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## Broker-Dealers and Investment Advisers: Comment Period Open for New Nevada Fiduciary Law

*by George Michael Gerstein, Jessica D. Burt & James Severs*

Recently, several states (including Connecticut, New Jersey and New York) have introduced legislation relating to the fiduciary responsibilities of broker-dealers and investment advisers. Reasons for the legislation may include protecting investors from the potential rollback of the U.S. Department of Labor’s Fiduciary Rule (the DOL Fiduciary Rule).

Effective July 1, Nevada broker-dealers and investment advisers became subject to the state’s financial planner statute (NRS 628A), making them fiduciaries to their clients and requiring them to submit to a rigorous disclosure regime. See our recent Investment Management Briefing (<http://www.stradley.com/insights/publications/2017/06/im-briefing-june-30-2017>). The newly adopted legislation (SB 383) removes existing exemptions for broker-dealers, investment advisers and their respective representatives from the definition of a “financial planner.” As a result, broker-dealers, investment advisers and their respective representatives will be “financial planners” under Nevada law if they advise others for compensation upon the investment of money or upon provision for income to be needed in the future, or if they hold themselves out as qualified to perform either of these functions. As financial planners, they will now be subject to Nevada’s statutory fiduciary duty with respect to advice that they provide to Nevada clients. Whether investment advisers that are registered with the U.S. Securities and Exchange Commission are exempt from SB 383 on federal preemption grounds is an open question.

The Nevada Securities Division (the Division) has requested that any interested persons affected by SB 383 submit written comments relating to the new legislation. While the Division will hold a workshop specifically for the purpose of soliciting comments, the Division encourages broker-dealers and investment advisers to submit written comments at any time prior to the workshop. The comments may focus on a wide range of issues, including specific challenges faced since the enactment of SB 383 or the need for clarification of specific terms or language included in SB 383. The Division is particularly interested in comments relating to the DOL Fiduciary Rule. The Division noted that those who comment should bring to light any and all issues that they believe are relevant to the discussion of SB 383.

The statutory fiduciary duty specifically requires financial planners to “disclose to a client, at the time advice is given, any gain the financial planner may receive,



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such as profit or commission, if the advice is followed.” The statutory fiduciary duty also requires financial planners, through a “diligent inquiry of each client,” to make an initial determination of suitability of the advice to be given to each client as well as to evaluate such suitability on an ongoing basis. In making such determinations of suitability, the financial planner should consider “the client’s financial circumstances and obligations and the client’s present and anticipated obligations to and goals for his or her family.”

NRS 628A also grants to the clients of financial planners a statutory right of action if the financial planner (1) violates any element of the fiduciary duty, (2) is grossly negligent in the provision of advice to the client, in light of all of the client’s financial circumstances known to the financial planner or (3) violated any state law in the provision of investment advice. If any of the above violations occur, the client is entitled to recover, in a civil action, the amount of any economic loss resulting from the advice and all costs of litigation and attorney’s fees.

Additionally, the new legislation authorizes the Nevada securities administrator to further define the statutory fiduciary duty, as applicable to broker-dealers, investment advisers and their respective representatives, through the inclusion or exclusion of certain actions as violations and to prescribe means reasonably designed to prevent violations of the fiduciary duty. A violation of the statutory fiduciary duty by these regulated persons and entities will be a violation of the Nevada Uniform Securities Act.

Pursuant to its authority under SB 383, the Division is in the process of considering and drafting regulations

for proposal. The Division intends to include regulations that will further define acts, practices and a course of business that are a violation of, or excluded from being violations of, the statutory fiduciary duty.

The regulation adoption process requires that the Division (1) determine how the proposed regulations may impact small businesses, (2) conduct at least one workshop on the proposed regulations, (3) submit the proposed regulations to the Legislative Counsel Bureau for review and (4) conduct public hearings on the proposed regulations.

As part of its small business impact analysis, the Division must consider whether the proposed regulations, if adopted, are likely to impose a significant economic burden on small businesses or restrict the formation or operation of small businesses. Under the Nevada Administrative Procedure Act, a small business is defined as a business conducted for profit that employs fewer than 150 full-time or part-time employees.

If a small business believes that it will be affected by the proposed regulations and wants to be considered in the Division’s small business impact analysis, it may send written comments to [fiduciaryduty@sos.nv.gov](mailto:fiduciaryduty@sos.nv.gov). Small businesses must explain how they qualify by identifying their number of employees. Written comments regarding the proposed regulations’ effect on small businesses must be submitted no later than Aug. 15, 2017. Comments from entities that are not small businesses can also be sent directly to the Division by email at [fiduciaryduty@sos.nv.gov](mailto:fiduciaryduty@sos.nv.gov).

The Division is also required to conduct a workshop to solicit comments. Any interested persons will have the opportunity to comment on the proposed regulations either during the workshop or by submitting written comments to the Division at any time prior to the workshop. The Division anticipates that this workshop will take place during mid- to late September 2017, and the Division will provide written notice of the time and place of the workshop at least 15 days in advance. A draft of any proposed regulations will be released to the public prior to the workshop.

Before it may hold a public hearing on any proposed regulations, the Division is required to submit the proposed regulations to the Nevada Legislative Counsel Bureau (the LCB) for review. The Division anticipates submitting the proposed regulations no later than

November 2017. Following that submission, the LCB will have 30 days to review and make any revisions to the proposed regulations.

After the LCB's review, and upon 30 days' written notice of its intent to adopt the proposed regulations, the Division will conduct an oral public hearing. The

Division anticipates that this hearing will occur after Jan. 1, 2018.

A summary of the Division's applicable deadlines and other relevant dates is provided below. Please note that, except for the deadline for small business impact comments, all dates are subject to change.

Action	Deadline
Small business impact comments	Must be received by August 15, 2017.
Workshop	Mid- to late September 2017.
Comments from any interested persons	May be submitted any time prior to the workshop. The Division must provide at least 15 days written notice of the workshop.
Submission to LCB	November 2017.
LCB review and revisions	Revisions must be made no later than 30 days after the proposal is submitted to the LCB.
Public hearing	After January 1, 2018. The Division must provide at least 30 days written notice of the hearing.

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