

January 6, 2020

Via Electronic Filing

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

**Re: Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents,
Investment Advisers, and Investment Adviser Representatives**

Dear Secretary Galvin:

The Investment Adviser Association¹ (**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 advisers,” as defined in the Massachusetts Uniform Securities Act (**Securities Act**).² The Massachusetts Securities Division’s (**Division’s**) proposed fiduciary conduct standard (**Proposal**)³ would deem it “an unethical or dishonest conduct or practice for a broker-dealer, agent, investment adviser, or investment adviser representative registered or required to be registered in Massachusetts to fail to act in accordance with a fiduciary duty to a customer or client.”⁴ The IAA appreciates the opportunity to comment on the Proposal.

The Proposal makes clear that it applies to any “investment adviser,” as that term is defined in the Securities Act. The statutory definition explicitly excludes federal covered

¹ 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.

² M.G.L. c. 110A, § 401(o).

³ See <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryruleidx.htm> and Proposed 950 CMR 12.207.

⁴ Massachusetts Securities Division, Proposed Regulations, Notice of Public Hearing and Comment Period, available at <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Notice-of-Comment-Period-and-Public-Hearing.pdf>.

advisers.⁵ We commend the Division for using the term “investment adviser” in the Proposal rather than the term “adviser,” which was used in the preliminary solicitation for public comment in June.⁶ The Proposal also applies to any “investment adviser representative,” which is defined in the Securities Act to include employees or persons associated with federal covered advisers, subject to the limitations of the National Securities Markets Improvement Act of 1996 (NSMIA) outlined in Section 203A of the Advisers Act.⁷ We are pleased that the Division has clarified that the Proposal does not apply to federal covered advisers, and that it does not apply to representatives of federal covered advisers, except as permitted by NSMIA.

In our comments on the preliminary solicitation (**July Comment Letter**),⁸ we explained that Title III of NSMIA, the Investment Advisers Supervision Coordination Act (**Coordination Act**), broadly preempts state regulation of SEC-registered investment advisers.⁹ It limits states’ authority over SEC-registered advisers to: (i) requiring 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) requiring the filing of documents filed with the SEC, but only for notice purposes; and (iii) investigating and bringing enforcement actions against SEC-registered advisers for fraud or deceit.¹⁰ NSMIA prohibits states from adopting any regulations, interpretations, or guidance that would have the effect of substantively regulating SEC-registered investment advisers.

We also explained in the July Comment Letter that states may not 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

⁵ M.G.L. c. 110A, § 401(m)(2).

⁶ See <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm>.

⁷ M.G.L. c. 110A, § 401(n)(B).

⁸ See Letter from Gail C. Bernstein, General Counsel, Investment Adviser Association, to Secretary Galvin, on Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (July 25, 2019), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/Comment_Letter_Compndiums/2019/July_25_2019_-_Investment_Adviser_Association_Comment_Letter_-_MA_Fiduciary_Proposal.pdf.

⁹ See *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Rel. No. IA-1633 (May 14, 1992) (**1997 Release**), at text accompanying n. 146, available at <https://www.sec.gov/rules/final/ia-1633.txt>.

¹⁰ Advisers Act Section 203A(b).

state requirements did not exist.¹¹ 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.”¹²

We are pleased that the Division clarified that the Proposal does not apply to SEC-registered investment advisers, and applies to the representatives of SEC-registered advisers only to the extent permitted by NSMIA. As we explained in the July Comment Letter, Massachusetts 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.¹³

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

¹¹ 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.

¹² 1997 Release at text accompanying n. 152.

¹³ *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>.