INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

July 26, 2019

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: Preliminary Solicitation of Public Comments Regarding Fiduciary Conduct Standards 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 preliminary solicitation on a proposed regulation, Regulation 12.207, which would define the term "dishonest or unethical conduct or practices in the securities business" to include a broker-dealer, agent or adviser 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. While the Institute neither supports nor opposes the Division proceeding with a formal rulemaking based on the proposal, we offer comments recommending that the Division revise its proposal to be consistent with 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 of 1934 (the "Exchange Act") as enacted by the National Securities Markets Improvement Act of 1996 (NSMIA).

[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 funds 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 of US$23.1 trillion in the United States, serving more than 100 million US shareholders, and US$6.9 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

I. Section 203A of the Advisers Act

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]."[2]

We note that, as drafted, the Division's proposed regulation would to apply to "advisers," which would be defined to include "any person, including persons registered or excluded from registration under the [Massachusetts Uniform Securities Act] who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise." The regulation would further provide that "it is a rebuttable presumption that such term includes all investment advisers and investment adviser representatives . . .." Consistent with the Division's authority under NSMIA and the manner in which the Division has regulated Federally-registered investment advisers and their representatives since NSMIA's enactment almost twenty-five years ago, we presume that the Division will continue to regulate Federally-registered investment advisers and their representatives consistent with NSMIA.[3]

II. Section 15(i) of the Exchange Act

Section 15(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 government securities dealers that differ from, or are in addition to, the requirements in those areas established [under Federal law]." We were pleased to see that, in recognition of Section 15(i)'s preemption, the Division has proposed to include Subsection (f) in the proposed regulation. Subsection (f) would provide that nothing in the new regulation shall be construed to impose

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[2] See Rules Implementing Amendments to the Advisers Act, SEC Release No. IA-1633 (May 15, 1997). Notably, NSMIA expressly limited the state's role 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.

[3] Further, we note that Federally-registered advisers are fiduciaries under the Advisers Act, and thus imposing a state fiduciary duty on SEC-registered advisers or their representatives is both inappropriate and unnecessary. *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 Commission in the Interpretation states "the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own."); *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Rel. No. IA-1633 (May 15, 1997) at text accompanying n. 147, *available at* https://www.sec.gov/rules/final/ia-1633.txt (Congress intended to avoid subjecting Federally-registered advisers to overlapping state and federal requirements.)

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 (f), 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[4] and under FINRA's rules.[5] To address this inconsistency, we recommend that, in addition to including Subsection (f) 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. Section 222 of the Advisers Act

As noted above, by referencing 15 U.S.C. Section 78o(i), Subsection (f) of the proposed regulation only addresses the preemptive impact of NSMIA on broker-dealers and their agents. The proposal is silent on the preemptive impact of Section 222 of the Advisers Act, which was added by NSMIA to prohibit a state from imposing its recordkeeping requirements on an investment adviser that maintains its principal place of business in another state (i.e., an out-of-state adviser) and that 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.

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The Institute appreciates the opportunity to provide these comments to the Division. If you have any questions concerning them or if we can be of any assistance to you on this proposal, please do not hesitate to contact me. I may be reached by phone at 202-326-5825 or email at tamara@ici.org.

Sincerely,

Tamara K. Salmon
Associate General Counsel

[4] See subsection (a)(2)(ii) of § 240.15l-1, *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, Rel. No. 34-86031 (June 5, 2019), *available at* https://www.sec.gov/rules/final/2019/34-86031.pdf.

[5] 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.