MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

June 12, 2020

Via Electronic Submission: kenneth.haim@ag.ny.gov

Mr. Kenneth Haim
Office of the Attorney General – Investor Protection Bureau
28 Liberty St., 21st Floor
New York, New York 10005

Re: Proposed Rulemakings on Investment Advisers and Brokers, Dealers and Salespersons

Dear Mr. Haim:

Managed Funds Association[1] ("MFA") appreciates the opportunity to provide comments to the Proposed Rulemakings on Investment Advisers ("Investment Adviser Proposal")[2] and Brokers, Dealers and Salespersons ("Brokers, Dealers and Salespersons Proposal")[3] (together, the "Proposals"). We support the goals that the Investor Protection Bureau of the Department of Law (the "Department") describes in the Proposals to more fully harmonize its regulations with the federal securities regime, modernize its registration requirements for investment advisers and broker-dealers, and reduce potential industry confusion as to certain aspects of its regulations.

In particular, we support the proposed amendments to the filing requirements for issuers making private offerings in the state, which will provide a more harmonized and simplified approach that will benefit both regulators and issuers. Regarding the proposed categories of "investment adviser representatives" and "finders," we recommend changes to ensure that they do not create unnecessary confusion with respect to federal law. Finally, we suggest that the Department provide additional guidance as to the newly explicit authority of the Attorney General to deny, suspend or revoke registration statements of investment advisers to ensure

[1] The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

[2] Investment Advisers Defined Under General Business Law, section 359-eee, New York State Register, Vol. XLII, Issue 15 (Apr. 15, 2020).

[3] Brokers, Dealers and Salespersons Defined Under General Business Law, section 359-e, New York State Register, Vol. XLII, Issue 15 (Apr. 15, 2020).

appropriate compliance with any new requirements. We provide additional discussion of these points below.

Form D Filings for Private Offerings under Regulation D

The Department has proposed to amend its regulations to provide that a private fund making an offering pursuant to Regulation D under the Securities Act of 1933 ("Securities Act") would satisfy its filing requirements by filing a Form D with the Department.[4] These amendments would simplify offerings by private funds and harmonize New York requirements with SEC rules and those of other states, which will reduce compliance burdens for private fund managers and eliminate potential confusion, while providing more consistent information for the Department.

As the Department notes in the Proposals, it is an appropriate time to update its regulations due to, among other things, the evolution of national registration processes and technological advancements. We agree with the Department that its policies and practices should be modernized to keep pace with the developments in state and federal securities regulation since the enactment of the National Securities Markets Improvement Act in 1996 ("NSMIA"), and that additional clarity regarding the classification and required filings of certain securities would be useful for issuers.

The adoption of Form D filings for private offerings will align New York with requirements at the federal level in a manner consistent with the framework set out in NSMIA and implemented by the SEC. Under SEC rules, issuers that conduct a private offering under Rule 506 of Regulation D must file a Form D with the SEC within 15 days after the first sale of securities in the offering. Such Form D notices and amendments are filed online using the SEC's EDGAR (Electronic Data Gathering, Analysis and Retrieval) system. Under the amendments proposed by the Department, an issuer making such an offering under Rule 506 of Regulation D would also file a Form D with the Department, instead of the currently required Form 99. Issuers would file the Form D through the North American Association of Securities Administrators' ("NASAA") electronic filing depository system ("EFD") on the same timeline as the filing required by the SEC under Regulation D.[5]

Such harmonization of state and federal filing requirements will benefit issuers by simplifying their reporting obligations and reducing confusion, while also enhancing investor protection by ensuring that the Department receives direct notice of persons offering securities to New York residents.

Registration and Exam Requirements for Investment Adviser Representatives and Finders

The Proposals provide for new categories of individuals, including "investment adviser representatives" and "finders," to become subject to registration and exam requirements. The Department explains that when the Central Registration Depository/Investment Advisor

[4] Proposed N.Y.C.C.R. Title 13, Section 10.1(a)(3).

[5] Proposed N.Y.C.C.R. Title 13, Section 10.11(b).

Registration Depository (collectively "CRD/IARD") system was first implemented, technological and other limitations made registration impractical, and that the new requirements are designed to complement nationwide regulation. We support these modernization efforts to ensure appropriate individuals are registered and subject to exam requirements, however, we recommend changes to these categories to ensure that they do not create unnecessary confusion with respect to federal law.

Many investment advisers with operations in New York are registered with the SEC and subject to registration and regulation requirements under the Investment Advisers Act of 1940 ("Advisers Act"), and the rules thereunder. Section 203A of the Advisers Act permits states to license, register, or otherwise qualify any investment adviser representative who has a place of business located within that state.[6] For purposes of Section 203A, investment adviser representatives of SEC-registered investment advisers include supervised persons of the adviser who have more than five clients who are natural persons, and more than ten percent of whose clients are natural persons, where "qualified clients"[7] are not counted as natural persons.[8]

In this way, the SEC has determined the types of employees of SEC-registered investment advisers that states may subject to licensing and registration requirements. For example, the SEC in 1998 amended the definition of "investment adviser representative" following the enactment of NSMIA to ensure that certain adviser employees would not fall within the definition if their clients were primarily institutional but they also had a small number of natural person clients.[9] In amending the definition, the SEC explained that those supervised persons of SEC-registered investment advisers who are not deemed to be investment adviser representatives under its rule are not subject to state qualification requirements.

The proposed definition of investment adviser representative would include natural persons of state-registered and SEC-registered investment advisers that represent the adviser in doing any of the acts that define an investment adviser under state law.[10] We recommend the

[6] Section 203A-3(b).

[7] Qualified clients generally are natural persons who have at least $1,000,000 under the management of the investment adviser or have a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $2,000,000. Advisers Act Rule 205-3(d)(1).

[8] Advisers Act Rule 203A-3(a). However, a supervised person is not an investment adviser representative if the supervised person does not on a regular basis solicit, meet with, or otherwise communicate with clients of the investment adviser, or provides only impersonal investment advice. Rule 203A-3(a)(2).

[9] Revisions to Rules Implementing Amendments to the Investment Advisers Act of 1940, SEC Release No. IA-1733 (July 20, 1998).

[10] An "investment adviser representative" would mean "a natural person representing an investment adviser, solicitor or federally covered investment adviser in doing any of the acts that define an investment adviser under GBL Section 359-eee(1)(a), including such acts for a federally covered investment adviser, except for natural persons who represent a federally covered investment adviser and do not have a place of business within the state. Any natural person supervising any investment adviser representative is deemed to be an investment adviser representative and is subject to the same examination and registration requirements under this part." Proposed N.Y.C.C.R. Title 13, Section 11.2(i).

definition be modified so that it is consistent with the SEC definition of investment adviser representative with respect to SEC-registered investment advisers. As the Advisers Act and SEC rules determine the types of employees of SEC-registered advisers who may be subject to state licensing and registration requirements, clarifying that the SEC definition of investment adviser representative applies to SEC-registered investment advisers would eliminate any potential confusion.

In addition, the Department has proposed "finders" as a new category of individuals who would be prohibited from receiving compensation unless they were registered as a broker-dealer or salesperson.[11] Similar to the discussion above regarding investment adviser representatives, we are concerned this could create uncertainty, and potential inconsistency, with respect to federal requirements.

The SEC has long determined through no-action letters the types of individuals that are finders under its regulatory framework.[12] We believe this long-standing SEC regulation of finders has been effective and provides a consistent, harmonized approach for firms, particularly those that operate in multiple states. In addition, the SEC recently stated that its Division of Trading and Markets is reviewing the status of finders for purposes of Section 15(a) of the Securities Exchange Act of 1934.[13] Accordingly, we recommend against the Department defining a new category of finders, so that firms will continue to be subject to a single, clear standard.

Additional Comments

The Department has proposed to provide the Attorney General with authority to deny, suspend, condition or revoke by order any registration statement or application of any investment adviser, investment adviser representative, solicitor or principal made pursuant to GBL 359-eee, in the public interest for good cause.[14] The Department states that it has always held the implicit authority to deny investment adviser applications in the public interest and that the new provision codifies this authority.

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[11] A "finder" would mean "a person, firm, association, or corporation who as a part of a regular business, engages in the business of effecting transactions in securities for the account of others within or from this state, to the limited extent that such person, firm, association or corporation, receives compensation for introducing a prospective investor or investors to any broker, dealer or salesperson." Proposed N.Y.C.C.R. Title 13, Section 10.10(a)(8).

Finders not associated with a registered broker-dealer would register by filing Form M-1. Finders associated with a non-FINRA member broker-dealer would need to file Form M-2, while finders associated with a FINRA member broker-dealer would file Form U4. Finders would also be subject to current New York exam requirements applicable to brokers, broker-dealers, and salespersons. Proposed N.Y.C.C.R. Title 13, Section 10.1(a)(6).

[12] *See e.g.*, SEC No-Action Letter, Paul Anka (July 24, 1991).

[13] Concept Release on Harmonization of Securities Offering Exemptions, 34-86129 (June 18, 2019) at n. 55.

[14] Proposed N.Y.C.C.R. Title 13, Section 11.18(a).

We appreciate that the Department explains in the Proposal that it anticipates promulgating guidance to further detail this authority. We encourage the Department in providing such guidance to clearly describe the conditions under which such authority could be used and the process for taking any actions so that firms will have sufficient understanding of any additional requirements as a result of this authority. For example, it would be helpful if the guidance explains whether the scope of the Department's authority has been expanded as a result of this amendment, and if so, to provide additional information about the types of activities of concern to the Department.

Finally, the Department would codify certain recordkeeping requirements for investment advisers registered with New York for the verification of "accredited investors" and "qualified clients," as those terms are defined under federal law. We agree that this requirement and other recordkeeping requirements apply to investment advisers registered with New York, and that SEC-registered investment advisers remain subject to separate recordkeeping requirements under federal law.

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MFA appreciates the opportunity to provide these comments to the Department in response to the Proposals. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Benjamin Allensworth

Benjamin Allensworth
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