The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Securities Division

REQUEST FOR COMMENT

December 13, 2019

The Massachusetts Securities Division (the "Division") of the Office of the Secretary of the Commonwealth is proposing to amend 950 MASS. CODE REGS. 12.200 (the "Regulations") as they relate to the standard of conduct applicable to broker-dealers, agents, investment advisers, and investment adviser representatives. Specifically, the Division is proposing and requesting comment on amendments that would do the following (collectively, the "Proposal"):

- Apply a fiduciary conduct standard on broker-dealers, agents, investment advisers, and investment adviser representatives when dealing with their customers and clients, at 950 CMR 12.207. The failure to adhere to the fiduciary standard of utmost care and loyalty will be deemed a dishonest or unethical practice under M.G.L. c. 110A, § 204(a)(2)(G); and

- Revise certain paragraphs in 950 CMR 12.204 and 950 CMR 12.205 to make clear that the existing suitability standard still applies to any relationships or transactions expressly excluded from the fiduciary standard.

1. The Division's Preliminary Rule Proposal and Comment Period

Beginning on June 14, 2019, the Division solicited preliminary comments on its proposed amendments to apply a uniform fiduciary conduct standard.[1] Between June 14, 2019 and August 6, 2019, the Division received approximately fifty-three written comment letters. Commenters included individual financial professionals, broker-dealer and investment adviser firms, financial and insurance industry trade associations, other government entities and regulators, and investor advocates.

The Division developed the current Proposal after reviewing and considering all comments received during the preliminary comment period. All references to comments in this document refer to comments received during the preliminary comment period.

[1] An electronic copy of the Division's Preliminary Solicitation of Public Comments can be found at http://sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm.

2. The Fiduciary Conduct Standard in the Proposal is Necessary in the Public Interest and for the Protection of Investors

Investment advisers and investment adviser representatives have long been subject to fiduciary duties of care and loyalty to their clients under federal and state securities laws. As fiduciaries, investment advisers and investment adviser representatives must put their clients' interests first and act in accordance with the duties of utmost care and loyalty. However, broker-dealers and agents have been permitted to provide, and hold themselves out as providing, trusted advice while not being held to the same fiduciary standard.

The need for a uniform fiduciary conduct standard applicable to all investment advice has been recognized for many years. In section 913 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Congress expressly authorized the U.S. Securities and Exchange Commission (the "SEC") to establish a fiduciary duty for broker-dealers and their agents that was "the same as the standard of conduct applicable to an investment adviser."[2] A key aspect of the Congressional mandate was that all financial professionals need to make recommendations and provide advice "without regard to [their own] financial or other interest[.]"[3] In 2011, the SEC's Section 913 Study, conducted pursuant to Dodd-Frank, specifically recommended that broker-dealers be held to the same fiduciary standard as investment advisers when providing advice.[4]

In spite of the clear recommendation of the SEC staff, the SEC's final Regulation Best Interest ("Reg BI") release and rulemaking (June 5, 2019)[5] fails to establish a strong and uniform fiduciary standard. Reg BI sets ambiguous requirements for how longstanding and harmful conflicts in the securities industry must be addressed. Further, Reg BI is overly focused on complicated disclosures, and permits the continuation of harmful practices such as sales quotas and broad-based sales contests. In many instances, it appears that the mitigation of conflicts required under Reg BI can be accomplished through disclosure alone.[6]

This approach contradicts years of data and will not protect investors from harmful conflicts. The empirical studies supporting the 2008 RAND Report found that investors were fundamentally

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[2] Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, § 913(g), 124 Stat. 1376, 1828 (2010).

[3] Dodd-Frank, § 913(g)(2) (codified at 15 U.S.C. § 80b-11(g)).

[4] Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (January 2011) at page (v):

> The Commission should exercise its rulemaking authority to implement the *uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers*. Specifically, the Staff recommends that the uniform fiduciary standard of conduct established by the Commission should provide that: 'the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.' (Emphasis added.)

[5] https://www.sec.gov/rules/final/2019/34-86031.pdf

[6] https://www.sec.gov/rules/final/2019/34-86032.pdf

confused about the differences between broker-dealers and investment advisers.[7] A key finding of the 2008 RAND Report is that most investors mistakenly believed the intermediary (whether it was a broker-dealer or an investment adviser) was acting in the investor's best interest.[8] That 2008 RAND Report also found that disclosures do not help protect or inform investors of conflicts because they are not easily understandable and are often delivered too late to make a difference.[9] That report concluded that investors typically do not have the education and background to understand and effectively use disclosures such as the current Form ADV, Part 2. While disclosure can be helpful to some investors, it cannot replace a clear fiduciary standard.

During the preliminary comment period, several commenters expressed their opinions that the Division should postpone or refrain from taking action to establish a uniform fiduciary conduct standard. After careful consideration of these comments, the Division does not find these arguments persuasive.

A. Preliminary Comments That the Division Should Refrain From Establishing a Uniform Fiduciary Standard

Several commenters wrote that the Division should defer to Reg BI. Some of these commenters argued that the SEC's rulemaking strikes the proper balance between investor protection and preserving "choice" and "access." Others argued that the Proposal would create a "patchwork" or a "regulatory labyrinth."[10]

i. Preliminary Comments That the Division Should Defer to the Reg BI

As explained above, the Division believes that Reg BI fails to provide investors the protection they need from harmful conflicts of interest. The critical term "best interest" is not defined in Reg BI, and the rule focuses far too heavily on disclosure through Form CRS. In many cases, it appears that compliance with Reg BI may be accomplished primarily or exclusively via disclosure. However, the 2008 RAND Report found that disclosure is of questionable value to investors in trying to evaluate conflicts of interest.[11] In any event, disclosure is the second-best option relative to eliminating the impact of conflicts. A fiduciary standard is necessary to ensure that financial advice be based on what is best for investors.

Some commenters wrote that a fiduciary standard would effectively restrict investor choice and access to products and services by increasing the cost of advice. The Division does not agree that the Proposal is likely to have a significant negative impact on investor choice of, or access to, quality advice, products, and services. When preserving "choice" means preserving the option to choose opaque, poorly-understood products that are sold via heavily conflicted advice, the benefits of such "choice" are illusory. There is no room for "you get what you pay for" when it

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[7] Angela A. Hung et al., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers ("RAND Report") 19 (2008) (stating that "the line between investment adviser and broker-dealers has become further blurred, as much of the recent marketing by broker-dealers focuses on the ongoing relationship between the broker and the investor and as brokers have adopted such titles as 'financial advisor' and 'financial manager.'")
[8] RAND Report at 19.
[9] RAND Report at 19.
[10] *See, e.g.,* Comment Letter from Insured Retirement Institute ("IRI Letter") (Jul. 26, 2019).
[11] RAND Report at 19.

comes to the quality and integrity of investment advice. Further, as explained in more detail below, the Proposal enhances the quality of advice in the transactional, episodic brokerage model without imposing any new ongoing obligations upon those providing it.

ii. Preliminary Comments That a State Fiduciary Standard Creates a "Regulatory Labyrinth"

The Division's primary responsibility is to investors in Massachusetts. The SEC's Reg BI is insufficient to protect those investors from harmful conflicts of interest. The Division hopes that other state regulators, and potentially the SEC, will eventually establish a true fiduciary standard for all investment advice. Until then, the Division has a duty to take the necessary steps to protect Massachusetts investors.

Several commenters wrote that the establishment of *any* state fiduciary standard conflicts with Reg BI and that the Division should not proceed with a formal regulation. The Division disagrees. Reg BI "sets a federal floor, not a ceiling, for investor protection."[12] If the purpose and objective of Reg BI is truly to enhance the standard for investment advice and improve investor outcomes, the more rigorous fiduciary standard does not prevent or frustrate that purpose.

One commenter wrote that the Division's preliminary proposal "is part of a much larger debate involving Congress and numerous regulatory agencies with differing jurisdictions, including the U.S. Securities & Exchange Commission, the Financial Industry Regulatory Authority, and the U.S. Department of Labor at the federal level, as well as the North American Securities Administrators Association, the National Association of Insurance Commissioners, and the individual state securities and insurance departments."[13] The Division has participated actively in the debate around Reg BI. It is the Division's view that further action is appropriate to protect the interests of investors and savers.

B. Preliminary Comments That the Division Should Postpone Action to Establish a Uniform Fiduciary Standard

Other commenters wrote that the Division should postpone taking any action for one year or more following implementation of Reg BI. Still others wrote that the Division should wait to coordinate with other federal and state regulators. The Division believes that it is both necessary and appropriate to impose a true, uniform fiduciary standard now.

The Division has been careful and deliberate in its approach to the Proposal. The Division did not propose its own fiduciary standard until after the SEC declined to adequately enhance Reg BI. Despite Secretary William Galvin's comments on August 7, 2018, and comments from several others urging the SEC to adopt a strong, fiduciary standard, the SEC's final version of Reg BI is too weak to truly protect investors from harmful conflicts of interest.

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[12] Commissioner Robert J. Jackson Jr., Statement on Final Rules Governing Investment Advice (Jun. 5, 2019), available at https://www.sec.gov/news/public-statement/statement-jackson-060519-iabd.
[13] IRI Letter.

As described above, the Division received and reviewed preliminary comments over approximately six weeks. After the preliminary comment period, the Division developed the current Proposal over approximately four months with that preliminary feedback and comments in mind.

The time to establish a true uniform fiduciary standard to protect Massachusetts investors is now, before industry habit and practices harden around Reg BI and form a barrier to further improvements.

3. Summary of the Proposal and Application of the Fiduciary Conduct Standard

The Proposal is based on the common-law fiduciary principles of care and loyalty. Under the Proposal, each broker-dealer, agent, investment adviser, and investment adviser representative must make recommendations and provide advice based on what is best for the customer or client, without regard to the interests of any other person. The failure to adhere to the fiduciary principles in the Proposal would be enforced as "unethical or dishonest conduct or practices" pursuant to M.G.L. c. 110A, § 204(a)(2)(G). The Proposal articulates a flexible, principle-based standard, and the application and scope of that standard will vary depending on the nature of the business and the relationship with the customer or client.

A. Scope of the Fiduciary Duty

The Proposal applies to all investment advice and the recommendations provided in one's capacity as a broker-dealer, agent, investment adviser, or investment adviser representative, regarding any investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security, commodity, or insurance product.

i. Application to Advice and Recommendations Regarding Commodity and Insurance Products by Registered Firms and Individuals

The Division added an explicit reference to recommendations regarding the purchase, sale, or exchange of any commodity or insurance product subsequent to the preliminary comment period. Many broker-dealers, agents, investment advisers, and investment adviser representatives recommend and provide advice regarding products that are typically not "securities" under M.G.L. c. 110A, such as annuities and real estate portfolios. In most cases, the advice about non-securities is provided in conjunction with the brokerage or investment advisory relationship, which imparts a degree of trust and confidence in the recommendations. While the Division does not take any position on annuities generally, the Division has seen numerous abusive practices involving the sale of annuities. This is exacerbated by the complexity of these products, the often-high costs and fees, and the high commissions for selling them.

Given the overlap of securities-related and non-securities-related advice, the Division has a strong interest in regulating the conduct of its registrants regardless of the presence or absence of securities. This interest is reflected in the Division's express statutory authority to take action against any applicant or registrant who "has engaged in any unethical or dishonest conduct in the securities, *commodities or insurance business*."[14] The addition of this language to the Proposal is therefore consistent with Section 204(a)(2)(G) and is necessary to protect investors.

Multiple commenters wrote that variable annuities and insurance products are not within the jurisdiction of the Division, and that the Proposal should expressly state that it does not apply to annuities. The Division acknowledges that annuities are not considered securities under M.G.L. c. 110A. However, the Division has a strong interest in regulating the conduct of its registrants, and disagrees that the sale of annuities should be explicitly excluded from the Proposal.

ii. "Recommendation" and "Advice"

Multiple commenters asked the Division to define "advice" and "recommendation," with some requesting specifically that the Division align these terms with the "call to action" concept in FINRA Rule 2111. The Division believes that these terms are commonly used and clear on their face. The Division acknowledges the FINRA interpretation of these terms, but declines to define them rigidly, particularly in the principle-based context of the Proposal.

iii. "Customer" and "Client"

The Proposal applies to recommendations made and advice provided to a customer or client. "Customer" and "client" are defined to include both current and prospective customers and clients. Therefore, when a person or business that is required to act as a fiduciary pursuant to 950 CMR 12.207 makes a recommendation or provides advice, it is immaterial whether the recipient acts on it or ultimately becomes a customer or client.

These terms are defined to exclude certain institutional investors, including banks and similar entities, insurance companies, investment companies, other broker-dealers, investment advisers and federal covered advisers, and other sophisticated institutional buyers. One commenter wrote that the Division should include institutional investors as customers or clients to whom a fiduciary duty is owed. However, the Division believes that the current definition strikes an appropriate balance between those who need the protection of a fiduciary standard and those who do not.

B. Application of the Fiduciary Duty to Episodic and Ongoing Advice Relationships

While all broker-dealers, agents, investment advisers, and investment adviser representatives will owe duties of care and loyalty, the precise scope of these fiduciary principles will vary based on the nature of the relationship with the customer or client. Specifically, the Proposal accommodates both ongoing advice relationships and truly episodic advice relationships.

i. Episodic Advice Relationships

Every person and business required to act as a fiduciary under the Proposal must do so "when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security,

[14] M.G.L. c. 110A, § 204(a)(2)(G) (emphasis added).

commodity, or insurance product."[15] The fiduciary obligation pursuant to this provision extends through the provision of advice or recommendations, as well as the implementation of that advice. This provision does not impose any ongoing duty where one does not already exist, whether to monitor the account or otherwise.

The Division disagrees with those commenters who argued that imposing a fiduciary duty on broker-dealers and agents when making recommendations would necessarily impose an ongoing duty to monitor accounts. The Division acknowledges that the duty of care for *investment advisers and investment adviser representatives* has been interpreted to require ongoing monitoring of accounts when the investment adviser has an ongoing relationship with the client and is compensated with a periodic asset-based fee.[16] However, this is due to the precise nature of that advisory relationship, not an immutable aspect of the fiduciary duty.[17]

ii. <u>Ongoing Advice Relationships</u>

In certain circumstances, the Proposal would impose ongoing obligations, including the obligation to monitor the customer's or client's portfolio on an ongoing basis. These circumstances account for relationships that look like investment advisory relationships. Broker-dealers and agents would be subject to such ongoing duties when the broker-dealer or agent is *acting like* an investment adviser, or where the broker-dealer or agent leads the customer or client to reasonably believe that the broker-dealer or agent will act in such a manner. This approach is designed to be consistent with the nature of the relationship, as well as the customer's or client's reasonable expectations. Under this provision in the Proposal, broker-dealers and agents cannot shield themselves from ongoing duties behind boilerplate disclosures and contract provisions while promising customers a more holistic relationship.

The Division added proposed 950 CMR 12.207(1)(c) subsequent to the preliminary comment period. This provision presumes that the use of certain titles and professional designations will result in a customer or client having a reasonable expectation that they are in a relationship of trust and confidence and that their portfolio will be monitored on an ongoing basis.[18] The 2008 RAND Report found that the use of such titles has contributed to the blurring of the distinction between investment advisers and broker-dealers in the eyes of consumers.[19] There is undoubtedly marketing value in being seen as an "adviser" instead of a "broker." In a paper published in 2019, a finance professor at the University of Southern Maine described the results of a survey he conducted to show how U.S. consumers perceive commonly used financial

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[15] *See* proposed 950 CMR 12.207(1)(a).
[16] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669, 33,672 (Jul. 12, 2019).
[17] *See*, *cf.*, Arthur B. Laby, Fiduciary Obligations of Broker-Dealers and Investment Advisers, 55 Vill. L. Rev. 701, 727 (stating that "the adviser's fiduciary duty would be commensurate with the scope of the relationship").
[18] *Cf.*, *id.* ("The phrase 'management services' connotes an ongoing relationship, which extends beyond the time a particular trade is made.").
[19] RAND Report at 19 (stating that "the line between investment adviser and broker-dealers has become further blurred, as much of the recent marketing by broker-dealers focuses on the ongoing relationship between the broker and the investor and as brokers have adopted such titles as 'financial advisor' and 'financial manager'").

professional titles.[20] The author found that titles such as "financial planner," "financial advisor," and "financial counselor" scored highest on positive traits like honesty, trustworthiness, helpfulness, and work ethic, while the "broker" title scored the lowest in honesty, serving the interest of others, trustworthiness, helpfulness, depth, and caring.

The Proposal does not prohibit the use of these titles. However, the Proposal requires that those using these titles observe ongoing obligations consistent with the expectations of consumers.

C. Scope and Application of the Duty of Care

Under the Proposal, the duty of care requires each broker-dealer, agent, investment adviser, and investment adviser representative to use the care, skill, prudence, and diligence that a person acting in a like capacity and familiar with such matters would use, taking into consideration all of the relevant facts and circumstances. For purposes of this provision, each must make reasonable inquiry into the risks, costs, and conflicts of interest of a recommendation, as well as the customer's or client's investment objectives, risk tolerance, financial situation, and needs, and any other relevant information.

One commenter suggested that the Division include a safe harbor for the duty of care if a broker-dealer complies with FINRA Rule 2111 (Suitability), or presume that compliance with FINRA Rule 2111 satisfies the duty of care. While the duty of care under the Proposal will at times parallel the scope of other rules, situations may arise in which those other rules are insufficient to meet the fiduciary principles in the Proposal. Therefore, the Division respectfully declines to restrict the principle articulated in the Proposal by creating such a safe harbor or presumption.

One commenter suggested that the Division state that maintaining the records required under federal law, including Reg BI, will be deemed to satisfy the duty of care. However, the duty of care is a conduct standard, not a recordkeeping standard. The Division again respectfully declines to create such a safe harbor.

One commenter wrote that the requirement to make reasonable inquiry into "any other relevant information" is overbroad. Another commenter wrote that the information gathering requirement would require firms to expand the universe of information they currently collect to include "information that would frequently have no bearing on the recommendation[.]" The Division disagrees. Those providing advice must use their judgment to decide what information is relevant, using the appropriate care, skill, prudence, and diligence. If information has no bearing on the recommendation, then the broker-dealer, agent, investment adviser, or investment adviser representative must determine whether that information is relevant, using the requisite care, skill, prudence, and diligence.

D. Scope and Application of the Duty of Loyalty

Under the Proposal, the duty of loyalty requires each broker-dealer, agent, investment adviser, and investment adviser representative to make all reasonably practicable efforts to avoid

[20] Derek T. Tharp, Consumer Perceptions of Financial Advisory Titles and Implications for Title Regulation, Mercatus Working Paper, Mercatus Center, George Mason University (2019).

conflicts of interest, eliminate conflicts that cannot be avoided, and mitigate conflicts that cannot be avoided or eliminated. The remaining material conflicts (those that cannot be avoided or eliminated) must be fully and clearly disclosed. Finally, recommendations must be made and advice must be provided without regard to the financial or any other interest of any person other than the customer or client. Disclosure or mitigation alone is insufficient to satisfy the duty of loyalty under the Proposal.

i. Management of Conflicts of Interest

Several commenters wrote that disclosure alone should be deemed sufficient to satisfy the duty of loyalty for some or all conflicts of interest. While the Division declines to allow all conflicts to be disclosed away, the Division acknowledges that some conflicts cannot reasonably be avoided or eliminated. The Division modified the preliminary proposal to include the principle-based order of operations approach articulated above. Notwithstanding the modified approach, disclosure or mitigation alone will not satisfy the duty of loyalty. Even where conflicts are disclosed, all advice and recommendations must be provided with complete focus on what is best for the customer or client, and "without regard to" the interests at the heart of those conflicts.

ii. Providing Advice and Recommendations "Without Regard To" the Interest of Those Other Than the Customer or Client

Several commenters objected to the requirement to provide advice and recommendations "without regard to" the interest of anyone other than the customer or client. Many of these commenters argued that it is impossible for broker-dealers and those receiving transaction-based compensation to disregard their own interests because they need to generate a certain amount of income or revenue. Other commenters argued that this requirement effectively prohibits transaction-based compensation. The Division disagrees. The Proposal does not prohibit compensation, revenue, or profit. Rather, the Proposal requires simply that those conflicting interests cannot motivate or influence the advice or recommendations provided. In this regard, the Proposal mirrors the fundamental fiduciary principles in section 913 of Dodd-Frank.[21]

iii. Sales Contests, Quotas, and Special Incentive Programs

Under the Proposal, it will be presumed a breach of the duty of loyalty for a broker-dealer, agent, investment adviser, or investment adviser representative to make a recommendation or provide advice "in connection with any sales contest, implied or express quota requirement, or other special incentive program." Sales contests, quotas, and other special incentives provide no benefit to the customer or client, and are therefore repugnant to the principle of loyalty. Although Reg BI prohibits certain sales contests limited to certain securities or types of securities within a limited period of time, the Division believes that Reg BI does not go far enough to curb the myriad known abuses that have resulted from these and similar practices. Recommendations and advice that are truly best for the customer or client should not require any extra incentive.

[21] Dodd-Frank, § 913(g)(2) (codified at 15 U.S.C. § 80b-11(g)(1)) (directing the SEC to require "all brokers, dealers, and investment advisers" to "act in the best interest of the customer *without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice*") (emphasis added).

iv. “Best of the Reasonably Available Options” Standard

The Division’s preliminary proposal included a presumption of 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.

The preliminary proposal also included a safe harbor for the receipt or payment of transaction-based compensation if the compensation was reasonable, transaction-based compensation “represents the best of the reasonably available remuneration options for the customer or client,” and the duty of care is otherwise satisfied.

Many commenters were opposed to these provisions, or sought clarification on their meaning. The vast majority of these commenters sought clarification of how “best” would be defined, given the broad range of products, services, fees, and investor needs. Some of these commenters wrote that the “best of” concept was misplaced because the duty of loyalty typically applies to the process and incentives, rather than finding the “best” result. One commenter urged that there should still be a potential breach of the duty of loyalty even where the investment was the best of the reasonably available options.

After considering the preliminary comments, the Division did not include language related to the presumption and safe harbor in the Proposal. The Division believes that the principle-based standards in the Proposal as written provide an adaptable framework that accounts for the principle animating these provisions. Among other circumstances, the Division intends to pursue enforcement action for breach of the duty of loyalty if transaction-based compensation is paid or received for a recommendation or advice, and other options were available which would have been less remunerative or reasonably expected at the time of the recommendation to result in a better outcome for the customer or client. Likewise, the Division intends to pursue enforcement action for breach of the duty of loyalty if transaction-based compensation is unreasonable or if another available compensation structure would result in a greater benefit to the customer or client.

These are not the only circumstances in which the Division will pursue enforcement action for breach of the duty of loyalty. Rather, these examples illustrate the continued application of the principle that the Division initially intended to convey in the preliminary proposal with the presumption and safe harbor. The omission of these examples from the Proposal does not indicate that they will not apply.

v. Commissions and Principal Transactions

Several commenters also expressed concern about and sought clarification on the extent to which the duty of loyalty would impact the availability of principal transactions, affiliated and proprietary products, and limited product offerings. Many of these commenters pointed out the potential negative impact on the municipal bond market in Massachusetts if principal transactions were effectively prohibited. Some of these commenters requested that the Division explicitly permit these transactions in the rule text. The Division does not believe that it is necessary or appropriate to include these transactions in the text of the Proposal itself. These transactions are not prohibited under the Proposal, but they do present conflicts of interest that must be addressed and managed according to the Proposal. On a case by case basis, the Division may deem it a breach of the duty of loyalty to effect a principal transaction when an agency transaction would have been cheaper for the customer, to recommend an affiliated or proprietary product when a third-party product would be expected to be better for the customer or client, or to limit products offered in a way that disadvantages some or all of a firm's customers or clients.

Several commenters expressed concern that the Proposal would inadvertently force the elimination of transaction-based compensation. One commenter urged the Division to ban commissions entirely. After careful consideration, the Division does not agree that such a course of action is necessary or appropriate. The duty of loyalty does not prohibit the payment or receipt of transaction-based compensation. However, this form of compensation creates a conflict that must be addressed and managed in accordance with the Proposal. The Division believes that the framework of the Proposal is sufficient to address the inherent conflict resulting from the existence of transaction-based compensation.

E. Continued Application of the Suitability Standard

In addition to the fiduciary conduct standard defined in 950 CMR 12.207, the Proposal includes amendments to its existing regulations at 950 CMR 12.204 and 950 CMR 12.205. These modifications are intended to emphasize the primacy of the fiduciary duty over the existing suitability standard, while maintaining suitability as an enforceable standard for those relationships and transactions that are expressly excluded from 950 CMR 12.207. These excluded relationships and transactions include advice and recommendations by those acting as ERISA fiduciaries, as well as recommendations and advice provided to those sophisticated institutional investors excluded from the definition of "customer" and "client."

COMMENT SUBMISSION PROCESS

The Division should receive written comments on the proposed amended regulations no later than **Tuesday, January 7, 2020 at 5:00 p.m.**

We will post comments on the Massachusetts Securities Division website and comments are subject to public records laws. We do not edit personal identifying information from submissions; submit only information that you wish to make available publicly.

Submission via Mail

Please mail any comments on the proposed amendments to:

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

Submission via Facsimile

Faxed comments may be sent to (617) 248-0177. Comments sent via facsimile should include a cover sheet to the attention of "Proposed Regulations."

Submission via Email

Email comments or submissions of scanned comment letters attached to an email may be submitted to securitiesregs-comments@sec.state.ma.us.

If you have questions about the proposed amendments, you may contact the Division at (617) 727-3548.

PUBLIC HEARING

A public hearing on the proposed amendments will be held at **9:30 a.m. on Tuesday, January 7, 2020** at John W. McCormack Building, One Ashburton Place, Ashburton Cafe Conference Room, Plaza Level, Boston, MA 02108.

Interested parties will be afforded a brief, allocated period in which to orally present data, views, and arguments relative to the proposed action. Priority will be given to those who register with the Division in advance. Interested parties can register by emailing securitiesregs-comments@sec.state.ma.us.

Written presentations may be made at the hearing or submitted at any time prior to the close of business on **Tuesday, January 7, 2020** to the Massachusetts Securities Division via mail, facsimile, or email, as provided above. Copies of the proposed amendments are available on the Division's website at http://www.sec.state.ma.us/sct/sctidx.htm, or by calling (617) 727-3548 or emailing MSD@sec.state.ma.us.