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GUIDE: COVID-19 ACTION CENTER

## Reg BI: "Advisor" and "Broker" No Longer Interchangeable

The SEC weighs in on word choice and more.



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### Word Choice

There's a lot to know in the new rule, so find out which words are forbidden, and which conversations won't rise to the level of a "call to action."

Brokers who call themselves "advisors" may find themselves on the wrong side of the SEC soon.

The agency recently clarified its stance on the use of the word "advisor" versus "broker" as part of the [new Regulation Best Interest \(REG BI\) rules](#) that go into effect June 30, 2020. In a nutshell, unless you're registered as an investment advisor, you won't be able to use the word advisor (or adviser) in your name when dealing with retail clients.

Some industry groups requested more time to comply with Reg BI. The agency denied that request, but Chairman Jay Clayton left some wiggle room - albeit light

on details – for specific cases of firms being hampered by Covid-19. In public remarks, he said if a firm is unable to make certain filings because of disruptions caused by Covid-19, those firms should “engage with us.” He expects the commission to take firm-specific circumstances into account during examination and enforcement efforts, he said.

The SEC has an extensive list of [frequently asked questions](#) on its website, which it is updating periodically. Here is an edited version with a focus on the more recent additions.

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### **What does it mean for a retail customer to “use” a recommendation?**

If a retail customer already has a brokerage account, or opens one as a result of a recommendation, they are in a position to “use” a recommendation. The broker-dealer does not necessarily need to receive compensation. For instance, if you make a recommendation to a customer who then goes to another firm to do the transaction, Reg BI still applies to you because the client used a recommendation when they had an existing account with your firm.

### **In that scenario, does Reg BI also apply to the second firm?**

That depends on whether the second firm also made a recommendation to the customer. If the customer executes the transaction in a self-directed account, and the firm hasn’t recommended the transaction, the rule would not apply to it. But if the customer discussed the transaction with the second firm, and that communication rises to the level of a recommendation, the rule would apply.

### **Does Reg BI apply in any other situation involving client recommendations?**

There is also the possibility of Reg BI applying even if the client does not have an account with your firm if you will receive compensation directly or indirectly as a result of the recommendation.

### **Does Reg BI apply to a recommendation to a customer to open a self-directed brokerage account if subsequent recommendations will not be provided by the broker-dealer?**

Yes. A recommendation of a securities account (in this case, a self-directed brokerage account) is covered by Reg BI even if the broker-dealer does not intend to provide subsequent recommendations.

### **Does Reg BI apply to broker-dealers that make recommendations of private offerings to accredited investors?**

Yes, if that accredited investor is a “retail customer” as defined in the rule. The definition of “retail customer” does not exclude high net worth or accredited investors. Reg BI applies to broker-dealers that make recommendations of any securities transaction or investment strategy involving securities to retail customers.

**Can a retail customer waive the protections of Reg BI if they are not relying solely on the advice of the broker-dealer?**

No. A broker-dealer must comply with Reg BI, and a retail customer cannot waive the protections afforded by the rule.

**If I meet and talk with a prospective retail customer in an informal setting (e.g., on the golf course, at social gatherings, or while running errands), is my communication subject to Reg BI?**

Whether your communication is subject to Reg BI depends on whether you make a “recommendation,” not on the location or setting of the communication. Reg BI applies to a “recommendation of a securities transaction or investment strategy involving securities (including account recommendations) to a retail customer.” A factor to consider is whether the communication reasonably could be viewed as a call to action. The more individually tailored the communication to a specific customer, the greater the likelihood that the communication may be viewed as a recommendation.

**What’s an example of a communication that would not rise to the level of a recommendation?**

Suppose you meet a prospective retail customer at a dinner party. You could say, “I have been working with our mutual friend, Bob, for 15 years, helping him invest for his kids’ college tuition and for retirement. I would love to talk with you about the types of services my firm offers, and how I could help you meet your goals. Here is my business card. Please give me a call on Monday so that we can discuss.” Absent other factors, in the SEC staff’s view, this wouldn’t be a recommendation because it wouldn’t reasonably be viewed as a “call to action” to open an account or engage in a transaction.

**What if I jump ship and join a new firm? Can I call my existing clients and tell them about my move?**

This would be viewed similar to the question above. Reg BI would apply if you make a recommendation. The SEC staff understands it is common for an advisor to try to persuade clients to jump ship with them. That said, whether a communication involves a “recommendation” depends on the facts and circumstances of the particular communication.

**If I’m a broker-dealer and a state-registered investment advisor, can I use the title “advisor” in my name?**

Yes. In that case, a state-registered investment advisor would be considered to be “registered as an investment advisor” for purposes of this rule.

**QUICK POLL****What other regulatory issues would you like to read about?**

12B-1 FEES

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If you remember one thing...

After years of debate, putting clients' interests first will finally be codified by the SEC's Reg BI. Learn what you can say — and what you can't.



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