

Via electronic delivery: securitiesregs-comments@sec.state.ma.us

July 26, 2019

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: CUNA Mutual Group Comments on Massachusetts Preliminary Fiduciary
Proposal (950 CMR 12.204-207)**

Dear Secretary Galvin:

On behalf of the companies of CUNA Mutual Group (“CUNA Mutual”), we are pleased to provide comments to Office of the Secretary of the Commonwealth of Massachusetts (Office) on the Preliminary Solicitation of Public Comments for the Fiduciary Conduct Standard for broker-dealers, agents, investment advisers, and investment adviser representatives.

CUNA Mutual is the nation’s leading provider of financial products and services to credit unions and credit union members. Through our companies, we serve as an insurer, a retirement plan services provider, a broker dealer, and a registered investment adviser. We make available various insurance and investment products to millions of credit union members across the United States. As part of the cooperative movement, we embrace the credit union philosophy of “people helping people” and our company’s mission is to “Help people achieve financial security.”

From CUNA Mutual’s earliest comment letters on the Department of Labor’s (DOL) regulatory process, the company has expressed support for a workable, appropriately tailored best interest standard. We take pride in helping those who make a modest income. It is in this spirit of supporting our customers that we offer these comments.

Regulatory Consistency Critical

CUNA Mutual supports a heightened duty of care, a best interest standard, as appropriate for certain types of financial professionals. We support the protection of consumers through a uniform standard of care to address investor confusion which can result from a lack of uniformity. Given recent actions by the U.S. Securities and Exchange Commission (SEC), the Office’s proposal counters principles of uniformity and could effectively disrupt or limit access to appropriate financial products and services.

A best interest standard, as now adopted by the SEC, is intended to ensure that financial professionals put consumer interests before their firm's interests while addressing the complexity and uncertainty of new and significant regulations. Complexity without clarity will result in more limited consumer choice and a reduction of available products and services needed to meet the financial goals of Massachusetts residents.

In adopting a single, federal standard for financial professionals, the new SEC standard promotes regulatory consistency which is critical to advisers and consumers. The SEC's Regulation Best Interest creates a new, nationwide, heightened standard of conduct for broker-dealers. Rather than move forward with a state specific standard, CUNA Mutual respectfully suggests the Office instead support implementation of the SEC's Regulation Best Interest and work to understand the actual impact and experiences of Massachusetts consumers. If gaps or problems arise, Massachusetts would then be better-positioned to respond in a prudent manner.

If individual states take steps to create their own and varied best interest or fiduciary rules, compliance and supervision challenges increase. Although a unique Massachusetts fiduciary duty may be possible to implement, it is likely to have a disruptive effect and cause the marketplace to concentrate to a few, large firms. More importantly, as additional states implement varying versions of a fiduciary or best interest rule, a patchwork of inconsistent and conflicting rules will emerge to impact the ability of consumers everywhere to access products, services, and financial advice. A uniform standard of conduct is encouraged to benefit consumers in Massachusetts and across the country.

Presumption Broker-Dealers are in Violation of Fiduciary Duties

One of the most concerning aspects of the proposed rule is the regulatory presumption that a broker-dealer has violated the fiduciary responsibility. This presumption may be rebutted by proof of three requirements, one of which is that the "remuneration represents the best of the reasonably available remuneration options for the customer or client..." This requirement presents two challenges for broker-dealers: the presumption that investment advisers receiving fee-based compensation are not in violation of their fiduciary duty without any consideration given to lower cost, transactional compensation options; and, "best of the reasonably available remuneration options" is not defined. Without certainty under these requirements, broker-dealers may not be able to confidently offer services under the terms of the proposed regulation.

A rule that establishes an unlevel playing field for broker-dealers, dual registrants, and investment advisers may lead dual registrants to limit the market by restricting the availability of products that feature transaction-based compensation. Under the proposal, investment advisers will be permitted to offer advisory services on a fee basis regardless of whether transaction-based compensation services might actually be the "best of the reasonably available remuneration options." The proposal presumes that fee-based compensation is always in the best interest of the customer if the advice comes from an investment adviser. Dual registrants may find it unworkable to take on this risk and so provide advice as an investment adviser. This may be true even if a client might be better off had the dual registrant acted as a broker-dealer, taking on the risk to meet the proposal's vague three-part test. We are concerned these forced choices may lead to a decrease in consumer choice, particularly for those investors of modest means whom we proudly serve.

The “best of the reasonably available remuneration options” is not defined in the proposed regulation and the term is not otherwise defined in common law. As currently proposed, broker-dealers and dual registrants offering transaction-based compensation options may likely approach the effective date of this regulation with no certainty as to how to overcome the presumption that they breached the fiduciary duty simply by receiving transaction-based compensation.

Uncertain, Increased Regulatory Burden for Advisers; Decreased Consumer Choice

The proposed rule will significantly increase the cost of delivery and uncertainty of doing business in the state. While the costs of doing business will increase, such as to implement additional processes and documentation requirements, equally significant for broker-dealers and dual registrants will be the increased risk of excessive litigation. Faced with rising business expenses and litigation risk, some broker-dealers and consumers will face difficult decisions. In particular, we are concerned that consumers of modest means may have fewer options and face increased costs.

Under the proposed fiduciary rule in Massachusetts, buy and hold investors may be particularly harmed as the business model often relied upon by such investors is challenged. Broker-dealers have historically operated on a transaction-based, third-party compensation basis and are currently subject to a suitability standard of care that will be replaced by the SEC’s Reg BI. Reg BI recognizes the conflict created by third-party compensation will exist in broker-dealer relationships and permits the practice through disclosure in the description of the standard of care. Established case law applicable to fiduciaries presumes no receipt of third-party compensation but supports fee-based practices. There are many cases in state and federal courts that interpret the duties of a fiduciary; SEC registered investment adviser have been subject to such a standard for years and have case law supporting their fee-based practices.

For many small account investors who buy and hold, purchasing assets in a brokerage account tends to lead to expense savings. Investment advisers may provide lower fees at the time of account opening, but the transaction-based commission the broker collects for low expense ratio products is often lower than advisory fees paid over the life of an investment. The Financial Industry Regulatory Authority (FINRA) scrutinizes assets held in advisory accounts under the theory of “reverse churning,” as expenses charged to clients do not reflect services received or the management of assets for conservative, buy and hold, investors.

Faced with rising costs and litigation risk, it will shift the landscape and create unintended consequences, leaving fewer options for Massachusetts consumers. We saw this play out as many firms, faced with the DOL fiduciary rule, changed how consumers of modest means were served, if at all.

Reasonable Implementation Timeline Needed

Finally, if the Office determines to move forward with the proposed fiduciary rule, adequate time should be allocated for firms to prepare and implement needed system adjustments once a rule is final. We suggest the Office err on the side of a longer timeframe.

In closing, CUNA Mutual appreciates the Office’s consideration of these comments. Like others in the industry, we work hard each day to bring financial products and services to the consumers who need them most. Without change, we believe the Office’s proposal creates an unlevel

playing field and increases delivery costs for the small account investors the proposed rule seeks to protect. CUNA Mutual supports a uniform, appropriate fee and conflict disclosure framework for broker-dealers across the country and in Massachusetts. Please reach out with any questions or if we can offer additional information to support these comments. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'M A C', likely representing Robert Comfort.

Robert Comfort
President
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