

July 26, 2019

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

The Honorable William Francis Galvin
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: Proposed Regulation – Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

Dear Secretary Galvin:

Raymond James Financial, Inc. (“Raymond James” or the “Firm”) has long supported consistency and clarity for customers and the financial services industry through a uniform best interest standard of care for broker-dealers (“BDs”) and investment advisers (“IAs”) that provides for investor protection without unnecessarily reducing or eliminating investor choice. In that light, we appreciate the opportunity to comment on the above-referenced proposed regulation (the “Proposal”) issued for preliminary comment by the Massachusetts Securities Division (the “Division”).

As discussed in more detail below, though the Proposal seeks to enhance investor protections, many of its provisions will have the unintended consequence of unnecessarily limiting Massachusetts investors’ access to investment services that provide for individualized financial planning. Moreover, a state-by-state regulatory approach will undoubtedly create overlapping and duplicative regulations, particularly when a broad authority like the U.S. Securities and Exchange Commission (“SEC”) recently adopted new rules on the same subject matter, as is the case with their recent release of Regulation Best Interest and related releases (“Reg BI”). While we recognize that other federal and state regulators have important roles to play in the retail investor space, we believe that consistency and clarity are only achievable through a single broad authority and that the SEC should continue to function as the primary regulator of BDs and federally-registered IAs.

For these reasons and those discussed in more detail below, we ask that you consider withdrawing the Proposal or providing an exemption from its application for BDs and IAs registered with the SEC.

I. Background of Raymond James

Raymond James is a leading diversified financial services company providing private retail client, capital markets, asset management, banking and other services to individuals, corporations and municipalities. Through its subsidiaries, the Firm is engaged in various

financial services activities, including providing investment management services for retail and institutional clients; the underwriting, distribution, trading and brokerage of equity and debt securities; and the sale of mutual funds and other investment products. Additionally, Raymond James provides corporate and retail banking services, as well as trust services.

In each line of business, our long-term success reflects commitment to our core value to always put the financial well-being of our clients first. We only do well when our clients thrive.

Raymond James is the sole owner of: Raymond James & Associates, Inc. (“RJA”), a BD and IA dually registered with the SEC; Raymond James Financial Services, Inc. (“RJFS”), a BD registered with the SEC; and Raymond James Financial Services Advisors, Inc. (“RJFSA”), an IA registered with the SEC. RJA representatives are employees of RJA. RJFS and RJFSA representatives are independent contractors who own their own businesses and are supported by the platforms and services offered by the Firm.

Raymond James, through its registered subsidiaries, has a total of nearly 1,800 registered representatives (“RRs”) and investment adviser representatives (“IARs”) through whom the Firm maintains relationships with over 25,000 Massachusetts investors who hold more than \$14 billion in assets in over 46,000 accounts.

II. The Proposal is Unnecessary in Light of Reg BI

As you know, in April 2018, the SEC released a proposal to enhance the standard of conduct for BDs and their associated persons when making recommendations of any securities transaction or investment strategy involving securities to a retail customer (“Proposed Reg BI”). The SEC received and reviewed over 6,000 comment letters and, in response, published the final version of Reg BI on June 5, 2019.

Raymond James respectfully disagrees with the Division’s premise for the Proposal: that Reg BI failed to establish the uniform standard recommended by the SEC’s 2011 *Study on Investment Advisers and Broker-Dealers* (“913 Study”). Indeed, the 913 Study recommended, consistent with Section 913 of the Dodd-Frank Wall Street Reform and Financial Protection Act (“Dodd-Frank”), a uniform standard of conduct that would be no less stringent than the fiduciary standard for investment advisers under the Investment Advisers Act of 1940 (“Advisers Act”). However, importantly, the 913 Study also made clear that “the standard should not prohibit, mandate or promote particular types of products or business models” and that it “should preserve investor choice among such services and products and how to pay for these services and products.” Moreover, in granting authority to establish a new standard of conduct for BDs, Section 913(g) of Dodd-Frank expressly states that the standard of conduct shall not require BDs “to have a continuing duty of care or loyalty after providing personalized investment advice about securities.” In this regard, Raymond James generally supports Reg BI because it is based on fiduciary principles tailored to the BD business model, preserves investor choice, and is clearly a higher standard of investor protection than FINRA Rule 2111 (Suitability).

In particular, Reg BI, among other things, expressly requires acting in clients’ best interests, ensures regulatory obligations cannot be reduced through contract, establishes an express

requirement to eliminate – or disclose and mitigate – conflicts of interest, and eliminates the element of “control” from finding an excessive trading violation. In addition, as noted above, Reg BI preserves investor choice and allows investors to continue to receive advice through the brokerage model, allows BDs to continue to receive commissions for executing transactions when appropriate for investors, applies broadly to all retail customer accounts, including retirement accounts, eliminating complexity and confusion, and allows the primary federal securities regulatory agency – the SEC – to enforce a uniform standard, not only across the industry, but also across the country.

Accordingly, with the release of Reg BI and in order to preserve choice and access to a variety of investment advice products and services for Massachusetts’s investors, we ask that the Division withdraw the Proposal. In the event that the Division chooses to proceed with the Proposal, then we ask that the Division revise the Proposal to include an exemption for SEC-registered BDs and IAs and their registered persons expressly stating that complying with Reg BI requirements would satisfy compliance with the Massachusetts fiduciary conduct standard.

III. The Proposal is Preempted Under the National Securities Markets Improvements Act of 1996 (“NSMIA”) with Respect to Both BDs and IAs Registered with the SEC (“RIAs”)

The Proposal, as written, would be preempted under NSMIA for both BDs and RIAs, and would not survive legal challenges on NSMIA grounds. Congress enacted NSMIA with the intent to clearly delineate the securities law responsibilities of federal and state governments. The Proposal, along with similar recent proposals by other states, would impose a regulatory structure that would directly contradict and undermine the intent of NSMIA to end the confusing, conflicting and overlapping federal and state securities laws that existed prior to its enactment.

1. The Proposal is preempted with respect to RIAs under NSMIA

In delineating regulatory responsibilities over IAs, NSMIA clearly left regulation of RIAs to the SEC. In this regard, NSMIA preserved state authority over RIAs only with respect to fraud and deceit. Moreover, in adopting rules to implement NSMIA, the SEC explained that NSMIA also “[precludes] a state from indirectly regulating activities of [RIAs] by applying state requirements that define ‘dishonest’ or ‘unethical’ business practices unless the prohibited practices would be fraudulent or deceptive absent the requirements.”

To the extent the Proposal is intended to apply to RIAs, including supervised persons of dually registered BDs/RIAs who rely on applicable exclusions from IAR registration in Massachusetts, the Proposal would impose numerous requirements that go beyond the limited areas preserved for state regulation, and would subvert the intent of Congress to deny states the ability to reinstitute the overlapping and duplicative regulation of RIAs. Accordingly, the Proposal would be preempted under NSMIA with respect to RIAs.

2. The Proposal is preempted with respect to BDs under NSMIA

NSMIA added Section 15(i) to the Exchange Act of 1934 (“Exchange Act”) which generally preempts states from establishing any requirements on BDs with respect to making and keeping records, among other things, that differ from, or are in addition to, such requirements established under the Exchange Act. In this regard, section 950 CMR 12.207(f) of the proposed new rule provides that:

“Nothing in this section shall be construed to establish any requirements for capital, custody, margin, financial responsibility, making and keeping of records, bonding, or financial or operation reporting requirements for any broker-dealer or agent that differ from, or are in addition to, the requirements established under 15 U.S.C. §78o(i).”

Despite the inclusion of this provision, the Proposal would impose such NSMIA-preempted books and records requirements, contrary to congressional intent.

IV. Limit the Scope of the Proposal and Preserve Investor Choice

Raymond James’s client base is diversified and varies, among other things, in family size, wealth, objectives, and interest in the amount of investment advice and services they receive. Our clients benefit from the ability to choose among a variety of advisory and brokerage services in a manner best suited to their needs and preferences. Clients often have both brokerage and advisory accounts that provide different levels of service at different costs to meet their financial situations, needs and objectives. Such clients typically have brokerage accounts for investments they intend to hold for longer periods of time, and advisory accounts through which they receive ongoing financial advice and asset management services. If the Division proceeds with the Proposal, several revisions are required to ensure the availability and continuity of brokerage services to Massachusetts retail investors.

1. Limit to investment advisory accounts the applicability of an ongoing duty

The Proposal would impose an ongoing fiduciary duty on BDs when making “ongoing recommendations.” The Proposal fails to define or provide guidance as to the scope of the term “ongoing recommendations.” Accordingly, the term creates uncertainty, and a textual reading suggests that the term could be interpreted very broadly – particularly because the Proposal attempts to differentiate “ongoing recommendations” from a “standalone recommendation.”

Historically and under Reg BI, a BD’s suitability and best interest obligations apply at the point-in-time when a recommendation is made. Moreover, absent an agreement, course of conduct or unusual fact pattern that might alter the normal BD-client relationship, a recommendation by a BD has not been deemed to create an ongoing duty to monitor or make subsequent recommendations.

An ongoing duty to monitor a client’s assets comes with substantial costs, and requires supervisory systems and controls designed specifically to supervise such ongoing monitoring. BD supervisory systems and controls are not structured to supervise brokerage accounts in this manner. The costs and time required to restructure these systems and controls would be

substantial. Such increased costs would likely make it impractical, if not impossible, for firms to continue to provide personalized investment advice under a transaction-based compensation model.

Firms would likely have no option other than to either recommend customers move their assets to an advisory account – if in their best interest – and, if not in their best interest, firms may have to cease providing any advice and investment services to those customers. In either event, the most likely result of imposing an ongoing obligation on BD accounts is that many Massachusetts retail investors who would prefer to receive periodic recommendations would likely lose access to investment advice altogether, or experience a potentially significant increase in the cost of that advice.

To avoid such an untenable outcome, the Proposal should be revised to eliminate the concept of “ongoing recommendations,” and expressly limit the ongoing fiduciary duty to investment advisory accounts unless the BD and the customer have entered into a written agreement expressly providing for an obligation to provide ongoing monitoring.

2. Define “recommendation” to be consistent with Reg BI

The Division should expressly define “recommendation” to be consistent with longstanding FINRA guidance as to the meaning of that term, and consistent with its meaning under Reg BI. In addition, the Division should revise the Proposal to provide an express exemption from the fiduciary standard for all unsolicited transactions.

3. Eliminate the phrase “through the execution of a recommendation”

The purpose for extending the fiduciary duty on BDs “through the execution of the recommendation” is unclear and, in any event, unnecessary. As discussed above, the standard of conduct for BDs should apply at the point-in-time when a recommendation is made. In addition, BDs already are subject to various best execution and client order handling obligations under federal securities laws and FINRA rules. If the intent of the Proposal’s language is to reinforce these existing obligations, then the Proposal should be revised to clarify that point and remove the regulatory uncertainty by eliminating the phrase “through the execution of the recommendation.”

4. Limit the scope of the Proposal with respect to account recommendations to be consistent with Reg BI

Consistent with Reg BI and FINRA Rule 2111, the Proposal should be revised to apply only to recommendations of “any securities transactions or investment strategy involving securities (including account recommendations) to a retail customer.” The Proposal’s application to recommendations of “the opening of, or transfer of assets to, any type of account” creates uncertainty whether firms’ supervisory systems redesigned to comply with Reg BI would be able to comply with the Proposal. Accordingly, the Proposal’s application should be revised or the Division should provide guidance that the Proposal is intended to be consistent with the applicability of Reg BI to “account recommendations.”

5. *Expressly limit “customers” to Massachusetts residents*

As indicated above, the Proposal, as written, will have significant negative consequences for investors. If not withdrawn, its potential impact should be limited solely to retail investors who are residents of Massachusetts. BDs, RRs, IAs, and IARs who have a place of business in Massachusetts should not be subject to the Proposal when providing brokerage or advisory services to clients residing outside of Massachusetts. It is important to note that the Proposal differs substantively from and may be inconsistent with regulations in other states where such clients actually reside. Accordingly, the Proposal should be revised to be expressly applicable only with respect to retail investors who are residents of Massachusetts at the time any applicable investment advice is provided or a recommendation made.

6. *Define institutional customers to be consistent with Reg BI*

The Proposal defines “customer” and “client” by excluding certain categories of persons that are primarily similar to those persons who would be considered “institutional accounts” under Reg BI and FINRA Rule 4512(c). However, the catchall category in the Proposal of “institutional buyers” as defined under 950 CMR 12.205(1)(a)(6) is inconsistent with Reg BI which provides for a catchall category of non-natural persons with total assets exceeding \$50 million. An inconsistency between Reg BI, FINRA rules, and the Proposal with respect to institutional customers would impose additional costs and difficulties in designing supervisory systems to incorporate the variation in the categories. While we believe that institutional customers should not exclude natural persons who meet the \$50 million monetary threshold noted above, to avoid unnecessary additional costs, the Proposal should revise its definitions of “customer” and “client” to be consistent with Reg BI.

V. *Duty of Care*

The Proposal’s duty of care would require “reasonable inquiry” regarding the “risks, costs, and conflicts of interest related to the recommendation or investment advice, and the customer’s or client’s investment objectives, financial situation, and needs, and any other relevant information.” The Division should expressly provide that “reasonable inquiry” will be interpreted to be consistent with the “reasonable diligence, care, and skill” requirement under Reg BI.

The Division also should provide guidance with respect to the specific factors that must be considered with respect to the reasonable inquiry. For instance, the Division should specify that the lowest-cost option may not always be in the client’s best interest depending on other facts and circumstances, such as historical performance and potential risks. The Division should provide guidance with respect to how firms should balance these factors in order to satisfy their duty of care.

VI. Duty of Loyalty

1. *Revise the “without regard to” standard to be consistent with Reg BI*

Under the Advisers Act, an IA’s duty of loyalty requires “an adviser to serve the best interests of its clients, which includes an obligation not to subordinate the clients’ interests to its own.” The Proposal’s duty of loyalty would require that a recommendation or investment advice be provided “without regard to any financial or any other interest of broker-dealer, agent, adviser, any affiliated or related entity and its officers, directors, agent, employees, or contractors, or any third-party.” The use of the phrase “without regard to” could be construed to require the elimination of *all* conflicts, an impossible standard. Indeed, in adopting Reg BI, the SEC also expressed concern that use of the “without regard to” language could be “inappropriately construed” to require elimination of all conflicts, which the SEC believed “could ultimately harm retail investors by reducing their access to differing types of investment services and products by increasing costs.” We agree with the SEC’s concerns, and recommend revising the Proposal to be consistent with the Reg BI and the longstanding common law fiduciary duty.

2. *The “Best of” Standard is unreasonably opaque*

The Proposal’s duty of loyalty is presumed to be breached when a recommendation regarding an account type or a securities transaction is not the “best of the reasonably available options for the customer or client.” Moreover, while the Proposal purports to permit transaction-based compensation, such compensation, in part, must be the “best of the reasonably available remuneration options” and only then will it be “presumed,” that the fiduciary duty has not been breached.

The “best of” standard is a remarkable departure from existing common law and statutory fiduciary duties. We have found no examples of such a “best of” standard defining the duty of loyalty for fiduciaries in other contexts such as corporate directors, partnerships, trustees, personal representatives, or guardians. This is not surprising, because in light of the broad spectrum of actions a fiduciary must undertake, the multiplicity of options “reasonably available,” and the multifaceted nature of the interests of the principal in any fiduciary relationship, there will be many situations in which no one option will be categorically the “best.” For example, corporate directors owe fiduciary duties under statutory and common law; however, outside of certain narrow cases such as a director’s fiduciary duty to seek the best value reasonably available for shareholders when the sale of a corporation is contemplated, directors are not required to identify, recommend, or select the single “best” option of all “reasonable available options” in order to satisfy their duty of loyalty.

Similarly, we are aware of no “best of” standard under federal securities laws, FINRA rules, or any state securities laws. In adopting Reg BI, the SEC noted:

We also recognize that different products are rarely perfectly equal, and that differences will be both quantitative and qualitative in nature. A broker-dealer will not be required to recommend the single “best” of all possible alternatives that might exist, in part because **many different options may in fact be in the**

retail customer's best interest. We are sensitive to commenters' concern that this determination, to the extent it can be made at all, may be judged in hindsight even though Regulation Best Interest applies at the time of the recommendation. (emphasis added)

We urge the Division to reconsider and remove the "best of" standard. We believe that standard is a fundamental transformation of the fiduciary duty of loyalty; and that across the broad range of recommendations and advice that BDs and IAs provide to retail customers, it is an unworkable standard, would subject firms to regulation through hindsight, and does not provide firms with fair notice of our obligations.

3. *Disclosure obligation*

The Proposal's duty of loyalty provides that "disclosing a conflict of interest in and of itself" shall not presumptively satisfy the duty. The common law duty of loyalty requires firms to eliminate or, if unable to eliminate, disclose material conflicts of interest and obtain informed client consent. That is, it does not prohibit an advisor from benefitting from a transaction with a client if the advisor provides clear disclosure and the client provides informed consent.

The Division states that the Proposal is based on the "common law fiduciary duties of care and loyalty." However, as the Proposal provides no guidance with regard to the role of disclosure other than as noted above, it is unclear how the Proposal's duty of loyalty is consistent with the common law fiduciary duty, Reg BI or existing federal securities laws.

Consistent with current federal securities laws and Reg BI, the Proposal should: (i) eliminate proposed subsection (c)(2)(ii) from section 950 CMR 12.207 of the Proposal; (ii) clarify that disclosure obligations are limited to *material* conflicts of interest as interpreted under the federal securities laws; and (iii) expressly state that the disclosure obligation is satisfied when in compliance with the Disclosure and Conflicts of Interest Obligations under Reg BI.

4. *Principal transactions*

The Proposal is silent with respect to its applicability to recommendations of principal transactions, and proprietary or other limited range of products, which raises concerns and uncertainty that such recommendations would be in violation of the duty of loyalty due to the Proposal's "without regard to" language and the inability to rely on disclosure to satisfy the duty of loyalty.

Principal transactions are an essential aspect of well-functioning capital markets. As also noted in the 913 Study, many types of securities, such as municipal and corporate bonds, new issues, and proprietary products are generally traded and offered on a principal basis. Indeed, Massachusetts companies and municipalities benefit from the ability of BDs to engage in principal transactions. A prohibition or overly burdensome restrictions on principal transactions, as the Proposal conceivably contemplates, could have significant detrimental effects on the availability of financing for both Massachusetts companies and municipalities, as well as market liquidity and access to new issues for retail investors in Massachusetts.

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In its 913 Study, the SEC noted that despite potential conflicts of interest inherent to principal transactions, Congress did not intend to apply Section 206(3) of the Advisers Act to BDs nor prohibit BDs from recommending principal transactions. Consistent with the intent of Congress, Reg BI, through the Disclosure Obligation and Form CRS, requires BDs to provide new conflict of interest disclosures with respect to principal transactions, but does not impose the requirements of Section 206(3) to BDs nor impose a prohibition on BDs from recommending principal transactions.

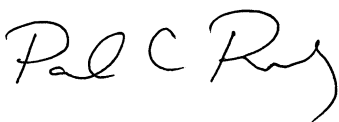
Accordingly, we recommend that the Proposal be amended, consistent with Reg BI, to explicitly acknowledge that: it does not prohibit recommendations of principal transactions, affiliated or proprietary products, or from among a limited range of products; such recommendations do not presumptively breach the proposed fiduciary duty; and the “best of” and “reasonably available” standards discussed above do not apply to such recommendations.

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As stated earlier, our primary opposition to the Proposal is our strong desire to avoid unintended consequences that would potentially restrict Massachusetts investors, particularly lower income investors, from receiving advice on their investments, limit choice and create confusion and complexity for advisors and their clients. We continue to believe there is strong evidence for those concerns and to advocate for states to defer to the SEC, which has broad authority across BDs and IAs, to implement a single standard of care.

We urge the Division to consider the issues outlined above, and appreciate the opportunity to comment on the Proposal.

Sincerely,



Paul C. Reilly
Chairman and CEO
Raymond James Financial, Inc.