December 20, 2023

Via Email to JunkFees@Mass.gov

Massachusetts Office of the Attorney General
Attn: Policy & Government Affairs Division
One Ashburton Place, 20th Floor
Boston, MA 02108

Re: SIFMA Comment on Proposed Regulations 940 C.M.R. 38.00
re: Unfair and Deceptive Fees

To Whom It May Concern:

The Securities Industry and Financial Markets Association (***"SIFMA"***)[1] appreciates the opportunity to comment on the Massachusetts Office of the Attorney General's proposed rules that would require the disclosure to a consumer of the total price of a product in connection with any advertising, marketing, solicitation, or offer of sale to a consumer (the ***"Proposal"***).[2] We respectfully submit the following comments for your consideration.

The Proposal broadly defines the term "Product" to include "[a]ny item available for or as part of a Sale, including but not limited to goods, services, and programs." The Proposal defines "Sale" to include "lease, rent, or barter." Finally, the Proposal defines the "Total Price" to be disclosed as "[t]he entire price to be paid by the consumer, inclusive of all fees, interest, charges, or other expenses necessary or required in order to complete the transaction."

The Proposal's Total Price formulation generally appears to be geared toward sales of physical goods or subscription goods and services. The broad definition of Product, however, could sweep in all services and programs, including financial services transactions. It is unclear

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed-income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit http://www.sifma.org.

[2] Proposed Regulation 940 C.M.R. 38.00, https://www.mass.gov/doc/proposed-regulations-940-cmr-3800-unfair-and-deceptive-fees/download.

whether that was the intent of the Proposal. Given the focus on physical goods and subscription goods and services, we respectfully request that the Massachusetts Office of the Attorney General confirm that the Proposal was not intended to and would not in fact apply to financial products and services offered by financial services firms, particularly as those would be preempted in large part by federal law, as discussed below.

Financial products and services offered by financial services firms should be explicitly exempt from the Proposal.

The financial services industry is heavily regulated, with a complex landscape of rules and regulations that organizations must follow to remain compliant. Financial services firms that offer securities, bank, insurance and other financial products and services are already subject to multiple, comprehensive regulations governing cost disclosure to their clients. The current disclosure regime is not only comprehensive, but also appropriately tailored to reflect the specific manner in which financial services firms operate, and effective in informing investors how they are paying for financial products and services.

Moreover, financial products and services are generally not paid for in the same manner as other goods and services because they are often priced by reference to ever-changing market prices, indices, and other variables that are not knowable, and that can only be estimated, at the time the parties agree to a financial transaction. Thus, Total Price is often not knowable "at the time of the initial presentation" as the Proposal would require. Consequently, financial services industry regulators do not require financial services firms to disclose cost information to clients under the Total Price formulation in the Proposal. Given the way "pricing" works in the financial services industry, the Total Price formulation is inherently incompatible, would be exorbitantly expensive and difficult to implement (if it could be implemented at all), and would not meaningfully enhance investors' understanding of their financial transaction costs.

For all the foregoing reasons, the Proposal should explicitly exempt financial products and services offered by financial services firms.

With respect to RIAs and BDs doing business in Massachusetts, the Proposal is federally preempted.

To the extent that financial services firms, including federally registered investment advisers (***"RIAs"***) and broker-dealers (***"BDs"***), are not exempt from the Proposal, then RIAs and BDs would presumably be required to disclose to clients the Total Price of financial products and services.

States, however, are restricted in their ability to regulate RIAs and BDs. In 1996, Congress passed the National Securities Markets Improvement Act (***"NSMIA"***) "to eliminate duplicative and unnecessary regulatory burdens [on RIAs and BDs] while preserving important investor protections by reallocating responsibility over the regulation of the nation's securities markets in a more logical fashion between the Federal government and the states."[3] NSMIA

[3] *See* H. Rep. No. 104-864, at 39-40 (1996) (Conf. Rep.).

preempts states from regulating RIAs, and from imposing books and records requirements on BDs that differ from, or are in addition to, federal requirements.

RIAs are exempt from the Proposal.

With respect to RIAs, NSMIA added section 203A(b)(1) to the Investment Advisers Act of 1940 (***"Advisers Act"***) which states:

> No law of any state or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person (A) that is registered under section [203] as an investment adviser, or that is a supervised person of such person, except that a State may license, register or otherwise qualify an investment adviser representative that has a place of business located within that State; or (B) that is not registered under [Section 203] because that person is excepted from the definition of an investment adviser under section [202(a)(11)].[4]

In the Rules Implementing Amendments to the Advisers Act, the SEC explained that Section 203A(b)(1), as amended by NSMIA, preempts not only a state's specific registration, licensing, and qualification requirements, but also all regulatory requirements imposed by state law on federally-registered investment advisers relating to their advisory activities or services, except those provisions relating to enforcement of anti-fraud prohibitions.[5]

Thus, NSMIA federally preempts the Proposal with respect to RIAs. Accordingly, the Massachusetts Office of Attorney General should confirm that RIAs and their investment adviser representatives are exempt from the Proposal.

BDs are exempt from the Proposal.

With respect to BDs, NSMIA amended the Securities Exchange Act of 1934 (***"Exchange Act"***) to prevent states from requiring BDs to make and keep records that differ from, or are in addition to, the records required under the federal rules.[6] Therefore, to the extent a state law or

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[4] 15 U.S.C. §80b-3a(b)(1).

[5] Rules Implementing Amendments to the Investment Advisers Act of 1940, Release No. IA–1633, File No. S7–31–96, (May 22, 1997), available at https://www.govinfo.gov/content/pkg/FR-1997-05-22/pdf/97-13284.pdf ("On its face, section 203A(b)(2) preserves only a state's authority to investigate and bring enforcement actions under its antifraud laws with respect to Commission-registered advisers. The Coordination Act does not limit state enforcement of laws prohibiting fraud. Rather, states are denied the ability to reinstitute the system of overlapping and duplicative regulation of investment advisers that Congress sought to end." (text at nn.155-56)).

[6] 15 U.S.C. § 78o(i)(1) ("No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish . . . making and keeping records . . . 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 this chapter.").

regulation necessarily compels a BD to create records that differ from, or are in addition to, federal requirements, then those state requirements are preempted by NSMIA.[7]

NSMIA not only limits state regulations that *directly* impose new or different recordkeeping requirements, but also state regulations that by their nature require BDs to make and keep new or different records than those required by federal law and FINRA rules. Notably, the federal rules require BDs to preserve a variety of different records, including "all communications sent . . . by the member, broker or dealer . . . relating to its business as such."[8] Thus, any state regulation that requires BDs to make specific new communications or disclosures would thereby require the creation of a new record, in violation of NSMIA.

In this case, as discussed above, while BDs are subject to a robust disclosure regime, neither of BDs' primary regulators – the SEC and FINRA - imposes rules that require firms to disclose information in the form of the Proposal's Total Price formulation. In connection with BD advertising and marketing, the Proposal directly conflicts with FINRA Rule 2210 (Communications with the Public),[9] and in connection with solicitation and investment recommendations, the Proposal directly conflicts with SEC Regulation Best Interest (***"Reg BI"***),[10] neither of which requires the formulation of Total Price set forth in the Proposal. Because the Proposal would require BDs to make a new disclosure to customers not currently required under federal law, it would necessarily require BDs to create a new record not currently required under federal law.

Thus, NSMIA, FINRA Rules, and Reg BI federally preempt the Proposal with respect to BDs. Accordingly, the Massachusetts Office of Attorney General should confirm that BDs and their associated persons are also exempt from the Proposal.

The Proposal's NSMIA savings clause cannot avoid NSMIA preemption of the Proposal.

Section 38.07 (Preemption) of the Proposal states that "*In the event any conflict exists between the provisions of 940 C.M.R. 38.00 and the provisions of any Federal statute or regulation, such Federal law shall control.*" Section 38.06 (Severability) states that *"If any provision of 940 C.M.R. 38.00 shall be held invalid, the validity of the remainder of [the Proposal] shall not be affected thereby."*

Collectively, these two provision are intended to essentially "cure" any defect in the Proposal due to federal preemption. These provisions, however, do not in fact relieve a state regulator of, or legally insulate a state regulator from, its obligation to avoid imposing, directly

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[7] *See* Books & Records Requirements for Brokers & Dealers Under the Sec. Exch. Act of 1934, Exchange Act Release No. 44992, 66 Fed. Reg. 55818, 55818 (Oct. 26, 2001) ("NSMIA prohibits States from establishing books and records rules that differ from, or are in addition to, the Commission's rules.").

[8] *See* Exchange Act Rule 17(a)-4, 17 CFR § 240.17a-4(b)(4).

[9] https://www.finra.org/rules-guidance/rulebooks/finra-rules/2210.

[10] https://www.federalregister.gov/documents/2019/07/12/2019-12164/regulation-best-interest-the-broker-dealer-standard-of-conduct.

or indirectly, NSMIA-preempted regulations on RIAs, or NSMIA-preempted books and records requirements on BDs. As currently drafted, the Proposal cannot be reconciled with NSMIA with respect to its application to RIAs and BDs. Thus, both RIAs and BDs should be explicitly exempted from the Proposal on federal preemption grounds. Otherwise, if enacted, the Proposal likely would not survive a legal challenge on federal preemption grounds.

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If you have any questions or would like to further discuss these issues, please contact the undersigned at 202-962-7300.

Sincerely,

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SIFMA

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