

# Regulation Best Interest: The SEC's Responds To The DOL's Fiduciary Rule

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On April 18, 2018, the Securities and Exchange Commission published its proposed [Regulation Best Interest](#). Regulation Best Interest would require broker-dealers and affiliated persons to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities.

Specifically, a broker-dealer making such a recommendation would have a duty to act in the best interest of the retail customer *at the time* the recommendation is made. According to the SEC, the broker-dealer can satisfy this obligation by complying with each of three specific obligations:

- The broker-dealer must disclose to the retail customer the key facts about the relationship between the broker-dealer and the customer, including material conflicts of interest.
- The broker-dealer must exercise reasonable diligence, care, skill, and prudence, to (i) understand the product it is recommending; (ii) have a reasonable basis to believe that the product is in the retail customer's best interest; and (iii) have a reasonable basis to believe that a series of transactions is in the retail customer's best interest.
- The broker-dealer must establish, maintain, and enforce policies and procedures reasonably designed to identify and eliminate (or, at a minimum,

disclose and mitigate) material conflicts of interest associated with the broker-dealer's recommendation, including those arising from financial incentives associated with its recommendation.

In addition, Regulation Best Interest would require broker-dealers to provide retail investors a "relationship summary." The relationship summary would be set forth on [proposed Form CRS](#), and contain sections covering (i) the relationships and services the firm offers to retail investors; (ii) the standard of conduct applicable to those services; (iii) the fees and costs for those services; (iv) comparisons of brokerage versus investment advisory services; (v) conflicts of interest; (vi) how and where to access additional information, including legal or disciplinary disclosures by the broker-dealer and how to make complaints; and (vii) a list of key questions for retail investors to ask the broker-dealer.

Regulation Best Interest is, in large part, a response to the highly-criticized Department of Labor Fiduciary Rule (the "DOL Fiduciary Rule"), which was vacated by the United States Court of Appeals for the Fifth Circuit on March 15, 2018 (see *Chamber of Commerce of the U.S.A., et al. v. U.S. Dep't of Labor, et. al.*, No. 17-10238 (5th Cir.) (Mar. 15, 2018)). Under the DOL Fiduciary Rule — in the absence of an exemption from the DOL — broker-dealers subject to the Rule (*i.e.* those that provide investment advice or recommendations for a fee or other compensation with respect to assets of an ERISA plan or IRA) would be prohibited from receiving common forms of broker-dealer compensation (notably, transaction-based compensation). According to a [statement from SEC Chairman Jay Clayton](#), "during the time the rule was in effect it imposed an additional standard of conduct for broker-dealers, amplifying significant regulatory complexity and uncertainty in this area, including through the introduction of multiple regulatory standards to the same investor relationship." Critics of the DOL rule argued that it would effectively eliminate a broker-dealer's ability or willingness to provide investment advice with respect to investors' retirement assets. Conversely, Regulation Best Interest would, according to Chairman Clayton, "preserve retail investors' ability to choose to receive transaction-based investment advice from [broker-dealers]" by permitting transaction-based compensation, so long as all disclosure and other obligations are met.

The 90-day public comment period for proposed Regulation Best Interest will end in July 2018, at which point the Commission will proceed with finalizing the Rule.

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