



Getting the full picture

The emerging best interest and fiduciary duty patchwork

April 2, 2019

Putting the pieces together

By all accounts, 2019 will see the advancement of a number of fiduciary and best interest investment advice regulations at both the federal and state levels. Firms subject to these regulations will face challenges in dealing with rules that will impose a host of new obligations, and that may 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- and State-Registered Investment Advisers	SEC-Registered Broker-Dealers [Under Proposed SEC Regulation Best Interest]	Proposed Nevada Securities Regulation and Financial Planning Statute	ERISA Fiduciaries Subject to DOL Rules	Producers and Insurers Subject to New York Regulation 187
Duty Owed	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.	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.
Source of Duty	Common law and Section 206 (the anti-fraud provisions) of the Advisers Act. For state-registered advisers, common law and state securities laws and rules.	SEC Proposed Rule Regulation Best Interest.	Explicit provisions in the statute and proposed regulation.	Explicit statutory provisions in ERISA.	Explicit provisions in NY Regulation 187.

	SEC- and State-Registered Investment Advisers	SEC-Registered Broker-Dealers [Under Proposed SEC Regulation Best Interest]	Proposed Nevada Securities Regulation and Financial Planning Statute	ERISA Fiduciaries Subject to DOL Rules	Producers and Insurers Subject to New York Regulation 187
Trigger	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>	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.	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.
Coverage	Investment advisers subject to the Advisers Act or corresponding state laws, 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.	“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.
Modifying Scope of Duty via Client Consent	An adviser’s responsibilities and the scope and nature of services provided can be altered with client consent but the fiduciary duty cannot be waived or changed by clients.	Unable to modify scope of best interest duty via client consent.	Not expressly addressed in Regulation.	May specify by agreement the type and scope of services to be provided (e.g., manage the fixed income sleeve of a defined benefit plan, or advise as to the investment options for a defined contribution plan), but may not modify the statutory fiduciary duty.	Unable to modify scope of best interest duty via client consent.

	SEC- and State-Registered Investment Advisers	SEC-Registered Broker-Dealers [Under Proposed SEC Regulation Best Interest]	Proposed Nevada Securities Regulation and Financial Planning Statute	ERISA Fiduciaries Subject to DOL Rules	Producers and Insurers Subject to New York Regulation 187
Ongoing Duty to Monitor	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.	Not expressly addressed in Regulation.	Primarily a matter for agreement with the investor, although DOL has suggested a duty to monitor may be inherent in recommending more complex investments.	No ongoing duty to monitor the policy to which recommendations are provided. Duty extends only to the specific recommendation.
Receipt of Compensation From Product Issuers and Other Third Parties	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.	Fiduciary duty does not prohibit or otherwise restrict compensation received from product issuers or other third parties. Nevada law does, however, require a financial planner to disclose to clients any commission or third-party compensation. However, 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.	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.
Conflict Management	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.	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.

	SEC- and State-Registered Investment Advisers	SEC-Registered Broker-Dealers [Under Proposed SEC Regulation Best Interest]	Proposed Nevada Securities Regulation and Financial Planning Statute	ERISA Fiduciaries Subject to DOL Rules	Producers and Insurers Subject to New York Regulation 187
Required Disclosure	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.	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.
Provides for Client Consent to Proceed With Activity That Constitutes a Conflict	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 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 but disclosure provisions might be read to imply client consent can be obtained to deal with conflicts.	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 not needed to proceed with activity that constitutes a conflict.
Private Remedy	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.	Not specifically addressed in Regulation but corresponding definition in financial planner legislation expressly provides for a private right of action.	Private right of action under ERISA.	No private right of action created by NY Regulation 187.
Enforceability	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 in private actions or by DOL.	Legally enforceable against insurance producers and insurance companies by the New York superintendent of insurance.

Contacts

For more commentary regarding the emerging landscape related to the standards of conduct for investment professionals, visit Eversheds Sutherland's 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.

Eric Arnold, *Partner*

T: +1 202 383 0741

ericarnold@eversheds-sutherland.com

Carol McClarnon, *Partner*

T: +1 202 383 0946

carolmcclarnon@eversheds-sutherland.com

Issa Hanna, *Counsel*

T: +1 212 389 5034

issahanna@eversheds-sutherland.com

Clifford Kirsch, *Partner*

T: +1 212 389 5052

cliffordkirsch@eversheds-sutherland.com

Holly Smith, *Partner*

T: +1 202 383 0245

hollysmith@eversheds-sutherland.com

Ben Marzouk, *Counsel*

T: +1 202 383 0863

benmarzouk@eversheds-sutherland.com

Michael Koffler, *Partner*

T: +1 212 389 5014

michaelkoffler@eversheds-sutherland.com

Mark Smith, *Partner*

T: +1 202 383 0221

marksmith@eversheds-sutherland.com

Bria Adams, *Associate*

T: +1 202 383 0810

briaadams@eversheds-sutherland.com

Susan Krawczyk, *Partner*

T: +1 202 383 0197

susankrawczyk@eversheds-sutherland.com

John Walsh, *Partner*

T: +1 202 383 0818

susankrawczyk@eversheds-sutherland.com

Related people/contributors

- Wilson Barmeyer
- Bruce Bettigole
- Adam Cohen
- Olga Greenberg
- S. Lawrence Polk
- Stephen Roth
- Brian Rubin
- Cynthia Shoss
- Dimitriy Kotov
- Sarah Sallis
- Amber Unwala