



National Association of Insurance and Financial Advisors of Massachusetts

July 26, 2019

DELIVERED VIA EMAIL

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

Dear Secretary Galvin:

Please accept on behalf of the National Association of Insurance & Financial Advisors – Massachusetts (NAIFA MA) and the National Association of Insurance and Financial Advisors (NAIFA) the following comments in response to the Massachusetts Securities Division’s preliminary rule proposal regarding a fiduciary duty for broker-dealers, investment advisers and their representatives (the “Proposal”).

Founded at the Parker House Hotel in Boston in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation’s oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States.

NAIFA MA is the collective voice for insurance agents and financial advisors in Massachusetts and emphasizes ethical conduct; quality education & training; practice management; and mentoring. We have become a valuable resource at the State House for consumer protection issues related to the financial advisory and insurance industries. Over the past few years we have worked with the legislature to pass laws protecting Massachusetts residents against insolvent insurance companies, and standardizing long-term care plans for consumers.

The mission of NAIFA and NAIFA MA is to advocate for a positive legislative and regulatory environment, enhance their members’ business and professional skills, and

promote the ethical conduct of their members. We have always supported reasonable efforts to protect consumers from unethical behavior and predatory financial practices.

1. While NAIFA MA and NAIFA strongly support the Massachusetts Securities Division's (Division) goals of protecting consumers and helping them achieve financial security, we are concerned that certain elements of the Proposal will adversely impact consumers. In addition to the issues raised in the joint trade associations comment letter submitted today, which NAIFA MA and NAIFA participated in, we respectfully raise the following important concerns and comments. The Proposal favors a fee-based business model over a commission-based model. One result of this will be that if adopted, the proposal will likely lead to large numbers of broker-dealers and registered representatives changing their business practice to a fee-based business model. Numerous studies on the impact of regulators adopting a fiduciary standard and specifically on the impact of the Department of Labor Fiduciary Rule support this conclusion. For example, research done by FTI Consulting which focused on the effects of the implementation of the DOL Fiduciary Rule found that the implementation of this rule forced financial service providers to move away from a commission-based model to a fee-based model.¹

This shift from a commission-based model to a fee-based business model will ultimately prove to have an adverse impact on many of the small and mid-sized investors who constitute a large portion of NAIFA MA's and NAIFA's members' practices. Since most fee-only advisors have minimum asset requirements of \$250,000, \$500,000 or more, this action will likely cause low and mid-level investors to lose access to financial products as well as the advice and services of financial professionals. NAIFA members' clients generally do not have the level of assets required by most fee-based advisors---so where will these investors get advice and service from? The answer is unclear at best. These consumers will lose out on the valuable services these professionals provide.

• ¹ [Fiduciary Rule: Initial Impact Analysis](#), FTI Consulting (September 2017); see also: Deloitte White Paper on the DOL Fiduciary Rule (August 2017); [The American College-NAIFA Survey of Financial Advisors](#), National Association of Insurance and Financial Advisors (June 2013)

Another factor to consider is that consumers want to have choices with respect to investment services as well as how they pay for these services. SEC Chairman Jay Clayton noted this fact in a recent speech, commenting that “For many, the broker-dealer relationship is the better choice, and, for many, the investment adviser relationship is the better choice. Some may want both. A principal focus of mine is working to ensure that both relationships remain available.”² Finally, depending on the type of account, account balance and amount of activity in a consumer’s account, a commission compensation structure may prove to be more economical than a fee-based structure for many investors.

2. NAIFA MA and NAIFA are also deeply concerned with the Proposal’s use of the un-defined phrases “best of the reasonably available options” found in section (c)2 (i) and “best of the reasonably available remuneration options” found in section (c) 3 (ii). This wording lends itself to an after-the-fact form of analysis and is so open-ended and subjective that any advisor could be found in violation of either or both of these provisions, despite the fact that the advisor acted in the best interests of the client at the time of the recommendation or transaction.

A “best of” standard is not used in any federal securities law, and this wording opens advisors up to “second guessing” by the Division. It also places upon them the impossible task of demonstrating their actions and /or compensation were the “best of the reasonably available options” when, in fact, several options could fit that description and the only way to possibly determine what was the single best option would be through hindsight.

3. Finally, NAIFA MA and NAIFA recommend that a provision be added to the Proposal that expressly excludes variable annuities from the scope of the Proposal. Current Massachusetts law excludes these products from the definition of “security”, stating that “Security” does not include “any insurance or endowment policy *or annuity contract* under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period.” (emphasis added). Variable annuities are already subject to comprehensive regulation by state insurance regulators, FINRA and the SEC.

• ² Jay Clayton [Speech](#) on “The Evolving Market for Retail Investment Services and Forward-Looking Regulation — Adding Clarity and Investor Protection while Ensuring Access and Choice” (May 2, 2018); see also [More Investors Seeking Financial Advice are Turning to Lower-Cost Options](#), Jim Puzzanghera, Los Angeles Times (May 9, 2016)

As such, they are among the most heavily regulated products in the financial marketplace. Subjecting these products to a possible addition layer of regulation by the state's securities regulator will provide little in the way of meaningful additional regulation and will potentially result in conflicts between the various regulatory regimes.

For the above stated reasons, NAIFA MA and NAIFA strongly believe that the proposal is not workable in its current form, and that if adopted it will prove to be harmful to the very consumers the Division is trying to protect—small and mid-size investors. Thank you for your consideration of our comments. If you would like to discuss our comments further please contact David Burg at 508-404-8881 / dburg@ft.newyorklife.com or Gary Sanders at 703-770-8192 / gsanders@naifa.org.

Sincerely,



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Jill Judd
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cc: William Cass, Suffolk Group

REPLY TO: 201 Jones Road, 5th Floor, Waltham, MA 02451