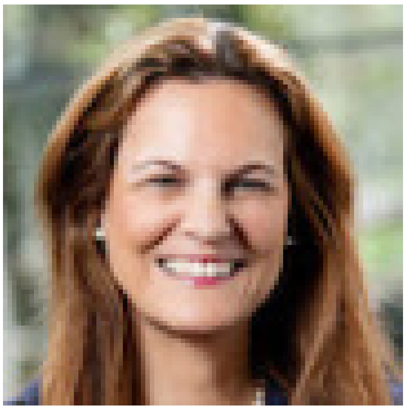
New York, New Jersey, NAIC propose investor protections

By Wagner Law Group *Wed, Feb 7, 2018*

New York regulators have proposed a "best interest" standard for sales of life and annuity products, the Wagner Law Group reported. Some New Jersey legislators want non-fiduciaries to disclose that they may be putting their own or their firms' best interests first.



The Wagner Law Group has published the following summary of recent proposals or initiatives by entities other than the Department of Labor to raise the standards of advisor behavior and protect investors and seniors from predatory sales practices.

The summary, released on January 31, 2018, describes proposals by the states of New York and New Jersey, and by the National Association of Insurance Commissioners. It also describes a completed action by the Financial Industry Regulatory Authority (FINRA) that took effect this week.

The summary as it applies to the retirement industry is reprinted below.

States proceed with their own fiduciary or "best interest" standards

While the U.S. Department of Labor (DOL) continues with its mandated review of the Fiduciary Rule and related exemptions, including the Best Interest Contract Exemption ("BICE"), states press on with developing their own rules to fill the vacuum.

We last discussed state-level legislation impacting investment advisers and other service providers, specifically with respect to Nevada and Connecticut, in a July 10, 2017 Newsletter. There has been recent activity involving New York and New Jersey, both of which have proposed new rules.

New York ("Best Interest"). On December 27, 2017, New York's Department of Financial Services proposed amendments to add a "best interest" standard for sales of life insurance and annuity products in both retirement and non-retirement accounts.

This standard would be in addition to the existing suitability requirements. Recall that the BICE does not impact life insurance products. These proposed rules would cover this area unaddressed by the BICE. Like the Fiduciary Rule, the proposal broadens the scope of communications that are treated as "recommendations."

Other proposed changes include:

- A requirement to disclose at the time of the recommendation, all relevant suitability considerations and product information that forms the basis of the recommendation

- A ban on any recommendation that states or implies that the recommendation is a part of financial planning, financial advice or investment management unless a certificate of professional designation has been obtained in that area
- The implementation of procedures designed to prevent financial exploitation and abuse

The proposal is subject to a 60-day notice and comment period ending on February 26, 2018. New York is the first state to impose a "best interest" standard, but it is possible other states will follow suit.

New Jersey (Fiduciary Status). On January 9th, lawmakers reintroduced legislation requiring certain disclosures by non-fiduciary investment advisors after a similar measure failed to gain traction last year. If an advisor is not acting as a fiduciary, he or she is required to disclose this fact in a compulsory statement written in plain language: "I am not a fiduciary. Therefore, I am not required to act in your best interests, and am allowed to recommend investments that may earn higher fees for me or my firm, even if those investments may not have the best combination of fees, risks, and expected returns for you."

The advisor will also be required to maintain a signed acknowledgement that the written disclosure was provided to the client. It is unclear whether the prospects for the legislation's success are any better than the previous attempt made in 2017.

National Association of Insurance Commissioners (NAIC) ("Best Interest")

The Annuity and Suitability (A) Working Group ("Working Group") of the NAIC was charged with reviewing the Suitability in Annuity Transactions Model Regulations #275. In its open meeting on December 3, 2017, it proposed several changes including introducing a "best interest" standard.

Here, "best interest" means, "at the time the annuity is issued, acting with reasonable diligence, care, skill and prudence in a manner that puts the interest of the consumer first and foremost."

The model language clarifies that "best interest" does not mean the least expensive annuity product, the product with the highest interest rate or payout rate, or the single best annuity product available in the market. Of course, individual states can deviate from the proposed model as they see fit. The public comment period recently ended on January 22, 2018.

FINRA (FAQs on financial exploitation of seniors)

New Rule 2165 (Financial Exploitation of Specified Adults) and amended Rule 4512 (Customer Account Information) are effective on February 5, 2018. Together they provide member firms with the tools to take action if they reasonably suspect that financial exploitation has occurred or will occur, not only with respect to those age 65 and older, but also those who may be impaired regardless of their age.

As a result, firms can contact an account holder's "trusted contact person" and/or place a temporary hold on disbursements from the account. Earlier this month, FINRA released Frequently Asked Questions (the "FAQs") on these rules. The FAQs provide additional guidance about the placement of temporary holds, trusted contacts, and information permitted to be disclosed to trusted contact persons.