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Secretary of State

STATE OF NEVADA



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*Deputy Secretary for Securities,
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**OFFICE OF THE
SECRETARY OF STATE**

January 18, 2019

Notice of Draft Regulations and Request for Comment,

The Office of the Secretary of State, Securities Division, 2250 Las Vegas Boulevard North, Suite 400, North Las Vegas, Nevada 89030, is releasing draft regulations to be added to Chapter 90 of the Nevada Administrative Code pertaining to laws set forth in Nevada Revised Statutes ("NRS") Chapters 90 and Chapter 628A. These regulations specifically pertain to NRS 90.575 and NRS 628A.010 and 628A.020, as modified by SB 383. The purpose of this release is to solicit written comment on these regulations prior to any additional workshop(s). The first workshop pertaining to this matter was held on October 6, 2017. A second workshop on these regulations will be noticed at a later date.

The Securities Division is requesting that all interested parties submit written comments on or before March 1, 2019. **Written Comments should be directed to Diana Foley, Nevada Secretary of State's Office Securities Division, 2250 Las Vegas Boulevard North, Suite 400, North Las Vegas, Nevada 89030.**

A copy of the draft regulations is attached to this notice. NRS Chapter 90 and Chapter 628A can be found at the following web addresses: <https://www.leg.state.nv.us/NRS/NRS-090.html> and <https://www.leg.state.nv.us/NRS/NRS-628A.html>. NAC Chapter 90 in its current form can be found at the following web address: <https://www.leg.state.nv.us/NAC/NAC-090.html>. These materials may also be obtained by contacting **Eli Beauchamp, 2250 Las Vegas Boulevard North, Suite 400, North Las Vegas, NV 89030, Telephone: 702-486-5519**. A reasonable fee for copying may be charged.

This Notice of Draft Regulations and Request for Comment has been sent to all persons on the Securities Division's mailing list for administrative regulations and posted at the following locations:

Nevada Secretary of State's Office, Main Lobby
2250 Las Vegas Boulevard, North, Suite 400, North Las Vegas, NV 89030

LAS VEGAS OFFICE
2250 Las Vegas Boulevard North, Suite 400
North Las Vegas, NV 89030
Telephone: (702) 486-2440
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Nevada Secretary of State's Office
Commercial Recordings Main Lobby
202 North Carson Street, Carson City, Nevada 89701

Nevada State Legislative Building
401 South Carson Street, Carson City, Nevada 89701

Nevada State Library
100 North Stewart Street, Carson City, NV 89701

State of Nevada Website
<http://nv.gov/>

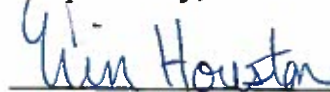
Nevada Secretary of State Website, Fiduciary Page
<http://www.nvsos.gov/sos/licensing/securities/new-fiduciary-duty>

Nevada Secretary of State Website
<http://www.nvsos.gov/sos>

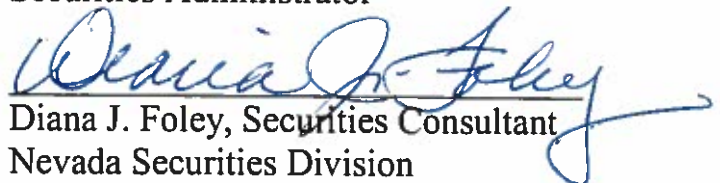
PLEASE NOTE: WRITTEN REQUESTS FOR NOTICE OF ADMINISTRATIVE
RULEMAKING LAPSE AFTER SIX MONTHS

Dated: January 18, 2019

Respectfully,



Erin Houston, Deputy Secretary for Securities
Securities Administrator



Diana J. Foley, Securities Consultant
Nevada Securities Division

LAS VEGAS OFFICE
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**PROPOSED REGULATION OF THE
SECRETARY OF STATE
THE SECRETARY OF STATE, SECURITIES DIVISION**

LCB File No. _____

Chapter 90 of NAC is hereby amended by adding thereto the provisions set forth as sections 1 through 15 of this regulation.

FIDUCIARY DUTY REGULATIONS

Section. 1. Fiduciary Duty of broker-dealer and sales representatives (NRS 90.575, NRS 62A.020)

1. A broker-dealer or a sales representative who provides investment advice to clients, manages assets, performs discretionary trading, utilizes a title or term set forth in Section 5.4 below, or who otherwise establishes a fiduciary relationship with clients, owes a fiduciary duty to their clients.

2. The fiduciary duty imposed upon a broker-dealer or sales representative includes the time period during which the broker-dealer or sales representative:

- (a) provides investment advice;*
- (b) performs discretionary trading;*
- (c) maintains assets under management;*
- (d) acts in a fiduciary capacity towards the client;*
- (e) discloses fees or gains;*
- (f) through the completion of any contract; and*
- (g) through the term of engagement of services.*

Sec. 2. Exemption to Ongoing Fiduciary Duty For Certain Broker Dealers and Sales Representatives Transactions (NRS 90.575, NRS 90.420, NRS 90.690) Episodic Fiduciary Duty Exemption—*A broker-dealer or sales representative who qualifies for the Episodic Fiduciary Duty Exemption has a fiduciary duty related to the specific investment advice provided, but does not have an ongoing to provide investment advice to a client regarding the security unless otherwise required by law.*

1. The fiduciary duty owed to the client under Episodic Fiduciary Duty Exemption ends once the advice is received by the client, the transaction is complete, if applicable, and the required fee and gain disclosures have been made.

- 2. The Episodic Fiduciary Duty Exemption may apply, unless otherwise prohibited by law, only if:*
- (a) the broker-dealer or sales representative does not manage the client's assets;*

(b) the broker-dealer or sales representative does not create periodic financial plans for the client, provide ongoing investment advice or enter into a contract to provide investment advice;

(c) the broker-dealer or sales representative does not perform discretionary trading for the client;

(d) the broker-dealer or sales representative has not otherwise developed a fiduciary relationship with the client from previous or concurrent services undertaken on behalf of the client;

(e) the broker-dealer and sales representative do not utilize terms set forth in Section 5.4;

(f) the facts and circumstances surrounding the transaction do not indicate that additional or ongoing investment advice is reasonably expected by the client relative to that transaction, type of product or advice; and

(g) the client solicited the investment advice.

3. A broker-dealer or sales representative who has qualified for the Episodic Fiduciary Duty Exemption set forth in this section and who does not have a continuing fiduciary duty after the transaction is consummated, does not have an ongoing duty to keep informed regarding the client's financial circumstances and obligations.

4. The Administrator may by order limit or revoke the ability of a broker-dealer or sales representative to rely on this Episodic Fiduciary Duty Exemption if the Administrator finds that the broker-dealer or sales representative has improperly claimed that the facts of a transaction meet the Episodic Fiduciary Duty Exemption requirements of Section 2.2 (a)-(g).

Sec. 3. Application of Fiduciary Duty Regulations to Investment Advisers and Representatives of Investment Advisers. (NRS 90.575, and NRS 628A. 010, 628.020)

1. The obligations to a client imposed by the fiduciary duty upon an investment adviser and a representative of an investment adviser includes the time period for which the investment adviser or representative of an investment adviser:

(a) provides investment advice;

(b) performs discretionary trading;

(c) maintains assets under management;

(d) acts in a fiduciary capacity towards the client;

(e) discloses fees or gains;

(f) through the completion of any contract; and

(g) through the term of engagement of services.

2. Any investment adviser who also acts as a broker-dealer, whether through the same entity or a related entity, and any representative of an investment adviser who also acts as a sales representative, is presumed to be acting in their capacity as an investment adviser or representative of an investment adviser. No such investment adviser or representative of an investment adviser may rely on any exemption from the fiduciary duty rule set forth in Section 2.

Sec. 4. Terms (NRS 90.575)

1. "Investment Advice" includes, but is not limited to:

- (a) providing advice or a recommendation regarding the buy, hold, or sale of a security to a client;
- (b) providing advice or a recommendation regarding the value of a security to a client;
- (c) providing analyses or reports regarding a security to a client;
- (d) providing account monitoring for the purpose of potentially recommending a buy, hold, or sale of a security;
- (e) providing advice or a recommendation regarding the type of account a client should open;
- (f) providing advice or a recommendation regarding the fee options available for the services provided by the investment adviser, representative of an investment adviser, broker-dealer, or sales representative;
- (g) providing information on a personalized investment strategy;
- (h) providing a financial plan that includes consideration of buying, holding, or selling a security;
- (i) providing a limited list of securities for consideration by a client or by a limited group of clients that is tailored to the client or group of clients;
- (j) providing information about a security that is not provided in the offering documents or is an opinion regarding the security or its potential performance;
- (k) recommending a broker dealer, sales representative, investment adviser, representative of an investment adviser, or financial planner; and
- (l) providing advice or a recommendation regarding an insurance product or an investment by comparison to a security, or that includes the buy, sale, or hold of a security.

2. Providing information about a security that is specifically contained in the security's offering documents is presumptively not investment advice unless, as part of the discussion, the investment adviser, representative of an investment adviser, sales representative, or broker-dealer recommends one product

over another, recommends a buy, hold, or sale, or advises on the purchase, hold, sale, or value of a security to a client or limited group of clients.

3. *Providing the following to the general public, that is not targeted to any particular group or individual clients, is not investment advice:*

(a) a general investment strategy that applies to the general public; or

(b) publishing an investment company ranking or a bond mutual fund volatility rating ranking consistent with FINRA Rules.

4. *Discretionary Trading. As used in these Fiduciary Duty regulations, discretionary trading does not include a broker-dealer's or sales representative's limited conduct of exercising discretion as to the time and price of buying or selling a security that is based upon a client's direction, or transactions executed to satisfy customer margin obligations.*

Sec. 5. Exemptions to Fiduciary Duty Standard. (NRS 90.575)

1. *A broker-dealer or sales representative who executes an unsolicited transaction for a client whose assets are not managed by the broker-dealer or sales representative, and has otherwise complied with all applicable laws, self-regulatory rules, and firm policies and procedures governing their conduct related to that transaction, does not owe a fiduciary duty to the client for that transaction unless the client receives investment advice (implicitly or explicitly), discretionary trading services, ongoing contractual services or a financial plan from the broker-dealer or sales representative.*

2. *A broker-dealer who executes a trade in good faith that was recommended to a client by a registered or licensed investment adviser or representative of an investment adviser, and has otherwise complied with all applicable laws, self-regulatory rules, and firm policies and procedures governing their conduct related to that transaction is exempt from the fiduciary duty rule for that transaction so long as the broker-dealer does not provide investment advice to the client, asset management, discretionary trading services, or a financial plan.*

3. *A clearing firm that receives a direct instruction for the execution of a transaction from a properly registered or licensed broker-dealer is exempt from the fiduciary duty rule for that transaction so long as the clearing firm has acted in good faith, otherwise complied with all applicable laws, self-regulatory rules, and firm policies and procedures otherwise governing their conduct.*

4. *A broker-dealer or sales representative who includes any of the following in their title, name, or their biographical description, or holds themselves out as any of the following, may not limit the fiduciary duty owed to a client and shall not qualify for or rely on the Episodic Fiduciary Duty Exemption set forth in sub-section 2.1. above or the exemptions in Section 5. 1-3 above:*

(a) advisor, adviser;

(b) financial planner, financial consultant;

(c)retirement consultant, retirement planner;

(d)wealth manager;

(e)counselor; or

(f)other titles that the Administrator may by order deem appropriate.

Sec. 6. *Conduct that is not a per se violation of the Fiduciary Duty. (NRS 90.575)*

1. The sale of a proprietary product by a broker-dealer or sales representative alone is not a breach of the fiduciary duty under the following circumstances:

(a) the broker-dealer's and sales representative's conduct does not otherwise violate the law;

(b)the broker-dealer's and sales representative's conduct does not otherwise violate an applicable self-regulatory organization rule; and

(c) they advised the client that the product is proprietary and advised the client of all risks associated with the product.

2. A broker-dealer, sales representative, investment adviser, or representative of an investment adviser who holds or manages a client's position in cash does not breach the fiduciary duty based on that cash position alone if:

(a) they advise the client of all risks associated with the cash position;

(b) the conduct does not otherwise violate the law; and

(c) all applicable self-regulatory organization, custody, and conduct rules are followed regarding the cash position.

3. A broker-dealer or sales representative does not breach the fiduciary duty by receiving transaction based commissions for sales, so long as it is in the client's best interest to be charged by transaction as opposed to other types of fees, and the commission is reasonable.

Sec. 7. *Disclosure of gain at the time advice is given (NRS 628A.020, NRS 90.575)*

1. If an investment adviser, representative of an investment adviser, broker-dealer, or sales representative receives any of the following gains as the result of a client following their advice, then the gain shall be disclosed to the client no later than at the time the advice is given, unless otherwise provided by paragraph 2 or 3 below. Gains include but are not limited to the following:

(a)percentage of managed assets fee;

(b)commission on the sale of a security;

(c)mark up or mark down commissions;

- (d) market maker commission (Electronic Communication Network rebates or credits);*
- (e) discounts based upon number of transactions or clients;*
- (f) management fee;*
- (g) deferred or trailed, fees or commission;*
- (h) front end load or back end load fees;*
- (i) service fees; or*
- (j) payment for order flow.*

2. An investment adviser, representative of an investment adviser, broker-dealer or sales representative does not violate 7.1 if the actual amount of the gain is not known at the time of the advice, if the fact that the gain may be paid and the manner of ascertaining that gain has been communicated to the client, and the amount actually received is provided to the client within a reasonable time period. A reasonable time period is within the time prescribed more specifically by other fee or compensation reporting requirements set by law or the applicable self-regulatory organization.

3. An investment adviser, representative of an investment adviser, broker-dealer, or sales representative who charges a client a fee based upon a specific percentage of assets under management pursuant to an agreement with the client, and who regularly provides the correct actual calculations and charges consistent with other firm documents and law, does not violate subsection 1. above regarding the timing of the disclosure for that fee.

4. Gain does not include the profit or gain an investment adviser, broker-dealer, representative of an investment adviser or sales representative may accrue as a result of all business activities.

5. An investment adviser, broker-dealer, representative of an investment adviser, or sales representative who receives a finder's fee, referral fee, or other benefit for recommending an investment adviser, representative of an investment adviser, broker-dealer, sales representative or financial planner shall disclose the fee and the amount to be received at the time of the referral, along with any applicable contracts relating to the referral.

Sec. 8. Breaches of the fiduciary duty. (NRS 90.575)

1. The fiduciary duty imposed by NRS 90.575 is breached if the investment adviser, representative of an investment adviser, broker-dealer, or sales representative:

- (a) fails to perform adequate and reasonable due diligence on a product or investment strategy prior to transacting sale or providing investment advice;*

- (b) recommends to a client a security or an investment strategy that is not in the client's best interest, or the recommendation or sale deviates from firm policies, offering limitations, or other law;*
- (c) provides investment advice on a product or investment strategy without understanding or conveying all risks or features of the product or investment strategy;*
- (d) puts their own interest, other client's interests, or the firm's interest ahead of the client;*
- (e) fails to provide current offering documents on the product prior to execution of the transaction;*
- (f) fails to disclose that a recommended product was a proprietary product or that the advice was based upon a limited pool of products, or fails to convey all material risks or features of the product;*
- (g) fails to adequately disclose all information regarding a potential conflict of interest;*
- (h) fails to comply with best execution rules;*
- (i) recommends or sells a security without disclosure of a bad actor disqualification as defined in Regulation D, Rule 506;*
- (j) recommends or charges a fee that is unreasonable;*
- (k) violates an applicable FINRA rule or other applicable self-regulatory organization rule that relates to client communications or disclosure;*
- (l) engages in conduct prohibited by NAC 90.321, 90.327, or 90.328; or*
- (m) limits the availability of securities to certain clients unless based upon a client's investment goals, a client's investment strategy, a firm's limitation of quantity or type of investment that can be sold to a client, or the security's own sales limitations.*

This list is not all inclusive, and other conduct may be considered a breach of the fiduciary duty.

Sec. 9. Presumption/Burdens (NRS 90.575, NRS 90.690) *A broker-dealer and sales representative shall each be presumed to owe a fiduciary duty to the client. The broker-dealer and sales representative have the burden of proving, in an arbitration, civil or administrative hearing, that an exemption to the fiduciary duty exists.*

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Sec. 10. Authority to conform to federal or state rules/interpretation ((NRS 90.575, NRS 90.860))

1. The Administrator shall have the authority to adopt by order any fiduciary duty related rule, exemption, form, or prohibition approved by the Securities and Exchange Commission for application to investment advisers, representatives of investment advisers, broker-dealers, and sales representatives, so long as the adoption does not materially diminish the fiduciary duty set forth in Chapter 90 or Chapter 628A of the Nevada Revised Statutes.

2. These regulations shall be interpreted and applied in harmony with the Securities Exchange Act of 1934, as amended by the National Securities Market Improvement Act of 1996 relating to state regulation of broker-dealer's books and records.

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