January 7, 2020

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standards Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Dear Secretary Galvin:

On behalf of the Massachusetts Bankers Association (MBA), which represents more than 140 commercial, savings and cooperative banks and federal savings institutions with 72,000 employees located throughout the Commonwealth and New England, we appreciate the opportunity to comment on the proposed regulation ("Proposal") "to apply a fiduciary conduct standard on broker-dealers, agents, investment advisers, and investment adviser representatives when dealing with their customers and clients." MBA and our member institutions continue to be concerned that the proposal will limit the choices currently available to consumers by hampering investors' access to one-on-one assistance and hindering the assortment of products offered throughout the Commonwealth.

Although we recognize the Division's diligence in addressing some of our larger concerns that were contained in the previous version of the draft regulation, we still believe that this proposal will hamper access to investment advice for Massachusetts consumers and result in further constriction of the brokerage model. Retail investment consumers will be adversely affected by the limitations placed on programs available to them, the pricing of those programs, and the investment products available. This scenario could also lead to losing access to personal, one-on-one assistance. Substantial inconsistencies between the federal standard and the proposed Massachusetts rule will also create confusion for investors and financial professionals.

The Proposal will cause many consumers to lose all contact with an investment professional

As we noted in our initial comment letter, the Proposal imposes a broad and ongoing fiduciary duty obligation on broker-dealers and their agents. This expansion, which is inconsistent with federal securities laws, limits consumer choice as broker-dealers adapt to the inconsistency by limiting some or all brokerage services currently available to Massachusetts residents.

Since the Proposal imposes an ongoing fiduciary duty if a broker-dealer, agent or adviser "provides investment advice, in any capacity, to a customer or client," depending on how investment advice is interpreted, every brokerage transaction could therefore be subject to an ongoing fiduciary duty. Even if the language is narrowed in the final rule, it would remain problematic. As a practical matter, this requirement would impose on dually registered broker-dealers a new duty to monitor the ongoing performance of a customer's brokerage account in cases where the customer also maintains an investment advisory account. The proposed regulation's requirement to impose upon broker-dealers an ongoing duty to monitor is inconsistent with the SEC's interpretation of the "solely incidental to brokerage" exception to the Investment Advisers Act and is in conflict with federal law.

The Proposal also imposes an ongoing fiduciary duty if a broker-dealer, agent or adviser "receives ongoing compensation in connection with the recommendation or advice." Many common investment products, such as mutual funds, have ongoing compensation (known as "trailing commissions") and imposing an ongoing duty to monitor these products will result in limiting or eliminating the availability of certain products. As you know, brokerage accounts represent an important, cost-conscious choice for retail investors and provide access to affordable advice, particularly for low- and moderate-income, buy-and-hold

investors saving for future expenses and retirement. If ongoing monitoring is required, some broker-dealers would likely shift brokerage account investors into advisory accounts, which typically have significantly higher account minimums and charge higher fees or require these investors to use only an online trading platform. This would be a major disservice to the hundreds of thousands of Massachusetts consumers who choose to hold broker-dealer accounts today and who want to continue to receive periodic brokerage advice.

The "without regard to" language could be materially disruptive to the Massachusetts municipal and other bond issuance process

We continue to believe that the Proposal could materially disrupt the bond issuance process in Massachusetts in two direct ways. Specifically, the revised Proposal includes language that "requires a broker-dealer, agent, investment adviser or investment adviser representative… to avoid conflicts of interest… and to make recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer or client."

A significant number of the financial institutions bidding to be an underwriter for Massachusetts bonds also have Massachusetts resident retail customers who would then purchase those same bonds on a principal basis. The "without regard to" language would prohibit this common practice since an institution holding these bonds in its inventory would be prohibited from selling them directly to a retail customer. By not being able to both participate in the underwriting and the sale of those same bonds to its retail brokerage business customers will cause disruption to the entire Massachusetts bond marketplace as principal buyers may either cease bidding to be part of a particular Massachusetts bond syndicate, or be forced to determine a practical way to then sell any bonds purchased as part of an underwriting syndicate to a third party dealer. The costs and uncertainty to that new process may deter firms from acting as an underwriter at all. This will also create uncertainty for municipalities, which may not have an active market for a planned bond issuance.

Even more concerning to Massachusetts consumers is that their costs to purchase Massachusetts bonds will be higher. Because a broker dealer would be prohibited from engaging in principal trading, any sales to consumers will have to be done on an agency basis. By not allowing principal buyers to sell directly to their customers due to a potential conflict of interest and violation of the duty of loyalty, the Proposal essentially ensures that all downstream buyers will pay more, since bonds will have to first be sold to a third-party dealer with mark ups being placed on these bonds before the customer could ultimately purchase them.

This is a lose/lose scenario for Massachusetts bond investors and principal bond buyers, and we urge you to further clarify or remove this language.

The Proposal should exempt insurance sales

The Proposal expressly broadens the scope of the fiduciary duty obligation beyond securities to the "purchase, sale or exchange of any security, commodity or insurance product" and extends the sales, quota and special incentive program prohibitions to insurance products. The Division even acknowledges that "annuities are not considered securities" but asserts it has authority "regardless of the presence or absence of securities."

As you know, Massachusetts banks have specific statutory authority to engage in the sale of insurance products (Chapter 129 of the Acts of 1998 and 209 CMR 142.00). These insurance sales are under the jurisdiction of the Division of Banks and the Division of Insurance and are outside the jurisdiction of the Securities Division. MBA believes that if the Proposal is finalized, it should expressly exempt insurance products already regulated by the Massachusetts Division of Insurance.

The proposed fiduciary duty of care standard is *still* unworkable

Under the Proposal, to satisfy the "fiduciary duty of care" standard a recommended security or account type must first be vetted by "taking into consideration all… relevant facts and circumstances" including making "reasonable inquiry" into "the risks, costs, and conflicts of interest related to all recommendations made" as well as "any other relevant information." This language essentially re-establishes the previously proposed and unworkable "best reasonably available" standard from the Division's initial proposal and in doing so would once again set Massachusetts apart by deviating significantly from current fiduciary law as no "best of" standard exists under current federal securities laws, nor any other common law fiduciary standard.

Federal agencies and securities regulators have generally accepted that it is not possible to definitively identify a single "best" option without the benefit of hindsight, essentially rendering the standard unattainable and impossible to satisfy. For example, with regard to securities trading there is often no such thing as the "best" security – is it the security with the lowest cost, the highest return, the lowest risk, the most liquid, the most market makers, the most research analysts covering it, or some combination thereof? Likewise, how could anyone subject to this duty of care mandate ever determine what a "reasonable inquiry" of a customer's risks, costs or even risk tolerance is, since customer preferences and the market change on a regular basis?

In addition, the Proposal provides no guidance, as to what will be considered "reasonable inquiry" or how the "any other relevant information" prong could ever be satisfied and is therefore unnecessarily broad and unworkable. Without knowing how to sufficiently satisfy these ambiguous requirements on any potential security, broker dealers will stop offering specific securities and types of securities, limiting investor choice in the Commonwealth.

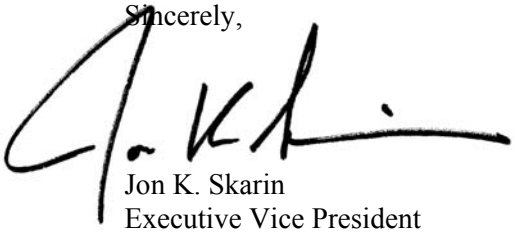
Conclusion

As you are aware, on June 5, 2019, the SEC passed Regulation Best Interest ("Reg BI"), which creates a new, nationwide, heightened standard of conduct for broker-dealers. Under Reg BI, a broker-dealer making a personalized recommendation to a retail customer must act in the client's best interest. While this new standard may not address every unique broker-client interaction, it raises the standard of care received by investors while avoiding the negative consequences of an overly broad rule.

Since Reg BI has a June 30, 2020 implementation date, we again encourage Massachusetts to allow Reg BI to be fully implemented before moving forward with state-specific fiduciary language. We believe that once Reg BI is implemented and regulators begin examining for compliance, the State will find that Massachusetts investors are receiving substantial additional protections while continuing to have access to the numerous choices and opportunities they have today.

Thank you again for the opportunity to comment and for your consideration of our views.

Sincerely,



Jon K. Skarin
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