

January 7, 2020

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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

Submitted via email: securitiesregs-comments@sec.state.ma.us

Dear Secretary Galvin:

State Street Global Advisors, the investment management arm of State Street Corporation, welcomes the opportunity to comment on the Massachusetts Securities Division (the “Division”) of the Office of the Secretary of the Commonwealth’s proposal dated December 13, 2019 to amend 950 Massachusetts Code Regs. 12.200 (the “Proposal”) as they relate to the standard of conduct applicable to broker-dealers, agents, investment advisers and investment adviser representatives.

For four decades, State Street Global Advisors has served the world’s governments, institutions and financial advisors. With a risk-aware approach built on research, analysis and market experience, we build from a breadth of active and index strategies to create cost-effective investment solutions for institutional investors. As stewards, we help portfolio companies see that what is fair for people and sustainable for the planet can impact long-term performance. And, as pioneers in index, exchange-traded funds, and environmental, social and governance investing, we continue to explore new ways to invest. As a result, we have become the world’s third-largest asset manager with nearly US \$2.95 trillion in assets under management¹.

State Street Global Advisors commends the Division’s desire to apply a fiduciary standard to broker-dealers, agents, investment advisers, and investment adviser representatives when dealing with their customers and clients and is grateful for the opportunity to provide comments to the Division on this significant initiative. We believe certain inconsistencies exist between federal standards and the Proposal, which, if not rectified, could lead to substantial increased costs for investors. As such, we support a delay in the finalization of this Proposal until the federal Securities and Exchange Commission (“SEC”) Regulation Best Interest is fully operational. However, if the Division intends on moving forward with the Proposal, we recommend certain modifications and clarifications. Specifically, we suggest

¹ This figure is presented as of September 30, 2019. Assets under management include the assets of the SPDR® Gold ETF and the SPDR® Long Dollar Gold Trust ETF (approximately \$44 billion as of September 30, 2019), for which State Street Global Advisors Funds Distributors, LLC (SSGA FD) serves as marketing agent; SSGA FD and State Street Global Advisors are affiliated.

expanding the scope of the employee benefit plan exclusion and ensuring the Proposal's focus on retail customers.

State Street Global Advisors' recommendation to expand the scope of the employee benefit plan exclusion:

State Street Global Advisors has been providing asset management services to institutional clients for over 40 years and began offering services to 401(k) plan clients in 1983.

State Street Global Advisors supports the Division's efforts in section 12.207(4) of the Proposal (the "Exclusion") to recognize the existing legal and regulatory landscape under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). It is our concern, however, that the Exclusion as currently drafted does not clearly capture non-fiduciary communications between an adviser and an ERISA plan participant, or other individual fiduciary consultant or adviser to an employee benefit plan. For example, investment advisers, including State Street Global Advisors, often provide investment education and create materials to describe their products and services. These communications are not fiduciary in nature and are in fact already addressed by the existing ERISA regulatory landscape². In defining "investment advice" under ERISA, the Department also has expressed its views on specific types of communications and activities that are directed at providing employee benefit plans and participants with investment information and education. In this way, the Department has taken steps to provide clarity necessary to ensure that individuals responsible for making investment decisions regarding their plan accounts can receive useful investment-related information. We are concerned, however, that the Proposal as drafted could result in less information being provided to those individuals. We respectfully request, therefore, that these communications be explicitly covered by the Exclusion. In addition, we believe that the Exclusion should apply to individual retirement accounts and other plans and accounts subject to section 4975 of the Code.

Recommendation: We respectfully request that the Division's exclusions in section 12.207(4) to be expanded to apply to any communication or activity relating to an employee benefit plan subject to ERISA. We believe doing so will avoid regulation of non-fiduciary communications and activities that are nonetheless specifically regulated by the Department of Labor. To the extent that it is helpful, we provide below suggested amendments to section 12.207(4):

² See Interpretive Bulletin 96-1; Participant Investment Education, 61 FR 29586, (June 11, 1996) (affecting 29 CFR 2509). (The summary statement by the Department of Labor explains, "This interpretive bulletin sets forth the views of the Department of Labor (Department) concerning the circumstances under which the provision of investment-related information to participants and beneficiaries in participant-directed individual account pension plans will not constitute the rendering of "investment advice" under the Employee Retirement Income Security Act of 1974, as amended (ERISA)"). We note that the Department issued a new version of this interpretive bulletin in connection with its regulation interpreting the definition of "Investment Advice" for purposes of ERISA section 3(21)(A)(ii), which was vacated by a decision of the Fifth Circuit Court of Appeals. However, whether the new version or the original version is in effect, the Department of Labor has specifically addressed communications regarding investments to individuals in defined contribution plans, even where such communications do not involve fiduciary investment advice. As a result, we believe the Exclusion should be broadened to cover any communications regarding a plan covered by ERISA or the Internal Revenue Code of 1986, as amended (the "Code").

12.207(4). Nothing in 950 CMR 12.207 shall be construed to apply to (i) a person acting in the capacity of a fiduciary or (ii) other communications or activities with respect to an employee benefit plan, its participants or beneficiaries, as those terms are defined in the Employee Retirement Income Security Act, as amended (ERISA), 29 U.S.C. §§ 1001 *et seq.* or to a plan or account subject to the section 4975(e)(1) of the Internal Revenue Code of 1986, as amended.

State Street Global Advisors' support for the institutional buyer exemption and recommendation to include all sophisticated investors:

We note that federally-registered advisers are considered fiduciaries under the Investment Advisers Act of 1940, as amended. We appreciate, therefore, the Division's efforts to clarify that the Proposal would not apply to these advisers and their investment adviser representatives, as well as other entities such as banks and trust companies, by referencing Massachusetts General Law c. 110A, section 401(m) and (n), rather than using an alternative, broader definition of adviser as preliminarily proposed by the Commission in June 2019.

We also commend the Division for seeking to limit the Proposal to retail customers in section 12.207(3). However, we believe the current list of excluded clients and customers in the Proposal does not include certain institutional investors that are not retail clients or customers. We believe qualified purchasers, as defined by section 2(a)(51)(A) of the Investment Company Act of 1940³, qualified eligible persons, as defined by Regulation 4.7(a)(2) and (3) under the Commodity Exchange Act⁴, and accredited investors, as defined in Rule 501 of Regulation D under the Securities Act of 1933⁵, are sophisticated investors. Advisers to and brokers for these types of clients should not be subject to the proposed fiduciary standards designed to address concerns with retail investors and customers. We also suggest clarifying that the terms "client" and "customer" refer to the direct clients of an adviser, and not to investors, interest holders or beneficial owners of, for example, a commingled vehicle to which an adviser provides services.

Recommendation: We recommend that the Division amend the list of excluded clients and customers in section 12.207(3) to explicitly include any entity that meets the definition of a qualified purchaser in section 2(a)(51)(A) of the Investment Company Act of 1940, a qualified eligible person, as defined by Regulation 4.7(a)(2) and (3) under the Commodity Exchange Act, and an

³ §2(a)(51)(iv) includes "any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than \$25,000,000 in investments."

⁴ Regulation 4.7(a)(2) and (3) includes certain commodity trading advisers, commodity pool operators, commodity pools, ERISA and state plans and government entities and instrumentalities.

⁵ Rule 501(a) includes any 501(c)(3) organization, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with sufficient total assets regardless of whether the business activities of such entity consists of investing, purchasing, selling or trading in securities issued by others.

accredited investor, as defined in Rule 501(a) of Regulation D under the Securities Act of 1933.

State Street Global Advisors appreciates the efforts by the Division in putting forth the Proposal, and we thank you for your consideration of our perspective. We would be happy to provide additional information regarding our recommendations or to discuss any questions you may have.

Respectfully,

A handwritten signature in black ink, appearing to read "Katherine S. McKinley". The signature is fluid and cursive, with a large initial "K" and a long, sweeping underline.

Katherine S. McKinley
Senior Vice President and General Counsel
State Street Global Advisors