Massachusetts Adopts Fiduciary Regulation

By Christine Lazaro, Professor of Law & Clinic Director

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This analysis was prepared by SAA *Advisory Board Member Prof. Christine Lazaro. The* Alert *thanks Prof. Lazaro for her thoughtful insights. The words that follow, aside from the italicized comments at the end, are hers.*

The Massachusetts Securities Division issued a Statement *on February 21 that it had adopted amendments to its standards of conduct for broker-dealers and agents, 950 CMR 12.200 (the "Regulations"). The amendments go into effect on March 6, 2020, but will not be enforced until September 1, 2020.*

Final Regulations

In its Adopting Release, the Securities Division sets forth the changes made following the publication of a proposed regulation, a public hearing, and review of the comments received. The Final Regulations make a number of changes to the Proposed Regulations *(see our analysis in SAA 2020-04 (Jan. 29))*. First, they remove any reference to investment advisers and investment adviser representatives from the title of 950 CMR 12.207, which is now titled, "Fiduciary Duty of Broker-Dealers and Agents." Next, they limit application of the standard to recommendations concerning securities, removing references to commodity and insurance products. 950 CMR 12.207(1)(a). The Final Regs also limit the application of the fiduciary duty, narrowing the scope of the duty. In the Proposed Regulations, the duty would have applied during the time period the firm or broker received any on-going compensation, as well as when the firm or broker did anything that would result in the reasonable expectation that the firm or broker would monitor the customer's account. Based on concerns raised in the comments that this created on-going duties to monitor a customer's account, the Final Regulations limit the duty to monitor to brokers who exercise discretion, have a contractual fiduciary duty, or have agreed to monitor on a periodic basis. 950 CMR 12.207(1)(b). The Final Regulations further clarify that an agreement to monitor only creates a duty to review the account at the agreed upon interval (e.g. monthly or quarterly). 950 CMR 12.207(1)(b)(3). Under the Proposed Regulations, there was also a presumption that brokers who used certain titles would be deemed to have created the expectation that they would monitor a customer's account. The Final Regulations eliminate this presumption.

Duty of Care

The Final Regulations establish a Duty of Care and a Duty of Loyalty on the part of brokers. 950 CMR 12.207(2). The Duty of Care remains unchanged from the Proposed Regulations, requiring that a broker "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." 950 CMR 12.207(2)(a). A broker is required to inquire as to the customer's investment objectives, risk tolerance, financial situation, and needs; and must consider the risks, costs, and conflicts of interest related to recommendations. 950 CMR 12.207(2)(a)(1) and (2). The Duty of Loyalty in the Final Regulations is similar to the duty set out in the Proposed Regulations. It requires a broker to: "(1) Disclose all material conflicts of interest; (2) Make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot reasonably be avoided, and mitigate conflicts that cannot reasonably be avoided or eliminated; and (3) Make recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer." 950 CMR 12.207(2)(b). The Final Regulations presume it will be a violation of the Duty of Loyalty if the broker makes any recommendation in connection with a sales contest. 950 CMR 12.207(2)(d). This is narrower than the Proposed Regulations that presumed a violation for recommendations in connection with an implied or express quota requirement, or other special incentive program, in addition to sales contests. The Final

Regulations retain the language that “disclosing conflicts alone does not meet or demonstrate the duty of loyalty.” 950 CMR 12.207(c).

Implementation and Enforcement

Although there were requests that Massachusetts hold off on adoption and implementation of any changes to its standards of conduct until compliance with the SEC’s Reg BI is implemented on June 30, the Final Regulations make the regulation effective on March 6, 2020. However, the Securities Division will not enforce the Final Regulations until September 1, 2020.

*(ed: *We analyzed the Proposed Regulations in SAA 2019-47 (Dec. 11) and the comments in SAA 2020-04 (Jan. 29). **Readers may recall that Massachusetts also published a preliminary request for comments earlier in 2019, and those comments were analyzed in SAA 2019-30 (Aug. 7). ***Every time we’ve reported on State efforts to move ahead with their own fiduciary rules or laws, we’ve queried the potential preemptive effect of the SEC’s rule. Reg BI addresses this issue directly: “We note that 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.” A footnote observes that “the preemptive effect on any state law would be determined in future judicial proceedings, and would depend on the language and operation of the particular state law at issue.” We expect to see litigation challenging the adoption of the Final Regulations on preemption grounds.)* (SAC Ref. No. 2020-08-02)

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NASAA's "E&O Insurance Survey" Makes Case for E&O Insurance as a Treatment for Unpaid Awards

Calling it a "key focus for the North American Securities Administrators Association," NASAA's Broker-Dealer Section reports, in a [10-page Study]() released on December 11, 2019, that the problem of unpaid arbitration awards has led it to survey the economic and practical feasibility of E&O insurance coverage for FINRA members.

That coverage for "errors and omissions" is too expensive and impractical to constitute a viable solution to the incidence of unpaid arbitration awards, particularly with respect to smaller broker-dealers, has been the stock reaction and repeated response to this suggested fix in the past. The Broker-Dealer Section and its Market Integrity and Regulatory Policy and Review Project Group decided to test the proposition.

To approach the problem in a deliberate way, the Section undertook to survey the frequency with which broker-dealers carry E&O insurance currently and the range in scope of policy coverage. The central objective aimed at finding the incidence of E&O insurance and how often it has paid awards or settlements in arbitration. The Report's findings: "[T]he survey results reveal that the majority of the responding firms had E&O insurance and that their policies have paid claims. Further, the results of the survey contradict the blanket assertion that E&O insurance is too expensive or too difficult."

The 64 firms in NASAA's survey were selected based on size and geographic location; small and mid-sized firms constituted 74% of the respondents of those surveyed. Among the small firms, 40% were not covered by E&O insurance, yet only 4% of that 40% cited cost as the reason for non-coverage. One firm specializing in the sale of Direct Participation Programs stated that insurance coverage was unavailable to it, while another, specializing in the sale of government securities, reasoned that it had never had a claim against it. Premium costs varied widely among the survey group, with the lowest premium falling under $4,000, another at $10,000, 17% claiming premium costs of $100,000 or more, and 4% claiming premiums exceeding $1 million. Four examples provided by NASAA reflected annual premiums constituting about 7%, 10%, 12%, and 30% of net capital. The data, according to the Report, show that "firms can obtain some measure of coverage at a reasonable cost."

NASAA also found that a surprising number (28) of insurance carriers offer E&O insurance to the sample and that the business was "evenly spread" — not concentrated among a select few providers. Coverage limitations were also studied. Examples of exclusions from coverage were claims relating to fraud, alternative products, and unapproved securities activities. Some policies excluded specific reps from coverage, presumably to reduce premiums. Finally, the survey collected information about payouts by carriers; for instance, 23% of the firms reported at least one claim payout during the most recent coverage year, covering both claims filed and customer complaints that did not reach the filing stage. Whether any claims were refused coverage by the carrier was not specifically indicated, but NASAA does comment that "covered claims are generally being paid."

Summing up, NASAA states its primary conclusion that "small firms included in the survey could obtain E&O insurance at a reasonable cost." The Report's authors opine further that E&O insurance might help assure payments for some investors successful in arbitration. But, they also concede that, "because E&O insurance may not necessarily address awards against inactive firms or claims involving fraud or other excluded conduct, it is not a complete solution to the problem of unpaid arbitration awards."

*(ed: *NASAA does not cite the claims by FINRA that it too studied the feasibility of E&O insurance coverage for arbitration awards and found required coverage an imprudent proposition, but this Report clearly aims a shot across FINRA's bow with its findings that*

*coverage is available, that it's not prohibitive in cost (in NASAA's view), and that, practically speaking, while fraud claims are commonly excluded from coverage, insurance carriers generally pay out when claims are made. **On this last point, we admit some discomfort with the Report's failure to deal with denied coverage and with the glib observation that "covered" claims are generally paid." Of course, covered claims are paid!! ***FINRA statistics, quoted in the Report, indicate that unpaid awards can be attributed to firms that were "inactive" at the time of the relevant arbitration filing 8-39% of the time and to individuals who were "inactive" at the time of filing 21-52% of the time. Such Respondents in arbitration would not have active insurance coverage, but, perhaps, some percentage of those becoming "inactive" during the arbitration would remain active, if E&O coverage were present, and, certainly, if coverage applied, fewer firms and individuals would be barred for non-payment. ****NASAA makes this observation in fn. 3 of the Report: "How this issue [of non-payment to successful clients in arbitration] relates to investment advisers is an area for further review." We would hope that "further review" would be hastened by the fact that NASAA's state regulators bear primary regulatory authority over nearly 18,000 RIAs. Would it not be a bold and persuasive move for the states to lead by example and demonstrate the effectiveness of E&O coverage in solving the problem of unpaid awards by imposing that requirement in a regime over which they have control and responsibility?)*

That Didn’t Take Very Long! Just as Reg BI Goes into Effect, Seven States and DC Sue To Block It

By George H. Friedman, SAA Editor-in-Chief

Just as the SEC’s Regulation Best Interest was about to go into effect September 10, several states and the District of Columbia sued to stop it.

As we reminded readers in SAA 2019-34 (Sep. 4), Regulation Best Interest (84 FR 33318) and Final Rule – Form CRS Relationship Summary and Form ADV Amendments (84 FR 33492) were set to go into effect September 10. Just a day before effectiveness, seven states and the District of Columbia sued the SEC and Chairman Jay Clayton to enjoin Reg BI’s implementation. *State of New York et al v. SEC*, No. 1:19-cv-08365-VM (S.D.N.Y. Sep. 9, 2019), was filed by the Attorneys General of California, Connecticut, Delaware, Maine, New Mexico, New York, Oregon, and the District of Columbia on September 9. The 36-page Complaint seeks declaratory and permanent injunctive relief. Say the AGs: “This lawsuit challenges a final regulation issued by the Securities and Exchange Commission that undermines critical consumer protections for retail investors, increases confusion about the standards of conduct that apply when investors receive recommendations and advice from broker-dealers or investment advisers, makes it easier for brokers to market themselves as trusted advisers (while nonetheless permitting them to engage in harmful conflicts of interest that siphon investors’ hard-earned savings), and contradicts Congress’s express direction.”

Deviation from Dodd-Frank

The Complaint also alleges that the Commission exceeded its authority under Administrative Procedure Act, 5 U.S.C. § 706(2)(C), by not following Dodd-Frank Act § 913(g). Say the Plaintiffs: "Congress … in a section expressly entitled 'Authority to Establish a Fiduciary Duty for Brokers and Dealers,' authorized the Commission to promulgate rules (a) harmonizing the standards of conduct that apply to broker-dealers and investment advisers, and (b) providing that 'the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers. . . , shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.' Contrary to this delegation of authority, however — and despite the published recommendations of the Commission's own expert staff — the Final Rule neither harmonizes the standards of conduct between broker-dealers and investment advisers, nor requires broker-dealers to act in their customers' best interests 'without regard to' the broker's own financial interests" (citations omitted; second ellipse in original).

Potential Harm

As for possible harm caused by Reg BI implantation, the Complaint says: "The Commission's disregard for Congress's directives in the Dodd-Frank Act will harm Plaintiffs and their residents. Among the harms they will suffer, Plaintiffs will lose revenue from the taxable portions of distributions from their residents' investment and retirement accounts that are worth less because of expensive conflicts of interest in investment advice; Plaintiffs will bear a greater financial burden to assist retirees and others whose savings are insufficient to meet their needs due to conflicted investment advice; and the regulation will harm Plaintiffs' strong quasi-sovereign interest in protecting the economic well-being of their residents."

*(ed: *Well, then! We can't wait to see the Answer. **We were a bit surprised there was no prayer for temporary injunctive relief. ***We found somewhat weak and speculative the potential harm arguments. ****Two Reg BI-related items were effective immediately on*

Federal Register *publication in July: Commission Interpretation Regarding Standard of Conduct for Investment Advisers (84 FR 33669) and Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser (84 FR 33681). *****We will certainly keep our eye on this one!)* (SAC Ref. No. 2019-35-01)

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Well, We Are Persistent. Comment Period Ended Mid-July on NJ Fiduciary Proposal. Comments Are Not Posted Online but We've Pieced Together an Analysis

By George H. Friedman, SAA Editor-in-Chief

The comment period closed July 18 on New Jersey's proposed fiduciary rule, with somewhat predictable comments. Although the comments are not routinely posted online (ed: really, New Jersey?), with some sleuthing and help from the AG's Consumer Affairs folks, we've *been able to put together an analysis.*

As reported in SAA 2019-15 (Apr. 17), the New Jersey Bureau of Securities on April 15th published 51 N.J.R. 493(a), seeking public comments on *Fiduciary Duty of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives.* As described in a Summary: "In order to better protect the public interest and, in particular, New Jersey's investing public, the New Jersey Bureau of Securities (Bureau) is proposing new N.J.A.C. 13:47A-6.4 to establish, by regulation, the common law fiduciary duty and apply it to broker-dealers and agents, and to codify it for investment advisers and investment adviser representatives. The Bureau believes that the proposed new rule is necessary to ensure that persons involved in the securities markets are uniformly held to a high standard in their dealings with the general public and is necessary to ensure the welfare of New Jersey investors." The comment period was to have expired on June 14, but the Bureau later published a Notice extending the deadline to July 18 (see SAA 2019-24 (Jun. 19)).

Comments Hard to Find, but as Expected

The comments period closed July 18th, with over 1,000 letters. We searched in vain for the official compilation of comments, but could not find them. This was confirmed to us by the Attorney General's Division of Consumer Affairs, which informed us that comment letters are not posted online but are available upon request after the comment period closes. We thus got our hands on the 1,000+ comments supplied by Consumer Affairs. We also found some institutional comments online which we link to below. As expected, consumer and investor groups by and large support the proposed reg as filling gaps in the SEC's Reg BI, and industry groups oppose the proposal as duplicative and costly. We analyze below some representative comment letters.

Consumer and Investor Advocates: Several investor and consumer rights groups sent a letter strongly supporting the proposed changes: "Several aspects of the Bureau's proposal are vastly more protective of investors than corresponding provisions in Regulation Best Interest. These include the provisions in the proposal that would apply a uniform fiduciary standard across an appropriately broad range of advisory activities. They also include the specific formulation of the fiduciary standard, which would ensure that brokers' and adviser's advisory activities alike are not tainted by conflicts of interest, to investors' detriment." AARP organized submission of several hundred supportive comments submitted by individual investors. PIABA (the Public Investors *Advocate* Bar Association, f/k/a the Public Investors Arbitration Bar Association; see coverage of the name change elsewhere in this *Alert*) submitted a separate letter supporting the proposed Reg, as did NASAA.

Industry: SIFMA and several other industry groups submitted a joint comment letter opposing the proposed amendment. The writers' core recommendation? "[W]e urge the Bureau to pause its rulemaking process, review Reg BI, and reevaluate its Proposal before deciding whether it is necessary to proceed with an additional state regulation. Doing so would give the Bureau an opportunity to determine if there are material gaps between Reg BI and the Bureau's proposed regulation. This is especially critical, as the creation of overlapping, duplicative or potentially conflicting requirements could create serious issues for the industry – particularly if such rules go into effect across multiple states, which would likely lead to increased investor confusion and undermine the intent of federal law." SIFMA submitted its own comment letter along the same lines.

*(ed: *Next will be promulgation of a final rule. **Every time we've reported on State efforts to move ahead with their own fiduciary rules or laws, we've queried the potential preemptive effect of the SEC's eventual rule. Reg BI addresses this issue directly: "We note that 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. We believe that Regulation Best Interest, Form CRS, and the related rules, interpretations and guidance that the Commission is concurrently issuing 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 and the spectrum of investment professionals and products." A footnote observes that "the preemptive effect on any state law would be determined in future judicial proceedings, and would depend on the language and operation of the particular state law at issue." On the other hand, the introduction seems to recognize that the States have some room to*

maneuver: "We emphasize that Regulation Best Interest is separate from any common law analysis of whether a broker-dealer has fiduciary duties.") (SAC Ref. No. 2019-31-02)

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Explained Award Features Settlement and Hearing, Dismissal of Claims and Expungement Dissent

For this case to unravel the way it did required that the Claimants pursue both the brokers and the firm as Respondents. That's not terribly common in FINRA arbitration, and less common is the further example of a broker fighting the claims after the firm settles. We remark, then, as much on the case dynamics here, as we do the Panel's dismissal and the Majority's support for expungement relief.

Adelman v. Grobman, FINRA ID #17-01069 (Phila., 6/7/19), involved claims of fraud, breach of fiduciary duty, federal and state statutory claims, and negligence, among other things, but the "Case Summary" section of the Award is bare-bones, providing no clue as to the nature of the dispute. Claimants Ira and Robin Adelman named Oppenheimer & Co., Inc.

and two brokers, Richard Grobman and Stephen Todd Walker. The claimed compensatory damages exceed $50,000, thus justifying a three-person Panel, but, by the time of hearing (and subsequent to Oppenheimer settling out), Claimant was asking for $25,538. Respondent Grobman was represented by counsel, but did not answer or sign a Submission Agreement. Within a few months of the commencement of the case, Claimants dismissed their claims against Mr. Grobman and, while he did not seek expungement relief, he did apparently appear and testify at hearing.

Merits Hearing Post-Settlement

The merits hearing in this matter took place from March 12-15, 2019, by which time Oppenheimer and the Claimants had entered into a settlement agreement. That left broker Walker *(ed: now at a different firm, according to BrokerCheck)* as the only Respondent and he wanted expungement relief, as well as a dismissal. Accordingly, rather than issuing an Award after the merits hearings concluded, the Panel held a separate telephonic expungement hearing on May 13, 2019. The "Award" section of the Panel's decision deals with the two issues separately as well, the Panel first denying Claimants' claims "in their entirety" and, then, granting expungement relief to broker Walker. The latter relief was issued by a Majority of the Panel, as one of the three Public Arbitrators dissented. Of interest, we thought, was the appearance of Robin Adelman and her counsel, not only at the merits hearing, but at the follow-up telephonic hearing on expungement. Counsel not only appeared, but made an opening statement, cross-examined Mr. Walker, introduced evidence through Ms. Adelman, and made closing arguments.

Panel's Explanation/Majority View

The two-page explanation in the Award indicates at the outset that Panel unanimity led to the dismissal of all claims. Only a majority deemed the claims "false," for purposes of FINRA Rule 2080. At the heart of the claims was the purchase of 2,500 shares of Duff and Phelps Select Energy MLP Fund at a cost of $50,000, the Panel reveals. The Panel reviewed the entire portfolio, Claimants' financial circumstances at the time, their investment experience and savvy, email communications from Claimants, the fact that the investment produced a

6% return for Claimants, Morningstar ratings, and adjudged the investment suitable. It further found that “Respondent Walker recommended the Fund in good faith, not for some nefarious undisclosed reason.” The Panel also determined that “Walker was subject to the suitability standard, not the fiduciary duty standard.” He did not occupy a trustee’s role or manage any ERISA investments for the couple. Deeming reliance on a fiduciary duty “clearly erroneous,” as well as claims that the broker inflicted emotional distress, either intentionally or negligently, the Majority concluded that expungement was appropriate.

Dissent Notes CRD Omission

Arbitrator Mary S. Wyatte submitted a dissent. It was clearly limited to the expungement issue and relied on two factors. First, she wrote, “…expungement should be denied in order to preserve the transparency and integrity of the CRD system.” Secondly, the instant case did not accord with the requirements of Rule 2080. “Although the legal basis for Claimants’ complaint was clearly without merit, the facts upon which the complaint is based, for the most part, were not false or erroneous.” The first explanation regarding transparency drew our attention, because, as the dissent notes, “Mr. Walker currently has two disclosures on his CRD which involve complaints similar to Claimants’ complaint.” We checked the CRD through BrokerCheck, since, as we have previously noted (SAA 2019-19), settlement amounts are often posted by FINRA on the “Disclosure” record between the time an arbitration Award issues and the time expungement relief is confirmed by a court. In this case, we discovered, as the dissent noted, there is no disclosure at all of this dispute, either as a customer complaint or as an arbitration claim. The same is true of Mr. Grobman’s CRD disclosures.

*(ed: *Well, the probability that Oppenheimer never reported this case to the CRD saves some time and expense for Messrs. Grobman and Walker. We were wondering why Mr. Grobman, who evidently participated in the hearing and was early exonerated from claims by Claimants, did not apply for expungement relief. Easy, there was no need to…. **The Panel’s explanation indicates that out-of-pocket damages on the Duff & Phelps investment was negligible, given the dividends paid out each year, so that might excuse the reporting of a customer complaint. The initial arbitration claim, though, asked for damages in excess of*

*$50,000, plus treble damages of $150,000, and attorney fees and costs. ***That these two brokers had moved to other firms by the time this claim was filed in May 2017 identifies potential confusion as to who has the reporting responsibility, the Respondent firm or the new employer. In any case, we think the dissenting Arbitrator has a point about "transparency.")*

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ET TU, MASSACHUSETTS? SECRETARY GALVIN ANNOUNCES INTENTION TO CRAFT FIDUCIARY RULE

ET TU, MASSACHUSETTS? SECRETARY GALVIN ANNOUNCES INTENTION TO CRAFT FIDUCIARY RULE. *Following the leads of Connecticut, Maryland, Nevada, and New Jersey, Massachusetts announced its intention to move ahead with its own fiduciary rule. And New Jersey is pressing forward with its proposed changes.* We reported in SAA 2019-22 (Jun. 5) that the SEC voted 3-1 to approve Regulation Best Interest (Reg BI) and three related proposed regulations at an open meeting held June 5. Specifically, the SEC published on its

Website the revised Reg Best Interest, the Final Rule – Form CRS Relationship Summary and Form ADV Amendments, forms, and interpretations (Standard of Conduct for Investment Advisers and Broker-Dealer Exclusion). We noted in our coverage that some States — Maryland, Nevada, Connecticut and New Jersey — have nevertheless moved ahead with their own fiduciary rules or laws. The Massachusetts Securities Division announced on June 14 that the Commonwealth will be joining this group. Secretary Frances Galvin on that date issued a *Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representative*s, seeking "preliminary comment [on] a regulation to apply a fiduciary conduct standard on broker-dealers, agents, investment advisers, and investment adviser representatives when dealing with their customers and clients, respectively." Why do this, given the SEC's issuance of a final rule? Says the Notice: "The SEC's Regulation Best Interest fails to define the key term 'best interest,' and sets ambiguous requirements for how longstanding conflicts in the securities industry must be addressed under the new rule. The SEC rule also fails to indicate whether some of the most problematic practices in the securities industry would be prohibited under the new rule. For instance, while the SEC's adopting release for Regulation Best Interest indicated that sales contests limited to specific products or product types would be contrary to that rule, it did not indicate that broader-based sales contests or quotas would be contrary to its requirements." Comments are due by Friday, July 26, 2019 at 5:00 p.m.

Speaking of New Jersey…

We reported in SAA 2019-15 (Apr. 17) that the New Jersey Bureau of Securities on April 15th published 51 N.J.R. 493(a), seeking public comments on *Fiduciary Duty of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives.* As described in a Summary: "In order to better protect the public interest and, in particular, New Jersey's investing public, the New Jersey Bureau of Securities (Bureau) is proposing new N.J.A.C. 13:47A-6.4 to establish, by regulation, the common law fiduciary duty and apply it to broker-dealers and agents, and to codify it for investment advisers and investment adviser representatives. The Bureau believes that the proposed new rule is necessary to ensure that persons involved in the securities markets are uniformly held to a high standard in their dealings with the general public and is necessary to ensure the welfare of New Jersey investors." The comment period was to have expired on June 14, but *InvestmentNews* reported on June 17th that the State has extended the deadline to July 18, and will be holding a hearing the day before.

In the meantime, we see that SIFMA and several other industry groups submitted a joint comment letter opposing the proposed amendment. The writers' core recommendation? "[W]e urge the Bureau to pause its rulemaking process, review Reg BI, and reevaluate its Proposal before deciding whether it is necessary to proceed with an additional state regulation. Doing so would give the Bureau an opportunity to determine if there are material gaps between Reg BI and the Bureau's proposed regulation. This is especially critical, as the creation of overlapping, duplicative or potentially conflicting requirements could create serious issues for the industry – particularly if such rules go into effect across multiple states, which would likely lead to increased investor confusion and undermine the intent of federal law." SIFMA submitted its own comment letter along the same lines. Several investor and consumer rights groups sent a June 14 letter strongly supporting the proposed changes: "Several aspects of the Bureau's proposal are vastly more protective of investors than corresponding provisions in Regulation Best Interest. These include the provisions in the proposal that would apply a uniform fiduciary standard across an appropriately broad range of advisory activities. They also include the specific formulation of the fiduciary standard, which would ensure that brokers' and adviser's advisory activities alike are not tainted by conflicts of interest, to investors' detriment."

The 800-Pound Gorilla

Every time we've reported on State efforts to move ahead with their own fiduciary rules or laws, we've queried the potential preemptive effect of the SEC's eventual rule. Reg BI addresses this issue directly: "We note that 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. We believe that Regulation Best Interest, Form CRS, and the related rules, interpretations and guidance that the Commission is concurrently issuing 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 and the spectrum of investment professionals and products." A footnote observes that "the preemptive effect on any state law would be determined in future judicial proceedings, and would depend on the language and operation of the particular state law at issue."

*(ed: *We continue to think potential federal preemption of these State initiatives looms large. **We will analyze the New Jersey comment letters in a future* Alert. ****Comments on the Massachusetts proposal can be emailed to securitiesregs-comments@sec.state.ma.us; faxed to 617-248-017; or mailed to Office of the Secretary of the Commonwealth, Attn: Proposed Regulations – Fiduciary Conduct Standard, Massachusetts Securities Division, One Ashburton Place – Room 1701, Boston, MA 02108. ****Reg BI and related materials have not yet been published in the* Federal Register. *The rules and forms will be effective 60 days after publication, while the interpretations will be effective immediately upon publication.)*