

January 7, 2020

Via E-Mail to securitiesregs-comments@sec.state.ma.us

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: Solicitation of Comments on Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

Dear Secretary Galvin:

On behalf of the Committee of Annuity Insurers (the “Committee”)¹ and its 31 member insurance companies that represent over 80% of the annuity business in the United States, we are submitting this letter in response to the Solicitation of Comments on Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives, issued by the Massachusetts Securities Division (the “Securities Division”) of the Office of the Secretary of the Commonwealth of Massachusetts on December 13, 2019.² This proposed rulemaking follows the Securities Division’s Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (the “Preliminary Proposal”), which was issued on June 14, 2019.³ The proposed rulemaking solicits comment on proposed amendments to 950 CMR 12.204 and 12.205 and newly proposed rule 950 CMR 12.207 (collectively, the “Proposal”), which differ in some respects from the Preliminary Proposal. Our comments below begin with an overview of the Committee and then turn to a summary of the Proposal and the Committee’s general and specific comments on the Proposal.

Overview of the Committee

The Committee is a coalition of life insurance companies formed in 1981 to participate in the development of federal and state policy with respect to securities, regulatory, and tax issues affecting annuities. Most of the Committee’s members also have affiliated broker-dealers and/or investment advisers that distribute and/or sell registered insurance products or provide advice in connection with such products as well as other securities. For over 35 years, the Committee has been actively involved in shaping and commenting upon many elements of the federal securities regulatory

¹ A list of the Committee’s member companies is attached as Appendix A.

² The Proposal is posted at <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryruleidx.htm>.

³ The Preliminary Proposal is posted at <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm>.

framework as it applies to annuity products. In particular, as relevant to the Proposal, the Committee over many years has been actively involved in standard of conduct and suitability-related initiatives of the U.S. Department of Labor, the Financial Industry Regulatory Authority, Inc., and the U.S. Securities and Exchange Commission ("SEC").

Overview of the Proposed Rule

The Proposal is comprised of two parts: amendments to 950 CMR 12.204 and 12.205 and newly proposed rule 950 CMR 12.207. Part One of the proposal would amend the existing suitability standard for broker-dealers to include recommending to a customer an investment strategy, the opening of any type of account, or the transferring of assets to any type of account. Part One of the proposal would also amend the existing suitability standard for investment advisers to include recommending an investment strategy, the opening of any type of account, or the transferring of assets to any type of account to a client to whom investment supervisory, management or consulting services are provided.

Part Two of the Proposal would require broker-dealers, agents, investment advisers, and investment adviser representatives to act as fiduciaries when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security, commodity, or insurance product. Furthermore, broker-dealers, agents, investment advisers, and investment adviser representatives would be required to act as fiduciaries when they: (i) have or exercise discretion in a customer's or client's account, unless the discretion relates solely to the time and/or price for the execution of the order; (ii) have a contractual fiduciary duty; (iii) have a contractual obligation to monitor a customer's or client's account on a regular or periodic basis; (iv) receive ongoing compensation or charge ongoing fees for advising a customer or client, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or providing the foregoing services as an integral component of other financially related services; or (v) engage in any act, practice, or course of business that results in a customer or client having a reasonable expectation that the broker-dealer, agent, investment adviser, or investment adviser representative will monitor the customer's or client's account(s) or portfolio on a regular or periodic basis. Finally, the use of a title, purported credential, or professional designation containing any variant of the terms "adviser," "manager," "consultant," or "planner," in conjunction with any of the terms "financial," "investment," "wealth," "portfolio," or "retirement," or any terms of similar meaning or import, would constitute engaging in an act, practice, or course of business that results or would result in a customer or client having a reasonable expectation that the broker-dealer, agent, investment adviser, or investment adviser representative will monitor the customer's or client's account(s) or portfolio on a regular or periodic basis.

To satisfy the duty of care, broker-dealers and investment advisers would be required to use the care, skill, prudence, and diligence that a person acting in a like capacity and familiar with such matters would use, taking into consideration all of the relevant facts and circumstances. The broker-dealer or investment adviser would be required to make reasonable inquiry, including risks, costs and conflicts of interest related to all recommendations made and investment advice given, and the customer's or client's investment objectives, risk tolerance, financial situation and needs, as well as any other relevant information. To satisfy the duty of loyalty, broker-dealers and

investment advisers and each agent and investment adviser representative would be required to disclose all material conflicts of interest, make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts of interest that cannot be avoided, and mitigate conflicts of interest that cannot be avoided or eliminated, and make recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer or client.

The Proposal notes that disclosing or mitigating conflicts alone does not meet or demonstrate the duty of loyalty. In addition, the Proposal creates a presumption of a breach of the duty of loyalty for a broker-dealer, agent, investment adviser, or investment adviser representative to recommend any investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security, commodity, or insurance product, if the recommendation is made in connection with any sales contest, implied or express quota requirement, or other special incentive program.

General Comments

In response to the Preliminary Proposal, the Committee provided comments on certain aspects of the Preliminary Proposal.⁴ The Committee appreciates the Securities Division's responsiveness to certain comments on the Preliminary Proposal. While the Committee is deeply concerned with key provisions of the Proposal, at the forefront of the Committee's concerns are the jurisdictional issues raised by the Proposal, which are discussed below.

Jurisdictional Issues. In response to the Preliminary Proposal, the Committee commented that variable annuities and other variable insurance products are regulated by the Massachusetts Division of Insurance (the "Insurance Division"). We asked the Securities Division to acknowledge that variable annuities and other variable insurance products would be excluded in any final rulemaking. The Committee appreciates the Securities Division's acknowledgement that annuities are not considered securities under the Massachusetts Uniform Securities Act (the "Securities Act").⁵ The Committee does not agree, however, with the Securities Division's decision to include non-securities in the Proposal, and therefore offers the following substantive comments.

The Secretary's Rulemaking Authority under the Securities Act. The Office of the Secretary of the Commonwealth of Massachusetts (the "Secretary") derives its authority to regulate securities from the Securities Act.⁶ Specifically, the Securities Act provides the Secretary with the authority to "make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of [the Securities Act], including rules and forms governing registration statements, applications, and reports, and defining any terms, whether or not used in this chapter, [as long] as the definitions are not inconsistent with the provisions of [the Securities Act]."⁷ The focus of the Securities Act is the promotion and the sale of securities. This provision does

⁴ Letter from the Committee of Annuity Insurers, to William F. Galvin, Office of the Secretary of the Commonwealth (July 26, 2019).

⁵ See § 3.A.(i), Mass. Secs. Div. of the Office of the Sec. of the Commonwealth, Request for Comment (Dec. 13, 2019).

⁶ See Mass. Gen. Laws ch. 110A.

⁷ See Mass. Gen. Laws ch. 110A, § 412(a).

not provide the Secretary with the express authority to regulate insurance products, and cannot be overwritten by a single clause in Section 204.

Section 101 of the Securities Act points clearly to the anti-fraud purposes of the Securities Act and also points clearly to the fact that the Securities Act's intended purpose is the regulation of *securities* and those persons engaged in the sale of securities. Section 101 states "It is unlawful for any person, in connection with the offer, sale, or purchase of any *security*, directly or indirectly, to [engage in fraudulent acts.]"⁸ Section 102 of the Securities Act contains a similar prohibition against persons who provide advisory services from engaging in fraudulent acts with respect to securities.⁹ Neither sections 101 or 102 of the Securities Act refer to any product type other than securities, and no other section of the Securities Act (with the exception of section 204) refers to any product type other than securities.¹⁰ It is difficult to envision that the Massachusetts legislature intended to empower the Secretary with the authority to regulate the conduct of persons distributing non-securities when the entire Securities Act is focused on issuers of securities and their agents.¹¹

The Secretary is relying on a provision found in Section 204 of the Securities Act that provides the Secretary with authority to take action against any applicant or registrant who "has engaged in any unethical or dishonest conduct in the securities, commodities, or insurance business."¹² It must be noted that Section 204 is included in the part of the Securities Act that addresses how broker-dealers, investment advisers, and their agents, including investment adviser

representatives, can become authorized to provide services within the jurisdiction of the state.¹³ For example, this part of the Securities Act prohibits broker-dealers, investment advisers, and issuers of securities from employing an agent unless that agent is registered in the state.¹⁴ The authority in Section 204 gives the Secretary a means to prevent a broker-dealer, investment adviser or an agent of these entities from remaining *registered* in the state of Massachusetts; it is not an open door through which the Secretary can promulgate new rules to regulate non-securities. The authority in Section 204 permits the Securities Division to initiate administrative action against a broker-dealer or investment adviser, including a fine, censure, or denial, suspension, or revocation of registration, so that the Secretary can affect the ability of a particular broker-dealer, investment adviser or an agent of these entities from providing broker-dealer or investment advisory services within the state.¹⁵ The Committee disagrees that Section 204 can be read to permit the Securities Division to promulgate a standard of conduct for broker-dealers and investment advisers who sell commodities or insurance. If the legislature intended for the Secretary and the Securities Division to regulate the sale of insurance and other non-securities, then the legislature would have also amended Sections 101 and 102 and numerous other sections of the Securities Act, and would

⁸ Mass. Gen. Laws ch. 110A, § 101 (emphasis added).

⁹ *Id.* at § 102.

¹⁰ Compare Mass. Gen. Laws ch. 110A, §§ 101 and 102, with Mass. Gen. Laws ch. 110A, § 204.

¹¹ See Mass. Gen. Laws ch. 110A, § 401 (defining an "Issuer" as any person who issues or proposes to issue any security, and "Agent" as any individual than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities).

¹² Request for Comment, § 3.A.(i); Mass. Gen. Laws ch. 110A, § 204(a)(2)(G).

¹³ See Mass. Gen. Laws ch. 110A, §§ 201-204.

¹⁴ See Mass. Gen. Laws ch. 110A, § 201.

¹⁵ See Mass. Gen. Laws ch. 110A, § 204.

not have also created the role of the Commissioner, the insurance laws and the Insurance Division, as discussed below.

Segregation of Securities and Insurance Divisions. The Massachusetts legislature intended the Securities Division and Insurance Division to be separately governed, and the Proposal's regulation of insurance products is in direct contradiction of the legislature's intention. For example, the Secretary of the Commonwealth is an officer created by the Massachusetts constitution. The Secretary derives authority from the Securities Act to regulate securities, as explained above. From this authority, the Securities Division was formed within the Office of the Secretary of the Commonwealth by regulation. As a constitutional officer, the Secretary is part of the Executive Branch; however, the Secretary is not subject to oversight or control by the Governor of Massachusetts.

On the other hand, the Massachusetts legislature created the Executive Office of Housing and Economic Development (EOHED) and the Insurance Division within the EOHED.¹⁶ Massachusetts law also provides for a cabinet secretary to oversee the EOHED¹⁷ and a commissioner to oversee the Insurance Division.¹⁸ The EOHED and the agencies thereunder, including the Insurance Division, are part of the Executive Branch and report directly to the Governor of Massachusetts.¹⁹

The differences between the Securities and Insurance Divisions, including their formation, authority, and reporting structures, indicate that the Massachusetts legislature intended securities and insurance to be regulated by distinct regulatory bodies. This intention is further illustrated by the Massachusetts insurance laws, which explicitly restrict the Securities Act from applying to insurance products.²⁰ When noting the laws that insurance and annuity contracts must comply with, the applicable statute states that, "any such contract and the negotiation, solicitation, sale or transaction [of such contract] by any person shall not be subject to the [Securities Act]."²¹ Further, this provision of the insurance laws aligns with the Securities Act, which excludes insurance and annuity contracts from the definition of a "security," and also exempts insurance and annuity contracts from registration under the Securities Act.²²

Risks of Overreaching. The Proposal states that "[m]any broker-dealers, agents, investment advisers, and investment adviser representatives recommend and provide advice regarding products that are typically not 'securities' under [the Securities Act], such as annuities and real estate portfolios."²³ The Proposal concludes that the

¹⁶ Mass. Gen. Laws ch. 6A, §§ 2 and 16G.

¹⁷ Mass. Gen. Laws ch. 6A, § 3.

¹⁸ Mass. Gen. Laws ch. 26, § 1.

¹⁹ See Mass. Gen. Laws ch. 6A, §§ 2-4, 16G(f).

²⁰ See Mass. Gen. Laws ch. 175, § 3.

²¹ See *id.*

²² See Mass. Gen. Laws ch. 110A, §§ 401(k) and 402(a)(5). The 1956 USA provides bracketed language that, if left in, operates to exclude only fixed insurance products from the definition of a "security." The Securities Act does not include the bracketed language, thereby not limiting the exclusion to fixed insurance products but also excluding variable insurance products from the definition of a "security." The 1956 USA also provides bracketed language that, if kept, subjects variable annuities to registration requirements. The Securities Act excludes the bracketed language, thereby exempting variable products from registration requirements. See also Official Comments, Uniform Securities Act (1956).

²³ See § 3.A.(i), Mass. Secs. Div. of the Office of the Sec. of the Commonwealth, Request for Comment (Dec. 13, 2019).

Securities Division has a strong interest in “regulating the conduct of its registrants regardless of the presence or absence of securities.”²⁴ However, the Committee notes that broker-dealers, agents, investment advisers, and investment adviser representatives sell many different types of products, most of which are subject to licensing, registration and enforcement authority by an appropriate regulatory body. While we understand that the Securities Division may have an interest in regulating the conduct of its registrants, the Committee does not believe that this interest should either result in the Securities Division sharing jurisdiction over such products with the Insurance Division, or result in a rulemaking that supersedes insurance regulations. The Committee views such a conclusion as problematic for many reasons. For example, this would mean that the Securities Division could also regulate the sale of all types of insurance, including fixed products and other lines of insurance distributed by broker-dealers or with respect to which investment advisers provide advisory services. However, the sale of fixed products and other lines of insurance to Massachusetts residents is clearly regulated by the Insurance Division.

The Commissioner of the Insurance Division derives authority to regulate insurance products and entities from statute.²⁵ Specifically, these laws provide the Commissioner with authority to administer and enforce the provisions of Massachusetts insurance laws.²⁶ A single provision granting the Secretary authority to take action against a broker-dealer or investment adviser “engaged in any unethical or dishonest conduct or practices in the . . . insurance business” pales in comparison to the entire chapter of insurance laws that grant the Commissioner the authority to govern insurance products and entities.²⁷ The Committee does not find persuasive the Securities Division’s argument that Section 204(a)(2)(G) authorizes the Securities Division to adopt a standard of conduct that applies to the sale of insurance. The title of the bill introduced into the Massachusetts Senate and House in 1991, which amended Section 204 by the addition of Section 204(a)(2)(G), is titled “An Act Relative to Securities Enforcement Actions.”²⁸ The legislative record does not demonstrate an intent on the part of the Senate or House to take authority away from the Insurance Division and vest it in the Securities Division with respect to the sale of insurance.²⁹

The Insurance Division’s comments on the Preliminary Proposal note that the Insurance Division intends to update its standard of conduct for insurance producers based on the forthcoming model rule developed by the National Association of Insurance Commissioners (NAIC).³⁰ The Committee agrees with the Commissioner that the Securities Division should defer further regulatory action on the Proposal, as it applies to those products and entities that are regulated by the Insurance Division.

Small Business Impact Statement. The Committee also believes that the Securities Division overlooked a critical requirement in the Proposal’s Small Business Impact Statement. Massachusetts law requires a small business impact statement to, among other things, “identify regulations of the promulgating agency, or of another agency or department of the commonwealth, which may duplicate or conflict with the proposed

²⁴ Id.

²⁵ See Mass. Gen. Laws ch. 175, § 1 et seq.

²⁶ See id.

²⁷ See Mass. Gen. Laws ch. 110A, § 204(a)(2)(G); but see Mass. Gen. Laws ch. 175, § 1 et seq.

²⁸ 1991 Mass. H.B. 3354.

²⁹ Id.

³⁰ Letter from the Massachusetts Division of Insurance, to William F. Galvin, Office of the Secretary of the Commonwealth (July 26, 2019).

regulation.”³¹ The Committee believes that the information provided in response to this requirement must acknowledge that the Commissioner of the Insurance Division requires insurance producers, who may also be broker-dealers or investment advisers, to comply with a suitability standard when selling insurance products. Many states, including Massachusetts, have adopted rules that require insurance producers to have reasonable grounds for believing that, among other things, a recommendation is suitable for a customer based on the facts disclosed by the customer as to his or her investments or other insurance and his or her financial situation and needs, including information such as the customer’s age, income, financial objectives, time horizon, liquidity needs, and risk tolerance.³² As a result, the Proposal’s fiduciary standard would be in direct conflict with the existing suitability standard with respect to its proposed regulation of insurance business. The Committee believes that the Proposal’s Small Business Impact Statement should sufficiently identify this conflict, because both the Insurance and Securities Divisions are not authorized to regulate insurance.

Comment Period. The Committee believes that the comment period for the Proposal has been inadequate. The Committee acknowledges that Massachusetts law only requires notice of a hearing or comment period to be filed with the Secretary at least 21 days prior to the hearing or comment period.³³ However, the Securities Division provided more than a month for interested parties to comment on the Preliminary Proposal.³⁴ The Committee believes that a similar timeframe for comments would have been more appropriate for the Proposal. The Securities Division notes that it received approximately 53 comment letters between June 14, 2019 and August 6, 2019.³⁵ Based on the number of interested parties that responded to the Preliminary Proposal, the Securities Division could have presumed that the same interested parties would also have an interest in having their comments recorded for the formal record in response to the Proposal. We also believe that the Securities Division should have allowed more time for comment based on the differences between the Preliminary Proposal and the Proposal. As noted above, the Securities Division added an explicit reference to recommendations regarding the purchase, sale, or exchange of any commodity or insurance product. In addition, the Securities Division added a presumption that the use of certain titles and professional designations will result in a customer or client having a reasonable expectation that they are in a relationship of trust and confidence and that their portfolio will be monitored on an ongoing basis. The Committee believes that, as a result of this truncated comment period, the Securities Division will miss out on significant input from key stakeholders on the Proposal.

CONCLUSION

The Committee appreciates the opportunity to provide these comments on the Proposal. Please do not hesitate to contact Clifford Kirsch (212.389.5052 or CliffordKirsch@eversheds-sutherland.com) or Holly Smith (202.383.0245 or

³¹ See Mass. Gen. Laws ch. 30A, § 5A(4).

³² 211 Mass. Code. Regs. 96.05(1).

³³ Mass. Gen. Laws ch. 30A, §§ 2-3.

³⁴ See supra note 3.

³⁵ See § 1, Mass. Secs. Div. of the Office of the Sec. of the Commonwealth, Request for Comment (Dec. 13, 2019).

HollySmith@eversheds-sutherland.com), if you have any questions regarding these comments.

* * *

Respectfully submitted,

EVERSHEDS SUTHERLAND (US) LLP

BY: Clifford Kirsch BMS
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Holly H. Smith

FOR THE COMMITTEE OF ANNUITY INSURERS

Appendix A

COMMITTEE OF ANNUITY INSURERS

AIG
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Brighthouse Financial, Inc.
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Financial Group
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Lincoln Financial Group
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
National Life Group
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Sammons Financial Group
Symetra Financial Corporation
Talcott Resolution
The Transamerica companies
TIAA
USAA Life Insurance Company