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July 26, 2019

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: IRI Comments on Massachusetts' Preliminary Fiduciary Proposal (950 CMR 12.204-207)

Dear Secretary Galvin:

On behalf of our members, the Insured Retirement Institute ("IRI")[1] appreciates the opportunity to provide comments to the Massachusetts Division of Securities (the "Division") on the Division's proposal to impose a fiduciary duty on broker-dealers, agents, investment advisers, and investment adviser representatives through proposed amendments to 950 CMR 12.204-205 and the proposed adoption of new rule section 950 CMR 12.207 (collectively, the "Proposal").

IRI and our members commend the Division for recognizing the need for appropriate standards of conduct and rules for financial professionals who work with Massachusetts investors. IRI and our members have long supported the creation of a workable best interest standard for financial professionals. However, in light of significant recent developments regarding the standard of conduct applicable to financial professionals (discussed in detail below), we believe the Division should delay final action with respect to the Proposal. If, despite these developments, the Division nonetheless

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[1] IRI is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, and distributors such as broker-dealers, banks and marketing organizations. IRI members account for more than 95 percent of annuity assets in the U.S., include the top 10 distributors of annuities ranked by assets under management, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

decides to move forward at this time with the Proposal, we have provided below several specific recommended modifications for the Division to consider.

I. The Division Should Delay Action on the Proposal Unless and Until It Determines Whether the Newly Adopted SEC Regulation Best Interest and Form CRS Leave Any Actual Gaps in Investor Protection.

The Proposal is part of a much larger debate involving Congress and numerous regulatory agencies with differing jurisdictions, including the U.S. Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA"), and the U.S. Department of Labor ("DOL") at the federal level, as well as the North American Securities Administrators Association ("NASAA"), the National Association of Insurance Commissioners ("NAIC"), and the individual state securities and insurance departments.

Just last month, the SEC finalized new rules to establish a best interest standard for federally-registered broker-dealers and registered representatives ("BDs") under the federal securities laws (collectively, the "Final SEC Rules").[2] Regulation Best Interest ("Reg BI") represents a substantial strengthening of investor protection compared to existing law in a manner that is consistent with the principle that financial professionals should be required to act in their clients' best interest when providing personalized investment advice, while also preserving investor choice and access to the products and services they need to achieve their financial goals. SEC Chairman Jay Clayton characterized the new rule as a more stringent and robust regulatory regime that imposes considerable new requirements on financial professionals and firms.

We also note that the NAIC has been working to develop enhancements to its Suitability in Annuity Transactions Model Regulation (the "NAIC Model") for more than a year, and has been moving on parallel tracks with the SEC to develop modifications that are compatible and consistent with the Final SEC Rules. We have actively participated in the NAIC's work on this effort, and we are confident that the NAIC will soon be in a position to finalize an enhanced NAIC Model that, when viewed in conjunction with the Final SEC Rules, will ensure that all consumers will enjoy the benefits of a robust and effective best interest standard for all securities and insurance professionals.

However, a small number of individual states have taken steps to create their own best interest or fiduciary rules. These state proposals would create a patchwork of inconsistent, conflicting, or duplicative rules that would significantly impair investors' access to valuable financial products and professional assistance about whether, when, and how to use those products. We fear that the adoption of the Proposal would make it more difficult for IRI members and others in the financial services industry to continue doing business in Massachusetts. Economic realities could drive firms to charge more for services, increase minimum account size thresholds, significantly scale back the products and services offered, or potentially even discontinue operating in Massachusetts if the cost of doing business becomes prohibitive. If this comes to pass, many citizens of Massachusetts will ultimately lose access to

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[2] Regulation Best Interest, Exchange Act Release No. 34-86031 (June 5, 2019) ("Reg BI Adopting Release"); Form CRS Relationship Summary; Amendments to Form ADV, Exchange Act Release No. 34-86032, Investment Advisers Act Release No. 5247 (June 5, 2019); Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, Investment Advisers Act Release No. 5249 (June 5, 2019); and Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019).

the wide variety of products and services available to other Americans to help them achieve their financial goals. Clearly, this is not the Division's intent, but we fear it will be the likely outcome if the Division adopts the Proposal.

Unlike the now-vacated DOL Rule[3], the Final SEC Rules recognize and seek to preserve the important and valuable distinctions between different types of financial professionals. BDs simply have different relationships with their clients than investment advisers ("IAs"), and, as such, investors have different expectations depending on whether they are working with a BD or an IA. The principles-based framework embodied in the Final SEC Rules will help investors understand the differences between BDs and IAs, thereby enabling them to make informed decisions about the type of financial professional that would best meet their needs.

In our view, the Proposal is inconsistent and incompatible with the Final SEC Rules. The SEC explicitly considered a number of alternative approaches, weighing the costs and benefits of each alternative. In fact, the SEC considered imposing a fiduciary standard on BDs akin to the approach taken by the Division but declined to embrace it. The adopting release for Reg BI clearly explains that, while a uniform fiduciary standard would produce greater consistency between BDs and IAs, it would have an adverse impact on investor choice, cost, and investor access in the market for financial advice. To avoid this result, the Final SEC Rules aim to maintain the substantive differences between the brokerage and advisory business models.

For the Division to create a separate regulatory structure that destroys the distinction between brokerage and advisory services is, at its best, misguided, and at worst, contrary to and incompatible with the Final SEC Rules. The Division's Proposal is antithetical to the SEC's approach and rejects the policy decision made at the SEC to protect the distinction between BDs and IAs to promote investor choice, contain cost, and ensure investor access to financial advice.

By rejecting the SEC's approach, the Division threatens to create a regulatory labyrinth. BDs will not only have to comply with the Final SEC Rules but also the Division's more expansive and inconsistent rules (as well as any laws or rules that may be promulgated in other states where they may have clients). The Proposal fails to address how this layered regulatory system would impact investor access to financial advice.

The Proposal includes predictions and conclusory statements as to the effectiveness of the SEC's effort in providing adequate investor protections and asserts that a fiduciary duty on BDs is necessary to protect investors against abuse. With the adoption of the Final SEC Rules, the Division can now assess the effectiveness in the real world – and how the Proposal would fit within the broader tapestry of regulations governing the conduct of financial professionals – before deciding whether and how to proceed.

[3] As used in this letter, the term "DOL Rule" means, collectively, the final regulation defining the term "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended, the Best Interest Contract Exemption, and the amendments to prohibited transaction exemption 84-24, each of which was issued by the DOL on April 8, 2016 and vacated *in toto* by the United States Circuit Court of Appeals for the Fifth Circuit on March 15, 2018.

We respectfully urge the Division to take advantage of the opportunity to see how well the Final SEC Rules will actually address your concerns before moving forward with regulatory action.

II. *If the Division Moves Ahead with the Proposal Despite the Recent Adoption of the Final SEC Rules, Several Important Changes Are Necessary to Minimize Unintended Investor Harm.*[4]

In the event the Division does not wait to adopt the Proposal until Reg BI has been in effect long enough to assess its effectiveness, we offer the following comments to help the Division craft a more workable rule that will have less adverse impact on Massachusetts investors. To be clear, however, even if the Division were to accept all the changes recommended below, we would still have significant concern about the creation of a patchwork of inconsistent and incompatible regulations.

A. *The Duty of Loyalty Formulation Creates an Impossible Standard and Should be Revised to Follow the Approach Taken in the Final SEC Rules.*

The Division's formulation of the duty of loyalty is among the most problematic and unworkable aspects of the Proposal.

First, section 12.207(c)(2) of the Proposal would require BDs to make recommendations "without regard to the financial or any other interest of the broker-dealer, agent, adviser, any affiliated or related entity and its officers, directors, agents, employees, or contractors, or any other third-party."

The "without regard to" language, which is drawn directly from the DOL Rule, appears to require a complete disregard of any financial interest of the fiduciary and its affiliates. In reality, and as we and numerous other commenters explained to the DOL, this formulation wholly ignores the business and economic reality that advisers and annuity providers must generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business.[5]

We do not believe the Division intended to require BDs to completely disregard their own business interests. Rather, we believe the Division's intent – consistent with that of the SEC in adopting Regulation BI[6] – was to require that the investor's interests are always considered first and foremost. Accordingly, we respectfully urge the Division to modify the Proposal to more clearly reflect this intent by aligning with the approach taken in the Reg BI.

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[4] The only way to fully avoid the unintended consequence of harming investors would be to delay finalization of the Proposal for the reasons outlined above. IRI's recommendations, as described in this section, are important and helpful but can only go so far to minimize the harm to investors.

[5] Reg BI Adopting Release, at 49-51 (describing comments received in support of and in opposition to the use of the "without regard to " phrasing), and at 62-67 (expressing the SEC's concern that the "without regard to" phrasing "would be inappropriately construed to require a broker-dealer to eliminate all of its conflicts when making a recommendation (i.e., require recommendations that are conflict free), which we believe could ultimately harm retail investors by reducing their access to differing types of investment services and products and by increasing their costs;" and explaining the decision to instead use the "without placing the financial or other interest…ahead of the interest of the retail customer" phrasing, which " recognizes that while a broker-dealer will inevitably have some financial interest in a recommendation—the nature and magnitude of which will vary—the broker-dealer's interests cannot be placed ahead of the retail customer's interest.")

[6] Id.

Moreover, based on the discussion of this issue in the Reg BI Adopting Release, the use of the "without regard to" phrasing in the Proposal would be in direct conflict with Reg BI, thereby increasing the likelihood that the Division's rule would be preempted (as discussed and explained in greater detail below).

Specifically, we recommend that the Division replace the language of section 12.207(c)(2) "without regard to the financial or any other interest of the broker-dealer, agent, adviser, any affiliated or related entity and its officers, directors, agents, employees, or contractors, or any other third-party" with the following language:

> "without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer."

Second, the presumption that BD compensation violates the duty of loyalty unless the BD can demonstrate that their recommendation is the "best of the reasonably available options" (as well as the related requirement that a transaction-based fee is the "best of the reasonably available fee options") is, perhaps, even more troubling. It is simply unclear whether the "best of the reasonably available options" means the cheapest option, or the most risk averse option, or if compliance with this standard will be judged based on other qualitative information.[7]

This approach fails to provide clear and meaningful guidance to help BDs satisfy the duty of loyalty and exposes them to significant litigation risk. Further, this approach presumes that there is a single right answer in all cases that all financial professionals should identify. This is simply not reality. In fact, in its recommendations regarding Reg BI, the SEC Investor Advisory Committee's Investor as Purchaser Subcommittee (chaired by Barbara Roper of the Consumer Federation of America) acknowledged this, observing that "there will often not be a single best option and that more than one of the available options may satisfy this standard," and stating that "compliance should be measured based on whether the broker or adviser had a reasonable basis for the recommendation at the time it was made, and not on how the recommendation ultimately performed for the investor…"

A multitude of relevant factors and variables (including the different features and benefits of different products, the obligation to seek best execution, limitations on the universe of products reasonably available to the BD,[8] and, of course, the individual client's financial situation, needs and objectives) can – and should – impact the decision-making process when a BD selects particular products to recommend to their clients, and reasonable minds can reach different conclusions based on those factors and

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[7] *See, e.g.,* Reg BI Adopting Release, at 283 (noting that the applicable standard would not be satisfied "by simply recommending the least expensive or least remunerative security without any further analysis of these other factors and the retail customer's investment profile" but could be satisfied by recommending "a more expensive security or investment strategy if…other factors…reasonably allow the broker-dealer to believe it is in the best interest of the retail customer, based on that retail customer's investment profile.")

[8] See Section II.D below for further discussion of the need for clarity as to the permissibility of BDs offering a limited range of products.

variables.[9] In fact, the only way to identify the "best of the reasonably available options" with any degree of certainty is with the benefit of hindsight (and even with hindsight, reasonable minds could have different views on which option would have been "best"). Attempting to regulate BD conduct in this way creates an impossible standard that, at best, will limit consumer choice and access, and at worst, will drive even the most ethical and honest financial professionals to seek alternative careers, leaving investors to fend for themselves.

For these reasons, Reg BI makes clear that "broker-dealer[s] 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."[10] Instead, Reg BI will require BDs to "consider reasonably available alternatives offered by the broker-dealer."[11] We respectfully urge the Division to eliminate the "best of" requirements from the Proposal and instead follow the same approach as the SEC, focusing on ensuring that BDs follow appropriate processes and consider only appropriate factors when deciding which product to recommend to his or her client.

Third, the duty of loyalty requirement in section 12.207(c)(2) that a broker-dealer, agent or adviser avoid conflicts of interest is unfeasible. The requirement is not limited in any manner and is not defined anywhere in the Proposal. Even with a definition, it will not be possible to avoid all conflicts.

Recognizing that one of the main objectives of imposing a duty of loyalty is to ensure that a BD's conflicts of interest do not result in investors getting recommendations that are not in their best interest, we would also encourage the Division to incorporate Reg BI's conflict of interest obligations, which require BDs to establish, maintain, and enforce "written policies and procedures reasonably designed to:

(A) Identify and at a minimum disclose…or eliminate, all conflicts of interest associated with recommendations;

(B) Identify and mitigate any conflicts of interest associated with such recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;

(C) (i) Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, in accordance with subparagraph (a)(2)(i), and

(ii) Prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make

[9] *See, e.g.,* Reg BI Adopting Release, at 282-283 ("[D]etermining what is in a retail customer's best interest is an objective evaluation turning on the facts and circumstances of the particular recommendation and the particular retail customer at the time the recommendation is made.")
[10] Id.
[11] Id, at 283 ("It is our view that such a consideration is an inherent aspect of making a "best interest" recommendation, and is a key enhancement over existing broker-dealer suitability.")

recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and

(D) Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time."

This is a far more workable and appropriate way to protect investors against potential harm from conflicts, and we believe the Division should take the same approach.

B. *The Ongoing Fiduciary Duty Language of § 12.207(b)(1)(ii) Would Prevent an Investor from Obtaining Both Brokerage and Advisory Services from their Preferred Financial Professional.*

Under the Proposal (§ 12.207(b)(1)(i)), a BD has a fiduciary duty to his or her client with respect to "a standalone recommendation" but that duty is extinguished when the recommended transaction is executed. However, if the BD makes an "on-going recommendation or provides investment advice…or receives ongoing compensation in connection with the recommendation or advice, the fiduciary obligation is deemed ongoing."

This construct will ultimately have a serious unintended adverse impact on investors' ability to work with their preferred financial professional in ways that best fit their needs and objectives.

The SEC has clearly recognized that brokerage services and advisory services separately offer valuable benefits to investors, and that investors should have the ability to decide which type of services they would prefer. Moreover, the SEC has also acknowledged that many investors are best served by brokerage services for some of their assets and advisory services for other assets. By crafting the Proposal to effectively prohibit "hat-switching," the Proposal is in direct conflict with the federal securities laws, which expressly authorize and permit dual registrants to "switch hats" as necessary to serve their customers, and with Reg BI, which implicitly recognizes that BDs are not required to provide ongoing monitoring by requiring disclosure of such limitations on the scope of services they offer.[12]

This is exemplified by the omission of clear definitions of "ongoing recommendation," "ongoing compensation," and "investment advice" in the Proposal leaving BDs with significant uncertainty as to when they would become subject to an ongoing fiduciary duty. Importantly, BDs need to understand the extent to which they can offer advice that is incidental to their brokerage services without triggering ongoing obligations. Similarly, we believe the Division should clearly distinguish general financial education from "investment advice."[13]

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[12] 17 CFR 240.15l-1(a)(2)(i)(A)(3) (2019).

[13] In fact, this is one area in which the DOL Rule, Reg BI, and New York's recently adopted best interest rule are aligned. We respectfully urge the Division to consider incorporating the approach taken in any of these regulations to address this concern. As an example, New York Insurance Regulation 187 states:

> "A recommendation does not include general factual information to consumers, such as advertisements, marketing materials, general education information regarding insurance or other financial products and general administrative services to the consumer. A recommendation also does not include use of an interactive tool that solely provides a prospective consumer with the means to estimate insurance, future income, or other financial needs or compare different types of products. . . ."

The Proposal also ignores the fact that, when an investor purchases a security in a brokerage account, they are choosing to potentially pay a lower cost for the advice because BDs cannot charge for ongoing advice.[14] If an investor wants ongoing monitoring, he or she has the option to work with an IA in an advisory account. By requiring BDs to have ongoing fiduciary obligations for 'investment advice', the Division is creating a regime that forces all BD investment advice to an RIA model. This is a fundamental disruption to current business models and in direct contradiction to federal securities law and regulation.

Furthermore, the Division has failed to account for the practical challenges posed by imposing an ongoing fiduciary duty on BDs. While dual-registrants are set up to manage their obligations on a transactional basis when operating as BDs as well as the ongoing obligations that apply when they are acting as an IA, firms that are registered only as BDs simply do not have the policies, procedures, systems, or tools needed to effectively provide ongoing services, nor do they price their services in a manner that reflects ongoing duties. For many of these firms, the risk of becoming subject to unintended ongoing fiduciary obligations would be an existential threat.

Moreover, even for dual registrants, significant time and resources would be needed to adapt and apply to their brokerage businesses the policies, procedures, systems, and tools used by their advisory businesses to perform and supervise ongoing monitoring. Despite the fact that a dual registrants' brokerage and advisory businesses are part of the same organization, the different business units have their own unique structural and supervisory processes and procedures that cannot simply be copied and pasted from one unit to the other.

As such, we respectfully urge the Division to revise the Proposal to a include clear definition of "investment advice" consistent with the definition and SEC's interpretation of that term under the Investment Advisers Act, as well as definitions of "ongoing recommendation," "ongoing compensation," and "investment advice." IRI also recommends the establishment of appropriate and workable parameters under which a financial professional could shift between brokerage and advisory services to meet the needs and objectives of their clients.

C. *The Information Gathering Aspect of the Duty of Care is Ill-Defined and Overbroad and Should Be Revised to Align with the Comprehensive List of Relevant Factors Included in FINRA's Suitability Rule (the Retail Customer's Investment Profile).*

The Proposal's duty of care, section 12.207(c)(1), would require BDs "to use the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use taking into consideration all of the facts and circumstances." Among other things, this would include an obligation to make reasonable inquiry into the "risks, costs, and conflicts of interest related to the recommendation or investment advice, and the customer's investment objectives, financial situation, and needs, and any other relevant information."

[14] SEC Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Advisoer, 17 CFR Part 276, Release No. IA-5249, available at https://www.sec.gov/rules/interp/2019/ia-5249.pdf.

The open-ended language in this provision fails to put meaningful boundaries on the types of factors a financial professional must assess when making a recommendation. In particular, the requirement to consider "all of the facts and circumstances," which may include "any other relevant information," would require BDs to consider an infinite number of criteria before making a recommendation. Such a requirement is unreasonable. This sort of open-ended, ill-defined requirement would make it nearly impossible for BDs to know with any degree of certainty that they are acting in compliance with the rule.

Moreover, this approach disregards the fact that BDs currently have practices in place to collect the information required to be taken into consideration under FINRA Rule 2111 (the "Retail Customer's Profile Information"). If the Division believes any particular types of information should be collected and taken into consideration beyond the Retail Customer's Profile Information, it should expressly identify such information. Otherwise, this provision is simply an invitation for unscrupulous plaintiffs' lawyers to allege violations based on failures to collect and consider relatively insignificant information that could be even tangentially relevant to the recommendation. To protect themselves against such claims, firms would be forced to vastly expand the universe of information they currently collect. This additional information would frequently have no bearing on the recommendation and therefore would provide no meaningful benefit to the investor, while simultaneously making the process more time-consuming and costly for the firm and the investor.

To avoid this outcome, IRI urges the Division to eliminate the catch-all phrases "all of the facts and circumstances" and "any other relevant information" and instead provide either safe harbor or a rebuttable presumption that a BD would satisfy the information gathering requirements under the Proposal by collecting the Retail Customer's Profile Information as required under FINRA Rule 2111. Incorporating existing FINRA rules into the Proposal would be consistent with the Final SEC Rules[15] and will help achieve greater regulatory harmony. In turn, regulatory harmony will mitigate the potential administrative and compliance costs on BD firms and help them maintain their current product and service offerings within Massachusetts.

D. *The Proposal Fails to Address the Permissibility of Common Brokerage Activities and Should Be Revised to Expressly Clarify that Such Activities are Not Inconsistent with the Fiduciary Duty.*

IRI is very troubled by the omission of important topics from the Proposal. Certain common brokerage activities and practices, such as principal trading, sales of affiliated or proprietary products, and limited product shelves, are left in limbo under the Proposal. Both Congress in the Dodd-Frank Act[16] and the SEC in the Reg BI Adopting Release, explicitly state that such activities are not inherently inconsistent with a fiduciary and/or best interest standard.

When viewed in conjunction with the requirement that BDs act "without regard to" their own financial interests and the provision that disclosure cannot satisfy the duty of loyalty, the lack of clarity as to the

[15] 17 CFR 240.15l-1(a)(2)(ii)(B) (2019).

[16] Dodd-Frank Act, § 913, available at http://www.dodd-frank-act.us/Dodd_Frank_Act_Text_Section_913.html

permissibility of such activities raises significant concerns and uncertainty about whether firms that engage in such practices would be in violation of the fiduciary duty.

These types of transactions are not only critical to the operation of our securities markets but also represent a clear benefit to retail investors. For example, principal transactions provide investors with brokerage accounts the opportunity to purchase municipal bonds issued by Massachusetts and its municipalities, and to buy and sell initial public offering (IPO) shares where the BD was part of the underwriting syndicate. Of equal importance is the investor's ability to sell products such as structured notes back to the BD, thereby facilitating liquidity.[17] Similarly, BDs that offer only proprietary products or a limited range of products provide consumers with invaluable and irreplaceable sources of knowledge about those products and how they can be used to achieve particular financial goals.

Accordingly, we recommend that the Proposal be amended to explicitly acknowledge that recommendations of principal transactions, affiliated or proprietary products, or from a limited product shelf do not presumptively breach the proposed fiduciary duty. Absent such clarification, BDs may seek to limit their risk by curtailing or even ceasing these beneficial investor offerings to Massachusetts residents.

E. *A Pattern or Practice of Fiduciary Breaches Should be Required to Demonstrate that a BD has Engaged in "Dishonest or Unethical Business Practices."*

While we share the Division's desire to ensure that investors are adequately protected and that bad actors are appropriately punished, we are concerned about the lack of specificity in section 12:207 including the "non-exhaustive list" language lacks guidance and would leave financial professionals open to excessive private right of action suits. Additionally, unfair trade practices laws and rules in place throughout the country generally require evidence of a pattern or practice of bad behavior before imposing penalties. For these reasons, we respectfully urge the Division to revise section 12.207 as follows:

> (b) The following practices ~~are a non-exhaustive list of practices~~ by a broker-dealer, agent, or adviser ~~which~~ shall be deemed "dishonest or unethical conduct or practices in the securities business" for purposes of MGL c. 110A § 204(a)(2)(G):
>
> (1) Engaging in a pattern or practice of failing to act in accordance with a fiduciary duty ~~to a customer or client~~ 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.

In addition, we respectfully encourage the Division to make clear that the Proposal is not intended to create any new private rights of action.

F. *The Proposal Should Expressly State that it Does Not Apply to Annuities.*

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[17] Notably, even the DOL Rule recognized the importance of maintaining the availability of principal transactions. *See, e.g.,* Proposed Principal Transactions Prohibited Transaction Exemption, available at https://content.next.westlaw.com/Document/I4a2c375ce85611e498db8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1.

Annuities are the only products available in the private market that can provide retirees and pre-retirees with a guaranteed source of income to ensure they can enjoy a financially secure and dignified retirement. Only insurance companies and their distribution partners can provide these products. Boomers who own insured retirement products, including all types of annuities, have a higher confidence in their overall retirement expectations, with nine out of 10 believing they are doing a good job preparing financially for retirement.

Compared to non-annuity owners, Baby Boomers who own annuities are more likely – by more than a two-to-one ratio –to be among those who are most confident in living comfortably throughout all their retirement years. Baby Boomer annuity owners also are more likely to engage in positive retirement planning behaviors than Baby Boomer non-annuity owners, with 68 percent having calculated a retirement goal and 63 percent having consulted with a financial adviser.

Annuities appeal to Americans of all income levels and consumers who do not have access to other retirement savings vehicles. In fact, annuity owners are overwhelmingly middle-income. Seven in 10 annuity owners have annual household incomes of less than $100,000.

The Massachusetts Uniform Securities Act (the "Act"), 110A MGL 401(k), excludes insured products, including annuity contracts, from securities regulations. The Act states 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."

Further, section 110A MGL 402(5), provides an exemption for "[a]ny security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized under the laws of any state and authorized to do business in this State" from certain requirements of the Act.

Annuities are already subject to extensive regulation by the Massachusetts Division of Insurance[18], the SEC, and FINRA. An additional layer of state regulation is unnecessary and would create redundant and potentially conflicting standards.

For these reasons, we respectfully urge the Bureau to include language in the Proposal that clearly and expressly excludes annuities.

G. *The Proposal Should Not Apply to Entities That Are Already Subject to Fiduciary Obligations Under Existing Law.*

We note that 12.207(e) excludes from the Proposal persons "acting in the capacity of a fiduciary to an employee benefit plan…as those terms are defined in the Employee Retirement Income Security Act (ERISA)…" This implies that a person with a fiduciary responsibility to others is subject to, and implicitly must be familiar with, a standard of care comparable to the Proposal. In that regard, any retirement plan fiduciary should have a general sophistication under law to not be considered a "customer" under the Proposal. We believe excluding retirement plan fiduciaries is consistent with the list of entities identified in 12.207(d) in that a majority of those listed entities are already fiduciaries under other regulatory regimes (i.e., RIAs, banks) or are otherwise considered sophisticated persons (institutional

[18] *See* Consumer Protection and Suitability in Annuity Transactions, 211 CMR 96.00, available at https://www.mass.gov/files/documents/2017/10/20/211cmr96.pdf.

buyers, as defined in 950 CMR 12.205(1)(a)6). We note this position is consistent with Reg BI which generally excludes plan representatives (plan sponsors; trustees; other fiduciaries) from the definition of "retail customer" under the regulation.[19]

As such, we respectfully urge the Division to add an additional subsection to 12.207(d) as follows:

> "5. Any person otherwise charged with being a fiduciary to a retirement plan."

H. *The Proposal Fails to Effectively Avoid Federal Preemption.*

We believe federal law preempts Massachusetts's authority to adopt the Proposal. As explained above, the Proposal would undermine the SEC's attempt to create a federal standard for broker-dealers to follow when making personalized investment recommendations to retail customers. Allowing each state to promulgate separate and potentially inconsistent standards for broker-dealers would create a patchwork regulatory structure that would be detrimental to investors and to the industry. While BDs could theoretically attempt to comply with multiple state-specific standards by following the strictest applicable rules, the reality is that state-specific standards are highly likely to differ from each other – and from Reg BI – in significant and incompatible ways. This outcome would fundamentally prevent the SEC from achieving its regulatory purpose in adopting Reg BI.

Moreover, the Proposal is contrary to the delicate balance Congress sought to achieve in enacting the National Security Markets Improvement Act (NSMIA).[20] Specifically, the Proposal would inherently require the creation of new books and records that go beyond the current requirements imposed under federal law. The states are prohibited from imposing such additional recordkeeping requirements under NSMIA, and as we and numerous other commenters have explained throughout the rulemaking process, the imposition of a fiduciary duty, by its nature, would inherently require BDs to create new books and records. Simply asserting that no such requirements are expressly imposed is not dispositive.

In addition, ERISA expressly preempts any state law or rule that purports to regulate 401(k) plans and other retirement plans covered by ERISA. While the Proposal expressly states that it will not apply to anyone acting as a fiduciary as defined under ERISA, it would still appear to apply to BDs working with ERISA plans who do not fall within the definition of fiduciary under ERISA. We believe this is inconsistent with, and prohibited by, ERISA's preemption provision.[21]

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[19] Reg BI Adopting Release, at 117.

[20] National Security Markets Improvement Act, Public Law 104-290, Oct. 11, 1996, available at https://www.congress.gov/104/plaws/publ290/PLAW-104publ290.pdf.

[21] We note, however, that the NAIC has included the following language in several model laws and regulations to avoid running afoul of ERISA preemption, and we respectfully urge the Division to consider the same approach:

> "This regulation shall not apply to transactions involving…contracts used to fund:
> (1) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);
> (2) A plan described by sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code (IRC), as amended, if established or maintained by an employer;
> (3) A government or church plan defined in section 414 of the IRC, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under section 457 of the IRC; [or]

I. *<u>A Final Rule Must Provide Sufficient Time to Develop and Implement the Policies, Procedures, and Systems Changes Necessary to Achieve Compliance.</u>*

The requirements and conditions included in the Proposal are complex and would require significant information technology re-design and build outs to support. Many institutions will be unable to achieve compliance and would have to suspend the delivery of services to customers if an insufficient implementation period is provided. Thus, IRI respectfully urges the Division to allow an implementation time frame of at least eighteen months to avoid the unnecessary market disruptions that would inevitably result from a shorter implementation period.

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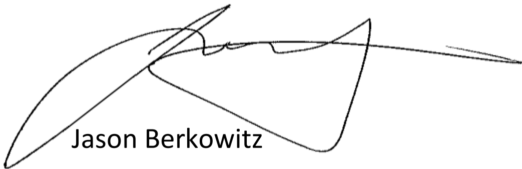
Thank you again for the opportunity to share our views on this important subject. If you have questions about anything in this letter, or if we can be of any further assistance in connection with this important regulatory effort, please contact me.

Sincerely,



Jason Berkowitz
Chief Legal & Regulatory Affairs Officer
Insured Retirement Institute (IRI)

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(4) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor."