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July 26, 2019

Submitted Electronically

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

Dear Sir or Madam:

MML Investors Services, LLC ("MML Investors") respectfully submits this letter on the Massachusetts Securities Division's (the "Division") *Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives* (the "Proposal"). MML Investors is a registered broker-dealer and a federally covered investment adviser that has more than 2.5 million customer accounts, with more than 100,000 of those accounts belonging to Massachusetts residents.

MML Investors is a subsidiary of Massachusetts Mutual Life Insurance Company ("MassMutual"), a leading mutual life insurance company headquartered in Springfield, Massachusetts. MML Investors' shares MassMutual's long-standing purpose to help our customers secure their future and protect the ones they love by making good financial decisions for the long term. MassMutual was founded in Springfield in 1851, and over its 168-year history has maintained its principal operations in the Commonwealth. MassMutual currently has more than 4,000 employees working in Massachusetts, and is in the process of meeting its 2018 recommitment to the state that will ultimately increase its in-state workforce to more than 5,000 employees collectively at its Springfield and Boston locations.

We support the Division's goal of protecting investors by raising the standard of conduct for firms and their agents. But we respectfully disagree with the premise that the Securities and Exchange Commission's recently adopted Regulation Best Interest ("Reg. BI") falls short of such goals because it does not extend a fiduciary duty to broker-dealers. The core requirements of Reg. BI "draw from key fiduciary principles," including those that apply to Investment Advisers under the Advisers Act.[1] And Reg. BI does substantially raise the standard of conduct for broker-dealers and their agents, imposing profound new requirements, ranging from a

[1] *See* SEC Press Release, *SEC Adopts Rules and Interpretations to Enhance Protections and Preserve Choice for Retail Investors in Their Relationships With Financial Professionals* (June 5, 2019), available at https://www.sec.gov/news/press-release/2019-89.

standard of care that is stronger than the existing suitability standard to extensive conflicts of interest mitigation obligations that require firms to implement policies and procedures to mitigate (and in some cases, eliminate) certain identified conflicts of interest that create incentives to make recommendations that are not in the customer's best interest.

We agree with other commenters that before moving forward with the Proposal the Division should wait for Reg. BI to be implemented by the industry in order to assess whether the regulation truly has raised the investment protection bar. We respect the critical "cop on the beat" role played by state securities regulators, including the Division, and our request for forbearance is not made lightly. But we are deeply concerned that core elements of the Proposal will have the effect of severely limiting – if not outright prohibiting – the ability of most broker-dealers (including MML Investors) to operate in the Commonwealth and provide the advice and guidance that their clients deserve and need. Such a result will remove choice from Massachusetts retail customers, especially lower- and middle-income investors, who are not seeking, or do not have the desire to pay for, ongoing monitoring or advisory services.

Our comments describe why we believe such core provisions of the Proposal will have a prohibitive effect on broker-dealers and agents that provide advice. If the Division decides to move forward with a fiduciary rule, notwithstanding those concerns, we urge it to consider making the changes explained below.

I. Core Issue: The Proposal's Duty of Loyalty is Unattainable For Broker-Dealers

The Proposal requires broker-dealers and agents to "avoid conflicts of interest" (which the proposal fails to define or place any material limitations around its usage) and to make recommendations "without regard" to the broker-dealer or agent's interest. The Proposal also specifically states that disclosure of conflicts of interest does not satisfy this duty of loyalty. These obligations are stated without qualification. And without qualification, such obligations go well beyond duty of loyalty obligations under the Investment Advisers Act of 1940 ("Advisers Act")[2] and even the now-vacated Department of Labor Fiduciary Rule.[3] As discussed later in this letter, the Proposal would also exceed the duty of loyalty obligations laid out by Congress in Section 913 of the Dodd-Frank Act.[4]

As a practical matter, some of the most common broker-dealer business practices would be prohibited, regardless of whether they play a positive role in a diverse marketplace. For example,

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[2] *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248 (June 5, 2019) at p.8, available at https://www.sec.gov/rules/interp/2019/ia-5248.pdf ("Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser— consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict."). *See also* Release No. IA-5248 at 23, n. 57 ("While an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts of interest and obtaining the client's informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client's trust.").

[3] DOL Fiduciary Rule, 81 Fed. Reg. 20945 (April 8, 2016).

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Sec. 913, Pub. L. No. 111-203, 124 Stat. 1376, available at http://legcounsel.house.gov/Comps/Dodd-Frank%20Wall%20Street%20Reform%20and%20Consumer%20Protection%20Act.pdf (2010) ("Dodd-Frank Act").

many firms offer proprietary products or products manufactured by an affiliate. Regardless of the quality of such a product or whether the recommendation otherwise meets the duty of care requirements, offering a proprietary product represents a conflict of interest effectively banned by the Proposal. Similarly, it is difficult to see how firms would be able to limit in any manner the securities on their shelves, their ability to receive compensation of any type from product manufacturers, or the ability of firms to recommend principal transactions. Given the constraints placed on such common business practices and the uncertainty about others, it is questionable how firms could continue to operate confidently in Massachusetts.

II. Core Issue: The Proposal's Requirement to Recommend "The Best" Investment Strategy, Account Type, Security, or Remuneration Option" Is Impossibly Subjective

The Proposal requires that recommendations of an investment strategy, account type or security be the "best of the reasonably available options for the customer."[5] Similarly, the Proposal provides that the receipt of transaction-based compensation is allowed only if "the remuneration represents the best of the reasonably available remuneration options for the customer or client."

Even the best intentioned and most competent firms and agents would have no way of knowing what constitutes a recommendation that is "best" for their client. The word "best" is not defined nor is the term "reasonably available option" or "reasonably available remuneration option" defined. Absent any clarifying language, firms and agents would be left with the impossible task of deciding which factors make a recommendation "the best" recommendation, which likely can only be known with the benefit of hindsight. And if, with hindsight, the Division (or other claimants) determined that a particular recommendation was not "the best," the firm or the agent would be treated as having committed a fraud.

Other regulators have recognized that identifying the one best product is not an achievable standard. The Department of Labor recognized as part of its fiduciary rule that requiring a financial institution to identify the single best investment would be "an unattainable obligation."[6] SEC Chairman Clayton recently stated that "[n]either investment advisers nor broker-dealers are required to recommend the single 'best' product. Many different options may in fact be in the retail investor's best interest, and what is the 'best' product is likely only to be known in hindsight."[7]

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[5] "There shall be a presumption of a breach of the duty of loyalty for offering or receiving direct or indirect compensation to or from a broker-dealer, agent, or adviser for recommending an investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security that is not the best of the reasonably available options for the customer or client." Proposed CMR 12.207(c)(2)(i).

[6] *See* Preamble to the Best Interest Contract Exemption, 81 Fed. Reg. 21002, 21029 (April 8, 2016).

[7] Speech by SEC Chairman Jay Clayton, *Regulation Best Interest and the Investment Adviser Fiduciary Duty: Two Strong Standards that Protect and Provide Choice for Main Street Investors* (July 8, 2019), available at https://www.sec.gov/news/speech/clayton-regulation-best-interest-investment-adviser-fiduciary-duty ("Chairman Clayton Speech").

There are many examples of why such a "best of" requirement would be unworkable.

- Take, for instance, the decision to recommend an S&P 500 index fund. For many customers, such a security would be an appropriate investment that furthers their needs and objectives. However, there are many S&P 500 index funds, each with different fees and performance. How would an agent know ahead of time which is "the best"?

- The Proposal is unclear as to how "best of" would be measured. Does an agent need to recommend the option with the lowest cost, the most liquidity, the lowest risk, or the best return?

- If "best of" means the product with the best return, an agent would only know the single best product years after the recommendation, and only with the benefit of hindsight. It cannot be the correct result that all other products, while appearing reasonable at the time of the recommendation, would fail the "best of" test because the return was not the best. For example, Morningstar has more than one 5-star rated mutual fund. Would the agent fail the "best of" standard unless he or she recommended the one Morningstar 5-star fund that performed the best?[8] And how could an agent ever be comfortable recommending a security that was not the best performing at the time of the recommendation under the Division's proposed "best of" standard?[9]

- With respect to account types and remuneration options, for many clients, both an investment advisory account and a brokerage account could be in a client's best interest and appropriate to further the client's needs and objectives. The final decision on account type may ultimately come down to the client's preference.

The obligation to recommend the single best security, account type, investment strategy, or remuneration option is unworkable and would place a burden on broker-dealers in Massachusetts that does not, as far as we are aware, apply to any other fiduciary. In addition, we are not aware of any courts that have interpreted common law in Massachusetts to require a fiduciary to recommend the "best" product. Rather, we believe that the obligations on broker-dealers and agents in Massachusetts should focus on the process undertaken to identify the needs and objectives of the customer and whether the recommendation advances those needs and objectives, while ensuring the interests of the broker-dealer and agents are not placed ahead of the client's. Focusing on the process, rather than being required to guarantee the result, is

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[8] Moreover, a high Morningstar mutual fund "star" rating is not a guarantee of future performance. *See* Kristin Grind, *The Morningstar Mirage*, THE WALL STREET JOURNAL (Oct. 25, 2017), available at https://www.wsj.com/articles/the-morningstar-mirage-1508946687 ("The Wall Street Journal tested Morningstar's ratings by examining the performance of thousands of funds dating back to 2003, shortly after the company began its current system. Funds that earned high star ratings attracted the vast majority of investor dollars. Most of them failed to perform.").

[9] Of course recommending a security based on past performance would be inconsistent with FINRA Rule 2210(d)(1)(F) prohibiting broker-dealers from predicting future performance or implying that past performance will recur.

entirely consistent with the common law duties of fiduciaries, which are the basis of similar obligations imposed by regulatory regimes.[10]

III. Core Issue: The Proposal's Ongoing Fiduciary Obligation Would Preclude Firms That Provide Advice or Receive Ongoing Compensation from Acting as a Broker-Dealer.

The Proposal applies a broad and ongoing fiduciary duty to broker-dealers and agents who (i) make ongoing recommendations or provide investment advice, in any capacity, to a customer or client, or (ii) receive ongoing compensation. Whether intended or not, this standard would prevent broker-dealers from providing incidental investment advice, making them ineligible to rely on the broker-dealer exclusion from the Advisers Act (the "BD Exclusion").[11]

While the Proposal provides for "standalone" recommendations, the limitations are so narrow that an on-going fiduciary duty would apply to most broker-dealer relationships. Virtually every recommendation from a broker-dealer or agent with respect to the purchase or sale of securities meets the definition of "investment advice" under the Advisers Act. This "incidental" advice by broker-dealers was contemplated and specifically carved out of the registration requirements of Advisers Act as the BD Exclusion. According to the Proposal, the incidental advice associated with every recommendation would subject broker-dealers and agents to an ongoing fiduciary duty. While the Division may have intended this reference to be limited to cases where a dually registered firm provides broker-dealer services, on the one hand, and investment advisory services, on the other, to the same client under separate relationships, the proposed language does not make that clear. Even if that was the Division's intent, it would still effectively eliminate the "standalone" recommendation option for dually registered firms and would prohibit a distinction that is permitted under federal securities law.

In addition, broker-dealers and agents often receive compensation that includes both an upfront commission and an ongoing trail commission paid for servicing the account. Based on the Proposal, the receipt of the trail commission would be "ongoing compensation" and would

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[10] For example, the Department of Labor has stated that the duties of a fiduciary under ERISA are related to "the process used to carry out the plan functions rather than simply the end results." *Profit Sharing Plans for Small Businesses*, available at www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications/profitsharingplansforsmallbusinesses. *See also* THE OXFORD HANDBOOK OF FIDUCIARY LAW 174 (Evan J. Criddle et al. eds., Oxford Univ. Press 2019) ("So long as fiduciaries meet this procedural prudence standard, courts have refused to use hindsight to find fiduciaries breached their duty of care when making investment decisions that ultimately lost money" (citing Jenkins v. Yager, 444 F.3d 916, 925-926 (7th Cir. 2006); Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 296-303 (5th Cir. 2000))).

[11] *See* Chairman Clayton Speech, *supra* note [7] ("As we discussed in our Solely Incidental Interpretation, we do not believe that it would be consistent with the solely incidental prong of the broker-dealer exclusion under the Advisers Act for a broker-dealer to agree to provide continuous monitoring of a customer account. That activity would subject the broker-dealer to regulation as an investment adviser. Therefore, and let me be clear about what such a requirement would mean: imposing an ongoing monitoring obligation would effectively prohibit brokers from providing retail customers with advice without registering as investment advisers." *See also* 15 U.S.C. § 80b-2(a)(11)(C) (Section 202(a)(11)(C) of the Advisers Act setting forth the BD Exclusion).

subject the broker-dealer and agent to an on-going fiduciary duty, regardless of whether ongoing advice is actually given.

For all of the reasons noted above, under the Proposal, broker-dealers and agents would have an on-going fiduciary obligation to clients. The SEC's recent interpretation[12] regarding the solely incidental prong of the broker-dealer exclusion, and unequivocal guidance from the SEC Chairman following the interpretation's release,[13] provide that a broker-dealer undertaking an ongoing fiduciary duty regarding investment advice can no longer rely on the broker-dealer exclusion. This would require broker-dealers to either move broker-dealer clients to investment advisory accounts, or if that is not the best account type or the clients do not qualify for a managed account (e.g., because of account minimums or registration limitations), it could lead to some broker-dealers no longer providing recommendations to those customers.

It is unclear to us why the Division drafted the ongoing fiduciary duty language in such a manner as to effectively compel all brokerage accounts to (1) convert to investment advisory accounts or (2) convert to non-advised brokerage accounts. But regardless of the intent, the effect of this provision of the Proposal is that firms likely will curtail their broker-dealer businesses in Massachusetts, resulting in fewer investors having access to advice. To avoid such an outcome, we urge the Division to modify the Proposal to allow broker-dealers to provide episodic, incidental advice to broker-dealer clients regardless of whether an on-going commission is paid or if the client receives a separate advisory service from the agent or broker-dealer.

IV. If the Division Moves Forward with a Fiduciary Regulation, The Proposal Should be Significantly Modified

As discussed above, there are core elements of the Proposal that, if implemented, would make the broker-dealer business model unworkable in Massachusetts. While we hold strongly that Reg. BI materially raises the bar and that the Division should defer moving forward with the Proposal, if the Division determines not to do so, it is imperative that modifications be made. We believe that such modifications would be consistent with the Secretary's earlier stated views on the standard of care for broker-dealers.

In his comment letter to the SEC concerning its initial proposal of Reg. BI, Secretary Galvin advocated for a broker-dealer standard of care that is no less stringent than the fiduciary duty for investment advisors, as contemplated by Section 913 of the Dodd-Frank Act and the SEC's report mandated by Section 913.[14] But the duty of loyalty under the Advisers Act is not expressed by coupling an absolute duty to avoid conflicts of interest with an absolute duty to act

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[12] *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser*, Release No. IA-5249 (June 5, 2019), available at https://www.sec.gov/rules/interp/2019/ia-5249.pdf.

[13] Chairman Clayton Speech, *supra* note [7].

[14] Section 913 of the Dodd-Frank Act, *supra* note [4]. *See* Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Jan. 2011) available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

without regard to the adviser's interests. Instead, advisers must not subrogate the interests of their clients to their own interests. And where there are conflicts, they must be eliminated or exposed.[15]

As referenced earlier in this letter, nothing in the Advisers Act or in the interpretive positions of the SEC (including the guidance and interpretations issued prior to the SEC's recent interpretation on the Advisers Act fiduciary duty) suggests that recommendations by investment advisers are subject to a "best of" standard similar to the requirement in the Proposal. In fact, the SEC has made it clear that choosing the cheapest or best performing product is not a requirement for meeting the fiduciary duty. If the Division believes that broker-dealers should be held to a standard of care no less stringent than that applied to investment advisers, it can do so without imposing an unattainable "best of" rule.

As for the requirement that broker-dealers providing advice or receiving ongoing compensation be held to an ongoing fiduciary duty, it should be recognized that under the Advisers Act, investment advisers are able to limit the scope and duration of their services by agreement with their clients.[16] If the Division moves forward with the Proposal, it should similarly be made clear that the scope and duration of advice provided by broker-dealers can be limited, so as to avoid broker-dealers losing the BD Exclusion from the investment adviser definition.

In Section 913 of the Dodd-Frank Act, Congress understood that without certain safeguards, extending a fiduciary duty to broker-dealers would have a deleterious effect on the core business model of broker-dealers. Thus Section 913 makes provisions for episodic advice, diverse business models (such as offering proprietary products or a limited set of products), and commission-based compensation structures without a presumption that commissions violate the duty of loyalty unless the broker-dealer can prove that commissions are "the best" remuneration option.[17] If the Division determines that it must move forward with the Proposal, we urge it to take similar steps for ensuring that broker-dealers are not effectively precluded from advising Massachusetts clients.

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We appreciate the opportunity to comment on these vitally important issues. MML Investors and MassMutual support regulatory initiatives aimed at raising the investor protection bar. We also seek to serve our diverse customer base, which requires finding ways to let customers' needs and

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[15] Release No. IA-5248 at 23 ("an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.").

[16] Release No. IA-5248 at 9-10 ("Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client. In particular, the specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal.").

[17] *See* Section 913(k) of Dodd-Frank Act, *supra* note [4].

means dictate the most appropriate way to access and pay for advice. We hope the Division will choose to move forward prudently and thoughtfully to assure that those important objectives are well served. Please do not hesitate to contact me with any comments or questions, or if further information would be helpful.

Very truly yours,

Robert Rosenthal
Chief Legal Officer