RAYMOND JAMES®

January 7, 2020

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

The Honorable William Francis Galvin
Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Re: Proposed Regulation – Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

Dear Secretary Galvin:

Raymond James Financial, Inc. ("Raymond James" or the "Firm") appreciates the opportunity to comment on the Massachusetts Securities Division's (the "Division's") *Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives* (the "Proposal"). As you know, Raymond James submitted comments to the Division's *Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives* (the "Preliminary Proposal").[1] As with the Preliminary Proposal, we are concerned that this Proposal will result in the unintended consequence of unnecessarily limiting Massachusetts investors' access to investment services that provide for individualized financial planning.

Raymond James has long supported consistency and clarity for clients and the financial services industry through a standard of conduct for broker-dealers ("BD"), when making recommendations, that (i) is based on the principles underlying the standard of conduct for investment advisers ("IAs"), (ii) is tailored to the BD business model, and (iii) serves the goal of enhanced investor protection without unnecessarily reducing or eliminating investor choice. We believe that the U.S. Securities and Exchange Commission (the "SEC") has accomplished this multi-faceted goal through its adoption of Regulation Best Interest ("Reg. BI") and related releases.[2]

Accordingly, the Firm reiterates its concerns that a state-by-state regulatory approach will create overlapping, conflicting, and duplicative regulations on the same subject matter between the States and national regulatory authorities such as the SEC. These are the same concerns that Congress recognized unnecessarily raise costs for American investors and led to substantial reforms in regulation of the securities industry with the passing of the National Securities

[1] https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm.

[2] https://www.sec.gov/news/press-release/2019-89.

Markets Improvements Act of 1996 ("NSMIA"). Though we recognize that other federal and state regulators have important roles to play in the retail investor space, we believe that consistency and clarity are only achievable through a single broad authority and that the SEC should continue to function as the primary regulator of BDs and federally-registered IAs.

For these reasons and those discussed in more detail below, Raymond James requests that the Division either withdraw the Proposal or provide an express exemption from the Proposal for SEC-registered BDs and IAs and their registered persons.

I. Background of Raymond James

Raymond James is a leading diversified financial services company providing private retail client, capital markets, asset management, banking and other services to individuals, corporations and municipalities. Through its subsidiaries, the Firm is engaged in various financial services activities, including providing investment management services for retail and institutional clients; the underwriting, distribution, trading and brokerage of equity and debt securities; and the sale of mutual funds and other investment products. Additionally, Raymond James provides corporate and retail banking services, as well as trust services.

In each line of business, our long-term success reflects commitment to our core value to always put the financial well-being of our clients first. We only do well when our clients thrive.

Raymond James is the sole owner of: Raymond James & Associates, Inc. ("RJA"), a BD and IA dually registered with the SEC; Raymond James Financial Services, Inc. ("RJFS"), a BD registered with the SEC; and Raymond James Financial Services Advisors, Inc. ("RJFSA"), an IA registered with the SEC. RJA representatives are employees of RJA. RJFS and RJFSA representatives are independent contractors who own their own businesses and are supported by the platforms and services offered by the Firm.

Raymond James, through its registered subsidiaries, maintains relationships with over 25,000 Massachusetts investors who hold more than $14 billion in assets in over 46,000 accounts with a total of nearly 1,800 registered representatives ("RRs") and investment adviser representatives ("IARs").

II. The Proposal is Unnecessary in Light of Reg. BI, and Will Lead to Increased Investor Costs While Limiting Investor Choice

As you know, in June 2019, the SEC adopted Reg. BI and related releases to, among other things, enhance the standard of conduct for BDs and their associated persons when making recommendations to retail investors, and provide retail investors with information necessary to better understand the relationship with their BDs and IAs and make informed choices. Importantly, Reg. BI preserves investor choice and allows investors to continue to receive advice through the brokerage model, allows BDs to continue to receive commissions for executing transactions when appropriate for investors, applies broadly to all retail client accounts, including retirement accounts (eliminating complexity and confusion), and allows the primary federal

securities regulatory agency – the SEC – to enforce a standard of conduct, not only across the industry, but across the country.

Raymond James respectfully but vehemently disagrees with the Division's views that: Reg. BI "fails to establish a strong and uniform fiduciary standard"; Reg. BI failed to establish the standard of conduct consistent with the standard recommended by the SEC's 2011 *Study on Investment Advisers and Broker-Dealers* ("913 Study"); and Congress *mandated* the particular standard of conduct to be adopted by the SEC. Indeed, Section 913(g) of the Dodd-Frank Wall Street Reform and Financial Protection Act ("Dodd-Frank") provides expressly that the SEC "may" but was not required to adopt a particular standard of conduct. As Congress expressly "required" the 913 Study, it also could have required the SEC to adopt a particular standard of conduct – instead Congress chose to defer the SEC's judgment.

Irrespective of the fact that it was not required to adopt a particular standard of conduct for BDs and IAs, the SEC, consistent with the intent of Section 913 of Dodd-Frank and the principles underlying the recommendations of the 913 Study, adopted a standard of conduct in the form of Reg. BI and its related releases that is based on the fiduciary principles governing IAs while tailored to the BD business model. Indeed, the 913 Study recommended that the standard ultimately adopted by the SEC should heighten investor protection and preserve investor choice while remaining flexible to accommodate different business models. Most importantly, the 913 Study recommended, and the SEC adopted, a standard requiring that retail investors receive recommendations and advice about securities that is in the their "best interest."

In particular, Reg. BI and its related releases, among other things:

- Expressly require acting in clients' best interests, "without placing the financial or other interests of the [BD] ahead of the interests of the retail customer";
- Require delivery of plain English brochures to retail investors designed to reduce investor confusion as to the services available and relationships with BDs and IAs;
- Expand the scope of the BD's standard of conduct to recommendations of account types, including recommendations to roll over or transfer assets from a retirement plan to an IRA;
- Establish an express requirement to eliminate – or disclose and mitigate – conflicts of interest, including an express requirement to eliminate sales contests and sales quotas as noted below;
- Ensure regulatory obligations cannot be reduced through contract; and
- Eliminates the element of "control" from finding an excessive trading violation.

Accordingly, Reg. BI established the strong standard of conduct expressly authorized by Congress and consistent with the key principles underlying the standard recommended by the

913 Study – a standard that is appropriately tailored to the BD business model, provides the same investor protections as the standard of conduct for IAs when making recommendations about securities, and preserves investor choice.

In addition, the Division's sense of urgency to adopt the Proposal is misplaced. Reg. BI was adopted just a little over six months ago, with a compliance date of June 30, 2020, and the industry is in the midst of a significant implementation in response to the myriad requirements of Reg. BI. Much of the impact of Reg. BI cannot be determined and assessed until well after its compliance date, and any currently perceived gaps may be addressed through additional guidance from the SEC and FINRA, as well as new or updated FINRA rules.

Accordingly, with the release of Reg. BI and in order to preserve choice and access to a variety of investment advice products and services for Massachusetts's investors, we ask that the Division withdraw the Proposal. Raymond James believes that rather than move forward with the Proposal, the Division should delay or withdraw the Proposal until such time that the impact of Reg. BI can be sufficiently assessed following its effective date. In the event that the Division chooses to proceed with the Proposal, then we ask that the Division revise the Proposal to include an exemption for SEC-registered BDs and IAs and their registered persons stating expressly that compliance with Reg. BI requirements would satisfy compliance with the Massachusetts fiduciary conduct standard.

III. The Proposal is Preempted under NSMIA with Respect to Both BDs and IAs Registered with the SEC ("RIAs")

The Proposal, as written, would be preempted under NSMIA for both BDs and RIAs, and would not survive legal challenges on NSMIA grounds. Congress enacted NSMIA with the intent to clearly delineate the securities law responsibilities of federal and state governments. The Proposal would impose a regulatory structure that would directly contradict and undermine the intent of NSMIA to end the confusing, conflicting and overlapping federal and state securities laws that existed prior to its enactment.

1. The Proposal is preempted with respect to RIAs under NSMIA

In delineating regulatory responsibilities over IAs, NSMIA clearly left regulation of RIAs to the SEC. In this regard, NSMIA preserved state authority over RIAs only with respect to fraud and deceit. Moreover, in adopting rules to implement NSMIA, the SEC explained that NSMIA also "[precludes] a state from indirectly regulating activities of [RIAs] by applying state requirements that define 'dishonest' or 'unethical' business practices unless the prohibited practices would be fraudulent or deceptive absent the requirements."

While the Proposal appears to exclude RIAs, the application to IARs – many of whom are affiliated with RIAs – could indirectly apply the Proposal to RIAs in conflict with NSMIA. To the extent the Proposal is intended to apply to RIAs or IARs of RIAs, including supervised persons of dually registered BDs/RIAs who rely on applicable exclusions from IAR registration in Massachusetts, the Proposal would impose numerous requirements that go beyond the limited

areas preserved for state regulation, and would subvert the intent of Congress to deny states the ability to reinstitute the overlapping and duplicative regulation of RIAs. Accordingly, the Proposal would be preempted under NSMIA with respect to RIAs.

2. The Proposal is preempted with respect to BDs under NSMIA

NSMIA added Section 15(i) to the Exchange Act of 1934 ("Exchange Act"), which generally preempts states from establishing any requirements on BDs with respect to making and keeping records, among other things, that differ from, or are in addition to, such requirements established under the Exchange Act. In this regard, section 950 CMR 12.207(5) of the proposed new rule provides that:

> "Nothing in 950 CMR 12.207 shall be construed to establish any requirements for capital, custody, margin, financial responsibility, making and keeping of records, bonding, or financial or operation reporting requirements for any broker-dealer or agent that differ from, or are in addition to, the requirements established under 15 U.S.C. §78o(i)."

Despite the inclusion of this provision, the Proposal would impose such NSMIA-preempted books and records requirements, contrary to congressional intent.

IV. Limit the Scope of the Proposal and Preserve Investor Choice

Raymond James's client base is diversified and varies, among other things, in relationship size, wealth, objectives, and interest in the amount of investment advice and services they receive. Our clients benefit from the ability to choose among a variety of advisory and brokerage services in a manner best suited to their needs and preferences. Clients often have both brokerage and advisory accounts that provide different levels of service at different costs to meet their financial situations, needs and objectives. Such clients typically have brokerage accounts for investments they intend to hold for longer periods of time, and advisory accounts through which they receive ongoing financial advice and asset management services. If the Division proceeds with the Proposal, several revisions are required to ensure the availability and continuity of brokerage services to Massachusetts retail investors.

1. Limit to investment advisory accounts the applicability of an ongoing duty

In our comment to the Preliminary Proposal, we expressed deep concerns that the Preliminary Proposal would impose an ongoing fiduciary duty on BDs which would limit investor choice and result in increased costs to investors. While we appreciate the Division's revisions with respect to the ongoing duty, the Proposal still would impose an ongoing fiduciary duty on BDs without regard for the BD business model and investor preferences, and, therefore, result in the same negative consequences for Massachusetts investors.

Historically and under Reg. BI, a BD's suitability and best interest obligations apply at the point-in-time when a recommendation is made. Moreover, absent an agreement, course of conduct, or

unusual fact pattern that might alter the normal BD-client relationship, a recommendation by a BD has not been deemed to create an ongoing duty to monitor or make subsequent recommendations.

The Proposal would impose an ongoing fiduciary duty on BDs if the BD or its agent engages in any act, practice or course of business that results in a customer or client having a "reasonable expectation" that the BD or agent will monitor the customer's or client's accounts or portfolio on a regular or periodic basis. This standard is highly subjective and open to interpretation.

Moreover, the Proposal expressly provides that each customer will have such "reasonable expectation" if a financial professional uses a title containing any variant of a number of commonly used terms such as "adviser, manager, consultant or planner" in conjunction with "financial, investment, wealth, portfolio, or retirement" or similar terms. It is unclear what titles could be used that would not impose a duty to monitor.

In addition, our dually registered persons generally use the title "financial advisor" and will have clients with any combination of relationships, including brokerage-only clients, investment advisory-only clients, and clients that receive both brokerage and advisory services. The Proposal would impose an ongoing duty for such financial advisors in all circumstances, even if a client is brokerage-only. Similarly, in direct conflict with Reg. BI, the Proposal's titling provision would impose an ongoing duty across the entire relationship, even if a client has both brokerage and investment advisor accounts to receive the different services available in both relationships.

The Proposal's imposition of an ongoing duty in ambiguous and highly subjective circumstances such as a client's or customer's "reasonable expectations," including the use of a title that contains virtually any combination of financial related terms other than "broker," is inconsistent with the Proposal's stated intent that the approach is "designed to be consistent with the nature of the relationship . . . ." As a result, the Proposal will make it virtually impossible for a financial professional to provide both brokerage and investment advisory services without being subject to an ongoing duty to monitor brokerage accounts.

An ongoing duty to monitor a client's assets comes with substantial costs, and requires supervisory systems and controls designed specifically to supervise such ongoing monitoring. BD supervisory systems and controls are not structured to supervise brokerage accounts in this manner. The costs and time required to restructure these systems and controls would be substantial. Such increased costs would likely make it impractical, if not impossible, for firms to continue to provide personalized investment advice under a transaction-based compensation model.

Firms would likely have no option other than to either recommend clients move their assets to an advisory account – if in their best interest – and, if not in their best interest, firms may have to cease providing any advice and investment services to those clients. In either event, the most likely result of imposing an ongoing obligation on BD accounts is that many Massachusetts retail investors who would prefer to receive periodic recommendations would likely lose access to

investment advice altogether, or experience a potentially significant increase in the cost of that advice.

To avoid such an untenable outcome, the Proposal should be revised to be consistent with Reg. BI by expressly limiting the ongoing fiduciary duty to investment advisory accounts unless the BD and the client have entered into a written agreement expressly providing for an obligation to provide ongoing monitoring, and revise the titling provision to be consistent with Reg. BI or eliminate it entirely as unnecessary.

2. Define "recommendation" to be consistent with Reg. BI

The Division should expressly provide that "recommendation" shall be interpreted consistent with longstanding FINRA guidance as to the meaning of that term under FINRA Rule 2111, and consistent with its meaning under Reg. BI. In addition, the Division should revise the Proposal to provide an express exemption from the fiduciary standard for all unsolicited transactions.

3. Limit the scope of the Proposal with respect to account recommendations to be consistent with Reg. BI

Consistent with Reg. BI and FINRA Rule 2111, the Proposal should be revised to apply only to recommendations of "any securities transactions or investment strategy involving securities (including account recommendations) to a retail customer." The Proposal's application to recommendations of "the opening of, or transfer of assets to, any type of account" creates uncertainty whether firms' supervisory systems redesigned to comply with Reg. BI would be able to comply with the Proposal. Accordingly, the Proposal's application should be revised or the Division should provide guidance that the Proposal is intended to be consistent with the applicability of Reg. BI to "account recommendations."

4. Expressly limit "clients" and "customers" to Massachusetts residents

As indicated above, the Proposal, as written, will have significant negative consequences for investors. If not withdrawn, its potential impact should be limited solely to retail investors who are residents of Massachusetts. BDs, RRs, RIAs, and IARs who have a place of business in Massachusetts should not be subject to the Proposal when providing brokerage or advisory services to clients residing outside of Massachusetts. Additionally, it is important to note that the Proposal differs substantively from and may be inconsistent with regulations in other states where such clients actually reside. Accordingly, the Proposal should be revised to be expressly applicable only with respect to retail investors who are residents of Massachusetts at the time any applicable investment advice is provided or a recommendation made.

V. Duty of Care

The Proposal's duty of care would require "reasonable inquiry" regarding the "risks, costs, and conflicts of interest related to all recommendation made and investment advice given, and the customer's or client's investment objectives, financial situation, and needs, and any other

relevant information." The Division should expressly provide that "reasonable inquiry" will be interpreted to be consistent with the "reasonable diligence, care, and skill" requirement under Reg. BI.

The Division also should provide guidance with respect to the specific factors that must be considered with respect to the reasonable inquiry. For instance, the Division should specify that the lowest-cost option may not always be in the client's best interest depending on other facts and circumstances, such as historical performance and potential risks. The Division should provide guidance with respect to how firms should balance these factors in order to satisfy their duty of care.

VI. Duty of Loyalty

1. Revise the "without regard to" standard to be consistent with Reg. BI

As we stated in our comments to the Preliminary Proposal, the Division's "without regard to" standard is too ambiguous. The use of the phrase "without regard to" could be construed to require the elimination of *all* conflicts, an impossible standard. Indeed, in adopting Reg. BI, the SEC expressed concern that use of the "without regard to" language could be "inappropriately construed" to require elimination of all conflicts, which the SEC believed "could ultimately harm retail investors by reducing their access to differing types of investment services and products by increasing costs." We share the SEC's concerns.

In addition, under the Advisers Act, an IA's duty of loyalty requires "an adviser to serve the best interests of its clients, which includes an obligation not to subordinate the clients' interests to its own." The Proposal's duty of loyalty would require that a recommendation or investment advice be provided "without regard to any financial or any other interest of broker-dealer, agent, adviser, any affiliated or related entity and its officers, directors, agent, employees, or contractors, or any third-party."

In light of the SEC's concerns, we recommend revising the Proposal to be consistent with Reg. BI and the longstanding common law fiduciary duty.

2. Clarify the Division's interpretation of the duty of loyalty

The Firm commends the Division for eliminating the explicit "Best of" standard that was included in the Preliminary Proposal. However, the Division's intent to implement the principles "animating these provisions" through enforcement actions merely replaces a standard that was a remarkable departure from existing common law and statutory fiduciary duties to rulemaking through enforcement approach that would provide inadequate notice to firms of their obligations.

Moreover, the specific instances cited for which the Division would pursue enforcement actions continue to raise similar concerns noted above with respect to the duty of care. For instance, the Division states that it would pursue enforcement actions for breach of the duty of loyalty "if transaction-based compensation is paid or received for a recommendation or advice, and other

options were available which would have been less remunerative or reasonably expected at the time of recommendation to result in a better outcome for the customer or client." As noted above with respect to the consideration of costs, a particular recommendation may be more remunerative and still be in the customer's best interest due to other factors such as historical performance and potential risks.

In adopting Reg. BI, the SEC noted:

> We also recognize that different products are rarely perfectly equal, and that differences will be both quantitative and qualitative in nature. A broker-dealer will not be required to recommend the single "best" of all possible alternatives that might exist, in part because **many different options may in fact be in the retail customer's best interest**. We are sensitive to commenters' concern that this determination, to the extent it can be made at all, may be judged in hindsight even though Regulation Best Interest applies at the time of the recommendation. (emphasis added)

We respectfully recommend that the Division, along with our recommended revision to the "without regard to" language, clarify that the duty of loyalty will be interpreted consistent with Reg. BI.

3. Revise the treatment of conflicts of interest to be consistent with Reg. BI

The Proposal would require disclosure of all "material" conflicts of interest. The addition of the "material" qualifier is a welcomed revision. However, the additional provisions regarding the treatment of conflicts of interests in meeting the duty of loyalty are inconsistent with Reg. BI and longstanding common law fiduciary duties. The Proposal creates ambiguity as to how the Division expects firms to manage conflicts to meet the duty of loyalty.

For instance, in addition to disclosure, the Proposal takes an operational approach to managing conflicts by requiring firms to make all "reasonably practicable efforts" to first avoid conflicts of interest, eliminate conflicts that cannot be avoided, and then mitigate conflicts that cannot be avoided or eliminated. The Proposal further adds that "disclosing or mitigating conflicts alone" will not meet the duty of loyalty.

The common law duty of loyalty requires firms to eliminate or, if unable to eliminate, disclose material conflicts of interest and obtain informed client consent. That is, it does not prohibit an advisor from benefitting from a transaction with a client if the advisor provides clear disclosure and the client provides informed consent. The SEC adopted this common law duty through its Disclosure and Conflicts of Interest Obligations.

To avoid ambiguities and unnecessary complexities, the Division should revise the Proposal to: (i) eliminate proposed subsection (2)(b)(c) from section 950 CMR 12.207; and (ii) expressly state that the disclosure obligation is satisfied when in compliance with the Disclosure and Conflicts of Interest Obligations under Reg. BI.

4. Principal transactions

The applicability of the Proposal to recommendations of principal transactions and proprietary or other similarly limited products is unclear. This uncertainty raises concerns that such recommendations would be in violation of the duty of loyalty due to the Proposal's "without regard to" language and firms'inability to rely on disclosure to satisfy the duty of loyalty.

As we stated in our comments to the Preliminary Proposal, principal transactions are an essential aspect of well-functioning capital markets. The SEC noted in the 913 Study that many types of securities, such as municipal and corporate bonds, new issues, and proprietary products are generally traded and offered on a principal basis. Indeed, Massachusetts companies and municipalities benefit from the ability of BDs to engage in principal transactions.

The Proposal's silence as to its applicability to principal transactions in addition to the Division's subsequent statements that, while not prohibited, potential conflicts of interest must be "addressed and managed according to the Proposal" has further raised our concerns with respect to principal transaction in Massachusetts. It is unclear how the Division expects potential conflicts of interest with respect to principal transactions would be "addressed and managed," particularly without the additional recommendations made herein.

Overly burdensome restrictions on principal transactions could have significant detrimental effects on the availability of financing for both Massachusetts companies and municipalities, as well as market liquidity and access to new issues for retail investors in Massachusetts.

In its 913 Study, the SEC noted that despite potential conflicts of interest inherent in principal transactions, Congress did not intend to apply Section 206(3) of the Advisers Act to BDs nor prohibit BDs from recommending principal transactions. Consistent with the intent of Congress, Reg. BI, through the Disclosure Obligation and Form CRS, requires BDs to provide new conflict of interest disclosures with respect to principal transactions, but does not impose the requirements of Section 206(3) on BDs nor impose a prohibition on BDs from recommending principal transactions.

Accordingly, we recommend that the Proposal be revised, consistent with Reg. BI, to explicitly acknowledge that: (i) it does not prohibit recommendations of principal transactions, affiliated or proprietary products, or from among a limited range of products; (ii) such recommendations do not breach the proposed fiduciary duty; (iii) recommendations of principal transactions are exempt from the "without regard to" language; and (iv) recommendations of principal transactions are exempt from the Proposal's avoid, eliminate, or mitigate standards for managing conflicts of interest.

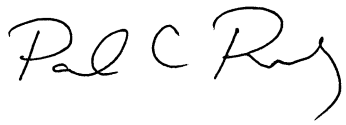
* * * * *

As stated earlier, our primary opposition to the Proposal is our strong desire to avoid unintended consequences that would potentially restrict Massachusetts investors, particularly lower income investors, from receiving advice on their investments, limit choice and create confusion and

complexity for advisors and their clients. We continue to believe there is strong evidence for those concerns and advocate for states to defer to the SEC, which has broad authority across BDs and IAs and has adopted a strong standard of conduct that provides the same level of protection to investors as the standard of conduct for IAs in the form of Reg. BI and its related releases.

We urge the Division to consider the issues outlined above, and appreciate the opportunity to comment on the Proposal.

Sincerely,



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