

Regulation Best Interest: The Broker-Dealer Standard of Conduct¹

I. General Requirements

- A. Regulation Best Interest (“Reg BI”) establishes a standard of conduct for broker-dealers (“BDs”) and their registered representatives (“RRs”) when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities.
- B. Under Reg BI, BDs and RRs will be required to:
 - 1. Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the BD or the RR ahead of the interests of the retail customer by satisfying four specified component obligations: disclosure, care, conflict of interest, and compliance.
 - 2. Address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where the SEC has determined that disclosure is insufficient, to mitigate or, in certain instances, eliminate the conflict.
- C. Reg BI does not:
 - 1. Require BDs and RRs to recommend the least expensive or least remunerative security or investment strategy;
 - 2. Extend beyond a particular recommendation or generally require a BD or RR to have a continuous duty to a retail customer or impose a duty to monitor;
 - 3. Require the BD or RR to refuse to accept a customer’s order that is contrary to the BD’s or RR’s recommendation; or
 - 4. Apply to self-directed or otherwise unsolicited transactions by a retail customer, whether or not that customer also received a separate recommendation from the BD.
- D. Compliance Deadline: June 30, 2020
- E. Compliance Standard: Negligence (not strict liability)

II. Key Terms and Scope of the Best Interest Obligation

- A. Recommendation
 - 1. Whether a recommendation of a securities transaction or an investment strategy will depend on:

¹ Resource: *Regulation Best Interest: The Broker-Dealer Standard of Conduct* <https://www.sec.gov/rules/final/2019/34-86031.pdf>

- a. Whether the communication “reasonably could be viewed as a ‘call to action’” and “reasonably would influence an investor to trade a particular security or group of securities;” and
 - b. How individually tailored the communication is to a specific customer or a targeted group of customers about a security or group of securities.
2. Recommendations to retail customers to take distributions from sales of specific securities or to take in-service loans from an employer-sponsored plan are recommendations of a securities transaction and are therefore subject to Reg BI.
3. Recommendations to use a bond ladder, day trading, liquefied home equity, or margin strategies are considered recommendations of investment strategies and are therefore subject to Reg BI.
4. The following are examples of communications that constitute “education” rather than “recommendations” and therefore are not subject to Reg BI:
 - a. General financial and investment information, including:
 - i. Basic investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment.
 - ii. Historic differences in the return of asset classes (*e.g.*, equities, bonds, or cash).
 - iii. Effects of inflation.
 - iv. Estimates of future retirement income needs.
 - v. Assessment of a customer’s investment profile.
 - b. Descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan.
 - c. Asset allocation models that are:
 - i. Based on generally accepted investment theory.
 - ii. Accompanied by disclosures of all material facts and assumptions that may affect a reasonable investor’s assessment of the asset allocation model or any report generate by such model.
 - iii. In compliance with FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an “investment analysis tool” covered by FINRA Rule 2214.
 - d. Interactive investment materials that incorporate the above.

B. Retail Customer

1. Consistent with Section 913(a) of the Dodd-Frank Act, Reg BI defines retail customer 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 BD or RR; and
 - b. Uses the recommendation primarily for personal, family, or household purposes (*i.e.*, not for commercial or business purposes), including a natural person's own IRA, 401(k), or other tax-favored retirement account.
2. Unlike FINRA Rule 4512(c), "natural persons" does not exclude high net-worth individuals (in FINRA rule, those with assets of at least \$50 million).
3. A legal representative of a natural person is a nonprofessional representative (*e.g.*, a nonprofessional trustee that represents the assets of a natural person, and similar representatives such as executors, conservators, and persons holding power of attorney for a natural person).
 - a. Regulated financial professionals, such as IAs, BDs, corporate fiduciaries (*e.g.*, banks, trusts companies), and insurance companies, are not treated as legal representatives for purposes of the definition of retail customer under Reg BI.
4. A retail customer "uses" a recommendation when, as a result of the recommendation:
 - a. The customer opens a brokerage account with the BD, regardless of whether the BD receives compensation;
 - b. The customer has an existing account with the BD and receives a recommendation, regardless of whether the BD receives direct or indirect compensation; or
 - c. the BD receives or will receive compensation, directly or indirectly, as a result of the recommendation even if the retail customer does not have an account at the firm.
5. The definitions of "retail investor" in Form CRS and "retail customer" in Reg BI are similar but not identical. The Form CRS definition is intentionally broader in order to cover natural persons who are seeking services.

C. Account Monitoring

1. BDs are not required to provide periodic or continuous monitoring, but a BD and a retail customer can agree to a specified frequency of monitoring, but.
2. BDs are required to disclose the terms of any agreed-upon account monitoring services (including the scope and frequency of those services) pursuant to the Disclosure Obligation.
3. When a BD or RR performs agreed-upon monitoring services but does not provide an express recommendation to buy, sell, or hold, an implicit hold recommendation subject to Reg BI is deemed to have been made at that time.
 - a. Thus, by performing account monitoring, a BD is taking on an obligation to make recommendations, whether implicit or explicit, on the same periodic basis as during the monitoring itself.
 - b. This differs from FINRA's existing guidance that its suitability rule does not cover implicit hold recommendations.

4. Reg BI would not apply, however, when a BD voluntarily, and without any agreement with the customer, reviews the holdings in the retail customer's account for purposes of determining whether to provide a recommendation to the customer.
 - a. Any explicit recommendation made after such review would be subject to Reg BI.
 - b. Any such voluntary review would be viewed as satisfying the "solely incidental" prong of the broker-dealer exclusion from the definition of investment adviser under the *Investment Advisers Act of 1940*.

D. Dual Registrants

1. A dual registrant will be subject to Reg BI when acting in a brokerage capacity but not when acting in an advisory capacity.
2. To determine whether a dual registrant is acting in a brokerage capacity or an advisory capacity requires a facts and circumstances analysis of the account type, account description, type of compensation, and other relevant factors (with no one factor being determinative).

III. Component Obligations

A. Disclosure Obligation

1. Prior to or at the time of a recommendation, BDs and RRs must fully and fairly disclose to their retail customers, in writing, all material facts relating to the following:
 - a. The scope and terms of the relationship with the retail customer, including:
 - i. That the BD or RR is acting as a broker-dealer with respect to the recommendation (the "capacity disclosure");
 - ii. The material fees and costs that apply to the customer's transactions, holdings, and accounts (the "fees and costs disclosure");
 - iii. The type and scope of services to be provided, including any material limitations on recommendations that could be made to the retail customer (the "services disclosure"); and
 - b. All material facts relating to conflicts of interest associated with the recommendation (the "conflicts disclosure").
2. *Capacity Disclosure.*
 - a. Standalone BDs (i.e., firms that are not also registered investment advisers) and their RRs can satisfy the capacity disclosure requirement by delivering Form CRS.
 - b. For dual-registrants and RRs associated with dual registrants, Form CRS would not suffice and additional disclosure, such as the following, will be needed to ensure that the customer understands the capacity in which the BD or RR is acting.

"All recommendations regarding your brokerage account will be made in a broker-dealer capacity, and all recommendations regarding your advisory

account will be in an advisory capacity. When we make a recommendation to you, we will expressly tell you orally which account we are discussing.”

- c. Use of the name or title “adviser” or “advisor” by BDs or RRs that are not also registered investment advisers or investment adviser representatives would violate the capacity disclosure requirement.

3. *Fees and Costs Disclosure.*

- a. This disclosure should summarize how the BD or RR is compensated and the conflicts of interest that such compensation creates but does not require disclosure of the exact amount of compensation.
- b. This requirement can be satisfied through initial disclosure of general information about standard fees and costs followed by more particularized information at the time of the recommendation.

4. *Services Disclosure.*

- a. The disclosure about the type and scope of services should include, for example, whether account monitoring is provided information about the frequency and duration of services to be provided.
- b. The “material limitations” component of the services disclosure will not require BDs or RRs to state that they cannot offer every product available in the market, but would, for example, address whether:
 - i. The BD or RR can only recommend:
 - (a) proprietary products;
 - (b) specific asset classes;
 - (c) products offered by a select group of issuers; or
 - (d) products subject to revenue sharing arrangements with third-parties;
 - ii. IPOs are made available only to certain clients;
 - iii. An RR of a dual registrant can offer only brokerage services and not advisory services; and
 - iv. Account balance minimums or other requirements must be met for a retail customer to open and maintain an account or establish a relationship.

5. *Conflicts Disclosure.*

- a. For purposes of Reg BI, “conflict of interest” is defined – consistent with *SEC v Capital Gains Research Bureau* – as follows:

“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.”

- b. This disclosure is not required on a “recommendation-by-recommendation basis,” but rather must be provided at the outset of the relationship.

6. *Basis for and Risks Associated with the Recommendation.*

- a. While not expressly stated in the rule text, BDs and RRs must disclose the general basis for their recommendations (*i.e.*, the BDs or RRs investment approach, philosophy, or strategy).
 - i. This position is based on the view that the process by which a BD or RR develops recommendations is of fundamental importance to the retail customer’s understanding of what services are being provided, and whether those services are appropriate to the retail customer’s needs and goals.
 - ii. This information can be described in a standardized or summary form, as long as the disclosure addresses the circumstances under which the BD or RR might not follow its usual process for developing recommendations and how the customer will be notified when that is the case.
- b. The Disclosure Obligation will require disclosure of the risks associated with a BDs or RRs recommendations in standardized terms, such as the following:

“While we will take reasonable care in developing and making recommendations to you, securities involve risk, and you may lose money. There is no guarantee that you will meet your investment goals, or that our recommended investment strategy will perform as anticipated. Please consult any available offering documents for any security we recommend for a discussion of risks associated with the product. We can provide those documents to you, or help you to find them.”

- c. This does not require disclosure of the specific basis for, or risks associated with, each recommendation, but BDs are encouraged to:
 - i. Consider developing policies and procedures as to the circumstances under which such specific disclosure would be provided; and
 - ii. Record the basis for their recommendations, particularly for more complex, risky, or expensive products or strategies as evidence of compliance with the Care Obligation.

7. *Materiality Standard.*

- a. For purposes of the Disclosure Obligation, materiality will be assessed under the *Basic v Levinson* standard: A fact is material if there is a “substantial likelihood that a reasonable [retail customer] would consider it important.”

8. *Full and Fair Disclosure.*

- a. The required disclosures should provide sufficient information to enable a retail investor to make an informed decision about whether to accept or reject a recommendation.

- b. The adopting release provides the following guidance as to what constitutes “full and fair” disclosure:
 - i. Initial disclosures should be standardized rather than individualized to each retail customer.
 - ii. Only material facts should be provided to avoid overly lengthy disclosures.
 - iii. Disclosures can be delivered in either paper form or electronically but cannot be delivered orally.
 - iv. Layered disclosure is encouraged.
 - v. Existing disclosures and standardized documents can be used to help satisfy the Disclosure Obligation, including a product prospectus, relationship guide, account agreement, or fee schedule
 - (a) Whether such documents satisfy the obligation will depend on the specific facts and circumstances.
 - vi. Disclosures should be written in plain English, including the use of short sentences and active voice, while avoiding legal jargon, highly technical business terms, or multiple negatives.
 - vii. Disclosures must be delivered prior to or at the time of the recommendation, but the exact timing and frequency is not prescribed.
 - viii. Materially outdated, incomplete, or inaccurate information would not satisfy the “full and fair disclosure” requirement.
 - (a) Updates must be provided if any information becomes materially inaccurate or when there is new relevant information.
 - (b) A BD may orally clarify or update written disclosures at the time of the recommendation if the written disclosure indicated the method by which clarifications could be provided.
 - (c) BDs should make and retain written records of any oral disclosures.
 - (d) Written updates should be provided within 30 days after the material change, supplemented with oral disclosure.

B. Care Obligation

- 1. In recommending specific investments or investment strategies (including the type of account to open), BDs and RRs must exercise reasonable diligence, care, and skill to:
 - a. Understand the potential risks, rewards, and costs (including both acquisition costs and costs related to a future sale or exchange, such as deferred sales charges or liquidation costs) associated with the recommendation;
 - b. Have a reasonable basis to believe that:
 - i. The recommendation could be in the best interest of at least some retail customers;

- ii. The recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation; and
- iii. A series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile.

The recommendation or series of recommended transactions must not place the financial or other interest of the broker, dealer, or such natural person making the series of recommendations ahead of the interest of the retail customer

2. *Reasonable Diligence, Care, and Skill.*

- a. The steps needed to satisfy this obligation will vary depending on, among other things, the complexity of and risks associated with the recommended security or investment strategy, and the BDs or RRs familiarity with the recommended security or investment strategy.
- b. BDs should consider important factors such as the following:
 - i. The security's or investment strategy's investment objectives, characteristics (including any special or unusual features, such as tax-deferred growth, annuitization, and living and death benefits in the case of a deferred variable annuity), liquidity, volatility, and likely performance in a variety of market and economic conditions;
 - ii. The expected return of the security or investment strategy; and
 - iii. Financial incentives to recommend the security or investment strategy.

3. *Retail Customer Investment Profile.*

- a. Consistent with FINRA's suitability rule, Reg BI states that "retail customer investment profile" includes, but is not limited to, the following:
 - i. The retail customer's:
 - (a) Age
 - (b) Other investments
 - (c) Financial situation and needs
 - (d) Tax status
 - (e) Investment objectives
 - (f) Investment experience
 - (g) Investment time horizon
 - (h) Liquidity needs
 - (i) Risk tolerance

- ii. Any other information the retail customer may disclose to the BD or RR in connection with a recommendation.
 - b. BDs and RRs should make a reasonable effort to ascertain this information before making a recommendation to an existing customer if the BD or RR knows or has reason to believe the information has changed.
 - c. BDs may generally rely on a retail customer's responses about their own information as long as there are no "red flags" indicating that the information is inaccurate.
 - d. When a retail customer's information is unavailable despite a BD's reasonable diligence, the BD should carefully consider whether it has a sufficient understanding of the retail customer to properly evaluate whether the recommendation is in the best interest of that retail customer.
 - e. Certain factors of a customer's investment profile may be more or less relevant when making a best interest determination.
 - i. A decision that any of the specified items are not relevant and therefore need not be obtained or analyzed should be documented.
4. *Consideration of Reasonably Available Alternatives.*
- a. To have a reasonable basis to believe a recommendation is in the customer's best interest, the BD or RR should consider "reasonably available alternatives."
 - b. This means the BD or RR should consider whether less complex or costly products could achieve the same objectives for their retail customers.
 - c. This does not require RRs to be familiar with every product on the BD's platform.
 - d. A BD should have a reasonable process for establishing and understanding the scope of reasonably available alternatives to be considered by particular RRs or groups of RRs in meeting the Care Obligation.
 - e. The scope of "reasonably available alternatives" could depend upon a variety of factors, including but not limited to:
 - i. The RR's customer base (including the general investment objectives and needs of the customer base);
 - ii. The investments and services available to the RR to recommend (including limitations due to licensing of the RR); and
 - iii. Specific limitations on the available investments and services with respect to certain retail customers (*e.g.*, product or service income thresholds; product geographic limitations; or product limitations based on account type, such as those only eligible for IRA accounts).
 - f. A limited product menu or the determination of reasonably available alternatives cannot be used to justify a recommendation that is not in the best interest of the retail customer.

- iv. Ability to take penalty-free withdrawals
 - v. Application of required minimum distributions
 - vi. Protection from creditors and legal judgments
 - vii. Holdings of employer stock
 - viii. Any special features of the existing account
- b. The availability of “more investment options” cannot, in and of itself, serve as the basis for recommending a rollover.

C. Conflict of Interest Obligation

1. BDs must establish, maintain, and enforce written policies and procedures reasonably designed to:
 - a. Identify and at a minimum disclose or eliminate all conflicts of interest associated with the recommendation;
 - b. Identify and mitigate any conflicts of interest associated with recommendations that create an incentive for an RR to place their own interests ahead of the interests of the retail customer;
 - c. Identify and fully/fairly disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations; and prevent such conflicts from causing the BD or RR to place their own interests ahead of the interests of the retail customer; and
 - d. Identify and eliminate any conflicts of interest associated with sales contests, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.
2. *Reasonably Designed Policies and Procedures.*
 - a. BDs should tailor their policies and procedures to their particular business model, focusing on areas that pose the greatest risk of noncompliance and potential harm to retail customers rather than requiring a detailed review of each recommendation.
 - b. The design of such policies and procedures will be measured using a reasonableness standard rather than strict liability.
 - c. Compliance with FINRA rules is not sufficient to demonstrate compliance with the Conflict of Interest Obligation because Reg BI establishes a broader obligation to address conflicts both at the firm level and at the associated person level.

3. *Identifying Conflicts of Interest.*

- a. To be reasonably designed to identify and categorize conflicts of interest, a BD's policies and procedures should:
 - i. Define such conflicts in a manner that is relevant to the BD's business and that enables employees to understand and identify conflicts;
 - ii. Establish a structure for identifying the types of conflicts that the BD and its RRs may face;
 - iii. Establish a structure to identify conflicts in the BD's business as it evolves;
 - iv. Provide for an ongoing (based on changes in the BD's business or organizational structure, compensation incentive structures, and introduction of new products or services) and regular, periodic (such as annual) review for the identification of conflicts associated with the BD's business; and
 - v. Establish training procedures regarding:
 - (a) the BD's conflicts of interest at both the firm level and the individual level;
 - (b) how to identify such conflicts; and
 - (c) defining employees' roles and responsibilities regarding identifying such conflicts

4. *Requirements for All Conflicts of Interest.*

- a. With respect to all conflicts of interest, the BD's policies and procedures must be reasonably designed to either:
 - i. Fully and fairly disclosed in accordance with the Disclosure Obligation; or
 - ii. Eliminated.
- b. Conflicts that cannot be fully and fairly disclosed in accordance with the Disclosure Obligation – as in the following scenarios – must be completely eliminated or adequately mitigated such that full and fair disclosure becomes possible:
 - i. When the nature and extent of a conflict of interest make it difficult to adequately convey to a retail customer the material facts or the nature, magnitude and potential effect of the conflict for informed decision-making.
 - ii. When disclosure may not be sufficiently specific or comprehensible for the retail customer to understand whether and how the conflict will affect the recommendations he or she receives.

5. *Incentives to Put RR's Interests Ahead of Customer's.*

- a. Where conflicts create an incentive for an RR to place their own interests ahead of the interests of the retail customer, the BD's policies and procedures must be

reasonably designed to affirmatively reduce the potential effect of such conflicts so they do not taint the recommendation.

- b. Compensation that varies based on the advice given (commissions, markups/markdowns, loads, revenue sharing, Rule 12b-1 fees), such as the following, will be subject to this requirement:
 - i. Compensation from the BD or from third parties, including fees and other charges for the services provided and products sold;
 - ii. Employee compensation or employment incentives, such as those tied to asset accumulation and not prohibited under a conflict elimination policy, special awards, differential or variable compensation, and incentives tied to appraisals or performance reviews; and
 - iii. Commissions or sales charges, or other fees, financial incentives, or differential/variable compensation paid by the retail customer, the BD, or a third party.
 - c. This requirement applies only to incentives provided to the RR by the firm or by third parties that are within the BD's control or are associated with the BD's business.
 - i. External interests of an RR not controlled or associated with the BD's business are not subject to this requirement.
 - d. For dual registrants, this requirement will apply only to incentives provided to the RR when making a recommendation in a brokerage capacity. Incentives provided when acting in an advisory capacity will remain subject to the fiduciary standards applicable to registered investment advisers and investment advisor representatives.
6. *Material Limitations on Recommendations.*
- a. When a BD places material limitations on the securities or investment strategies their RRs can recommend to retail customers, the BD's policies and procedures must be reasonably designed to:
 - i. Disclose such limitations and any associated conflicts of interest; and
 - ii. Prevent such conflicts from causing the BD or RR to place their own interests ahead of the interests of the retail customer.
 - b. In developing such policies and procedures, firms should consider establishing product review processes for products that may be recommended, including:
 - i. Procedures for identifying and mitigating the conflicts associated with the product;
 - ii. Declining to recommend a product where the firm cannot effectively mitigate the conflict;

- iii. Identifying which retail customers would qualify for recommendations from the product menu (*e.g.*, “preferred lists” restricting the retail customers to whom a product may be sold);
- iv. Prescribing minimum knowledge requirements for RRs who may recommend certain products; and
- v. Conducting periodic product reviews to assess whether the measures are working as intended and to modify the mitigation measures per product selection accordingly.

7. *Incentives Based on Sales of Specific Securities or Types of Securities.*

- a. BDs must make reasonable efforts to eliminate sales contests, sales quotas, bonuses, and non-cash compensation (including merchandise, gifts and prizes, travel expenses, meals, and lodging, but excluding healthcare and retirement benefits) based on the sales of specific securities or types of securities within a limited period of time.
- b. This requirement does not apply to the following practices as long as the Disclosure and Care Obligations are satisfied:
 - i. Compensation and incentives to sell a more general category of securities (mutual funds, variable annuities, bonds, equities, etc.) as long as those incentives do not create high-pressure situations to sell a specific type of security within a limited period of time;
 - ii. Compensation practices based on total products sold, asset growth/accumulation, and customer satisfaction; and
 - iii. Offering only proprietary products, placing material limitations on the menu of products, or incentivizing the sale of such products through its compensation practices, as long as the incentive is not based on selling specific securities or types of securities within a limited period of time.

8. *Mitigating Conflicts of Interest.*

- a. The mitigation requirements in the Conflict of Interest Obligation are intended to reduce the potential effect conflicts may have on a recommendation given to a retail customer by reducing the incentive for an RR to put the BD’s or RR’s interests ahead of the customer’s interests.
- b. BDs are not required to employ any specified mitigation measures, but rather are given flexibility to develop and tailor mitigation measures based on
 - i. The nature and significance of the incentives provided to the associated person (*e.g.*, variable compensation, incentives tied to asset accumulation, or incentives tied to firm revenues);
 - ii. The size of the BD;

- iii. The diversity of the BD's retail customer base (*i.e.*, investment experience and financial needs); and
 - iv. The complexity of the security/strategy being recommended
- c. BDs should revise their mitigation policies and procedures as appropriate based on actual experience applying those policies and procedures, including, for example, when subsequent events or information obtained through the supervision of their RRs' recommendations demonstrate that the policies and procedures are no longer reasonably designed to achieve the intent of the Conflict of Interest Obligation.
- d. The following is a non-exhaustive list of practices that could be used as potential mitigation methods:
- i. Avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales.
 - ii. 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), by establishing differential compensation based on neutral factors.
 - iii. 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.
 - iv. Implementing supervisory procedures to monitor recommendations that: are near compensation thresholds, are near thresholds for firm recognition, involve higher compensating products or 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.
 - v. Adjusting compensation for associated persons who fail to adequately manage conflicts of interest.
 - vi. Limiting the types of retail customer to whom a product, transaction or strategy may be recommended.

D. Compliance Obligation

1. BDs must establish, maintain, and enforce policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole.
 - a. Satisfaction of this obligation will be based on an objective facts-and-circumstances analysis.
2. A BD's policies and procedures should be proportionate to the scope, size, and risks associated with the operations of the BD and the types of businesses in which the BD engages.

3. A reasonably designed compliance program would include the following:
 - a. Controls
 - b. Remediation of non-compliance
 - c. Training
 - d. Periodic review and testing

E. Recordkeeping Requirements

1. For each retail customer to whom a recommendation of any securities transaction or investment strategy involving securities is or will be provided, BDs must retain a record of all information (whether provided orally or in writing (paper or electronic)) collected from and provided to the retail customer pursuant to Reg BI, as well as the identity of each natural person who is an associated person of a BD who is responsible for the account.
 - a. Neglect, refusal, or inability of a retail customer to provide or update any such information would excuse the BD from obtaining that information.
 - b. Records need not be created and maintained on a recommendation-by-recommendation basis.
 - c. Records need only be created and maintained with respect to recommendations actually made to a retail customer and need not include comparisons of potential investments to one another.
 - d. Records demonstrating compliance with Reg BI should be retained separately, rather than simply including those records in the broader “business as such” category of records required to be retained under existing rules.
 - e. Records must be retained for at least six years after the earlier of the date the account was closed or the date on which the information was replaced or updated.
2. This new recordkeeping requirement is not intended to create new standalone burdens, but to provide a means by which BDs can demonstrate and SEC examiners can confirm compliance with Reg BI.
 - a. Existing records that are sufficient to demonstrate compliance with Reg BI need not be duplicated; rather, such existing records can simply be referenced in a new record noting which pre-existing documents were provided to the customer, or what customer information already being preserved by the BD was relied upon to meet the obligations of Reg BI.
3. Much of the information required to be retained should already be collected under existing Exchange Act rules, such as existing Rule 17a-3(a)(17), which requires creating and periodically updating customer account information of those who receive BD recommendations.
4. The written policies and procedures referenced in the component obligations of Reg BI are already required to be retained pursuant to Exchange Act Rule 17a-4(e)(7), and therefore are not subject to any new recordkeeping requirements.

