



July 25, 2019

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standards
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Dear Secretary Galvin:

On behalf of the Massachusetts Bankers Association (MBA), which represents more than 140 commercial, savings and cooperative banks and federal savings institution members with 72,000 employees located throughout the Commonwealth and New England, we appreciate the opportunity to comment on the proposed regulation (“Proposal”) “to apply a fiduciary conduct standard on broker-dealers, agents, investment advisers, and investment adviser representatives when dealing with their customers and clients.” MBA and our member institutions are concerned that the proposal will limit the choices currently available to consumers by hampering investors’ access to one-on-one assistance and hindering the assortment of products offered throughout the Commonwealth.

We believe that this proposal limits access by imposing additional fiduciary requirements that will result in further constriction of the brokerage model. Retail investment consumers will be adversely affected by the limitations placed on programs available to them, the pricing of those programs, and the investment products available. This scenario could also lead to losing access to personal, one-on-one assistance. Substantial inconsistencies between the federal standard and the proposed Massachusetts rule will also create confusion for investors and financial professionals.

The Proposal will cause many consumers to lose all contact with an investment professional.

The Proposal imposes a broad and ongoing fiduciary duty obligation on broker-dealers and their agents. This expansion, which is inconsistent with federal securities laws, limits consumer choice as broker-dealers adapt to the inconsistency by limiting some or all brokerage services currently available to Massachusetts residents.

Since the Proposal imposes an ongoing fiduciary duty if a broker-dealer, agent or adviser “provides investment advice, in any capacity, to a customer or client,” depending on how investment advice is interpreted, every brokerage transaction could therefore be subject to an ongoing fiduciary duty. Even if the language is narrowed in the final rule, it would remain problematic. As a practical matter, this requirement would impose on dually registered broker-dealers a new duty to monitor the ongoing performance of a customer’s brokerage account in cases where the customer also maintains an investment advisory account. The proposed regulation’s requirement to impose upon broker-dealers an ongoing duty to monitor is inconsistent with the SEC’s interpretation of the “solely incidental to brokerage” exception to the Investment Advisers Act and could mean that a broker-dealer is then subject to that federal law.

The Proposal also imposes an ongoing fiduciary duty if a broker-dealer, agent or adviser “receives ongoing compensation in connection with the recommendation or advice.” Many common investment products, such as mutual funds, have ongoing compensation (known as “trailing commissions”) and imposing an ongoing duty to monitor these products will result in limiting or eliminating the availability of certain products. As you know, brokerage accounts represent an important, cost-conscious choice for retail investors and provide access to affordable advice, particularly for low- and moderate-income, buy-and-hold investors saving for future expenses and retirement. If ongoing monitoring is required, some broker-dealers would likely shift brokerage account investors into advisory accounts, which typically have significantly higher

account minimums and charge higher fees or require these investors to use only an online trading platform. This would be a major disservice to the hundreds of thousands of Massachusetts consumers who choose to hold broker-dealer accounts today and who want to continue to receive periodic brokerage advice.

The “without regard to” language could be materially disruptive to the Massachusetts municipal and other bond issuance process.

The Proposal includes language that “requires a broker-dealer, agent, or adviser to avoid conflicts of interest and to make recommendations and provide investment advice without regard to the financial or any other interest of the broker-dealer...” This language could materially disrupt the bond issuance process in Massachusetts in two direct ways.

First, a significant number of the financial institutions bidding to be an underwriter for Massachusetts bonds also have Massachusetts resident retail customers who would then purchase those same bonds on a principal basis. . The Proposal’s “without regard to” language would prohibit this common practice since an institution holding these bonds in its inventory would be prohibited from selling them directly to a retail customer. By not being able to both participate in the underwriting syndicate and then selling those same bonds on a principal basis to its retail brokerage business customers will cause disruption to the entire Massachusetts bond marketplace as principal buyers may either cease bidding to be part of a particular Massachusetts bond syndicate, or be forced to determine a practical way to then sell any bonds purchased as part of an underwriting syndicate to a third party dealer. The costs and uncertainty to that new process may deter firms from acting as an underwriter at all. This, in turn, will cause municipalities to also have uncertainty as to whether there will be an active market for its planned bond issuance.

Second, and even more concerning to Massachusetts consumers, is that their costs to purchase Massachusetts bonds will be higher. Because a broker dealer would be prohibited from engaging in principal trading – without further specific language in the regulation as to how to do that – any sales to consumers will have to be done on an agency basis. . By not allowing principal buyers to sell directly to their customers due to a potential conflict of interest and violation of the duty of loyalty, the Proposal essentially ensures that all downstream buyers will pay more to buy bonds as they would have to first be sold to a third-party dealer with mark ups being placed on these bonds before the customer could ultimately purchase them.

This is a lose/lose scenario for Massachusetts bond investors and principal bond buyers, and we urge you to further clarify or remove this language.

The proposed “best reasonably available” standard is unworkable.

Under the Proposal, a recommended security or account type must be “the best of the reasonably available options” and that any transaction-based fee received by the broker-dealer must be both “reasonable” and “the best of the reasonably available fee options...” This language deviates significantly from current fiduciary law as no “best of” standard exists under current federal securities laws, nor any other common law fiduciary standard.

Federal agencies and securities regulators have generally accepted the fact that it is not possible to definitively identify a single “best” option without the benefit of hindsight, essentially rendering the standard unattainable and impossible to satisfy. For example, with regard to securities trading there is often no such thing as the “best” security – is it the security with the lowest cost, the highest return, the lowest risk, the most liquid, the most market makers, the most research analysts covering it, or some combination thereof? Since customer preferences and the market change on a constant basis and the Proposal provides no guidance, it is impossible to determine the “best” option at any given time for any specific consumer. Without knowing how to possibly select the “best of” any potential security, broker dealers will cease offering specific securities and types of securities, and this is harmful to Massachusetts consumers.

The Proposal is unnecessarily broad and appears to redefine the term “adviser” to include individuals specifically excluded in the statutory definition of “adviser” in M.G.L. c. 110A.

The Proposal significantly broadens the statutory definition of “adviser”¹ to include “any person, including persons registered or excluded from registration under M.G.L. c. 110A, who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase and sale, whether through the issuance of analyses or reports or otherwise.” This language is unnecessarily broad and would subject numerous individuals who have been statutorily exempt under Massachusetts law since 2002² from even registering to this new strict fiduciary standard. . This new group of “advisers” would potentially include lawyers, accountants, engineers and even teachers, whose performance of these services is solely incidental to the practice of their profession. The language would also apply the fiduciary standard to other non-adviser entities including banks, trust companies, publishers of newspapers or news columns, amongst others.

MBA believes that this is in direct contradiction to Legislative intent. Specifically, the narrowly tailored exemption language in current law gives the Secretary authority to exempt more individuals to the existing “investment adviser” definition³, not to broaden the registration criteria. We have serious concerns with this proposed language, and we recommend that any newly mandated fiduciary duty be applied only to those persons defined as “investment advisers” under current state law.

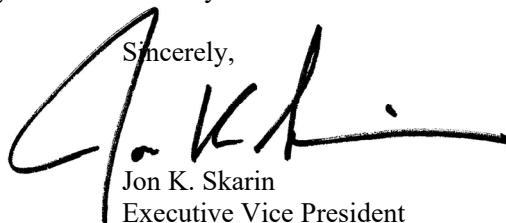
Conclusion

As you know, on June 5, 2019, the SEC passed Regulation Best Interest (“Reg BI”), which creates a new, nationwide, heightened standard of conduct for broker-dealers. Under Reg BI, a broker-dealer making a personalized recommendation to a retail customer must act in the client’s best interest. While this new standard may not address every unique broker-client interaction, it raises the standard of care received by investors while avoiding the negative consequences of an overly broad rule.

Since Reg BI has a June 30, 2020 implementation date, we encourage Massachusetts to allow Reg BI to be fully implemented before moving forward with state-specific fiduciary language. We believe that, once Reg BI is fully operational and the regulators begin examining for compliance, the State will find that Massachusetts investors are receiving substantial additional protections while continuing to have access to the numerous choices and opportunities they have today.

Again, we appreciate the opportunity to comment and your consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jon K. Skarin', is written over the typed name and title.

Jon K. Skarin
Executive Vice President

¹ M.G.L. c. 110A § 401

² M. G. L. c. 110A § 401 inserted by St. 2002, c.74 § 12

³ M.G.L. c. 110A § 401 (m)(1)(H)