

Financial Products: States Continue to Puzzle Together Standards and Required Disclosures for Professionals Selling or Providing Advice

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States continue to puzzle together the duty of care financial professionals owe, or disclosures financial professionals make, to consumers. Ideally, states would ensure that the pieces fit together. However, as reflected in the summary below, states continue to take differing approaches, resulting in pieces being jammed together.

CONNECTICUT

Effective July 5, 2017, non-regulated Connecticut financial planners are required to disclose whether they are a fiduciary if asked by a consumer.

DELAWARE

In late 2017, the Delaware Department of Insurance proposed requiring agents, producers, brokers, and companies to complete a written suitability review before the issuance of any life, limited benefit, long-term care, or Medicare supplement policy.

ILLINOIS

In early 2018, a bill titled “Investment Advisor Disclosure Act” was introduced without any language, and no subsequent action has occurred.

MARYLAND

In February 2019, bills were introduced in the Maryland Senate and House imposing a fiduciary duty on broker-dealers and their agents, insurance producers, investment advisers, federally covered advisers, and investment adviser representatives 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. Maryland’s Securities Commissioner asserted at a public hearing that a level playing field was necessary to erase consumer confusion about the duty of care owed by financial professionals. Industry groups urged the legislature to wait for the SEC to finalize Regulation Best Interest (“Reg BI”), while consumer groups praised Maryland’s efforts, commenting that the SEC’s Reg BI won’t likely become a true fiduciary standard.

MASSACHUSETTS

In his August 2018 comments on the SEC’s Reg BI Proposal and Form CRS, William Galvin, Massachusetts’ Secretary of the Commonwealth, urged the SEC to adopt a fiduciary standard where “best interest” is defined “as no less stringent than the standard under the ‘40 Act” and to adopt a private right of action to bring claims for violations of the duty. He also asserted that Reg BI is inadequate to provide consumers protection and “if the Commission does not adopt a strong and uniform fiduciary standard, Massachusetts will be forced to adopt its own fiduciary standard.”

NAIC

The November 19, 2018, draft of proposed revisions to the Suitability in Annuity Transactions Model Regulation (#275) was

exposed for comments. While the November 19 draft did not include a best-interest standard, it noted that additional consideration was needed as to the legal distinction between a best-interest standard and a fiduciary standard. The goal of exposing the November 19 draft was to create a working NAIC draft to promote discussions with the SEC and other regulators. While the NAIC sought comments from a broader group, the commenters were the usual parties.

NEVADA

In early 2019, the Nevada Securities Division proposed a broad rule that imposes a fiduciary duty on investment advisers and broker-dealers who provide investment advice to clients, manage assets, perform discretionary trading, use certain titles specified in the proposed rule, or otherwise establish a fiduciary relationship with clients. The proposed rule also outlines the time periods during which broker-dealers or investment advisers are subject to a fiduciary duty standard. Industry trade groups have asserted that the application of the proposed rule is overly broad and that the exemptions are too narrow.

Nevada's Division of Insurance (NVDOI) proposed revisions to Nevada's suitability regulations to incorporate a best-interest requirement along the lines of an earlier but subsequently abandoned draft of its Suitability and Best Interest Standard of Conduct in Annuity Transactions Model. Commenters urged the NVDOI to drop its efforts and await further action by the NAIC on the Suitability in Annuity Transaction Model.

NEW JERSEY

In October 2018, the New Jersey Bureau of Securities issued a pre-proposal for comment as to whether broker-dealers, agents, investment advisors, and investment advisor representatives should be subject to a fiduciary duty. Industry groups asserted that any state-level fiduciary duty faces significant preemption hurdles due to the National Securities Markets Improvement Act, which "precludes a State from enacting regulations relating to the making and keeping of records 'that differ from, or are in addition to, the requirements in those areas established under [the Exchange Act].'" Consumer groups argued that this fiduciary standard should apply to all consumers and all forms of financial or investment advice and urged New Jersey to include a private right of action "so that investors can take action on their own behalf against financial professionals and their firms that violate the rule."

NEW YORK

The First Amendment to Regulation 187 incorporates a best-interest standard and imposes differing duties for recommendations with respect to "new sales" and "in-force transactions" involving life insurance and annuities. Reg 187 will take effect with respect to annuities on August 1, 2019, and with respect to life insurance on February 1, 2020.

Two lawsuits, *In re Independent Insurance Agents & Brokers of New York, Inc.* and *In re National Association of Insurance and Financial Advisors – New York State, Inc.*, have been filed, raising a number of issues challenging the legality of Reg 187 under New York law, including the state's constitution and common law.