

Morgan Lewis

MEMORANDUM

TO: ML Retail Advice Working Group

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DATE: July 28, 2019 **Working Draft**

SUBJECT: SEC Standards of Conduct – Workstream Planning (Day One)

As firms plan to implement the SEC's Reg. BI, Form CRS, and IA interpretations across their platforms, we wanted to share lessons learned from the implementation of the DOL Rule, and our observations on how firms are structuring their workstreams to operationalize these new rules.

DOL Rule—What We Learned. Although experiences with consultants during the DOL Rule process appear mixed, one observation seems to resonate. **Firms would have liked to get to the bulk of the work sooner** (i.e., drafting client disclosures and communications, making systems changes, amending contracts, drafting field communications, and revising policies and procedures). As with any large project, there is a ramp-up period (to understand the new rules and make strategic decisions), but many of our clients expressed a desire to reduce this period to the extent possible to better take advantage of their resources earlier in the process.

SEC Rules—What are Firms Doing Now? In working with a number of firms on the SEC's rules, we are seeing firms prioritize work on tasks that (1) will have to be done regardless of the business strategy ultimately adopted, new guidance from the SEC, or how industry practices evolve, and (2) may need to be completed before the end of the year (in light of the 6/30/20 effective date).

Specifically, to better utilize firm resources during the ramp-up period for implementing these new rules, we are seeing firms start to perform the following:

- Client Facing Documents Catalog:** Identify and catalog existing client-facing agreements, disclosures and marketing materials into four main categories (the use of eRooms and similar are becoming popular):
 - Prospective clients
 - Client on-boarding
 - On-going/relationship maintenance/new recommendations
 - Documents related to FA recruits and transitions
- FA Titling:** Identify potential FA titling issues and cataloging changes in marketing and other materials that may need to be done.

3. **Conflicts/Compensation Database:** Establish and update conflicts database (look for consistency issues), including conflicts in four categories:
 - Firm
 - FA/Representative
 - Among clients
 - Different business segments (i.e., FA licensing issues, product selection, third-party compensation arrangements, robo and digital acquisitions)
4. **Policies & Procedures Work Plan:** Identify and catalog existing policies and procedures that will need to be modified, including, in particular, for suitability, conflicts mitigation, and disclosures, understanding that expected FINRA rule modifications based on Reg. BI will also have to be considered.
 - Consider issues for CFP Board standards, where applicable.
5. **Tech. Builds:** Identify where a tech build may be needed and consider lead times. Examples of areas of focus include: (1) Form CRS and Reg. BI disclosure delivery; (2) recordkeeping Form CRS for prospective customers; (3) documenting the basis for recommendations (SEC “encouraged” practice); (4) tools to aid FAs in meeting applicable standards.
6. **Business Frameworks/Form CRS & Reg. BI Disclosures:** Draft template/skeleton Form CRS for brokerage and advisory and prepare outlines of Reg. BI disclosures to aid in assessing business framework.
 - Based on our experience with the DOL Rule, business leaders will want to see these types of documents and disclosures as they choose and implement strategies.
7. **2020 Comp. Plan Strategy:** Given that firms generally set their FY 2020 compensation plans in the later part of 2019 (Q3 or Q4) and Reg. BI is scheduled to go into effect in 2020, firms will have to decide how they are going to handle this change sooner rather than later.
 - For the DOL Rule, which presented similar challenges, we saw a number of strategies used. These ranged from varying “wait and see” approaches to contingent arrangements that kicked in on the rule’s implementation date to material structural changes.
8. **Training Modules:** Identify and catalog FA training materials that will need to be modified (again, an eRoom could be helpful), including any scripts used for client interactions.
 - As the IA interpretation is already in effect, a particular focus should be on (i) the use of the words “fiduciary”, “best interest” and “recommendation” and (ii) how to deal with client acquisitions and account-type recommendations.
9. **BD to IA Conversions:** Review brokerage products/services to assess whether the “solely incidental” interpretation reclassifies current brokerage offerings (non-Series 65 sold products) into advisory platforms—noting that this interpretation is already effective.
 - We have already seen issues with certain types of historic brokerage services for plan participants.
10. **Rollovers/Account Recommendation Practices:** Review current practices for compliance under IA standard of conduct interpretation. Consider current tools.
11. **Dust off DOL Fiduciary Rule Solutions:** Although, at first glance, these rules are not as onerous as the DOL Rule, the devil may be in their enforcement. Many of the solutions proposed for the DOL Rule attempted to mitigate and

eliminate many conflicts present in the brokerage model, including through migration to the advisory model. Review of DOL Rule solutions at a high-level may help decision makers better understand their options and potential changes to the retail market.

As always, we are here to help.