



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Securities Division

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
December 13, 2019

Pursuant to its authority under the Massachusetts Uniform Securities Act, M.G.L. c. 110A (the “Act”), § 412(a), the Securities Division (the “Division”) of the Office of the Secretary of the Commonwealth has proposed the following amendments to its regulations at 950 CMR 10.00 *et seq.* (collectively, the “Regulations”):

- Adding section 12.207, deeming it an unethical or dishonest conduct or practice for a broker-dealer, agent, investment adviser, or investment adviser representative registered or required to be registered in Massachusetts to fail to act in accordance with a fiduciary duty to any customer or client, as articulated in that section; and
- Revising certain paragraphs in 950 CMR 12.204 and 950 CMR 12.205 to make clear that the existing suitability standard still applies to any relationships or transactions expressly excluded from the fiduciary standard.

The proposed regulations would apply to all broker-dealers, agents, investment advisers, and investment adviser representatives registered in Massachusetts. As of the date of this filing, there are approximately 900 investment advisers¹ registered in Massachusetts² and approximately 1,900 broker-dealers with at least one agent registered in Massachusetts. The Division believes that a significant majority of these firms can reasonably be considered “small businesses,” as the term is defined under the Small Business Act, 15 U.S.C. § 632(a)(1).

The following is the Division’s Small Business Impact Statement, which considers, without limitation, the impact of the proposed regulations on small businesses pursuant to the Massachusetts Administrative Procedures Act, M.G.L. c. 30A, § 2.

¹ As used in this Small Business Impact Statement, “investment adviser” or “investment advisers” shall refer to the term “investment adviser” as it is defined in M.G.L. c. 110A, § 401(m).

² Investment advisers and investment adviser representatives, as that term is defined in M.G.L. c. 110A, § 401(n), are already required to adhere to a fiduciary duty to their clients. The proposed regulations will not modify that existing duty, or impose any new or additional burden on investment advisers or investment adviser representatives as such. The primary goal of the proposed regulations is to establish an enforceable, uniform fiduciary duty applicable to broker-dealers and agents, as well as investment advisers and investment adviser representatives.

Projected Impact on Small Businesses in Massachusetts, Pursuant to M.G.L. c. 30A, § 2

A. Projected Reporting, Recordkeeping, and Other Administrative Costs Required for Compliance with the Proposed Regulation

The fiduciary standard articulated in 950 CMR 12.207 is fundamentally a conduct standard. 950 CMR 12.207 requires broker-dealers, agents, investment advisers, and investment adviser representatives to adhere to the common-law fiduciary duties of utmost loyalty and care when dealing with their customers and clients. 950 CMR 12.207 does not impose any reporting or recordkeeping requirements. Broker-dealers and investment advisers are generally required to supervise their agents and investment adviser representatives, respectively, to assure compliance with the Act and Regulations. The cost of supervision may be considered an “administrative cost.” The proposed regulations only modify the standard of conduct for those affected, and do not prescribe the manner in which the already-existing supervisory obligation will be carried out.

Although some commenters during the preliminary comment period³ raised concerns that being held to a fiduciary standard would increase compliance costs for broker-dealers and investment advisers, none of those commenters provided details about the dollar amounts or specific sources of those increases. Accordingly, the Division cannot verify or estimate these purported costs. However, the Division does not believe that the proposed regulations will significantly increase compliance costs.

B. The Appropriateness of Performance Standards Versus Design Standards

Similar to the common-law fiduciary duty, the fiduciary standard articulated in 950 CMR 12.207 requires that those subject to it adhere to duties of utmost care and loyalty when dealing with their customers and clients. The proposed regulations provide parameters for compliance, but do not specifically prescribe any particular manner of adhering to these principles. Given the variety of circumstances in which the principles of care and loyalty must be applied, the Division believes that the fiduciary standard is most appropriately proposed as a performance standard.

C. Identification of Regulations of the Division or Any Other Agency or Department of the Commonwealth, Which May Duplicate or Conflict with the Proposed Regulation

The proposed regulations do not duplicate or conflict with any of the Division’s existing Regulations. The Division is not aware of any other agency or department of the Commonwealth that has promulgated regulations requiring broker-dealers, agents, investment advisers, or investment adviser representatives to adhere to a fiduciary standard, or precluding the same from adhering to such a standard.

³ The Division received and reviewed approximately fifty-three written comment letters on the Division’s preliminary rule proposal between June 14, 2019 and August 6, 2019. Certain aspects of the proposed regulations are different from the preliminary proposal, but the fiduciary principles at the core of the proposed regulations remain the same.

D. Analysis of Whether the Proposed Regulation is Likely to Deter or Encourage the Formation of New Businesses in Massachusetts

The proposed regulations fundamentally require that broker-dealers, agents, investment advisers, and investment adviser representatives provide financial advice and make recommendations based on what is best for their customers and clients, without regard to anyone else's interest.

The Division does not believe that the proposed regulations will deter the formation of new investment advisory businesses in Massachusetts because investment advisers are already held to the fiduciary standard.

It is possible that newly-formed broker-dealers and existing broker-dealers who do not currently conduct business in Massachusetts may decide not to conduct business in Massachusetts if they determine that being held to a fiduciary standard will be too costly or subject them to too much regulatory risk.⁴ However, any potential deterrent effect on new business formation is substantially outweighed by (1) the cost to investors of conflicted advice,⁵ and (2) the ample and varied sources of financial advice already available to Massachusetts investors.⁶

Individuals and business that seek to provide financial advice, but are unable or unwilling to treat their customers and clients with the appropriate care and loyalty present a substantial risk to investors. The potentially catastrophic harm that can result from conflicted advice requires the rigorous approach embodied in the proposed regulations.

⁴ As discussed above, the Division does not believe that the proposed regulations will cause any significant increase in compliance cost.

⁵ In 2015, the Council of Economic Advisers estimated the aggregate annual cost to investors of conflicted financial advice to be approximately \$17 billion. Jason Furman and Betsey Stevenson, *The Effects of Conflicted Investment Advice on Retirement Savings* (Feb. 23, 2015), <https://obamawhitehouse.archives.gov/blog/2015/02/23/effects-conflicted-investment-advice-retirement-savings>.

⁶ As discussed above, there are approximately 900 investment advisers registered in Massachusetts and approximately 1,900 broker-dealers with at least one agent registered in Massachusetts.