

Q&As on Reg BI for Agents and Registered Representatives

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1. I only have an insurance producer's license—no securities licenses, and I don't sell any securities—only insurance policies and fixed/indexed annuities. Does Reg BI affect me? How? Do I have to provide clients with the new Form CRS?

No. Reg BI only applies to broker-dealers and their representatives who are licensed by the SEC to sell securities products.

2. If I have both an insurance producer's license and a securities license, do these new regs apply when I am recommending or selling a pure insurance product to a client, such as a term or whole life policy or a fixed annuity?

No. Reg BI only applies when making a recommendation of any securities transaction or investment strategy involving securities.

3. Which requirements of the new regulations apply directly to me—require me to do, say or give something to my clients? Which requirements, even though they might affect me, apply only to my BD and place responsibilities/duties/requirements only on my BD?

There are 4 main requirements or “obligation buckets” under Reg BI: disclosure, care, conflict of interest, and compliance. The disclosure and care obligations apply directly to you and your BD. The conflict of interest and compliance obligations apply only to your BD.

4. So...it's OK if I—the registered representative of the BD—have a financial conflict of interest, and I don't have to do anything about it?

The SEC is not requiring “conflict free” advice. It is, however, imposing obligations on RRs to make sure they appropriately manage any conflicts and act in their clients' best interest. For RRs, those obligations include:

(1) full and fair disclosure of any conflicts associated with a recommendation that a reasonable customer would consider important, the terms and scope of the RR-

client relationship, information about fees and costs (which do not have to be specific dollar amounts for each client, but may be expressed as standardized dollar or percentage ranges; and type and scope of services that will be provided (this must include a description of limitations on the products or strategies a RR may recommend based on, for example, proprietary product restrictions or limitations based on licensure status of the RR); and

(2) Acting with reasonable diligence, care, and skill to have a reasonable basis to believe the recommendation is in a client's best interest and not put the RR's interest ahead of the customer's interests.

BDs likely will develop standardized disclosures to satisfy the first obligation, but to the extent those disclosures are not developed or are not sufficient (e.g., not specific enough or not complete enough) for a particular client or relationship, the obligation still falls on the RR to make sure proper disclosures are being made.

5. With respect to the new Form CRS disclosure document—am I supposed to draft and develop this for my own use? Or will my BD draft the Form CRS and require me to complete and use the document they prepare?

The SEC's instructions for Form CRS require BDs and investment advisers (IAs) who are registered with the SEC to deliver the Form to all retail investors and to file their Forms with the SEC. We therefore expect that BDs and IAs will develop these documents for their associated persons and require you to deliver the Form to retail investors with whom you work.

6. In addition to my insurance producer's license I'm also an RR of a BD. Does the new Reg BI and/or the other rules adopted along with it now require me to disclose to my clients how much I will be compensated/paid for selling them stocks/mutual funds/variable annuities?

There are compensation disclosure rules that apply in this situation. Form CRS requires disclosure of the types of compensation you and/or your BD may receive for a transaction—such as commissions, an assets-under-management fee, an hourly fee. Then, as part of a “layered” disclosure approach, Reg BI requires additional compensation disclosures that are more specific to the recommendations you are making to a particular client (so, if you are

recommending a mutual fund to a client, you would disclose standardized compensation information – like a percentage range – for what you get paid for that type of product). Notably, you do not have to calculate and disclose a specific, unique dollar amount you will get paid for each investor with whom you work.

7. How will it be measured whether I've acted in the "best interest" of my clients?

"Best interest" is not defined in the rule. Rather, you and your BD will demonstrate that you act in the best interest of your clients by satisfying all of the four underlying obligations (disclosure, care, conflict of interest and compliance). A violation of any one of these obligations means that the "best interest" standard has not been satisfied.

8. If compensation I will receive does have to be disclosed, do I have to make that disclosure, or does my BD provide the disclosure?

Form CRS will include "compensation type" disclosures that likely will be drafted by your BD. Similarly, we expect that the Reg BI compensation disclosures will be developed by the BDs and the SEC says you generally may rely on your firm's disclosures. However, because you also are directly subject to the Reg BI disclosure obligation, you are expected to supplement your BD's standard disclosure if you think there are additional facts that apply to you/your compensation that your client would think are important to know.

9. Am I now allowed to only recommend to my clients the single best product for them—for example, with fixed annuities, am I required to recommend the best fixed annuity to the client? If "yes", how am I supposed to determine what is the single best fixed annuity? And who will decide, and how will they decide, whether what I've recommended is the single best annuity?

Remember that Reg BI only applies to securities products, not insurance products--so it wouldn't apply to a fixed annuity recommendation/sale. With respect to securities products you recommend, the SEC has clarified that you are not expected to find and recommend "the" best product for your client. Any product

you do recommend, however, must be in your client's best interest and part of the care obligation under Reg BI is to consider reasonably available alternatives offered by your BD. The SEC also clarified that you are not expected to search *all* alternatives – or even all alternatives on your BD's platform if your BD offers many product options.

10. Similar to the last question, do I now have to recommend the products that will pay me the least/be the least costly to my clients?

No. The SEC specifically states that you are not required to recommend the lowest cost option. Cost is one factor that must be taken into consideration under Reg BI, but you also must consider your clients' overall investment profile and objectives. In fact, the SEC points out, when all of these factors are taken together, the lowest cost option may not always be in the client's best interest (because, for example, it does not make sense given your client's investment priorities).

11. I've heard that Reg BI contains restrictions on who can use the words "advisor/adviser" —

a. If I am just licensed as an insurance producer, do these restrictions apply to me?

No. The titling restriction is part of the Reg BI disclosure obligation, so it only applies to BDs and RRs dealing in securities products.

b. I'm an RR but not an IAR—can I write on my business card below my name "Advisor" or "Financial Advisor"?

No. RRs not also registered as IARs may not use "adviser/advisor" in their names or titles.

c. I'm an RR but not an IAR—can I write on my business card below my name "Member of the National Association of Insurance and Financial Advisors"?

Yes. Remember, the restriction on the use of “adviser/advisor” applies to using these terms in the names and titles of RRs and BDs who are not also registered as IARs/IAs. NAIFA’s name is not impacted by the restriction. In this example, you are not using “adviser/advisor” in your name or title, but instead to indicate your membership in your professional organization. This is allowed.

- d. I’m an RR but not an IAR—if my company name has the word “Advisor” in it—such as AXA Advisors--can my company name be on my business card?

Yes, as long as your firm (AXA Advisors in this example) is dual registered as a BD and IA.

- e. So...if my company has the word “Advisor” in its name and it is only a BD, but not also an IA, does this mean that my company has to change its name? Or that I can’t use my company’s name on my business card?

The company will be required to change its name.

- f. I’m an RR but not an IAR—in the marketing materials I may use—such as brochures, newsletters, etc.—can I say things like “I’ve been a trusted financial advisor for 22 years”? How about “I’ve been advising my clients on their insurance and investment needs for 22 years?”

Yes. The rule allows use of “adviser/advisor” by RRs as descriptors in marketing materials. Again, you are not using the term in your name or title. Be mindful, however, of not misleading customers about the advisory services you are permitted to offer without also being an IAR (only those that are “solely incidental” to securities transactions).

- g. I’m an RR and an IAR-- can I write on my business card below my name “Advisor” or “Financial Advisor”?

Yes. The restrictions do not apply to dual registrants.

- h. I'm an RR and an IAR-- can I write on my business card below my name "Member of the National Association of Insurance and Financial Advisors"?

Yes.

- i. I'm an RR and an IAR- if my company name has the word "Advisor" in it—such as AXA Advisors--can my company name be on my business card?

Yes.

- j. I'm an RR and an IAR -- in the marketing materials I may use—such as brochures, newsletters, etc.—can I say things like "I've been a trusted financial advisor for 22 years"? How about "I've been advising my clients on their insurance and investment needs for 22 years?"

Yes.

- 12. I'm an RR but not an IAR, and I've heard the SEC made some changes to the amount of and kind of advice I can give my clients without being required to also register as an IAR—

- a. Can you briefly describe what these changes are and tell me what I can do and still remain only an RR (examples would be helpful)?

RRs and BDs can avoid having to register as IARs/IAs if they only provide advice that is solely incidental to their business of executing securities transactions and receive no special compensation for the advice they give. The SEC clarified its interpretation of what "solely incidental" means in this context. Essentially, the advice must be connected to the sale (or holding) of a securities product – it must be transactions-based. It does not matter how often the advice is given or whether the advice is trivial or inconsequential, so long as it is connected to a transaction.

So, for example, exercising unlimited discretion over a client's investment account or continuously monitoring an account for purposes of deciding whether to make

a securities transaction recommendation would not be solely incidental and you would cross into IA/IAR territory. On the other hand, limited discretion or monitoring per a contract with the client to periodically review specific buy, hold or sell recommendations of particular securities products could satisfy this test.

Ultimately, whether or not the kind of advice you give a client “crosses the line” and will require you to register as an IAR will depend on the unique facts and circumstances of each situation. The SEC has left it up to the BDs to develop policies and procedures that will inform when RR advice is “solely incidental,” so watch for additional guidance from your firms on this point.

- b. Can you describe what types/amount of advice would require me to register as an IAR?

The type and amount of advice does not determine whether it is an IAR activity – the connection to the securities transaction without any special compensation for the advice is the determinative factor.

- c. Specifically—if a client meets with me and asks me about variable annuities—can I describe for him what VAs are, how they work, and recommend a specific VA for him without having to become an IAR?

Yes. Generally speaking, the rule allows for investor education and general information about products, strategies, etc. without triggering any of the Reg BI requirements (because there is not a specific “recommendation”). A recommendation of a specific securities product to purchase would trigger the Reg BI obligations, but would stay within the “solely incidental” test because it is tied to a particular transaction (the purchase of the recommended product).

- 13. I am only allowed to recommend the proprietary securities products of my BD/my BD only has agreements to market the securities products of a limited number of companies—Do these new rules allow me to recommend these products? If “yes”, what “hoops” do I have to jump through to do so?

Yes. The rule does allow RRs and BDs to offer a limited range of products, including only proprietary products. There are disclosure requirements under the

Reg BI obligation and Form CRS to tell your clients how your product offerings are limited and your BD will have to develop policies and procedures to address any potential conflicts of interest that may arise from these types of arrangements. And ultimately, to make any recommendation from your platform, you must ensure that the product recommended is in the client's best interest – but this is true for all RRs and BDs, regardless of business arrangement.

14. Once I've made a recommendation about a product, do I have any ongoing responsibilities to my client about that product? Do I have to monitor it in any way, reach out to my client about it every few months, etc.?

No. There is no ongoing duty to monitor under Reg BI. You are permitted, however, to take on that responsibility for your clients if you so choose. Either way, Form CRS and the Reg BI disclosure obligation require you to tell the client whether you will or will not take on those responsibilities (and if so, how often you will monitor, etc.). And if your Form CRS or Reg BI disclosure says that you will have ongoing responsibilities or will continue to monitor the investment for the client, then you are required to do so.

15. Is the new "best interest" standard the same as the current fiduciary duty standard for IAs?

No. The SEC specifically declined to adopt a uniform standard for BDs/RRs and IAs/IARs. The "best interest" standard is not a fiduciary standard. Rather, the "best interest" standard is met for a particular recommendation to a client if the disclosure and care obligations laid out in the rule are satisfied.

16. Are any compensation models or types of compensation models barred completely? What about sales contests—are they still allowed?

Some compensation models have been barred completely. Specifically, to satisfy the best interest standard, BDs must eliminate all sales contests, quotas, bonuses, and non-cash compensation (for example, prizes or travel) that are based on the sale of specific securities or types of securities within a limited timeframe.

17. Are IRA rollovers covered under these new rules?

Yes. The final rule clarifies that rollover recommendations are covered under the best interest standard.

18. What does it mean that conflicts related to variable compensation arrangements in general must be mitigated by my BD? What are they referring to as “variable compensation? What does it mean to “mitigate” a conflict?

“Variable compensation” is generally referring to non-flat fee compensation or compensation that depends on the product you sell (e.g., commissions, third-party compensation for the sale of certain products). The rule is not designed to eliminate this type of compensation. But the SEC is requiring BDs to put policies and procedures in place to mitigate – or reduce the potential effects of – such compensation arrangements on RRs’ recommendations to clients.

These mitigation measures are left up to the BDs to design and implement based on their own business judgment, but the SEC provides several examples of what these measures might look like – such as avoiding compensation thresholds for RRs that disproportionately increase compensation for incremental increases in certain product sales, or establishing differential compensation criteria based on neutral factors (such as the complexity of the product and the work involved) and not based on the specific product sold.

19. Does passing a series 65 exam allow an RR who is not also an IAR to use “adviser/advisor” in his name/title?

No. A RR who is not also a supervised person of an IA may not use “adviser/advisor” in his/her name or title.

20. Does the new BI standard require me to recommend the product that is least expensive to the client?

No. RRs must take cost to the client into account as one factor in the analysis of whether a recommended product is in the best interest of the client, but must also take into account the client’s investment profile, goals, etc. The SEC specifically states that this will not always result – nor should it result by default – in a recommendation of the least expensive product.

21. When does the Form CRS have to be delivered to my clients? If there are changes to the Form CRS information, do I have to provide an updated form to existing clients? If so, when?

IAs/IARs must deliver Form CRS to each retail investor before or at the time of entering into an investment advisory contract. BDs/RRs must deliver it before or at the earliest of the time: (1) a recommendation is made, (2) an order is placed for the investor, or (3) a brokerage account is opened.

If the information in Form CRS changes, firms have 30 days to update the Form and file it with the SEC. Then, within 60 days of that filing, an updated Form or a separate supplemental disclosure must be delivered to existing clients free of charge and highlighting what information has changed.