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August 7, 2018

Brent J. Fields, Esq.
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-0609

Re: File No. S7-09-18 – Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation

Dear Mr. Fields:

MFS Investment Management ("MFS")[1] appreciates the opportunity to comment on the proposed Securities and Exchange Commission ("SEC" or "Commission") interpretation of the standard of conduct for investment advisers under the Investment Advisers Act of 1940, as amended ("Advisers Act") when providing personalized investment advice.[2] While MFS agrees with the Commission that "it would be appropriate and beneficial to address in one release and reaffirm – and in some cases clarify – certain aspects of the fiduciary duty that an investment adviser owes to its clients under section 206 of the Advisers Act", we believe that the proposed interpretation in some instances goes beyond reaffirming and clarifying those aspects of an investment adviser's fiduciary duty. In addition, we believe that, in light of the impact of Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Commission Directive 2002/92 and Council Directive 2011/61, O.J. (L 173) 57, 349 and equivalent national rules of member states ("MiFID II") upon the acquisition of research by investment professionals, the SEC should clarify the standard of conduct for investment advisers when providing impersonal investment advice, particularly to sophisticated institutional clients. MFS also appreciates the opportunity to comment regarding aspects of enhanced investment adviser regulation.

1. Impersonal Investment Advice

The Proposed Interpretation states that the "[t]he Commission recognizes that many advisers provide impersonal investment advice. . . . This Release does not address the extent to which the Advisers Act applies to different types of impersonal investment advice."[3] We believe that the scope of the standard of conduct owed by broker-dealers that provide research services to institutional clients in instances where: (i) the research services constitute impersonal investment advice; (ii) the services are solely incidental to the broker-dealer's conduct of its business as a broker-dealer with the meaning of Section 202(a)(11)(C) of the Advisers Act; but (iii) that receive special compensation within the meaning of Section 202(a)(11)(C) has assumed increasing importance in light of the enactment of MiFID II. In particular, it is

[1] MFS Investment Management traces its history to 1924 and the creation of the country's first mutual fund, Massachusetts Investors Trust. Today MFS is a global investment manager managing approximately $476 billion in assets through a variety of collective investment vehicles and separate accounts.

[2] *Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation,* Investment Advisers Act Rel. No. 4889 (Apr. 18, 2018). 83 FR 21203, 21204 (May 9, 2018) ("*Proposed Interpretation*").

[3] *Id., 83 FR at 21204 note 8.*

our experience that more investment advisers are seeking to pay for all of their investment research from their own resources, and that more clients – even those that are not subject to MiFID II – are seeking to cause their investment advisers to pay for investment research out of the investment advisers' resources rather than out of client resources. Yet, as long as such payments are treated as special compensation and the scope of the standard of care that attaches to broker-dealers that become investment advisers by virtue of their acceptance of such payments remains unclear, regulatory impediments will continue to inhibit investment advisers and their clients from structuring research payment arrangements in ways that both parties agree are most beneficial.[4] Consequently, we believe that the SEC should address the standard of care that attaches to impersonal investment advice owed by broker-dealers that provide research services to institutional clients in instances where: (i) the research services constitute impersonal investment advice; (ii) the services are solely incidental to the broker-dealer's conduct of its business as a broker-dealer with the meaning of Section 202(a)(11)(C) of the Advisers Act; but (iii) that receive special compensation within the meaning of Section 202(a)(11)(C).

2. **The Scope of an Investment Adviser's Fiduciary Duty**

The Proposed Interpretation notes that "[t]he Advisers Act establishes a federal fiduciary standard for investment advisers." [5] The Commission states that "the investment adviser cannot disclose or negotiate away, and the investor cannot waive, the federal fiduciary duty", which the Commission states comprises a duty of care and a duty of loyalty.[6] The Proposed Interpretation states that "[d]isclosure of a conflict alone is not always sufficient to satisfy the adviser's duty of loyalty and section 206 of the Advisers Act."[7] While the Commission alludes to conflicts that it expects advisers to mitigate or eliminate rather than disclose,[8] it does not identify particular conflicts that are incapable of being "disclosed away".

In our view, it is difficult to reconcile these statements with past Commission statements about what an adviser can "disclose away". For example, when the SEC proposed its amendments to Part 2 of Form ADV, it stated:

> [T]he U.S. federal securities laws do not prescribe minimum experience or qualification requirements for persons providing investment advice. They do not establish maximum fees that advisers may charge. Nor do they preclude advisers from having substantial conflicts of interest that might adversely affect the objectivity of the advice they provide. Rather, investors have the responsibility, based on disclosure they receive, for selecting their own advisers, negotiating their own fee arrangements, and evaluating their advisers' conflicts.[9]

While MFS, like many of its peers, seeks to mitigate or eliminate certain conflicts of interest rather than disclose and obtain client consent to each and every one, we believe that the decision regarding which conflicts to eliminate, which conflicts to mitigate and which conflicts to simply disclose and obtain informed consent without taking any steps to mitigate or eliminate should be left to investment advisers and their clients.

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[4] Of course, investment advisers and their clients may decide that factors such as tax and accounting treatment of client commission payments versus payments from an investment adviser's own resources may militate in favor of paying for research with client commissions.

[5] *Proposed Interpretation*, 83 FR at 21205 (citations omitted).

[6] *Id.,* 83 FR at 21205-06.

[7] *Id.,* 83 FR at 21208.

[8] *Id.,* 83 FR at 21210.

[9] *Amendments to Form ADV*, Investment Advisers Act Rel. No. 2711 (Mar. 3, 2008), 73 FR 13958 (Mar. 14, 2008).

3. **Financial Responsibility**

The Proposing Release notes that Rule 206(4)-2 under the Advisers Act ("Custody Rule") generally requires investment advisers with custody to maintain client assets with banks or broker-dealers and comply with certain other requirements.[10] The Commission specifically solicited comment on whether "the custody rule and other rules under the Advisers Act adequately address the potential for misappropriation of client assets and other financial responsibility concerns for advisers?" [11]

We note that the SEC staff has issued, and later amended, guidance concerning custody in instances in which a custody contract to which an adviser is not a party purports to provide the investment adviser broader authority to withdraw client funds and securities than is provided to the investment adviser in its investment management agreement with its client.[12] In addition, we note that the staff continues to grapple with the issue of whether an adviser has custody of securities that are settled otherwise than on a delivery versus payment basis. We believe that until the Commission and the staff resolve these more basic custody issues, the Custody Rule potentially encompasses investment advisers that present very different risk profiles with respect to the possibility of misappropriating client assets. We would also note that as the Commission re-examines the Custody Rule, it should examine the impact of technological developments such as blockchain upon the risk of an adviser misappropriating client assts.

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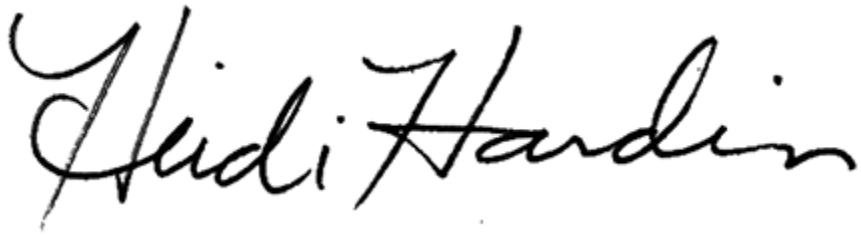
We appreciate the opportunity to comment on the Proposal. If you have any questions regarding this comment letter or need additional information, please contact me at [redacted] or Ethan Corey at [redacted].

Sincerely,



Heidi W. Hardin
General Counsel

cc: The Honorable Walter J. Clayton
Chairman
Securities and Exchange Commission

The Honorable Kara M. Stein
Commissioner
Securities and Exchange Commission

[10] *Proposed Interpretation*, 83 FR at 21213.

[11] *Id.,* 83 FR at 21214.

[12] *See IM Guidance Update 2017-01* "Inadvertent Custody: Advisory Contract Versus Custodial Contract Authority" (February 2017); IM Information Update 2018-01 "Updates to Custody Rule Frequently Asked Questions" (June 2018).

The Honorable Michael S. Piwowar
Commissioner
Securities and Exchange Commission

The Honorable Robert J. Jackson, Jr.
Commissioner
Securities and Exchange Commission

The Honorable Hester M. Peirce
Commissioner
Securities and Exchange Commission