

**Morgan Lewis**

**SIFMA REGULATION BEST INTEREST SEMINAR**

**Outline for Panel Discussion on What's Next?  
State Fiduciary Rules and Preemption**

**Washington, D.C.  
July 10, 2019**

**David C. Boch  
Jason S. Pinney<sup>1</sup>  
Morgan, Lewis & Bockius LLP**

---

<sup>1</sup> The authors would like to thank Sam Thomas for providing research and drafting assistance.

## **I. Prospective State Fiduciary Rules**

- A. **Nevada**: On January 18, 2019, Nevada proposed a draft regulation imposing fiduciary obligations on broker-dealers and investment advisers under its financial planner statute.<sup>2</sup> The Comment period ended on March 1, 2019.
1. The proposed rule repeals an exception for broker-dealers and investment advisers from the financial planner statute's definition of "financial planner," thereby subjecting broker-dealers and investment advisers to the fiduciary duties imposed on financial planners.
  2. The proposal regulates activities that include providing "investment advice," managing client assets, performing discretionary trading, disclosing fees and gains, and using certain job titles.
  3. Under the proposed regulation, broker-dealers and their representatives are subject to a fiduciary duty that is ongoing unless an "episodic fiduciary duty exemption" applies. The exemption limits the fiduciary duty to the transaction at issue. To be eligible for the exemption, the client must have solicited the investment advice and not reasonably expect ongoing advice, and certain other conditions must be satisfied.
  4. The proposed regulation requires broker-dealers and investment advisers to perform reasonable due diligence on investment products and strategies, recommend products and strategies that are in the client's "best interest," and not put their own interests ahead of the client.
  5. Under the proposed rule, broker-dealers and investment advisers must disclose material conflicts of interest, and all fees and charges must be reasonable.
  6. The proposed rule requires broker-dealers and investment advisers to disclose any "gains" resulting from the transaction at the time advice is given.

---

<sup>2</sup> See Nev. Rev. Stat. § 628A.020 (2017); Nevada Proposed Fiduciary Duty Regulations (Jan. 18, 2019), <https://www.nvsos.gov/sos/home/showdocument?id=6156>.

B. **New Jersey**: On April 15, 2019, New Jersey proposed a draft regulation imposing fiduciary duties on broker-dealers, advisers, and agents.<sup>3</sup> The New Jersey Bureau of Securities extended the comment deadline from June 14 to July 18. A public hearing is set for July 17, 2019.<sup>4</sup>

1. The proposed regulation covers “customers” and excludes certain types of institutional and sophisticated investors, as well as advice provided by an ERISA plan fiduciary.
2. The proposed regulation covers recommending (1) an investment strategy; (2) the opening of any account; (3) transfer of assets to any account; and (4) the purchase, sale, or exchange of any security.
3. The proposed rule imposes a fiduciary duty that is ongoing for any “broker-dealer or agent [who] provides, in any capacity, investment advice to the customer.”
4. Recommended securities or accounts must be “the best of the reasonably available options,” and the broker-dealer’s transactions fees must be the “best of the reasonably available fee options.”
5. Under the proposed rule, recommendations and investment advice must be given without regard to the interests of the recommender, and compensation and commissions must be reasonable.

C. **Massachusetts**: On June 14, 2019, Massachusetts proposed a regulation that is substantially similar to the proposed New Jersey regulation.<sup>5</sup> Massachusetts is accepting written comments on the proposed amended regulations until July 26, 2019.

1. The proposed rule covers “customers” and “clients” and excludes advice to certain types of institutional and sophisticated investors, as well as advice provided by an ERISA plan fiduciary. In contrast to New Jersey, the Massachusetts proposal does not exclude sophisticated natural persons.
2. The proposal requires both state and potentially federally registered investment advisers, broker-dealers, and their agents to comply with fiduciary duties regarding (1) purchases, sales, or exchanges of any

---

<sup>3</sup> See New Jersey Proposed Fiduciary Duty Regulation, N.J. Admin. Code § 13:47A-6.4 (Apr. 15, 2019), <https://www.njconsumeraffairs.gov/Proposals/Pages/bos-04152019-proposal.aspx>.

<sup>4</sup> See Notice of Public Hearing regarding New Jersey Proposed Fiduciary Duty Regulation, N.J. Admin. Code § 13:47A-6.4 (June 17, 2019), <https://www.njconsumeraffairs.gov/Proposals/Pages/bos-06172019-public-notice.aspx>.

<sup>5</sup> Massachusetts Proposed Regulation Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (June 14, 2019), <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm>.

security; (2) investment strategies; (3) opening accounts; and (4) transferring assets.

3. Advisers, broker-dealers, and their agents must avoid conflicts of interests, and the proposed rule imposes a presumed breach of the duty of loyalty for offering or receiving compensation for a recommendation that is not the “best of the reasonably available options.”
4. Recommendations must be made without regard to the interests of the broker-dealer, agent, adviser, or affiliated entity, and transaction-based payments must be reasonable.
5. The ongoing fiduciary duty is triggered by providing in any capacity “investment advice,” making “ongoing recommendations,” or receiving “ongoing compensation.” This is broader than the New Jersey proposal.

D. A chart comparing Reg BI and the proposed Nevada, New Jersey and Massachusetts regulations is attached as **Exhibit 1**.

## II. **The Preemption Doctrine**

- A. There are two types of preemption—express preemption and implied preemption.<sup>6</sup>
1. Express preemption occurs when Congress explicitly states that it intends to preempt state regulation in certain areas of the law.<sup>7</sup>
  2. Implied preemption occurs in two scenarios.
    - a. Field preemption—when Congress establishes a comprehensive regulatory scheme in the area effectively removing the entire field from the state realm.<sup>8</sup>
    - b. Conflict preemption—occurs (i) when a state law or regulation directly conflicts with federal law such that it is impossible to comply with both at the same time,<sup>9</sup> or (ii) when the state law or

---

<sup>6</sup> See *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982) (“Preemption may be either express or implied, and is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” (quotations and citation omitted)).

<sup>7</sup> See, e.g., *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (holding that express preemption occurs when the “language in the federal statute [] reveals an explicit congressional intent to pre-empt state law”).

<sup>8</sup> See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (finding state law was preempted where the “scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it” (quotations and citation omitted)).

<sup>9</sup> See *Wyeth v. Levine*, 555 U.S. 555, 589 (2009) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (federal law preempts state law by implication “[w]here compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce”).

regulation stands as an obstacle to the achievement of federal objectives.<sup>10</sup>

B. Federal regulations have the same preemptive authority as federal statutes.<sup>11</sup>

### **III. Reg BI and Preemption**

A. As the SEC noted more than once in Reg BI's adopting release, "the preemptive effect of Regulation Best Interest on any state law governing the relationship between regulated entities and their customers would be determined in future judicial proceedings based on the specific language and effect of that state law."<sup>12</sup>

B. When the SEC issued Reg BI, Chairman Clayton expressed concerns about "the potential patchwork of inconsistent state-level standards,"<sup>13</sup> while Commissioner Jackson argued that the SEC should have stated unequivocally that Reg BI "sets a federal floor, not a ceiling, for investor protection" and that "[o]ur failure to do so invites extensive and expensive litigation over the scope of the rule—and its effects on nascent state regulation."<sup>14</sup>

1. In a footnote, Commissioner Jackson stated that: "The release is right, of course, to say that 'the preemptive effect of Regulation Best Interest on any state law governing the relationship between regulated entities and their customers [will] be determined in future judicial proceedings.' . . . I would have said no more. *Compare* Final Rule, *supra* note 6, at 43 ('Regulation Best Interest [and its companion releases] will serve as focal points for promoting clarity, establishing greater consistency in the level of retail customer protections provided, and easing compliance across the regulatory landscape.')."

C. In promulgating Reg BI, the SEC exercised authority granted under Section 913 of the Dodd-Frank Act.<sup>15</sup> Section 913 states, in relevant part, that the SEC has the

---

<sup>10</sup> See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (federal law preempts state law by implication when "under the circumstances of [a] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

<sup>11</sup> *Wyeth*, 555 U.S. at 576 ("[A]gency regulation with the force of law can pre-empt conflicting state requirements.").

<sup>12</sup> Securities and Exchange Commission, Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 34-86031, 43, 514 n.1163 (June 5, 2019).

<sup>13</sup> SEC Chairman Jay Clayton, "Statement at the Open Meeting on Commission Actions to Enhance and Clarify the Obligations Financial Professionals Owe to our Main Street Investors" (June 5, 2019), <https://www.sec.gov/news/public-statement/statement-clayton-060519-iabd>.

<sup>14</sup> SEC Commissioner Robert J. Jackson Jr., "Statement on Final Rules Governing Investment Advice" (June 5, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-060519-iabd>.

<sup>15</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

authority to “commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to address the legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to such retail customers.”<sup>16</sup>

- D. When Reg BI was proposed, the SEC stated: “We [] believe that, through the establishment of a standard of conduct for broker-dealers under the Exchange Act, this proposed approach would foster greater clarity, certainty, and efficiency with respect to broker-dealer standards of conduct. In addition, by drawing from principles that have developed under other regulatory regimes, we seek to establish greater consistency in the level of protection provided across the spectrum of registered investment advice and ease compliance with Regulation Best Interest where these other overlapping regulatory regimes are also applicable.”<sup>17</sup>

#### IV. Possible Preemption Arguments

- A. National Securities Markets Improvement Act of 1996 (“NSMIA”)
1. Express Preemption: NSMIA expressly preempts state law in certain areas of securities regulation. Accordingly, any state law that regulates in these areas is preempted.<sup>18</sup>
    - a. Investment Advisers—NSMIA preempts the states from regulating federally registered investment advisers except for notice filings, fee collections or “investigating and bringing enforcement actions with respect to fraud or deceit.”<sup>19</sup>
    - b. Broker-Dealers—NSMIA preempts the states from regulating federally registered broker-dealers, such that “[n]o law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ

---

<sup>16</sup> *Id.*

<sup>17</sup> Securities and Exchange Commission, Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. 34-83062, 2018 WL 1911162 (proposed Apr. 18, 2018).

<sup>18</sup> See *Barnett Bank*, 517 U.S. at 31 (holding that express preemption occurs when the “language in the federal statute . . . reveals an explicit congressional intent to pre-empt state law”).

<sup>19</sup> 15 U.S.C. § 80b-3a(b)(1)–(2).

from, or are in addition to, the requirements in those areas established under this chapter [of the Exchange Act].”<sup>20</sup>

B. Reg BI

1. **Implied Preemption:** Conflict preemption may occur where a state regulation would frustrate the objectives of a federal rule or where it would be impossible to comply with the federal rule and the state rule.
  - a. Frustration—In *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282 (N.Y. Ct. App. 1996), the New York Court of Appeals held that Rule 10b-10 preempted state regulations over order flow payments. The court reasoned that Rule 10b-10 impliedly preempted state regulations because a patchwork of state regulations in this area would frustrate the federal rule and impose a heavy burden on broker-dealers operating nationally.<sup>21</sup>
  - b. Impossibility—In *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918 (Minn. 1996), the Minnesota Supreme Court held that Rule 10b-10 preempted Minnesota’s regulation of order flow payments on impossibility grounds. The court reasoned that Rule 10b-10, which required disclosure *after* the agency received the payment, and the Minnesota regulation, which required the agent to receive consent from the client *before* accepting payments, were impossible for a firm to comply with given the difficulties in calculating the aggregate payments.<sup>22</sup>

V. **Additional Potential Challenges**

A. State Administrative Law

1. State rules may be subject to both procedural and substantive challenges under local administrative procedures acts.
  - a. The New Jersey Administrative Procedure Act<sup>23</sup> requires [regulations] to include “[a] description of the . . . record-keeping . . . requirements being proposed for adoption”; “[a]n estimate of

---

<sup>20</sup> 15 U.S.C. § 78o(i)(1).

<sup>21</sup> *Guice*, 674 N.E.2d at 290 (noting that if state regulations were not preempted, broker-dealers face “nationwide class action civil damage liability” and would therefore be “impelled to tailor their disclosures to each State’s common-law agency jurisprudence, and the carefully crafted SEC disclosure requirements would have little, if any, influence”).

<sup>22</sup> *Dahl*, 545 N.W.2d at 925.

<sup>23</sup> N.J. Rev. Stat. § 52:14B-1 (2013).

the initial capital costs and an estimate of the annual cost of complying with the rule”,<sup>24</sup> and “a cost-benefit analysis that supports the agency’s decision to impose the standards.”<sup>25</sup>

- b. The Nevada Administrative Procedures Act states that an agency “may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions,” but only “[t]o the extent authorized by the statutes applicable to it.”<sup>26</sup>

## B. The Federal Arbitration Act

1. The Federal Arbitration Act<sup>27</sup> may preempt state regulations that allow customers to bring civil actions against broker-dealers in violation of an arbitration agreement.
2. In *Securities Industry Association v. Connolly*, 883 F.2d 1114 (1st Cir. 1993), the Secretary of the Commonwealth of Massachusetts amended a rule to define a broker-dealer’s insertion of mandatory arbitration clauses in customer agreements as an “unethical act.”<sup>28</sup> The First Circuit invalidated the rule on preemption grounds because it restricted the enforcement of arbitration agreements in direct conflict with the language of the Federal Arbitration Act.

## C. ERISA

1. ERISA imposes fiduciary duties that apply to persons or entities that exercise discretionary control or authority over plan assets, or anyone who provides investment advice to a plan for compensation.<sup>29</sup>
2. ERISA expressly preempts state laws and regulations relating to ERISA employee benefit plans.<sup>30</sup>

---

<sup>24</sup> N.J. Rev. Stat. § 52:14B-19.

<sup>25</sup> N.J. Rev. Stat. § 52:14B-23.

<sup>26</sup> Nev. Rev. Stat. Ann. § 233B.040 (2017); *see also Cashman Photo Concessions & Labs, Inc. v. Nevada Gaming Comm’n*, 91 Nev. 424, 428, 538 P.2d 158, 160 (1975).

<sup>27</sup> 9 U.S.C. §§ 1–14 (1982).

<sup>28</sup> *Connolly*, 883 F.2d at 1123–24.

<sup>29</sup> 29 U.S.C. §§ 1001–04 (1974).

<sup>30</sup> *See* 29 U.S.C. § 1144(a) (1975).



D. First Amendment

1. The First Amendment protects commercial speech. Courts evaluate four factors to determine if a government restricts commercial speech violates the First Amendment: (1) whether that communication is misleading or relates to unlawful activity; (2) whether the state has a “substantial interest” in restricting the speech; (3) whether the restriction “directly advances” the state’s interest; and (4) whether the restriction is narrowly tailored.<sup>31</sup> The government bears the burden of justifying its restriction on speech.<sup>32</sup>

E. The Commerce Clause

1. Under the U.S. Constitution, Congress has the power to regulate commerce, and Congress has the authority to make laws that are necessary and proper for executing that power.<sup>33</sup>
2. The Supreme Court employs a two-tier analysis when determining whether state economic regulation impinges on Congress’s authority under the Commerce Clause.<sup>34</sup> If “(1) a state statute directly regulates or discriminates against interstate commerce, or (2) its effect is to favor in-state economic interests over out-of-state interests, the Court has generally struck down the statute without further inquiry.”<sup>35</sup>

---

<sup>31</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

<sup>32</sup> *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

<sup>33</sup> U.S. CONST. art. I, § 8, cl. 3, 18.

<sup>34</sup> *Chrysler Capital Corp. v. Century Power Corp.*, 800 F. Supp. 1189, 1194 (S.D.N.Y. 1992) (holding Arizona’s antifraud laws concerning leaseback of electric generating plant and other utility facilities did not violate the Commerce Clause because provisions did not impede interstate commerce and did not impose any additional requirements on engaging in interstate commerce).

<sup>35</sup> *Id.* (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579–80 (1986)).

**MEMORANDUM**

TO: Attendees of SIFMA Regulation Best Interest Seminar

FROM: Lindsay B. Jackson  
Daniel R. Kleinman  
Natalie R. Wengroff  
David C. Boch  
Jason S. Pinney

DATE: July 2, 2019

SUBJECT: Comparison of Proposed Massachusetts, Nevada and New Jersey Brokerage Standards of Conduct and the SEC’s Regulation Best Interest

The table below compares the requirements of the proposed Massachusetts, Nevada and New Jersey fiduciary duty regulations and the SEC’s Regulation Best Interest as applied to broker-dealers and their registered representatives, along with select observations.

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
<b>Covered customers/clients</b>	“Retail Customer”—a natural person, or legal representative of such natural person, who receives a recommendation of any securities transaction or investment strategy involving securities from a broker-dealer (or natural person who is an associated person) and uses the recommendation primarily for personal, family, or household purposes.	“Customer” and “Client” are not defined under the proposed regulation or MA securities statutes and regulations.  Regulation expressly <b>excludes</b> recommendations and advice to: <ul style="list-style-type: none"> <li>• a bank, savings and loan association, insurance company, or registered investment company</li> <li>• a broker-dealer registered with a state securities commission (or agency or</li> </ul>	“Client”—A person who receives advice from a “financial planner.”	“Customer” is not defined under the proposed regulation or NJ securities statute and regulations.  Regulation expressly <b>excludes</b> recommendations and advice to: <ul style="list-style-type: none"> <li>• a bank, savings and loan association, insurance company, or registered investment company</li> <li>• a broker-dealer registered with a state securities commission (or agency or</li> </ul>	The New Jersey and Massachusetts proposals both include an express carve-out for advice to certain types of institutional/sophisticated investors. New Jersey’s proposal is modeled on the one the DOL provided in its fiduciary rule, but would also encompass advice given to an individual investor with assets over \$50 million. Massachusetts does not include any exceptions that would cover natural persons.  The New Jersey and Massachusetts proposals both also carve out

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
		<p>office performing like function)</p> <ul style="list-style-type: none"> <li>• an investment adviser registered either 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 function)</li> <li>• any other institutional buyer (as defined in 950 Mass. Code. Regs. 12.205(1)(a)6), which includes: (1) 501(c)(3) organizations with a securities portfolio of more than \$25 million, (2) an investing entity that existed prior to February 3, 2012 and ceased to accept new beneficial owners and whose only investors are accredited investors, and (3) an investing entity whose only investors are financial institutions and institutional buyers.</li> </ul> <p>The proposal also excludes a person acting in the capacity of a fiduciary to an ERISA-covered employee benefit plan, its participants, or beneficiaries.</p>		<p>office performing like function)</p> <ul style="list-style-type: none"> <li>• an investment adviser registered either 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 function)</li> <li>• a person (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least \$50 million.</li> </ul> <p>The proposal also excludes a person acting in the capacity of a fiduciary to an ERISA-covered employee benefit plan, its participants, or beneficiaries.</p>	<p>advice provided by an ERISA plan fiduciary, though note that ERISA would likely preempt state regulation of ERISA fiduciaries regardless.</p> <p>The SEC declined to provide an exception for natural persons based on assets, income, or sophistication. While recommendations to ERISA plan fiduciaries would generally not be subject to Reg BI, advice to plan participants generally would.</p>
<b>Covered transactions</b>	<p>Recommending:</p> <ul style="list-style-type: none"> <li>• securities transactions, or</li> <li>• investment strategies involving securities</li> </ul>	<p>Recommending:</p> <ul style="list-style-type: none"> <li>• an investment strategy</li> <li>• the opening of any type of account</li> </ul>	<p>Providing:</p> <ul style="list-style-type: none"> <li>• “investment advice”</li> <li>• managing assets</li> </ul>	<p>Recommending:</p> <ul style="list-style-type: none"> <li>• an investment strategy</li> <li>• the opening of any type of account</li> </ul>	<p>The state proposals along with the final SEC rule encompass rollovers/transfers and account type recommendations.</p>

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
	(including account recommendations)	<ul style="list-style-type: none"> <li>• transfer of assets to any type of account</li> <li>• the purchase, sale, or exchange of any security</li> </ul> <p>Having discretionary authority or a contractual fiduciary duty.</p>	<ul style="list-style-type: none"> <li>• performing discretionary trading</li> <li>• acting in a fiduciary capacity</li> <li>• disclosing fees or gains</li> <li>• through the completion of any contract, and</li> <li>• through the term of engagement of services.</li> </ul> <p>“Investment advice” includes providing:</p> <ul style="list-style-type: none"> <li>• buy, hold, or sell a security advice/recommendation</li> <li>• advice/recommendation regarding value of a security</li> <li>• analyses or reports regarding a security</li> <li>• account monitoring</li> <li>• advice/recommendation regarding account type</li> <li>• advice/recommendation regarding fee options</li> <li>• information on a personalized investment strategy</li> <li>• financial plan that includes consideration of buying, holding, or selling a security</li> <li>• limited list of securities</li> <li>• information not in a securities offering documents</li> <li>• recommendation of a broker, investment adviser, or financial planner</li> <li>• advice/recommendation regarding insurance products buy comparison to</li> </ul>	<ul style="list-style-type: none"> <li>• transfer of assets to any type of account</li> <li>• the purchase, sale, or exchange of any security</li> </ul> <p>Having discretionary authority or a contractual fiduciary duty.</p>	<p>Nevada’s proposal broadly encompasses many activities that are not currently subject to FINRA’s suitability rule.</p>

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
			<p>a security, or that includes buy, sale, or hold of a security</p> <p>Subject to certain requirements (good faith, compliance with applicable law, etc.), the following transactions are exempt from fiduciary duty obligations:</p> <ul style="list-style-type: none"> <li>• <b>Unsolicited trades</b>, unless client receives investment advice, discretionary trading, ongoing contractual services, or a financial plan, or B-D uses restricted titles.</li> <li>• <b>Executing a trade</b> recommended by an investment adviser is exempt, unless broker-dealer provides investment advice, asset management, discretionary trading services, or a financial plan, or B-D uses restricted titles.</li> <li>• <b>Clearing services</b>, unless use restricted titles.</li> </ul> <p>Additionally, subject to certain conditions, providing information in offering documents or general investment strategies and ranking to the general public are not considered investment advice.</p>		

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
<b>Standard of conduct</b>	"best interest"	"fiduciary"	"fiduciary"	"fiduciary"	
<b>Loyalty/conflicts</b>	<p>Act <b>without placing the financial or other interest</b> of the broker, dealer, or natural person who is an associated person from making the recommendation <b>ahead of</b> the interest of the retail customer.</p> <p>Must establish, maintain, and enforce written policies and procedures reasonably designed to:</p> <ul style="list-style-type: none"> <li>Identify and at a minimum <b>disclose, or eliminate, all conflicts of interest</b> that are associated with such recommendations.</li> <li>Identify and <b>mitigate any</b> conflicts that create an incentive for a natural person who is an associated person of a broker-dealer to place the broker-dealer's or associated person's interests ahead of the retail customer's interests.</li> <li>Identify and <b>disclose any material limitations</b> placed on recommendations of securities or investment strategies and <b>any conflicts of interest associated</b> with such</li> </ul>	<p>Must <b>avoid conflicts of interest</b> and make recommendations or provide advice <b>without regard to</b> 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> <p><b>No presumption that disclosing a conflict of interest</b> satisfies the duty of loyalty.</p> <p><b>Presumption of a breach of the duty of loyalty</b> for offering or receiving compensation for a recommendation to open or transfer assets to a specific type of account, or purchase sale, or exchange of a security that is <b>not the "best of the reasonably available options"</b></p> <p><b>Transaction-based remuneration</b> are not deemed a breach provided that the remuneration is reasonable and is the best of the reasonably available</p>	<p>Fiduciary duty breached if broker-dealer or representative:</p> <ul style="list-style-type: none"> <li><b>puts their own interest, other client's interest, or the firm's interest ahead of</b> the client, or</li> <li>fails to disclose all information regarding a potential conflict of interest.</li> </ul> <p>Sales of <b>proprietary products</b> are not breaches if:</p> <ul style="list-style-type: none"> <li>conduct does not otherwise violate law or SRO rule, and</li> <li>client advised that product is proprietary and of all risks associated with the product.</li> </ul> <p><b>Transaction based commission</b> for sales is not a breach, so long as it is in the client's best interest to be charged by transaction and commission is reasonable.</p>	<p>Recommendation or advice must be made <b>without regard to</b> 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> <p><b>No presumption that disclosing a conflict of interest</b> satisfies the duty of loyalty.</p> <p><b>Presumption of a breach of the duty of loyalty</b> for offering or receiving compensation for a recommendation to open or transfer assets to a specific type of account, or purchase sale, or exchange of a security that is <b>not the "best of the reasonably available options"</b></p> <p><b>Transaction-based fees</b> are not deemed a breach provided that the fee is reasonable and is the best of the reasonably available fee options, and the duty of care is satisfied.</p>	<p>All three state proposals raise questions as to the extent to which disclosure can address a conflict of interest, and, if not, what additional steps to mitigate the conflict are required, or whether conflict must be eliminated.</p> <p>Regulation Best Interest requires certain conflicts of natural/associated persons to be both disclosed and mitigated, while others may be disclosed, and certain sales contests that preference specific investment products or types of products must be eliminated.</p> <p>New Jersey and Massachusetts use "without regard to" formulation from DOL's fiduciary rule, which many found to be problematic to operationalize.</p> <p>Massachusetts would also require conflicts to be avoided.</p> <p>All three state proposals, along with Regulation Best Interest, permit transaction-based fees and commissions, though New Jersey, Massachusetts and Nevada require that transaction-based compensation be in the client's</p>

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
	<p>limitations. <b>Prevent such limitations and associated conflicts of interest</b> from causing the broker, dealer, or natural person who is an associated person to make recommendations that places their interest ahead of the retail customer.</p> <ul style="list-style-type: none"> <li>Identify and <b>eliminate</b> any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.</li> </ul>	remuneration options, and the duty of care is satisfied.			<p>“best interest” or “best of the reasonably available” options.</p> <p>Massachusetts and New Jersey indicated in their respective proposals, a concern regarding sales contests, but do not elaborate on or define the types of sales contests that are problematic, or which practices need to be eliminated, as opposed to disclosed and/or mitigated.</p> <p>New Jersey and Massachusetts both presume the duty of loyalty is breached if direct or indirect compensation is paid or received in connection with a recommendation, unless the recommended transaction is “the best of reasonably available options.” No details are provided on how this standard can be met or substantiated.</p>
<b>Care</b>	<p>Must act in the retail customer’s best interest and exercise reasonable diligence, care, and skill to:</p> <ul style="list-style-type: none"> <li><b>Understand</b> the potential <b>risks, rewards, and costs</b> associated with the recommendation and have a reasonable basis to believe the recommendation could be in the best interest of at least some retail customers;</li> </ul>	<p>Must:</p> <ul style="list-style-type: none"> <li>Use the care, skill, <b>prudence</b>, and diligence that a prudent person acting in a like capacity and familiar with such matters would use taking into consideration of all the facts and circumstances, and</li> <li>Make <b>reasonable inquiry</b>, including risks, costs, and conflicts of interest related to the recommendation or</li> </ul>	<p>Fiduciary duty breached if broker-dealer or representative:</p> <ul style="list-style-type: none"> <li><b>Fails to perform adequate and reasonable due diligence</b> on a product or strategy prior to sale or advice, including all risks or features.</li> <li>Fails to <b>understand and convey all risks or features</b> of the product or strategy.</li> </ul>	<p>Must:</p> <ul style="list-style-type: none"> <li>Use the care, skill, <b>prudence</b>, and diligence that a prudent person acting in a like capacity and familiar with such matters would use taking into consideration of all the facts and circumstances, and</li> <li>Make <b>reasonable inquiry</b>, including risks, costs, and conflicts of interest related to the recommendation or</li> </ul>	<p>New Jersey and Massachusetts both propose a “prudence” duty of care, consistent with ERISA/DOL fiduciary rule.</p>

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
	<ul style="list-style-type: none"> <li>• Have a <b>reasonable basis</b> to believe that the recommendation is in the <b>best interest of a particular retail customer based on</b> that retail customer’s <b>investment profile</b> and the potential <b>risks, rewards and costs</b> associated with the recommendation and does not place financial or other interests ahead of retail customer’s interests; and</li> <li>• Have a <b>reasonable basis</b> to believe that a <b>series of recommended transactions</b>, even if in the retail customer’s best interest when viewed in isolation, <b>is not excessive</b> and is in the retail customer’s <b>best interest when taken together</b> in light of the retail customer’s investment profile and does not place financial or other interests ahead of retail customer’s interests.</li> </ul>	investment advice, and the customer’s or client’s investment objectives, financial situation, and needs, and any other relevant information.	<ul style="list-style-type: none"> <li>• Recommends a security that is not in the client’s <b>best interest</b>.</li> <li>• <b>Limits availability of securities to certain clients</b> unless based on investment goals or strategy, or limitations on quantity or type of investment that can be sold, or security’s own limitations.</li> <li>• Fails to comply with <b>best execution</b> rules.</li> </ul>	investment advice, and the customer’s investment objectives, financial situation, and needs, and any other relevant information.	
<b>Compensation</b>	No specific requirement; SEC noted in proposed Regulation Best Interest that broker-dealers already required to receive only fair and reasonable compensation.	No specific requirement, broker-dealers and investment advisers are already required to receive only fair and reasonable compensation.	Fiduciary duty breached if broker-dealer or representative recommends or charges a fee that is unreasonable.	Receiving an unreasonable commission or profit prohibited as a dishonest or unethical practice under current law.	



Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
<b>On-going/ episodic</b>	Obligation applies <i>at the time recommendation is made</i> , unless the broker-dealer agrees to provide ongoing advice.	Obligation extends through the <i>execution of the transaction</i> , and is not ongoing, <i>unless</i> the broker-dealer also <i>makes ongoing recommendations or provides in any capacity "investment advice"</i> to the customer, or <i>receives ongoing compensation</i> in connection with the recommendation or advice.	Obligation is <i>ongoing</i> , unless conditions of <i>Episodic Duty Exemption</i> are satisfied, including: <ul style="list-style-type: none"> <li>• Broker-dealer does not: <ul style="list-style-type: none"> <li>○ manage client assets</li> <li>○ create periodic financial plans</li> <li>○ provide ongoing advice</li> <li>○ enter into a contract to provide investment advice</li> <li>○ perform discretionary trading</li> <li>○ otherwise develop a fiduciary relationship from previous or concurrent services</li> <li>○ use specified titles</li> </ul> </li> <li>• Facts and circumstances do not indicate client reasonably expects additional or ongoing advice</li> <li>• Client solicited the investment advice</li> </ul>	Obligation extends through the <i>execution of the transaction</i> , and is not ongoing, <i>unless the broker-dealer also provides in any capacity "investment advice"</i> to the customer.	<p>Regulation Best Interest recognizes that a broker-dealer's obligations are generally limited to the time a recommendation is made, and not ongoing, unless agreed to with the customer.</p> <p>Many consider Nevada's Episodic Exemption to be too limited/difficult to satisfy to be workable for traditional brokerage services.</p> <p>New Jersey's and Massachusetts's proposals would extend the obligation beyond the time of recommendation to the time of execution.</p> <p>Additionally, while New Jersey's preamble suggests that an ongoing obligation is intended to apply to dual-hatted B-Ds and RIAs, it is not clear how broadly "investment advice" could be interpreted. In contrast, Massachusetts's proposal would apply the ongoing obligation more broadly including where the broker-dealer receives ongoing compensation or provides recommendations in any capacity.</p>
<b>Disclosures</b>	Must disclose all material facts relating to the scope and terms of the relationship with the retail customer, including capacity, material fees and costs, type and scope of services (including any material	No specific disclosure requirements under proposal; certain disclosures required under current law.	Must disclose: <ul style="list-style-type: none"> <li>• "Gains" which includes: <ul style="list-style-type: none"> <li>○ Percentage of assets fee</li> <li>○ Sales commissions</li> <li>○ Mark ups and mark downs</li> </ul> </li> </ul>	No specific disclosure requirements under proposal; certain disclosures required under current law.	<p>Additional disclosures apply to broker-dealers under SEC's Form CRS.</p> <p>Many view Nevada's disclosure obligations as problematic to operationalize.</p>

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
	<p>limitations) and all material facts regarding conflicts of interest associated with the recommendation.</p> <p>Must provide disclosure in writing either prior to or at time of the recommendation.</p>		<ul style="list-style-type: none"> <li>○ Market maker commissions (Electronic Communication Network rebates or credits)</li> <li>○ Transaction volume discounts</li> <li>○ Management fees</li> <li>○ Trailed or deferred fees or commissions</li> <li>○ Front and back end loads</li> <li>○ Service fees</li> <li>○ Payment for order flow</li> <li>• All information regarding potential conflicts of interest</li> <li>• Current offering documents</li> <li>• That a product is proprietary or advice is based on a limited pool of assets</li> <li>• All material risks or features of a product</li> <li>• Bad actor disqualification</li> </ul> <p>Must also comply with FINRA requirements on customer communications and disclosures.</p>		
<b>Titles</b>	Disclosure obligation presumed to be breached if a broker-dealer or representative uses the terms "adviser" or "advisor" unless dually registered as an investment adviser.	No restrictions.	<p>Additional limitations and obligations apply where broker-dealer or representative uses the titles:</p> <ul style="list-style-type: none"> <li>• Advisor, adviser</li> <li>• Financial planner, financial consultant</li> <li>• Retirement consultant, retirement planner</li> </ul>	No restrictions.	

Requirement	Regulation Best Interest	Massachusetts	Nevada	New Jersey	Observations
			<ul style="list-style-type: none"> <li>• Wealth manager</li> <li>• Counselor</li> <li>• Other titles the administrator may by order deem appropriate</li> </ul>		
<b>Presumptions of status</b>	None	Rebuttable presumption that "adviser" includes all investment advisers and investment adviser representatives (including those not required to register under state law), as well as other persons who charge fees based on assets under management or portfolio performance for rendering investment advice	<p>Broker-dealer presumed to owe a fiduciary duty and has burden of proving otherwise.</p> <p>Dual-hatted broker-dealer/investment advisers are presumed to be acting as an investment adviser and may not rely on episodic advice exemption.</p>	None	
<b>Effective Date</b>	June 30, 2020	TBD	TBD	Effective 90 days after the effective date of final rule.	