

December 13, 2018

*Via Electronic Filing*

Mr. Christopher W. Gerold  
Bureau Chief  
Bureau of Securities  
P.O. Box 47029  
Newark, NJ 07101

**Re: Fiduciary Duty; Notice of Pre-Proposal (PPR 2018-004)**

Dear Mr. Gerold:

The Investment Adviser Association<sup>1</sup> (**IAA**) appreciates the opportunity to comment on the New Jersey Bureau of Securities' (**Bureau's**) request for comment on its Notice of Pre-Proposal regarding fiduciary duty (**Pre-Proposal**).<sup>2</sup> The Pre-Proposal describes amendments "to require that broker-dealers, agents, investment advisers, and investment adviser representatives be subject to a fiduciary duty." The Bureau "is considering making it a dishonest or unethical business practice for failing to act in accordance with a fiduciary duty when recommending to a customer, an investment strategy, or the purchase, sale, or exchange of any security or securities, or providing investment advisory services to a customer."

Current New Jersey regulations regarding dishonest or unethical business practices provide that "[t]he rules in this subchapter apply to Federal covered advisers to the extent that the conduct alleged is fraudulent or deceptive, or to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290)" (**NSMIA**).<sup>3</sup> We understand and assume that the Bureau, if it proceeds to propose amendments, will do so in compliance with NSMIA. The IAA's members are exclusively investment adviser firms registered with the SEC under the Investment Advisers Act of 1940 (**Advisers Act**). We therefore have a strong interest in ensuring that the Bureau, in compliance with NSMIA, does not attempt to extend any substantive regulation to SEC-registered advisers. We also note that SEC-registered advisers are already fiduciaries under the Advisers Act – as the Bureau has recognized in the pre-proposal – and thus imposing a state fiduciary duty on SEC-registered advisers would be inappropriate and unnecessary – and contrary to the purpose of NSMIA to prevent "overlapping and duplicative

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<sup>1</sup> 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](http://www.investmentadviser.org).

<sup>2</sup> See Fiduciary Duty Notice of Pre-Proposal, PPR 2018-004, available at <https://www.njconsumeraffairs.gov/Proposals/Pages/bos-10152018-proposal.aspx>.

<sup>3</sup> N.J.A.C. 13:47A-6.1(e).

regulation.”<sup>4</sup> 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.

As you know, Title III of NSMIA, the Investment Advisers Supervision Coordination Act (**Coordination Act**), “broadly preempts”<sup>5</sup> state regulation of SEC-registered investment advisers. 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.<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.<sup>7</sup> 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.”<sup>8</sup>

We respectfully request that the Bureau make clear that it does not intend to apply the proposed rules to SEC-registered investment advisers.

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<sup>4</sup> *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>.

<sup>5</sup> *Id.* at text accompanying n. 146.

<sup>6</sup> Advisers Act Section 203A(b).

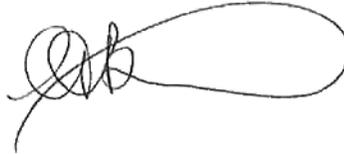
<sup>7</sup> The Coordination Act includes a savings clause that explicitly preserves antifraud investigation and enforcement authority for states. The SEC has made clear its view that the very fact of the savings clause manifests Congress’s intent that other authorities, including the authority to adopt any conduct regulations, are preempted. *See* 1997 Release.

<sup>8</sup> 1997 Release at text accompanying n. 152.

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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,

A handwritten signature in black 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 Kara M. Stein  
SEC Commissioner Robert J. Jackson Jr.  
SEC Commissioner Hester M. Peirce  
SEC Commissioner Elad L. Roisman  
Dalia Blass, Director, SEC Division of Investment Management