

## Agenda

**CEFLI Compliance & Ethics Committee Meeting**  
**Wednesday, December 11, 2019**  
**2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT**  
**Dial In: (800) 239-9838**  
**Passcode: 3646069**

- I. Welcome and Introduction. Donald J. Walters**
  - A. Antitrust Statement.
- II. Approval of Minutes – November 13, 2019 Meeting. The Committee**
- III. Issues for Review. The Committee**
  - A. California Policy Form Filing Requirements - Questions Related to Citizenship/Residency.

In recent policy form filings with the California Department of Insurance, it has been reported that the Department raised objections to questions on application forms that sought information concerning the applicant's citizenship/residency.

It has been the recent position of the California Department of Insurance that questions related to citizenship/residency are considered discriminatory, and, therefore, cannot be asked legally under California Insurance Code §§ 10140 and 10142. Nevertheless, according to a policy form filing reviewer within the California Department of Insurance, life insurance companies are allowed to ask questions concerning whether the applicant is legally entitled to reside in the United States (i.e., whether the applicant is a legal resident of the United States).

A request seeking clarification of the application of the California Insurance Code sections noted above (as they relate to policy form filing documents) has been submitted to the General Counsel of the California Department of Insurance.

The request noted that life insurance companies maintain an interest in determining the citizenship/residency of applicants for life insurance and annuity products for identification purposes and also as a means to comply with other legal requirements such as the USA Patriot Act, Bank Secrecy Act and OFAC.

Therefore, a question has been presented to the Committee to determine whether other companies who may have filed policies recently for approval in California have received similar comments pertaining to application questions seeking information regarding an applicant's citizenship/residency.

***The Committee will be asked to discuss whether their companies have had any recent experience filing policy forms with the California Department of Insurance that raised concerns regarding application questions concerning an applicant's citizenship/residency. In addition, to the extent companies have received feedback from the California Department of Insurance related to application questions regarding citizenship/residency, companies will be asked to discuss whether they have modified their policy forms to comply with the feedback received from the California Department of Insurance.***

B. Conversions - Replacements.

The NAIC Life Insurance and Annuities Replacement Model Regulation offers exemptions from its requirements when a contractual change or a conversion privilege is being exercised.

The exemption to the requirements of the Model Regulation can be found under Section 1.B (4) which reads as follows:

*An application to the existing insurer that issues the existing policy or contract when a contractual change or a conversion privilege is being exercised; or, when the existing policy or contract is being replaced by the same insurer pursuant to a program filed with and approved by the Commissioner; or, when a term conversion privilege is exercised among corporate affiliates.*

A question has been presented concerning how companies may treat conversion applications. A few examples may help to illustrate these issues:

- If an existing policy lapses because a conversion privilege is being exercised (i.e., a new policy is issued), are companies considering these transactions as not constituting replacements?
- If an existing policy lapses because a conversion privilege is being exercised and a premium loan is made on a different existing policy that is being used to pay premium on the newly converted policy, are companies considering these transactions as replacements?

***The Committee will be asked to discuss their company's strategy with respect to whether the exercise of a conversion privilege constitutes a replacement transaction under their company's policies and procedures.***

C. Permitting Producers to Accept Applications via WebEx, Skype or Other Electronic Media.

As technology becomes more pervasive throughout the society, life insurance companies are exploring ways to allow their producers to accept life insurance and annuity product applications through the use of various electronic media such as WebEx, Skype or FaceTime. However, these evolving developments may present unique compliance concerns.

Examples of issues that may arise include:

- *Are there specific limitations on the types of technological platforms (e.g., WebEx, Skype, FaceTime, etc.) that a company may allow producers to use to meet with applicants to accept product applications?*
- *Must the producer be licensed in the jurisdiction in which the individual on the other end of the electronic platform is located or solely in the applicant state of residency?*
- *If a company permits producers to use technological platforms to meet with applicants to accept product applications, does the company keep an archive or record of the technological transaction? If so, why?*
- *To the extent your company may permit producers to use technological platforms to meet with applicants to accept product applications, what types of additional compliance concerns and/or considerations have been raised?*

***The Committee will be asked to discuss whether their companies permit producers to use technological platforms to meet with applicants to accept product applications and, if so, does the company keep an archival record of the technological transaction. In addition, are there any other additional compliance concerns and/or considerations companies should be aware of when considering whether to permit these types of activities.***

D. Use of CFP Designation by Advisers Who Sell Insurance Products.

During prior Committee meetings, the Committee discussed strategies companies may be pursuing with respect to the use of the Certified Financial Planner (“CFP”) Designation by advisers who may sell insurance products.

In one strategy, a company asked its advisors to drop their CFP designations if they were going to sell the company’s products. Our further discussion of this issue indicated that several companies were reviewing their current strategies in

light of recent changes by the Certified Financial Planner Board of Standards to expand their fiduciary standard applicable to CFP's.

In light of the evolving nature of this issue, we have been asked to revisit this question to determine the current status of compliance strategies associated with advisors who may hold the CFP designation and acting in a fiduciary capacity with respect to selling a life insurance company's products.

***The Committee will be asked to discuss company practices with respect to allowing/prohibiting insurance producers from using the CFP designation in the sale of a life insurance company's products.***

E. NYDFS Regulation 187 - Life Insurance Compliance - Key Issues and Decisions.

(As we move toward the February 1, 2020 effective date for compliance with the life insurance requirements of NYDFS Regulation 187, we will continue to include Regulation 187 issues on the Committee's agenda.)

Over the past several months, companies have been exploring various strategies to comply with the life insurance requirements of Regulation 187.

Among the issues companies have been examining include:

- *Whether to include additional questions on the life insurance policy application to gather information to conduct a best interest/suitability analysis?*
- *Whether to create a separate form to gather information to conduct a best interest/suitability analysis?*
- *Will an insurer's underwriting standards be considered as part of a suitability analysis for life insurance products?*
- *Where will the suitability analysis for life insurance products take place within a life insurance company (e.g., compliance, underwriting, etc.)?*

***The Committee will be asked to discuss any key issues and decisions they may be reviewing in order to meet the February 1, 2020 compliance date for life insurance products with respect to NYDFS Regulation 187.***

#### IV. Reporting Items.

CEFLI Staff.

A. Revisions to the NAIC Suitability in Annuity Transactions Model Regulation.

The NAIC met for its Fall National Meeting in Austin, Texas on December 6-10. (See separate agenda item below.)

During the Fall National Meeting, the NAIC Life Insurance and Annuities (A) Committee met to review comments submitted on the November 5 draft of proposed revisions to the NAIC Suitability in Annuity Transactions Model Regulation.

Following discussion of these comments, a revised version of the Model Regulation was issued by the NAIC (i.e., the 12/8/19 version). (See copy attached.)

***CEFLI Staff will provide a brief report concerning the proposed workplan for the NAIC Life Insurance and Annuities (A) Committee to finalize revisions to the NAIC Suitability in Annuity Transactions Model Regulation.***

B. NAIC Fall National Meeting.

The NAIC conducted its Fall National Meeting in Austin, Texas on December 6-10.

***CEFLI staff will provide a brief report concerning relevant highlights of the recent NAIC Fall National Meeting.***

C. Massachusetts - Proposed Fiduciary Rule.

Secretary of the Commonwealth of Massachusetts, William Galvin, is proposing a fiduciary standard of care applicable to broker-dealer representatives and investment advisers when offering recommendations to customers. (See copy attached.)

Mr. Galvin indicated that the fiduciary standard of care is being proposed because, in his view, the SEC's Regulation Best Interest fails to provide investors with the protections they need against conflicts of interest.

Massachusetts joins New Jersey and Nevada in pursuing fiduciary rules adding further complexity to the sales standards applicable to the sale of financial products.

**V. CEFLI Activities.**

A. 2019 CEFLI Summit Meeting - The Future of Sales Standards in the Life Insurance Industry - November 20-21, 2019 - Washington, DC.

CEFLI conducted its 2019 CEFLI Summit Meeting to explore *The Future of Sales Standards in the Life Insurance Industry* at the Fairmont Hotel in Washington, DC on November 20-21.

***CEFLI Staff will provide a brief report concerning the highlights of the Summit Meeting.***

- B. End of Year Webinar - Friday, December 20 - 1 PM EST/12 Noon CST/11 AM MST/10 AM PST.

CEFLI will be conducting the next webinar in its Educational Webinar Series on Friday, December 20 at 1 PM EST/12 Noon CST/11 AM MST/10 AM PST to examine the key compliance issues faced by the life insurance industry in 2019 with a view toward identifying anticipated compliance issues in 2020.

Faculty members for the webinar will include former Iowa Commissioner and NAIC President, Susan Voss; former Ohio Director Mary Jo Hudson and former Assistant Director of the Ohio Department of Insurance, Sue Stead.

We hope you will be able to join us!

**VI. Next Meeting.**

The next meeting of the Committee is scheduled to take place:

Wednesday, January 15, 2020 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST

Please mark your calendar and plan to join us!

The remaining Committee meeting dates for 2020 will be as follows:

Wednesday, February 12, 2020 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST  
Wednesday, March 18, 2020 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT  
Wednesday, April 15, 2020 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT  
Wednesday, May 13, 2020 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT  
Wednesday, June 17, 2020 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT  
Wednesday, July 22, 2020 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT  
Wednesday, August 19, 2020 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT  
Wednesday, September 16, 2020 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT  
Wednesday, October 14, 2020 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT  
Wednesday, November 11, 2020 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST  
Wednesday, December 16, 2020 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST

**VII. Other Business.**

***The Committee will be asked to identify and discuss any other business to be brought before the Committee.***

**DRAFT**

**Minutes  
Meeting of the  
CEFLI Compliance & Ethics Committee  
November 13, 2019  
2 PM EDT/1 PM CDT/11 AM PDT**

A meeting of the CEFLI Compliance & Ethics Committee (the "Committee") was held via conference call on Wednesday, November 13, 2019 at 2 PM EDT/1 PM CDT/11 AM PDT.

The following CEFLI member company representatives participated in the meeting:

Ro Adebisi, Thrivent Financial  
Molly Akin, Ohio National  
Marcie Allen, Texas Life Insurance Company  
Jenna Austin, Guggenheim  
Brendan Bakala, Catholic Order of Foresters  
Lauren Barbaruolo, Oxford Life Insurance  
Chad Batterson, Athene  
Deidre Beckley, Pacific Life  
Ann Binzer, Cincinnati Life  
Kate Blalock, Western & Southern  
Donna Brown, Lombard International  
Laura Bullard, Foresters Financial  
Nancy Campbell, Symetra  
Alayna Cook, MassMutual  
Steve Corbly, Cincinnati Life Insurance Co  
Jacquie Crader, Cuna Mutual Group  
Nicholas Criscitelli, Voya Financial  
John Cunningham, Fidelity  
Chad Eslinger, Voya  
Bruce Eschbach, Texas Life Insurance Company  
Jill Fiddler, Assurity Life Insurance  
Kris Fischer, Thrivent Financial  
Hether Fronk, Global Atlantic Financial Group  
Toba Fryer, John Hancock  
Rebecca Gacek, Global Atlantic Financial

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Patrick Garcy, Sagicor Life Insurance Co  
Teagan Garyson, Knights of Columbus  
Paula Gentry, Cincinnati Life  
Jim Golembiewski, Sagicor  
Rachel Gomez, State Farm  
Steve Harris, Lincoln Financial  
Lisa Holland, State Farm  
Michelle Holmes, Voya Financial  
Audrea Horrobin, Pacific Life  
Donna Hough, Sun Life  
Belinda Howard, Principal  
Emily Jordan, Amalgamated Life Insurance  
Martin Karp, Oxford Life Insurance  
De Keimach, Delaware Life  
Chris Kirby, Foresters Financial  
Jennifer Knabe, Ohio National  
Samantha Knackmuhs, State Farm  
Michele Kulish Danielson, American Enterprise  
Mark Lasswel, Riversource  
Brian Leary, Fidelity Investments  
Dan Leblanc, SBLI  
Susan Markey, USAA Life Insurance  
Ryan Meehan, Ameriprise  
Morgan Milner, Modern Woodmen of America  
Deb Naegele, Cincinnati Financial Corporation  
Mark Neidinger, NGL  
Liza Perry, USAA  
Megan Phillips, Principal  
Tony Poole, AAA Life  
Caitlin Posner, Foresters Financial  
Sandy Ray, Symetra  
Daniel Reinecke, Gerber Life Insurance  
Danielle Rempel, Securian Financial  
John Ricci, Amica Life Insurance  
Sally Roudebush, Lincoln Heritage Life Insurance Company  
Heather Russo, Illinois Mutual  
Ryan Schwoebel, Protective Life  
Leslie Smith, Southern Farm Bureau Life Insurance  
Alison Soderberg, Lombard International  
Lori Straight, Sammons Financial Group  
Jill Terry, Cincinnati Life Insurance Company  
Bill Turner, American Fidelity  
Catherine Valeri, Global Atlantic

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Michele Ward, Erie Family Life  
Jaime Waters, Equitrust Life Insurance  
Larry Welch, Citizens  
Kathy Wiggins, Voya Financial  
Emily Wilburn, Illinois Mutual

Donald Walters of CEFLI also participated in the meeting.

**I. Welcome and Introduction.**

The meeting began with a recitation of CEFLI's anti-trust statement.

**II. Approval of Minutes – October 30, 2019 Meeting.**

On motion, duly made and seconded and unanimously carried, the Committee: RESOLVED, that, the Minutes of the October 30, 2019 meeting are hereby approved.

**III. Issues for Review.**

A. Data Governance.

Data is playing an increasingly important role at life insurance companies. Accordingly, the Committee was asked to discuss several key issues associated with the broader question of data governance.

Specifically, the Committee was asked to describe their company's data governance practices, as applicable, and their initiatives designed to confirm compliance with the California Consumer Privacy Act and the NAIC's Insurance Data Security Model Law.

Several Committee members indicated that issues associated with privacy are reviewed as part of a legal department responsibility with appropriate liaisons between the legal department and various business units. In other companies, data governance is considered an information technology issue and is managed through the company's information technology department.

The discussion also confirmed that, as part of data governance initiatives, companies are exploring their records retention and management systems. As a result, they are building into their current data governance procedures appropriate controls so that data can be deleted in a timely manner, as appropriate.

Other companies maintain a separate privacy office that manages enterprise-wide privacy initiatives and compliance is often a stakeholder as part of that process.

Companies are also taking steps to prepare for the January 1, 2020 effective date of the California Consumer Privacy Act. In preparation for these requirements, several companies indicated that they are conducting a data inventory or data mapping project to identify the current data used by the company so appropriate procedures and controls can be established to govern the use of the data consistent with the requirements of the California Consumer Privacy Act as well as the NAIC's Insurance Data Security Model Law (as it is adopted by various states).

Still, in other cases, Committee members indicated that compliance "owns" privacy initiatives on behalf of the entire company.

#### B. Annuity Withdrawals to Purchase Life Insurance.

Annuity products offered by life insurance companies often will permit contract holders to take withdrawals from their annuities. In some instances, these withdrawals have been used to purchase life insurance policies offered by the same life insurance company.

Recognizing that companies have differing practices with respect to whether they will permit this type of activity to take place, the Committee was asked to discuss company practices in this area.

Several companies indicated that they do not prohibit this type of activity but view it as a replacement. The Committee's discussion indicated that it is not uncommon to see these types of withdrawals used to purchase single premium immediate annuities.

Other companies analyze the question differently if the source of funding constitutes a series of periodic payments versus a partial withdrawal. In those instances, a partial withdrawal would be considered a replacement whereas using funds derived through an annuitization would not be considered a replacement.

Some companies indicated that these types of transactions (e.g., using a withdrawal to purchase a single premium immediate annuity) have been questioned during market conduct examinations; specifically, by the states of Missouri and Nebraska. The focus of the regulatory questions centered around the suitability of the single premium immediate annuity.

As a result of these inquiries, one company indicated that it changed its procedures related to reviewing the source of funds to purchase an annuity as

part of a suitability review and, if the suitability review indicated that the funds were coming from an annuity, the transaction would not be permitted.

C. Compliance Monitoring and Auditing and Testing.

Risk control strategies at life insurance companies often incorporate a “three lines of defense” approach where business units assume responsibility for the first line of defense, compliance conducts monitoring to determine whether policies and procedures are being implemented and operated as intended and internal audit conducts auditing and testing to confirm compliance with the company’s policies and procedures.

However, over the past several years, the role of compliance within the “three lines of defense” risk control structure has evolved. In some instances, compliance may assume different roles rather than the traditional role of monitoring under a “three lines of defense” risk control strategy.

Therefore, the Committee was asked to discuss the extent to which the Compliance Department may have responsibility for “first line of defense” functions and the extent to which the Compliance Department may have responsibility for “third line of defense” functions such as auditing and testing.

Several Committee members acknowledge that the role of the Compliance Department in a “three lines of defense” strategy is changing. In one instance, a Committee member indicated that the Compliance Department at their company serves as the “first line of defense” in areas such as annuity suitability and complaints. In another example, a Committee member indicated that their company’s Compliance Department assumes a “first line of defense” responsibility for policies governing the annual meeting and firm element of FINRA-related compliance.

In other instances, some Committee members indicated that the Compliance Department has developed a new group that conducts testing similar to a “third line of defense” functions. As the Compliance Department takes on these new roles, compliance professionals undergo on-the-job training to develop the capabilities to perform these tests.

In other instances, the Compliance Department conducts independent compliance reviews whose reports undergo separate internal audit review and testing.

Finally, there were several Committee members that indicated that their Compliance Department maintains a supervisory controls group that tests supervisory procedures throughout the enterprise.

D. Market Conduct Examinations - Term Conversions to Permanent Policies.

The Committee discussed recent market conduct examination findings of certain states (e.g., Minnesota) that have questioned whether an opportunity for the owner of a term life insurance policy to convert the term policy to a permanent life insurance policy may give rise to an obligation to conduct a suitability analysis on the purchase of the permanent life insurance policy.

In addition, another question was presented concerning whether the opportunity to convert a term life insurance policy to a permanent life insurance policy may constitute an inducement or a rebate to purchase the permanent life insurance policy.

Members of the Committee confirmed that, if the right to convert a term policy to a permanent policy is a contractual right, then it would be inappropriate to prevent a policyholder from exercising that right. Therefore, a suitability analysis may be inappropriate as the policyholder is permitted to exercise that contractual right.

Moreover, the exercise of a contractual right to convert a term policy to a permanent policy should not be considered a rebate.

E. NYDFS Regulation 187 - Frequently Asked Questions (“FAQs”).

The Committee also discussed whether the New York Department of Financial Services may be issuing a list of Frequently Asked Questions (“FAQs”) to clarify the NYDFS’ view with respect to compliance with the requirements of Regulation 187.

Though there was some understanding that draft FAQs have been under development, there was no confirmation that the NYDFS was going to issue the FAQs in the foreseeable future.

**IV. Reporting Items.**

A. NAIC Annuity Suitability Working Group.

The NAIC Annuity Suitability (A) Working Group has been meeting over the past several weeks via conference call to develop a final draft of proposed revisions to the NAIC Suitability in Annuity Transactions Model Regulation.

At the close of the Working Group’s November 5 conference call, Ohio Director Jillian Froment, Chair of the Working Group, reported that the Working Group’s work is done. The November 5 draft of the revisions to the NAIC Suitability in

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Annuity Transactions Model Regulation were reported to the NAIC Life Insurance and Annuities (A) Committee for their consideration.

The NAIC Life Insurance and Annuities (A) Committee is fielding comments on the November 5 draft of the Model Regulation.

Comments were due by November 26.

***CEFLI Staff provided a brief report concerning the Working Group's efforts.***

- B. UPDATE: "Up Line" Licensing of Individuals Who May Be Receiving Compensation.

During the Committee's October 30 call, the Committee discussed issues associated with licensing of "up line" individuals who may be receiving compensation based upon sales transactions.

Subsequent to our call, we received a copy of West Virginia Informational Letter No. 202 (2019) which provides further guidance on these issues which we thought might be of interest to Committee members.

A copy of the West Virginia Informational Letter was provided to the Committee.

- C. FINRA Regulatory Notice 19-36 - Seeking Comment on a Rule to Limit a Registered Person from being named a Customer's Beneficiary.

FINRA is seeking comment on a proposed rule to limit a registered person from being named a customer's beneficiary or holding a position of trust for a customer.

Comments are due by January 10, 2020.

- D. FINRA Regulatory Notice 19-34 - Annual Compliance Meetings.

FINRA recently announced it will continue to require firms to conduct Annual Compliance Meetings.

Though asked to provide guidance on topics to be discussed during the Annual Compliance Meetings, FINRA continues to maintain its posture that it would be difficult to provide an exhaustive list of the topics that should be addressed at the Annual Compliance Meeting.

E. SEC Proposes Amendments to its Advertising Rule for Registered Investment Advisers.

The SEC recently proposed amendments to its advertising rule (Rule 206(4)) for registered investment advisers that would allow advisors to use testimonials, endorsements and third-party ratings to solicit clients, subject to certain conditions.

The Committee was provided with a link to the 507 page Proposed Rule.

The Proposed Rule seeks to replace the limitations within the current Rule with a more principles-based approach.

F. US Supreme Court to Consider Lawsuit Challenging the SEC's Ability to "Clawback" Ill-Gotten Gains from Financial Frauds.

A key enforcement tool of the SEC, namely, the ability to "clawback" ill-gotten gains derived from fraudulent financial activity, is the subject of a lawsuit which will be heard by the US Supreme Court.

The US Supreme Court issued an order stating it would hear an appeal of a lawsuit filed by a California couple who the SEC alleged defrauded investors seeking the possibility of permanent residence through investing in certain businesses. A California federal court ordered the couple to disgorge more than \$26 million.

The lawsuit challenges the SEC's authority to "clawback" money derived from fraudulent financial activity.

CEFLI will continue to monitor and report on any developments at the Working Group.

**V. CEFLI Activities.**

A. 2019 CEFLI Summit Meeting - The Future of Sales Standards in the Life Insurance Industry - November 20-21, 2019 - Washington, DC.

The Committee was informed that CEFLI would be conducting its 2019 CEFLI Summit Meeting to explore The Future of Sales Standards in the Life Insurance Industry at the Fairmont Hotel in Washington, DC on November 20-21.

All CEFLI member company representatives may attend the Summit Meeting without any registration fee as part of their company's CEFLI membership benefits.

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B. Webinar - Records Management - Deloitte.

The Committee was also informed that CEFLI would be conducting the next webinar in its Educational Webinar Series on Tuesday, November 26 at 1 PM EST/12 Noon CST/11 AM MST/10 AM PST to explore the topic of Records Management in a joint CEFLI webinar presentation offered with CEFLI Affiliate Member firm Deloitte.

**VI. Next Meeting.**

The Committee will hold its next meeting on:

December 11, 2019 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST.

The Committee will hold its final meeting of 2019 on:

**VII. Other Business.**

There being no additional business the meeting was adjourned.

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.

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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.

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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.

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

(1) The following practices are a non-exclusive list of practices by a broker-dealer, 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, 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;

3. Has a contractual obligation to monitor a customer's or client's account on a regular or periodic basis;

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, 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, 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, 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, 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 be avoided, and mitigate conflicts that cannot 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, 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.

(3) For purposes of 950 CMR 12.207, the terms "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).