Via e-mail: securitiesregs-comments@sec.state.ma.us

January 6, 2020

The Honorable William Francis Galvin
Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Dear Secretary Galvin:

We the undersigned trade associations appreciate the opportunity to comment on the Massachusetts Securities Division's ("the Division") Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Advisor Representatives ("Proposal") dated December 13, 2019. We collectively represent a broad cross section of the financial services industry, and many of our members do business and serve retail investors, state and local governments, corporations, and institutional investors in the Commonwealth.

We are writing to express our serious concerns with the Proposal as currently drafted. Many of the undersigned commented on the Division's Preliminary Solicitation of Public Comments, dated June 14, 2019 in a joint submission as well as individually. While we appreciate the Division's attempt to address some of the identified problems, many concerns remain. Additionally, some of the revisions raise new, and in some cases even more troubling, issues.

While many of us are again sending separate letters, we thought it was important to highlight some universal concerns and to strongly encourage you not to finalize the Proposal at this time. Specifically, we urge you to consider the following:

1. Massachusetts investors would face higher costs and more limited opportunities under the Proposal. The Proposal would create Massachusetts-specific standards that are substantively different from national standards as well as those of every other jurisdiction. The different standards and requirements, aside from causing confusion, will inevitably contribute to higher costs and fewer options in terms of advice, products and services. In fact, it is likely that many products and services that have effectively provided Massachusetts investors with financial security and helped them build wealth over years and decades will no longer be affordable or available.

2. It is premature for the Division to characterize Regulation Best Interest's heightened standard as insufficient. As you know, in June of 2019, the Securities and Exchange Commission ("SEC") adopted Regulation Best Interest ("Reg BI") which creates a new nationwide, heightened standard of conduct for broker-dealers ("BDs") and their representatives when dealing with retail customers. In its Request for Comment, the Division states that "Reg BI fails to provide investors the protection they need from harmful conflicts of interest." We strongly disagree. In our view, Reg BI provides substantial and meaningful investor protection, and the heightened standard impacts nearly every aspect of a BD's operation. We respectfully suggest that, since Reg BI is not yet fully operational, it is at least premature to characterize the years-long federal effort as insufficient. We would strongly encourage you to wait until Reg BI is fully operational and the SEC, FINRA and state regulators begin examining for compliance before finalizing a potentially unnecessary, state-specific standard which conflicts with the federal rule.

3. Any proposal should make clear that it does not apply to SEC-Registered Investment Advisers ("IAs") and their Representatives ("IARs"). Unlike the Preliminary Solicitation, the Proposal seems to suggest that federal covered advisers are appropriately excluded from this Proposal. We would appreciate clarification of that fact. We respectfully ask for similar clarification that the Proposal does not apply to IARs of federal covered advisers. The Massachusetts Securities Act defines "investment adviser representative" to include employees or persons of federal covered advisers "subject to the limitations of section 203A of the Investment Advisers Act of 1940." While Massachusetts has the authority to bring enforcement actions for fraud and deceit, such authority is substantially different than imposing substantive conduct requirements on employees or persons of federally covered advisers.

4. An ongoing monitoring requirement is inconsistent with the brokerage model and will likely limit consumer choice. The Massachusetts proposal would impose a broad and ongoing fiduciary duty obligation on BDs, IAs and their agents if, among other things, they use any of a wide range of common titles, they receive "ongoing compensation" from the client, or the customer has a "reasonable expectation" that an account is being monitored. While we have

specific concerns with each of these components, an ongoing monitoring requirement is inconsistent with the brokerage model. Moreover, as the SEC noted, such a duty may not be consistent with the "solely incidental" prong of the BD exclusion from the definition of investment adviser.

Any ongoing duty would likely result in firms limiting or eliminating brokerage services. Clients would then likely have to choose between moving to more expensive fee-based advisory accounts or moving to internet or call center-based execution-only platforms. To avoid this outcome, we again recommend that the Proposal limit the duration of the fiduciary duty to the point in time a recommendation is being made.

5. The Proposal's "Avoid Conflicts" requirement is ambiguous and conflicts with federal law. The Proposal's duty of loyalty requires, among other things, that BDs, IAs and their representatives "make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot be avoided, and mitigate conflicts that cannot be avoided or eliminated." The provision, however, contains substantial ambiguity. For example, what constitutes "all reasonably practicable efforts?" If a conflict can be avoided, does it have to be avoided? Is mitigation only an option if conflicts can't be avoided or eliminated? Without greater clarity, firms will likely restrict investment options, products and services in the state.

6. The Proposal's "Without Regard to" language is unworkable. We continue to be concerned with the requirement that BDs, IAs and their representatives "make recommendations and provide investment advice *without regard to* the financial or any other interest of any party other than the customer or client." This language remains unworkable. Because financial professionals get paid for their services, they will always be vulnerable to claims that they did not satisfy their duty of loyalty obligation. The new language is even broader than the language in the Preliminary Solicitation and thus may be even more problematic. We again encourage you to replace the "without regard to" language with the SEC terminology which reads "without placing the financial or other interest . . . ahead of the interest of the retail customer."

7. The Proposal should expressly exempt commodities and insurance products. The Proposal expressly broadens the scope of the fiduciary duty obligation beyond securities to the "purchase, sale or exchange of any security, commodity or insurance product" and separately extends the sales, quota and special incentive program prohibitions to insurance products. In its Request for Comment, the Division "acknowledges that annuities are not considered securities" but asserts it has authority "regardless of the presence or absence of securities." We respectfully reiterate our belief that commodities and insurance products are not within the jurisdictional mandate of the Division. While the Division has limited authority to bring enforcement actions against its registrants, this is different from imposing substantive conduct requirements in an area where the Massachusetts Insurance Division is the primary and appropriate state regulator. In addition, the Securities Division's efforts could undercut national standards for annuity products and the Massachusetts Insurance Division's own efforts to elevate the conduct standard for recommending annuity products in the state.

8. The Proposal's principal transactions language needs further clarification. The Division's Request for Comment raises additional concerns about how principal transactions would be treated. The Division states that "[t]hese transactions are not prohibited under the Proposal, but they do present conflicts of interest that must be addressed and managed under the Proposal." Concerns about how to "address and manage" these conflicts could negatively impact the underwriting process and make it more expensive for both issuers and retail clients. Retail investors may not have the same access to the issuances or will have to purchase them on an agency (non-principal) basis, at a higher cost.

9. The Disclosure Obligation should be modified. The Proposal requires that BDs, agents, IAs and IARs "disclose all material conflicts of interest" and states that "disclosing or mitigating conflicts alone does not meet or demonstrate the duty of loyalty." We appreciate the addition of the word "material," but continue to contend that, in some instances, disclosure alone should be sufficient.

10. The Proposal raises pre-emption and other legal concerns. We believe the Proposal has a variety of potential pre-emption issues and legal deficiencies. While this list is not inclusive, we believe that the Proposal raises express and conflict preemption issues. We think NSMIA preempts states from imposing such requirements on federal covered advisors and their representatives, and that the Proposal violates NSMIA books and records requirements. We further believe that the Proposal imposes investment advisory requirements on BDs which are inconsistent with Massachusetts law. All of this suggests that the Proposal may ultimately be unenforceable.

11. Any final regulations should specify an appropriate future effective date and provide for a sufficient implementation period. We strongly encourage you to wait until after Reg BI is fully operational and federal and state regulators like yourself have examined for compliance before moving forward. Should you decide to proceed, we would encourage you to have an effective date of on or after June 30, 2020 and to include an implementation period of at least 18 months. Alternatively, we would urge you to delay the enforcement date for at least 18 months. It will take time for entities to assess whether and how to modify their business activity in the State and to develop infrastructure, policies and procedures, and training and compliance programs for any new regulations.

We appreciate the opportunity to comment and your consideration of our views.

Sincerely,

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