

Via electronic delivery: securitiesregs-comments@sec.state.ma.us

January 7, 2020

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 Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

Dear Secretary Galvin:

On behalf of the companies of CUNA Mutual Group (CUNA Mutual), we are pleased to provide comments to the Massachusetts Securities Division (Division) of the Office of the Secretary of the Commonwealth on the Division's Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives.

CUNA Mutual is the nation's leading provider of financial products and services to credit unions and credit union members. Through our companies, we serve as an insurer, a retirement plan services provider, a broker-dealer, and a registered investment adviser. We make available various insurance and investment products to millions of credit union members across the United States. As part of the cooperative movement, we embrace the credit union philosophy of "people helping people" and our company's mission is to "Help people achieve financial security."

From CUNA Mutual's earliest comment letters on the Department of Labor's (DOL) regulatory process, the company has expressed support for a workable, appropriately tailored best interest standard. We take pride in helping those who make a modest income. It is in this spirit of supporting our customers that we offer these comments.

Regulatory Consistency Critical

CUNA Mutual supports a heightened duty of care, a best interest standard. We support the protection of consumers through a harmonized standard of care to address investor confusion which can result from a lack of uniformity and inconsistent expectations. However, given recent actions by the U.S. Securities and Exchange Commission (SEC), the Division's proposed regulations counter principles of uniformity and could disrupt or limit consumers' access to appropriate financial products and services.

A best interest standard, such as the SEC's Regulation Best Interest (Reg BI), requires financial professionals act in the best interest of customers at the time a recommendation is made and without placing the financial or other interests of the person making the recommendation ahead of the interests of the customer or client. In adopting a single, federal standard for

financial professionals, Reg BI promotes regulatory consistency which is critical for advisers and consumers. The SEC's Reg BI creates a new, nationwide, heightened standard of conduct for broker-dealers.

In harmony with Reg BI, the National Association of Insurance Commissioners (NAIC) is now in the final stages of adopting a best interest model act to enhance the required standard of conduct applicable to state insurance producers. The model act is expected to be finalized in the coming month and could then be immediately adopted across the states. CUNA Mutual supports the NAIC's work to enhance the required standard of conduct for insurance producers in a manner consistent with the SEC's Reg BI.

As nationwide regulatory developments are still ongoing, CUNA Mutual respectfully suggests the Division pause fiduciary rule proposal efforts to consider the actual impact and experiences of Massachusetts consumers under these new rules. If gaps or problems are found to exist, the Division would then be better-positioned to respond to specific issues in a prudent manner.

If individual states take steps to create their own and varied best interest or fiduciary rules, compliance and supervision challenges increase. Even if a unique Massachusetts fiduciary duty could be possible to implement, it is likely to have a disruptive effect and cause the marketplace to concentrate to a few, large firms. More importantly, as additional states implement varying fiduciary or best interest rules outside of Reg BI and the NAIC's best interest standard, a patchwork of inconsistent and conflicting rules will impact the ability of consumers everywhere to access products, services, and financial advice. A harmonized standard of conduct is encouraged to support consumers' investment expectations in Massachusetts and across the country.

Proposed Regulations Overlap with Insurance Division Authority

As proposed in Section 12.207(1)(a), the Securities Division seeks to apply a fiduciary duty if a broker-dealer, agent, investment advisor, or investment advisor representative recommends "the purchase, sale, or exchange of any security, commodity, or insurance product." Here the proposed regulations create authority issues as the Massachusetts Uniform Securities Act excludes any insurance product from the jurisdiction of the Securities Division. Insurance products and annuities are already subject to extensive regulation by the Massachusetts Division of Insurance, SEC, and the Financial Industry Regulatory Authority (FINRA). A layering on of additional regulations by the Securities Division could result in conflicting standards and additional consumer confusion.

As the primary regulator for the Commonwealth's insurance industry, the Massachusetts Division of Insurance is well-positioned to continue enforcing standards of conduct for the recommendation of insurance products. In their July 26, 2019, comment letter, the Massachusetts Division of Insurance outlined concerns about likely inconsistencies between a fiduciary rule by the Securities Division and the NAIC's best interest model law. CUNA Mutual shares the concerns outlined by the Division of Insurance and respectfully recommends the Securities Division either harmonize their work with the NAIC's or remove all references to insurance products in the proposed regulations.

Uncertain, Increased Regulatory Burden for Advisers; Decreased Consumer Choice

The proposed regulations will significantly increase the cost of delivery and uncertainty of doing business in the Commonwealth for financial professionals. While the costs of doing business will increase, such as to implement additional processes and documentation requirements, equally significant for broker-dealers and dual registrants will be the increased risk of excessive

litigation. Faced with rising business expenses and litigation risk, some broker-dealers and consumers will face difficult decisions. CUNA Mutual is concerned that consumers of modest means may have fewer product and service options and face increased costs as a result.

Under the proposed fiduciary rule, buy and hold investors may be particularly harmed as the business model often relied upon by such investors is challenged. Broker-dealers have historically operated on a transaction-based, third-party compensation basis and are currently subject to a suitability standard of care that will be replaced by the SEC's Reg BI. Reg BI recognizes the conflict created by third-party compensation will exist in broker-dealer relationships and permits the practice through the framework requiring a duty of care, duty of loyalty, disclosure, and compliance program. Established case law applicable to fiduciaries presumes no receipt of third-party compensation but supports fee-based practices. There are many cases in state and federal courts that interpret the duties of a fiduciary; SEC registered investment advisers have been subject to such a standard for years and have case law supporting their fee-based practices.

For many small account investors who buy and hold, purchasing assets in a brokerage account tends to lead to expense savings. Investment advisers may provide lower fees at the time of account opening, but the transaction-based commission a broker collects for low expense ratio products is often lower than advisory fees paid over the life of an investment. FINRA scrutinizes assets held in advisory accounts under the theory of "reverse churning," as expenses charged to clients do not reflect services received or the management of assets for conservative, buy and hold, investors.

Further, Section 12.207(b)(4) of the proposed regulations requires broker-dealers, agents, investment advisers, and investment adviser representatives to meet a fiduciary duty if they receive "ongoing compensation or charge(s) ongoing fees" for providing certain advice. Commission-based compensation arrangements can include both an up-front commission as well as a trailing commission, a structure that can be financially beneficial for some consumers. Under the proposed regulations, any arrangement involving trailing commissions would be subject to a fiduciary duty, thus imposing an obligation to provide ongoing monitoring services which may not be part of services received today.

Ongoing account monitoring can be an important, and sometimes expensive, service. It is also a service not universally desired by investors. For example, a buy and hold investor could choose to go years without making any portfolio changes so would not benefit from ongoing monitoring and the associated expense. For firms and financial professionals, ongoing account monitoring requires time, training, and includes exposure to potential liabilities that may not otherwise exist. As written, the proposed regulations would require buy and hold customers to pay for ongoing monitoring services, regardless of need or want, and drive up expenses and risk for financial professionals.

On compliance, there are several sections of the proposed regulations where undefined and vague terms will hinder compliance certainty. For example, in Section 12.207(b)(4), a fiduciary duty is owed where a broker-dealer, agent, investment adviser, or investment adviser representative advises on certain investment activities "as an integral component of other financially related services." Without definition, financial professionals and firms will not know with any certainty whether they have engaged in conduct triggering fiduciary obligations. Similarly, Section 12.207(b)(5) proposes that a fiduciary duty may be imposed where there is a

“reasonable expectation” that monitoring will occur on an ongoing or periodic basis. It is unclear what may constitute a “reasonable expectation.” For financial professionals and firms, clarity in when a fiduciary duty is owed is necessary for compliance.

Faced with vague rules, rising costs, and litigation risk, the landscape will shift under these proposed regulations to create unintended consequences and leave fewer and more expensive options for Massachusetts consumers. We saw this play out as many firms, faced with the DOL fiduciary rule, changed how consumers of modest means were served, if at all. If history repeats itself, firms may increase account minimum thresholds and scale back the products and services offered to manage compliance with the Division’s fiduciary rule proposal.

Conflicts of Interest Framework

While improved in the current proposal, the proposed conflicts of interest framework continues to lack sufficient detail to enable informed and clear rules of the road. The proposed regulations specify that conflicts should be avoided, then eliminated, and if not avoidable or able to be eliminated, then mitigated. The proposed regulations also specify in Section 12.207(2)(c) that disclosing or mitigating conflicts alone does not meet or demonstrate the duty of loyalty. The proposed regulations do not couple this standard with guidance for financial professionals and firms on what conflicts must be avoided, eliminated, and mitigated and/or how to appropriately do so. CUNA Mutual recommends the Division include additional details in the conflicts framework to enable an improved understanding of the requirement.

Reasonable Implementation Timeline Needed

If the Division determines to move forward with the proposed fiduciary rule, adequate time should be allocated for firms to prepare and implement needed system adjustments once a rule is final. We cannot stress enough the importance of this issue as we continue to implement the SEC’s Reg BI and anticipate the upcoming adoption of the NAIC best interest model for annuities. Implementing the proposed regulations on top of Reg BI and the NAIC’s model will require extensive work by our business, IT, and compliance areas. As one might expect, we have a finite number of employees with the subject matter expertise required to handle these issues. We suggest the Division err on the side of a longer implementation timeframe.

In closing, CUNA Mutual appreciates the Division’s consideration of these comments. Like others in the industry, we work hard each day to bring financial products and services to the consumers who need them most. Without change, we believe the Division’s proposed regulations will introduce compliance confusion and increase delivery costs for the small account investors the proposed regulations seek to protect. CUNA Mutual supports a best interest standard of care for financial professionals. The company also supports a harmonized, appropriate fee and conflict disclosure framework for broker-dealers across the country and in Massachusetts. Please reach out with any questions or if we can offer additional information to support these comments. Thank you.

Sincerely,



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