How Should You Care? Overlapping Standards of Care

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The evolving regulation of the standards of care of financial intermediaries—whether broker-dealers, investment advisers, dual registrants or affiliated entities—continues to have a significant impact on regulatory risk programs and compliance infrastructure for private client servicing. In addition to Regulation Best Interest ("Reg BI") and Advisers Act fiduciary duty, firms have faced additional Department of Labor requirements and state requirements in recent years, several of which have been subject to litigation. Furthermore, in response to the prevalence of artificial intelligence, the Securities and Exchange Commission ("SEC") issued a proposed rule regarding predictive data analytics. This proposal—which is unlikely to be adopted in its present form—illustrates how regulation of new technologies could have an additional impact on accepted frameworks such as Reg BI and Advisers Act fiduciary duty.

[1] This CLE outline was finalized on or about January 10, 2025. For key developments after January 10, 2025, please refer to Armstrong Teasdale client alerts.

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Despite additional standards continuing to be proposed and at times adopted, Reg BI[3] and Advisers Act fiduciary duty remain the core obligations shaping firms' standards of care when providing advice to clients. SEC Staff guidance for both Reg BI and Advisers Act fiduciary duty highlights the overlapping nature of the standards.[4] Prior to the guidance, Reg BI was the subject of several years of pre-rulemaking, then rulemaking, implementation and now enforcement. Advisers Act fiduciary duty was also the subject of additional guidance alongside the 2019 adoption of Reg BI, and the Investment Adviser Interpretation ("Adviser Interpretation")[5] occurred after almost a decade of focus from federal regulators and lawmakers on fiduciary duty and the standards of conduct that should govern the dealings that investment advisers and broker-dealers have with retail investors. SEC and FINRA enforcement actions pursuant to Reg BI accelerated in 2024 and are expected to continue to accelerate in 2025 as well.

Standards of care that apply to retail and retirement advice are increasingly converging, though with enough differences as to cause a regulatory burden for firms. We address SEC, DOL and state developments in this outline, as well as convergence between broker-dealer and investment adviser standards of care considerations.

SEC rules beyond Reg BI and Advisers Act fiduciary duty can have an impact on standards of care to customers and clients. For example, in 2023, the SEC proposed potential new requirements to conflicts of interest associated with the use of predictive data analysis by broker-dealers and investment advisers.[6] It is highly unlikely this rulemaking will be finalized as proposed. Any follow-up effort should be closely monitored for potential follow-on impact on Reg BI and Advisers Act fiduciary duty.

Beyond the SEC, the regulatory emphasis on standards of conduct for financial intermediaries continues on a non-linear path. The final April 2024 Retirement Security Rule from the Department of Labor ("DOL")[7] did not survive litigation in the Fifth Circuit, which stayed the rule and the changes to the applicable prohibited transaction exemptions in July of 2024. Furthermore, the combination of Congressional disapproval and judicial actions against a revised DOL Fiduciary Rule, in addition to the presidential transition from the Biden Administration to the second Trump Administration, are indications that it is unlikely a fiduciary rule will be re-proposed anytime soon.

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[3] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318 (July 12, 2019) ("Reg BI Adopting Release").

[4] *See* Staff Bulletins, *infra* note 11.

[5] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019).

[6] Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 FR 53960 (proposed Aug. 9, 2023).

[7] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 FR 32122 (Apr. 25, 2024) (to be codified at 29 C.F.R. § 2510.3-21).

There continues to be more active standards of care engagement, examination and enforcement at the state level as well. In November 2024, the North American Securities Administrators Association ("NASAA") re-proposed a broker-dealer standard of care rule. This proposal streamlines the 2023 NASAA proposal for a broker-dealer standard of care rule. Separately, the Missouri ESG rule did not survive litigation.

1. Regulation Best Interest: Rule Text, Adopting Release, Staff FAQs (2020) and Staff Bulletins (2022-2023)

In 2019, Reg BI established a new standard of conduct for broker-dealers when making a recommendation of a securities transaction or investment strategy involving securities (including account recommendations) to a retail customer. The SEC designed Reg BI to "improve investor protection by enhancing the quality of broker-dealer recommendations to retail customers and reducing the potential harm to retail customers that may be caused by conflicts of interest."[8] Although the term "best interest" is not defined in Reg BI, the best interest obligation is satisfied by meeting four component obligations: (a) Disclosure Obligation; (b) Care Obligation; (c) Conflict of Interest Obligation; and (d) Compliance Obligation. Each of these obligations is discussed in more detail below in the order they appear in the rule, though we note that broker-dealers should be considering the Disclosure and Conflict of Interest obligations together.

When broker-dealers were implementing Reg BI, there were FAQs provided toward the end of the implementation period,[9] though it was clear from industry thought leadership and dialogue that many firms sought further specificity. Over the course of 2022 and 2023, the SEC staff issued three staff bulletins that provide further SEC staff guidance on Reg BI in the format of frequently asked questions.[10] The 2022-2023 staff bulletins provide additional guidance on two of the Reg BI Obligations: the Care Obligation and the Conflict of Interest Obligation. There is also a third bulletin focusing on account recommendations, which is governed by the Disclosure Obligation. At the same time they released the bulletins, SEC Staff also issued an FAQ related to investment adviser considerations of diversity, equity, and inclusion factors.[11]

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[8] Reg BI Adopting Release at 33321.

[9] SEC, *Frequently Asked Questions on Regulation Best Interest* (last modified Aug. 4, 2020). No new FAQs were issued after 2020.

[10] SEC, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligation* (Apr. 20, 2023) ("Care Obligation Staff Bulletin"); SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest* (Aug. 3, 2022) ("Conflicts Staff Bulletin"); SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors* (Mar. 30, 2022) ("Account Recommendation Staff Bulletin").

[11] SEC, *Frequently Asked Questions Relating to Investment Adviser Considerations of DEI Factors* (last modified Oct. 13, 2022). The FAQ noted an investment adviser that recommends other investment advisers to, or selects other advisers for, their clients may consider a variety of factors in making a recommendation or selection, including, but not limited to, factors relating to diversity, equity, and inclusion ("DEI"), provided that the use of such factors is consistent with a client's objectives, the scope of the relationship, and the adviser's disclosures. Note that the reference to other investment advisers is rooted in the question. A reasonable interpretation of this FAQ could be extended to an investment adviser recommending a security or strategy including a range of factors but not limited to DEI factors.

Even more than Reg BI and its Adopting Release, the 2022-2023 staff bulletins highlight the convergence of broker-dealer and investment adviser obligations, while also ensuring that Reg BI and the Advisers Act fiduciary duty remain distinct. The bulletins reiterate the Staff's view that although the application of Reg BI and the investment adviser fiduciary standard may differ, they "generally yield substantially similar results in terms of the ultimate responsibilities owed to retail investors."[12] The bulletins also spend considerable time addressing how associated persons of dually registered broker-dealers and investment advisers recommend brokerage versus advisory accounts. We address these bulletins at times below in our discussion of each Reg BI obligation and note that the discussion can be extended to Adviser Act obligations as well. Generally, the bulletins provide additional granularity.

The Account Recommendation Staff Bulletin reiterates that reasonably available alternatives applies not only to particular securities or investments but also to account types. Factors that have bearing on which kind of account should be recommended would include account minimums, eligibility requirements, services offered, fees imposed, and conflicts of interest embedded in the various kinds of available accounts. The staff bulletins also make clear that the sole determinant relating to recommending a particular kind of account should not be an associated person's limited license.[13] So, for example, if an associated person is not qualified to manage an account in a specific wrap fee program sponsored by the dual registrant, the associated person would need to consider that kind of account notwithstanding that person solely having broker-dealer licensing and therefore being ineligible to manage an adviser wrap account.

(a) Disclosure Obligation

The Disclosure Obligation is an example of how the SEC drew from the Advisers Act and related caselaw to shape the contours of Reg BI, without imposing a fiduciary standard on broker-dealers. As compared to the prior suitability regime, one of the most significant impacts of Reg BI is that it imposes a "more explicit and broader disclosure obligation on broker-dealers than that which currently exists under the federal securities laws and SRO rules."[14] The definition of "conflict of interest" under Reg BI is modeled off of *SEC v. Capital Gains Research Bureau, Inc.*, which describes, with respect to investment advisers, an "interest that might incline an investment adviser—consciously or unconsciously—to make a recommendation that is not disinterested."[15]

(i) Disclosure of Conflicts of Interests

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[12] SEC, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligation* (Apr. 20, 2023).

[13] SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors*, Question 1.c. (Mar. 30, 2022).

[14] Reg BI Adopting Release at 33346.

[15] 375 U.S. 180, 191-92 (1963).

Reg BI requires broker-dealers, prior to or at the time of the recommendation, to provide to the retail customer, in writing, *full and fair disclosure* of all *material facts* related 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. If a broker-dealer agrees to monitor a customer's account, the terms of the account monitoring, including the scope and frequency of those services, must also be disclosed.

- "*Full and fair disclosure*" means giving "sufficient information to enable a retail investor to make an informed decision with regard to the recommendation."[16]
- "*Material facts*" is modeled on the standard set in *Basic v. Levinson*: a fact is material if there is a substantial likelihood that a reasonable retail customer would consider it important.[17] The SEC explicitly requires disclosure, at a minimum:
    - That the broker, dealer or such natural person is acting as a broker, dealer or an associated person of a broker-dealer with respect to the recommendation;
    - Of the material fees and costs that apply to the retail customer's transactions, holdings and accounts; and
    - Of the type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer.

(ii) Titling Restrictions for Broker-Dealers

It is a presumptive violation of the Disclosure Obligation if a broker-dealer uses the terms "advisor" or "adviser" in a name or title if the broker-dealer is not a dual registrant, or, if an associated person of a broker-dealer uses such terms if the associated person is not supervised by an investment adviser (as well as a broker-dealer).

(iii) Timing and Frequency of Disclosure

The SEC does not provide any specific requirements for the timing and frequency of written disclosures, other than requiring disclosure prior to or at the time of the recommendation. However, the SEC believes it should be made "early enough" to give retail investors ample time to make informed decisions, but "not so early" that the disclosure fails to provide meaningful information. The SEC also recommends that firms repeat or highlight disclosures at the time of recommendation.

Disclosures should be updated when they "contain materially outdated, incomplete, or inaccurate information," and such updates should be made "as soon as practicable," but "no later than 30 days after the material change." Firms are encouraged to supplement/correct via oral disclosure until the written disclosure is updated.

[16] Reg BI Adopting Release at 33438.

[17] 485 U.S. 224, 231-32 (1988).

(iv) Form of Disclosure

Reg BI does not prescribe the format or method of satisfying the Disclosure Obligation (other than that the disclosure be in writing). Broker-dealers have flexibility to provide disclosures in the manner and form they normally provide them (outside the context of Reg BI).

(v) Layered Disclosure

Layered disclosure is permitted. The SEC did not prescribe the method of satisfying the disclosure obligation and instead is allowing broker-dealers to determine how to provide full and fair disclosure. The Form CRS or Relationship Summary and the Disclosure Obligation, while separate obligations, are designed to complement and build upon each other to provide different levels of key information. However, in most instances the Relationship Summary will not be sufficient to satisfy the Disclosure Obligation.

(vi) Relying on Existing Documents

The Disclosure Obligation can be satisfied through existing documents provided to retail customers, such as account opening documents, with a standalone document, or by some combination. The key consideration in determining whether to rely on existing disclosure documents, or whether to include or repeat information from existing customer disclosures (e.g., account agreements, advisory brochures, guides to services, fee schedules, 408(b)(2) disclosures, prospectuses and other offering documents) is the usefulness and ease of understanding for retail customers.

(vii) Electronic Delivery or Website Disclosures

Electronic delivery is permitted, consistent with existing SEC guidance on the use of electronic media. However, broker-dealers must make paper delivery available upon request.

(b) Care Obligation

The Care Obligation comprises three components. When making a recommendation subject to Reg BI, broker-dealers must exercise reasonable diligence, care and skill to meet the following three requirements:

- *Reasonable Basis Prong*: Understand the potential risks, rewards and costs associated with the recommendation and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers;
- *Customer-Specific Prong*: Have a reasonable basis to believe the recommendation is in the best interest of the particular retail customer given the retail customer's investment

profile and potential risks, rewards and costs, and does not place the financial or other interest of the broker-dealer ahead of the interest of the retail customer; and

- *Series of Transactions Prong*: Have a reasonable basis to believe that 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 and does 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.

(i) Reasonable-Basis Prong

The first component, which was intended to enhance broker-dealers' existing "reasonable-basis suitability" obligations under FINRA rules, requires that broker-dealers understand the particular security or investment strategy recommended. The SEC noted that "[w]ithout establishing such a threshold understanding of its particular recommended security or investment strategy involving securities, [it] do[es] not believe that a broker-dealer could, as required by Regulation Best Interest, have a reasonable basis to believe that it is acting in the best interest of a retail customer when making a recommendation."[18]

The determination of what would qualify as reasonable diligence, care and skill regarding reasonable-basis suitability depends mostly on "the complexity of and risks associated with the recommended security or investment strategy and the broker-dealer's familiarity with the recommended security or investment strategy."[19] In this vein, broker-dealers should "apply heightened scrutiny" to determine whether recommending complex and/or risky securities and investment strategies would be in a retail customer's best interest.[20] Initial examinations and enforcement efforts by the SEC staff indicate a focus on due diligence practices of broker-dealers, while the Care Obligation Staff Bulletin also includes some mentions.[21]

(ii) Customer-Specific Prong

The second component focuses on individual customers and requires that broker-dealers apply their understanding of a particular securities transaction or investment strategy to determine whether it would be in the best interest of a particular retail customer based on their understanding of the potential risks, rewards and costs of the recommendation, and in light of the retail customer's investment profile.

The Care Obligation is an area where documentation is paramount to ensure compliance and mitigate risk, despite the Adopting Release stating that the Care Obligation does not require that

[18] Reg BI Adopting Release at 33375-33376.

[19] *Id*. at 33376.

[20] *Id*.

[21] *See* SEC, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligations*, Question 10 (Apr. 20, 2023).

broker-dealers document the basis for a recommendation.[22] Broker-dealers are well served by focusing on the following part of the Adopting Release, particularly for securities other than equities: "broker-dealers may wish to document an evaluation of a recommendation and the basis for the particular recommendation in certain contexts, such as the recommendation of a complex product, or where a recommendation may seem inconsistent with a retail customer's investment objectives on its face [or when viewed in isolation]."[23] The SEC explained, for example, that recommending an investment that would be risky by itself may be in the retail customer's best interest if the investment was added as a hedging tool in a conservative portfolio.[24] The documentation discussion that is embedded in the Care Obligation section of the Adopting Release has resulted in a range of risk-based industry practices, with an ever-growing focus on documentation.[25]

Notably, the Care Obligation Staff Bulletin further clarified the importance of documentation and supervision. As stated in the latest Staff Bulletin, "[i]t is the staff's view that it may be difficult for a firm to assess periodically the adequacy and effectiveness of its policies and procedures or to demonstrate compliance with its obligations to retail investors without documenting the basis for such conclusions."[26] Nonetheless, broker-dealers have the obligation to assess the adequacy and effectiveness of policies and procedures and to demonstrate compliance with them.

(iii) Series of Recommended Transactions (or Quantitative) Prong

This component, which incorporated FINRA's "quantitative suitability" requirement, is designed to address practices like "churning," where a broker, whose compensation is based on transaction volume, recommends an excessive number of trades, which in isolation may be suitable, but in totality may result in a customer bearing unexpectedly high trading costs that negate the underlying economic returns from a given set of transactions. Reg BI's approach differs from FINRA's rule in that FINRA only required broker-dealers to satisfy quantitative suitability when a broker-dealer has control over a customer account. Reg BI does not include this "control" provision.

(c) Conflict of Interest Obligation

The Conflict of Interest Obligation requires broker-dealers to establish, maintain and enforce written policies and procedures reasonably designed to identify and at a minimum disclose, in accordance with the Disclosure Obligation, or eliminate conflicts of interest associated with

[22] Reg BI Adopting Release at 33382.

[23] *Id*. at 33378.

[24] *Id*.

[25] A continuing area of Reg BI concern remains the concept of reasonably available alternatives. The staff provided some limited examples in the Care Obligation Staff Bulletin, all rooted in documentation.

[26] SEC, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligations* (Apr. 20, 2023).

recommendations made to retail customers, and to mitigate certain identified conflicts (if those conflicts were not otherwise eliminated).

(i) Identifying Conflicts of Interest

According to the SEC, reasonably designed policies and procedures to identify conflicts of interest generally should do the following:

- Define such conflicts in a manner that is relevant to a broker-dealer's business (i.e., conflicts of both the broker-dealer entity and the associated persons of the broker-dealer), and in a way that enables employees to understand and identify conflicts of interest;
- Establish a structure for identifying the types of conflicts that the broker-dealer (and associated persons of the broker-dealer) may face;
- Establish a structure to identify conflicts in the broker-dealer's business as it evolves;
- Provide for an ongoing (e.g., based on changes in the broker-dealer's business or organizational structure, changes in compensation incentive structures, and introduction of new products or services) and regular, periodic (e.g., annual) review for the identification of conflicts as-sociated with the broker-dealer's business; and
- Establish training procedures regarding the broker-dealer's conflicts of interest, including conflicts of natural persons who are associated persons of the broker-dealer, how to identify such conflicts of interest, as well as defining employees' roles and responsibilities with respect to identifying such conflicts of interest.

(ii) Elimination and Mitigation

The Conflict of Interest Obligation requires broker-dealers to establish policies and procedures reasonably designed to identify and eliminate "any sales contests, sales quotas, 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." Other than sales contests, conflicts of interest generally can be addressed through mitigation and disclosure.

The Reg BI Adopting Release does not prescribe how conflicts should be mitigated. However, it has stated that it would look to whether policies and procedures are "reasonably designed to reduce the incentive for the associated person to make a recommendation that places the associated person's or firm's interests ahead of the retail customer's interest."[27] The SEC provides the following examples of mitigation measures:

- Avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales;

[27] Reg BI Adopting Release at 33391.

- 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 rollover 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)[28] 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.

Firm-level financial incentives generally may be addressed through disclosure rather than mitigation. However, broker-dealers are required to identify and mitigate conflicts of interest that create an incentive for an associated person of the broker-dealer to place its interests or the interest of the firm ahead of the retail customer's interest. Additional granularity is provided in the Conflicts Staff Bulletin.[29]

(iii) Ownership of the Conflict of Interest Obligation

Unlike the Disclosure and Care Obligations, which apply both to broker-dealers and their associated persons, the Conflict of Interest Obligation (and the Compliance Obligation) applies solely to the broker-dealer firm. However, the firm is required to consider conflicts between: (i) the broker-dealer firm and the retail customer; (ii) the associated persons and the retail customer; and (iii) the broker-dealer firm and its associated persons.

(d) Compliance Obligation

The Compliance Obligation requires that broker-dealers establish, maintain and enforce written policies and procedures to achieve compliance with Reg BI as a whole. This obligation was included in the final rule but was not part of the initial rule proposal in 2018.

[28] Note that PTE 2020-02 takes into account Reg BI within its Impartial Conduct Standard component.

[29] *See* SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest*, Questions 6-10 (Aug. 3, 2022).

The policies and procedures must address compliance with the Disclosure and Care Obligations, in addition to the Conflict Obligation. Reg BI does not mandate specific requirements to fulfill the Compliance Obligation; rather it provides flexibility to allow broker-dealers to establish compliance policies and procedures that accommodate a broad range of business models. The guidance for Reg BI allowed that broker-dealers could satisfy the obligation by adjusting and/or building upon current systems of supervision and compliance, as opposed to creating entirely new systems.

From an enforcement perspective, this component of Reg BI allows the SEC to bring Reg BI charges against broker-dealers for policies and procedures violations in the absence of an underlying Reg BI violation. Note however, that when that occurs, the SEC will also need to account for Section 15(b)(4)(e) of the Exchange Act, which creates a possible liability for failure to supervise by authorizing the Commission to impose a sanction on an associated person who "has failed reasonably to supervise, with a view to preventing violations of . . . [federal securities] statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision." Note the related safe harbor, under which no person can be liable for failure to supervise if: (1) there have been established procedures and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person; and (2) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.[30] In the context of an enforcement action, the safe harbor will add an obligation for the regulator to demonstrate causation.

Note also that FINRA Rule 3110 requires member firms to "establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules."

2. Reg BI Examination Priorities and Early Enforcement Outcomes

(a) 2025 Examination Priorities

(i) SEC Priorities

On October 21, 2024, the Division of Examinations ("Examinations") issued its 2025 examination priorities which reflect a continued focus on Reg BI, Form CRS and investment adviser fiduciary standards.[31] Much as with the 2024 priorities, broker-dealers and investment advisers have been put on notice that Examinations will continue to place an increased focus on the care obligation, including consideration of reasonably available alternatives, consideration of all costs associated with a recommendation, and approach to recommendations of account types, rollovers, sweep

[30] Section 15(b)(4)(e) of the Exchange Act.

[31] SEC, *Division of Examinations 2025 Examination Priorities* (Oct. 21, 2024).

programs, and high-cost, complex, illiquid, and proprietary products.[32] A new addition to the 2025 priorities is a reference to recommendations related to commercial real estate. Examinations is also focusing on the conflicts obligation, including processes for identifying and disclosing conflicts and appropriately mitigating financial professional compensation (including overall structure and supervision). As in 2024 and prior years, Examinations will additionally pay close attention to the content and delivery of required disclosures, as well as adopting reasonably designed policies and procedures, including supervision, systems for surveillance and training. It is also noteworthy that the 2025 priorities highlight a focus on the effectiveness of investment advisers' compliance programs.

(ii) FINRA Priorities

FINRA also included Reg BI as part of its Annual Regulatory Oversight Report in 2024 and we expect it will do so in 2025.[33] In the most recent 2024 iteration of the report,[34] FINRA noted that it had examined broker-dealers regarding implementation of Reg BI obligations throughout 2021-2023. The 2024 Report noted in its Reg BI section certain additional considerations and questions for firms to implement within their Reg BI implementation process. Notably, FINRA highlighted compensation practices and reasonably available alternatives.

(b) Recent Enforcement Outcomes

Please see Appendix A: Select Recent Reg BI Enforcement Actions.[35]

3. Advisers Act Fiduciary Standard

Simultaneous with its adoption of Reg BI, the SEC issued interpretive guidance regarding the standard of conduct for investment advisers.[36] The SEC retained two separate standards of conduct for broker-dealers and investment advisers in recognition of the differences in the types of relationships that broker-dealers and investment advisers have with their clients and different models for providing advice. Notwithstanding this 2019 policy position, the Staff Bulletins issued to provide further guidance on Reg BI assume convergence of both business model and regulation.[37] The Staff bulletins addressed earlier note that the guidance should be extended to Advisers Act obligations.[38]

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[32] SEC, *Division of Examinations 2024 Examination Priorities* (Oct. 16, 2023).

[33] As of the date of this outline, the FINRA 2025 Annual Regulatory Oversight Report had not yet been released.

[34] FINRA, *Regulatory Obligations and Related Considerations*, as part of *2024 FINRA Annual Regulatory Oversight Report* (Jan. 2024), https://www.finra.org/rules-guidance/guidance/reports/2024-finra-annual-regulatory-oversight-report/reg-bi-form-crs.

[35] Appendix A, *supra* p. 18.

[36] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019).

[37] *See* Staff Bulletins, *supra* note 11.

[38] *See* Staff Bulletins, *supra* note 11.

Investment advisers' fiduciary duty under the Advisers Act is based on common law principles and includes a duty of loyalty and a duty of care. With respect to disclosure, investment advisers are already required, under federal securities laws, rules and regulations, to make ongoing disclosures, particularly regarding fees and conflicts, to retail investors via Form ADV filings and deliveries. Also, unlike broker-dealers, investment advisers already have a disclosure obligation under the fiduciary standard's duty of loyalty.

For additional information and analysis on the impact of the Adviser Interpretation and enforcement developments, please refer to *Fiduciary Obligations for Identifying, Managing, and Disclosing Conflicts of Interest,*[39] and *Ethics for Advisers: Compliance with Fiduciary Standards Spotlight on Code of Ethics Requirements*.[40]

4. Beyond the SEC: State Securities Regulators and DOL

(a) NASAA Model Rule Proposal

NASAA initially published a Model Rule proposal in September 2023 intended to update NASAA's existing Model Rule on "dishonest or unethical practices" pertaining to broker-dealers and agents,[41] and has since re-proposed a more streamlined version.[42] The 2023 proposed Model Rule broadly called for the incorporation of the principles encompassed in Reg BI. However, the 2023 proposed Model Rule contained "subparts" presented as a "menu of provisions" to be used to "define, clarify or emphasize the obligations and components of Reg BI that matter most to each jurisdiction." In addition to the 2023 proposal potentially contributing to the development of disparate standards, there were significant industry concerns that the subparts called for different standards than those under Reg BI.[43] The comment period for the 2023 proposal closed in early December 2023 and comments were under consideration through 2024, followed by a re-proposal.

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[39] A. Valerie Mirko & Margaret Mudd, *Fiduciary Obligations for Identifying, Managing, and Disclosing Conflicts of Interest* (Sept. 1, 2023).

[40] A. Valerie Mirko et al., *Ethics for Advisers: Compliance with Fiduciary Standards Spotlight on Code of Ethics Requirements* (Mar. 6, 2024).

[41] NASAA, *Proposed Revisions to Model Rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents* (Sept. 5, 2023), available at https://www.nasaa.org/wp-content/uploads/2023/09/Request-for-Public-Comment-on-BD-Best-Interest-Model-Rule.pdf.

[42] NASAA, *Proposed Amendments to the NASAA Model Rule, Dishonest or Unethical Business Practices of Broker-Dealers and Agents* (Nov. 4, 2024), available at https://www.nasaa.org/wp-content/uploads/2024/11/FINAL_Request-for-Public-Comment_Amendments-to-DU-Nov.-2024.pdf.

[43] For a more detailed analysis comparing Reg BI and NASAA's Model Rule, *see* Valerie Mirko, *Summary & Comparison Chart: NASAA Proposed Broker-Dealer Model Rule and SEC Regulation Best Interest* (Dec. 1, 2023); *see also* Kevin M. Carroll, *SIFMA Comment Letter: Proposed Revisions to NASAA Broker-Dealer Model Rule* (Dec. 1, 2023).

In November 2024, NASAA re-opened a public comment period based on subsequent revisions to the Model Rule.[44] NASAA stated in its release for the 2024 re-proposal that it removed the section of "subparts" based on a careful review of stakeholder responses in late 2023. The remaining two revisions did not change. While the industry's most substantial concerns were addressed by removing Revision #2, comments submitted during this comment period continued to advocate for a more direct incorporation of Reg BI. For example, several comments noted that the current proposed language still differs from and excludes certain language that could lead to a misapplication of the rule in ways contrary to Reg BI's intent.[45] The comment period for the revised proposal closed on December 19, 2024 and comments remain under consideration.

(b) Massachusetts Fiduciary Rule

In February 2020, the Massachusetts Securities Division of the Secretary of State ("MSD") adopted final regulations governing the standard of conduct applicable to broker-dealers and their agents. The regulations apply a fiduciary duty standard of conduct to broker-dealers and agents and went into effect in March 2020. Enforcement of the regulations began September 1, 2020. The Massachusetts rule requires broker-dealers and their agents to act as fiduciaries: when providing investment advice or recommending to a customer an investment strategy, the opening of, or transfer of assets to, any type of account, or the purchase, sale, or exchange of any security.

The most significant difference between the Massachusetts rule and Reg BI is the language regarding how broker-dealers are required to address financial conflicts of interest. The duty of loyalty under the Massachusetts regulation requires, in part, that broker-dealers and their agents "[m]ake recommendations and provide investment advice *without regard* to the financial or any other interest of any party other than the customer."[46] The Massachusetts rule's Adopting Release attempted to clarify that, when viewed together with the other elements of the duty of loyalty under the rule, the "without regard to" language does not create an absolute requirement to provide conflict-free advice. In contrast, the SEC considered using the "without regard to" language in Reg BI, but ultimately decided to adopt phrasing requiring that broker-dealers do not place their financial or other interest ahead of the interest of the retail customer. The SEC reasoned that the "'without placing the financial or other interest . . . ahead of the interest of the retail customer' phrasing recognizes that while a broker-dealer will inevitably have some financial

[44] NASAA, *Proposed Amendments to the NASAA Model Rule, Dishonest or Unethical Business Practices of Broker-Dealers and Agents* (Nov. 4, 2024), available at https://www.nasaa.org/wp-content/uploads/2024/11/FINAL_Request-for-Public-Comment_Amendments-to-DU-Nov.-2024.pdf.

[45] *See e.g.,* SIFMA, Comment Letter on the Proposed Amendments to the NASAA Model Rule, Dishonest or Unethical Business Practices of Broker-Dealers and Agents (Dec. 13, 2024), available at https://www.nasaa.org/wp-content/uploads/2024/11/SIFMA-comment-on-NASAA-model-rule-FINAL-12.13.2024.pdf; Financial Services Institute, Comment Letter on the Proposed Amendments to the NASAA Model Rule, Dishonest or Unethical Business Practices of Broker-Dealers and Agents (Dec. 19, 2024), available at https://www.nasaa.org/wp-content/uploads/2024/11/Comment-NASAA-Reg-BI-Model-Repropose-12-19-24.pdf.

[46] 950 CMR 12.207(2)(b)(3) (emphasis added).

interest in a recommendation—the nature and magnitude of which will vary—the broker-dealer's interests cannot be placed ahead of the retail customer's interest."[47]

After being struck down by the lower court, the Massachusetts Supreme Judicial Court upheld the fiduciary rule on August 25, 2023.[48] The case was settled on January 18, 2024.[49] There is currently a Massachusetts Securities Division sweep.

(c) Additional State Developments

In 2024, the Washington Department of Financial Institutions ("DFI") proposed the adoption of new rules concerning broker-dealers and salespersons of broker-dealers with an intent to update its rules to be consistent with Reg BI and FINRA rules, and incorporate NASAA model rules. As proposed, the new rule would have made it an unethical practice to "allow[] an individual who is not registered as a salesperson in Washington to enter trades on behalf of retail customers of the broker-dealers who are located in Washington, unless an exemption from salesperson registration would apply." Following an evaluation of comments to the proposed rule, DFI removed this subsection from the final adopted rule. The rule became effective on October 13, 2024.[50]

Florida similarly adopted regulations in March 2024 to incorporate Reg BI in its entirety.[51] Thus, violating any standard set forth in Reg BI would constitute a violation of Florida's regulations as well. Florida separately incorporated Reg BI into the state's books and records rule.[52]

On November 8, 2024, the Texas State Securities Board proposed, among other things, a new rule to its regulations governing securities dealers and agents.[53] The proposed new rule would adopt by reference Reg BI, as well as other fair practice, ethical standard, or conduct rules promulgated by FINRA, the SEC, the United States Commodity Futures Trading Commission ("CFTC"), or any self-regulatory organization approved by the SEC or the CFTC. The comment period for this proposal closed in December 2024 and comments remain under consideration.

In August 2024, a federal court in Missouri ruled in favor of the Securities Industry and Financial Markets Association ("SIFMA") in its legal challenge to two Missouri disclosure and consent

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[47] Reg BI Adopting Release at 33332.

[48] Robinhood Financial LLC v. Secretary of Commonwealth, 214 N.E.3d 1058 (2023).

[49] *See* Hannah Miao, *Robinhood to Pay $7.5 Million to Settle Massachusetts 'Gamification' Case*, WALL STREET JOURNAL (Jan. 18, 2024), https://www.wsj.com/livecoverage/stock-market-today-dow-jones-earnings-01-18-2024/card/robinhood-to-pay-7-5-million-to-settle-massachusetts-gamification-case-L38We94jHxZWKR0NqWcz.

[50] Wash. Admin. Code § 460-20C-210.

[51] Fla. Admin. Code. r. 69W-600.013.

[52] Fla. Admin. Code. r. 69W-600.014.

[53] Texas State Securities Board, 2024 Tex. Reg. 681461 (Nov. 8, 2024) (to be codified at 7 Tex. Admin. Code § 115.24), proposal available at https://ssb.texas.gov/texas-securities-act-and-board-rules/board-rules/recent-changes-board-rules/november-8-2024.

rules.[54] The rules required financial professionals to disclose and obtain written consent from customers when considering nonfinancial objectives in investment advice, defining nonfinancial objectives broadly to include factors like tax considerations, diversification, and values-based goals. SIFMA argued this could unnecessarily encompass typical investment decisions, and the court agreed, declaring the rules preempted by federal laws (National Securities Markets Improvements Act ("NSMIA") and Employee Retirement Income Security Act ("ERISA")), unconstitutional under the First and Fourteenth Amendments, and overly vague. The court issued a permanent injunction halting the enforcement of these rules. Missouri initially decided to appeal the ruling to the Eighth Circuit, but the state's Attorney-General dropped the appeal in October 2024.[55]

(d) DOL Fiduciary Rule

On April 23, 2024, the U.S. Department of Labor ("DOL") released a final rule, titled the "Retirement Security Rule" (the "Final Rule").[56] Shortly after the DOL issued the Final Rule, insurance industry trade groups filed a lawsuit in the Fifth Circuit's Eastern District of Texas and another in the Fifth Circuit's Northern District of Texas asking each court to stay the DOL's Final Rule. The lawsuit brought in the Eastern District essentially claimed that the Final Rule was no different than the 2016 Fiduciary Rule that was vacated by the Fifth Circuit. As of the date of this outline, the DOL has appealed the district courts stay ruling, but based on the change in administrations it is unclear if the appeal will be withdrawn or how hard the DOL will push the appeal process. The first Trump administration did not appeal the Fifth Circuit's vacating of the 2016 Fiduciary Rule.

(i) Background

By way of background, the Final Rule looked to update the longstanding meaning of what constitutes "investment advice" under the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). At the time the Final Rule was adopted, the DOL believed that the retirement landscape had changed since ERISA was enacted, and as such, retirement investors who mainly save through defined contribution plans and IRAs, rather than traditional defined benefit plans, were not receiving adequate protections when investment-related decisions were being made in relation to their plans and savings. In addition to revising the fiduciary definition, the Final Rule also eliminated from the following Prohibited Transaction Exemptions, the portion of those exemptions that allowed fiduciaries to receive

[54] SIFMA v. John R. Ashcroft, et al., Case No. 23-cv-04154-SRB, Order Granting Summary Judgment (W.D. Mo. Aug. 14, 2024), available at https://www.sifma.org/wp-content/uploads/2024/08/2024.08.14-Order-on-Motions-for-Summary-Judgment.pdf.

[55] SIFMA v. John R. Ashcroft, et al., Case No. 23-cv-04154-SRB, Order Granting Joint Motion for Entry of Final Judgment (W.D. Mo. Oct. 17, 2024), available at https://www.sifma.org/wp-content/uploads/2024/10/FINAL-JUDGMENT-ORDER-2024.10.17.pdf.

[56] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122 (Apr. 25, 2024) (to be codified at 29 C.F.R. § 2510.3-21).

reasonable compensation so as to streamline the DOL's position and require all fiduciaries to rely on PTE 2020-2 (as defined below):

- 75-1 "Securities Transactions Involving Broker-Dealers, Reporting Dealers and Banks"
- 77-4 "Purchase of Shares of Open-End Investment Companies"
- 80-83 "Use of Proceeds from Sale of Securities to Reduce or Retire Indebtedness"
- 83-1 "Mortgage Pool Investment Trusts"
- 86-128 "Executing Securities Transactions and Recapture of Commissions"

Prohibited Transaction Exemptions 2020-02 ("PTE 2020-02") generally permits ERISA fiduciaries to accept reasonable compensation for providing investment advice provided that the conditions contained in the exemption are followed. Because of the nature of transactions covered by Prohibited Transaction Exemption ("PTE 84-24"), the DOL, also amended the investment advice safeguards of PTE 84-24, which provides relief to ERISA fiduciaries when receiving compensation related to certain insurance and mutual fund transactions with a plan, to closely follow the requirements contained in PTE 2020-02 and has eliminated from the ability of other prohibited transaction exemptions from exempting investment advice compensation going forward.[57] In the unlikely event that the Final Rule were to survive the Fifth Circuit's stay rulings, Broker-dealers, investment advisers and independent insurance agents will need to familiarize themselves with the changes to these exemptions when providing investment advice to retirement investors in the future. However, as of the date of this outline, the stay issued by the Fifth Circuit applies to the DOL's changes to each of the Prohibited Transaction Exemptions as well.

(ii) Legal Challenges

As noted above, shortly after the DOL issued their Final Rule, insurance industry trade groups filed a lawsuit in the Fifth Circuit's Eastern District of Texas and another in the Fifth Circuit's Northern District of Texas asking each Court to stay the DOL's Final Rule. The lawsuit brought in the Eastern District essentially claimed that the Final Rule was no different than the 2016 Fiduciary Rule that was vacated by the Fifth Circuit.

On July 25, 2024, the U.S. District Court for the Eastern District of Texas issued a stay siding with the insurance industry plaintiffs and enjoining the DOL from enforcing the Final Rule on its effective date of September 23, 2024. In his decision, the judge stated that "Plaintiffs are likely to succeed on the merits of their claim because the 2024 Fiduciary Rule conflicts with ERISA in

[57] The DOL has officially eliminated from Prohibited Transaction Exemptions: 75-1 "Securities Transactions Involving Broker-Dealers, Reporting Dealers and Banks," 77-4 "Purchase of Shares of Open-End Investment Companies," 80-83 "Use of Proceeds from Sale of Securities to Reduce or Retire Indebtedness," 83-1 "Mortgage Pool Investment Trusts" and 86-128 "Executing Securities Transactions and Recapture of Commissions," the portion of those exemptions that allowed fiduciaries to receive reasonable compensation as of September 24, 2024.

several ways, including by treating as fiduciaries those who engage in onetime recommendations to roll over assets from an ERISA plan to an IRA."[58]

In addition, the Court cited to the Supreme Court's recent decision in *Loper Bright*, which overturned the so-called Chevron Doctrine which generally allowed administrative agencies to receive deference when interpreting ambiguities in the law, stating that "[a] court should no longer defer to an agency's interpretation of a statute but should decide for itself whether the law means what the agency says."[59] Based on the overall language and tone of the Court's decision, it would appear that the DOL will have its work cut out for it if it wants to save this version of the fiduciary rule change.

On July 26, 2024, the Northern District Court also issued a stay that incorporated the Eastern District's holding but went further and extended the stay to the prohibited transaction exemption changes made under the Final Rule. The Northern District, like the Eastern District, found that the DOL's Final Rule was likely going to lose on the merits of the plaintiffs' claims and the plaintiffs would suffer irreputable harm if the Final Rule were to be implemented.[60] The DOL subsequently appealed both stay rulings on September 20, 2024, but as of this outline no additional decision has been made as to the status of the Final Rule. Therefore, as of today, the existing 1975 rules remain in effect as does the original text of the prohibited transaction exemptions that the DOL attempted to change.

[58] Fed'n of Americans for Consumer Choice, Inc. v. United States Dep't of Lab., No. 6:24-CV-163-JDK (E.D. Tex. July 25, 2024).

[59] Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

[60] Am. Council of Life Insurers v. United States Dep't of Lab., No. 4:24-CV-00482-O (N.D. Tex. July 26, 2024).

APPENDIX A

Select Recent Reg BI Enforcement Actions: SEC and FINRA[61]

SEC Enforcement Actions

In the Matter of J.P. Morgan Securities LLC, Release No. IA-6758, October 31, 2024

J.P. Morgan Securities LLC (JPMS) and affiliates settled five separate enforcement actions, one of which was related to failures to make recommendations in the best interest of customers. According to the SEC's order, between June 2020 and July 2022, JPMS recommended certain mutual fund products, known as Clone Mutual Funds, to its retail brokerage clients despite the availability of more affordable ETF products offering the same investment portfolios. The order states that in making these recommendations, JPMS and its registered representatives did not account for the cost differences and lacked a reasonable basis to believe their advice was in the best interest of the customers. During this period, approximately 10,500 customers made around 17,500 purchases of the Clone Mutual Funds based on JPMS' guidance. Because JPMS self-reported the issue, provided substantial cooperation, and repaid approximately $15.2 million to impacted customers, the SEC did not impose a civil penalty.

Sanctions: Censure.

In the Matter of First Horizon Advisors, Inc., Release No. IA-6708, September 18, 2024

According to the SEC's order, First Horizon did not adhere to its Reg BI policies and procedures in several instances. One such failure occurred in 2021 when First Horizon transferred over 5,000 customer brokerage accounts to its system from a merged broker-dealer. Due to system incompatibilities, First Horizon lacked the accurate customer information necessary to assess the compliance of structured note recommendations with its Reg BI policies. Moreover, the registered representatives who joined First Horizon through the merger were not provided access to the firm's exception reporting site, preventing them from reviewing structured note transactions flagged as non-compliant, as required by the firm's Reg BI policies. The SEC's order further finds that, in 2023, First Horizon approved structured note recommendations without obtaining all the required documentation specified in its Reg BI policies and procedures.

Sanctions: Censure, $325,000 civil penalty.

In the Matter of Western International Securities, Inc., Release No. IA-6642, July 30, 2024

Western International Securities Inc. and five of its registered representatives settled two separate cases with the SEC relating to the sale of L Bonds issued by GWG Holdings, Inc. According

[61] For a discussion on Advisers Act enforcement, please refer to A. Valerie Mirko & Margaret Mudd, *Fiduciary Obligations for Identifying, Managing, and Disclosing Conflicts of Interest* (Sept. 1, 2023).

to the SEC's original complaint, Western and its representatives sold high-risk L Bonds to retail customers, many of whom were on fixed incomes and had moderate risk tolerances. The SEC alleged that Western failed to meet Reg BI's Care Obligation by not properly understanding the bonds' risks and recommending them to certain customers without a reasonable basis. The SEC further stated that Western violated the Compliance Obligation by failing to establish effective policies and procedures for Reg BI compliance. In addition to the SEC settlement agreements, FINRA fined Western $475,000 and ordered it to pay more than $1,000,000 in restitution for failing to establish, maintain, and enforce a supervisory system reasonably designed to supervise actively traded accounts in violation of FINRA Rules 3110 and 2010.

Sanctions: Censure, $160,000 civil penalty, $34,468 disgorgement and prejudgment interest.

In the Matter of LifeMark Securities Corp., Release No. IA-6641, July 29, 2024

According to SEC Orders, LifeMark Securities Corp. and its representatives violated Reg BI by recommending high-risk L Bonds issued by GWG Holdings, Inc. to retail customers without taking reasonable steps to ensure the investments were in the best interest of their clients. The SEC found that the firm, acting through its representative, failed to consider the finanical conditions outlined in GWG's prospectus, which warned that the bonds involved a high degree of risk, including the risk of losing one's entire investment. As a result of these actions, the SEC found that the firm and its representative violated Reg BI's Care Obligation and General Obligation.

Sanctions: Censure, $85,000 civil penalty, $5,115.48 disgorgement and prejudgment interest.

In the Matter of Key Investment Services, LLC, Release No. IA-6609, May 21, 2024

Per the SEC's order, Key Investment Services violated Reg BI by recommending that its brokerage and advisory clients transfer securities to Key Private Bank, an affiliate of the firm. Representatives would earn a finders' fee if they made three or more customer referrals in a particular quarter to Key Private Bank, regardless of whether the referrals resulted in a transfer of securities. If the referral recommendations did result in a transfer of securities to Key Private Bank, representatives then received an additional fee based on the value of any securities or assets transferred. The firm did not disclose that the representatives were acting as associated persons of Key Investment Services or that the representatives would receive compensation in the form of finders' fees and annual fees for making the transfer recommendations. The firm also failed to disclose the conflicts of interest associated with the transfer recommendations, and the SEC found that the firm's written policies and procedures were not reasonably designed to ensure compliance with its disclosure obligations.

Sanctions: Censure, $223,228 civil penalty.

TIAA-CREF Individual & Institutional Services LLC, Release No. 34-99549, Release No. IA-6559, February 16, 2024

According to the SEC order, the TIAA IRA allowed retail customers to invest in both a pre-selected "core menu" of affiliated investments, including affiliated mutual funds, and, through the TIAA IRA's optional "brokerage window," a broader array of securities, including a variety of mutual funds, ETFs, stocks and bonds. During the relevant period, the order states, "the brokerage window included the lowest-cost share classes of certain affiliated mutual funds offered in the core menu, but with the investment minimums waived." More than 94% of TIAA IRA customers invested only through the core menu, and as a result, paid more than $900,000 total in expenses that could have been avoided by purchasing substantially equivalent funds through the brokerage window. TC Services violated Reg BI by, among other things, failing to disclose both that substantially equivalent, lower-cost share classes of affiliated funds were available in the brokerage window and the conflicts that created. We note that this is an example of the SEC staff drawing from its various share class share disclosure related case theories and applying them within a Reg BI context.

Sanctions: Censure; $1,250,000 penalty; $936,714 disgorgement; $103,424.91 prejudgment interest.

Laidlaw and Company (UK) LTD., Release No. 34-98983, November 20, 2023

According to the SEC order, Laidlaw violated Exchange Act Rule 15l-1(a)(2)(ii), Reg BI's Care Obligation, when two of its registered representatives made a series of recommendations to six retail customers without a reasonable basis to believe that the series of recommended transactions were not excessive when taken together in light of the retail customer's investment profile, and because the series of recommended transactions placed the financial interest of the firm ahead of the interest of the retail customers (the "quantitative prong" of the Care Obligation) in Exchange Act Rule 15l-1(a)(2)(ii)(C). Laidlaw also violated Exchange Act Rule 15l1(a)(2)(iv), the Reg BI Compliance Obligation, by failing to establish, maintain and enforce written policies and procedures reasonably designed to achieve compliance with the quantitative prong of Reg BI's Care Obligation. As a result of Laidlaw's violations of these Reg BI's component obligations, it also violated Exchange Act Rule 15l-1(a)(1), the Reg BI General Obligation, which requires compliance with Reg BI's four component requirements, including the Care and Compliance Obligations.

Sanctions: Censure; $223,328 fine; $547,712.36 disgorgement; $51,844.22 prejudgment interest.

CitiGroup Global Markets, Inc. and Citi International Financial Services, LLC, now known as Insigneo International Financial Services, LLC, Release No. 34-98609, Release No. IA-6440, September 28, 2023

According to the SEC order, Respondents did not comply with the Disclosure Obligation of Reg BI and the delivery requirement of Form CRS until April 2021, when Respondents mailed the disclosures and Form CRS to Existing Retail Customers. By that time, however, registered representatives of the firms had made approximately 31,600 securities recommendations to approximately 13,600 Existing Retail Customers, all without effecting delivery within the

framework of the SEC's electronic delivery guidance for the required disclosures and Form CRS to nearly all those retail customers, in violation of Exchange Act Rule 15l-1(a)(1), as well as Section 17(a)(1) of the Exchange Act and Rule 17a-14(f)(3) thereunder.

Sanctions: Censure; $1,976,000 penalty.

Salomon Whitney LLC, Release No. 34-98619, September 28, 2023

According to the SEC order, during the relevant period, SW Financial, through several of its registered representatives, recommended a short-term, high-volume investment strategy to at least sixteen of its customers without a reasonable basis. As a result of this high volume of recommended transactions and their attendant commissions and fees, it would have been virtually impossible for these customers to achieve profits in their accounts. While these customers were left with aggregate losses in the Affected Accounts exceeding $1,000,000 for the relevant trading periods, SW Financial and these registered representatives collectively received over $660,000 in commissions and fees as a result of the excessive trading activities they recommended. SW Financial violated Sections 17(a)(1) and (3) of the Securities Act, Exchange Act Section 10(b) and Rules 10b-5(a) and (c) during the Relevant Period, and the Care Obligation of Regulation Best Interest (Exchange Act Rule 15l-1) from June 30, 2020, the compliance date for Reg BI, through June 2022. SW Financial also violated Reg BI's Compliance Obligation by failing to establish, maintain and enforce policies and procedures reasonably designed to achieve compliance with Reg BI's Care Obligation concerning excessive trading during the Reg BI Period.

Sanctions: $216,896 disgorgement; $19,277 prejudgment interest.

FINRA Enforcement Actions (Acceptance, Waiver and Consent Orders)

CUNA Brokerage Services, Inc., FINRA File No. 2023080042101, November 18, 2024

CUNA Brokerage Services was found by FINRA to have failed to preserve important information collected from retail customers during recommendations about rolling over employer-sponsored retirement plans into individual retirement accounts. Between June 30, 2020, and January 31, 2022, the firm inadvertently deleted about 14,000 records during a business transition. These records, required under Reg BI, included key details such as whether a rollover was a forced distribution and the customer's preferences on asset protection and distribution flexibility. FINRA stated that CUNA Brokerage Services did not properly preserve this information in other records it maintained.

Sanctions: Censure; $30,000 fine.

Signet Securities, LLC, FINRA File No. 2024069303201, October 3, 2024

FINRA censured and fined Signet Securities for supervisory failures in its sale of private placement securities. From June 30, 2020, onwards, the firm failed to enforce policies and maintain an adequate supervisory system to comply with Reg BI. It recommended $140,000,000 in Regulation D private placement sales but conducted insufficient due diligence, relying only on documents from the issuer. Signet also failed to supervise outside business activities and did not deliver the required customer relationship summary (Form CRS) to existing customers, violating FINRA rules and the Exchange Act.

Sanctions: Censure; $100,000 fine; and required to issue a certification within 60 days that verifies remediation of the issues identified and implementation of a supervisory system, including written supervisory procedures, reasonably designed to achieve compliance with Reg BI.

Dalmore Group LLC, FINRA File No. 2021069395701, September 17, 2024

FINRA agreed to a settlement with Dalmore Group LLC relating to several violations spanning from January 2019 to January 2023. The violations included failure to maintain a supervisory system to ensure compliance with suitability and best interest obligations in private placement sales, as well as failure to prevent misuse of material non-public information. Dalmore also failed to fingerprint non-registered associated persons, report outside business activities of its representatives, and comply with content standards for retail communications. Moreover, the firm mishandled investor funds in private offerings, released funds prematurely, and provided incomplete or inaccurate responses to FINRA's document requests. These violations involved breaches of multiple regulations, including Reg BI and FINRA Rules, highlighting lapses in operational oversight and compliance practices.

Sanctions: Censure; $370,000 fine; and required to issue a certification within 90 days that verifies remediation of the issues identified and implementation of a supervisory system, including written supervisory procedures, reasonably designed to achieve compliance with Reg BI and FINRA Rules.

Merrill Lynch, Pierce, Fenner & Smith Incorporated, FINRA File No. 2020067795501, July 1, 2024

In FINRA's first Reg BI enforcement action focused on account-type recommendations, Merrill Lynch was charged with violating Reg BI's Compliance Obligation. According to the AWC, several Merrill Lynch financial advisors, who were dually registered as broker-dealers and investment advisers, recommended that clients purchase "new-issue" products in their brokerage accounts. Shortly after, they advised these clients to transfer the products into their advisory accounts. Had the products been purchased directly in the advisory accounts, Merrill Lynch would have applied a 12-month waiver for the advisory fees that would typically be charged. Because the products were initially bought in brokerage accounts, however, the waiver was not applied, resulting in clients effectively paying for the same products twice—first through a commission or sales charge in the brokerage account, and again through an asset management fee in the advisory account.

Sanctions: Censure; $1,486,380 restitution plus interest.

Murray Securities, Inc., FINRA File No. 2021069350301, April 8, 2024

According to the AWC for this matter, Murray Securities did not establish relevant procedures or policies related to Reg BI until over a year after the deadline. The policies that were implemented were vague and insufficient, lacking guidance on how to deal with conflicts of interest and ensuring the best interest of the customers during investment recommendations. The policies also did not include certain steps to prevent financial or other interests of stockbrokers from overriding those of their customers. Moreover, the firm's written supervision procedures lacked clear guidelines on the necessary supervisory actions, including how often to conduct reviews, the documentation of these reviews, and the use of automated systems or exception reports for oversight. FINRA found Murray Securities violated FINRA Rules 2010 and 3110 and Rule 15l-1 of the Securities Exchange Act of 1934.

Sanctions: Censure; $35,000.00 fine; and required to issue a certification within 60 days that verifies their compliance with Reg BI, along with accompanying exhibits to prove compliance.

LPL Financial, LLC, FINRA File No. 2017052494701, December 27, 2023

Among other supervisory failures, for approximately two million direct business transactions, LPL failed to ensure that it collected information for customers' investment profiles (e.g., customers' ages, investment time horizons, and liquidity needs) that was relevant for making certain suitability determinations. By failing to collect required customer information, LPL failed to make and preserve required books and records in violation of Section 17(a) of the Securities Exchange Act of 1934, Exchange Act Rule 17a-3, NASD Rule 3010, and FINRA Rules 3110, 4511 and 2010. Additionally, from February 2016 through June 2020, LPL sent to customers approximately 11,300 switch letters that contained inaccurate information about the charges customers incurred by switching from one security to another in violation of FINRA Rule 2010. LPL also violated FINRA Rules 3110 and 2010 by failing to reasonably supervise the suitability of certain transactions because the firm's supervisory review tool contained incorrect information about the charges customers paid in connection with certain switches. Finally, from May 2017 to November 2022, LPL violated FINRA Rules 3110 and 2010 and Rule 15l-1 of the Securities Exchange Act of 1934 by failing to establish, maintain, and enforce a supervisory system, including written procedures, reasonably designed to ensure that recommendations of publicly traded securities of business development companies (Listed BDCs) complied with FINRA Rule 2111 and Regulation Best Interest's Care Obligation.

Sanctions: Censure; $5,500,000 fine; $651,374.51 restitution; required to issue a certification within 90 days that verifies their compliance with Reg BI, along with accompanying exhibits to prove compliance.

Haywood Securities (USA) Inc., FINRA File No. 2019061852801, November 13, 2023

According to the AWC for this matter, from September 2014 through the present, Haywood USA recommended 134 sales totaling almost $11 million of 53 different private placements to U.S. customers without conducting reasonable due diligence of the issuers and the offerings. Therefore, from September 2014 until June 30, 2020, the firm failed to establish, maintain, and enforce a supervisory system, reasonably designed to achieve compliance with FINRA Rule 2111, in violation of FINRA Rules 3110 and 2010 and NASO Rule 3010. From June 30, 2020, to the present, the firm failed to establish, maintain, and enforce a supervisory system reasonably designed to achieve compliance with Reg BI, in violation of FINRA Rules 3110 and 2010. In addition, from September 2014 to February 2023, Haywood USA failed to file offering documents with FINRA in connection with 236 Canadian private placement offerings in violation of FINRA Rules 5123 and 2010.

Sanctions: Censure; $175,000 fine; required to issue a certification within 60 days that verifies their compliance with Reg BI, along with accompanying exhibits to prove compliance.

Network 1 Financial Securities, Inc., FINRA File No. 2021070851501, August 31, 2023

According to the AWC for this matter, from January 2016 through March 2022, Network 1 did not establish, maintain, and enforce a supervisory system, including written supervisory procedures (WSPs) reasonably designed to achieve compliance with the suitability requirements of FINRA Rule 2111 and the Care Obligation of Rule 15l (Reg BI) as they pertain to excessive trading in violation of FINRA Rules 3110 and 2010. As of June 30, 2020, Network 1 also violated Reg BI's Compliance Obligation by not establishing, maintaining, and enforcing WSPs reasonably designed to achieve compliance with Reg BI. Additionally, from July 2017 through March 2022, Molinaro, Network 1's chief compliance officer, violated FINRA Rules 3110 and 2010 by not establishing, maintaining, and enforcing a supervisory system, including WSPs, reasonably designed to achieve compliance with FINRA Rule 2111 and, as of June 30, 2020, Reg BI, as they pertain to excessive trading.

Sanctions (Network 1): Censure; $200,000 fine; $533,587 plus interest restitution; required to issue a certification within 90 days that verifies their compliance with Reg BI, along with accompanying exhibits to prove compliance. *Sanctions (Network 1):* three-month suspension from association with any FINRA member in all principal capacities; $5,000 fine.

Monmouth Capital Management, LLC, FINRA File No. 2022076459303, July 6, 2023

According to the AWC for this matter, from August 1, 2020, through February 28, 2023, Monmouth, acting through six registered representatives, excessively traded 110 customer accounts, of which 42 were also churned, causing the customers to incur $3,953,492 in total trading costs. The trading in the 110 customer accounts resulted in annualized cost-to-equity ratios ranging from 21.75% to 128.5%, and annualized turnover rates ranging from 6.05 to 35.24, and each of the accounts suffered substantial losses. As a result, Monmouth willfully violated the Care Obligation of Reg BI, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, and also violated FINRA Rules 2020 and 2010.

From August 1, 2020, through the present, Monmouth also failed to establish, maintain, and enforce a supervisory system and written supervisory procedures (WSPs) reasonably designed to achieve compliance with the Exchange Act and FINRA rules relating to excessive trading and churning. In July 2020, Monmouth represented to FINRA that it had improved its supervisory system, including revising its WSPs to provide specific actions to take to monitor for, and address, red flags of excessive trading and churning. Monmouth's representations to FINRA were inaccurate. Until at least December 2022, the firm's supervisors failed to take any of the promised remedial steps, including reviewing monthly active account exception reports and sending active account letters to customers. As a result, Monmouth willfully violated Reg BI's Compliance Obligation and violated FINRA Rules 3110 and 2010. Additionally, between November 9, 2020, and February 28, 2023, Monmouth provided false and misleading disclosures on its Form CRS concerning the scope of its account monitoring services and the nature of certain trading costs it charged to customers. These misrepresentations included a statement that Monmouth would monitor customer accounts utilizing daily exception reports, but the firm did not in fact utilize these reports. As a result, Monmouth willfully violated Section 17(a)(1) of the Exchange Act and Exchange Act Rule 17a-14 and also violated FINRA Rule 2010. During this same period, Monmouth also failed to have a reasonable supervisory system, including WSPs, to ensure that its customer disclosures on Form CRS were not false or misleading. As a result, Monmouth violated FINRA Rules 3110 and 2010.

Sanctions: Expulsion from FINRA Membership.

SW Financial, FINRA File No. 2020065599101, May 11, 2023

According to the AWC for this matter, between January 2018 and December 2021, SW Financial made material misrepresentations and omissions to investors in connection with the sale of private placement offerings of pre-initial public offering (pre-IPO) funds (the Offerings). SW Financial misrepresented to investors that it would receive only a ten percent sales commission from its sale of the Offerings when, in fact, SW Financial had entered into an agreement with the issuer to receive an additional five percent in selling compensation as well as half of any carried interest. SW Financial never disclosed this agreement or the additional compensation it would receive to investors. SW Financial also made misrepresentations to FINRA about the amount of compensation it would receive in connection with the Offerings. As a result, SW Financial violated FINRA Rule 2010, both independently and by virtue of violating Sections 17(a)(2) and (3) of the Securities Act of 1933. SW Financial, for its misconduct occurring on or after June 30, 2020, also willfully violated the Disclosure Obligation of Reg BI, set forth at Rule 15l-1(a)(2)(i)(B) under the Exchange Act and violated FINRA Rule 2010. Moreover, prior to recommending and selling the Offerings, SW Financial failed to confirm that the issuer of the Offerings had possession of or access to the pre-IPO shares identified in the offering documents or that the issuer's markups were reasonable and not excessive. SW Financial therefore lacked a reasonable basis to believe that the Offerings were suitable for, or in the best interests of, at least some customers. As a result, SW Financial violated FINRA Rules 2111 and 2010, and willfully violated the Care Obligation of Reg BI in Exchange Act Rule 15l-1(a)(2)(ii)(A).

Furthermore, according to the AWC for this matter, between January 2016 and May 2019, SW Financial, acting through two former registered representatives, churned nine customer accounts, causing the customers to incur more than $350,000 in total trading costs and realized losses of more than $465,000. As a result, SW Financial willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and also violated FINRA Rules 2020, 2111, and 2010. In connection with both types of misconduct, SW Financial also violated FINRA Rule 3110. Specifically, from January 2018 through December 2021, SW Financial failed to establish, maintain, and enforce a reasonably designed supervisory system and procedures with respect to the firm's sale of private placement offerings. And, from January 2016 through November 2019, SW Financial failed to establish, maintain, and enforce a supervisory system and procedures reasonably designed to achieve compliance with the Exchange Act and FINRA rules relating to excessive trading and churning. Therefore, SW Financial violated FINRA Rules 3110 and 2010.

Sanctions: Expulsion from FINRA Membership.