PACIFIC LIFE

SHARON A. CHEEVER
Senior Vice President
General Counsel
Law Department
Telephone (949) 219-3852
FAX (949) 219-3706
email: Sharon.Cheever@PacificLife.com

July 25, 2019

Submitted electronically 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: Pacific Life Comments on Massachusetts's Preliminary Fiduciary Proposal (950 CMR 12.204-207)

Dear Secretary Galvin:

Thank you for the opportunity to share our comments on the Massachusetts Securities Division (the "Division") proposal to impose a fiduciary duty on broker-dealers, agents, investment advisers, and investment adviser representatives through proposed amendments to 950 CMR 12.204-205 and the proposed adoption of new rule section 950 CMR 12.207 (collectively referred to herein as "Fiduciary Proposal").

Pacific Life has consistently supported regulatory harmony and collaboration as both federal and state regulators work on creating a uniform and reasonable standard of care for financial professionals. However, we have significant concerns about the Fiduciary Proposal and the approach that the Division is taking by requiring *all* financial professionals making a recommendation or providing investment advice to be subject to a fiduciary standard. Rather than require all financial professionals be subject to a fiduciary standard, we would suggest that simply requiring all financial professionals to act in the consumer's best interest would better meet your goal of protecting consumers. Furthermore, consumer harm will be better solved if the Division *waits* and *coordinates* with other federal and state regulators to avoid multiple standards of care for financial professionals. If the Division truly wants to eliminate consumer harm, please consider our comments below.

"The beginning of wisdom is the definition of terms." – Socrates

Numerous reports[1], surveys, and focus groups continue to show that consumers neither understand nor appreciate differences in "standards of care" or even what a "standard of care" is generally. Consumers also do not understand how financial professionals' roles and responsibilities vary based solely on their title. If you were to simply ask a consumer whether they would want their financial professional to act in their best interest or, alternatively, act as a fiduciary, the everyday consumer will almost certainly say "best interest" because the words are easily understood. Beyond that, it would be highly unlikely the consumer would even know what a fiduciary is or does (or why, if, and how a fiduciary is any different than a non-fiduciary financial professional in the consumer's expectations as to service, honesty, and integrity).

To truly end the confusion, for both consumers and financial professionals, Pacific Life supports a harmonized "best interest" standard of care for all financial professionals, regardless of what they are called, licenses they hold, etc. In other words, from the consumer's perspective, if the person sitting across from the consumer providing financial advice calls themselves an "adviser," a " broker," an "insurance producer," a "wealth manager," a "financial planner" or "financial consultant" – regardless – that person is expected to act in the consumer's best interest in the same exact way. There can only be one uniform standard of care applicable to all, but we must also leave room for distinctions such as a fiduciary duty standard as we explain below.

Ultimately, we must create a standard that can reasonably be understood by consumers, complied with by financial professionals, enforced by the applicable regulatory agencies, and requires *all* financial professionals to act in their clients' best interest. Despite the deafening noise coming from numerous interested parties, the means to get there is not that complicated.

Define and Distinguish What Makes a Financial Professional a Fiduciary

A starting point is to define and then distinguish the terms "Fiduciary" and "Best Interest" so that while all financial professionals must act in their clients' best interest (in the same way), only those certain financial professionals who agree to a "special relationship" with their client based on the services they provide will be held to the heightened fiduciary standard. Put simply, acting in someone's best interest should not be exclusively attributed to a fiduciary, and only when certain circumstances are present should a financial professional be held to the heightened responsibilities of a fiduciary. The term "fiduciary" needs to be defined and remain distinguished in law, but fully understanding the legal distinction should *not* be expected of consumers in the everyday consumer experience as noted above.

Generally, a common element of when a fiduciary relationship arises under the law is that a person (entrustee; the "fiduciary") enters into a "special relationship" with another person or entity (entrustor) and the fiduciary is entrusted with the entrustor's well-being, property, assets, money, etc., for an ongoing stated or agreed to period of time. The fiduciary is typically given discretionary authority/control by the entrustor over the entrusted person or property. Trusting

[1] For example, RAND Institute, *Investor Testing of Form CRS Relationship Summary*, November 2018.

another person with your well-being or property, and giving them dominion and control/discretion over decisions related to your well-being or property over time, is what makes the fiduciary arrangement a "special relationship." As a result, the expectation under law is that the fiduciary has a more "heightened" duty to the entrustor, and must act on that entrusted property in utmost good faith and fidelity to the entrustor.

Our industry and those who regulate us understand that not all financial professionals have agreed to enter into that "special *fiduciary* relationship" with their client – to take dominion and control of their assets through a grant of discretionary authority from the client, where the financial professional has agreed to an obligation to manage, monitor, and review that client financial portfolio on an ongoing basis in the utmost good faith and fidelity to their client. These *added* responsibilities of a financial professional would rise to the level of a *true* fiduciary duty, and the appropriate heightened level of scrutiny under law and precedent that accompanies that responsibility.

Earlier this year, as a companion to the Securities and Exchange Commission's ("SEC") Regulation Best Interest ("Reg B.I."), the SEC released "Commission Interpretation Regarding Standard of Conduct for Investment Advisers." Therein, the SEC discussed two existing core components of an Investment Adviser's *Fiduciary* Duty:

1. **Duty of Care**
   - Duty to Provide Advice that is in the Client's Best Interest
   - Duty to Seek Best Execution
   - Duty to Act and to Provide Advice and Monitoring over the Course of the Relationship

2. **Duty of Loyalty**
   - Put the Client's Interests First
   - Make Full and Fair Disclosure to its Clients of all Material Facts Relating to the Advisory Relationship
   - Must Eliminate or at least Expose Through Full and Fair Disclosure All Conflicts of Interest Which Might Incline an Investment Adviser to Render Advice Which Was Not Disinterested

In a harmonized best interest standard, the shaded components as built into Reg B.I. would now be common requirements for both brokers and investment advisors, and would be completely understandable to and expected by a consumer. From the consumer perspective, no matter what type of financial professional the consumer is working with (broker or advisor), these core elements would apply.

In this harmonized framework, how does one go, then, from a non-fiduciary best interest standard to be a fiduciary? It may depend on specific state law or facts and circumstances in some situations, but the SEC already has in place the additional components outlined above (unshaded) that create a fiduciary duty for investment advisors – the duty of best execution anticipates a discretionary relationship, and the requirement to provide ongoing advice and

monitoring over the course of the client relationship clearly distinguishes a fiduciary relationship from other financial professional activities that are simply transaction-based where the consumer maintains control of and is the ultimate decision maker regarding disposition of their assets. Both of these requirements are clearly and rightly absent in SEC's proposed Reg B.I. that specifically targeted non-fiduciary broker-dealers. This distinction between non-fiduciary and fiduciary financial professionals was even discussed in another companion to Reg B.I. released, the "Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Advisor." Simply stated, in addition to the best interest requirements applicable to all, we feel a "fiduciary" would have the additional unique responsibilities tied to discretionary control/authority over their clients' assets, and the ongoing obligation to oversee and monitor those assets. And, as already required today, because these additional duties must be fully understood by a consumer, it must be clearly delineated in written summary form to the client. Ultimately, it doesn't make sense for financial professionals without these additional responsibilities (e.g., broker-dealers and their representatives) to be held to the fiduciary standard since the discretionary and ongoing relationship obligations are not generally applicable to their relationships with consumers.

Coordinate with Federal and State Regulators

As you know, the issue of applying a fiduciary duty or a heightened standard of care (e.g., "best interest") to financial professionals has been a part of a much larger debate involving Congress and numerous regulatory agencies with differing jurisdictions, including, at the federal level, the SEC, the Financial Industry Regulatory Authority ("FINRA"), and the U.S. Department of Labor ("DOL"), and, at the state level, the North American Securities Administrators Association ("NASAA"), the National Association of Insurance Commissioners ("NAIC"), and the individual state securities and insurance departments.

Pacific Life appreciates the Division's desire to enhance the standard of care for financial professionals who work with Massachusetts consumers. However, the Division should collaborate and coordinate with federal and state policymakers to develop appropriate, cohesive, and workable standard of care rules, and should not finalize the Fiduciary Proposal until this effort is complete.

The SEC, DOL, and NAIC have mutually pledged to coordinate their efforts on the development of uniform, consistently applied standards of care. As mentioned before, the SEC has just released Reg B.I., and the DOL has listed this as an agenda item for 2019. Further, the NAIC is actively considering changes to rules governing financial professionals. Pacific Life supports these coordinated efforts among the functional regulators to develop uniform standards of care that can be consistently applied across all regulatory platforms. Most importantly, such coordination will help ensure that consumers are not asked to identify or be responsible for understanding what standard of care, from a multitude of standards, any particular financial product sale or investment/financial advice is under.

Pacific Life Insurance Company
700 Newport Center Drive, Newport Beach, California 92660-6397 (949) 219-3221

Reasonable Implementation Period and Effective Date

If the Division decides to move forward with the Fiduciary Proposal, Pacific Life respectfully recommends that the Division consider the complexity of implementation which will take time for entities to assess whether and how to modify their business activity in MA and to develop infrastructure, policies and procedures, and training and compliance programs for any new regulations.

Consumer access to valuable advice, tools, and products to properly plan for retirement is in jeopardy during hastened compliance time frames. For example, confusion in the marketplace, uneven analysis and implementation across the industry, and repurposing significant resources towards building effective compliance programs adds unnecessary costs and reduces customer service levels. Providing an implementation period of at least 18 months will give the industry the time needed to assess, develop, and implement orderly processes and procedures to comply with the Fiduciary Proposal.

Conclusion

Ultimately, considering everyone a fiduciary will dilute the important significance of being a fiduciary; and diminish the special relationship born from this arrangement. It will certainly be less confusing to the consumer if *all* financial professionals are required to act in their best interest regardless of title or license without also being tasked to understand the significant legal differences between fiduciaries and non-fiduciaries.

We believe it is important for the Division to clearly state within the Fiduciary Proposal that only the financial professionals that agree to take dominion and control of the consumer's assets through a grant of discretionary authority, coupled with an obligation to manage, monitor, and review that client portfolio on an ongoing basis, rise to that "special fiduciary relationship" with the consumer (and thus also be required to be a Registered Investment Adviser and all that entails). We believe the better way to achieve our shared goal of requiring financial professionals to act in the consumer's best interest, and still maintain the important legal distinction of being a fiduciary, must begin with the definition of terms.

Thank you again for the opportunity to share our views on this important regulatory effort. Pacific Life supports a uniform best interest standard of care applicable to all financial professionals and we stand ready to help you find the right path forward.

Sincerely,

Sharon Cheever

Sharon Cheever
Senior Vice President and
General Counsel

Pacific Life Insurance Company
700 Newport Center Drive, Newport Beach, California 92660-6397 (949) 219-3221