



Insured Retirement Institute

STATE STANDARD OF CONDUCT ACTIVITY TRACKER

Updated October 2019

This document¹ tracks state legislative and regulatory activity relating to the standard of conduct applicable to insurance companies and the firms and financial professionals who sell insurance products. In the aftermath of the [5th Circuit's decision](#) to strike down the Department of Labor's fiduciary rule,² a growing number of state legislatures and regulators are taking or considering action to raise the standard of conduct under state insurance and/or securities law. In addition, some state courts impose a fiduciary duty on broker-dealers based on state common law. Given the multitude of approaches, each state is at a different stage of the process. This tracker provides a synopsis of current state legislative, regulatory, and judicial activity on the standard of conduct and identifies jurisdictions where future activity is possible.

Questions should be directed to [Jason Berkowitz](#), *Chief Legal and Regulatory Affairs Officer*, or [Chelsea Crucitti](#), *Director of State Affairs*.

Standard of Conduct Activity:

- **Adopted:** [New York](#) (Best Interest Standard) (*Department of Financial Services*), [Nevada](#) (Fiduciary Standard) (*Legislature*)
- **Proposed:** [Massachusetts](#) (Fiduciary Standard) (*Securities Division*), [Nevada](#) (Fiduciary Standard) (*Insurance Division*), [Nevada](#) (*Securities Division*), [New Jersey](#) (*Bureau of Securities*)
- **Defeated:** [Maryland](#) (Fiduciary Standard) (*Legislature*)

Fiduciary Disclosure Activity:

- Connecticut, Illinois, New York

Common Law Fiduciary Duty:

- California, Missouri, South Carolina, South Dakota

¹ This document does not constitute a legal opinion or conclusion by the Insured Retirement Institute, its staff, or its member companies, and should not be used as the sole basis for making individual company decisions or conclusions. IRI reviews this tracker and makes updates as appropriate. Users should refer to the websites linked below for the most current and complete information.

² *Chamber of Commerce of the U.S.A., et al. v. U.S. Dep't of Labor, et al.*, No. 17-10238, slip op. 46 (5th Cir. Mar. 15, 2018).

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The states listed below have taken legislative and/or regulatory action towards adopting a fiduciary standard or otherwise enhance the applicable standard of conduct. In addition to the states listed below, IRI is also watching for signs of possible activity in traditional Democratic strongholds such as California, the District of Columbia, Florida, Illinois, Oregon, and Washington, as well as states in which control of the governor’s mansion and/or the legislature flipped from Republican to Democrat in the most recent elections.

State	Status	Summary	Recent Activity, History, and Next Steps
Maryland Legislature SB786 / HB1127 (2019)	Died (4/8/19)	The legislation would have effectuated the Commission’s January 14, 2019 report (required by 2018 fiduciary legislation HB 1634 /SB 1068 that was amended into a study bill). The report recommends the creation a uniform fiduciary standard to act for investment advisors and broker-dealers 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.”	<ul style="list-style-type: none"> ▪ On March 13, 2019, the House and Senate held two hearings. IRI presented oral testimony at both hearings. ▪ IRI submitted written testimony to the House and Senate for hearings on the bill urging the legislature to wait for the SEC, DOL and NAIC to take action before deciding whether a state-specific rule is needed. ▪ The fiduciary provision was removed from the bill and replaced with a provision calling for a study of the issue by the Maryland Consumer Financial Protection Commission after significant pushback from IRI and others. ▪ On 4/8/19, both bills died upon adjournment after being Reported Unfavorably by committees.
Massachusetts Securities Division Preliminary Fiduciary Proposal	Pending - Preliminary Proposal (6/14/19)	The preliminary proposal would impose a fiduciary duty on BDs, agents, and advisors. The fiduciary conduct standard requires that recommendations and advice be made in the best interest of customers and clients without regard to the interests of the broker-dealer or advisory firm or its personnel. The receipt of transaction-based remuneration is allowed if it is reasonable, it is the best of the reasonably available remuneration options, and the care obligation is satisfied.	<ul style="list-style-type: none"> ▪ On 8/7/18, Massachusetts’ Secretary of the Commonwealth, William F. Galvin, submitted a highly critical comment letter to the SEC on its proposed Regulation Best Interest asserting that he would pursue a state-specific fiduciary standard if the SEC proposal is not meaningfully enhanced. ▪ On June 14, 2019, the Securities Division issued a preliminary proposal. ▪ On July 26, 2019, IRI submitted a comment letter addressing concerns with the proposal. ▪ The Mass. Division of Insurance submitted a comment letter requesting that promulgation of the Proposal be delayed to allow sufficient time to harmonize the Proposal with the work of Division of Insurance and the

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			<p>NAIC and “modified as necessary to reflect the unique nature of annuity products.”</p> <ul style="list-style-type: none"> ▪ Next Steps: A formal proposal is expected in the fall of 2019 likely followed by a formal hearing.
<p>New Jersey Bureau of Securities Rule Proposal 51 N.J.R. 493(a) (2019)</p> <p>Notice of Pre-Proposal (2018)</p>	<p>Proposed</p>	<p>The proposal would impose a fiduciary duty (duty of loyalty and duty of care) on BDs, agents, and advisors. The fiduciary standard requires that recommendations and advice be made in the best interest of customers and clients without regard to the interests of the broker-dealer or advisory firm or its personnel.</p> <p>The pre-proposal sought public comments on possible amendments to the Bureau’s rules to require that broker-dealers, agents, investment advisers, and investment adviser representatives be subject to a fiduciary duty.</p>	<ul style="list-style-type: none"> ▪ On 9/17/18, Governor Phil Murphy issued a statement indicating that New Jersey would propose a fiduciary standard. ▪ On 10/15/18, the Bureau issued the notice of pre-proposal. ▪ On 11/19/18, IRI provided testimony at the informal conference. ▪ On 12/14/18 a joint trades’ comment letter signed by IRI was submitted to the Division. ▪ On 3/18/19, IRI staff met with New Jersey Securities Chief, Christopher Gerold. IRI staff reported favorably on the meeting and signaled that the New Jersey Securities Division was taking a well-balanced and thoughtful approach on the rulemaking. ▪ On 6/14/19, IRI submitted written comments to the Bureau. The Bureau agreed to IRI’s request to hold a public hearing and extend the comment period. ▪ On 7/17/19, IRI testified at a second public hearing (hearing testimony transcript). ▪ On 10/24/19, IRI met in-person with several Bureau staff to reiterate our concerns and respond to the Hearing Officer’s Report’s characterization of the industry and seemingly personal views that comprised most of the report. Bureau staff indicated that they do not intend to include annuity recommendations within the scope of the rule (except when accompanied by a recommendation to sell securities to fund the purchase of an annuity), though they would not commit to expressly stating that position in the final rule.

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			<ul style="list-style-type: none"> ▪ Next Steps: The Bureau has one year, until April 15, 2020, to review all public comments it received and issue a summary of the comments and its response. The summary will be published in a Notice of Adoption indicating the regulation is final. The rule becomes final and will take effect 90 days after publication, unless extended in the rule itself. ▪ Next Steps: IRI is monitoring the Bureau’s review of submitted comment letters and the possibility of an in-person meeting with Director Rodríguez. <p>.....</p> <ul style="list-style-type: none"> ▪ In the course of discussions with the New Jersey Bureau of Securities, IRI became aware of an existing fiduciary duty on licensed insurance agents, existing since at least 1989. ▪ Codified at 11:17A-4.10 N.J.A.C., the language states: “[a]n insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business.” ▪ In 2004, the Department issued Bulletin No. 04-20 (N.J.A.C. 11:17A-4.10) offering industry guidance. ▪ Based on the judicial gloss painted over this regulation, it appears the regulation is more a light-touch fiduciary duty that is more akin to malpractice than traditional norms of fiduciary status. This provision is rarely invoked in litigation and is often conflated with common law duties. In short, the fiduciary duty requires insurance agents to exercise good faith and reasonable skill when advising clients. Weinisch v. Sawyer, 123 N.J. 333, 340 (1991). Moreover, an insurer is obligated “(1) to procure the insurance; (2) to secure a policy that is neither void nor materially deficient; and (3) to provide the coverage he or she undertook to supply.” President v. Jenkins, 853 A.2d 247, 257 (2004) (citing Rider v. Lynch, 201 A.2d 561, 566 (1964)). The concept is closely related to malpractice

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			<p>and requires agents to “possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected.” Aden v. Fortsh, 776 A.2d 792, 801 (2001) (quoting Rider, 201 at 476).</p> <ul style="list-style-type: none"> IRI has conducted an in-house review of the rule and its application. Those seeking additional information should inquire with Jason Berkowitz.
<p>New York Department of Financial Services (DFS) First Amendment to Regulation 187</p>	<p>Adopted on 7/18/18.</p> <p>Effective Dates: Annuities: 8/1/19; Life insurance: 2/1/20.</p>	<p>Regulation 187 incorporates a best interest standard and applies to recommendations of new sales and in-force transactions involving life insurance and annuities, as well as recommendations that a client refrain from entering a transaction. Insurers remain responsible for oversight of producers’ suitability determinations but are not charged with supervising best interest determinations.</p>	<ul style="list-style-type: none"> IRI submitted comments to DFS on 2/26/18 (IRI-only and joint trades), and 6/15/18. On 6/11/18, IRI met with DFS staff. IRI created its New York Reg 187 Working Group to help support members’ implementation efforts through a series of conference calls to discuss member questions culminating. The Working Group produced an Implementation Q&A Guide and Flow Chart. On 8/29/19, IRI, LICONY, and members had a constructive meeting with DFS to discuss implementation challenges and suggest ways to rectify the problems. DFS accepted IRI’s suggested language and memorialized it in formal guidance. On 10/7/19, DFS contacted IRI to provide feedback on its draft FAQs aimed at helping with day-to-day application of the regulation. IRI teamed with LICONY to submit joint feedback.
<p>Nevada Insurance Division LCB File No. R165-18</p>	<p>Proposed</p>	<p>The proposal would amend the state’s annuity suitability regulation to conform to draft revisions that were under consideration by the NAIC Annuity Suitability Working Group during the summer of 2018.</p>	<ul style="list-style-type: none"> IRI led a coalition of trade groups on joint comment letters dated 11/7/18 and 12/14/18 On November 14, 2018, IRI testified during the Division’s workshop. Division staff indicated its intention to wait for the completion of the NAIC’s work before deciding whether to proceed.

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			<ul style="list-style-type: none"> ▪ Next Steps: IRI will continue to monitor the Division’s activity and encourage it to wait until the NAIC completes its work.
<p>Nevada Securities Division Fiduciary Proposal (N.A.C. Chapter 90)</p>	<p>Proposed (1/18/19)</p>	<p>The proposal would define the parameters of the fiduciary duty applicable to broker-dealers and sales representatives under the legislation enacted in 2017 (SB 383).</p>	<ul style="list-style-type: none"> ▪ On March 1, 2019, IRI submitted a comment letter on the proposal and signed onto a joint trade letter. ▪ Next Steps: IRI will continue to encourage the Securities Division to wait until Reg BI is implemented and assessed for deficiencies.
<p>Nevada Legislature SB383</p>	<p>Enacted - Effective 7/01/2017</p>	<ul style="list-style-type: none"> ▪ The legislation amends the section of the Nevada code that defines “financial planners” to remove the exemption for broker-dealers, meaning that any broker-dealer or registered representative who engages in “financial planning” will owe their clients a fiduciary duty. ▪ Under the amendment, broker-dealers must <ul style="list-style-type: none"> ▪ disclose to a client, at the time advice is given, any gain he or she may receive (i.e. profit or commission), if the advice is followed; and ▪ make a diligent inquiry of each client to ascertain initially, and keep currently informed concerning, the client’s financial circumstances and obligations and the client’s present and anticipated obligations to and goals for his or her family. ▪ The legislation grants rulemaking authority to the Securities Division to promulgate rules defining acts, practices, or a course of business that are a violation of the fiduciary duty. 	

STATE FIDUCIARY DISCLOSURE ACTIVITY

Fiduciary disclosure legislation would require financial professionals to disclose to customers whether they are acting under a fiduciary duty.

<u>State</u>	<u>Activity to Date</u>
2019 Activity	
New York A2476/S2872 Non-fiduciary Disclosure	<ul style="list-style-type: none"> ▪ On January 22, 2019, Assemblyman Jeffrey Dinowitz re-introduced the Investment Transparency Act (Bill No. A2476) Senate companion bill (S2872) was introduced by Sen. Holyman on January 30, 2019. The bill would require non-fiduciary investment advisors to provide their customers an initial disclosure orally and in writing that would disclaim that the advisor is not required to act in the investor's best interest. The disclosure shall read: "A non-fiduciary investment advisor is not required by law to act solely in the client's best interest. Federal law, state law, and standards of professional conduct do not apply a fiduciary standard to my investment recommendations, although other standards may apply. You may ask any advisor to explain to you the standards that apply to their investment recommendations." ▪ Assemblyman Dinowitz has introduced identical bills in previous years without success. ▪ At this time, it is unclear how the bill would interact with the New York Department of Financial Service's Regulation 187. ▪ On May 22, 2019, A2476 was passed out of the Judiciary Committee and referred to the Codes Committee. On May 23, 2019, S2872 was recommitted to the Judiciary Committee. ▪ Next Steps: IRI is monitoring the legislation and is aware of the possibility of similar legislation being introduced in 2020.
2018 Activity	
Illinois HB 4753	<p>On 2/13/18, the Investment Advisor Disclosure Act (HB4753) was introduced in the House of Representatives. The bill is merely a placeholder and contains no statutory language besides a short title. No action was taken on this bill during the 2018 session. The bill was not reintroduced in 2019.</p>
2017 Activity	
Connecticut HB 6992 Fiduciary Disclosure	<p>On 7/5/17, Public Act No. 17-120 was enacted. The Act applies only to financial planners who are not otherwise regulated by state or federal law and requires them to disclose to investors whether they are acting as fiduciaries.</p>

STATE COMMON LAW – FIDUCIARY DUTY

Courts in the following jurisdictions have ruled that broker-dealers are subject to a fiduciary standard of conduct under state common law.

<u>State</u>	<u>Case Citation</u>	<u>Court's Language</u>
California	<i>Hobbs v. Bateman Eichler, Hill Richards Inc.</i> , 164 Cal. App. 3d 174, 201 (1985)	"The relevant law is clear. 'The relationship between broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith toward the principal.'"
Missouri	<i>State ex rel Paine Webber v. Voorhees</i> , 891 S.W.2d 126, 130 (1995)	"In Missouri, stockbrokers owe customers a fiduciary duty. ...This fiduciary duty includes at least these obligations: to manage the account as dictated by the customer's needs and objectives, to inform of risks in particular investments, to refrain from self-dealing, to follow order instructions, to disclose any self-interest, to stay abreast of market changes, and to explain strategies."
South Carolina	<i>Cowburn v. Leventis</i> , 619 S.E.2d 437, 447 (S.C. Ct. App. 2005)	"A broker or dealer of securities is an agent of the buyer, and therefore, generally owes the buyer fiduciary duties. These duties often include the duty to account for all funds and property belonging to the buyer, to refrain from acting adversely to the buyer's interest, to avoid engaging in fraudulent conduct, and to communicate any information he or she may acquire that would be to the buyer's advantage."
South Dakota	<i>Dinsmore v. Piper Jaffray, Inc.</i> , 593 N.W.2d 41 (S.D. 1999)	"[S]ecurities brokers owe, at least, the same fiduciary obligations to their clients as do real estate brokers, viz. 'a duty of utmost good faith, integrity and loyalty.' [citation omitted]. Investors, as a rule, employ securities brokers to perform specialized financial services and entrust the brokers with the authority to act for them. This repose of trust in the broker, that the broker will act in the client's best interest, is a mark of a fiduciary relationship."