



National Association *of* Insurance &
Financial Advisors *of* Massachusetts

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DELIVERED VIA EMAIL to 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:

Please accept on behalf of the National Association of Insurance & Financial Advisors – Massachusetts (NAIFA MA) and the National Association of Insurance and Financial Advisors (NAIFA) the following comments in response to the Massachusetts Securities Division’s Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers and Investment Adviser Representatives dated December 13, 2019 (the “Proposal”).

Founded at the Parker House Hotel in Boston in 1890 as The National Association of Life Underwriters (NALU), NAIFA is the nation’s oldest, largest and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States.

NAIFA MA, with nearly 500 members, is the collective voice for insurance agents and financial advisors in Massachusetts and emphasizes ethical conduct; quality education & training; practice management; and mentoring. We have become a valuable resource at the State House for consumer protection issues related to the financial advisory and insurance industries. Over the past few years we have worked with the legislature to pass laws standardizing long-term care plans for consumers, and protecting Massachusetts residents against insolvent insurance companies.

The mission of NAIFA is to advocate for a positive legislative and regulatory environment, enhance their members' business and professional skills, and promote the ethical conduct of their members. We have always supported reasonable efforts to protect consumers from unethical behavior and predatory financial practices.

While NAIFA strongly supports the Massachusetts Securities Division's (Division) goals of protecting consumers and helping them achieve financial security, we are concerned that the Proposal if adopted, will adversely impact small and mid-market consumers—who are a majority of our members' clients-- by adversely impacting these consumers' ability to have access to financial products and professional advice, guidance and service. In addition, the U.S. Securities and Exchange Commission's (SEC) new Regulation Best Interest (Reg BI) along with the soon-to-be final amendments to the NAIC's *Suitability in Annuities Transactions* Model Regulation will provide significant enhancements to consumer protection. The states should allow sufficient time to elapse in order to determine whether additional regulation is needed in these areas.

Following is a discussion of our principal concerns with the Proposal:

1. The Proposal favors a fee-based business model over a commission-based model, which will increase consumers' costs while decreasing consumer choice.

If adopted, the proposal will likely lead to large numbers of broker-dealers and registered representatives changing their business practice to a fee-based business model. Numerous studies on the impact of regulators adopting a fiduciary standard, and specifically on the impact of the Department of Labor's Fiduciary Rule, support this conclusion. For example, research done by FTI Consulting which focused on the effects of the implementation of the DOL Fiduciary Rule found that the implementation of this rule forced financial service providers to move away from a commission-based model to a fee-based model.¹ The proposal's bias towards an advisory model is due to, among other things, the overly broad and vague way the proposal addresses conflicts of interest; the

¹ Fiduciary Rule: Initial Impact Analysis, FTI Consulting (September 2017); see also: Deloitte White Paper on the DOL Fiduciary Rule (August 2017); The American College-NAIFA Survey of Financial Advisors, National Association of Insurance and Financial Advisors (June 2013)

requirement that covered persons make recommendations “without regard to the financial or other interest of any party other than the customer or client”; and the increased compliance costs and responsibilities that will result from the proposal’s fiduciary duty and its ongoing obligations.

This shift from a commission-based model to a fee-based business model will ultimately prove to have an adverse impact on many of the small and mid-sized investors who constitute a large portion of NAIFA’s members’ practices. A fee-based (advisory) model is often more expensive to consumers over the long run. In addition, since most fee-only advisors have minimum asset requirements of \$250,000, \$500,000 or more, this action will likely cause low and mid-level investors to lose access to financial products as well as the advice and services of financial professionals. NAIFA members’ clients generally do not have the level of assets required by most fee-based advisors---so where will these investors get advice and service? The answer is unclear at best. These consumers will lose out on the valuable services these professionals provide.

Another factor to consider is that consumers want to have choices with respect to investment services as well as how they pay for these services. SEC Chairman Jay Clayton noted this fact in a 2016 speech, commenting that “For many, the broker-dealer relationship is the better choice, and, for many, the investment adviser relationship is the better choice. Some may want both. A principal focus of mine is working to ensure that both relationships remain available.”² Finally, depending on the type of account, account balance and amount of activity in a consumer’s account, a commission compensation structure may prove to be more economical than a fee-based structure for many investors.

2. The Proposal should expressly exempt all insurance products, including variable annuities.

The preliminary proposal issued by the Division was unclear as to whether the proposal’s fiduciary duty would apply to variable annuity transactions. In our previous comment letter of July 26, 2019 NAIFA MA and NAIFA had recommended that a provision be added to the Proposal that expressly excluded

² Jay Clayton Speech on “The Evolving Market for Retail Investment Services and Forward-Looking Regulation — Adding Clarity and Investor Protection while Ensuring Access and Choice” (May 2, 2018); see also More Investors Seeking Financial Advice are Turning to Lower-Cost Options, Jim Puzanghera, Los Angeles Times (May 9, 2016)

variable annuities from the scope of the Proposal. Unfortunately, the current Proposal not only does not contain such a provision but it also appears to extend the scope of the Proposal's fiduciary duty to "insurance products" in general.³

Current Massachusetts law excludes all annuities (including variable annuities) from the definition of "security", stating that "Security" does not include "any insurance or endowment policy **or annuity contract** under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period." (emphasis added). Furthermore, variable annuities are already subject to comprehensive regulation by state insurance regulators, FINRA and the SEC. As such, they are among the most heavily regulated products in the financial marketplace. Subjecting these products to a possible addition layer of regulation by the state's securities regulator will provide little in the way of meaningful additional regulation and will potentially result in increased costs to consumers as well as conflicts between the various regulatory regimes.

With respect to other insurance products in general, such products are outside of the jurisdiction of the Securities Division and the appropriate regulator for these products is the state's insurance Division.

3. The Proposal differs from the SEC's Reg BI and the near-final amendments to the NAIC's Suitability in Annuities Transactions Model Regulation in ways likely to cause significant confusion and compliance problems.

The SEC's new Regulation Best Interest along with the soon-to-be final amendments to the NAIC's *Suitability in Annuities Transactions Model Regulation* will provide significant enhancements to consumer protection in a uniform, consistent manner. Individual state action in these areas will likely lead to overlapping, duplicative or conflicting requirements that could increase consumer confusion and result in serious compliance issues for advisors. At a minimum, the Division should delay any action on the Proposal until an appropriate amount of time—we would suggest 18 months or more-- has passed following Reg BI's adoption and the finalization of the NAIC amendments to accurately determine the impact that the SEC and NAIC's actions have had on consumer protection and

³ See Proposal at 90 CMR 12.207(1)(a) and (2)(d).

the marketplace, and whether there are any regulatory holes that require further state action.

For the above stated reasons, NAIFA MA and NAIFA strongly believe that the Proposal is not workable and that if adopted it will be harmful to the very consumers the Division is trying to protect—small and mid-size investors. Thank you for your consideration of our comments.

Sincerely,

David Burg

A handwritten signature in blue ink, appearing to read 'David Burg', with a stylized flourish at the end.

President, NAIFA Massachusetts

Cammie K. Scott

A handwritten signature in black ink, appearing to read 'Cammie Scott', written in a cursive style.

President, NAIFA