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Via email to: securitiesregs-comments@sec.state.ma.us

Secretary William F. Galvin
Office of the Secretary of the Commonwealth
Attn: Proposed Regulation – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Re: Request for Comment: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

Dear Secretary Galvin:

LPL Financial LLC ("LPL") appreciates the opportunity to provide comments to the Massachusetts Securities Division ("Division") regarding its proposal to impose a fiduciary conduct standard on broker-dealers, agents, investment advisers, and investment adviser representatives through proposed amendments to 950 CMR 12.200 (the "Proposal") dated December 13, 2019.[1] We commend the Division for its thoughtful and productive amendments to the Proposal in response to comments it received on the Division's June 2019 preliminary solicitation of public comments on a fiduciary conduct standard (the "Preliminary Proposal").

LPL has consistently voiced its support for regulations requiring that investors receive investment advice and recommendations that are in their best interests.[2] We also believe it is important that financial institutions and professionals provide clear disclosures regarding the nature of their services, their fees and compensation, and material conflicts of interest so that investors are empowered to make informed choices about investment services and products. At the same time, we have urged that such standards and requirements be adopted in a way that preserves investor choice and access to a wide range of investment and financial services.[3] We are concerned that the Proposal, while seeking to protect

[1] We note our support for the comments the Securities Industry and Financial Markets Association provided in its letter to the Division dated January 6, 2020.

[2] *See*, *e.g.*, Letter from Michelle B. Oroschakoff, Chief Legal Officer, LPL Financial LLC, to Brent J. Fields, Sec'y, U.S. Sec. & Exch. Comm'n (Aug. 7, 2018) (commenting on proposed "Regulation Best Interest," proposed "Form CRS Relationship Summary," and "Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers"); Letter from Michelle B. Oroschakoff, Chief Legal Officer, LPL Financial LLC, to Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n (Dec. 18, 2018) (providing proposed clarifying language for the SEC to consider in its "best interest" rulemaking releases that would be issued in connection with the adoption of proposed Regulation Best Interest and the titling restrictions under proposed Rule 15*l*-2 under the Exchange Act). *See also* Exchange Act Release No. 83062 (Apr. 18, 2018), 83 Fed. Reg. 21,574 (May 9, 2018) ("Regulation Best Interest Proposing Release"); Exchange Act Release No. 83063 (Apr. 18, 2018), 83 Fed. Reg. 21,416 (May 9, 2018) ("Form CRS Proposing Release"); Advisers Act Release No. 4889 (Apr. 18, 2018), 83 Fed. Reg. 21,203 (May 9, 2018) ("Proposed Interpretation").

[3] *See*, *e.g.*, Letter from Stephanie L. Brown, Managing Director, General Counsel, LPL Financial LLC, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Aug. 30, 2010) (addressing comments on File No. 4-606: Study Regarding Obligations of Brokers, Dealers, and Investment Advisers) (stating, "Securities professionals providing the same service to

investors and improve investment outcomes, may unintentionally harm investors by reducing access to, and choice of, investment products and services.

In our view, investors will be best served with a single, consistent standard across the nation, which will preserve choice and access to investment services, reduce investor confusion and costs, facilitate compliance, and promote holistic investment services, advice and planning. Such standards will result in better savings and investment outcomes for all Americans, including Massachusetts residents, regardless of whether they work with a broker-dealer, investment adviser, or other financial professional.

We believe the Securities and Exchange Commission's ("SEC's") Regulation Best Interest and related rules and interpretations ("Reg. BI")[4] accomplishes our shared goal of elevating and harmonizing the standards that apply to retail investment advice while preserving choice and access to services. As we did in our previous comment letter on the Preliminary Proposal,[5] which we incorporate herein by reference, we respectfully urge the Division to reconsider Reg. BI's effectiveness to meet the Division's goal of protecting Massachusetts investors before finalizing this Proposal. Reg. BI's adoption is a critical step toward raising the bar from the existing FINRA suitability standard to a heightened standard that "draw[s] on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers."[6] Broker-dealers have made significant changes to prepare for implementation of a best interest standard under Reg. BI by June 30, 2020. Those diligent efforts to comply with the new rules (e.g., through development of new policies and procedures, training programs and disclosure materials) are indicative of the positive changes that Reg. BI requires in the interest of retail investors. We believe Reg. BI will materially improve the way financial professionals and firms work with retail investors.

Of course, the full impact of these changes is not yet apparent because firms are continuing to develop their compliance strategies as they work towards the June 30, 2020 effective date. Accordingly, we respectfully submit that the Division would best serve the interests of Massachusetts retail investors by observing how the SEC Rules are actually implemented and enforced before proceeding with a final

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retail customers should be held to the same standard of care and the same best practices. … The focus … should be consumer protection and enhanced transparency to the retail client."); Letter from David P. Bergers, General Counsel, LPL Financial LLC, to U.S. Dep't of Labor (Mar. 17, 2015) (addressing Proposed Extension of Fiduciary Rule Applicability Date); Letter from David P. Bergers, General Counsel, LPL Financial LLC, to U.S. Dep't of Labor (Jul. 21, 2015) (addressing Proposed Definition of the Term "Fiduciary" and Related Proposed Prohibited Transaction Exemptions); see also n. 1 *supra*.

[4] *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240), *available at* https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf (hereinafter, "Reg. BI Adopting Release"); Form Customer Relationship Summary ("CRS"); Amendments to Form ADV, 84 Fed. Reg. 33,492 (July 12, 2019) (to be codified at 17 C.F.R. pts. 200, 240, 249, 275, and 279), *available at* https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12376.pdf (hereinafter, "Form CRS Adopting Release"). *See also* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669 (July 12, 2019) (to be codified at 17 C.F.R. pt. 276), *available at* https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf (hereinafter, "IA Standard Interpretation"); Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer, 84 Red. Reg. 33,681(Jul. 12, 2019) (to be codified at 17 C.F.R. pt. 276), *available at* https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12209.pdf (hereinafter, "Solely Incidental Interpretation").

[5] Letter from Michelle B. Oroschakoff, Chief Legal Officer, LPL Financial LLC, to William F. Galvin, Sec'y, Commonwealth of Massachusetts (Jul. 26, 2019).

[6] Reg. BI Adopting Release, 84 Fed. Reg. at 33,320.

Proposal.[7] Moreover, we believe investors will be best served by a single, clearly-defined standard that applies to retail investment advice across the nation.

Moreover, introducing the Proposal while firms are focused on developing compliance strategies for the upcoming Reg. BI effective date will prove challenging and will likely result in firms reducing or eliminating brokerage services in Massachusetts, harming not only Massachusetts investors, but also Massachusetts small business owners operating as financial professionals. Thus, we strongly suggest that the Division delay finalizing the Proposal until it has time to fully assess and consider the changes effected by the industry for Reg. BI compliance. We further note that the federal standards of conduct are not yet fully settled as the Department of Labor ("DOL") is soon expected to propose a new "fiduciary rule" to take the place of the one that was vacated by the Fifth Circuit Court of Appeals in 2018. Depending on its exact contours, this new regulation could have a significant impact on financial services provided to IRAs and other retirement accounts in which most Americans, particularly those in the middle class, hold the vast majority of their investible assets—another reason to wait before finalizing the Proposal. However, should the Division decide to proceed with the Proposal, this letter includes comments and suggestions for changes that we believe will lessen its potential risks to both Massachusetts retail investors and small business owners. At a minimum, we ask that the Division align the effective date with the June 30, 2020 effective date of Reg. BI and provide at least an additional twelve months for firms and financial professionals to transition before the Division begins to enforce the amended regulations.

I. Overview of LPL

LPL is a diversified financial services company and is dually registered with the SEC as a broker-dealer and investment adviser. We provide proprietary technology, comprehensive clearing and compliance services, practice management programs and training, and independent research to more than 16,000 independent financial professionals and over 800 banks and credit unions. LPL has been the nation's largest independent broker-dealer since 1996. LPL's primary focus is on supporting approximately 3,500 financial professionals licensed with insurance companies and a network of over 400 independent investment advisers throughout the country by providing them with access to a range of products, platforms, and services.

Unlike typical financial professionals who are employees of large multinational financial institutions, the majority of LPL's representatives are supported by LPL's platform and services, but operate as independent contractors and own their own businesses. As small business owners and entrepreneurs, our financial professionals seek to build personal and long-term relationships with their customers and the communities in which they work by educating and guiding their customers through the complexities of the investment decisions they must make to move towards their financial goals. Our mission is to help our financial professionals grow their businesses while doing right by the investors they serve.

In Massachusetts, LPL has been registered as a broker-dealer since 1981 and has notice-filed as a federal covered adviser since 1994. Approximately 604 independent financial professionals reside in

[7] We note that the North American Securities Administrators Association has established a "Regulation BI Implementation Committee" to assess Reg. BI and to assist members with interpretations and implementation.

Massachusetts, 4,271 financial professionals are registered in Massachusetts, and 26 banks and credit unions are associated with LPL in Massachusetts.

II. The Proposal Will Harm Financial Professionals' Ability to Serve Massachusetts Investors

Based on our experience with challenges the industry recently went through in attempting to implement changes needed to comply with the now vacated DOL fiduciary rule, we expect that the Proposal may, from a practical standpoint, similarly result in a significant curtailment of access to brokerage services in Massachusetts, and drive further consolidation in the financial services industry.

This is because the Proposal:

- Is overbroad and will substantially increase the costs and risks of providing brokerage services in the Commonwealth;
- Would newly require broker-dealers to provide regular and periodic monitoring services similar to those currently provided under advisory programs;
- Includes an ambiguously worded duty of loyalty that leaves firms open to second-guessing; and
- Incentivizes frivolous litigation.

Brokerage services are appropriate for many investors because they provide cost-effective access to episodic investment assistance from a financial professional. While we will strive to maintain brokerage services in Massachusetts to the extent possible, in light of the above challenges, instead of trying to sustain brokerage services for Massachusetts investors, many SEC dual-registrants may take the simpler path and favor an advisory-only service model that is not subject to the Proposal.

This will no doubt harm those Massachusetts investors who want and need access to brokerage services because they:

- Do not have sufficient assets to enroll in an advisory program, but want access to individualized investment advice;
- Prefer, and benefit financially from, a long-term buy and hold investing approach;
- Prefer to pay commissions for each investment transaction instead of an ongoing asset-based fee; and
- Benefit from maintaining both advisory and brokerage services.[8]

We believe the Proposal could limit Massachusetts investors' continued access to brokerage and force investors to choose fee-based advisory where it is available, or make investment decisions without

[8] *See* K. Damato, "3 Reasons to Pay Commissions, Not Fees, to a Financial Adviser," THE WALL STREET JOURNAL (Feb. 18, 2015), *available at* http://blogs.wsj.com/totalreturn/2015/02/18/3-reasons-to-pay-commissions-not-fees-to-a-financial-adviser/. Congress recognized the benefits of commission-based fees by showing its intent to preserve such arrangements under section 913 of the Dodd-Frank Act.

advice. Because small savers and investors, including those just starting their journey to accumulate retirement assets, may not have sufficient assets available to qualify for advisory programs, they are likely to be disproportionately negatively impacted by the Proposal.

To avoid these potential unintended consequences and harms, we believe the best course is for the Division to take the time needed to fully assess whether additional regulations are necessary in light of Reg. BI's enhanced standards and their implementation, which we discuss in the next section.

III. The SEC Rules Substantially Strengthen Protection for Retail Investors

Reg. BI meaningfully enhances the standards of conduct for SEC-registered broker-dealers. Contrary to the Division's assertions in the Request for Comment that "Reg BI sets ambiguous requirements for how longstanding and harmful conflicts in the securities industry must be addressed," and that Reg. BI "focuses far too heavily on disclosure through Form CRS," we believe the SEC Rules' enhancements are thoughtfully calibrated to protect investors with heightened care, conflicts, and compliance obligations, while protecting investor choice.[9] Additionally, the SEC has made an effort to develop a new layered approach to disclosure that will help investors more easily receive and digest information about financial services and products so they can make informed decisions. We believe Reg. BI accomplishes many of the goals the Division has stated it hopes to achieve through the Proposal and does so without further need for additional, or different, regulations that may limit investors' choice of, and access to, investment products and services. In particular:

- ***Reg. BI imposes a duty of care that requires firms and their representatives to exercise reasonable diligence, care, and skill to make recommendations in investors' best interest.*** The requirements under Reg. BI's Care Obligation are clearly articulated, and require a nuanced assessment of whether a recommendation is in a customer's best interest.

- ***Reg. BI requires that investors' interests come first.*** Reg. BI prohibits broker-dealers and their representatives from putting their financial interests ahead of the retail investor's financial interests and requires more than mere disclosure of conflicts of interest. Specifically, conflicts that could affect a financial professional's investment recommendations must be mitigated so that any recommendations provided are in the retail investor's best interests. Additionally, the SEC requires firms to eliminate harmful sales contests that create undue pressure for financial professionals to sell particular investment products.

- ***Reg. BI improves disclosures so that investors are empowered to make informed decisions about investment products and services.*** The layered approach to disclosure that the SEC adopted, in particular the combination of the Disclosure Obligation and Form CRS, carefully and deliberately addresses the different levels of disclosure that are appropriate and most informative to investors at different points of the customer relationship.[10] Under this modernization of the

[9] *See, e.g.*, A Small Entity Compliance Guide, Regulation Best Interest, SEC Staff, *available at* https://www.sec.gov/info/smallbus/secg/regulation-best-interest#_edn1; Frequently Asked Questions on Form CRS (last modified Nov. 26, 2019), *available at* https://www.sec.gov/investment/form-crs-faq.

[10] We note that the Request for Comment cites the 2008 Rand Report as evidence that disclosures create confusion, but does not mention the 2018 Rand Report supporting the effectiveness of the Reg. BI disclosure approach, including the Form CRS Customer Relationship Summary.

disclosure regime, investors will receive high-level disclosures about a firm's services, fees, and conflicts when they are making important decisions, such as whom to hire for investment services and whether to choose brokerage or advisory services. Should the investor want more information, this disclosure will have links and cross-references to other, more detailed disclosures. Similarly, prior to or at the time the investor receives an investment recommendation, the investor will receive material information about the recommendation. We believe these disclosures will meaningfully improve investor experiences and help investors make carefully informed choices about investment products and services. This approach to disclosures for retail investors goes beyond the Proposal's requirement to disclose conflicts of interest.

In light of Reg. BI's enhanced protections, which we believe will achieve the Division's investor protection goals without sacrificing investors' choice and access to investment products and services, we urge the Division to reevaluate the need for the Proposal and the potential impact on choice and access to investment services in the Commonwealth.

IV. Clarify the Proposal to Avoid Inadvertently Harming Massachusetts Investors

Should the Division nonetheless decide to proceed with the Proposal, this section includes suggestions for changes and clarifications that we believe will benefit Massachusetts investors, and reduce the potential for harm to those investors.

A. Clarify when a customer could have a reasonable expectation that an account will be monitored on a regular or periodic basis.

Under the Proposal, a firm or financial professional would have an ongoing fiduciary duty during any period a customer has a "reasonable expectation" that an account will be monitored on a regular or periodic basis. We are concerned that this provision could be interpreted broadly to apply an ongoing fiduciary duty in a number of common scenarios and could have a chilling effect on engagement and communication with customers out of concern that an ongoing fiduciary duty or monitoring obligation could be established. For example:

- If a financial professional checks in with an investor regularly about their investments or any changes in their financial situation, could the investor have a "reasonable expectation" that the financial professional will monitor their accounts?

- If such an expectation exists, would the financial professional have a fiduciary duty to those clients 365 days a year?

As currently proposed, and without greater clarity, this provision leaves firms and financial professionals open to after-the-fact second guessing about whether and when they are subject to a fiduciary duty. We are concerned that this uncertainty could create a disincentive for firms and financial professionals to engage in many common activities, such as periodic check-ins, that are beneficial to investors for fear of being subject to obligations that are outside of the scope of their agreed-to services or that could create a reasonable expectation of regular or periodic monitoring or an ongoing fiduciary duty, which could have the unintended consequence of reducing communications between investors and their advisors. To address this concern, we recommend that the Division revise the Proposal to apply

the fiduciary duty when a firm or financial professional agrees to regularly or periodically monitor the account (orally or in writing) at the time such monitoring is agreed to be performed.

B. Financial professional titles should not be viewed as creating an expectation that an account will be monitored.[11]

We do not believe titles alone create an expectation that an account will be monitored on a regular or periodic basis, especially when the financial professional has not agreed to provide such monitoring services, and is not compensated for such services (e.g., through a periodic asset-based fee). Accordingly, we request that the Division amend the Proposal to either remove the titling restriction entirely or, consistent with interpretive guidance from the SEC's Division of Investment Management and the North American Securities Administrators Association ("NASAA"), clarify that the use of specified titles is but one of many factors that could result in a customer having a reasonable expectation that the firm or its representative will provide regular or periodic account monitoring, or narrow the terms to remove those that do not convey that regular or periodic monitoring is being offered.[12]

- ***The broad terms restricted in the titling provision refer to financial professionals who provide advice and financial services generally, but do not convey an expectation of ongoing services, including monitoring.*** The provision would establish an ongoing fiduciary duty if a financial professional uses the term "financial consultant." The definition of "consult" is to "seek information or advice from someone with expertise in a particular area." The use of the term "consultant" therefore conveys that a financial professional is available to provide advice when consulted, and not that the financial professional would be providing ongoing advice or monitoring when not consulted.

  Similarly, a new ongoing service would need to be provided if a financial professional uses the term "financial advisor." The SEC analyzed the use of this term and the potential for investor confusion as part of Reg. BI. Because the term "advisor" or "adviser" is closely related to the statutory term "investment advisor," the SEC determined to restrict the use of this title under Reg. BI to financial professionals who offer investment advice. Although the term "advisor/er" can convey that advice will be offered, it does not necessarily convey an expectation of ongoing, regular or periodic advice or monitoring. As the SEC noted in its IA Standard Interpretation, financial advice can include a wide range of services, from a single financial plan for which a client may pay a onetime fee, to ongoing portfolio management for which a client may pay a periodic fee based on the value of assets in the portfolio.[13]

  In addition, the provision would establish an ongoing obligation if a financial professional uses the term "financial plan" in his or her title or business name. A financial planning engagement typically involves a point in time analysis of an individual's present and anticipated assets and liabilities, insurance, savings, investments, anticipated retirement, employee benefits and goals.

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[11] *See* Proposed Regulation 950 CMR 12.207(1)(c).

[12] *See* Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Advisers Act Release No. 1092 (Oct. 8, 1987), *available at* https://www.sec.gov/rules/interp/1987/ia-1092.pdf.

[13] 84 Fed. Reg. at 33,671.

The financial plan typically sets out a course of actions to be taken by the individual, which he or she may choose to implement or not in full or in part, and for which he or she may engage the professional who prepared the plan, or a different professional. Financial plan services are typically provided to customers on a fixed fee or hourly basis, and not for an ongoing or periodic asset-based fee. The term "financial plan" is commonly associated with a point in time engagement and therefore we do not believe it conveys an expectation of ongoing services.

Moreover, we note that the SEC's Form ADV sets out standards for when an advice relationship is considered to be ongoing. For purposes of calculating assets under management, an investment adviser must include assets for which the firm provides "continuous and regular supervisory or management services." The Form's instructions define this as an "ongoing responsibility to select or make recommendations, based on the needs of the client, as to specific securities or other investments the account may purchase or sell, and, if such recommendations are accepted by the client, [the investment adviser] is responsible for arranging or effecting the purchase or sale." The instructions further state that that if an investment adviser is compensated based on the time spent with a client or paid a retainer based on a percentage of assets covered by a financial plan, it suggests that an investment adviser *does not* provide continuous or regular supervisory or management services. The instructions also state that an investment adviser that provides advice on an intermittent or periodic basis (such as upon client request, or in response to a market event, or on a specific date) does not provide continuous and regular supervisory or management services. Based on these instructions, financial planning and consulting engagements are not considered ongoing relationships and are not included in the calculation of assets under management.

As noted above, the staffs of the SEC's Division of Investment Management and NASAA have together provided interpretive guidance as to when financial planning *might* require application of federal or state investment adviser laws and when financial planning *might not* result in such an "advisory" relationship for which some ongoing duty might exist.[14] The analysis generally turns on the facts and circumstances. The Division's narrow conception of "financial planning," however, ignores the diversity and nuances of the services in concluding that "financial planning" is, effectively by law, tantamount to having an ongoing advisory relationship with a customer.

The Proposal would also include a catch-all that would treat "any terms of similar meaning or import" as creating an expectation that regular or periodic monitoring is being offered. The Division's decision to leave open whether additional titles may create an ongoing fiduciary duty creates an uncertain business environment that would expose firms to untenable regulatory risks.

The overbroad application of the Proposal's titling restriction would likely result in a variety of interpretive questions. For example, it is not clear how the Division would expect a financial planner who only develops a point-in-time financial plan with specific point-in-time recommendations to subsequently monitor those point-in-time recommendations, especially as they may be implemented at another firm or through another financial professional. In addition, it is unclear whether the Proposal would require that a financial planner or investment consultant

[14] *See* Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Advisers Act Release No. 1092 (Oct. 8, 1987), *available at* https://www.sec.gov/rules/interp/1987/ia-1092.pdf.

seek to periodically update a financial plan or prior recommendation for a customer, notwithstanding that the customer has paid only a fixed fee and has sought to execute the plan or recommendation on his or her own at another firm.

- ***The titling restriction fails to address how dual registrants can comply.*** The titling provision does not acknowledge the common scenario where representatives of a dual registrant broker-dealer and investment adviser, like LPL, have titles that reflect their credentials as not only registered representatives of a broker-dealer, but also as investment adviser representatives. The SEC addressed this very issue in adopting Reg. BI, in particular in its presumption that use of the terms "adviser" or "advisor" in a name or title by (i) a broker-dealer that is not also registered as an investment adviser or (ii) an associated person that is not also a supervised person of an investment adviser would be a violation of the capacity disclosure requirement under Reg. BI. The Division should consider clarifying how its titling provision would apply to dual registrants and their representatives who provide both brokerage and investment advisory services so as not to inhibit the accurate and appropriate use of certain titles by representatives who provide investment advice to their customers. As noted above, there are many types of advice relationships, whether one-time, episodic, periodic or continuous, and the term "advisor/er" does not necessarily convey an ongoing relationship.

As such, we request that the Division eliminate the titling provision, or alternatively, narrow the terms to remove those that do not convey ongoing services or clarify that a financial professional's title is one among many factors that may be considered in assessing whether an investor has a reasonable expectation that an account will be monitored on a periodic basis. Should the Division decline to make this change, we note that significant time will be needed to change the titles our financial professionals use including in our agreements, disclosures, marketing materials, investor education, stationery, signage, business cards, and websites.

C. Clarify that the episodic fiduciary duty applies *at the time of* the recommendation.

We believe the Division intentionally omitted language included in the prior draft of the Proposal that would have applied a fiduciary duty through the "execution of the recommendation" to clarify that the fiduciary duty applies *at the time* a recommendation is provided. However, the Division's statement in the Request for Comment that the fiduciary duty would also apply to "the implementation" of the advice or recommendation creates uncertainty on this point. As we previously explained in our comment letter in response to the Preliminary Proposal, we are concerned that applying a fiduciary duty through execution of a recommendation would create significant operational challenges, including potentially requiring broker-dealers to break customer-directed trades—an exercise of discretion that is likely inconsistent with the SEC's interpretation of "solely incidental" brokerage advice that could result in best execution violations.

D. Align the duty of loyalty with Reg. BI's conflicts obligation.

We are concerned that the vague and ambiguous duty of loyalty in the Proposal may fall short of providing additional protections to retail investors over those Reg. BI provides and creates compliance uncertainty that could cause firms to curtail brokerage services in Massachusetts.

Specifically, it is unclear what is required to avoid conflicts, eliminate conflicts that cannot be avoided, and mitigate conflicts that cannot be avoided or eliminated. The Division should consider clarifying, in the Proposal itself or through interpretive guidance, the interrelationships among the concepts of avoiding, eliminating, and mitigating conflicts of interest. For example, it is difficult to understand how a firm can "eliminate" conflicts that "cannot be avoided," unless the intent is that any product or service that includes conflicts (such as commission and transaction-based compensation) should not be offered to customers in any circumstance. This does not appear to be the intention, however, given that the Proposal also states that firms can "mitigate" conflicts that "cannot be avoided or eliminated." It is confusing, then, that the Proposal also states that "[d]isclosing or mitigating conflicts alone does not meet or demonstrate the duty of loyalty," suggesting that avoidance or elimination might be the only compliant approach. The Division should consider establishing a clearly articulated framework that takes into account the inherent conflicts of operating a brokerage business (such as transaction-based compensation and the ability to attract and incentivize representatives), while protecting Massachusetts retail investors.

To address these concerns, we recommend that the Division revise the duty of loyalty to be consistent with Reg. BI's Conflicts Obligation. In particular, we believe that requiring disclosure and mitigation of financial incentives for representatives strikes an appropriate balance that preserves the transaction-based brokerage model while insulating investors from conflicts that could affect the recommendations representatives provide.

E. Provide an effective date and non-enforcement relief to provide time for compliance while minimizing disruption to investors.

We request that the Division choose an effective date that is no earlier than Reg. BI's effective date of June 30, 2020. Additionally, to ensure a smooth transition with minimal disruption to investors, we request that the Division provide a transition period of at least twelve months from the effective date before enforcing the amended regulation.

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We thank the Division for the opportunity to comment on the Proposal and hope that the Division will undertake an objective, reasoned analysis of the impact that adopting the Proposal will likely have on Massachusetts' investors' access to financial services. As drafted, we are concerned that the Proposal may result in the reduction and termination of brokerage products and services by a variety of market participants, harming both investors who need such products and services the most in the Commonwealth, particularly moderate wage earners and savers and Massachusetts small business owners who operate as financial professionals.

We urge the Division to reconsider its decision to proceed with the Proposal at this time and allow Reg. BI to take effect and then reassess what enhancements, if any, are necessary to protect Massachusetts retail investors. Unnecessary investor disruption, confusion, and expense associated with the implementation of the Proposal, in its current form, should be avoided.

We very much appreciate and support Massachusetts's goal of protecting investors and look forward to continuing to work with you towards achieving that goal while preserving choice and access to investment and financial services in Massachusetts.

Sincerely,

Michelle Oroschakoff
Chief Legal Officer