



Retirement Guidance

THE SEC'S NEW INVESTMENT ADVICE RULES ARE HERE. HOW DO THEY IMPACT YOUR RETIREMENT PLAN?

The Securities and Exchange Commission (SEC) released its final package of regulations and interpretations (the package) dealing with the duties broker dealers (BDs) and registered investment advisors (RIAs) owe to their customers, including individual retirement plan participants. The package impacts investment professionals regulated by the SEC and is not intended to regulate retirement plan sponsors. However, it does impact the advice plan participants may get, and employers should be generally aware of the rule. More importantly, the Department of Labor (DOL) is currently working to issue its own fiduciary regulation, expected in December, that parallels the SEC package and will clearly impact retirement plan sponsors.

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What's in the SEC package

The package is nearly 800 pages long, with only about six pages including actual regulations. The remainder of the package is made up of SEC commentary, analysis and explanatory notes.

There are four distinct parts:

- **REGULATION BEST INTEREST:** Requires BDs to act in the best interest of a retail customer at the time of a recommendation without placing the BD's financial or other interests ahead of the customer. BDs must maintain and enforce additional policies and procedures reasonably designed to achieve compliance by June 30, 2020.
- **FORM CRS RELATIONSHIP SUMMARY AND FORM ADV AMENDMENTS:** Requires both BDs and RIAs to deliver a relationship summary or "Form CRS" to "retail investors." Firms will be required to file (and periodically update) Form CRS with the SEC. Form CRS is intended to be a document provided at the beginning of a relationship with a broker or investment advisor that provides a summary of the firm's offerings. This requirement begins June 30, 2020.
- **NEW GUIDANCE ON THE STANDARD OF CONDUCT FOR INVESTMENT ADVISERS:** The following clarifications on the fiduciary duties of RIAs are effective immediately:
 - RIAs are fiduciaries with a duty of care that includes the duties to provide investment advice in a client's best interest, seek best execution of client transactions, and provide advice and monitoring over the course of a relationship.
 - There is no obligation to update a client's profile for one-time investment advice.
 - The duty of loyalty requires an RIA to "eliminate or make full and fair disclosure of all conflicts of interest" that might incline the RIA to provide conflicted advice. This disclosure must be "sufficiently specific so that a client is able to understand the material fact or conflict of interest" to provide informed consent. If the RIA cannot fully and fairly disclose the conflict, they must eliminate or adequately mitigate the conflict.
 - An advisor's fiduciary duty includes advice about opening investment accounts and rollovers.
- **NEW GUIDANCE ON BROKER-DEALER EXCLUSION FROM THE DEFINITION OF INVESTMENT ADVISOR:** The following clarifications related to BDs' ability to provide advice without becoming subject to the Investment Advisers Act and its fiduciary duties are effective immediately:
 - BDs can provide investment advice if providing advice is not their primary business or if the advice is reasonably related to effecting securities transactions. The amount of advice given is not the determinative factor. However, a BD cannot provide "unlimited discretion" and stay within the exception. Any ongoing advice must be limited to time, scope and other features that are not "comprehensive and continuous."
 - BDs can provide ongoing monitoring services for the purpose of making buy, hold or sell recommendations, but such monitoring should never be ongoing, and BDs cannot charge a fee for monitoring services.



Are retirement plans impacted?

Yes. Unlike the DOL, the SEC's authority extends to protecting retail customers, which includes individuals receiving a recommendation or advice and who will use it primarily for personal, family or household purposes. As a result, the package will impact any BD or RIA providing recommendations to your individual plan participants, as they are considered retail investors, but does not impact the advice given to institutional customers such as retirement plan fiduciaries.

Retirement plans need to evaluate the impact in situations where their plan offers participant level advice through the recordkeeper or a third party, likely in one-on-one meetings or via call centers. The SEC package directly touches any participant advice pertaining to rollovers, investment allocations and distributions. In those situations, the Regulation Best Interest may result in changes to how advice providers interact with plan participants. In addition, a conservative approach is to assume that ERISA's general duty to monitor service providers extends to a plan fiduciary's obligation to ensure the advice provider is complying with these new rules.

Plan sponsor action steps

The Regulation Best Interest and Form CRS requirements become effective June 30, 2020. With such a significant set of changes, compliance in that short time frame will be challenging, and the SEC has indicated that it will be providing compliance assistance. We expect that BDs and RIAs who provide participant level advice services to retirement plans will be reviewing the rule and working quickly to evaluate and implement any necessary changes. Many have been preparing since the draft rule came out last year. If you have participant advice built into your plan, we recommend you:

- Request the advice provider comply with the new regulations.
- Determine if the advice provider appears to be taking proper action.
- Document this process in your fiduciary files.

Lockton's take

This is the latest turn in the path plan sponsors have been traveling for more than a decade. The DOL started its attempt to protect individual investors a decade ago, only to see its efforts halted in the courts. What is glaring here is that the SEC declined to create a uniform fiduciary standard of conduct between BDs and RIAs. Under the package, BDs are required to act in a client's best interest and RIAs are fiduciaries. Tired of this confusion, several states are passing their own regulations, and the SEC package does not preempt them from doing it. With the DOL's reproposal looming, we expect to see lawsuits challenging the SEC's package of changes. If past events are an indicator of future results, this is far from over. Should you have any questions, please contact your Lockton Retirement Services Team.

PROTECTION FOR CLIENTS' BUSINESSES. SECURITY FOR THEIR EMPLOYEES.

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