



January 7, 2020

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:

RBC Wealth Management, a division of RBC Capital Markets, LLC, ("**RBC**")¹ appreciates the opportunity to comment on the Massachusetts Securities Division's (the "**Division**") proposed amendments to 950 CMR 12.200 that would create a new fiduciary conduct standard for Massachusetts-registered broker-dealers, agents, investment advisers, and investment adviser representatives (the "**Regulation**").

RBC is registered with the US Securities and Exchange Commission ("**SEC**") as a broker-dealer and investment adviser. RBC has over fifty registered representatives and over forty more employees in six branches in Massachusetts. RBC works with many individuals and families residing in the Commonwealth to help them achieve their investment and savings goals. We believe our success is defined in large part by the long-term well-being of the people that we serve and the places in which we operate. Our mission is to help our clients thrive and communities prosper and to be among the world's most trusted and successful financial institutions. As such, one of our core corporate values is to put our clients' interests first.²

We support the Division's goal of ensuring that Massachusetts investors receive the high-quality investment advice and services they deserve and are protected from firms and financial professionals who do not put their clients' interests first. However, we are concerned that the Regulation is likely to harm the investors the Division is charged to protect by limiting their access to professional advice and services through the commission-based brokerage model.

¹ RBC is a wholly-owned subsidiary of the Royal Bank of Canada.

² RBC, Purpose, Vision, and Values, <https://www.rbc.com/our-company/purpose-vision-and-values.html> (last visited 12/30/2019).

Moreover, we believe that the SEC’s newly adopted Regulation Best Interest (together with its related rules and interpretations, “**Reg. BI**”),³ meaningfully elevates the existing standards that apply to firms and financial professionals when they work with retail investors. Reg. BI is scheduled to become effective on June 30, 2020, and firms, including RBC, are diligently working to develop and implement new Reg. BI compliance plans. Because it will take some time for the full measure of the changes that Reg. BI is instituting to become apparent, we urge the Division to delay further action on the Regulation until it can comprehensively assess whether Reg. BI’s protections are sufficient. Taking this time will help ensure that the Commonwealth does not adopt a Regulation that needlessly causes its residents to lose access to advice and services through the brokerage model without materially increasing investor protections.

Part I of this letter explains how the Regulation will harm Massachusetts investors. Part II provides our views on the heightened protections that Reg. BI will provide to retail investors and why we believe additional regulation at the state level is not necessary at this time. Should the Division nonetheless decide to proceed with the Regulation, Part III provides suggestions for changes that we believe will reduce the Regulation’s potential to harm Massachusetts investors.

I. The Regulation Would Harm Massachusetts Investors

We understand that the Division intends that the Regulation benefit investors by holding broker-dealers and investment advisers to a fiduciary standard and requiring them to put investors’ interests first. However, we are concerned that the Regulation will instead harm investors by significantly limiting the availability of the transaction-based brokerage model, including help selecting investments and making financial decisions from a financial professional on a cost-effective basis.

We believe the Regulation is likely to cause many firms to severely restrict or cease offering brokerage services in Massachusetts because the Regulation, in its current form, will:

- Impose ongoing fiduciary duties, including requirements to periodically or regularly monitor accounts that are inconsistent with the transaction-based brokerage service and fee model;

³ 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 Fed. 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”).

- Create a loosely defined duty of loyalty that exposes broker-dealers to unmanageable regulatory risks and exposures; and
- Invites the plaintiffs' bar to bring frivolous lawsuits based on ambiguous fiduciary standards.

Faced with these significant risks, we believe many firms (particularly the larger firms with comprehensive risk, supervisory, and compliance controls) will be forced to control exposure to these undefined risks by shifting their service models to focus more on advisory where possible, and dramatically reducing access to advised brokerage from a financial professional for investors who are not eligible for advisory services.

We are concerned that the Division may not fully recognize the potential harm that losing access to brokerage services may cause to Massachusetts residents. In particular, many investors are not eligible for services through the advisory model because they do not have sufficient assets to invest to meet applicable account minimums. Moreover, advisory services may not be well-suited for "buy and hold" investors who hold investments, such as mutual funds, for the long term and do not take advantage of the ongoing monitoring and advice services offered through advisory programs or want to pay ongoing advisory fees. Finally, many investors simply prefer to manage their own investments with periodic advice from a financial professional, and to pay only for the investment transactions they choose to implement. In short, the Regulation will reduce the ways in which Massachusetts retail investors can obtain investment recommendations from financial professionals.

The Division appears to misperceive the importance of preserving choice and the brokerage model, stating, "[w]hen preserving 'choice' means preserving the option to choose opaque, poorly understood products that are sold via heavily conflicted advice, the benefits of such 'choice' are illusory. There is no room for 'you get what you pay for' when it comes to the quality and integrity of investment advice."⁴ The choice between advisory and brokerage services is not a choice between high- and low-quality service models. Rather, it is a choice between when a client receives advice and whether he or she must pay an additional, ongoing, advisory fee or only commissions for effecting and executing transactions.

We believe that the Division's position ignores that individuals have true preferences as to how they want to interact with, and compensate, their financial professionals. We also believe that the Division may misperceive the quality of advice and services that many firms and financial professionals offer through the brokerage model in Massachusetts today. As noted above, putting clients' interests first is one of our core values, regardless of whether we are acting as an investment adviser or a broker-dealer. We believe doing so is critical to our firm's and our financial professionals' success. Moreover, while we understand that some firms and financial professionals may not share this value or meet this standard, we do not believe the Regulation is the best way to address this. Rather, we believe Massachusetts currently has the tools it needs to bring enforcement actions against firms and financial professionals who do not put their clients' interests firsts. Additionally, and as discussed in Part II of this letter, we

⁴ Initial Small Business Impact Statement Pursuant to M.G.L. c. 30A, §§ 2 and 5, Massachusetts Securities Division, Proposed Amendments to 950 CMR 12.200 (Dec. 13, 2019).

believe Reg. BI meaningfully enhances the current standards that apply to broker-dealers at the federal level, making additional state regulation unnecessary.

II. **Reg. BI Requires Firms and Financial Professionals to Put Investors' Interests First**

We respectfully disagree with the Division's assertions in its Request for Comment that Reg. BI's standards are ambiguous and are focused on complicated disclosures. Rather, we believe that Reg. BI sets forth clearly articulated standards of conduct that are carefully balanced and calibrated to the brokerage model that requires all firms and financial professionals to put investors' interests first. Specifically, Reg. BI:

- ***Elevates the standard of care that applies to broker-dealers***, requiring them to exercise reasonable diligence, care, and skill to understand the investor's investment profile and the risks, rewards, and costs of a particular investment, and only recommend the investment if it is in the investor's best interests.
- ***Requires more than disclosure to address conflicts***, obligating firms to take additional steps to mitigate financial incentives that could affect the recommendations a financial professional provides and to eliminate certain sales contests.
- ***Rationalizes investor disclosures***, creating a layered disclosure regime and emphasizing the importance of plain-English and accessible disclosures so that investors are empowered with the information they need to make educated decisions about the firms they hire and the investment services and products they select.

Demonstrating that these standards are meaningful, we and other firms have dedicated substantial time and resources from our business, compliance and legal personnel and are working with outside counsel and consultants to develop and implement new and enhanced compliance plans. These plans include, among other things:

- Conflicts inventories, assessments, disclosure, and mitigation procedures;
- New systems, standards, and training programs to support compliance with the heightened standard of care;
- Investment product reviews; and
- Enhanced disclosures and customer communications.

These changes will take time to implement and their benefits to investors will take more time to fully realize. However, we believe the changes will make a difference through improved investor protections at the federal level and better investment outcomes. We therefore respectfully urge the Division to delay further action on the Regulation until it can properly assess Reg. BI and the changes it is bringing to the market for financial services. Failing to do so risks introducing a Regulation that may actually harm Massachusetts residents by reducing their access to the brokerage model and help from financial professionals without materially adding to investor protections.

III. The Regulation Would Benefit from Changes and Clarifications That Reduce Its Potential Harm⁵

Should the Division decide to proceed with the Regulation, we offer the following suggestions for changes and clarifications that we believe may reduce its deleterious impact.

A. Clearly Define the Duty of Loyalty to Align with Reg. BI's Conflicts Obligation

We believe additional clarification is needed so that firms can operationalize the Regulation's duty of loyalty. As proposed, the Regulation's duty of loyalty consists of three separate obligations:

- (1) Disclose all material conflicts of interest,
- (2) 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
- (3) Make recommendations without regard to the financial or any other interest of any party other than the customer or client.

It is unclear what is required for a firm to comply with the second and third obligations. Without greater certainty, firms will not be able to design compliance regimes with any certainty that they will satisfy the regulator that they have met the fiduciary standard.

Specifically, it is unclear which conflicts must be avoided, which must be eliminated, and which may be mitigated. We are concerned that this structure leaves firms open to second-guessing by the Division and the plaintiffs' bar. If the Division's goal is to elevate the current requirements for addressing conflicts in Massachusetts, it must create a specific and clear framework so that firms can effectively design policies and procedure to comply with the duty of loyalty.

Additionally, the "without regard to" formulation of the duty of loyalty has long been criticized for its ambiguity and potential interpretation that firms must eliminate all conflicts associated with a recommendation. While we agree with the Division that firms and financial professionals should put their clients' interests first, however we believe a clearer statement of this requirement is essential to preserving the transaction-based brokerage model.

The Regulation creates greater uncertainty by providing that disclosing or mitigating conflicts alone does not meet or demonstrate the duty of loyalty and not providing any guidance regarding what actions, short of eliminating or avoiding all conflicts, would satisfy the duty of loyalty. Finally, the sales contest presumption is unclear and will chill many common, permissible, and beneficial incentive programs. Because the Division has not defined what types of activities it views as sales contests, we are

⁵ Our suggestions in this comment letter do not address every issue we have identified with the Regulation and instead focuses on key issues along with suggestions in order to allow for the brokerage model to continue in the Commonwealth. We support and incorporate by reference in their entirety, the comments and arguments included in the letter the Securities Industry and Financial Markets Associations ("*SIFMA*") submitted on January 6, 2020.

concerned that firms will have no certainty about whether particular incentives they provide to motivate their sales forces is permissible.

Comment: We recommend that the Division revise the duty of loyalty under the Regulation to be consistent with the formulation in Reg. BI. Specifically:

- (1) A firm or representative should not put its interests ahead of the investor's interests,
- (2) All conflicts must be disclosed,
- (3) Financial incentives that create conflicts for financial professionals must be mitigated,
- (4) Sales contests used to incentivize sales of specific investment products in a limited time period must be eliminated.

B. Allow Broker-Dealers to Define the Scope of Their Duty to Monitor Client Accounts By Agreement with Their Clients

The Regulation would create ongoing fiduciary duties and obligations to regularly or periodically monitor customer accounts that are inconsistent with the brokerage business model and investor expectations. We are also concerned that these ongoing duties and obligations are in direct conflict with Reg. BI. Specifically, we believe the following elements of the Regulation are problematic:

- (1) ***It is unclear whether the episodic fiduciary duty applies at the time of the recommendation or extends through implementation of the recommended transaction.*** We believe the Division intentionally revised the regulation to remove language that would have applied a fiduciary duty through the "execution of the recommendation," to clarify that the episodic fiduciary duty applies only at the time of a recommendation. But, the Division's statement in the Request for Comment that the fiduciary duty applies "the implementation" of the advice or recommendation creates uncertainty. We are concerned that subjecting broker-dealers to a fiduciary duty through the implementation of a recommended transaction would require new recordkeeping and operational changes and may conflict with federal law, including broker-dealer's best execution requirements.
- (2) ***It is unclear when the ongoing fiduciary duty applies.*** The Regulation provides that a fiduciary duty applies "during any period" the broker-dealer, agent, investment adviser, or investment adviser representative "has a contractual obligation to monitor a customer's or client's account on a regular or periodic basis," and when a client has a reasonable expectation that his or her account will be regularly or periodically monitored. We believe that the Division intends to apply the fiduciary duty *at the time* the firm or representative is obligated or expected to monitor the account, however this is not clear from the regulatory language. We are concerned that the Regulation could be interpreted to apply a fiduciary duty during the *entire period* the monitoring obligation or expectation exists. Applying an ongoing fiduciary duty to broker-dealers is inconsistent with the brokerage model and is inconsistent with Reg. BI, which

recognizes that the obligations that apply to broker-dealers are episodic in nature and defined by the terms of customer agreements.

- (3) ***Financial professional titles cannot reasonably be viewed as creating an expectation that a firm or financial professional will monitor an account on a regular or periodic basis.*** We agree that certain titles may connote certain qualities, traits, or services and have marketing value. As examples, it is reasonable for an investor to assume that a “Financial Planner” offers financial plans and that an “Investment Manager” manages investments. However, we are not aware of any title that is in common usage that creates any expectation that the financial professional using it regularly or periodically monitors accounts. Indeed, many of the title combinations the Regulation would view as creating such expectations are more commonly perceived as indicating a point-in-time service. This is particularly the case for financial planners and investment consultants who are often compensated on a fixed fee or hourly basis for completing a particular plan or service. As such, we do not believe using these titles should be viewed as creating an expectation that the account will be monitored, absent an express agreement to do so, or other circumstances that suggest the financial professional has agreed to monitor the account. Moreover, as Reg. BI permits, financial advisors can offer both episodic brokerage services without monitoring and ongoing advisory services. The Regulation would appear to directly conflict with Reg. BI on this point by requiring financial advisors to regularly and periodically monitor customer accounts and preventing them from offering different service levels.

Comment: We recommend that the Division revise the scope of application of the fiduciary duty under the Regulation as follows:

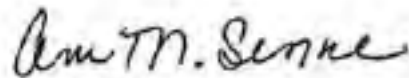
- (1) Clarify that the episodic fiduciary duty applies at the time a recommendation is provided.
- (2) Clarify that the ongoing fiduciary duty applies at the time a broker-dealer, agent, investment adviser, or investment adviser representative has a contractual obligation to monitor the account or at the time the client has a reasonable expectation that the account will be monitored.
- (3) Eliminate the provision that titles create a reasonable expectation that an account will be regularly or periodically monitored.

We thank the Division for considering our comments on the Regulation. Like the Division, we believe that firms and financial professionals should always put their clients’ interests first. We want to work with the Division to ensure that Massachusetts’ investors have the protections they deserve, as well as choice and access to high-quality investment services, including through the cost-effective, transaction-based brokerage model.

We are concerned that, as proposed, the Regulation will cause firms reduce, restrict, and potentially cease offering brokerage services in Massachusetts, harming the investors that we and the Division serve. To avoid this outcome, we urge the Division to delay going forward with the Regulation carefully assess whether Reg. BI provides sufficient protection once it becomes effective. Only then will the Division be able to determine whether additional enhancements are needed to protect Massachusetts investors, and only then can the Division appropriately tailor these enhancements to fill the gaps (if any).

We appreciate and support Massachusetts's goal of protecting investors and we hope to continue to work with the Division to achieve our common goal of making sure investors come first, while preserving choice and access to investment and financial services Massachusetts.

Sincerely,

A handwritten signature in black ink that reads "Ann M. Senne". The signature is written in a cursive, flowing style.

Ann Senne
Head of Advice and Solutions
RBC Wealth Management