

**Regulation Best Interest  
Disclosure Obligation Worksheet  
March 13, 2020 DRAFT**

We created the following Reg. BI disclosure obligation worksheet to help firms draft their required disclosures. The worksheet is based on required elements specified in the Adopting Release to Reg. BI.

**NOTE:** As business models vary significantly among firms, your disclosures will have to reflect your business in a fair and not misleading manner. Accordingly, this sample is not intended as a substitute for SEC guidance; please think of this as a starting point. You will need to draft and review your own disclosures with your own legal counsel and other advisors and we are here to help.

Please contact any of the Morgan Lewis attorneys listed below if you have any questions or comments about this worksheet and Reg. BI requirements.

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<i>Obligation</i>	<i>Description</i>	<i>SEC Commentary</i>	<i>Observations</i>	<i>Notes on Approach to Disclosure and Delivery</i>
<b>Capacity</b>	That the broker, dealer, or natural person is acting as a broker, dealer, or associated person of a broker or dealer with respect to the recommendation	<ul style="list-style-type: none"> <li>• Promote greater awareness among retail customers of the capacity in which their financial professional or firm acts with respect to recommendations.</li> <li>• So that the retail customer can more easily identify and understand their relationship, a goal shared with the Form CRS relationship summary.</li> <li>• A standalone broker-dealer will generally be able to satisfy by delivering Form CRS.</li> <li>• For dual-registrants and for associated persons who are either dually registered, or who are not dually registered, but offer services through a firm that is dually registered, Form CRS delivery is not sufficient.</li> <li>• Dual registrants must state whether they are acting as a broker-dealer or investment adviser.</li> <li>• Associated persons of dual registrants who do not offer advisory services must state that they are only acting as an associated person of a broker-dealer and must state that fact as a material limitation.</li> <li>• Presumption that using “advisor” or “adviser” by a broker-dealer that is not also registered as an investment adviser or a financial professional that is not also a supervised person of an investment adviser violates disclosure obligation. [See pp. 33,350-33,354 for more details.]</li> <li>• Disclosure may in part be made orally. For example, a broker-dealer may disclose that “All recommendations will be made in a</li> </ul>	<p>Consider approaches to capacity, including default capacity for particular interactions with retail investors.</p> <p>For single-registrant broker-dealers, delivering Form CRS should satisfy Reg. BI capacity disclosure.</p> <p>For dual-registrants, additional disclosure is needed, but firms can leverage Form CRS to set up approach to disclosure.</p>	

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		<p>broker-dealer capacity unless otherwise expressly stated at the time of the recommendation; any such statement will be made orally.” Similarly, “All recommendations regarding your brokerage account will be made in a broker-dealer capacity, and all recommendations regarding your advisory account will be made in an advisory capacity. When we make a recommendation to you, we will expressly tell you orally which account we are discussing.” In this instance, no further disclosure of capacity is necessary.</p>		
<p><b>Fees and costs</b></p>	<p>The material fees and costs that apply to the retail customer’s transactions, holdings, and accounts</p>	<ul style="list-style-type: none"> <li>• Goal of the disclosure is to help retail customers understand fees and costs, and to provide more individualized disclosure where appropriate.</li> <li>• Desire for greater fee transparency by building off fee and cost disclosures in Form CRS.</li> <li>• Fees and costs descriptions do not need to be individualized, can be standardized or hypothetical amounts, dollar or percentage ranges. May need to also include explanatory text where appropriate.</li> <li>• Clearly and accurately convey why, how, and when a fee is being charged to the retail customer.               <ul style="list-style-type: none"> <li>○ Clarify if fee is paid on a per-transaction or quarterly basis.</li> <li>○ Describing a commission or markup as a fee for “handling services”, could inappropriately disguise the fee’s true nature.</li> <li>○ If using a percentage or dollar range to describe a fee, range should be designed to reflect the actual fee charged, i.e. cannot say may charge between 5 and 100</li> </ul> </li> </ul>	<p>For a layered disclosure approach, provide disclosure of a range of product fees, and then supplement with more particularized information regarding the actual recommendation.</p> <p>Can utilize existing disclosure documents for subsequent information, such as trade confirmations, prospectus delivery, or fee schedules.</p>	

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		<p>basis points if in almost all instances the charge is between 85 and 100 basis points.</p> <ul style="list-style-type: none"> <li>○ Include fee triggering events, such as a fee imposed because an account minimum falls below a threshold and whether fees are negotiable or can be waived.</li> <li>● SEC best practice - review with retail customers on a periodic basis, the effect of fees and costs on the retail customer's account(s).</li> </ul>		
<b>Type and scope of services</b>	The type and scope of services provided to the retail customer	<ul style="list-style-type: none"> <li>● Expand upon the description of services and scope provided in Form CRS with a focus on services that are actually available to the retail customer.</li> <li>● Account Monitoring: <ul style="list-style-type: none"> <li>○ Types of account monitoring services (if any) provided,</li> <li>○ Whether or not the firm will be providing monitoring services for the particular retail customer's account, and</li> <li>○ Frequency and duration. [Example language on pg 33358]</li> </ul> </li> <li>● Account Balance Requirements: <ul style="list-style-type: none"> <li>○ Clarify requirements (if any) for opening or maintaining an account or establishing a relationship</li> <li>○ Minimum account size, dollar threshold, or other requirements to avoid additional fees when a threshold is crossed (e.g. a "low account balance" fee).</li> <li>○ Address when standardized disclosures will not apply and how the retail customer will be notified. Example of standardized risk disclosure on pg 33,359.</li> <li>○ See footnote 414 for examples of currently required risk disclosures that can be relied upon.</li> </ul> </li> <li>● Material Limitations:</li> </ul>	<p>Can leverage existing disclosure documents, such as account opening agreement or other account opening related documents.</p> <p>Must clearly state scope of services provided by the particular associated person, may need specific supplemental disclosures.</p>	

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		<ul style="list-style-type: none"> <li>○ Describe the material facts relating to limitations on the securities or strategies the firm offers.</li> <li>○ Examples of material limitations, pg 33,357:               <ul style="list-style-type: none"> <li>▪ Recommending only proprietary products (e.g., any product that is managed, issued, or sponsored by the broker-dealer or any of its affiliates).</li> <li>▪ Recommending a specific asset class, or products with third-party arrangements (e.g., revenue sharing, mutual fund service fees).</li> <li>▪ Recommendations of only products from a select group of issuers.</li> <li>▪ Limited availability of IPOs to certain retail customers.</li> <li>▪ If associated person is dually registered, but only offers brokerage and not advisory services.</li> <li>▪ If the associated person’s offerings differ from the offerings of the firm.</li> </ul> </li> </ul>		
<b>Other Material Facts</b>	Other material facts related to the scope and terms of the relationship	<ul style="list-style-type: none"> <li>● Basis for and risks associated with the recommendation               <ul style="list-style-type: none"> <li>○ Explain the general basis of the firm’s or associated person’s recommendations, the investment approach, philosophy, or strategy.</li> <li>○ May need to disclose if associated person has a different investment philosophy from the firm.</li> <li>○ Risk Disclosure: Can describe product-level risks in standardized terms, with additional information available in existing disclosures, e.g. issuer disclosures or private placement documents.</li> </ul> </li> </ul>	Consider whether there may be other material facts beside basis for and risks associated with the recommendation.	

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Conflicts of interest	All material facts relating to conflicts of interest that are associated with the recommendation	<ul style="list-style-type: none"> <li>• Disclosure “should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.”</li> <li>• Definition of “conflict of interest” associated with a recommendation “as an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer— consciously or unconsciously—to make a recommendation that is not disinterested”, based off <i>SEC. v. Capital Gains Research Bureau</i>.</li> <li>• Build off conflicts identified in Form CRS; discuss additional conflicts and provide more information about the conflicts included in Form CRS.</li> <li>• Summary of compensation and incentives should include (if applicable):               <ul style="list-style-type: none"> <li>○ The sources and types of compensation received (e.g. compensation through sale of securities or product, asset based sales charges or service fees on mutual funds),</li> <li>○ How associated persons are compensated,</li> <li>○ Fees and costs paid directly or indirectly by retail customer, and/or</li> <li>○ Any variation of compensation by product or professional.</li> </ul> </li> <li>• Standardized disclosure may need to be supplemented.               <ul style="list-style-type: none"> <li>○ For example, regarding mutual fund transactions and holdings, can broadly disclose compensation by the fund out of product fees or funds’ sponsor, which can incentivize a recommendation of that product. Then supplement the disclosure with specific details about the compensation arrangements regarding the</li> </ul> </li> </ul>	<p>Conflicts disclosure in Form CRS will need to be supplemented.</p> <p>Associated person’s supplemental disclosures may vary based on compensation arrangements/structure.</p>	

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		<p>recommendation of a particular fund, like revenue sharing associated with the fund family.</p> <ul style="list-style-type: none"> <li>○ If at the outset, the relationship with the mutual fund is disclosed, then do not need to provide further disclosure.</li> <li>● Refrain from use of word “may” if an actual conflict exists.</li> </ul>		