

Comparison of Massachusetts Proposed Regulations for a state fiduciary conduct (released in November 2019, published in the Massachusetts Register in December 2019) and the Final Regulations (released February 2020, expected publication March 6, 2020). Rule text from MA Securities Division website.

(Note: changes begin on page 2 of this document)

12.204: Denial, Revocation, Suspension, Cancellation and Withdrawal of Registration

(1) Dishonest and Unethical Practices in the Securities Business.

(a) Broker-dealers. Each broker-dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business. Acts and practices, including, but not limited to the following, are considered contrary to such standards and constitute dishonest or unethical practices which are grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration, or such other appropriate action:

...

4. Except as provided in 950 CMR 12.207, recommending to a customer an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

...

29. Failing to act in accordance with the duties and standards described in 950 CMR 12.207.

(b) Agents. Each agent shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of his or her business. Acts and practices, including, but not limited to, the following, are considered contrary to such standards and constitute dishonest or unethical practices in the securities industry and are thereby grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration or such other action as is appropriate:

...

8. Engaging in conduct specified in 950 CMR 12.204(1)(a)1., 2., 3., 4., 5., 6., 10., 11., 12., 13., 18., 19., 22., 23., 27., 28., or 29.

~~12.205: Investment Advisers and Federal Covered Advisers~~

...

~~(9) Fraudulent Practices/Dishonest or Unethical Practices:~~

...

~~(c) The following practices are a non-exclusive list of practices by an adviser which shall be deemed "dishonest or unethical conduct or practices in the securities business" for purposes of M.G.L. c. 110A, § 204(a)(2)(G):~~

~~1. Except as provided in 950 CMR 12.207, recommending to a client to whom investment supervisory, management or consulting services are provided an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale or exchange of any security without reasonable grounds to~~

~~believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's overall portfolio, investment objectives, financial situation and needs, investment experience and any other information known or acquired by the adviser after reasonable examination of the client's records as may be provided to the adviser.~~

950 CMR 12.207: Fiduciary Duty of Broker-Dealers; ~~and~~ Agents; ~~Investment Advisers, and Investment Adviser Representatives~~

(1) The following practices are a non-exclusive list of practices by a broker-dealer; or agent; ~~investment adviser, or investment adviser representative~~ which shall be deemed “unethical or dishonest conduct or practices” for purposes of M.G.L. c. 110A, § 204(a)(2)(G):

(a) 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; ~~commodity, or insurance product.~~

(b) Failing to act in accordance with a fiduciary duty to a customer ~~or client~~ during any period in which the broker-dealer or agent; ~~period in which the broker-dealer, agent, investment adviser, or investment adviser representative;~~

1. Has or exercises discretion in a customer's ~~or client's~~ account, unless the discretion relates solely to the time and/or price for the execution of the order;
2. Has a contractual fiduciary duty; or
3. Has a contractual obligation to monitor a customer's ~~or client's~~ account on a regular or periodic basis; as such regular or periodic basis is determined by agreement with the customer.

~~4. Receives ongoing compensation or charges ongoing fees for advising a customer or client, either directly or through publications or writings, as to value of securities or as to the advisability of investing in, purchasing, or selling securities, or providing the foregoing services as an integral component of other financially related services; or~~

~~5. Engages in any act, practice, or course of business that results in a customer or client having a reasonable expectation that the broker-dealer, agent, investment adviser, or investment adviser representative will monitor the customer's or client's account(s) or portfolio on a regular or periodic basis.~~

~~(c) The use of a title, purported credential, or professional designation containing any variant of the terms "adviser," "manager," "consultant," or "planner," in conjunction with any of the terms "financial," "investment," "wealth," "portfolio," or "retirement," or any terms of similar meaning or import, constitutes engaging in an act, practice, or course of business that results or would result in a customer or client having a reasonable expectation that the broker-dealer, agent, investment adviser, or investment adviser representative will monitor the customer's or client's account(s) or portfolio on a regular or periodic basis within the meaning of 950 CMR 12.207(1)(b)5., above.~~

(2) To meet the fiduciary duty, each broker-dealer; or agent; ~~investment adviser, or investment adviser representative~~ shall adhere to duties of utmost care and loyalty to the customer ~~or client~~.

(a) The duty of care requires a broker-dealer; or agent; ~~investment adviser, or 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 paragraph, a broker-dealer; or agent; ~~investment adviser, or investment adviser representative~~ shall make reasonable inquiry, including:

1. The risks, costs, and conflicts of interest related to all recommendations made and investment advice given;
2. The customer's ~~or client's~~ investment objectives, risk tolerance, financial situation, and needs; and
3. Any other relevant information.

(b) The duty of loyalty requires a broker-dealer; or agent; ~~investment adviser; or investment adviser representative~~ to:

1. Disclose all material conflicts of interest;
2. Make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot reasonably be avoided, and mitigate conflicts that cannot reasonably be avoided or eliminated; and
3. Make recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer ~~or client~~.

(c) Disclosing ~~or mitigating~~ conflicts alone does not meet or demonstrate the duty of loyalty.

(d) It shall be presumed to constitute a breach of the duty of loyalty for a broker-dealer; or agent; ~~investment adviser; or investment adviser representative~~ to recommend any investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security, ~~commodity; or insurance product;~~ if the recommendation is made in connection with any sales contest; ~~implied or express quota requirement; or other special incentive program.~~

(e) Notwithstanding the foregoing, investment advice or a recommendation regarding the purchase, sale, or exchange of any security in M.G.L. c. 110A, § 402(a)(1) to or for a customer shall be excluded from the scope of 950 CMR 12.207(2)(b).

(3) For purposes of 950 CMR 12.207, the ~~term~~term “customer” ~~and “client”~~ shall include current and prospective customers ~~and clients~~, but shall not include:

(a) A bank, savings and loan association, insurance company, trust company, or registered investment company;

(b) A broker-dealer registered with a state securities commission (or agency or office performing like functions);

(c) An investment adviser registered with the SEC under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or agency or office performing like functions); or

(d) Any other institutional buyer, as defined in 950 CMR 12.205(1)(a)6. and 950 CMR 14.401.

(4) Nothing in 950 CMR 12.207 shall be construed to apply to a person acting in the capacity of a fiduciary to an employee benefit plan, its participants, or its beneficiaries, as those terms are defined in the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*

(5) Nothing in 950 CMR 12.207 shall be construed to establish any requirements for capital, custody, margin, financial responsibility, making and keeping of records, bonding, or financial or operational reporting for any broker-dealer or agent that differ from, or are in addition to, the requirements established under 15 U.S.C. § 78o(i).

(6) 950 CMR 12.207 shall be enforced as of September 1, 2020.