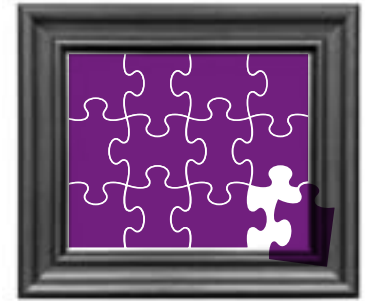


# Getting the full picture

The emerging best interest and fiduciary duty patchwork

January 11, 2021



## Putting the pieces together

As anticipated, a number of fiduciary and best interest investment advice regulations advanced at both the federal and state levels last year. As we begin 2021, firms subject to these regulations face challenges in dealing with rules that impose a host of new obligations, and that at times overlap and conflict with one another. This chart is intended to help firms take stock of the evolving framework and aid firms in putting the pieces together.

	SEC-Registered Investment Advisers	SEC-Registered Broker-Dealers [Under SEC Regulation Best Interest]	Proposed Nevada Securities Regulation and Financial Planning Statute	Massachusetts Fiduciary Rule	Proposed New Jersey Securities Regulation	ERISA Fiduciaries Subject to DOL Rules	Producers and Insurers Subject to New York Regulation 187	NAIC Suitability in Annuity Transactions Model Regulation (#275)
<b>Duty Owed</b>	Advisers are fiduciaries; they owe a duty of care and a duty of loyalty, and they must act in the best interest of clients.	Broker-dealers must act in the best interest of their retail customers at the time recommendations are made, and their interests must not be placed ahead of the customers' interests.	Broker-dealers and investment advisers in Nevada owe a fiduciary duty to clients.	Broker-dealers owe a fiduciary duty to customers, which requires broker-dealers and their agents to satisfy both a duty of care and a duty of loyalty.	Broker-dealers and investment advisers owe a fiduciary duty to customers, which requires broker-dealers, agents, investment advisers and investment adviser representatives to satisfy both the duty of care and duty of loyalty.	ERISA fiduciary is subject to duties of loyalty, prudence and diversification; also prohibitions on transactions with "parties in interest" (which includes a broker-dealer), on acting with a self-interest or conflicted interest, and on receiving payments from third parties.	When making recommendations, a producer (or insurer where no producer is involved) must act in the best interest of the consumer, and only the interests of the consumer shall be considered in making recommendations.	Producers must 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. A producer has acted in the best interest of the consumer if they have satisfied the following four obligations expressly identified under the Model Regulation: (1) care; (2) disclosure; (3) conflict of interest; and (4) documentation. Insurers must establish and maintain a detailed system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.

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<b>Source of Duty</b>	Common law and Section 206 (the anti-fraud provisions) of the Investment Advisers Act of 1940 (Advisers Act).	SEC Regulation Best Interest.	Explicit provisions in the statute and proposed regulation.	Massachusetts' Uniform Securities Act (MUSA) prohibits broker-dealers from engaging in dishonest or unethical practices. MUSA also grants the Secretary of State the authority to impose an administrative fine or censure, or deny, suspend, or revoke any registration or take any other appropriate action in the public interest when a broker-dealer engages in dishonest or unethical practices in the securities business.	Failure to act in accordance with a fiduciary duty would constitute a dishonest or unethical business practice under New Jersey's Securities Law.	Explicit statutory provisions in ERISA.	Explicit provisions in NY Regulation 187.	May be a statute or rule depending on the state considering adoption.
<b>Trigger</b>	Establishing an advisory-client relationship.	Making recommendations of any securities transaction or investment strategy to a retail customer.	<p>Providing investment advice to a client, managing assets, performing discretionary trading, using certain titles or terms, or otherwise establishing a fiduciary relationship with clients.</p> <p>The fiduciary duty owed by an investment adviser and a representative of an investment adviser is triggered by the establishment of an advisory-client relationship and includes the time period for which the adviser or representative engages in certain activities set forth in the Regulation.</p> <p>The fiduciary duty owed by an investment adviser or broker-dealer and a representative of an investment adviser/broker-dealer is triggered by providing advice and other enumerated instances.</p>	<p>When providing investment advice or recommending an investment strategy to a customer, the opening of any type of account, the transferring of assets to any type of account, or the purchase, sale, or exchange of any security.</p> <p>Having or exercising discretion in a customer's account, unless the discretion relates solely to the time and/or price for the execution of the order.</p> <p>Having a contractual fiduciary duty.</p> <p>Having a contractual obligation to monitor a customer's account on a regular or periodic basis.</p>	<p>When providing investment advice or recommending to a customer an investment strategy, the opening of any type of account, the transfer of assets to any type of account, or the purchase, sale, or exchange of any security.</p> <p>The regulation also provides that it is a dishonest or unethical practice if an adviser or a broker-dealer or its agent who has discretionary authority over a customer's account or a contractual fiduciary duty or who is acting as an adviser, fails to act in accordance with a fiduciary duty to a customer when providing investment advice.</p>	Providing investment advice for a fee to an ERISA plan or participants, or exercising discretion in the investment of ERISA plan assets, within the meaning of ERISA. Prohibited transaction rules also apply to IRAs under the Internal Revenue Code. May include rollover advice, under a new 2020 DOL interpretation.	Making recommendations to consumers for a sales transaction or an in-force transaction with respect to policies delivered or issued for delivery in the State of New York.	<p>Any recommendation of an annuity to an individual consumer that was intended to or does result in a sale, including an exchange or replacement of an annuity, triggers the Best Interest Obligation.</p> <p>Annuity transactions that are entered into without a recommendation from an insurer or a producer are also subject to certain requirements. For example, the issuance of an annuity by an insurer where no recommendation is made must be reasonable under all the circumstances actually known by the insurer at the time of issuance.</p>

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<b>Coverage</b>	Investment advisers subject to the Advisers Act, as well as supervised persons of such investment advisers.	Broker-dealers, as well as any persons associated with the broker-dealer (i.e., registered representatives and principals), when making recommendations of a securities transaction or investment strategy to retail customers.	Any person who acts as a "financial planner" in Nevada, including broker-dealers, sales representatives, investment advisers, and representatives of investment advisers.	It applies to all SEC-registered broker-dealers who are also registered in Massachusetts. It also applies to agents when they buy (or sell) or offer to buy (or sell) when (1) an offer to buy (or sell) is made in Massachusetts, or (2) an offer to buy (or sell) is made and accepted in Massachusetts.	It applies to all SEC-registered broker-dealers who are also registered in New Jersey. It applies to state-registered advisers, but not SEC-registered advisers.	"Fiduciaries" who provide investment advice for a fee or have discretion in the investment of plan assets, within the meaning of ERISA. Discretionary advice is and has always been fiduciary activity.	Insurance producers (and insurers where no producer is involved) recommending sales transactions or in-force transactions involving life insurance or annuities to consumers.	It applies to producers, which is a person or entity required to be licensed to sell, solicit, or negotiate insurance, including annuities. The term "Producer" includes an insurer where no producer is involved.  In addition, the Model Regulation includes a number of requirements related to supervision, training, recordkeeping, and other obligations of the insurer issuing the annuity.
<b>Ongoing Duty to Monitor</b>	Generally yes, unless altered with client consent.	No ongoing duty to monitor investment performance. Duty extends only to the specific recommended securities transaction or investment strategy.	Ongoing monitoring obligation only relieved if firm qualifies for the "Episodic Fiduciary Duty Exemption." Dual registrants prohibited from relying on this exemption.	A broker-dealer or agent will have an ongoing duty to monitor under the following circumstances: (1) having or exercising discretion in a customer's account, unless the discretion relates solely to the time and/or price for the execution of the order; (2) having a contractual fiduciary duty; or (3) having an agreement with the customer that the broker-dealer or agent will monitor the customer's account on a regular or periodic basis.	For broker-dealers, the fiduciary obligation extends through the execution of the recommendation.  If a broker-dealer also provides investment advice in any capacity, has discretionary authority over a customer's account, or a contractual fiduciary duty, the fiduciary duty will be applicable to the entire customer relationship, regardless of the customer account type.	Primarily a matter for agreement with the investor, although DOL has suggested a duty to monitor may be inherent in recommending more complex and ESG investments.	No ongoing duty to monitor the policy to which recommendations are provided. Duty extends only to the specific recommendation.	The Care Obligation does not require a producer to monitor on an ongoing basis, although ongoing monitoring may be separately owed under the terms of a fiduciary, consulting, investment advising or financial planning agreement between the consumer and the producer.

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<b>Receipt of Compensation From Product Issuers and Other Third Parties</b>	Permissible to receive compensation from third parties, if client consent is obtained and conflicts are mitigated. However, compensation cannot be paid for distribution or offering activity conducted on behalf of issuers without being registered as a broker-dealer and without such activity being subject to requirements applicable to broker-dealers.	Permissible, if broker-dealer establishes procedures to identify, disclose, and mitigate (or eliminate) material conflicts of interest arising from financial incentives, which includes receipt of compensation from product issuers and other third parties.	Transaction-based compensation is permissible so long as it is in the client's best interest to be charged on a transaction basis as opposed to some other basis, and the commission is reasonable. Nevada law does require a financial planner to disclose to clients any commission or third-party compensation.  Compensation cannot be received for distribution or offering activity conducted on behalf of issuers without being registered as a broker-dealer with Nevada and without such activity being subject to requirements applicable to broker-dealers.	There is a presumption of a breach of the duty of loyalty for recommending 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 product if the recommendation is made in connection with any sales contest.	There is a presumption of a breach of the duty of loyalty for offering, receiving, direct or indirect compensation to or from the broker-dealer, agent, or adviser, for recommending the opening of a specific type of account, the transfer of assets to a specific type of account, or the purchase, sale, or exchange of a specific security that is not "the best of the reasonably available options."  It is not a breach of fiduciary duty when the broker-dealer or agent receives a transaction-based fee, provided that: (i) the fee is reasonable; (ii) the fee is the best of the reasonably available fee options, and (iii) the duty of care is satisfied.	If a fiduciary, prohibited absent an applicable statutory or DOL prohibited transaction exemption, which tend to be product-specific. Also, crediting the value of the third-party compensation back to the plan, including through fee offsets or additional services, avoids the prohibited conflict.	Insurance producers may be compensated if the amount of the compensation or the receipt of the incentive does not influence the recommendation. Moreover, insurers may maintain within and across product lines variations in compensation or other incentives that comply with New York insurance laws and regulations provided that the insurer's compensation and incentive practices, when taken as a whole, are designed to avoid recommendations by producers that are not in the best interest of consumers.	There are no prohibitions on the receipt of compensation from insurers or other third parties. As part of the Disclosure Obligation, and prior to the recommendation or sale of an annuity, a producer must prominently disclose on a form substantially similar to Appendix A to the Model Regulation:  a description of the sources and types of cash compensation and non-cash compensation to be received by the producer, including whether the producer is to be compensated for the sale of a recommended annuity by commission as part of premium or other remuneration received from the insurer, intermediary, or other producer or by fee as a result of a contract for advice or consulting services.

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<b>Conflict Management</b>	An adviser is required to disclose and mitigate conflicts.	Broker-dealer must establish procedures to identify, disclose, and mitigate (or eliminate) material conflicts of interest arising from financial incentives associated with the recommended securities transaction or investment strategy. Material conflicts of interest not arising from financial incentives need to be identified and disclosed and/or eliminated.	Regulation specifically requires that in order to satisfy fiduciary duty, potential conflicts need to be disclosed.	<p>Duty of Care: When making a recommendation or providing investment advice, a broker-dealer or agent must 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.</p> <p>For the duty of care to be satisfied, a broker-dealer or agent must make reasonable inquiry, including: risks, costs, and conflicts of interest related to all recommendations and investment advice; the customer's investment objectives, risk tolerance, financial situation, and needs; and any other relevant information.</p> <p>Duty of Loyalty: When making a recommendation or providing investment advice, a broker-dealer or agent must disclose all material conflicts of interest, make all reasonably practical efforts to avoid conflicts of interest, eliminate conflicts that cannot be avoided, mitigate conflicts that cannot reasonably be avoided or eliminated, and make recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer.</p>	<p>Duty of Care: When making a recommendation or providing investment advice, a broker-dealer or investment adviser must 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.</p> <p>For the duty of care to be satisfied, broker-dealers and agents must make a reasonable inquiry, including risks, costs and conflicts of interest related to any recommendation or investment advice, and the customer's investment objectives, financial situation, and needs, and any other relevant information.</p> <p>Duty of Loyalty: For a broker-dealer or investment adviser, recommendations or advice must be made 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.</p>	Prohibited conflicts are allowable only to the extent permitted under an applicable statutory or DOL prohibited transaction exemption, which regularly include conflict mitigation conditions.	No express requirement imposed under the Regulation to manage compensation-related conflicts. However, insurers are required to establish, maintain, and audit a system of supervision that is reasonably designed to achieve the insurer's and producers' compliance with the best interest standard. Moreover, producer compensation arrangements and product offering limitations are subject to specific disclosure requirements.	<p>As part of the Conflict of Interest Obligation, a producer must identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest. The term "material conflict of interest" does not include any interests of the producer that arise from cash or non-cash compensation.</p> <p>While not classified as part of the Conflict of Interest Obligation, the Model Regulation imposes certain obligations on an insurer related to sales contest under its supervisory obligations as follows:</p> <p>The insurer shall establish and maintain reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time. The requirements of this subparagraph are not intended to prohibit the receipt of health insurance, office rent, office support, retirement benefits, or other employee benefits by employees as long as those benefits are not based upon the volume of sales of a specific annuity within a limited period of time;</p>

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<b>Conflict Management, cont'd</b>				Disclosing conflicts alone does not meet or demonstrate the duty of loyalty.				Note: The intent of this limitation is not to prohibit general incentives regarding the sales of a company's products with no emphasis on any particular product
<b>Required Disclosure</b>	Required by fiduciary duty and also specific requirement in Form ADV.	At the time the recommendations are made, the broker-dealer must reasonably disclose to the retail customer, in writing, the material facts relating to the scope of the brokerage relationship, including all material conflicts of interest that are associated with securities recommendations. Form CRS also would impose additional disclosure requirements for broker-dealers at the outset of the customer relationship.	Among other things, Regulation calls for specific disclosure regarding, as applicable, the sale of proprietary products or that the advice was based on a limited pool of products. Broad ranging requirement to disclose all information related to conflicts.	None.	None.	Disclosure does not alone cure a prohibited ERISA conflict. Prohibited conflicts are allowable only to the extent permitted under an applicable statutory or DOL prohibited transaction exemption, which often require disclosures.	The best interest standard requires, among other things, that there be a reasonable basis to believe that the consumer has been reasonably informed of certain features of the policy and potential consequences of the transaction, both favorable and unfavorable.	Under the Disclosure Obligation, prior to the recommendation or sale of an annuity, the producer must prominently disclose to the consumer on a form substantially similar to Appendix A to the Model Regulation:  (a) a description of the scope and terms of the relationship with the consumer and the role of the producer in the transaction;  (b) an affirmative statement on whether the producer is licensed and authorized to sell the following products: (1) fixed annuities; (2) fixed indexed annuities; (3) variable annuities; (4) life insurance; (5) mutual funds; (6) stocks and bonds; and (7) certificates of deposit;  (c) an affirmative statement on whether the producer is authorized, contracted (or appointed), or otherwise able to sell insurance products, using the following descriptions: (1) from one insurer; (2) from two or more insurers; or (3) from two or more insurers although primarily contracted with one insurer.

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Required Disclosure, <i>cont'd</i>								<p>(d) a description of the sources and types of cash compensation and non-cash compensation to be received by the producer, including whether the producer is to be compensated for the sale of a recommended annuity by commission as part of premium or other remuneration received from the insurer, intermediary or other producer or by fee as a result of a contract for advice or consulting services; and</p> <p>(e) a notice of the consumer's right to request additional information regarding cash compensation described below.</p> <p>Upon request of the consumer or the consumer's designated representative, the producer must disclose:</p> <p>(a) reasonable estimate of the amount of cash compensation to be received by the producer, which may be stated as a range of amounts or percentages; and</p> <p>(b) whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages.</p>

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<b>Required Disclosure, cont'd</b>								Prior to or at the time of the recommendation or sale of an annuity, the producer must have a reasonable basis to believe the consumer has been informed of various features of the annuity.
<b>Provides for Client Consent to Proceed With Activity That Constitutes a Conflict</b>	Client consent is needed to proceed with activity that constitutes a conflict. Such consent may often be satisfied by full and fair disclosure.	Client consent is not needed to proceed with activity that constitutes a conflict, although certain financial conflicts will need to be mitigated (or eliminated) regardless of client consent.	Not specifically addressed in Regulation.	No. The Regulation specifically provides that disclosing conflicts alone does not meet or demonstrate the duty of loyalty.	No. There is no presumption that disclosing a conflict of interest in and of itself will satisfy the duty of loyalty.	Client consent, even after disclosure, does not alone cure a prohibited ERISA conflict. Prohibited conflicts are allowable only to the extent permitted under an applicable statutory or DOL prohibited transaction exemption, which often require consent from an independent fiduciary or plan participant.	Client consent is not needed to proceed with activity that constitutes a conflict.	No. A producer must identify and avoid or reasonably manage and disclose material conflicts of interest, which are limited due to the definition of "material conflict of interest" that does not include cash or non-cash compensation.



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<b>Private Remedy</b>	Only limited private rights of action under federal law (to recover investment advisory fees). Clients may have other private rights of action under state common law.	SEC indicates that no private right of action or right of rescission created by Regulation Best Interest.	Broker-dealers and sales representatives have the burden of proving in arbitration, or civil or administrative actions, that an exemption to the fiduciary duty exists; financial planner statute expressly provides for private right of action.	MUSA includes a private right of action against a seller for offering or selling a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading. This private right of action also applies to any person who directly or indirectly controls a seller liable, every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, with few exceptions.	No private right of action created by Proposed New Jersey Securities Regulation.	Private right of action under ERISA; generally not available to IRA owners.	No private right of action created by NY Regulation 187.	No private right of action created by NAIC model rule.
<b>Enforceability</b>	Legally enforceable against adviser and supervised persons of advisers by SEC.	Legally enforceable standard against broker-dealer and/or registered persons of the broker-dealer by SEC.	Legally enforceable standard against broker-dealers, sales representatives, investment advisers, and representatives of investment advisers by the Administrator of the Nevada Securities Division.	Legally enforceable against broker-dealers and agents by action of the Massachusetts Securities Division.	Legally enforceable in private actions and by administrative action of state securities regulators.	Legally enforceable in private actions or by DOL. Excise taxes for non-exempt prohibited transactions enforced by IRS.	Legally enforceable against insurance producers and insurance companies by the New York superintendent of insurance.	Legally enforceable against producers and insurers by action of state insurance commissioner.
<b>Effective/ Compliance Date</b>	Effective Date: July 12, 2019 (SEC's Final Interpretation)	Effective Date: September 10, 2019 Compliance Date: June 30, 2020		Effective Date: March 6, 2020 Enforcement Date: September 1, 2020		January 1, 1975	Effective Date: August 1, 2019 Compliance Date: August 1, 2019 (annuity contracts) February 1, 2020 (life insurance policies)	As indicated when adopted on a state-by-state basis.

## Contacts

For more commentary regarding the emerging landscape related to the standards of conduct for investment professionals, visit Eversheds Sutherland's [www.secfiduciaryrule.com](http://www.secfiduciaryrule.com). If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Eversheds Sutherland attorney with whom you regularly work.

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