Best Interest Compliance Team

STATE FIDUCIARY AND BEST INTEREST DEVELOPMENTS

State	Fiduciary/Best Interest Development	Sources
Arizona	• The state has enacted a best interest standard for annuity producers in recommending an annuity to their customers. The new law (SB 1557) is based on the NAIC model suitability standard (discussed below) and the law recently enacted by Iowa. The law provides: ○ Requires a producer to "act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest." ○ Indicates that a producer has acted in the best interest of a consumer if it satisfies the law's care, disclosure, conflict of interest and documentation requirements. ○ To satisfy the "care" requirement, a producer must "exercise reasonable diligence, care and skill" to satisfy a number of requirements, including the duty to "know the consumer's financial situation, insurance needs and financial objectives" and to understand the available product options. ○ Does not create a fiduciary obligation or relationship with the consumer but only "a regulatory obligation," does not require the lowest compensation for the producer and does not impose an ongoing monitoring obligation. ○ Says recommendations that "comply with comparable standards satisfy the requirements" imposed by the Arizona statute. "Comparable standards" include the SEC's Reg BI and fiduciary interpretation for RIAs and the ERISA fiduciary requirements. • As with other state laws, the statute also makes clear that it does not "create or imply a private cause of action for violation of [the law] or subject a producer to civil liability under the best interest standard of care…or under standards that govern the conduct of a fiduciary or fiduciary relationship." • The new law will become effective January 1, 2021.	Fact Sheet for SB 1557 SB 1557
Connecticut	• Connecticut HB 7161 "An Act Requiring Administrators of Certain Retirement Plans to Disclose Conflicts of Interest" went into effect on October 1, 2017. • On January 1, 2019, any company that administers a retirement plan offered by a political subdivision of the state will have to disclose: "(1) The fee ratio and return, net of fees, for each investment under the retirement plan, and (2) the fees paid to any person who, for compensation, engages in the business of providing investment advice to participants in the retirement plan either directly or through publications or writings." • The law applies to any person that: (1) enters into a contract or agreement with a 403(b) plan not regulated under ERISA to provide services to the plan; and (2) reasonably expects to receive $1,000 or more in direct or indirect compensation for such services.	Text of HB 7161

This chart is regularly updated based on current developments. Please check our blog page at http://www.brokerdealerlawblog.com/resources for the most recent version of this chart.

State	Fiduciary/Best Interest Development	Sources
Illinois	• In 2018, a bill entitled "the Investment Advisor Disclosure Act" was introduced, but with no text. The bill was referred to the House Rules Committee and died with no action taken. There has been no additional legislative action on this topic.	HB4753
Iowa (Regulation)	• On February 27, 2020, the Iowa Insurance Division proposed a best interest standard for annuity producers and securities sales representatives to act in the best interest of their customers in recommending an annuity. • In finalizing the rule, the Division indicated that, in response to comments, it was postponing the securities portion of the standard but proceeding with the insurance portion of the rule without change from the proposal. The Division indicated that it "anticipates publishing a new Notice of Intended Action related to the securities portion of the rulemaking this summer", though no proposal has been published as of July 10, 2020. • The final rule, which is similar to the NAIC model suitability standard (discussed below) and is intended to be consistent with the SEC's Regulation Best Interest, will require financial professionals to "always put the consumer's interest first" and to only make recommendations that match the customer's needs, objectives and personal situation. • The final rule specifically provides that it is not intended to give consumers a private right of action to enforce the new standard or to create a fiduciary relationship between a producer and a consumer. • The insurance portion of the rule will become effective January 1, 2021.	Proposed Rulemaking Related to Best Interest Standard in annuity sales. Rulemaking related to best interest standard for insurance professionals
Maryland	• The Maryland Senate Finance Committee rejected a bill, the Financial Protection Act of 2019, on April 3, 2019. The bill was introduced in February. • The bill would have imposed a fiduciary standard on brokers and insurance representatives, including "to act in the best interest of the customer without regard to the financial or other interest of the person or firm providing the advice." • Investment advisors are already subject to a fiduciary standard, but the bill would have made them subject to a best interest standard as well. • A House version of the bill expired on April 8 when the Maryland legislature adjourned.	The Financial Protection Act of 2019
Massachusetts (Advisor Fee Table)	• The Massachusetts Securities Division ("Division") has adopted a rule requiring investment advisers registered with the Division to create a stand-alone Table of Fees for Services. The Division has provided instructions for creation of the form and a template for development of the Table. • Specifically, an investment adviser must create a one-page fee table, which includes all fees and services provided by the adviser. The Division notes that the "Fee Table supplements, but does not replace" an adviser's disclosure obligations. • The fee table must be updated annually in coordination with the timing of required amendments to the adviser's Form ADV, and must be delivered annually in paper or electronic form to the investment adviser's current advisory clients. • The requirement will be enforced by the Division beginning January 1, 2020.	Adoption of Amendments to Investment Adviser Disclosure Regulations

State	Fiduciary/Best Interest Development	Sources
Massachusetts (Broker-Dealer Fiduciary Standard)	The Division has issued a final regulation defining a fiduciary standard of conduct for broker-dealers and agents registered in or required to be registered in Massachusetts. The regulation went into effect in March 2020. The final regulation makes a number of changes in the proposal issued last December: • As proposed, the regulation would have applied to investment advisers and their representatives and to advice on commodities and insurance products. Both of these requirements have been eliminated because, the Division stated, investment advisers "are already subject to a fiduciary duty" and the regulation should only apply to "securities." • The final regulation continues to provide that failure to adhere to the "fiduciary standard of utmost care and loyalty" will be deemed a dishonest or unethical practice. • The duty applies during the period in which advice is given in connection with a securities recommendation. It is also extended to periods where the broker-dealer exercises discretion over a customer's account, has a contractual fiduciary duty or a contractual obligation to monitor a customer's account. • The regulation requires a broker-dealer 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." This duty includes the requirement to: ○ Make a reasonable inquiry regarding risks, costs, and conflicts of interest related to the recommendation, the customer's investment objectives, risk tolerance, financial situation and needs and "any other relevant information." • The duty of loyalty requires a broker-dealer to disclose all material conflicts of interest. In its release, the Division makes it clear that the "duty of loyalty cannot be satisfied without disclosure…".though the regulation itself states that "disclosing conflicts alone does not meet or demonstrate the duty of loyalty." • The regulation goes on to require that broker-dealers make all "reasonably practicable efforts" to avoid conflicts and eliminate or mitigate those that cannot "reasonably be avoided or eliminated." It also specifies that recommendations made in connection with sales contests are "presumed to constitute a breach of the duty of loyalty" though quote requirements and special inventive programs are no longer prohibited *per se*. • The final regulation continues to exclude from the definition of "customer" various financial institutions and institutional buyers (in general, accredited investors under the securities laws and 501(c)(3) organizations with a securities portfolio of more than $25 million), as well as fiduciaries under ERISA. • Enforcement of the regulation began on September 1, 2020.	Final Regulation
Nevada **Nevada *cont.***	• New state law effective July 1, 2017, amended NRS 628A.010 and NRS 90.575. • Provides that a financial planner "has the duty of a fiduciary toward a client." The term "financial planner" means a person who, for compensation, advises others upon the investment of money or upon provision for income to be needed in the future, or who holds himself or herself out as qualified to perform either of these functions. • The law also imposes a fiduciary duty on broker-dealers, sales representatives and investment advisers who, for compensation, advise other persons concerning the investment of money. The law does not apply to sales of insurance, unless accompanied by investment advice.	Senate Bill No. 383 September 8, 2017 Notice of Regulation October 2, 2017 Notice of Regulation January 18, 2019 Draft Fiduciary

State	Fiduciary/Best Interest Development	Sources
	• The law does not include a definition of fiduciary duty but does provide for a private right of action. • Implementation of the law is dependent on the adoption of regulations. On January 18, 2019, Nevada released draft regulations. • In general, the draft regulations describe the substantive duties investment advisors and broker-dealers owe their clients, and what actions constitute a breach of their fiduciary duties, as well as certain exceptions to these regulations. • The comment period ended on March 1, 2019.	Duty Regulations
New Jersey (Legislation)	• New Jersey proposed two related bills on January 9, 2018. • The first (Senate No. 735) would require financial advisors to disclose their fiduciary status to investors. Senate No. 735 delineates between "non-fiduciary investment advisors" and advisors subject to a fiduciary duty. Specifically, non-fiduciary investment advisors would have to advise clients—both orally and in writing—that they are not fiduciaries, and thus have no duty to act in the client's best interests. Any advisors subject to a fiduciary duty would have to let clients know they are subject to a fiduciary duty. Both types of advisors could face a $5,000 fine for failing to disclose this information. • The second (A208) requires disclosures from individuals who administer certain school retirement plans created in accordance with section 403(b) of the Internal Revenue Code. • Specifically A208 requires "person[s] administering annuity retirement plans for teachers to annually disclose fee ratio, return, and fees to each participant." These disclosures would need to be made both upon enrollment and annually after.	New Jersey Proposed Bill Text No. 208 Proposed Bill Text
New Jersey (Regulation)	• On April 15, 2019, the New Jersey Bureau of Securities issued a proposal to establish a fiduciary standard for broker-dealers in making recommendations, which include "investment strategy, the opening of or transfer of assets to any type of account, or the purchase, sale, or exchange of any security." • To meet their fiduciary duty, broker-dealers would need to satisfy duties of loyalty and care. • The duty of care would require a broker to "make reasonable inquiry, including 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." • To satisfy the duty of loyalty, the broker would need to ensure their advice is made without regard to their financial interest or the financial interest of any third-party. • The proposed regulation also seeks to "codify" the fiduciary standard for investment advisors, who already "owe their customers a fiduciary duty as a matter of law." Insurance providers also owe their clients a fiduciary duty under existing law. • The regulation itself does not create a new private right of action concerning a breach of fiduciary duty, though New Jersey securities law has an existing private right of action should a broker commit fraud or deceit.	Rule Proposal to Require NJ Financial Industry to Put Customers' Interests First April 14 Executive Order extending the deadline for finalizing proposed rules.
New Jersey		

State	Fiduciary/Best Interest Development	Sources
(Regulation) ***cont.***	• Because the proposal has not been finalized, it was set to expire on April 14, 2020, under New Jersey law. To avoid this, the Governor issued an executive order on that date extending the deadlines for rulemaking for state agencies until 90 days after the end of the current coronavirus health emergency.	
New York (Regulation)	• On July 18, 2018, the New York Department of Financial Services (NYDFS) issued a final version of New York Insurance Regulation 187 (now called "Suitability and Best Interests in Life Insurance and Annuity Transactions") which sets forth a "best interest" standard for sellers of life insurance and annuity products. It requires an insurer to have reasonable grounds for believing a recommendation is in the best interest of the consumer. • While annuity products were already subject to a suitability standard, a best interest standard is new. Further, prior to the Regulation, a best interest or suitability standard did not apply to the sellers of life insurance, but now both standards apply to life insurance. • The Regulation expands the applicability of the regulation to apply to insurance producers, life insurance policies, and in-force policies/contracts. It applies to policies/ contracts delivered or issued for delivery in New York. • The Regulation continues to exempt policies/contracts used to fund qualified retirement plans, ERISA plans, and employer-sponsored IRAs. • The Regulation also will not apply to sales of mutual funds or other securities, unless related to an annuity or life insurance product. • There are two effective dates: August 1, 2019 for annuities and February 1, 2020 for life insurance.	Faegre Drinker Blog Post on Proposed Regulation Final Version of New York Insurance Regulation 187
New York (Legislation)	• On January 22, 2019, the Investment Transparency Act (the "ITA") was introduced in the New York Assembly. This bill was introduced last term but did not pass. • The ITA is aimed at "mandating greater levels of disclosures by non-fiduciaries that provide investment advice" • This would be accomplished through amending several sections of the general obligations law. • Investment advisors not currently subject to a fiduciary standard would be required, at the outset of the client relationship, to specifically disclose to clients, orally and in writing, that they are not fiduciaries. • The specific disclosure must state: "I am not a fiduciary. Therefore, I am not required to act in your best interest, and am allowed to recommend investments that may earn higher fees for me or my firm, even if those investments may not have the best combination of fees, risks, and expected returns for you." • Investment advisors that the bill specifically requires to make this disclosure include: "brokers," "dealers" "financial advisors," "retirement planners," or any advisor whose title would suggest expertise in financial planning, retirement planning or investments.	The Investment Transparency Act

State	Fiduciary/Best Interest Development	Sources
National Association of Insurance Commissioners (NAIC)	• On November 19, 2018, the NAIC released its latest draft model regulation concerning suitability in annuity transactions. • The purpose of this regulation is to "require insurers to establish a system to supervise recommendations and to set forth standards and procedures for recommendations to consumers that are suitable, in the consumer's interest." • The regulation would require insurers to act in the consumer's interest, without placing its financial interest ahead of the consumer's. • Prior to recommending the annuity, insurers would be required to disclose: (1) the scope and terms of their relationship with the consumer; (2) any limitations it has; (3) how it is being compensated; and (4) any material conflicts of interest. • Insurers would need to establish a supervision system "reasonably designed" to achieve its compliance with the regulation. • Should an insurer violate this regulation, it would need to take corrective action and could be subject to "appropriate penalties and sanctions". • This regulation would not create a private right of action.	Suitability in Annuity Transactions Model Regulation
Certified Financial Planner Board of Standards, Inc. (CFP Board)	• In November 2018, the CFP Board updated its Code of Ethics and Standards of Conduct by extending the fiduciary duty owed to clients. Previously, the Standard applied to financial planning, but the new Standard – which will be effective October 1, 2019 -- will cover financial advice to clients. • The Standard says that in providing financial advice, a CFP professional "must act as a fiduciary, and therefore, act in the best interest of the Client." This duty includes duties of loyalty and care and a duty to follow client instructions. • The duty of loyalty requires, among other things, that the interests of the client be placed above those of the CFP professional and his/her firm. • The Standard also imposes requirements when a professional takes on a duty to monitor. • Among other things, the Standard will require CFP professionals to make full disclosure of material conflicts, and adopt and follow business practices reasonably designed to prevent conflicts from compromising the professional's ability to act in the client's best interest. Before providing advice, the professional must obtain the client's consent, which may be implicit. • CFP professionals are also required by the new Standard to make disclosures of their services, compensation, how the client pays for the products or services being recommended, and a description of additional costs the client may have to bear. • CFP professionals are not subject to a private right of action under the Standard, but are subject to discipline by the CFP Board.	Code of Ethics and Standards of Conduct

Best Interest Compliance Team

Our national Best Interest Compliance Team assists clients with the evolving and overlapping federal and state regulations related to the standard of care for broker-dealers, investment advisers, and insurance companies, agents and brokers.

The interdisciplinary group of more than 20 lawyers consists of attorneys from the firm's Investment Management, ERISA, SEC and Regulatory Enforcement Defense, Litigation/FINRA Arbitration, and Insurance Regulatory and Transactional practice areas. The team includes attorneys who were former financial services in-house counsel, legislative professionals, compliance supervisors and/or regulators.

We actively assist investment managers, broker-dealers, registered investment advisers, retirement plan/IRA service providers and insurance companies with the challenges resulting from the ever-changing regulations of the SEC, FINRA, the Department of Labor and state agencies related to fiduciary requirements and best interest duties.

Our experience with fiduciary and best interest compliance and reporting obligations includes strengthening supervisory procedures and internal controls. In addition, our lawyers draft agreements, disclosure documents and Written Supervisory Procedures to assist with the implementation of new standards of care, and supervision of those standards. We also advise clients on the development of products and services that are consistent with ERISA's fiduciary standards and prohibited transaction restrictions, including retirement income investments and guaranties.

We represent clients involved in investigations and enforcement matters before agencies such as the SEC, the Department of Labor, the IRS, FINRA and other self-regulatory or state agencies. Our lawyers also provide independent assessments of risk management and supervisory frameworks, and overall compliance policies and procedures related to conflicts of interest, breaches of fiduciary duty and securities law violations. In addition, our lawyers represent broker-dealers, investment advisers, insurance companies and other financial services entities in litigation and arbitration matters on standards of care and conflicts of interest.

Through articles, webinars, audio casts and white papers, our Best Interest Compliance Team also provides investment advisers, brokers, insurance representatives and others with counsel and information to stay ahead of directives from the SEC, FINRA, the Department of Labor and other regulatory agencies.

Team Members

Bruce L. Ashton
Partner – Los Angeles

Jeffrey R. Blumberg
Partner – Chicago

Bradford P. Campbell
Partner – Washington D.C.

Joshua B. Deringer
Partner – New York

Page D. Fleeger
Partner – Minneapolis

Sandra Dawn Grannum
Partner – Florham Park

Douglas J. Heffernan
Partner – Minneapolis

Jamie L. Helman
Associate – Florham Park

Megan E. Hladilek
Partner – Minneapolis

Kimberly A. Jones
Partner – Chicago

James F. Jorden
Partner – Washington D.C.

Stephen J. Jorden
Partner – Hartford

James G. Lundy
Partner – Chicago

Jason S. Luter
Partner – Dallas

Michael R. MacPhail
Partner – Denver

Robert J. Mancuso
Partner – New York

James G. Martignon
Counsel – Chicago

Glenn Merten
Partner – Washington D.C.

Matthew M. Morrissey
Associate - Chicago

Joan M. Neri
Counsel – Florham Park

K. Elise Norcini
Associate - Chicago

Timothy J. O'Driscoll
Partner – Philadelphia

Betsy A. Olson
Associate – Los Angeles

Gregory J. Ossi
Partner – Washington D.C.

Waldemar J. Pflepsen Jr.
Senior Counsel – Washington D.C.

David W. Porteous
Partner – Chicago

Andrew C. Raby
Partner – Chicago

Fred Reish
Partner – Los Angeles

Diego J. Rosado
Associate – Florham Park

Tracey Salmon-Smith
Partner – Florham Park

Edward J. Scarillo Jr.
Associate – Florham Park

Matthew R. Silver
Counsel - Philadelphia

Michael A. Valerio
Partner – Hartford

Joshua J. Waldbeser
Partner – Chicago

David L. Williams
Partner – Chicago