January 6, 2020

Sent electronically to securitiesregs-comments@sec.state.ma.us

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 Sir or Madam:

The Investment Company Institute[1] appreciates the opportunity to comment on the Massachusetts Securities Division's proposed rule relating to a fiduciary duty ("Proposal").[2] The Proposal would amend the definition of "dishonest or unethical conduct or practices in the securities business" to include a broker-dealer, agent, investment adviser or investment adviser representative 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 transferring of assets to any type of account, or the purchase, sale or exchange of any security.

We offer the following comments on the Proposal. As with ICI's July 26, 2019 letter to the Division, our comments below primarily focus on the Division's authority under Sections 203A and 222 of the Investment Advisers Act of 1940 (the "Advisers Act") and Section 15(i) of the Securities Exchange Act

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETfs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar fonds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets ofUS$24.7 trillion in the United States, serving more than 100 million US shareholders, and US$7.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] Sec proposal to amend 950 Mass. Code Regs. 12. 200, including new 950 CMR 12.207, available at https://v.,,,.vv>l.sec.scace.ma.us/sct/sccftduciai:yconductstandard/6.duciaryruleidx.hcrn.

of 1934 (the "Exchange Act") as enacted by the National Securities Markets Improvement Act of 1996 (NSMIA).[3]

I. The Proposal Better Aligns the Division's Authority Over Registrants Under NSMIA than the Draft Proposal.

Section 203A of the Advisers Act prohibits any state from requiring the registration, licensing, or qualification of any Federally-registered investment adviser. As explained by the SEC in implementing this provision, Section 203A "preempts not only a state's specific registration, licensing, or qualification requirements, but all regulatory requirements imposed by state law on Commission-registered advisers relating to their advisory activities or services, except those provisions that are specifically preserved by [NSMIA]."[4]

The draft regulation published by the Division in connection with its preliminary solicitation applied broadly to "advisers." ICl's comment letter expressed concern with the breadth of the definition as it appeared to apply the draft regulation to persons that the Division was preempted from regulating under NSMIA. We are pleased that the Division has narrowed the Proposal's scope. As a result, the Proposal now only applies to any "investment adviser" as that term is defined in Massachusetts' Security Act (M.G.L. c. 1 l0A, § 401 (m)). This statutory definition explicitly excludes "a federal covered adviser." We commend the Division for making this change, which better aligns the Proposal with the Division's authority under NSMIA with respect to federally-registered investment advisers and investment adviser representatives.[5]

II. The Division Should Modify the Proposal's Application to Broker-Dealers to Remove Implicit Recordkeeping Requirements.

Section 1S(i) of the Exchange Act prohibits any state from establishing "capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or

---

[3] See letter from Tamara K. Salmon, Associate General Counsel, ICI, to Massachusetts Securities Division, July 26, 2019 ("!Cl's comment letter"), available at https://www.ici.org/pdf/19_!tr_mafidicuiai:y.pdf, submitted in response to the Division's preliminary solicitation of comments.

[4] See Rules Implementing Amendments to the Advisers Act, SEC Release No. IA-1633 (May 15, 1997). Notably, NSMIA expressly limited the state's authority over Federally-registered investment advisers to investigating and bringing enforcement actions with respect to fraud and deceit. The SEC, in turn, has interpreted the states' ability to regulate fraud and deceit narrowly. Id. at 73-74.

[5] Because NSMIA prohibits a state from doing indirectly what it is prohibited from doing directly, if the Division were to impose the Proposal's requirements on the representatives of a federal covered adviser, it would result in subjecting the federal covered adviser to such requirements - a result clearly prohibited by NSMIA. Based on the statutory definition of "investment adviser representative" in M.G.L. c. 1 lOA, § 40 l(n) and its express reference to NSMIA's limitations, we presume that the Division will continue to respect the limitations ofNSMIA when regulating the representatives of federally-covered investment advisers.

government securities dealers that differ from, or are in addition to, the requirements in those areas established [under federal law]." As in the preliminary solicitation, in recognition of Section 15(i)'s preemption, the Division has proposed to include Subsection (5) in the regulation. Subsection (5) would provide that nothing in the new regulation shall be construed to establish any requirements on broker-dealers or agents that are inconsistent with the recordkeeping requirements imposed on broker-dealers under federal law.

While we commend the Division for including Subsection (5), we do not believe that it sufficiently addresses the reach of Section 15(i)'s preemption. This is because the records necessary to document a broker-dealer's compliance with the "reasonable inquiry" requirement in the proposed regulation differ from those broker-dealers are required to maintain under federal law, including under the SEC's recently finalized Regulation Best Interest[6] and under FINRA's rules.7 To address this inconsistency, we recommend that, in addition to including Subsection (5) in the proposed regulation, the Division clarify that the records a broker-dealer maintains under federal law, including related to Regulation Best Interest's "Care Obligation" and any applicable FINRA rules or guidance, shall be deemed to satisfy the proposed regulation's requirements, including a broker-dealer's duty to conduct a "reasonable inquiry."

III. The Division Should Clarify the Proposal's Application to Out-of-State Advisers.

As noted above, Subsection (5) appears intended to avoid the Proposal running afoul ofNSMIA. However, by only referencing 15 U.S.C. Section 78o(i), Subsection (5) only addresses the preemptive impact ofNSMIA on broker-dealers and their agents. The Proposal is silent on the preemptive impact of Section 222 of the Advisers Act on those state-registered investment advisers that maintain their principal place of business in a state other that Massachusetts. Section 222 as enacted by NSMIA prohibits a state from imposing its recordkeeping requirements on an investment adviser that (i) maintains its principal place of business in another state (i.e., an out-of-state adviser) and (ii) is in compliance with such state's recordkeeping requirements. To be consistent with the Division's authority under NMSIA, we recommend that it revise its Proposal to expressly recognize the preemptive impact of Section 222 of the Advisers Act.

---

6 See subsection (a)(2)(ii) of§ 240.151-1, *Regulation Best Interest: The Broker-Dealer Standard of Conduct,* Rel. No. 34-86031 Qune S, 2019), *available at* https://www.sec.gov/rules/final/2019/34-8603I.pdf

7 See, e.g., FINRA Rule 2111. It is expected that FINRA may amend its rules, including Rule 2111, to reflect the changes made by Regulation Best Interest. FINRA already has been focused on Regulation Best Interest and is providing resources to its members to assist them in their compliance efforts. See https://www.finra.org/rules-guidance/key-topics/regulation-best-interest.

IV. The SEC Expressed Compelling Reasons for Adopting a Best Interest Standard Rather than a Fiduciary Standard.

In the Request for Comment, the Division explains that it issued the Proposal because "the SEC's final version of Reg BI is too weak to truly protect investors from harmful conflicts of interest." More specifically, the Division criticizes the SEC's Regulation Best Interest for not imposing a true fiduciary duty on broker-dealers, noting that the Division hopes that the SEC "will eventually establish a true fiduciary standard for all investment advice."

While we do not dispute Massachusetts' authority to impose a fiduciary duty on those financial professionals over which it has jurisdiction, we do disagree with its characterization of Regulation Best Interest. Regulation Best Interest does significantly enhance the existing standard of conduct applicable to broker-dealers providing recommendations to retail customers, and the SEC articulated compelling reasons for adopting a standard of conduct for broker-dealers that is distinct from the fiduciary standard that applies to investment advisers under the Advisers Act.

The SEC considered, and ultimately rejected, a fiduciary duty as an alternative to a best interest standard for broker-dealers, recognizing the important differences between the different relationships and business models of broker-dealers and advisers.[8] This was necessary, according to the SEC, to reflect key differences in the ways broker-dealers and investment advisers engage with retail investors and how investors pay for those services. The SEC was concerned that imposing a fiduciary standard on broker-dealers could limit choice for investors and increase costs to both investors and financial service providers. The SEC declined to label Reg BI a fiduciary standard out of a concern that doing so would risk importing Advisers Act and other precedent applicable to "fiduciaries" that would not adequately recognize the differences between the business models and services provided by advisers and broker-dealers.

[8]Regulation Best Interest Adopting Release (https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf) at 33464. In addition, we note that the application of Subsections (l)(b)(S) and (l)(c) of the Proposal would result in an extraordinarily broad imposition of an ongoing fiduciary duty based on the use of certain tides. In recognition of the distinction between advisers and broker-dealers, the SEC presumes that use of the terms "adviser" and "advisor" in a name or tide by a broker-dealer or its representative that, respectively, is not also an investment adviser or its supervised person, would be a violation of the capacity disclosure requirement under Reg BL The SEC declined, however, to impose a broader restriction on the use of tides, noting that other regulatory requirements and restrictions, including Form CRS, the "solely incidental" exclusion for broker-dealers under the Advisers Act, and FINRA Rule 2210, would limit the way a broker-dealer may market its services. Id. at 33353.

ICI appreciates the opportunity to provide these comments to the Division. We would be glad to answer any questions or provide further assistance. Please feel free to contact me at (202) 326-5813, Sarah Bessin at (202) 326-5835, or Shannon Salinas at (202) 326-5809.

Sincerely,

Susan M. Olson
General Counsel
Investment Company Institute