



January 7, 2020

Submitted Electronically

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:

Massachusetts Mutual Life Insurance Company (“MassMutual”) and MML Investors Services, LLC (“MML Investors”)<sup>1</sup> respectfully submit this comment letter on the Massachusetts Securities Division’s (the “Division”) *Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives* (the “Proposal”).

Since our founding in Springfield, Massachusetts in 1851, MassMutual’s purpose has been to help people secure their future and protect the ones they love. Almost 170 years later, that commitment remains our guiding principle. It’s how we continue to deliver quality products and services to help our policyowners and customers achieve their financial goals, and protect those who matter most.

MassMutual and MML Investors have and will continue to support efforts by policymakers to raise the standard of conduct for broker-dealers and their agents. We believe that such efforts must be done in a manner that does not limit the access to quality products, advice or choice by retail customers, especially lower and middle income investors, who are not seeking or do not have the ability to pay for ongoing monitoring or advisory services.

On July 26, 2019, MML Investors submitted comments in response to the *Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents,*

<sup>1</sup>MassMutual is a leading mutual insurance company that is run for the benefit of its members and participating policyowners. MassMutual offers a wide range of financial products and services, including life insurance, disability income insurance, long term care insurance, annuities, retirement plans and other employee benefits. Since 1851, MassMutual has maintained its principal operations in the Commonwealth. MassMutual currently has more than 4,000 employees working in Massachusetts, and is in the process of meeting its 2018 recommitment to the Commonwealth that will ultimately increase its in-state workforce to more than 5,000 employees. MML Investors is a subsidiary of MassMutual and is a registered broker-dealer and a federally-covered investment adviser. MassMutual and MML Investors have more than 250,000 customers who reside in Massachusetts.

*Investment Advisers, and Investment Adviser Representatives (“Preliminary Proposal”)*. While some technical modifications were made to the Division’s Preliminary Proposal, we remain concerned that core elements of the Proposal could have the effect of severely limiting – if not outright prohibiting – the ability of broker-dealers and agents that provide advice to serve customers in the Commonwealth. We are also deeply troubled by the Proposal’s expansion into the substantive regulation of insurance sales activities. As a leading mutual life insurer, MassMutual has not veered from its mission of serving the best interests of our policyowners and customers. Unfortunately, the Proposal’s effect (but not likely its intent) would seem to call into question a core component of our business model: the ability of dedicated financial professionals to meet the protection needs of individuals and small businesses in the Commonwealth merely because they are affiliated with a broker-dealer.

The comments below reflect our key concerns about the Proposal’s impact. We also share the additional concerns detailed by leading industry commenters, specifically, the Securities Industry and Financial Markets Association (“SIFMA”) and the American Council of Life Insurers (“ACLI”).

## **I. Core Issue: The Proposal’s Application to Insurance Products**

In comments on the Preliminary Proposal, the ACLI, SIFMA and other trade associations asked the Division to clarify that its proposed fiduciary obligation would not apply to variable annuities as they are excluded from the definition of a security under the Massachusetts Uniform Securities Act. The Proposal does not make this clarification. Instead, the Proposal broadens the scope of fiduciary obligation to explicitly include recommendations regarding “insurance products” generally, despite the fact that the Division acknowledges that not even annuities are considered securities under M.G.L. c. 110A. The Division asserts that the inclusion of insurance products in a regulation imposing a new fiduciary duty standard is consistent with Section 204(a)(2)(G). We respectfully disagree.

Section 204(a)(2)(G) allows the Secretary to impose an administrative fine or censure or deny, suspend or revoke any registration or take any other action if he finds that the applicant or registrant “has engaged in any unethical or dishonest conduct or practices in the securities, commodities or insurance business.” Section 204(a)(2)(G) does not, however, allow the Secretary to define what constitutes “unethical or dishonest conduct or practices” in the insurance industry in the first instance, and certainly does not allow the Secretary to punish sales practices that fully comply with the standards of conduct prescribed by the Division of Insurance or the responsible insurance regulators in other states. That is because the Secretary’s authority under Section 204(a)(2)(G) must be read in light of M.G.L. c. 175, § 3, which unequivocally states that “the negotiation, solicitation, sale or transaction [of a contract of insurance or annuity] by any person shall not be subject to the provisions of chapter one hundred and ten A.” To give

Section 3 meaning, Section 204(a)(2)(G)'s reference to the "insurance business" must be interpreted only as giving the Secretary authority to address "unethical or dishonest conduct or practices in the . . . insurance business" *as defined by insurance regulators*. Indeed, the Appeals Court previously has explained that "the determination of unfair and deceptive practices in the insurance business should come in the first instance from the Commissioner, who is charged by statute with administration and enforcement of the comprehensive statutory and regulatory framework . . . governing the industry." *Lapierre v. Maryland Cas. Co.*, 14 Mass.App.Ct. 248, 250 (1982).

This reading of Section 204(a)(2)(G) also is compelled by Section 415, which provides (emphasis added) that "This chapter shall be so construed as to effectuate its general purpose to make *uniform* the law of those states which enact [the Uniform Securities Act] and to coordinate the interpretation and administration of this chapter with the related federal regulation." To our knowledge, no state to have adopted the Uniform Securities Act has ever imposed substantive standards governing insurance sales under the authority of that Act. Indeed, the current implementing regulations for G.L. c. 110A, § 204, found at 950 C.M.R. 12.200, which do contain extensive definitions of "dishonest and unethical conduct in the securities business," *see* 950 C.M.R. § 12.204(1), nowhere discuss insurance transactions. Notably, the fiduciary duty regulations recently proposed in New Jersey and Nevada only define duties applicable to securities transactions, not insurance transactions. And while New York has proposed a "best interests" rule for insurance transactions, that rule is being promulgated not under the Uniform Securities Act, but under, *inter alia*, Articles 24 and 42 of the New York Insurance Law.

At bottom, Chapter 110A does not provide the Secretary authority to set substantive standards governing transactions in insurance products in the first instance. Such standards are the province of the Commissioner of Insurance. We therefore request that the Proposal be amended to eliminate application of the new duties of care and loyalty to transactions in insurance products.

If the Division nevertheless decides to move forward without eliminating application of the new duties to insurance transactions, modifications are necessary to make it clear that certain core business model attributes associated with the distribution of life insurance and annuity products do not violate the duty of loyalty provisions of the Proposal. Specifically, the Division should clarify that (1) insurers such as MassMutual can continue to offer health and welfare benefits to their insurance producers who are registered with a broker-dealer and/or investment adviser and (2) the recommendation by registered agents of proprietary insurance and annuity products does not in and of itself violate the duty of loyalty provided that the affiliation of the agent with the insurance company is disclosed and the duty of care is met.

MassMutual distributes its proprietary annuity and insurance products to clients through a "career agency system" of financial professionals. The career agency system seeks to foster a long-term relationship between the insurance company and its customers – a relationship that is

maintained by a highly-trained, well supervised agent and that is beneficial to both the customer and the company. In a career agency system, career agents agree to primarily represent one insurance company and principally sell and service that company's insurance and annuity products. While career agents are permitted to recommend other insurers' products, the determination of whether a career agent is "principally selling" MassMutual's annuity and insurance products, is based on the career agents satisfying a production requirement set by MassMutual. Under a federal legal framework that has been in place for over 60 years, by principally selling MassMutual's annuity and insurance products, career agents are considered "full-time life insurance salesmen," eligible under the Internal Revenue Code to participate as a "statutory employee" in MassMutual's health and retirement plans.<sup>2</sup>

We are concerned that the Proposal could be read to effectively prohibit MassMutual from paying health and welfare benefits to our career agents simply because they are subject to a production requirement. As currently drafted, the Proposal would presume that "the purchase, sale or exchange of any . . . insurance product, . . . made in connection with any sales contest, implied or expressed quota requirement, or other special incentive program" would constitute a breach of the duty of loyalty. While we do not believe the Division specifically considered or intended to prohibit insurance companies from providing health and retirement benefits to its career agents, the Proposal on its face appears to conflict with our longstanding commitment to provide such benefits since their payment is connected to achieving production requirements. Without clarification that such minimum production requirements do not in and of themselves violate the duty of loyalty, companies such as MassMutual will be exposed to significant risk that the Division will treat those requirements as prohibited quotas and per se violations.

Other regulators, after considering the negative impact their rules could have on the ability of insurance companies to pay benefits to their contracted agents, have specifically clarified that such practices were not prohibited:

- The Department of Labor confirmed in the Best Interest Contract Exemption accompanying its now-vacated fiduciary rule that the receipt by "an insurance agent of reasonable and customary deferred compensation or subsidized health or pension benefit arrangements such as typically provided to an "employee" as defined in Code section 3121(d)(3) does not, in and of itself, violate the policies and procedures requirement or the Impartial Conduct Standards" as long as the incentive practices when viewed as a whole are reasonably and prudently designed to avoid a misalignment of the interests of agents and clients.<sup>3</sup>
- The New York Department of Financial Services specifically clarified in its best interest rule for life insurance and annuities that nothing in Regulation 187 should be construed to

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<sup>2</sup> See Section 7701(a)(20) of the Internal Revenue Code.

<sup>3</sup> Best Interest Contract Exemption. 81 Fed. Reg. 21036 (April 8, 2016)

prohibit the payment of any type or amount of compensation including “pension and welfare benefits” that is otherwise permitted under the insurance laws.

- In Regulation Best Interest, the SEC provided clarifying language in connection with its limitations on noncash compensation, that they did not intend to prohibit the receipt of employee benefits by statutory employees, even where production requirements may exist to maintain a contract of employment.

We specifically request that the Division clarify that the duty of loyalty does not in and of itself prohibit the receipt of employee benefits by statutory employees, even where production requirements may exist to maintain statutory employee status.

We are also concerned that the Proposal could be read to effectively prohibit MassMutual agents from offering MassMutual insurance products. For our entire 168-year history, MassMutual has relied on career agents to offer our insurance and annuity products – a business model that has played a vital role in ensuring the long-term financial security of families and business across the Commonwealth. While the Proposal does not explicitly prohibit career agents who are registered agents from recommending such proprietary products, the duty of loyalty language is so broad and undefined as to create great uncertainty that such recommendations would not be viewed by the Division as violations of the agent’s fiduciary duty, even if such recommendations were fully compliant with applicable Massachusetts insurance law. We believe it is critical that the Proposal explicitly acknowledge that recommending proprietary products is permitted and not inconsistent with the Proposal’s fiduciary duty.

Additionally, the Proposal should clarify that it is not inconsistent for a producer to primarily offer the insurance products of one insurer. In its Request for Comment, the Division states that “[o]n a case by case basis, the Division may deem it a breach of the duty of loyalty...to recommend an affiliated or proprietary product when a third-party product would be expected to be better for the customer or client....” This statement suggests that agents must always be comparing proprietary insurance products with third-party products, which runs counter the IRC requirement that an insurance agent must primarily agree to sell insurance and annuity products of one insurer to be considered a “statutory employee,” as explained above. The Division’s position would also expose broker-dealers and agents to unmanageable enforcement risk as the Division would always be making this determination with the benefit of hindsight. This is especially problematic when applied to recommendations of proprietary insurance products. Factors such as the financial strength of the insurer, product cost and product features are all appropriate considerations to be taken into account when making a recommendation, but assessing whether a proprietary or third party product is “better” is so subjective as to be inoperable in practice.

We specifically request that the Division clarify that recommending proprietary product, including the primary recommendation of proprietary products by career agents, does not in and of itself violate the duty of loyalty provided that the conflict is fully disclosed and that the insurer's (or other product manufacturer's) compensation and incentive practices, when taken as a whole, are designed to avoid recommendations by agents that are not in the customers interest. A similar approach was taken by the New York Department of Financial Services in its annuity and life insurance best interest regulation. By adopting such a balanced approach, the New York regulator avoided chilling the sale of proprietary insurance products.

## **II. Core Issue: The Proposal Effectively Requires an Ongoing Fiduciary Obligation That is Inconsistent with Federal Law**

As explained in MML Investors' initial comment letter, we were concerned that under the Preliminary Proposal, broker-dealers and agents would have an on-going fiduciary obligation to clients that would render broker-dealers ineligible to rely on the broker-dealer exclusion from being deemed an investment adviser.

While the Division made certain modifications to the Preliminary Proposal, the Proposal effectively maintains an ongoing fiduciary obligation for any broker-dealer or agent who provides advice. For example, it would virtually be impossible to build a compliance program that reliably prevents customers from not having a reasonable expectation of account monitoring, when the broker-dealer or agent does the right thing and periodically reaches out to the customer, unless the Proposal makes it clear that a broker-dealer's clear disclaimer of such responsibility fulfills the "reasonable expectation" element. It would also virtually be impossible to build a compliance program that reliably prevents the broker-dealer from having an ongoing fiduciary obligation based on the titles, credentials and designations used by the broker-dealer's agents since the Proposal not only includes a set of specified terms that will trigger the obligation but also any other term that the Division later decides has similar meaning or import. In addition, with respect to agents who are dually registered as investment adviser representatives, the Proposal would apply an on-going fiduciary duty on all of their broker-dealer accounts. This is because they will inevitably use the term "adviser" to describe their status as an investment adviser representative, whether this is disclosed on a business card, in their Form ADV Part 2B, or even on FINRA's Broker-Check. In this respect, the Proposal appears to eliminate the broker-dealer exclusion under the Investment Advisers Act of 1940 ("Advisers Act"). Finally, the Proposal also appears to extend an ongoing fiduciary obligation when a broker-dealer or agent receives normal on-going payments from product issuers, such as trail commissions.

For all of the reasons noted above, under the Proposal, broker-dealers and agents would have an on-going fiduciary obligation to clients, which as detailed in the Request for Comment, would include the obligation to monitor the customer's or client's portfolio on an ongoing basis. The

SEC's recent interpretation<sup>4</sup> regarding the solely incidental prong of the broker-dealer exclusion, and unequivocal guidance from the SEC Chairman following the interpretation's release,<sup>5</sup> provide that a broker-dealer undertaking an ongoing monitoring obligation can no longer rely on the broker-dealer exclusion. This would require broker-dealers to either move broker-dealer clients to investment advisory accounts, or if that is not the best account type or the clients do not qualify for a managed account (e.g., because of account minimums or registration limitations), it could lead to some broker-dealers no longer providing recommendations to those customers. The inevitable effect of this provision is that firms likely would curtail their broker-dealer businesses in Massachusetts, resulting in fewer investors having access to advice. To avoid such an outcome, we urge the Division to modify the Proposal to allow broker-dealers to provide episodic, incidental advice to broker-dealer clients without triggering an on-going fiduciary duty by addressing the concerns noted above.

### **III. Core Issue: The Proposal Effectively Retains Impossibly Subjective Requirements to Recommend “The Best” Investment Strategy, Account Type, Product or Remuneration Option”**

The Proposal was modified from the Preliminary Proposal to remove the specific language that recommendations of an investment strategy, account type or security must be the “best of the reasonably available options for the customer”<sup>6</sup> and that the receipt of transaction-based compensation is allowed only if “the remuneration represents the best of the reasonably available remuneration options for the customer or client.” However, in the Request for Comment, the Division indicated that regardless of that change, it intends to pursue enforcement action for breach of the duty of loyalty if other less remunerative options were available or if other options were available that would have reasonably been expected to result in a better outcome for the customer; effectively rendering the changes reflected in the Proposal meaningless.

We reiterate the points from our initial comment letter that even the best intentioned and most competent firms and agents would have no way of knowing what constitutes a recommendation

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*Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser*, Release No. IA-5249 (June 5, 2019), available at <https://www.sec.gov/files/rules/interp/2019/ia-5249.pdf>

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Speech by SEC Chairman Jay Clayton, *Regulation Best Interest and the Investment Adviser Fiduciary Duty: Two Strong Standards that Protect and Provide Choice for Main Street Investors* (July 8, 2019), available at <https://www.sec.gov/news/speech/clayton-regulation-best-interest-investment-adviser-fiduciary-duty> (Chairman Clayton Speech) (“ . . . imposing an ongoing monitoring obligation would effectively prohibit brokers from providing retail customers with advice without registering as investment advisers.”).

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“There shall be a presumption of a breach of the duty of loyalty for offering or receiving direct or indirect compensation to or from a broker-dealer, agent, or adviser for recommending an investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security that is not the best of the reasonably available options for the customer or client.” Preliminarily proposed CMR 12.207(c)(2)(i). 7

that is “best” for their client. Firms and agents will be left with the impossible task of deciding which factors make a recommendation “the best” recommendation, which likely can only be known with the benefit of hindsight. The obligation to recommend the single best security, account type, investment strategy, or remuneration option is unworkable and would place a burden on broker-dealers in Massachusetts that does not, as far as we are aware, apply to any other fiduciary.

#### **IV. Core Issue: The Proposal’s Duty of Loyalty is Unattainable**

The Proposal requires broker-dealers, agents, investment advisers and investment adviser representatives to “make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot be avoided, and mitigate conflicts that cannot be avoided or eliminated” and to make recommendations “without regard” to the financial or other interest of any party other than the customer. While disclosure of material conflicts of interest is required, the Proposal also specifically states that disclosing or mitigating conflicts of interest does not meet or demonstrate the duty of loyalty. In our original comment letter we expressed concern that these obligations go beyond duty of loyalty obligations under the Advisers Act<sup>7</sup> and even the now-vacated Department of Labor Fiduciary Rule.<sup>8</sup> The Proposal would also exceed the duty of loyalty obligations laid out by Congress in Section 913 of the Dodd-Frank Act.<sup>9</sup> We remain concerned that the lack of clarity on when it would be reasonable to avoid, eliminate or mitigate will leave firms and agents exposed to enforcement risk for some of the most common broker-dealer business practices, regardless of whether they play a positive role in a diverse marketplace. Similarly, it is difficult to know whether firms must eliminate or avoid differential compensation, revenue sharing or a limited product shelf and it will be questionable how firms could continue to operate confidently in Massachusetts that they are in compliance with the Proposal.

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<sup>7</sup> *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248 (June 5, 2019) at p.8, available at <https://www.sec.gov/rules/interp/2019/ia-5248.pdf> (“Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.”). See also Release No. IA-5248 at 23, n. 57 (“While an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts of interest and obtaining the client’s informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client’s trust.”).

<sup>8</sup> DOL Fiduciary Rule, 81 Fed. Reg. 20945 (April 8, 2016).

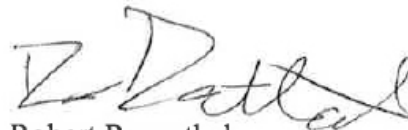
<sup>9</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Sec. 913, Pub. L. No. 111-203, 124 Stat. 1376, available at <http://legcounsel.house.gov/Comps/Dodd-Frank%20Wall%20Street%20Reform%20and%20Consumer%20Protection%20Act.pdf> (2010) (“Dodd-Frank Act”).

We appreciate the opportunity to comment on these vitally important issues. MassMutual and MML Investors support regulatory initiatives aimed at raising the investor protection bar. We also seek to serve our diverse customer base, which requires finding ways to let customers' needs and means dictate the most appropriate way to access and pay for advice. We hope the Division will choose to move forward prudently and thoughtfully to assure that those important objectives are well served. Please do not hesitate to contact us with any comments or questions, or if further information would be helpful.

Very truly yours,



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