisers, contrary to NSMIA and New Jersey’s provisions relating to the scope of its dishonest or unethical business practices regulations.⁷ We are not aware of the Bureau applying substantive rules to SEC-registered advisers, directly or indirectly, and we appreciate the fact that the scope provisions of the subchapter have not changed. We thus understand and assume that the Bureau will continue to enforce these regulations in compliance with NSMIA.

Separately, we note that SEC-registered advisers are already fiduciaries under the Advisers Act,⁸ and thus imposing a state fiduciary duty on SEC-registered advisers or their representatives would be unnecessary and contrary to the purpose of NSMIA to prevent “overlapping and duplicative regulation.”⁹ Clients of SEC-registered investment advisers in New Jersey and elsewhere are already protected by the advisers’ fiduciary duty, which applies to the entire advisory relationship.

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⁴ N.J.A.C. 13:47A-6.1(e).

⁵ N.J.A.C. 13:47A-6.2(a).

⁶ See *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Rel. No. IA-1633 (May 15, 1997) (1997 Release), at text accompanying n. 146, available at <https://www.sec.gov/rules/final/ia-1633.txt>.

⁷ See N.J.A.C. 13:47A-6.1(e).

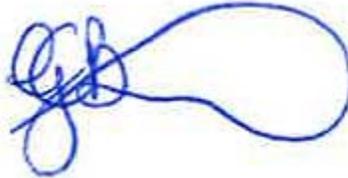
⁸ See *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Rel. No. IA-5248 (June 5, 2019), available at <https://www.sec.gov/rules/interp/2019/ia-5248.pdf>. The SEC reaffirmed in the Interpretation that “the adviser must, at all times, serve the best interest of its client and not subordinate its client’s interest to its own.” The Bureau similarly recognized in the Proposal that, “An investment adviser is a fiduciary whose duty is to serve the best interests of its clients, including an obligation not to subordinate clients’ interests to its own.”

⁹ 1997 Release, at text accompanying n. 156.

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Thank you for 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,

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

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
Dalia Blass, Director, SEC Division of Investment Management