

January 7, 2020

VIA EMAIL

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

Re: Proposed Regulations – Fiduciary Conduct Standard

Dear Secretary Galvin:

The American Retirement Association (“ARA”) appreciates the opportunity to further comment on the Massachusetts Securities Division’s (the “Division’s”) Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (“Proposed Regulation”) dated December 13, 2019, which would impose a fiduciary conduct standard on broker-dealers, agents, investment advisers and investment adviser representatives (“Investment Professionals”)¹. As you know, the ARA submitted comments in July 2019 on the Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (“Preliminary Proposal”).

- **The ARA supports the exclusion of Employee Retirement Income Security Act of 1974 (“ERISA”)² fiduciaries from the application of the Proposed Regulation because a fiduciary standard under Massachusetts law should not apply to advice that is already covered by ERISA.**

The ARA strongly supports the principle that informs the Proposed Regulation: investors are best served when the interests of advisers and investors are aligned. However, ARA believes that ERISA already provides a uniform body of benefits law and regulations that protect participants and beneficiaries from impermissible conflicts of interest. In enacting ERISA, Congress intended to provide a uniform set of national rules that Massachusetts should respect in promulgating regulations applicable to Investment Professionals.

The American Retirement Association is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America’s private retirement system, the American Society of Pension Professionals and Actuaries, the National Association of Plan Advisors, the National Tax-Deferred Savings Association, the American Society of Enrolled Actuaries, and the

¹ Proposed revisions to the Code of Massachusetts Regulations at 950 C.M.R. 12.200.

² Pub. L. 93-406, 88 Stat. 829 (Sept. 2, 1974).

Plan Sponsor Council of America. ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to American workers, savers, and the sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Discussion

The interests of participants and beneficiaries in ERISA-covered retirement plans are protected by ERISA's fiduciary standard, which has long been recognized as the "highest known to law."³ This standard is stringent and its reach is broad. Individuals administering a plan, those providing advice on the investments, and many in between are subject to these requirements. Moreover, on top of the civil and criminal ERISA enforcement carried out by the federal government, participants in ERISA-covered have the right to sue for benefits and breaches of fiduciary duty.

According to the U.S. Supreme Court, "Congress enacted ERISA to 'protect ... the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans, and to 'provide for appropriate remedies, sanctions, and ready access to the federal courts.' 29 U.S.C. 1001(b)."⁴ ERISA has an expansive pre-emptive reach that is intended to ensure that employee benefit plan regulation is "exclusively a federal concern."⁵ ERISA §514(a) provides that the sections of ERISA relevant here supersede any state law that is in conflict.⁶ Excepted from pre-emption are state laws that regulate insurance, banking or securities, as long as the state law does not attempt to regulate an ERISA plan under laws that would deem it to be an insurance company (or other insurer), a bank, a trust company or an investment company.⁷

As the ARA described in our comments on the Preliminary Proposal, we have long believed that financial professionals who provide investment advice should indeed be held to a fiduciary standard that requires their recommendations be in the best interests of their clients. ARA advocates for an expanded concept of fiduciary responsibility at the federal level, and supported the extensive rulemaking project undertaken by the U.S. Department of Labor ("DOL Rule")⁸ to broaden the definition of an ERISA fiduciary. The DOL Rule, which was vacated by a federal court⁹, would have increased ERISA's consumer protections for an expanded universe of retirement accounts by covering IRAs. ARA continues to support an expanded fiduciary standard, but recognizes that having such a standard be a function of state law is problematic for

³ *Donovan v. Bierworth*, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982).

⁴ *Aetna Health v. Davila*, 542 U.S. 200, 208 (2004).

⁵ *Donovan v. Bierworth*, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982) (citing *Alessi v. Raybestos- Manhattan, Inc.*, 451 U.S. 504 (1981)).

⁶ ERISA § 514(a).

⁷ ERISA § 514(b)(2).

⁸ Definition of the Term Fiduciary, 82 Fed Reg. 16902 (April 7, 2017).

⁹ *Chamber of Commerce of the U.S.A. v. U.S. Dep't of Labor*, No. 17-10238, slip op. 46 (5th Cir. Mar. 15, 2018).



ERISA-covered retirement plans and the service providers to those plans. This is due to the very real potential for conflicting fiduciary standards between state law standards and fiduciary standards already in effect under ERISA.

ARA supports explicit exclusion of persons acting in the capacity of fiduciaries to employee benefit plans, their participants or. Fiduciary rules under laws of individual states, without exempting ERISA-covered plans, will lead to duplicative regulation, investor confusion, legal conflicts and compliance challenges while not providing additional investor protection benefits.

* * *

ARA supports the Proposed Regulation's inapplicability to persons acting as fiduciaries to ERISA plans, their participants, and beneficiaries. **ARA recommends** that the Massachusetts Securities Division retain this exclusion when the Proposed Regulation is finalized.

ARA would welcome the opportunity to discuss these comments further with you. Please contact Will Hansen, ARA Chief Government Affairs Officer, at WHansen@USARetirement.org. Thank you for your time and consideration.

Sincerely,

/s/ Brian H. Graff, Esq., APM
Chief Executive Officer
American Retirement Association

/s/ Will Hansen, Esq.
Chief Government Affairs Office
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/s/ Allison Wielobob, Esq.
General Counsel
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