



ANALYSIS OF SEC RESPONSES TO NAGDCA'S COMMENTS ON REG BI

On June 5, 2019, the Securities and Exchange Commission (“SEC”) finalized and adopted its long awaited best interest standard of conduct and procedures for broker-dealers when advising retail customers. Commonly referred to as the Regulation Best Interest (“Reg BI”), it enhances the standard of conduct imposed on a broker-dealer when making a recommendation to a retail customer of any securities transaction or securities investment strategy.¹ It aligns a broker-dealer’s standard of conduct with a retail customer’s reasonable expectation that a broker-dealer act in the best interest of the retail customer at the time the recommendation is made without regard to the financial or other interest of the broker-dealer.²

The finalized regulation sets forth certain principles and disclosure obligations on broker-dealers when offering investment recommendations so that the interest of the firm or the financial professional is never placed ahead of a retail customer.³ Accordingly, regardless of which broker-dealer is chosen for a recommendation, the retail customer is assured that the recommendation is transparent to any conflicts of interest and understood to be in such retail customer’s best interest. The Reg BI is effective September 10, 2019 but imposes a compliance date of June 30, 2020.⁴

The Reg BI reflects certain proposed changes offered by public comment in response to the proposed regulation published on April 18, 2018. The Reg BI also articulates the SEC’s rationale as to why certain suggested changes did not make its way into the finalized version. In response to the draft regulation, the National Association of Government Defined Contribution Administrators (“NAGDCA”) issued a letter dated August 7, 2018 to the Secretary of the SEC, Mr. Brent J. Fields (“SEC Letter”). Due to the unique governance and oversight structure of governmental plans, NAGDCA raised a number of questions as to the how the broker-dealer disclosure obligations would apply to governmental plans sponsored by state or local governments under the anticipated Reg BI.

NAGDCA specifically sought guidance as to “How Will Regulation Best Interest Apply to DC Plans, Sponsors, Representatives and Participants” as it relates to a broker-dealers’ recommendations. Specifically, NAGDCA asked the following: (1) Who is a “Retail Customer” Under Regulation Best Interest; (2) Who is a “Legal Representative” Under Regulation Best Interest; and (3) What “Uses” of a Recommendation Are Covered by Regulation Best Interest.” Other questions included how the final regulation defines the terms “recommendation,” “retirement account,” and “retirement investments.” NAGDCA also sought clarification that plan educational materials and pure distribution recommendations are not “recommendations” subject to Reg BI as well as how Reg BI applies to rollovers. Finally, NAGDCA asked how the Form CRS delivery requirements would apply to DC plans and/or participants?

The manner in which the Regulation Best Interest (Reg BI) addressed these questions are discussed below.

¹ Regulation Best Interest, Exchange Act Release No. 86031 (June 5, 2019) (adopting rule 15l-1 under the Exchange Act (“Regulation Best Interest”)) at p. 1.

² *Id.*

³ *Id.*

⁴ *Id.* at p. 372. The SEC believes that “this compliance date will provide adequate notice and opportunity for broker-dealers to comply with newly enacted rules.”

ISSUE	COMMENTS	FINAL RULE
<p style="text-align: center;">HOW WILL REGULATION BEST INTEREST APPLY TO GOVERNMENTAL DC PLANS, SPONSORS, REPRESENTATIVES AND PARTICIPANTS</p>	<p>Retirement Plans Participants.</p> <p>NAGDCA sought clarification as to whether the definition of a <i>Retail Customer</i>, as proposed in the draft, covered DC Plans, Sponsors, Representatives, Service Providers, and/or Participants.⁵</p> <p>1. <i>How Will Regulation Best Interest Apply to DC Plans, Sponsors, Representatives and Participants</i></p> <p>a. <i>Who Is a “Retail Customer” Under Regulation Best Interest</i></p>	<p>The finalized Regulation Best Interest (Reg BI) modified the definition to clarify the scope of the term “Retail Customer.” To emphasize the personalized nature of the regulation, the final draft adds the term “natural person”.⁶ A Retail Customer is defined as: A natural person, or the legal representative of such natural person, who (A) receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer, or a natural person who is an associated person of a broker or dealer; and (B) uses the recommendation primarily for personal, family, or household purposes.</p> <p>The preamble confirms that DC Plan participants are retail customers covered by Reg BI and that Reg BI applies to retirement accounts – i.e., IRAs and individual accounts in workplace retirement plans. Under Reg BI, a workplace retirement plan includes “any arrangement available at a workplace that provides retirement benefits or allows savings for retirement, including, for example, . . . deferred compensation plans of state and local governments and tax-exempt organizations described by Code section 457.”⁷ Reg BI will also apply to other tax-favored arrangements such as Archer MSAs, HSAs (and similar arrangements), Coverdell ESAs, and 529 plans. 403(b) insurance contracts that are not securities are not addressed.</p> <p>However, a Participant <i>could</i> be considered a <i>Retail Customer</i> under Reg BI. since investment recommendations received by a Participant within a §457 plan would implicate the broker-dealers obligations furthered by the regulation.⁸ Reg BI provides that a “plan participant receiving recommendations about whether to take a distribution from a 401(k) or other workplace retirement plan and how to invest that distribution would be covered as retail customers.”⁹</p> <p>A Participant would be treated as a <i>Retail Customer</i> in cases where a recommendation is obtained with respect to the Participant’s individual account held in a workplace retirement plan.¹⁰ Provided the elements , as described in the first paragraph above, are present, a Participant of a DC Plan could be considered a <i>Retail Customer</i> when obtaining investment direction, choices, or recommendation through a DC Plan under Reg BI. For the sake of clarity, the</p>

⁵ The capitalized terms DC Plans, Sponsors, Representatives, Service Providers and Participants have the same meaning and use as found in the SEC Letter.

⁶ Regulation Best Interest at p. 108.

⁷ *Id.* at p. 116 note 250.

⁸ *See Id.* at 116, n. 250.

⁹ *Id.* at 117.

¹⁰ *Id.*

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		NAGDCA Legislative Committee will consider whether further guidance is needed with respect to a Participant functioning within a DC Plan environment.
	<p>Retirement Plan Representatives. NAGDCA’s letter asked the SEC to confirm that Reg BI would not apply to retirement plan representatives (e.g., employers, advisers, and consultants) since they do not meet the definition of “retail customer.” Thus, recommendations to plan representatives would not be covered by the regulation.</p>	<p>A <i>Retail Customer</i> would not include a Plan or a Sponsor as they are not a natural person.¹¹ A <i>Retail Customer</i> would also not include a Representative or a Service Provider as such persons are not functioning in the capacity of a customer nor receiving investment recommendations within the context of the DC Plan for primarily personal, family, or household purposes.¹² However, a Representative who is a sole proprietor or other self-employed individual is considered a retail customer for purposes of Reg BI. While we generally don’t expect this would include NAGDCA member DC Plans, we felt it was worth noting nonetheless.</p>
	<p>Legal Representatives. NAGDCA’s SEC Letter noted the limited guidance on the meaning of a <i>Legal Representative</i> of a natural person for purposes of the Retail Customer definition.</p> <p><i>b. What Is a Legal Representative Under Regulation Best Interest?</i></p>	<p>Reg BI clarifies the SEC’s view that only non-professional representatives were intended to be covered by the term <i>Legal Representative</i>.¹⁴ This would include executors, conservators, a non-professional trustee that represents the assets of a natural person, and persons holding a power of attorney for a natural person. This aligns with expectations articulated by NAGDCA in its SEC Letter.¹³</p> <p>By limiting the definition to non-professionals, the SEC recognizes that the transparency protections offered by the Regulation Best Interest also need to be extended to non-professional legal representatives of a natural person who rely directly on the broker dealer for a recommendation.¹⁴</p> <p>Professional representatives such as registered investment advisors, broker-dealers, corporate fiduciaries (e.g., banks, trust companies and similar financial institutions), and corporate fiduciaries, would benefit little from being a beneficiary of the Reg BI, as may be inferred from the SEC’s decision. In addition, such professional representatives are subject to their own obligations to their retail customers separate and apart from Reg BI and any disclosure information received may then be duplicative and unnecessary.¹⁵</p>

¹¹ *Id.* at pp. 117-119.

¹² *Id.*

¹³ See SEC Letter at p. 3.

¹⁴ Regulation Best Interest at 114.

¹⁵ *Id.* at 115; see also *See Form CRS Relationship Summary; Amendments to Form ADV* Exchange Act Release No. 86032, Advisers Act Release No. 5247, File No. S7-08-18 (June 5, 2019) (“Relationship Summary Adopting Release”).

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	<p><i>c. What “Uses” of a Recommendation Are Covered by Regulation Best Interest?</i></p> <p>NAGDCA asked whether recommendations made to a Sponsor or Representative in connection with the establishment and operation of a DC Plan would be construed as a use of a recommendation that would evoke Reg BI.</p> <p>What is a recommendation in the context of DC plans and participants?</p>	<p>Reg BI does not treat such a use by a Sponsor or Representative as a covered “use.” The SEC interprets the term <i>Use</i> within the context of a natural person’s conduct as it relates to his or her own personal, household, or family use.¹⁶ To be covered as a <i>Use</i> for purposes of the <i>Retail Customer</i> definition, the natural person, upon receipt of the recommendation either (1) opens a brokerage account with the broker-dealer, regardless of whether the broker-dealer receives compensation, (2) has an existing account with the broker-dealer and receives a recommendation from the broker-dealer, regardless of whether the broker-dealer receives or will receive compensation, directly or indirectly, as a result of that recommendation, or (3) the broker-dealer receives or will receive compensation, directly or indirectly as a result of the recommendation, even if the retail customer does not have an account at the firm.¹⁷</p> <p>Based on these factors, the actions taken by a Sponsor or Representative in the establishment and operation of a DC Plan should not be subject to Reg BI.¹⁸ The Sponsor is not a natural person and therefore exempt. Likewise, any actions taken by the Representative, who may be a natural person, on behalf of the Sponsor with respect to the DC Plan would not qualify as a covered <i>Use</i> as any use would not be associated with the Representative’s personal, household or family use, but rather for the benefit of the DC Plan.¹⁹</p> <p>The final regulations do not expressly define the activities and communications that will be treated as a “recommendation.” Like the proposal, the preamble explains the existence of a “recommendation” will be determined based on existing SEC and FINRA precedent interpreting that concept. To that end, the determination of whether a broker-dealer has made a recommendation that triggers application of Reg BI should turn on the facts and circumstances of the particular situation and therefore, whether a recommendation has taken place is</p>

¹⁶ Regulation Best Interest at 120.

¹⁷ *Id.* at 120-121.

¹⁸ We note that the SEC pointed out that the Department of Labor has rules currently in place that address how plan representatives operate participant-directed plans and select investment menus for such plans what actions, including disclosures, plan representatives must take to be able to raise a defense or claim for investment losses by a participant or beneficiaries, and also generally require broker-dealers making investment alternatives available for a participant-directed plan to disclose in writing (among other things) all direct and indirect compensation received in connection with providing plan services. While the Department of Labor’s oversight is confined to plans covered by ERISA, some government DC Plans may, in part, adopt ERISA principles.

¹⁹ In the DC Plan context, a Representative would not be receiving recommendations from a broker-dealer for his or her own account and considerations material to the Representative’s investment decisions differ from a situation in which a retail customer/Participant who receives a recommendation from a broker-dealer for his or her own account. *See Id.* at p. 118, n. 253.

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	<p>What is the definition of “retirement account”?</p> <p>What is the definition of “retirement investments”?</p>	<p>not susceptible to a bright line definition. Factors considered in determining whether a recommendation has taken place include whether the communication “reasonably could be viewed as a ‘call to action’” and “reasonably would influence an investor to trade a particular security or group of securities.” The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a “recommendation.”²⁰</p> <p>The SEC confirmed “personal, family or household purposes” would cover retirement accounts, as retirement savings is a personal, household or family purpose. Accordingly, the definition of retail customer will include a natural person receiving recommendations for his or her own retirement account, including but not limited to IRAs and individual accounts in workplace retirement plans, such as 401(k) plans and other tax-favored retirement plans. “In response to commenters, we also clarify that workplace retirement plans include any arrangement that provides retirement benefits or allows saving for retirement, including, any 401(k) plans or other plan that meet requirements for qualification under Code §401(a), deferred compensation plans of state and local governments and tax-exempt organizations described by Code §457, and annuity contracts and custodial accounts described by Code §403(b).”²¹</p> <p>No definition is provided. Footnote 172 is the only place in the rule that uses the term retirement investments as it applies to Reg BI. It provides: “Although FINRA has stated that a recommendation concerning the type of workplace retirement plan account in which a customer should hold his retirement investments typically involves a recommended securities transaction, and thus is subject to suitability requirements, FINRA did not address whether such a recommendation would be an investment strategy in the absence of such a recommended securities transaction. FINRA Regulatory Notice 13-45, Rollovers to IRAs – FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers (Dec. 2013).”²²</p>

²⁰ *Id.* at p. 79.

²¹ *Id.* at p. 116 n 250.

²² *Id.* at p. 85 n 172.

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	<p>Clarification that plan educational materials are not recommendations subject to Reg BI.</p> <p>NAGDCA’s letter asked for clarification that certain beneficial conversations regarding retirement accounts would not involve a recommendation covered by Reg BI.</p>	<p>The preamble to the final regulations includes a description of the types of communications the SEC generally views as falling outside the scope of a “recommendation.” This exclusion covers communications excluded under FINRA Rule 2111.03, including: “Descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan.”</p> <p>The final regulations include a footnote stating: “communications regarding participation in a plan and communications to make or increase plan contributions, without more, would generally not come within ‘recommendation.’” The NAGDCA Legislative Committee will consider whether to seek further clarification on what is meant by “without more.” For example, the final regulations make clear that recommendations of securities account types (e.g., to open an IRA or other brokerage account) and recommendations to roll over or transfer assets from one type of account to another (e.g., a workplace retirement plan account to an IRA) will be covered by Reg BI, regardless of whether such recommendations are tied to a specific securities transaction.</p> <p>“Some commenters also sought an explicit carve out or confirmation that certain communications, such as general education materials, general retirement planning materials, or general retirement communications, including “pure distribution recommendations,” are not “recommendations” subject to Reg BI.²³</p> <p>“The treatment of certain communications as “education” rather than “recommendations” is well understood by broker-dealers. We generally view the following types of communications as not being recommendations of any securities transaction or investment strategy involving securities as long as they do not include, standing alone or in combination with other communications, a recommendation of a particular security or securities or particular investment strategy involving securities:</p> <p>General financial and investment information, including: basic investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment, historic differences in the return of asset classes (e.g., equities, bonds, or cash) based on standard market indices, effects of inflation, estimates of future retirement income needs, and assessment of a customer's investment profile;</p>

²³ *Id.* at pp. 88-89.

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	<p>Clarification that plan educational materials are not recommendations subject to Reg BI continued:</p>	<p>Descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan; Asset allocation models that are: based on generally accepted investment theory, accompanied by disclosures of all material facts and assumptions that may affect a reasonable investor's assessment of the asset allocation model or any report generated by such model, and in compliance with FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an “investment analysis tool” covered by FINRA Rule 2214; and Interactive investment materials that incorporate the above.</p> <p>Thus, for example, a general conversation about retirement planning, such as providing a company’s retirement plan options to a retail customer, would not, by itself, rise to the level of a recommendation. Similarly, where a broker-dealer informs a retail customer that he or she needs to take a required minimum distribution under the Internal Revenue Code, we would not interpret such communication, by itself, to rise to the level of a recommendation.</p> <p>Such a communication would be considered investment education or descriptive information, provided it does not involve, for example, a recommendation regarding specific securities to be sold or a recommendation regarding specific securities to be purchased with the proceeds of any sale.</p> <p>We agree with commenters that Reg BI should not stifle investment education as a means to encourage financial wellness, or otherwise restrict broker-dealers from disseminating information about, for example, retirement plans, and the approach we are taking to what is or is not considered a ‘recommendation’ achieves this goal.”²⁴</p>
	<p>Distribution Recommendations. NAGDCA’s letter urged the SEC to clarify that pure distribution recommendations would not be recommendations covered by Reg BI.</p>	<p>The preamble explains that a recommendation generally does not include a broker-dealer informing a retail customer that he or she needs to take a required minimum distribution under the Internal Revenue Code. For example, where a broker-dealer informs a retail customer that based on age and other relevant factors, he or she needs to take a required minimum distribution, but does not otherwise recommend specifics, such as what securities to sell, or where to place the proceeds, the communication would generally not be a “recommendation” subject to Reg BI. Such communication, “by itself,” would not be a recommendation because it is “education” or “descriptive information.”</p>

²⁴ *Id.* at pp. 89-91.

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		<p>However, it would be a recommendation if it involves, for example, a recommendation regarding specific securities to be sold or a recommendation regarding specific securities to be purchase with the proceeds of any sale.²⁵</p> <p>The preamble goes on to explain that “informing a retail customer about a required minimum distribution may become a recommendation where a broker-dealer includes (standing alone or in combination with other communications) a recommendation of, or regarding, a particular security or securities or an investment strategy involving securities.”²⁶ The preamble also explains that “recommendations to retail customers to take distributions from proceeds of specific securities or to take in-service loans from an employer-sponsored plan are recommendations of a securities transaction, as they would involve recommendations to sell a security.”²⁷</p> <p>Also, Reg BI expressly applies to recommendations to take a plan distribution for the purpose of opening a securities account.²⁸</p>
	<p>Rollover Recommendations. NAGDCA’s letter asked how Reg BI will apply to rollovers.</p>	<p>Several commenters sought clarity regarding whether and when a rollover or account type recommendation would be a “recommendation” under Reg BI.²⁹ Recommendations of account types, including recommendations to roll over or transfer assets from one type of account to another.</p> <p>“We are modifying Reg BI to expressly apply to account recommendations including, among others, recommendations to roll over or transfer assets in a workplace retirement plan account to an IRA, recommendations to open a particular securities account (such as brokerage or advisory), and recommendations to take a plan distribution for the purpose of opening a securities account. We are also providing guidance under the Care Obligation on what factors a broker-dealer generally should consider when making such recommendations.”³⁰</p> <p>“After careful consideration of comments and feedback, the Commission has modified the rule text to state that an “investment strategy involving securities” includes “account recommendations.” We interpret “account recommendations” to include recommendations by broker-dealers of securities account types</p>

²⁵ *Id.* at p. 91.

²⁶ *Id.* at p. 91 note 183.

²⁷ *Id.* at p. 107.

²⁸ *Id.* at p. 34.

²⁹ *Id.* at p. 93.

³⁰ *Id.* at p. 34.

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		<p>generally, as well as recommendations to roll over or transfer assets from one type of account to another (e.g., workplace retirement plan account to an IRA).</p> <p>In addition, the Commission is stating its view that “any securities transaction or investment strategy involving securities” not only includes explicit hold recommendations, but also includes implicit hold recommendations that are the result of agreed-upon account monitoring between the broker-dealer and retail customer.”³¹</p> <p>“Although account recommendations, including recommendations of a securities account type generally, as well as recommendations to roll over assets from a workplace retirement plan account to an IRA or to open an IRA held at the broker-dealer, will almost always involve a “securities transaction” (such as a securities purchase, sale, or exchange), and thus would generally be subject to Regulation Best Interest, we are modifying the rule text to provide that such recommendations are “investment strategies involving securities” for purposes of Regulation Best Interest, regardless of whether they are tied to a specific securities transaction.”³² Further, “[a] recommendation that a retail customer roll over or transfer assets to an IRA held at the broker-dealer, or open an IRA or another securities account with a broker-dealer, presumes that the recommendation would involve transactions in securities, even if the rollover or account recommendation does not result in transactions or transaction-based compensation.”³³</p> <p>Reg BI is a higher standard for rollovers than existing "suitability" standard for brokers. Based on the adopting release for Reg BI, the new rules include three elements of a rollover recommendation: (1) to take money out of a plan (i.e., if it's not in a participant's best interest to be in the plan); (2) put that money in an IRA (i.e., if the IRA is the best place to put the money); and (3) invest the money (i.e., investment choice).</p> <p>Broker-dealers can't rely on an IRA having more investment options than an employer's plan as "the basis for recommending a rollover." In addition to number of investment options, other requirements apply, such as: consideration of a participant's investment profile, and the potential risks, rewards and costs of a particular security or investment strategy. SEC applies cost to be a "fairly</p>

³¹ *Id.* at pp. 93-94.

³² *Id.* at p. 96.

³³ *Id.* note 194.

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		<p>significant factor" in assessing such recommendations, because IRAs are almost always more expensive than those in employer plans.</p> <p>Brokers must do a comparative analysis between a client's plan and an IRA based on several factors, including fees and expenses; level of service available; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; holdings of employer stock; and any "special features" of the existing account.</p> <p>This list isn't exhaustive, according to the SEC, and some factors may have more or less relevance given the particular client. NAGDCA's Legislative Committee will consider whether it can provide a draft comparative analysis in response.</p>
<p>APPLICATION OF FORM CRS TO DC PLAN PARTICIPANTS</p>	<p>Will Form CRS Delivery Requirements Apply to DC plans and/or Participants?</p> <p>NAGDCA's letter asked the SEC to clarify whether retirement plan participants are "retail investors" for purposes of the Form CRS delivery requirement.</p>	<p>The final regulations generally exclude retirement plan participants from the Form CRS delivery requirement, unless a participant is seeking to select or retain a firm to provide brokerage or advisory services. In this regard, a retirement plan participant will generally not be treated as a "retail investor" for purposes of the Form CRS delivery requirement, but will be treated as a "retail customer" for purposes of Reg BI if a broker-dealer makes a recommendation to such participant.</p> <p>The preamble to the final regulations specifically indicates that broker-dealers are not required to furnish Form CRS to retirement plan participants when participants are making "certain ordinary plan elections that do not involve selecting or retaining a firm to provide brokerage or advisory services." Ordinary plan elections, for this purpose, include "a participant's decision to invest through a self-directed brokerage account and a participant's selection of an in-plan managed account service, where a plan representative retains and supervises the broker-dealer or investment advisory firm providing such services to the plan."³⁴ The SEC did not defined "supervises" in this context and NAGDCA's Legislative Committee will consider whether to provide additional information to the SEC on how brokerage windows are reviewed by DC Plan fiduciaries.</p> <p>The preamble to the final regulations also says: "Even if a financial professional or other firm representative assists a participant directly, e.g., at an enrollment</p>

³⁴ Form CRS Relationship Summary; Amendments to Form ADV. at p. 199.

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		<p>meeting or through a call center interaction, the participant generally would not be making the type of account or firm choice contemplated by a relationship summary because the plan’s sponsor or another representative designated by the terms of the plan (e.g., a trustee or other fiduciary or other responsible party) (a ‘plan representative’) already has selected the firm, has negotiated the terms of service, and remains responsible for supervising the firm.”</p> <p>The SEC did note, however, that the relationship summary applies when retail investors seek services for their retirement accounts as well as non-retirement accounts because retirement savings is a personal, household or family purpose. Accordingly, the definition of retail investor will include a natural person seeking to select and retain a firm to provide brokerage or advisory services for his or her own retirement account, including but not limited to IRAs and individual accounts in workplace retirement plans, such as 401(k) plans and other tax-favored retirement plans. For example, firms will be required to deliver a relationship summary to plan participants seeking advice about whether to take a distribution from a 401(k) plan or other workplace retirement plan and how to invest that distribution. Similarly, a firm will be required to deliver a relationship summary to a plan participant seeking to retain the firm to provide brokerage or advisory services for the participant’s individual account held in a 401(k) plan or other workplace retirement plan.³⁵</p>
	<p>Investment Advisers</p>	<p>The preamble to the final regulations confirms that broker-dealers and investment advisers will generally not be required to deliver Form CRS to retirement plans and their representatives, because such plans and their representatives will not be “retail investors,” as they generally do not seek services primarily for personal, family, or household purposes.</p> <p>The preamble does note, however, that broker-dealers and investment advisers will be required to deliver Form CRS to plan representatives to the extent that such representatives are sole-proprietors or other self-employed individuals who participate in the plan and decide the service arrangements for such plan.</p>

³⁵ Regulation Best Interest. at pp. 197-198

In sum, DC Plan Sponsors generally do not meet the definition of “retail customer” and thus will not be impacted by Reg BI. Reg BI does expressly apply, however, to recommendations made to DC Plan participants, including, among others, recommendations to roll over or transfer assets in a workplace retirement plan account (including, “any arrangement available at a workplace that provides retirement benefits or allows savings for retirement, including, for example, . . . deferred compensation plans of state and local governments and tax-exempt organizations described by Code section 457.”) to an IRA, recommendations to open a particular securities account (such as brokerage or advisory), and recommendations to take a plan distribution for the purpose of opening a securities account. Additionally, retirement plan participants are generally excluded from the definition of “retail investor” and are thus excluded from the Form CRS delivery requirements. The relationship summary does, however, apply when retail investors seek services for their retirement accounts as well as non-retirement accounts because retirement savings is a personal, household or family purpose. Accordingly, the definition of retail investor will include a natural person seeking to select and retain a firm to provide brokerage or advisory services for his or her own retirement account, including but not limited to IRAs and individual accounts in workplace retirement plans, such as 401(k) plans and other tax-favored retirement plans. For example, firms will be required to deliver a relationship summary to plan participants seeking advice about whether to take a distribution from a 401(k) plan or other workplace retirement plan and how to invest that distribution. Similarly, a firm will be required to deliver a relationship summary to a plan participant seeking to retain the firm to provide brokerage or advisory services for the participant’s individual account held in a 401(k) plan or other workplace retirement plan.

This analysis, and NAGDCA’s 2018 comments on the proposed regulation, were prepared by an ad hoc work group convened by the NAGDCA Legislative Committee: R. Keith Overly, Ohio Deferred Compensation; Cindy Rehmeier, Missouri State Employees’ Retirement System; Sandy Blair, California State Teachers’ Retirement System; Reid Chisholm, Office of the North Carolina State Treasurer; Charles Hong, Office of the Los Angeles City Attorney; Marilyn R. Collister, Empower Retirement and Marla J. Kreindler, Brian J. Baltz and Matthew J. Wolock, Morgan, Lewis & Bockius LLP. NAGDCA is grateful to each of them for generously sharing their expertise.
