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Via Electronic Filing: [securitiesregs-comments@sec.state.ma.us](mailto:securitiesregs-comments@sec.state.ma.us)

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: Proposal to amend 950 MASS. CODE REGS. 12.200 (“Proposal”)**

Charles Schwab & Co., Inc. (“Schwab”) appreciates this opportunity to comment on the Proposal. We support the general intent behind the Proposal to enhance the standard of conduct of broker-dealers when they give investment advice. Section I provides an overview of our business model and how we serve Massachusetts residents by giving them choice across a spectrum of advice models. Section II offers two specific recommendations to preserve that consumer choice by avoiding an ongoing fiduciary monitoring obligation on broker-dealers when a client does not request or want to pay for it, simply based on the type of revenue a firm earns or the title its representatives use. We those two changes the Proposal would enhance investor protection while preserving Massachusetts retail investors’ choice in how they want to receive and pay for investment advice.

**I. Schwab’s Business Model to Serve All Investors**

As a dually registered broker-dealer (BD) and investment adviser (RIA) with \$3.94 trillion in total client assets and 12.2 million active accounts<sup>1</sup> that also serves approximately 8,000 independent RIAs, we believe we can offer a valuable perspective for the Division’s consideration. Our client base reflects the investing public. It runs the spectrum from small “Mom and Pop” investors, to sophisticated self-directed investors, to investors who delegate and entrust their financial lives to an RIA. Schwab’s assets under custody are divided almost evenly between our Investor Services business which directly serves retail investors, and our Advisor Services business which serves independent RIAs and their clients.

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<sup>1</sup> As of November 30, 2019.

In our direct retail investor business, about 15% of the assets are in an investment advisory account with Schwab for which clients pay an ongoing fee for advice. Of those households, most also have at least one brokerage-only account in which they pay only applicable transaction fees. The majority of our retail clients are self-directed, and some of them ask us for occasional investment advice for which they do not pay a fee. This large group of investors does not need, and may not be willing or able to pay the additional fees for, an ongoing investment advisory relationship. Our financial and portfolio consultants who serve our retail clients are dually licensed (broker-dealer and investment adviser representative) to serve clients holistically across multiple types of accounts, including retirement and non-retirement. Many are Certified Financial Planner (“CFP”) professionals subject to the CFP Board Code of Ethics and its fiduciary obligations.

The dual registration of our firm and representatives, and our platform of services for independent RIAs, enable us to uphold investor choice and provide access to a wide range of investment advice services.

It is important for the Division’s final rule to enhance investor protection while not diminishing the autonomy and choice for Massachusetts residents who maintain their accounts at dual registrant firms like Schwab or who hire independent RIAs to help them invest and manage their accounts. To this end, retail investors should expect that those who make securities recommendations will act in their best interest, exercise due care to understand their needs and the investments they recommend, and address and disclose potential conflicts of interest that could undermine acting in their best interest. Schwab, therefore, supports the general purpose and intent of the Proposal.

Retail investors as a group also deserve access to a full range of investment advice options including:

- (1) Occasional or episodic buy or sell recommendations for no additional fee, paying only a commission or cost associated with the transaction,
- (2) More frequent or regular non-discretionary investment advice for a fee, or
- (3) Discretionary management of investments including monitoring of the account.

Broker-dealers are the category of registrants who provide the first category of investment advice, and for many investors it is the best choice depending on their need, ability, and willingness to pay a fee for that advice. With occasional or episodic recommendations, the investment advice duties a broker-dealer owes its client (and is being paid for) must and should be fulfilled at the time of the recommendation. The duty, while significant, should not be ongoing.

RIAs provide the second and third categories of investment advice. They include a more in depth level of investment advice service usually for an asset-based fee and customarily spelled out in an investment management agreement between the investor and RIA. Given the trust and confidence an investor has placed on the RIA and is paying for, the investment advice duties RIAs owe their clients are ongoing and may include account monitoring.

Preserving these distinctions between BDs and RIAs is highly important to preserving investor choice and access. As discussed in Section II below, preserving the choice of the investment advice service they are receiving (transactional or ongoing), and the corresponding obligations their financial services firm owes them (whether BD or RIA), are the most important items that the Division should consider before finalizing the Proposal.

## II. Ongoing fiduciary obligations, where not otherwise agreed, are problematic

Sections 950 CMR 12.207(1)(b)(4) and 950 CMR 12.207(1)(c) present the greatest challenges to preserving investor choice.

### A. “Receives ongoing compensation”

As written in 950 CMR 12.207(1)(b)(4), the Proposal could be read to impose an ongoing fiduciary duty for such common practices as a BD firm receiving shareholder servicing or 12b-1 fees following the sale of a mutual fund. Under this section, an ongoing fiduciary duty applies when a BD “[r]eceives ongoing compensation or charges ongoing fees for advising a customer or client . . . as to the advisability of investing in, purchasing, or selling securities . . . .” The Division may have intended the modifier “for advising a customer or client” to apply to both “receives ongoing compensation” and “charges ongoing fees.” If so, then there is no issue. If not, then the provision could be read as imposing an ongoing fiduciary duty even after the transaction. This essentially would eliminate retail investor choice in how to receive and pay for investment advice. A BD would need to provide, and therefore a retail investor would need to pay for, ongoing monitoring of his or her account. To avoid that result, we would request that the Division either eliminate “receives ongoing compensation” from the text or clarify in adopting the final rule that the modifier – “for advising a customer or client” -- applies to both “receives ongoing compensation” and “charges ongoing fees.”

### B. Use of titles

As drafted, 950 CMR 12.207(1)(c) would create an ongoing fiduciary duty to monitor a client’s account simply based on a representative’s title. This will not preserve investor choice for Massachusetts residents, as monitoring is an investment advisory service that requires additional time and therefore an additional fee. While we support the goal of assuring that retail investors understand the kind of financial professional with whom they are dealing, this section is overbroad. At Schwab, for example, we use the title “Financial Consultant.” There is nothing in this title that is unusual or implies any ongoing fiduciary duty. The dictionary meaning of consultant is simply a professional who provides advice; this is entirely consistent with what BD representatives do and the title does not convey an ongoing and continuous duty. Schwab has used “financial consultant” throughout much of our 45 year history of serving retail investors, and we strongly believe that our clients who receive occasional advice from our financial consultants understand the level of service they receive and pay for and the nature of our relationship.

The Proposal would also appear to impose an ongoing fiduciary duty on Certified Financial Planner (CFP) certificant holders where none exists today simply because of the use of the two words “financial” and “planner.” Under the new CFP Code of Ethics and Standards of Conduct,<sup>2</sup> a CFP

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<sup>2</sup> <https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/cfp-board-code-and-standards.pdf?sfvrsn=23>

owes a fiduciary duty when providing “financial advice.”<sup>3</sup> While there are instances where this could be an ongoing duty, it can be a transactional standard that requires a CFP act as a fiduciary at the time of providing financial advice. It does not extend beyond that point-in-time recommendation.

However, the Proposal would effectively impose an ongoing fiduciary standard on a CFP professional to monitor a client’s account even when that client has only engaged the professional to provide a one-time plan. This would result in Massachusetts residents either not having access to a straight forward financial plan or having to pay for an ongoing monitoring service that they may not want, need, or be able to afford.


Whether by title or credential, this subsection effectively changes the Proposal from a point-in-time fiduciary standard to an ongoing fiduciary standard, which is applicable to an investment adviser but is inconsistent with the role of a broker-dealer. This will eliminate investor choice. Moreover, it is unnecessary. The Division’s goals are already met by imposing a fiduciary duty at the time of the recommendation. Imposing an ongoing fiduciary duty would only serve to confuse the role of a broker-dealer compared to an investment adviser and limit investor choice and access. Accordingly, we ask the Division to remove 950 CMR 12.207(1)(c) from any final rule or in the very least strike “consultant” from the list and make clear that it is not intended to change the obligations of a CFP professional.

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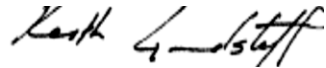
<sup>3</sup> *See id.* at Financial Advice. a: “A communication that, based on its content, context, and presentation, would reasonably be viewed as a recommendation that the Client take or refrain from taking a particular course of action with respect to: i. The development or implementation of a financial plan; ii. The value of or the advisability of investing in, purchasing, holding, gifting, or selling Financial Assets; iii. Investment policies or strategies, portfolio composition, the management of Financial Assets, or other financial matters; or iv. The selection and retention of other persons to provide financial or Professional Services to the Client; or b. The exercise of discretionary authority over the Financial Assets of a Client. The determination of whether Financial Advice has been provided is an objective rather than subjective inquiry. The more individually tailored the communication is to the Client, the more likely the communication will be viewed as Financial Advice. The provision of services or the furnishing or making available of marketing materials, general financial education materials, or general financial communications that a reasonable CFP® professional would not view as Financial Advice, does not constitute Financial Advice.”

Schwab appreciates the Division's efforts on the Proposal, and with the recommendations noted above we believe the Proposal can preserve Massachusetts retail investor choice. Please contact us with any questions regarding our comments.

Very truly yours,



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