

SEC Keeps June 30 Deadline for Complying With Regulation Best Interest Despite COVID-19

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On April 2, Securities and Exchange Commission (SEC) Chairman Jay Clayton [announced](#) that despite the COVID-19 emergency, the SEC will not extend the June 30 deadline for compliance with Regulation Best Interest (Reg BI) and Form CRS. Although the SEC will take into consideration requests for additional time on a case-by-case basis, as a general matter, it will expect registered broker-dealers and investment advisers to meet the original date.

The pandemic has led the SEC to relax other requirements, including extending deadlines for [issuers](#) and [investment advisers](#) to make required periodic filings. The Chairman explained, however, that the agency did not see a need for similar flexibility with respect to Reg BI and Form CRS, because firms that handle a substantial majority of retail investor assets have already made “considerable progress” toward compliance.

On the heels of the Chairman’s announcement, the SEC’s Office of Compliance Inspections and Examinations (OCIE) issued two Risk Alerts related to [Reg BI](#) and [Form CRS](#). The Alerts summarize how OCIE will assess compliance with Reg BI and Form CRS in its upcoming examinations. Per the Chairman, OCIE will begin conducting these exams after the June 30 compliance date, and will be “focusing on whether firms have made a good faith effort to implement policies and procedures necessary to comply with Reg BI.”

The Chairman’s statement is in keeping with the SEC’s [earlier pledge](#) to maintain the continuity of its enforcement and examination programs despite COVID-19. Here’s what you need to know.

What are Reg BI and Form CRS?

Reg BI establishes a new “best interest” standard of conduct for broker-dealers and associated persons when they make a recommendation concerning any securities transaction or investment strategy involving securities to a retail customer. This includes recommendations of account types, rollovers, or transfer of assets, as well as implicit hold recommendations arising from any agreed upon account monitoring arrangement. Reg BI requires broker-dealers to act in the best interest of the retail customer when making a recommendation, without placing their own financial interests ahead of the customer’s interests, and to disclose, and in some cases eliminate, conflicts of interest. (As we have [previously discussed](#), Reg BI has been widely criticized as inadequate, and Massachusetts recently adopted a more stringent fiduciary standard for retail broker-dealers, with other states likely to follow suit.)

In a similar vein, Form CRS requires registered broker-dealers and investment advisers to give retail investors a brief customer or client relationship summary that provides basic information about the firm. Firms must file their relationship summaries with the SEC. The relationship summary is designed to assist retail investors with the process of deciding whether to (i) establish an investment advisory or brokerage relationship, (ii) engage a particular firm or financial professional, or (iii) terminate or switch a relationship or specific service.

What do the two Alerts tell us?

Examinations for Compliance with Reg BI

OCIE’s initial investigations will primarily evaluate whether firms have established policies and procedures reasonably designed to comply with Reg BI. OCIE will focus on four compliance areas in particular:

1. **Disclosure Obligation:** requires broker-dealers to provide retail customers with a full and fair disclosure of: (i) all material facts relating to the scope of the relationship with retail customers, and (ii) all material facts relating to conflicts of interest related to a recommendation. To assess compliance, OCIE may review the contents and timing of disclosures, fee schedules and disclosures surrounding them, and other firm records.
2. **Care Obligation:** requires broker-dealers to exercise reasonable diligence, care, and skill when making a recommendation, and carefully consider the customer's investment profile and the potential risks, rewards, and costs associated with the recommendation. To assess compliance, OCIE may review information from clients or assess how broker-dealers make recommendations, including their processes, what information they consider, and how they evaluate risk.
3. **Conflict of Interest Obligation:** requires broker-dealers to establish, maintain, and enforce written policies and procedures designed to address conflicts of interest. To assess compliance, OCIE will review the firm's policies and procedures.
4. **Compliance Obligation:** requires broker-dealers to establish, maintain, and enforce written policies and procedures designed to achieve compliance with Reg BI as a whole. To assess compliance, OCIE will, again, review the policies and procedures.

Examinations for Compliance with Form CRS

OCIE's initial investigations will focus on whether firms have made a good faith effort to comply with Form CRS. OCIE will focus particularly on:

1. **Delivery and Filing:** OCIE will assess whether the firm has filed its relationship summary on time, and how it has delivered the summary to existing and new retail investors.
2. **Content:** OCIE will assess the contents of the firm's summary to determine whether it is accurate and contains all required information.
3. **Formatting:** OCIE will assess whether the firm's summary is consistent with applicable formatting requirements.
4. **Updates:** OCIE will assess the firm's policies and procedures for updating the relationship summary as appropriate.
5. **Recordkeeping:** OCIE will review the firm's records to make sure the firm complies with applicable recordkeeping requirements.

What should firms do now?

The Chairman's statement advises firms to "continue to make good faith efforts around operational matters to ensure compliance by June 30," including "devoting resources as necessary and available in light of the circumstances." Accordingly, you should continue to work towards compliance with Reg BI and Form CRS as best you can, while carefully documenting any disruptions related to COVID-19.

What if we need more time to come into compliance?

The SEC is aware that some firms may need extensions due to COVID-19-related disruptions. In his April 2 statement, the Chairman advised:

To the extent that a firm is unable to make certain filings or meet other requirements because of disruptions caused by COVID-19, including as a result of efforts to comply with national, state or local health and safety directives and guidance, the firm should engage with us. I expect that the Commission and the staff will take the firm-specific effects of such unforeseen circumstances (and related operational constraints and resource needs) into account in our examination and enforcement efforts.

The statement indicates that the SEC will be particularly willing to entertain extensions for delays that result from a firm's compliance with stay-at-home and related orders that hinder its personnel from taking the steps outlined in the OCIE Risk Alerts. If your firm expects that it may need to request an extension, careful documentation of all COVID-19-related disruptions it is encountering will be essential.

Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney.

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