INVESTMENT COMPANY INSTITUTE

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June 14, 2019

Mr. Christopher W. Gerold, Bureau Chief
New Jersey Bureau of Securities
153 Halsey Street, 6th Floor
P.O. Box 47029
Newark, New Jersey 07101

Sent Electronically to DCAProposal@dca.lps.state.nj.us

Re: Fiduciary Duty of Broker-Dealers, Agents, and Advisers (Proposal Number: PRN 2019-044)

Dear Mr. Gerold:

The Investment Company Institute[1] appreciates the opportunity to comment on the New Jersey Bureau of Securities' proposed new rule relating to a fiduciary duty. This new rule, Rule 13:47A-6.4, would define the term "dishonest or unethical business practice" under the New Jersey Securities Act (the "Act") 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 or the purchase, sale, or exchange of a security. While the Institute neither supports nor opposes adoption of the rule, we offer two comments on it prior to its final adoption.

Our first comment relates to the proposed rule's incorporation of the limits imposed on the Bureau by the National Securities Markets Improvement Act of 1996 (NSMIA). In our letter responding to the Bureau's Notice of Pre-Proposal of this rule, ICI urged the Bureau to ensure that any rule it issues be

[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.

consistent with the Bureau's authority under NSMIA.[2] We were very pleased to see that the Bureau has proposed to address our NSMIA-related concerns by including Subsection (e) in the proposed rule. In substance, Subsection (e) would provide that nothing in the new rule shall be construed to impose requirements on broker-dealers that are inconsistent with the Bureau's authority under Section 15(i) of the Securities Exchange Act of 1934 as enacted by NSMIA. While we appreciate the Bureau's inclusion of Subsection (e), we note that it does not entirely address our NSMIA-related concern. This is because the "reasonable inquiry" requirement in Subsection (b)(1)(i) of the proposed rule is not entirely consistent with the suitability inquiry required of broker-dealers under the SEC's recently finalized Regulation Best Interest[3] and FINRA rules.[4] This inconsistency may result in Rule 13:47A-6.4 requiring a broker-dealer to create records documenting that the broker-dealer has satisfied the rule's inquiry requirements. Because such records are not required under the Federal securities laws or FINRA's rules, requiring their creation would appear to run afoul of Section 15(i) of the Securities Exchange Act of 1934 as incorporated into Subsection (e) of the rule. To avoid this result, we recommend that the Bureau clarify that a broker-dealer's compliance with Regulation Best Interest's "Care Obligation" and any applicable FINRA rules or guidance shall be deemed to satisfy the broker-dealer's "reasonable inquiry" requirement under the proposed rule.

Our second comment, too, relates to ensuring consistency between the proposed rule and NSMIA. In particular, the proposed rule would to apply to "advisers." Pursuant to Rule 13:47A-6.2, this term includes, in addition to an investment adviser, the investment adviser's representatives. As defined in Section 49:3-49(s) of the Act, the term "investment adviser representative" refers to representatives of both state-registered and Federally-registered investment advisers.[5] The imposition of the new fiduciary duty on the representatives of a Federally-registered investment adviser would indirectly subject the Federally-registered adviser to the rule even though NSMIA preempts states from doing indirectly what they are prohibited from doing directly. Consistent with the Bureau's authority under NSMIA and the manner in which the Bureau has regulated Federally-registered investment advisers and their representatives since the enactment of NSMIA in 1996, we presume that the Bureau will continue to regulate Federally-registered investment advisers and their representatives consistent with NSMIA.[6]

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[2] See letter from Tamara Salmon, Associate General Counsel, Investment Company Institute, to Christopher W. Gerold, Division Chief, New Jersey Bureau of Securities (November 9, 2018).

[3] 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.

[4] See, e.g., FINRA Rule 2111. It is expected that FINRA may amend Rule 2111 or others of its rules to reflect the changes made by Regulation Best Interest.

[5] The definition of investment adviser representative in Section 49:3-49(s) of the Act includes a person "who has a place of business located in this State and is employed by or associated with [an SEC registered investment adviser]."

[6] 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

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The Institute appreciates the opportunity to provide these comments to the Bureau. 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

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).