INVESTMENTS & WEALTH MONITOR

A reprinted article from November/December 2019

Harmonizing Regulation Best Interest with Fiduciary Practices

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INVESTMENTS & WEALTH INSTITUTE®
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As regulators move toward a tougher standard on investment advice, most dually registered financial advisors[1]—those who straddle the line between a suitability and a fiduciary standard—will face new compliance challenges and potential liability when Regulation Best Interest[2] (Reg BI) goes into effect June 30, 2020. For those wealth managers and financial planners in a position to adjust their compliance procedures, now is the time to start the harmonization process.

This article provides an overview of five activities common to most retail practices—disclosure, suitability, best execution, rollover/account recommendations, and compensation—across three areas of compliance: the Securities and Exchange Act of 1934 (i.e., Reg BI), the Investment Advisers Act of 1940 (Advisers Act), and the Employee Retirement Income Security Act of 1974 (ERISA).

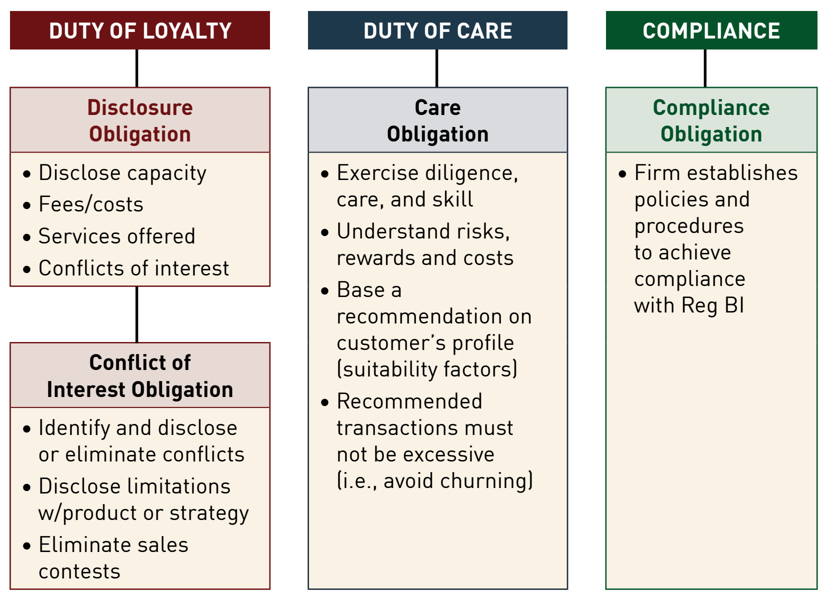
The best way to tackle harmonization is: (1) get to know Reg BI, (2) understand the differences and overlap with the Advisers Act and ERISA regulation, and (3) put it all together into one consistent due diligence process.

REG BI OVERVIEW

The text of Reg BI is seven pages, but the Securities and Exchange Commission (SEC or Commission) uses 764 pages to describe this complex, quasi-fiduciary duty and its related costs and benefits.[3] The SEC describes the Reg BI standard as a principles-based regimen, like the fiduciary standard under the Advisers Act. In other words, there are no bright-line procedures guiding compliance.

Figure 1

REG BI—SORTED BY FIDUCIARY DUTY



The SEC leaves it up to the brokerage industry to establish policies and procedures. However, clues to what the SEC would deem compliance with the rule are sprinkled throughout the final release in the form of commentary. The SEC is expected to provide additional guidance in the future, some of it in the form of FAQs.

In the Reg BI final release, the SEC also states that the regulation "draws from key principles underlying fiduciary obligations, including those that apply to investment advisers …" So let's look at both[4] through a fiduciary lens.

Figure 1 shows the four subordinate obligations that a broker must meet in order to comply with Reg BI's best interest standard. Although "best interest" is not defined in the text of the rule,[5] the final release states that the Best Interest Obligation is satisfied by meeting the other four obligations: Disclosure, Care, Conflict of Interest, and Compliance. Stated another way, the "best interest" standard is defined using the four subordinate obligations—or duties—shown in figure 1 and described in detail below.

Disclosure obligation. Viewed through a fiduciary filter, the four Reg BI obligations can be sorted into twin duties of loyalty and care, as detailed in the Advisers Act. For example, a broker's disclosure obligation is similar to an adviser's obligation to disclose basic information about the business, including services and products. Although the Financial Industry Regulatory Authority (FINRA) does not require delivery of a core disclosure document similar to advisers' Form ADV, brokers must disclose specific conflicts associated with a recommendation under the disclosure obligation. In addition, as part of the Reg BI package approved by the Commission, Form CRS is a new disclosure document that broker-dealers and registered investment advisers (RIAs) will have to deliver to new and existing clients providing a high-level overview of their respective business models.[6]

Conflict of interest obligation. This duty places the onus on the firm to identify and at the very least disclose conflicts of interest related to its brokers' recommendations. In addition to disclosure, the firm is obligated to "mitigate conflicts" that create a financial incentive for the broker to make recommendations "that place the firm's interests ahead of the customer" including limitations associated with the product or strategy. Moreover, the firm must eliminate sales contests based on a specific product or types of securities within a limited period of time. In a nutshell, this obligation overlaps partly with the disclosure obligation by mandating disclosure of material facts related to conflicts of interest.

Care obligation. Many of the same due diligence processes used by advisers as part of a financial planning or wealth management engagement can be found in the Care Obligation. The suitability factors in Reg BI are virtually identical to those under FINRA's current suitability duty and include age, investment experience, objectives, tax status, and liquidity needs. Interestingly, RIAs also have an implied suitability duty to formulate reasonable investment recommendations under a 1994 rule that never was formally adopted by the SEC.

Compliance obligation. Finally, brokers have a duty to abide by their firms' policies and procedures designed to achieve compliance with Reg BI. Advisers, too, have a roughly comparable rule, albeit one that encompasses all of their advisory activities, not just for retail advice. Rule 206(4)-7 of the Advisers Act, adopted by the SEC in 2003, generally requires written policies and procedures, tested annually by the firm, to prevent violation of federal securities laws.[7] Both compliance rules serve as an important means of articulating the fiduciary duty for advisers and the quasi-fiduciary standard under Reg BI.

Fiduciary duty. SEC staff has confirmed numerous times in guidance, regulatory alerts, enforcement actions, and other commentary that investment advisers have twin duties of loyalty and care. In figure 2, we can see strong similarities between Reg BI and the fiduciary duties of an investment adviser. As noted previously, advisers also have what amounts to a catch-all compliance rule that requires specific policies and procedures designed to avoid a fiduciary breach. Upon closer review, subtle differences between the two standards can be found, which will be analyzed in this article. Nonetheless, the SEC studiously avoids using the terms "fiduciary" or "duty of loyalty" or "duty of care" in Reg BI, but the agency uses a similar approach that roughly parallels the duties of an investment adviser.

HARMONIZING THE DUTY OF LOYALTY

Now let's dig a little deeper into harmonizing not only a common advice standard under Reg BI and the Advisers Act, but throwing in the Department of Labor (DOL) Impartial Conduct Standards for good measure. Overall, ERISA's fiduciary standard is more robust, and in order to be compliant with all three statutes, a significant part of harmonization—particularly under the duty of loyalty—must incorporate ERISA's fiduciary standard.

In addition, the DOL fiduciary rule was overturned by a federal court in 2018, but one vestige of it remains intact, at least for the time being. In response to the court decision,[8] the DOL published guidance that established a temporary safe harbor for conflicted investment advice.[9]

Although the Impartial Conduct Standards may be replaced by the Trump administration with something else, for now the Standards, as well as Department commentary related to the fiduciary rule's exemptions for conflicted advice, serve as an important regulatory barometer under ERISA.

In figure 3, we see side-by-side comparisons of how a dual registrant under ERISA, the Advisers Act, and Reg BI can satisfy the duty of loyalty. A careful reading of the first bullet point for each will detect a nuanced but important difference among the three in defining a best-interest standard. Although the differences may appear to be merely word-parsing, the SEC and many legal experts consider ERISA's "without regard to" standard the highest of the three standards.[10] As a consequence, the SEC

Figure 2

ADVISERS ACT FIDUCIARY GUIDANCE

DUTY OF LOYALTY	DUTY OF CARE	COMPLIANCE
• Serve client's best interests and not subordinate client's interest to its own* • Eliminate, or at least provide "full and fair disclosure," of conflicts	• Advice must be suitable • Make reasonable inquiry into client's financial situation • Disclose monitoring scope and frequency • Seek best execution	• Adopt and implement written policies and procedures reasonably designed to prevent violations

** SEC guidance states fiduciary obligation "is an overarching principle that encompasses both the duty of care and the duty of loyalty." The above interpretative guidance is not all-inclusive of an adviser's fiduciary duties.*

replaced the ERISA "without regard to" language (which also was mandated by Congress in the Dodd-Frank Act if the SEC were to adopt a uniform fiduciary standard for brokers and advisers) with a much less stringent loyalty standard. The standard under Reg BI, in contrast, requires the broker to provide advice "without placing the financial or other interest" of the firm or broker ahead of the customer.[11] The SEC stated in the Reg BI release that the "without regard to" language "could be inappropriately construed to require a broker-dealer to eliminate all of its conflicts."[12]

Dual registrants servicing retirement, brokerage, and advisory accounts are best-served in the harmonization process by adopting the "without regard to" standard for avoiding or otherwise mitigating conflicts of interest. As stated in the DOL guidance, the Impartial Conduct Standards require that "such [investment] advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing … without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party."[13]

Full and fair disclosure. The standards for disclosure provided under the Best Interest Contract (BIC) exemption and SEC requirements for investment advisers also parallel Reg BI's "full and fair" disclosure of conflicts. Although the DOL Impartial Conduct Standards do not include a "full and fair" disclosure standard, this specific language was included elsewhere in the final release of the BIC exemption and suggests the agency's preferred standard for disclosing conflicts of interest. In addition, both the BIC exemption and the SEC's most recent guidance for investment advisers[14] stress the importance of securing the client's "informed consent" with respect to disclosing a material conflict.

Informed consent of the investor. Ensuring that a client provides informed consent following disclosure is assumed but not required under Reg BI. The SEC asserts that although "informed consent" in an advisory relationship is important due to activities that may include unlimited investment discretion, a brokerage relationship "on the other hand is generally transaction-based and the retail customer must accept (or reject) each recommendation." The SEC goes on to say that "after a broker-dealer provides full and fair disclosure such that a retail customer can make an informed decision … we believe that the retail customer has provided 'informed consent' in a manner that is analogous to the informed consent required to be provided by a client in the context of an investment adviser-client relationship."[15]

Figure 3

HARMONIZING DUTY OF LOYALTY

ERISA's IMPARTIAL CONDUCT STANDARDS	ADVISERS ACT GUIDANCE	REG BI's CARE OBLIGATION
• Advice is provided without regard to the financial interests of the advisor/firm • Statements about recommended transaction, fees, compensation, and conflicts of interest not materially misleading at time they are made • Recommended transaction will result in reasonable, not excessive, compensation for services	• Cannot subordinate clients' interests to advisor/firm's interests • "Full and fair" disclosure of conflicts of interest • "Conflict" is an interest that might incline you to "consciously or unconsciously" give advice that is not disinterested	• Act in the best interest of the customer without placing interests of firm ahead of the customer • "Full and fair" disclosure of conflicts of interest • "Conflict" is an interest that might incline you to "consciously or unconsciously" give advice that is not disinterested

Harmonizing disclosure. A harmonized approach would default to the highest standard, thereby requiring "full and fair disclosure"—a fairly consistent standard across all three jurisdictions—as well as informed consent of the client, following the Advisers Act and ERISA standard.

Providing additional context, it should be recalled that the DOL found disclosure to have its limitations as a mitigation tool for conflicted advice. In its final BIC release, the Department stated, "Full and fair disclosure of material conflicts and informed consent are … important elements of exemption relief but are not sufficient on their own to form the basis of an exemption that is this broad and flexible."[16]

Finally, it would be impractical to rely on Form ADV to satisfy the disclosure requirements of all three statutes. As noted by the SEC in the Reg BI final release, "the Disclosure Obligation only requires disclosure of … material facts relating to conflicts of interest associated with [the broker's] recommendations, and not of all material facts relating to the relationship." The Reg BI release goes on to say, "In contrast, the disclosure requirements imposed by the fiduciary duty under the Advisers Act generally and Form ADV in particular are broader …"[17]

Harmonization can only go so far in terms of disclosure across all three areas of regulation. For example, prior to a variable-annuities transaction, brokers must disclose various product features including the potential surrender period and surrender charge and potential tax penalty if customers sell or redeem deferred variable annuities before reaching age 59½. Unfortunately, even though Form ADV allows significant flexibility in drafting the disclosure, it would be impossible to disclose all of the information clients would need in order to make an informed purchasing decision. Granular disclosure requirements under the Impartial Conduct Standards, Reg BI, and the Advisers Act means the goal of creating a one-size-fits-all disclosure document simply doesn't work.

HARMONIZING THE DUTY OF CARE

SUITABILITY STANDARD

The adviser's implied duty of care under the Advisers Act and ERISA are much easier to align with Reg BI's Care Obligation under harmonization. In figure 4 the Reg BI's suitability factors listed under the definition of a "Retail Customer Investment Profile" are found to be identical to the express suitability duty of a broker under FINRA's suitability standard (Rule 2111).[18] Both require consideration of at least nine factors; the adviser's implied duty under the Advisers Act[19] and the Impartial Conduct Standards cover five of those nine factors: investment objectives, financial circumstances or situation, risk tolerance, needs of the investor, and investment experience. The same suitability factors under Rule 2111 are listed under the definition of a "Retail Customer Investment Profile" in Reg BI.

Presumably financial planners and wealth managers in a comprehensive engagement would cover all of the Rule 2111 suitability factors plus many others during the data-collection and analysis part of the process.

PRUDENCE VERSUS SUITABILITY

It is important to keep in mind, too, that all three care standards under ERISA, Reg BI, and the Advisers Act refer to ERISA's prudence standard in which the investment fiduciary must exercise "care, skill, prudence, and diligence" in providing investment advice. Again, fiduciary purists may object to the comparison, particularly because ERISA's prudence standard has evolved over many decades under the common law of trusts (and updated in the Restatement 3d of Agency), but it is nonetheless another way of referring to the roughly similar suitability that has come to be an all-inclusive label defining a broker's standard of care.

The so-called Prudent Investor (formerly Prudent Man) Rule under ERISA requires an investment fiduciary to act "with care, skill, prudence and diligence under circumstances then prevailing …"[20] In figure 4 we saw that the SEC's never-adopted suitability standard for RIAs references ERISA's prudence standard as similar to its own proposal.[21] The original Reg BI proposal had included "prudence" in its Care Obligation, although in the final release the SEC removed "prudence," stating that the term was "superfluous and unnecessarily presents the possibility for confusion and legal uncertainty."[22] The original Reg BI proposal incorporating this language received significant pushback from industry participants who also had opposed the DOL fiduciary rule. Some of Reg BI's industry advocates took exception to the term "prudence," claiming that it was superfluous. However, others viewed it as increasing liability, with one insurance firm commenting that the term "raises numerous interpretative issues and compliance risks," and another warning that the term "could lead to confusion in interpretation of the care obligation set forth in the Proposal."[23]

Superfluous or not, in our harmonized suitability standard, consider using ERISA's prudence standard as the baseline for stepping back and assessing the suitability of investment recommendations in order to satisfy the requirements of all three statutes.

HARMONIZING THE DUTY OF BEST EXECUTION

Best execution may not always be top of mind but if you're a dual registrant, it's helpful to make sure the standards under FINRA rules and the Advisers Act are met. By meeting both of these requirements, you also are likely to satisfy a similar requirement under the now

Figure 4

HARMONIZING SUITABILITY

ERISA's IMPARTIAL CONDUCT STANDARDS

- Investment objectives
- Financial circumstances
- Risk tolerance
- Needs of investor

- *Prudent Expert Standard: Fiduciary "… acts with care, skill, prudence and diligence under circumstances then prevailing…"*

ADVISERS ACT's IMPLIED SUITABILITY STANDARD

- Investment objectives
- Financial situation
- Investment experience
- Financial goals
- Advice is suitable in context of overall portfolio
- Financial planning inquiry should include information on:
  - > Current income
  - > Investments
  - > Assets and debts
  - > Marital status
  - > Tax status
  - > Insurance policies

- *SEC's proposed suitability rule for RIAs (never adopted) notes similarity to ERISA's prudence standard and trust law*

REG BI's CARE OBLIGATION

- Investment objectives
- Financial situation and needs
- Investment experience
- Risk tolerance
- Age
- Other investments
- Tax status
- Time horizon
- Liquidity needs

- *Broker exercises "reasonable diligence, care and skill"*
- *Must evaluate potential rewards, risks and costs*

defunct DOL fiduciary rule exemption for principal trades.

In figure 5 we see the standards required for executing securities transactions under the DOL's principal transactions exemption were satisfied by compliance with FINRA rules 5310 and 2121 (and any successor rules). Both DOL and FINRA rules require the broker to seek best execution at the most favorable terms "reasonably available under the circumstances." Although the Advisers Act guidance requires consideration of other factors, by combining those with the requirements under Rule 5310 a dual registrant should be able to satisfy the duty of best execution under all three statutes.[24] Keep in mind, however, that the DOL safe harbor applies to a much narrower set of transactions, typically when a broker-dealer is selling bonds out of inventory. Both SEC and Reg BI guidance stress that cost is only one consideration in seeking best execution.

Figure 5

HARMONIZING BEST EXECUTION

DOL's PRINCIPAL TRANSACTIONS EXEMPTION	ADVISERS ACT GUIDANCE	REG BI's CARE OBLIGATION
• Principal Transactions Exemption (Part of FAB 2018-02, Temporary Enforcement Policy) • Fiduciary must seek to obtain best execution "reasonably available under the circumstances" • Satisfied by compliance with FINRA rules 2121 and 5310 or successor rules	• Duty to seek best execution, including consideration of: > Research value > Execution capability > Commission rate > Responsiveness to advisor	• Duty to seek best execution "at the most favorable terms reasonable available under the circumstances" • FINRA Rule 5310 requires consideration of: > Market conditions (price, volatility, liquidity) > Size and type of transaction > Number of markets checked > Accessibility of quotation > Terms and conditions of order > Rule 2121 requires fair pricing

ROLLOVERS AND ACCOUNT SWITCHES

Again, pointing to the higher standard for investment advice under ERISA, harmonization is best-served by following the criteria set out by the DOL for rollover advice under the BIC exemption. Harmonizing the due diligence process is even more important because the final Reg BI release does not reach a conclusion about whether Reg BI or the Advisers Act would apply in the situation in which a dual registrant is asked for rollover advice. This scenario is made even more difficult if the plan participant does not have an existing account with the dual registrant's firm. The SEC resorts to calling it a facts and circumstances test in determining which standard applies—Reg BI or the Advisers Act. According to the Reg BI final release, the final recommendation would depend, in part, on the type of account recommended, how it is described, the form of compensation to be received, "and the extent to which the dual registrant made clear to the customer or client the capacity in which it was acting."[25]

Figure 6

HARMONIZING ROLLOVER ADVICE

DOL's CONDITIONS UNDER BIC EXEMPTION	ADVISERS ACT (OCIE RISK ALERT 6/22/15)	REG BI's CARE OBLIGATION
• Whether plan sponsor permits a participant to leave money in current plan • If plan pays some or all of plan expenses • Comparing fees and expenses between plan and IRA • Comparing levels of services and investments available under each option	• Advisor must have a reasonable basis for account selection • Identify material conflicts of interest associated with: > Fees charged > Services provided > Incentives to place clients in certain accounts • Disclosures are: > True and accurate, including fees; and > Do not omit material information	• Factors to consider in a rollover: > Fees and expenses > Level of service > Available investment options > Ability to take penalty-free withdrawals > Application of RMDs > Protection from creditors > Employer stock holdings > Special features of existing account

Referring back to the BIC exemption conditions for a rollover, the DOL stated that, with respect to rollovers or when switching from a commission to an advisory account, the fiduciary should document the reasons why the final recommendation was in the best interest of the participant.[26]

The DOL also suggests reviewing other factors noted in FINRA Notice 13-45.[27] By combining all of the factors listed in figure 6, an experienced advisor should be able to develop a due diligence process applicable to all clients and to address any regulatory concerns of the three regulators.

Note that sometimes it is not easy to get all of the information from a plan participant that is needed to compare all of a plan's administrative features to a rollover option. In an FAQ published after the fiduciary rule was adopted, the DOL said that when the adviser does not have "reliable information about the existing plan's expenses and features" that it should first make diligent and prudent efforts to obtain that information. If it is unable to do so, the adviser could look to alternative data sources, such as the most recent Form 5500 or reliable benchmarks for similar plans. The documentation also should include an explanation of how the firm determined that the benchmark or other data used were reasonable.

REASONABLE COMPENSATION

The DOL Impartial Conduct Standards have one requirement that is conspicuously absent from Reg BI and the Advisers Act. Under the Impartial Conduct Standards, the recommended transaction must not cause the agent, firm, or any affiliate to receive compensation "that is in excess of reasonable compensation" under ERISA. The DOL rule also applies to individual retirement account (IRA) transactions.

Similar to the previous approaches to harmonization, the advisor should default to the highest standard under ERISA. These include benchmarking compensation practices for similar services, and factoring in any additional fees for monitoring, product complexity, and offsets for other services. The DOL's conditions under the BIC exemption are the most detailed of the three regulators (see figure 7).

Keen observers may note that the Fifth Circuit's elimination of the expanded definition of a fiduciary (which for the first time captured hundreds of thousands of brokers and insurance producers who provided services to 401(k)-type plans) doesn't mean they're off the fiduciary hook. That is because the reasonable compensation limit is embedded in both ERISA and the Internal Revenue Code (the latter covers IRA advice). Any changes to the "reasonable" test would have to be made by Congress, not a federal agency. Moreover, the compensation test applies to all ERISA and IRA service providers, not just investment fiduciaries.

Neither the Advisers Act nor Reg BI imposes a specific compensation test. Instead, the SEC emphasizes disclosure as an appropriate mitigation tool. For example, SEC staff has taken the position that adviser fees for similar services that substantially exceed market pricing may violate the antifraud provisions of the Advisers Act. As such, if the advisor charges an asset management fee greater than 2 percent, the SEC would view the compensation as excessive unless the adviser discloses that its fee is higher than industry norms.[28]

FINRA's rules for compensation, like the DOL's and SEC's, fail to offer a bright-line standard. Charges for various services under Rule 2122 must be reasonable and not unfairly discriminatory among customers.

Again, relying on the DOL guidelines for reasonable compensation (keeping in mind that it applies to agent compensation as well as the firm and the firm's affiliates) would be a conservative approach to harmonization and ensuring compliance in all three jurisdictions.

Advisors can explore other potential areas to harmonize compliance procedures. One fairly easy one is record retention. Records under the DOL prohibited-transaction and FINRA rules generally require retention for six years; for SEC-registered investment advisers, five years. So this one is easy: Default to a minimum of six years for all records.

Other strategies include suitability or best execution checklists combining the factors listed in figures 1–7 and integrated into a firm's due diligence procedures. A master list of potential conflicts of interest, for internal use, can be developed based on activity or advisory service, such as rollover advice, use of proprietary products, principal transactions, third-party compensation, and referrals.

Figure 7

COMPENSATION

DOL's CONDITIONS UNDER BIC EXEMPTION	ADVISERS ACT	REG BI
• Compensation to adviser, firm, and affiliates must be reasonable • Factors to consider: > Marketplace pricing > Scope of monitoring > Product complexity > Fee offsets for other services	• Does not specifically impose a reasonable compensation test • However, must disclose conflict if assets under managment over 2 percent • Fees and compensation "one of many important factors" to consider in recommendations	• Does not specifically impose a reasonable compensation test • Contests banned • Emphasis on transactional costs, not fees • Broker also must consider financial incentives in recommending a product or investment strategy

CONCLUSION

Each wealth management practice is a unique business model, connected to the broader financial services industry by mutual areas of regulation and market conduct standards. The choice is clear: Firms can continue to operate under bifurcated market conduct standards, switching hats as necessary, or they can invest in harmonizing their policies and procedures to meet compliance requirements across the board. If there is one overriding methodology that works, consider revamping due diligence processes. The harmonization process will require a considerable upfront investment in time and resources, but the benefits are also worthwhile: increased practice efficiencies, marketing benefits, reduced liability, and operating at the highest standard, thereby increasing client and professional satisfaction.

Independent RIAs, too, should heed the new best-interest standard for brokers, even though SEC-registered advisory firms are subject only to Form CRS.[29] From a marketing standpoint, knowing the competition is important, especially because independent advisory firms often differentiate their services from brokerage firms based on compliance with a fiduciary standard. Come July 2020, RIAs will face a new best-interest pitch from the competition, and they will need to explain the differences when courting new clients.

As market conduct standards for investment advice slowly converge under insurance, securities, and pension laws, compliance should become easier over time. An effort at harmonizing this regulatory convergence now can expedite the process at the firm level and pay dividends over the long-term.

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ENDNOTES

1. The term "dually registered financial advisor" ("dual registrant" for short) refers to an individual affiliated with a broker–dealer as a registered representative (RR or broker) subject to rules under the Securities Exchange Act of 1934 (the Exchange Act) and as an investment adviser representative (IAR) of a registered investment adviser firm (RIA) subject to rules under the Investment Advisers Act of 1940 (the Advisers Act). Some advisors also may hold insurance producer licenses, further complicating the harmonization process.
2. "Regulation Best Interest," Securities and Exchange Commission, Release No. 34-86031; File No. S7-07-18 (June 5, 2019), https://www.sec.gov/rules/final/2019/34-86031.pdf. Investments & Wealth Institute offers an executive summary that highlights the key provisions of Reg BI, https://investmentsandwealth.org/publications/legislative-intelligence/2019/volume-iv-issue-6-special-edition-regulation-best-.
3. Some fiduciary purists may disagree with the description of Reg BI as a quasi-fiduciary duty. It is the author's opinion that, although Reg BI does not rise to the level of a fiduciary duty, it contains some of the same elements and is a stronger market conduct standard than the current suitability standard for retail brokerage advice.
4. Reg BI final release, 1.
5. Text of the Reg BI rule can be found at 764-771.
6. Due to space limitations, Form CRS, or Customer Relationship Summary, is not addressed at length in this article. Form CRS is intended to provide summary information about the types of client and services the firm offers; the fees, costs, conflicts of interest; and a shorthand description of the standard of conduct associated with its retail investment advice. For additional information, see "Form CRS Relationship Summary; Amendments to Form ADV, Release Nos. 34-86032; IA-5247 (June 5, 2019), https://www.sec.gov/rules/final/2019/34-86032.pdf.
7. See U.S. Securities and Exchange Commission, "Final Rule: Compliance Programs of Investment Companies and Investment Advisers," Rel. Nos. IC-26299 and IA-2204 (December 17, 2003), http://www.sec.gov/rules/final/ia-2204.htm.
8. On March 15, 2018, in a surprise decision, the Fifth Circuit overturned a district court ruling that held the DOL fiduciary rule did not violate its mandate under ERISA to create appropriate exemptions for conflicted advice and other federal administrative procedure laws.
9. See Field Assistance Bulletin 2018-02 (FAB 2018-02), Department of Labor (May 7, 2018), https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02.pdf.
10. See Reg BI final release for a discussion of the issue, at 49-52. In fact, SEC staff in 2011 recommended using the "without regard to" language as part of its overall recommendation that the Commission adopt a uniform fiduciary standard for both broker–dealers and RIAs. The SEC declined to do so in Reg BI. See Reg BI final release, 19.
11. Reg BI final release, 765–766.
12. Reg BI final release, 50.
13. FAB 2018-02, 1.
14. See U.S. Securities and Exchange Commission, "Commission Interpretation Regarding Standard of Conduct for Investment Advisers," Rel. No. IA-5248 (June 5, 2019), https://www.sec.gov/rules/interp/2019/ia-5248.pdf.
15. For a more in-depth discussion of the issue, see Reg BI final release, 214-218.
16. See Department of Labor, "Best Interest Contract Exemption," 29 CFR Part 2550, 21062 (April 8, 2016).
17. Reg BI final release, 213.
18. See "Suitability," Rule 2111, Financial Industry Regulatory Authority (FINRA), https://www.finra.org/industry/suitability.
19. For more details, see "Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients," Securities and Exchange Commission, Release No. IA-1406 (1994), http://www.brightlinesolutions.com/files/Plaze/Release%20IA-1406%20Suitability.pdf. Although never adopted, the most recent fiduciary guidance (which is part of the Reg BI package of rules approved June 5, 2019) cited the proposed suitability rule "merely to show that the Commission has long held this view." See "Commission Interpretation Regarding Standard of Conduct for Investment Advisers," SEC, Release No. IA-5248, 12, https://www.sec.gov/rules/interp/2019/ia-5248.pdf.
20. See Impartial Conduct Standards, supra note 13.
21. See footnote 13, supra note 16.
22. Reg BI final release, 257.
23. Reg BI final release, Primerica letter, in footnote 577, pp. 255-256.
24. The SEC's fiduciary guidance contains a brief discussion of best execution factors for investment advisers. See supra note 11, 19-20.
25. Reg BI final release, 127. The release's discussion of account selection also clarifies that the rule would not apply to a dual registrant when servicing an advisory account, even if the same customer has a brokerage account and even if the dual registrant executes a transaction in the advisory account while acting in the brokerage capacity and receives transaction-based compensation.
26. For additional information, see supra note 13, 21012.
27. "Rollovers to Individual Retirement Accounts," FINRA Notice 13-45 (December 2013), https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.
28. See "Regulation of Investment Advisers by the U.S. Securities and Exchange Commission," Robert E. Plaze, Proskauer Rose LLP, fn 638 at 120 (June 2018), https://www.hardincompliance.com/wp-content/uploads/2018/07/Plaze-Regulation-of-Investment-Advisers-June-2018-Proskauer.pdf.
29. State-registered investment advisers are not subject to either Reg BI or the Form CRS disclosure requirement.

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