Frequently Asked Questions on Regulation Best Interest

The staff of the Division of Trading and Markets have prepared the following responses to questions about Regulation Best Interest and expect to update from time to time our responses to additional questions. These responses represent the views of the staff of the Division of Trading and Markets. They are not a rule, regulation, or statement of the Securities and Exchange Commission ("Commission"). The Commission has neither approved nor disapproved its content. These responses, like all staff guidance, have no legal force or effect: they do not alter or amend applicable law, and they create no new or additional obligations for any person. The Adopting Release for Regulation Best Interest is available at https://www.sec.gov/rules/final/2019/34-86031.pdf. Frequently Asked Questions on Form CRS are available at https://www.sec.gov/investment/form-crs-faq.

Topics

Retail Customer

Q: Retail customer is defined as "a natural person, or the legal representative of such natural person, who: (A) receives a recommendation of any securities transaction or investment strategy involving securities from a broker-dealer; and (B) uses the recommendation primarily for personal, family, or household purposes." What does it mean to "use" a recommendation?

A: A retail customer "uses" a recommendation of a securities transaction or investment strategy involving securities when, as a result of the recommendation: (1) the retail customer opens a brokerage account with the broker-dealer, regardless of whether the broker-dealer receives compensation; (2) the retail customer has an existing account with the broker-dealer and receives a recommendation from the broker-dealer, regardless of whether the broker-dealer receives or will receive compensation, directly or indirectly, as a result of that recommendation; or, (3) the broker-dealer receives or will receive compensation, directly or indirectly as a result of that recommendation, even if that retail customer does not have an account at the firm. We note that when a retail customer opens or has an existing account with a broker-dealer the retail customer has a relationship with the broker-dealer and is therefore in a position to "use" (i.e., accept or reject) the broker-dealer's recommendation.

We remind firms to carefully consider the extent to which associated persons can make recommendations to prospective retail customers (i.e., that have received, but not yet "used" the recommendation as noted above) in compliance with Regulation Best Interest, including having gathered sufficient information that would enable them to comply with Regulation Best Interest at the time the recommendation is made, should the prospective retail customer use the recommendation. (Posted February 11, 2020)

Q: If an associated person from Firm A makes a recommendation to an existing retail customer who then executes the transaction with Firm B, does Regulation Best Interest apply to Firm A?

A: Yes. As discussed above, a retail customer has "used" a recommendation when the retail customer has an existing account with the broker-dealer and receives a recommendation from the broker-dealer, regardless of whether the broker-dealer receives or will receive compensation, directly or indirectly, as a result of that recommendation.

Regulation Best Interest applies at the time the broker-dealer makes the recommendation, and associated persons, when making a recommendation, should gather sufficient information that would enable them to comply with Regulation Best Interest at the time the recommendation is made. Firm A's recommendation must comply with Regulation Best Interest at the time it was made, even if the recommendation is ultimately not executed with Firm A by the retail customer. (Posted May 7, 2020)

Q: Does Regulation Best Interest apply to Firm B in this scenario?
A: Whether Regulation Best Interest applies to Firm B depends on whether Firm B made a recommendation to the retail customer. If the retail customer executes the transaction in a self-directed account, and Firm B has not recommended the transaction, Regulation Best Interest would not apply to Firm B. However, if the retail customer discusses the potential transaction with Firm B, Regulation Best Interest would apply if, based on the facts and circumstances of the particular communication, such communication rises to the level of a recommendation. (Posted May 7, 2020)

Q: Does Regulation Best Interest apply to limited purpose broker-dealers, for example, broker-dealers that make recommendations of private offerings to accredited investors?
A: Yes, if that accredited investor is a "retail customer" as defined in the rule. The definition of "retail customer" does not exclude high-net worth natural persons and natural persons that are accredited investors. Whether a broker-dealer engages in limited activity does not dictate whether or not Regulation Best Interest applies. Regulation Best Interest applies to broker-dealers that make recommendations of any securities transaction or investment strategy involving securities to retail customers. (Posted February 11, 2020)

Q: For purposes of the definition of retail customer, who would be considered a legal representative?
A: The Commission interpreted the term "legal representative" to only cover non-professional (i.e., non-regulated) legal representatives. Examples of non-professional legal representatives are non-professional trustees that represent the assets of natural persons and similar representatives such as executors, conservators, and persons holding a power of attorney for a natural person. A non-professional legal representative is covered pursuant to this rule even if another person is a trustee or managing agent of the trust. A workplace retirement plan representative (e.g., plan sponsor, trustee, other fiduciary) generally is not considered a non-professional legal representative of a natural person, except in limited circumstances (e.g., where the plan representative is a sole proprietor or other self-employed individual who will participate in the plan).
If a legal representative is a regulated financial services industry professional, he or she would not be covered by the definition of "retail customer." Examples of regulated financial services industry professionals include registered investment advisers and broker-dealers, corporate fiduciaries (e.g., banks, trust companies and similar financial institutions) and insurance companies, and the employees or other regulated representatives of such advisers, broker-dealers, corporate fiduciaries and insurance companies. In the staff's view, a legal representative who is formerly a regulated financial services industry professional, but who is not currently regulated, would be considered a "non-professional" legal representative that would be covered by the definition of "retail customer." (Posted February 11, 2020)

Q: Can a retail customer waive the protections of Regulation Best Interest? For example, could a non-professional legal representative certify or otherwise represent that it is not relying solely on the advice of the broker-dealer in advising a natural person, in order to be excluded from the definition of "retail customer" of the broker-dealer?
A: No. A broker-dealer must comply with Regulation Best Interest. A failure to comply with all four component obligations is a violation of Regulation Best Interest, and a retail customer, which includes a

natural person or her non-professional legal representative, cannot waive or agree to waive the protections afforded under Regulation Best Interest. (Posted February 11, 2020)

Q: Does Regulation Best Interest apply if a broker-dealer makes a recommendation of a securities transaction or investment strategy involving securities to a regulated financial services industry professional for his or her own account?

A: Yes. In the staff's view, if a regulated financial services industry professional is acting in a personal capacity for his or her own account, the individual is considered a retail customer for purposes of Regulation Best Interest. The fact that the recipient of the recommendation is a regulated financial services industry professional would not excuse a firm from complying with Regulation Best Interest, because in this situation the individual would be a natural person receiving and using the recommendation for personal, family, or household purposes. (Posted August 4, 2020)

Recommendation

Q: What account recommendations are covered by Regulation Best Interest?

A: Regulation Best Interest expressly applies to account recommendations including recommendations of securities account types generally (e.g., to open an IRA or other brokerage account, or an advisory account), as well as recommendations to roll over or transfer assets from one type of account to another (e.g., from a workplace retirement plan account to an IRA).

There are many options or account types within brokerage accounts. For example, brokerage accounts can include: education accounts (e.g., 529 Plans and tax-free Coverdell accounts); retirement accounts (e.g., IRA, Roth IRA, or SEP-IRA accounts); and specialty accounts (e.g., cash or margin accounts, and accounts with access to Forex or options trading). Different brokerage accounts can also offer different levels of services, such as access to online trading, or can offer different products, for example in higher dollar amount accounts (e.g., access to products with break-points). The staff notes that these are just some examples of brokerage accounts that could be recommended to a retail customer, and to which Regulation Best Interest would apply.

The type of securities account recommended is an investment strategy that has the potential to greatly affect retail customers' costs and investment returns. For example, different types of securities accounts can offer different features, products, or services, some of which may—or may not—be in the best interest of certain retail customers. Accordingly, the staff reminds broker-dealers that the term "investment strategy" (which includes account recommendations) is to be interpreted broadly. Further, account recommendations will almost always involve a "securities transaction" (such as a securities purchase, sale, or exchange), and thus would generally be subject to Regulation Best Interest in any case. (Posted January 10, 2020)

Q: Are there additional considerations if I am a dually registered financial professional making an account recommendation?

A: If you are a dually registered financial professional (*i.e.,* an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether you work for a dual-registrant, an affiliated firm, or an unaffiliated firm)) making an account recommendation, you would need to make this evaluation taking into consideration the spectrum of accounts that you can offer (*i.e.,* both brokerage and advisory taking into account any eligibility requirements such as account minimums), and not just brokerage accounts.[1] (Posted January 10, 2020)

Q: If I am only registered as an associated person of a broker-dealer, but my firm is a dual registrant, do I need to take into consideration both brokerage and advisory accounts?

A: No. If you are only registered as an associated person of a broker-dealer (regardless of whether you work for a dual-registrant or a broker-dealer affiliated with an investment adviser), you would need to take into consideration only the brokerage accounts available at your firm. The Commission noted that even if your firm only offers brokerage accounts, you would still need to have a reasonable basis to believe that the recommended account is in the best interest of the retail customer.[2] (Posted January 10, 2020)

Q: I am an associated person of a broker-dealer. If I meet and talk with a prospective retail customer in an informal setting (e.g., on the golf course, at social gatherings, or while running errands), is my

communication (sometimes referred to as a "hire me" communication) subject to Regulation Best Interest?
A: Whether your communication is subject to Regulation Best Interest depends on whether you make a "recommendation," not on the location or setting of the communication.
Regulation Best Interest applies to a "recommendation of a securities transaction or investment strategy involving securities (including account recommendations) to a retail customer." The Commission interprets whether a "recommendation" has been made to a retail customer that triggers the Regulation Best Interest obligations consistent with the precedent under the anti-fraud provisions of the federal securities laws as applied to broker-dealers, and with how the term has been applied under the rules of self-regulatory organizations. Under this existing framework, a factor to consider is whether the communication "reasonably could be viewed as a 'call to action.'" The more individually tailored the communication to a specific customer or a targeted group of customers, the greater the likelihood that the communication may be viewed as a "recommendation."

If you engage in a communication with a retail customer that rises to the level of a "recommendation," whether in the context of a "hire me" conversation or otherwise, the recommendation will be subject to Regulation Best Interest.

Not all communications with a prospective retail customer will rise to the level of a recommendation. For example, consider a scenario where you meet a prospective retail customer at a dinner party and say: "I have been working with our mutual friend, Bob, for fifteen years, helping him to invest for his kids' college tuition and for retirement. I would love to talk with you about the types of services my firm offers, and how I could help you meet your goals. Here is my business card. Please give me a call on Monday so that we can discuss."

Absent other factors, in the staff's view this communication would not be a "recommendation" subject to Regulation Best Interest, as the staff does not believe this communication in and of itself would reasonably be viewed as a "call to action" to open an account, engage in a securities transaction or act on an investment strategy.(Posted January 10, 2020)

Q: Would the analysis be different if I am leaving Firm A to join Firm B, and I call my existing Firm A retail customers to tell them about my move to Firm B?
A: The analysis would be the same; Regulation Best Interest applies if you make a "recommendation" as described above.
The staff understands that it is common industry practice for an associated person of a broker-dealer leaving Firm A to go to Firm B to call his or her Firm A customers prior to his departure to attempt to persuade the customers to move their accounts to Firm B. In such circumstances, the staff believes that there is a significant possibility that a communication may be reasonably likely to be viewed as a "call to action." However, whether a communication involves a "recommendation" turns on the facts and circumstances of the particular communication.

Not all communications between a representative and an existing retail customer in this context will rise to the level of a recommendation. For example, consider a scenario where you are leaving Firm A to go to Firm B, and you call your existing retail customer and say: "I wanted to let you know that I am leaving Firm A after today. As of Monday, I will be joining Firm B. It has been really great working with you all of these years, and I would love to continue our relationship. I will give you a call next week to tell you more about Firm B and discuss what it has to offer."

Absent other factors, in the staff's view, this communication would not be a "recommendation" subject to Regulation Best Interest, as the staff does not believe this communication in and of itself would reasonably be viewed as a "call to action" to open an account, engage in a securities transaction or act on an investment strategy. (Posted January 10, 2020)

Q: I am an associated person of a broker-dealer. If I inform a retail customer that he or she may make a cash contribution to an IRA in an amount up to the annual IRS contribution limit, or if I make other

educational communications about IRAs or other retirements accounts, are those communications subject to Regulation Best Interest?
A: Generally, no. While this answer will depend on the facts and circumstances of the communication, in the staff's view, a communication such as informing a retail customer that he or she may make a cash contribution to an IRA in an amount up to the annual IRS contribution limit would not, by itself, rise to the level of a "recommendation." Consistent with existing broker-dealer regulation, certain communications are treated as "education" rather than "recommendations." For example, a general conversation about retirement planning, such as providing a company's retirement plan options to a retail customer, would not, by itself, rise to the level of a recommendation. Similarly, if you inform a retail customer that he or she needs to take a required minimum distribution under the Internal Revenue Code, the Commission stated that it would not interpret such communication, by itself, to rise to the level of a "recommendation." Such a communication would be considered investment education or descriptive information, provided it does not involve, for example, a recommendation regarding specific securities to be sold or a recommendation regarding specific securities to be purchased with the proceeds of any sale. (Posted January 10, 2020)

Q: Does Regulation Best Interest apply to a recommendation to a retail customer to open a self-directed brokerage account where subsequent recommendations will not be provided by the broker-dealer?
A: Yes. A recommendation of a securities account (here, a self-directed brokerage account) is covered by Regulation Best Interest even if the broker-dealer does not intend to provide subsequent recommendations subject to Regulation Best Interest in the new account. (Posted February 11, 2020)

Disclosure Obligation

Q: I am an associated person of a broker-dealer; are there circumstances where I can provide oral disclosures, or provide written disclosures *after* a recommendation is made, without violating the obligation under Regulation Best Interest to provide written disclosures "prior to or at the time of the recommendation"?
A: Only in limited circumstances. Regulation Best Interest requires the broker, dealer, or natural person who is an associated person of a broker or dealer, prior to or at the time of the recommendation, to provide the retail customer, in writing, full and fair disclosure of all material facts relating to the scope and terms of the relationship with the retail customer and all material facts relating to conflicts of interest that are associated with the recommendation.
Subject to the conditions summarized below and as described further in the Adopting Release, the Commission provided flexibility with respect to the "in writing" requirement of the Disclosure Obligation, as well as with respect to the timing that disclosure is made, in certain circumstances, such as when you update your written disclosures orally in order to reflect facts not reasonably known at the time the written disclosure is provided (e.g., a dual-registrant informing a retail customer of the capacity in which the dual-registrant is acting in conjunction with a recommendation).

In addition, subject to the conditions described below, in the limited instances where existing regulations permit disclosure after the recommendation is made (e.g., trade confirmation, prospectus delivery), you may satisfy your Disclosure Obligation regarding the information contained in the applicable disclosure document by providing such document to the retail customer after the recommendation is made.

Before supplementing, clarifying or updating written disclosure in the limited circumstances described above, you (or your firm) must provide an initial disclosure in writing that identifies the material fact and describes the process through which such fact may be supplemented, clarified or updated. In addition, when making supplemental oral disclosure not later than the time of the recommendation, your firm must maintain a record of the fact that oral disclosure was provided to the retail customer. (Posted January 10, 2020)

Q: I am a broker-dealer; can I satisfy the Disclosure Obligation under Regulation Best Interest with my Relationship Summary (Form CRS)?
A: Generally, no. Whether the Relationship Summary or any existing disclosure, by itself, will satisfy the Disclosure Obligation in full would depend on the facts and circumstances. However, in most instances, you will need to provide additional information beyond the summary information contained in the Relationship Summary in order to satisfy the Disclosure Obligation. (Posted January 10, 2020)

Q: I am a broker-dealer; if my Relationship Summary includes a hyperlink to my Regulation Best Interest disclosures, can I satisfy my obligation to deliver the Regulation Best Interest disclosures by delivering Form CRS to new or prospective retail customers?
A: Regulation Best Interest and Form CRS have distinct disclosure delivery obligations. The staff notes that neither Regulation Best Interest nor Form CRS permits a "notice plus access" or "access equals delivery" method of electronic delivery. Rather, both Regulation Best Interest and Form CRS permit firms to provide electronic delivery of documents within the framework of the Commission's existing guidance regarding electronic delivery.[3] The existing framework consists of the following elements: (1) notice to the investor that information is available electronically; (2) access to information comparable to that which would have been provided in paper form and that is not so burdensome that the intended recipients cannot effectively access it; and (3) evidence to show delivery (i.e., reason to believe that electronically delivered information will result in the satisfaction of the delivery requirements under the federal securities laws). One method to satisfy the evidence of delivery element is to obtain informed consent from investors.
For purposes of Form CRS only, under General Instruction 9.B. of Form CRS, firms may deliver the Relationship Summary to new or prospective clients or customers in a manner that is consistent with how the retail investor requested information about the firm or its financial professional. This approach applies only to the initial delivery of the Relationship Summary to new or prospective clients or customers, and not to any other delivery obligation of any other required disclosure (including under Regulation Best Interest). (Posted January 10, 2020)

Q: I am a broker-dealer; can I satisfy the Disclosure Obligation under Regulation Best Interest for existing retail customers by delivering disclosure of all requisite material facts along with the customer's June 2020 quarterly account statement?
A: As of June 30, 2020, if you are subject to Regulation Best Interest, you must disclose in writing, prior to or at the time of a recommendation, all material facts relating to the scope and terms of your relationship with a retail customer, as well as all material facts relating to conflicts of interest associated with a recommendation. You may choose to include Regulation Best Interest disclosures in a quarterly mailing after June 30, 2020. However, that mailing will not satisfy the Disclosure Obligation with respect to any recommendations you make to retail customers between June 30, 2020 and the time you provide the requisite disclosures. (Posted January 10, 2020)

Q: When can a broker-dealer or its associated person rely on the Relationship Summary to satisfy the capacity disclosure obligation?
A: Under the Disclosure Obligation, before or at the time of the recommendation, a broker-dealer or its associated person must disclose, in writing, all material facts about the scope and terms of its relationship with the retail customer, including (among other things) that the firm or its associated person is acting in a broker-dealer capacity. A standalone broker-dealer (i.e., a broker-dealer not also registered as an investment

adviser) will generally be able to satisfy this requirement to disclose its capacity by delivering the Relationship Summary to the retail customer, in accordance with Exchange Act Rule 17a-14.
However, for broker-dealers who are dually registered, and for associated persons who are either dually registered or, who are not dually registered but only offer broker-dealer services through a firm that is dually registered, the information contained in the Relationship Summary will not be sufficient to disclose their capacity in making a recommendation. Accordingly, dually registered associated persons and associated persons who are not dually registered but only offer broker-dealer services through a firm that is dually registered, must disclose whether they are acting (or only acting) as an associated person of a broker-dealer.

Similarly, for standalone broker-dealers who choose to prepare a combined Relationship Summary with an investment adviser affiliate, or whose associated persons deliver both the broker-dealer's Relationship Summary and an affiliated investment adviser's Relationship Summary, it is the staff's view that the information contained in the broker-dealer's Relationship Summary will not be sufficient to disclose their capacity in making a recommendation. Accordingly, in the staff's view, the associated person would need to disclose that she is acting only as an associated person of a broker-dealer. (Posted February 11, 2020)

See also the Frequently Asked Questions on Form CRS concerning presentation and delivery for affiliates.

Q: I am a broker-dealer; if I am not also a registered investment adviser, may I use the term "adviser" or "advisor" in my firm's name or title?
A: Generally, no. The Commission presumes that the use of the terms "adviser" or "advisor" in a name or title by a broker-dealer that is not also registered as an investment adviser is a violation of the requirement to disclose the broker-dealer's capacity under Regulation Best Interest's Disclosure Obligation.
Although use of the terms "adviser" or "advisor" in a name or title creates a presumption of a violation of the Disclosure Obligation, the Commission did not expressly prohibit the use of these names and titles by broker-dealers. Broker-dealers may use these terms when they are acting in a role specifically defined by federal statute that does not entail providing investment advisory services to retail customers, for example, as a municipal advisor, commodity trading advisor, or advisor to a special entity. A broker-dealer that provides advice in other capacities outside the context of investment advice to a retail customer may in its discretion use the terms "adviser" and "advisor."

In most instances, however, when a broker-dealer uses these terms in its name or title in the context of providing investment advice to a retail customer without also being a registered investment adviser, it will be presumed to violate the Disclosure Obligation under Regulation Best Interest. (Posted April 20, 2020)

Q: I am an associated person of a broker-dealer; if I am not also a supervised person of a registered investment adviser, may I use the term "adviser" or "advisor" in my name or title?
A: Generally, no. Similarly to the discussion above, the Commission presumes that the use of the terms "adviser" or "advisor" in a name or title by an associated person of a broker-dealer who is not also a supervised person of an investment adviser is a violation of the Disclosure Obligation under Regulation Best Interest. (Posted April 20, 2020)

Q: I am a broker-dealer with an affiliated registered investment adviser. Can my firm use the terms "adviser" or "advisor" in its name?
A: Generally, no. As noted above, the use of the terms "adviser" or "advisor" in a name or title by a broker-dealer that is not also a registered investment adviser would presumptively violate the Disclosure Obligation under Regulation Best Interest. (Posted April 20, 2020)

Q: I am a broker-dealer; if I am also a state-registered investment adviser, may I use the title "adviser" or "advisor" in my name?
A: Yes. As noted above, the Commission presumed that the use of the terms "adviser" or "advisor" in a name or title by (i) a broker-dealer that is not also registered as an investment adviser or (ii) an associated person of a broker-dealer who is not also a supervised person of an investment adviser, in either case, is a violation of the Disclosure Obligation under Regulation Best Interest. In the staff's view, a state-registered investment adviser would be considered to be "registered as an investment adviser" for purposes of this presumption. (Posted April 20, 2020)

Q: My firm regularly communicates with retail customers in a language other than English. Our customers' primary language is Spanish. May our firm deliver disclosures required under the Disclosure Obligation to those retail customers in Spanish?
A: The staff would not object to the delivery of a complete translation of all of the disclosures required under the Disclosure Obligation in a foreign language so long as the firm also delivers such disclosures in English at the same time. In the staff's view, the translated version: (i) should be a complete, fair, and accurate translation of the English disclosures; (ii) should not make any of the terms used in the disclosures misleading; and (iii) should otherwise comply with the requirements under the Disclosure Obligation. Lastly, a firm should not translate the term "U.S. Securities and Exchange Commission." This staff view applies solely to the disclosures required pursuant to the Disclosure Obligation of Regulation Best Interest. (Posted May 7, 2020)
See also the Frequently Asked Question on Form CRS concerning the relationship summary in non-English language.
Q: I am a broker-dealer; if I am not also a registered investment adviser, may I use the term "adviser" or "advisor" in my firm's "doing business as" or "marketing" name?
A: Generally, no. As noted above, the Commission presumes that the use of the terms "adviser" or "advisor" in a name or title by (i) a broker-dealer that is not also registered as an investment adviser or (ii) an associated person of a broker-dealer who is not also a supervised person of an investment adviser is a violation of the Disclosure Obligation under Regulation Best Interest. In the staff's view, this presumption applies to a firm's "doing business as" or "marketing" name, as well as a firm's legal name. (Posted August 4, 2020)
Q: I am a broker-dealer that is dually registered as an investment adviser. Can my firm's financial professionals, including those who are not also supervised persons of an investment adviser, use or distribute firm materials that generally describe our firm's financial professionals as "financial advisors" or by another general title using the term "adviser" or "advisor" (e.g., "Our financial advisors…" or "Talk to your financial advisor about…")?
A: Generally, yes. In the staff's view, where a dually-registered broker-dealer uses or distributes firm material, such as marketing material that generally refers to financial professionals using the terms "advisers" or "advisors," such language, by itself, would not presumptively violate the capacity disclosure requirement under the Disclosure Obligation. This would be the case whether or not the financial professional using the firm's materials is also a supervised person of an investment adviser.
However, the staff reminds broker-dealers that in order to satisfy the Disclosure Obligation when making a recommendation, they must make full and fair disclosure of all material facts relating to the scope and terms of the relationship with a retail customer, including the capacity in which they are acting with respect to the recommendation. This obligation applies to both the broker-dealer and to associated persons of the broker-dealer. Accordingly, additional disclosures to identify capacity may be necessary for the firm and the financial professional using such materials when making a recommendation. For example, in a situation where such firm materials are used by a financial professional who is not also a supervised person of an investment adviser, additional disclosures would be necessary to identify the capacity in which the financial professional is acting when making the recommendation. Similarly, a financial professional who is not also a supervised person of an investment adviser would not be permitted to use his or her own materials that refer to himself

or herself as an "adviser" or "advisor" notwithstanding his or her firm's registration status. (Posted August 4, 2020)

Q: I am a standalone broker-dealer (I am not dually registered as an investment adviser). Some of my firm's registered representatives are also supervised persons of a registered investment adviser (either affiliated with my firm or not affiliated with my firm). Can my firm's financial professionals use or distribute materials prepared by my firm that generally describe my firm's financial professionals as "financial advisors" or by another general title using the term "adviser" or "advisor" (e.g., "Our financial advisors…" or "Talk to your financial advisor about…")?
A: Generally, no. In the staff's view, where a standalone broker-dealer uses or distributes firm materials, such as marketing materials that generally refer to its financial professionals using the terms "advisers" or "advisors," such disclosures would presumptively violate the capacity disclosure requirement under the Disclosure Obligation. However, where a financial professional is also a supervised person of an investment adviser, such individual may use his or her own materials (or materials prepared by the registered investment adviser) that refer to himself or herself as an "adviser" or "advisor." (Posted August 4, 2020)
Q: Can a broker-dealer, whether standalone or dually registered as an investment adviser, use or distribute issuer-prepared marketing and disclosure materials if the issuer-prepared materials generally describe financial professionals collectively as "financial advisors" or by another general title using the term "adviser" or "advisor"?
A: Generally, yes. In the staff's view, where a broker-dealer uses or distributes issuer-prepared materials, such as a prospectus that generally refers to financial professionals using the terms "advisers" or "advisors," such disclosure, by itself, would not presumptively violate the capacity disclosure requirement under the Disclosure Obligation. This would be the case regardless of whether the broker-dealer is dually registered or the associated persons of the broker-dealer are also supervised persons of an investment adviser.
However, the staff reminds broker-dealers that in order to satisfy the Disclosure Obligation when making a recommendation, they must make full and fair disclosure of all material facts relating to the scope and terms of the relationship with a retail customer, including the capacity in which they are acting with respect to the recommendation. This obligation applies to both the broker-dealer and to associated persons of the broker-dealer. Accordingly, additional disclosures to identify capacity may be necessary for the firm and the financial professional using the issuer materials when making a recommendation. For example, in a situation where such materials are used by a financial professional who is not also a supervised person of an investment adviser, additional disclosures would be necessary to identify the capacity in which the financial professional is acting when making the recommendation. (Posted August 4, 2020)

Q: I am an associated person of a broker-dealer and also offer services on behalf of a bank ("dual-hatted broker-dealer-bank employee"). When acting on behalf of the bank, would the use of the term "adviser" or "advisor" in my title or "doing business as" name presumptively violate the capacity disclosure requirement of Regulation Best Interest?
A: No. The Commission stated that Regulation Best Interest applies only in the context of a brokerage relationship with a brokerage customer, and specifically, when a broker-dealer is making a recommendation in the capacity of a broker-dealer. In the staff's view, Regulation Best Interest would not apply when a dual-hatted broker-dealer-bank employee is acting in the capacity of a bank employee.
However, where a dual-hatted broker-dealer-bank employee is providing a recommendation to a retail customer in his or her broker-dealer capacity, in the staff's view, it would be a presumptive violation of the Disclosure Obligation to use the name or title "adviser" or "advisor" unless such individual is also a supervised person of an investment adviser. (Posted August 4, 2020)

Care Obligation

Q: For purposes of the Care Obligation under Regulation Best Interest, what constitutes a "series of transactions" and whether a particular transaction is part of a "series of transactions"?
A: A "series" of recommended transactions is an established term under the federal securities laws and SRO rules that is evaluated in concert with existing guideposts, such as turnover rate, cost-to-equity ratio, and use

of in-and-out trading, which have been developed over time and which serve as indicators of excessive trading. The staff notes that Regulation Best Interest does not change this well-established approach. The Commission stated that what would constitute a "series" of recommended transactions would depend on the facts and circumstances, and would need to be evaluated with respect to a particular retail customer. (Posted January 10, 2020)

Q: I am a dually registered financial professional. My customer holds securities in a brokerage account, for which she has paid transaction-based compensation, including commissions, markups, and upfront sales loads. In my broker-dealer capacity, may I recommend that she roll over or transfer such assets from her brokerage account to an advisory account where she will be charged an ongoing asset-under-management fee? What factors should I consider?

A: It depends. Under Regulation Best Interest, you must have a reasonable basis to believe that the recommendation is in the retail customer's best interest at the time of the recommendation and does not place your financial or other interest ahead of the interest of the retail customer. In doing so, you must weigh the potential risks, rewards, and costs of a particular security or investment strategy, in light of the particular retail customer's investment profile.[4]

In the staff's view, prior to recommending a retail customer roll over or transfer assets, such as from a brokerage to an advisory account, you should take into consideration, among other factors, the potential risks, rewards, and costs associated with the transfer or rollover of the securities, including whether the transfer or rollover would require a sale of securities. This would include consideration of any fees and costs related to any such sale of securities or to the rollover or transfer of assets, such as deferred sales charges or liquidation costs. Moreover, you would need to consider the potential risks, rewards, and costs associated with the advisory account (including, for example, the projected cost to the retail customer of the account), and weigh such factors in light of the particular retail customer's investment profile, as well as other relevant factors.

For example, where a retail customer holds class A mutual fund shares, the sale of such shares could generate a taxable event, and could result in the forfeit of certain benefits, such as rights of accumulation or rights of exchange. In addition, class A shares typically charge a front-end sales load, but tend to have a lower 12b-1 fee and annual expenses than certain other mutual fund share classes. You should understand these potential risks, rewards, and costs when weighing whether a recommendation to roll over or transfer class A mutual fund shares is in the best interest of the retail customer.

Finally, where a retail customer holds a variety of investments, or prefers differing levels of services (e.g., both episodic recommendations from a broker-dealer and continuous advisory services including discretionary asset management from an investment adviser), it may be in the retail customer's best interest to recommend both a brokerage and an advisory account. (Posted August 4, 2020)

Q: I am a dually registered financial professional and I offer both advisory and brokerage accounts. When I first meet with a potential customer and begin to gather her or his personal and financial background information, how do I know in which capacity I am acting as I evaluate which type of account to recommend? Would the ultimate account-type recommendation dictate my capacity at the time of the evaluation?

A: Determining the capacity in which a dual-registrant is making a recommendation is a facts and circumstances test, with no one factor being determinative, but the Commission considers, among other factors, the type of account, how the account is described, the type of compensation and the extent to which the dual-registrant made clear to the customer the capacity in which it was acting. Regulation Best Interest would not apply to investment advice provided to a retail customer by a dual-registrant when acting in the capacity of an investment adviser, even if the retail customer has a brokerage relationship with the dual-registrant or the dual registrant executes the transaction in its brokerage capacity. Similarly, a dual registrant is an investment adviser solely with respect to those accounts for which a dual-registrant provides investment advice or receives compensation that subjects it to the Investment Advisers Act.

Where a dually-registered financial professional may not yet know and has not clearly disclosed the capacity in which he or she is acting to a potential retail customer, in the staff's view, the financial professional should assume that both Regulation Best Interest and the Investment Advisers Act would apply, and the account recommendation generally should be evaluated under both Regulation Best Interest and the Investment Advisers Act. (Posted August 4, 2020)

Conflict of Interest Obligation

Q: Are there any other specific conflicts that should be eliminated in addition to: sales contests, sales quotas, bonuses, and non-cash compensation, based on the sales of specific securities or types of security within a limited period of time?

A: The Commission emphasized that prohibiting certain incentives does not mean that all other incentives are presumptively compliant with Regulation Best Interest. Such other incentives and practices that are not explicitly prohibited are permitted provided that the broker-dealer establishes reasonably designed policies and procedures to disclose and mitigate the incentives created, and the broker-dealer and its associated persons comply with the Care Obligation and the Disclosure Obligation.

The Conflict of Interest Obligation includes an overarching requirement to establish, maintain, and enforce reasonably designed policies and procedures to identify and, at a minimum, disclose, in accordance with the Disclosure Obligation, or eliminate all conflicts of interest associated with the recommendation. Pursuant to this overarching requirement, elimination of conflicts of interest is one method of addressing the conflict, in lieu of disclosure, which broker-dealers may find appropriate in certain circumstances even when not required by Regulation Best Interest. (Posted January 10, 2020)

Q: Does the Commission mandate any particular mitigation methods? For example, do firms need to provide "level-fee" compensation or use neutral factors for differential compensation?

A: No. In lieu of mandating specific mitigation measures or a "one-size fits all" approach, broker-dealers have flexibility to develop and tailor reasonably designed policies and procedures that include conflict mitigation measures, based on each firm's circumstances.

The Commission recognized that there are a number of different kinds of incentives and depending on the specific characteristics of an incentive, different levels and types of mitigation may be necessary. In certain instances, compliance with existing supervisory requirements and disclosure may be sufficient, for example, where a firm may develop a surveillance program to monitor sales activity near compensation thresholds.

The Commission provided the following non-exhaustive list of practices that could be used as potential mitigation methods for firms to comply with subsection (a)(2)(iii)(B) of Regulation Best Interest:

- avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales;
- minimizing compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred provider products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors;
- eliminating compensation incentives within comparable product lines by, for example, capping the credit that an associated person may receive across mutual funds or other comparable products across providers;
- implementing supervisory procedures to monitor recommendations that are: near compensation thresholds; near thresholds for firm recognition; involve higher compensating products, proprietary products or transactions in a principal capacity; or, involve the roll over or transfer of assets from one type of account to another (such as recommendations to roll over or transfer assets in an ERISA account to an IRA) or from one product class to another;
- adjusting compensation for associated persons who fail to adequately manage conflicts of interest; and
- limiting the types of retail customer to whom a product, transaction, or strategy may be recommended.

The Commission did not require firms to establish differential compensation based on neutral factors but, firms could choose to do so as a potential practice to promote compliance with the requirement to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate any

conflicts of interest that create an incentive for an associated person to place its interest ahead of the interest of the retail customer. (Posted January 10, 2020)

Q: Are forgivable loans conflicts of interest under Regulation Best Interest?
A: Typically, yes. Staff understands that firms may offer "forgivable loans" as an incentive to induce associated persons to move from one firm to another and that typically these loans are forgiven based upon the performance of future services by the individuals and based upon the achievement of specified performance goals related to asset accumulation, revenue benchmarks, client transfer, or client retention. Under Regulation Best Interest, a conflict of interest is defined as "an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer—consciously or unconsciously—to make a recommendation that is not disinterested."
In the staff's view, a forgivable loan that is based on the achievement of specified performance goals such as those described above would constitute a conflict of interest. Therefore, pursuant to the Conflict of Interest Obligation, firms would need to establish, maintain, and enforce written policies and procedures reasonably designed to identify and address such forgivable loans. Specifically, firms would be required to identify, and at a minimum, disclose or eliminate all conflicts of interest associated with the forgivable loans. In addition, to the extent that forgivable loans are incentives to associated persons, the broker-dealer would be required to have policies and procedures reasonably designed to mitigate any conflicts of interest associated with these incentives.

If a firm offered forgivable loans that were based on the sale of specific securities or specific types of securities within a limited period of time, the firm would be required to establish, maintain, and enforce written policies and procedures reasonably designed to identify and eliminate this incentive to its associated persons. However, compensation practices based on total products sold, asset growth or accumulation, and customer satisfaction are not subject to that requirement. Nonetheless, the staff reminds firms that just because certain compensation practices are not subject to the requirement does not mean that they are presumptively compliant with Regulation Best Interest. [See the FAQ above concerning elimination of conflicts]. (Posted February 11, 2020)

Compliance Obligation

Q: Are firms required to build new systems of controls and compliance in order to satisfy the Compliance Obligation?
A: The Compliance Obligation requires that firms establish, maintain and enforce, written policies and procedures that are reasonably designed to achieve compliance with Regulation Best Interest. The Commission has stated that these policies and procedures should be reasonably designed to address and be proportionate to the scope, size and risks associated with the operations of the firm and types of business in which the firm engages. In adopting the requirement, the Commission did not mandate specific requirements but provided flexibility to allow broker-dealers to establish compliance policies and procedures that accommodate a broad range of business models.
Broker-dealers are currently subject to supervisory obligations under federal securities laws and regulations, as well as applicable self-regulatory organization rules, and broker-dealers could choose to satisfy the Compliance Obligation by adjusting/building upon their current systems of supervision and compliance, as opposed to creating entirely new systems. (Posted February 11, 2020)

[1] For the corresponding obligation applicable to investment advisers, *see* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) at note 44 ("Accordingly, in providing advice to a client or customer about account type, a financial professional who is dually licensed (*i.e.,* an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether the professional works for a dual registrant, affiliated firms, or unaffiliated firms)) should consider all types of accounts offered (*i.e.,* both brokerage accounts and advisory accounts) when determining whether the advice is in the client's best interest.")

[2] For the corresponding obligation applicable to investment advisers, *see id*. ("A financial professional who is only a supervised person of an investment adviser (regardless of whether that advisory firm is a dual registrant or affiliated with a broker-dealer) may only recommend an advisory account the adviser offers when the account is in the client's best interest.")
[3] *See* Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Exchange Act Release No. 37182 (May 9, 1996) [61 FR 24644 (May 15, 1996)]; Use of Electronic Media, Exchange Act Release No. 42728 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)]; and Use of Electronic Media for Delivery Purposes, Exchange Act Release No. 36345 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)].
[4] For a discussion of an investment adviser's fiduciary duty, which would apply to a financial professional acting in the capacity of an investment adviser, see Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] at 33670-78.

Modified: Aug. 4, 2020