March 8, 2019

The Honorable Dereck E. Davis
Chair, House Economic Matters Committee
House Office Building, Room 231
6 Bladen Street
Annapolis, MD 21401

Re: Maryland House Bill 1127 – Financial Consumer Protection Act of 2019

Dear Chairman Davis and Members of the House Economic Matters Committee:

The Investment Adviser Association[1] (**IAA**) appreciates the opportunity to comment on Maryland House Bill 1127, the Financial Consumer Protection Act of 2019. Section 5 of the bill would add a fiduciary provision, Section 11-803, to the Corporations and Association Article (**Section 11-803**). All IAA members are investment adviser firms (**SEC Advisers**) registered with the U.S. Securities and Exchange Commission (**SEC**) under the Investment Advisers Act of 1940 (**Advisers Act**). Our members are also "federal covered advisers" under the Maryland Securities Act.[2] We have a strong interest in ensuring that the Maryland legislature maintains the division of regulatory oversight of investment advisers between the SEC and the states as established by Congress under the National Securities Markets Improvement Act of 1996 (**NSMIA**). In order to prevent overlapping and duplicative regulation of investment advisers, Title III of NSMIA, the Investment Advisers Supervision Coordination Act (**Coordination Act**), prohibits states from extending substantive regulation to SEC Advisers.[3]

Section 11-803 would classify multiple categories of financial services firms and their representatives as fiduciaries. Section 11-803(A)(5) includes "federal covered adviser[s]." Section 11-803(A)(6) includes "investment adviser representative[s]," but does not specify whether the section applies to investment adviser representatives associated with investment advisers registered or required to be registered in Maryland or also those associated with federal covered advisers.

[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 more than 650 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] Section 11-101(e) of the Maryland Securities Act defines "federal covered adviser" as a person who is registered under Section 203 of the Advisers Act.

[3] *See SEC Rules Implementing Amendments to the Investment Advisers Act of 1940*, Rel. No. IA-1633 (May 15, 1997) (**1997 Release**), at text accompanying n. 156, *available at* https://www.sec.gov/rules/final/ia-1633.txt.

Section 11-803(A)(5) and Section 11-803(A)(6), to the extent that it would apply to representatives of SEC Advisers, would both be preempted under NSMIA. Apparently acknowledging preemption under Title I of NSMIA for broker-dealers, Section 11-803(D) provides that "[n]othing in this section imposes on a broker-dealer any books and records requirement that is not imposed under federal law." However, there is no provision addressing preemption for federal covered advisers even though state regulation of federal covered advisers is expressly preempted by the Coordination Act.

Congress enacted NSMIA to address its concerns about the overlap in regulation and duplication of regulatory resources at the federal and state levels. Congress's goals in enacting NSMIA were to "modernize and rationalize certain important aspects of the regulatory scheme… including the respective responsibilities of [f]ederal and [s]tate governmental authorities over the securities markets,"[4] and to "eliminate[e] the costs and burdens of duplicative and unnecessary regulation."[5]

Under the Coordination Act, States retain some limited authority over SEC 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 Advisers for fraud.[6] States may *not* adopt any regulations, interpretations, or guidance that would have the effect of substantively regulating SEC Advisers.[7]

Nor may states indirectly regulate activities of SEC Advisers by deeming violations of state requirements related to business conduct to be fraudulent unless the conduct involved

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[4] H.R. Rep. No. 104-622 at 16 (1996), available at https://www.congress.gov/congressional-report/104th-congress/house-report/622/1.

[5] *Id*. The House Hearing report included references to testimony that indicated that there continues to be a substantial degree of duplication between federal and state securities regulation, and that this duplication tends to raise the cost of capital to American issuers of securities without providing commensurate protection to investors or our markets. Indeed, when President Clinton signed NSMIA into law, he stated that:

> This legislation will more efficiently divide responsibility for regulation between the Federal and State governments. The SEC will be charged with responsibility for . . . large investment advisors. States will have responsibility for . . . investment advisors with smaller portfolios, while retaining their authority to take enforcement actions against fraudulent conduct in all situations.

Statement by President Clinton on signing H.R. 3005, p. 1, October 11, 1996.

[6] Advisers Act Section 203A.

[7] *See* 1997 Release at text accompanying n. 146.

would be fraudulent even if the state requirements did not exist.[8] The SEC has explicitly stated 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."[9]

We separately note that SEC Advisers are already fiduciaries to their clients under the Advisers Act. That duty applies throughout the advisory relationship between the SEC Adviser and its clients and requires the adviser to act in the clients' best interest and not put its own interests ahead of those of its clients. Clients of SEC Advisers in Maryland and elsewhere are thus already protected by the advisers' fiduciary duty.

We respectfully request that the House remove from Section 11-803 the reference to federal covered advisers, and clarify that, with respect to investment adviser representatives, Section 11-803 does not apply to investment adviser representatives of federal covered advisers.

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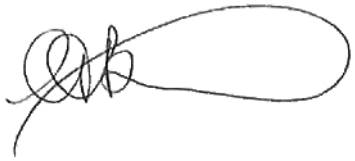
[8] The Coordination Act includes a savings clause that explicitly preserves antifraud investigation and enforcement authority for states. The SEC has made clear its view that the very fact of the savings clause manifests Congress's intent that other authorities, including the authority to adopt any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

[9] 1997 Release at text accompanying n. 152.

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,



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