COMMONWEALTH *financial network*

July 26, 2019

Via email to: securitiesregs-comments@sec.state.ma.us

Office of the Secretary of the Commonwealth
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Re: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives; proposed amendments to 950 CMR 12.204 and 950 CMR 12.205 and newly proposed 950 CMR 12.207

Dear Secretary Galvin,

Thank you for the opportunity to comment on the above-referenced fiduciary conduct standard (the "Proposal") issued by the Massachusetts Securities Division (the "Division") of the Office of the Secretary of the Commonwealth. Commonwealth Financial Network® (the "Firm") is dually registered as a broker/dealer and an SEC-registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California. The Firm has approximately 2,000 independent contractor broker/dealer representatives, most of whom who are also registered as investment adviser representatives, conducting business in all 50 states. Currently, more than 300 Commonwealth Financial Network representatives residing in Massachusetts, and more than 700 additional representatives registered with the Firm, provide financial products and services to broker/dealer customers and advisory clients in Massachusetts. Given the importance of the Proposal to the Firm and the independent representatives we serve, we are compelled to comment on several aspects.

Independent financial representatives affiliated with Commonwealth Financial Network are small business owners who have strong ties to their communities. They provide financial services—including financial education, planning, and access to investment products—to thousands of Massachusetts individuals, families, small businesses, organizations, and retirement plans. The Firm's representatives are proud to provide citizens of Massachusetts with products and services that can assist them in reaching their financial goals, no matter what stage of life they're in.

Commonwealth Financial Network supports strong conduct standards as well as the preservation of investor access to transaction-based advice and investment products. Although we recognize that the Division finds Regulation Best Interest ("Reg BI") lacking, we believe Reg BI creates a heightened standard of conduct that strengthens client disclosures and highlights the "best interest" duties owed to clients by broker/dealers and representatives while preserving investors' choice as to products and services. We believe that Reg BI harmonizes the standard of care

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broker/dealers and investment advisers owe their clients while retaining the meaningful distinctions between brokerage services and investment advisory services. Most important, we believe Reg BI accomplishes the dual goal of enhancing investor protection and allowing investors to choose the investment products and/or advisory services they want to receive from their financial professional and the way in which they pay for those services. We respectfully request that the Division reconsider the need for the Proposal based on the reasons presented herein as well as comments provided by industry organizations whose members provide investment products and services to small and midsize investors, persons who are in the most need of access to affordable financial advice and services.

As stated above, Commonwealth Financial Network and our representatives provide investment products and services throughout the country. We are concerned that additional state regulation, in combination with federal standards, would create complicated and possibly conflicting disclosure and requirements. This could undermine the purpose of the SEC's client relationship summary ("Form CRS") and impact the ability of firms to draft disclosures that are reasonably easy to understand. The Firm believes Reg BI obligations imposed on broker/dealers are consistent with the duty of care owed to clients by investment advisers. A key difference is that the duties imposed by Reg BI apply at the time a broker/dealer representative makes a recommendation to a client and do not include an ongoing duty to monitor accounts except in instances where a broker/dealer agrees to provide account monitoring services to its clients.

Of particular concern to Commonwealth Financial Network is the section of the Proposal that appears to indicate that a broker/dealer that makes multiple recommendations to a customer or that provides investment advice, in any capacity, or that receives ongoing compensation with respect to the sale of investment products is engaged in "dishonest or unethical conduct or practices in the securities business" for purposes of M.G.L. c. 110A, unless the broker/dealer acts as a fiduciary to the customer for the duration of the customer relationship. As stated at the beginning of this letter, Commonwealth Financial Network is a dual registrant. As written, the Proposal would impose an ongoing duty of care when incidental investment advice is provided as part of a stand-alone securities sale. Importantly, the Proposal conflicts with the Massachusetts Uniform Securities Act as well as long-standing SEC standards that clearly acknowledge the distinctions between securities products offered in a broker/dealer capacity and advisory services provided by a registered investment adviser.

Almost all Commonwealth Financial Network's representatives are both FINRA and SEC registered. It is not unusual for customers to have both brokerage account investments and advisory accounts. Customer assets held in brokerage accounts are often earmarked for long-term goals and commonly utilize buy-and-hold strategies. The Proposal would impose on dually registered Commonwealth Financial Network representatives whose customers have both brokerage and advisory accounts a duty to monitor the ongoing performance of customers' brokerage accounts. Contrary to the monitoring services provided by investment advisers to their clients for which the adviser receives ongoing compensation, the effort and risk associated with such a duty if applied to broker/dealers would create unexpected and unremunerated work for the broker/dealer and its representatives. As such, it is likely that some broker/dealers or their representatives would decline to continue as the broker/dealer or representative on some customer accounts, which may lead to abandoned clients, limited services, or increased costs to

customers. To the extent the Firm and our representatives continue to service these accounts, additional costs would likely be passed down to the customer, which could impact the customer's ability to obtain those services. We respectfully request that the Proposal conform to FINRA and SEC rules.

We believe that conflicts of interest are inherent in most businesses and that many inherent conflicts of interest have no impact on customers. Interestingly, the language in the new Reg BI was intentionally modified to omit a "without regard to" standard out of concern that this standard would be inappropriately construed to require a broker/dealer to eliminate all its conflicts when making a recommendation, which could harm investors by eliminating access to various investment services and products. We believe Reg BI's Duty of Loyalty obligation found the correct balance by acknowledging the realities of conflicts while still holding representatives to a strict standard to protect investors. We agree with the SEC's reasoning and respectfully request that this language in the Proposal be modified accordingly.

While the Proposal appears on its face to give broker/dealers the ability to continue to utilize their current business model by permitting transaction-based fees, practical application of the requirement will make this impossible. There is serious risk of an unintentional violation, as the Proposal lacks specificity regarding how a broker/dealer is expected to determine and document for compliance that an investment strategy; specific type of account; or purchase, sale, or exchange of any security is "the best of reasonably available options for the customer or client" prior to making such recommendation. The Proposal contains neither a definition of "best of" nor clear guidance regarding how a broker/dealer can make a "best of" determination.

The Proposal also requires that remuneration be "reasonable" and "the best of the reasonably available remuneration options for the customer or client." It is unclear how broker/dealers or representatives will be assured that they have met this standard. The language of the Proposal is vague, and there is nothing similar in current federal securities law to reference.

At Commonwealth Financial Network, we sincerely question whether it is possible to identify a single "best" recommendation and/or remuneration option without the benefit of hindsight. Even if Massachusetts regulators would not engage in hindsight judgment, it is a certainty that such judgment would be used by claimant's counsel in situations where a customer's account or investment did not perform as expected. The "best of the reasonably available options" standard established in the Proposal is vague, entirely subjective, and simply unworkable. This standard should be removed from the Proposal or significantly modified.

The Proposal, as currently drafted, would impose a significant amount of new recordkeeping that would be different from and in addition to records required under federal rules. The "best of reasonably available options" standards would leave firms no option but to significantly increase their required policies and procedures to demonstrate compliance with the Proposal. The standards would also require Commonwealth Financial Network and our representatives to create new documentation in order for the firm to properly supervise.

We believe Reg BI's harmonization of conduct duties imposed on broker/dealers and investment advisers reflects a reasoned approach to disclosures. Reg BI allows a broker/dealer representative

to satisfy the disclosure obligation by providing, in writing, prior to or at the time of a recommendation, a full and fair disclosure of all material facts relating to the scope and terms of the relationship and all material facts relating to conflicts of interest associated with the recommendation. Form CRS will provide customers with a brief plain-English relationship summary. It will encourage a meaningful conversation between representatives and their customers. Reg BI's Disclosure obligation requires a broker/dealer to establish, maintain, and enforce written policies and procedures reasonably designed to disclose, mitigate, or eliminate conflicts. As currently written, the Duty of Loyalty presumption in the Proposal states that disclosing a conflict of interest doesn't presumptively satisfy the duty of loyalty. We believe the language in the Proposal clearly conflicts with existing federal securities law as well as Reg BI and should be modified.

Maintaining a meaningful distinction between broker/dealer transaction-based roles and responsibilities and the roles and responsibilities inherent in an investment advisory relationship is of critical importance to the Firm and our representatives. A broker/dealer's relationship with its customers is fundamentally different from the relationship between an investment adviser and its clients, as each serves different purposes and investor needs. Under the Proposal, Commonwealth Financial Network, as a dual registrant, would be subject to an ongoing fiduciary standard if, in our capacity as a broker/dealer, we provide "solely incidental" investment advice to a customer. As drafted, it is likely that the Proposal would result in a diminution of financial services to small and midsize investors. These investors are most in need of affordable guidance and solutions to save for retirement and fund their children's education, among other life goals.

In conclusion, we respectfully suggest that the Division delay enacting the Proposal until Reg BI has been in effect for a period of time sufficient to assess its effectiveness. If, after that time, the Division decides to move forward with the Proposal, we respectfully request that the Proposal be clarified to state that the Massachusetts standard of care applies only to retail investors who are legal residents of Massachusetts or who currently reside in Massachusetts and modified to provide specific definitions and guidance regarding key terms. In addition, it would be very helpful if the effective date of the Proposal was extended by at least 18 months to allow us adequate time to modify systems and prepare and train representatives regarding the Proposal's requirements. Commonwealth Financial Network is currently actively engaged in analyzing many aspects of our business in light of Reg BI and Form CRS requirements. It is imperative that we have enough time to prepare for additional state-specific requirements. Thank you for your consideration of our comments and concerns.

Very truly yours,

James B. Adelman
Senior Vice President, General Counsel