STEP JOURNAL

WWW.STEP.ORG/JOURNAL

MAY 2019 VOLUME 27/ISSUE 4

Confused by art?

Our experts offer insight on planning for clients' collections

REGIONAL FOCUS
US AND CANADA

SPOTLIGHT ON
ISRAEL

STEP
ADVISING FAMILIES ACROSS GENERATIONS

Paul G Marcotte et al, 'States of play', STEP Journal (Vol27 Iss4), pp.29–31

States of play

SINCE THE COLLAPSE OF THE US DEPARTMENT OF LABOR'S 'FIDUCIARY RULE' IN 2018, A NUMBER OF US STATES HAVE DRAFTED THEIR OWN REGULATIONS

THE US DEPARTMENT of Labor's (DOL's) 'fiduciary rule' was drafted in 2016 to expand on the terms in the *Employee Retirement Income Security Act of 1974* (ERISA), widening the definition of the 'investment advice fiduciary' title to incorporate a broader range of professions within the financial services industry. The change would have seen the newly incorporated job titles being held to higher legal and ethical requirements.

Having been set to enter into force from April 2017, implementation was first delayed, and then cancelled, when the US Fifth Circuit Court of Appeals ruled to vacate the rules in March 2018.

Following this, a number of US states took it upon themselves to draft their own regulations regarding fiduciary responsibility, and a round-up of the latest situation in four of these states is given here.

CONNECTICUT

TURNING THE LIGHTS UP ON INVESTMENT DUTIES AND FEES

In response to uncertainty during the past few years over the DOL's 'fiduciary rule,' the State of Connecticut has taken its own action, with the stated purpose of protecting consumers. Connecticut's efforts can best be summarised in a word: disclosure. Instead of imposing duties on those providing investment services or advice, two separate pieces of legislation require that certain information be disclosed to consumers, both addressing the relationship between the consumer and the party having to issue the disclosure.

CONNECTICUT PUBLIC ACT NO. 17-120

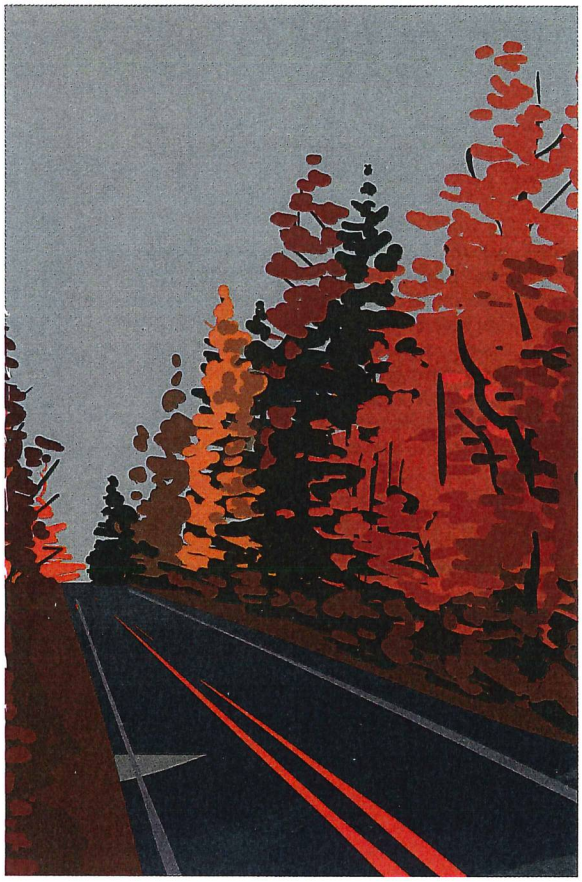
The first is the *Connecticut Public Act No. 17-120*,[1] signed into law in July 2017, which imposes disclosure requirements for financial planners.

For the purposes of this legislation, the term 'financial planner' is defined as 'a person offering individualized financial planning or investment advice to a consumer for compensation where such activity is not otherwise regulated by state or federal law'. As such, a financial planner must disclose information to a consumer on request whether or not the planner has a 'fiduciary duty'. The term 'fiduciary duty' is defined here as 'a duty to act with prudence in the best interests of a consumer with undivided loyalty to such consumer'.

While this statute does not impose a duty, the disclosure is intended to put the consumer on notice. It also specifically aims to limit confusion with elderly clients by restricting which accreditation and certificates may be used by planners.

CONNECTICUT PUBLIC ACT 17-142

The other initiative is the *Connecticut Public Act 17-142*,[2] which applies only to plans established under s.403(b) of the *Internal Revenue Code of 1986* and which are not already regulated under ERISA. These are generally plans administered by municipalities in Connecticut.



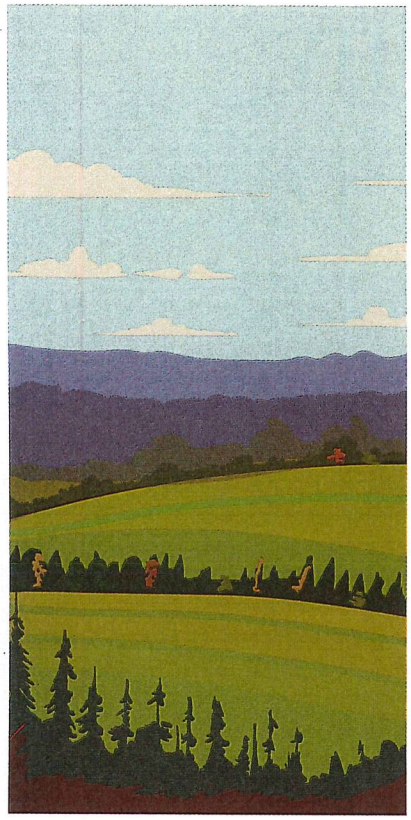
This legislation, passed in 2017 and effective as of 1 January 2019, requires that any company administering such a plan must disclose information related to the fees paid to investment advisors, as well as the fees as compared to the performance of the investments. These disclosures must be made at the time of enrolment and on an annual basis thereafter.

RAISED BILL 901

At the time of writing, there is a proposal before the legislature that has already received approval from the relevant legislative committee and appears likely to pass, in the form of Raised Bill 901, *An Act Concerning Retirement Plans Offered By Political Subdivisions of this State*, which would require that the above disclosures be published on a state agency website by 1 March 2022. This additional piece of proposed legislation, along with those outlined above, indicates that Connecticut's efforts to navigate this complicated issue will continue.

JAMES I DOUGHERTY IS A PARTNER AT WITHERS BERGMAN, GREENWICH, CT

Paul G Marcotte et al, 'States of play', STEP Journal (Vol27 Iss4), pp.29–31



MARYLAND

ASSESSING THE IMPACT OF THE PROPOSED *FINANCIAL CONSUMER PROTECTION ACT OF 2019*

In February 2019, the *Financial Consumer Protection Act of 2019* (the Act) was introduced in both chambers of the Maryland General Assembly by way of Senate Bill 786 (the Bill).[3] The proposed legislation would adopt sweeping changes impacting the financial services industry in the state.

The Bill was introduced following a report from the Maryland Financial Consumer Protection Commission in January 2019 (the Report)[4] that recommended the state could do more to protect consumers when dealing with financial professionals, as Maryland's existing regulatory scheme was deemed weaker compared to prevailing federal or national standards.

'Chief among the changes would be a more stringent fiduciary standard for a broad class of financial services representatives'

FIDUCIARY DUTY

Chief among the changes would be adoption of a more stringent fiduciary standard for a broad class of financial services industry representatives. The Act is intended to amend the *Maryland Securities Act* by applying a fiduciary standard to a range of professionals, including:

- broker-dealers;
- broker-dealer agents;
- investment advisors;
- federally covered investment advisors;
- investment advisor representatives; and
- insurance producers.[5]

The proposed statute further specifies that the fiduciary duty imposed is 'a duty 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'.[6]

APPLICATION TO THE INSURANCE INDUSTRY

The Act pays particular attention to the insurance industry. Under its terms, an 'insurance producer' is defined by reference to a separate statute regulating insurance in the state and means a person who 'for compensation, sells, solicits, or negotiates insurance contracts, including contracts for nonprofit health service plans, dental plans, and health maintenance organizations' (subject to various exceptions not here listed).[7]

According to the Report, making insurance-related professionals subject to this fiduciary standard was necessary to address a concern as to annuity-type products being sold to the general public at high cost, or where conflicts of interest were not disclosed due to the fact that insurance advisors are subject to a less rigorous suitability standard. The statute as drafted, however, appears to apply to a much broader range of insurance products.

The statute would also direct the Maryland Securities Commissioner to adopt regulations to implement the new fiduciary standard, including those defining, requiring, prohibiting or excluding a particular act, practice or course of business of a person subject to this new standard.

If enacted, this provision of the Act would be effective beginning 1 October 2019.

PAUL G MARCOTTE TEP IS A PARTNER AT PALEY ROTHMAN IN BETHESDA, MD

NEVADA

FOUR KEY TAKEAWAYS FROM THE 'NEVADA RULE'

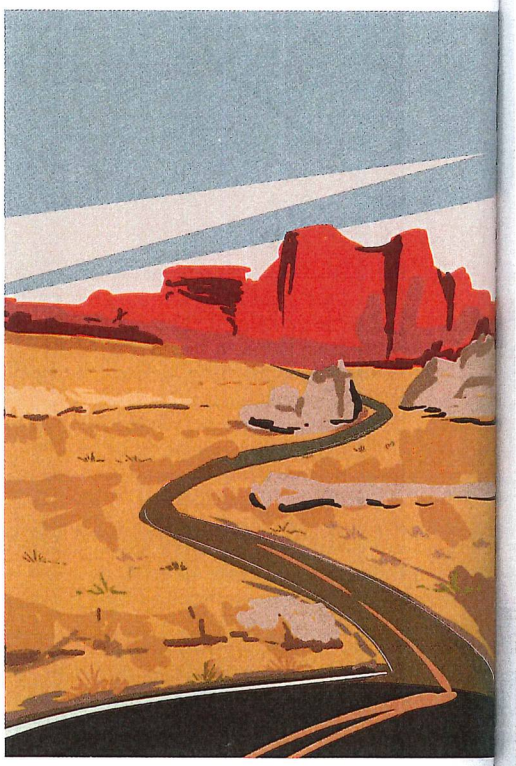
On 18 January 2019, the Nevada Secretary of State, Securities Division, released draft regulations (the Regulations)[8] for its new fiduciary rules, known colloquially as the 'Nevada Rule'. The Regulations set forth fiduciary standards to govern broker-dealers (BDs) and investment advisors (IAs). The Securities Division is now reviewing the Regulations in light of public comments, including highly critical ones from the securities industry.

Should the Nevada Rule enter into force, it will provide a major enhancement of the protections afforded to investors who rely on the advice of BDs and IAs. The Regulations focus on four main areas, outlined here.

RETAIL

The Nevada Rule would expand the fiduciary duty owed by BDs and IAs to retail customers. Specifically, the definition of 'investment advice' would be expanded to include:

- 'providing analyses or reports regarding a security to a client';
- 'providing advice ... regarding the type of account a client should open';
- 'providing advice ... regarding the fee options';



Paul G Marcotte et al, 'States of play', STEP Journal (Vol27 Iss4), pp.29–31