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Prospectus Delivery Obligations, Regulation Best Interest and the Buried Facts Doctrine: Has the SEC Changed the Time When Prospectuses Must Be Delivered?

By Ethan Corey

> "'I want someone to tell me,' Lieutenant Scheisskopf beseeched them all prayerfully. 'If any of it is my fault, I want to be told.' 'He wants someone to tell him,' Clevinger said. 'He wants everyone to keep still, idiot,' Yossarian answered. 'Didn't you hear him?' Clevinger argued. 'I heard him,' Yossarian replied. 'I heard him say very loudly and very distinctly that he wants every one of us to keep our mouths shut if we know what's good for us.'"[1]

On June 5, 2019, the Securities and Exchange Commission (SEC) adopted new Rule 15l-1 under the Securities Exchange Act of 1934 (Regulation Best Interest or Reg BI). Reg BI creates an enhanced standard of conduct applicable to broker-dealers at the time they recommend to a retail customer a securities transaction or investment strategy involving securities.[2] Reg BI requires that when making a recommendation, a broker-dealer act in the retail customer's best interest and not place its own interests ahead of the customer's interests. One requirement of Regulation Best Interest is that a broker-dealer provide certain prescribed disclosure before or at the time of the recommendation, about the recommendation and the relationship between the retail customer and the broker-dealer (Disclosure Obligation).[3] The Disclosure Obligation requires, among other things, that a broker-dealer disclose, in writing, material facts about the scope and terms of its relationship with the customer and relating to conflicts of interest that are associated with the recommendation.[4] Material facts identified by the SEC include the material fees and cost the customer will incur and facts relating to conflicts of interest associated with the recommendation that might incline a broker-dealer to make a recommendation that is not disinterested, including, for example, proprietary products, payments from third parties and compensation arrangements.[5]

Many material facts required to be disclosed pursuant to Reg BI appear in prospectuses and confirmations. Yet the SEC stated that

> although Regulation Best Interest requires a broker-dealer to disclose, prior to or at the time of a recommendation, all material facts relating to the scope and terms of the relationship with the retail customer and relating

> to conflicts of interest that are associated with the recommendation, we recognize that in some instances . . . such disclosure is provided to the retail customer pursuant to an existing regulatory obligation, such as the delivery of a product prospectus or a trade confirmation, after the execution of the trade.[6]

Further, the SEC Staff issued responses to frequently asked questions regarding Regulation Best Interest (FAQs), in which the SEC Staff explicitly stated that

> in the limited instances where existing regulations permit disclosure after the recommendation is made (for example, trade confirmation, prospectus delivery), [a broker-dealer] may satisfy [its] Disclosure Obligation regarding the information contained in the applicable disclosure document by providing such document to the retail customer after the recommendation is made [if it complies with certain conditions].[7]

On the other hand, there is a long-standing doctrine—the so-called buried facts doctrine—that posits disclosures that are made in a manner that "conceals or obscures information sought to be disclosed," for example, disclosure "in a piecemeal fashion," can trigger liability under Rule 10b-5 under the Securities Exchange Act of 1934 (Exchange Act), even if there would be no liability if the information had not been buried.[8] While the buried facts doctrine has been applied in the past only in cases involving issuer disclosures, rather than intermediary disclosures, there is no reason that the doctrine could not be applied to assess whether a broker-dealer has provided full *and fair* disclosure of material facts, as required by the Disclosure Obligation.[9]

This article argues that, in practice, the conditions that the SEC imposes to enable post-recommendation disclosure may lead to violations of the buried facts doctrine, particularly in instances in which broker-dealers may recommend a variety of products (for example, mutual funds, exchange-traded funds, annuities, securities of operating companies). Consequently, many broker-dealers will find that even if they do not have to deliver prospectuses at the time of a recommendation, they will have to deliver information that is equivalent to that which is contained in a prospectus not later than the time of a recommendation.

The Proposing Release—the Issue Is Identified

The SEC was aware of the conflict between the timing to satisfy the Disclosure Obligation and the timing to satisfy prospectus and confirmation delivery obligations at the time it proposed Regulation Best Interest. The SEC stated:

> Disclosure after the recommendation, such as in a trade confirmation for a particular recommended transaction would not, by itself, satisfy the Disclosure Obligation, because the disclosure would not be "prior to, or at the time of the recommendation." However, a broker-dealer could satisfy the Disclosure Obligation, depending on the facts and circumstances, if the initial disclosure, in addition to conveying material facts relating to the scope and terms of the relationship with the retail customer, explains when and how a broker-dealer would provide additional more specific information regarding the material fact or conflict in a subsequent disclosure (*e.g.*, disclosures in a trade confirmation concerning when the broker-dealer effects recommended transactions in a principal capacity).[10]

Nevertheless, much of the timing discussion in the Reg BI Proposing Release focused on the duty of a broker-dealer to update disclosures made to clients *before* it made a particular recommendation.[11] The SEC's request for comment

on the Disclosure Obligation included 36 questions concerning various aspects of the Disclosure Obligation, two of which addressed the timing of the Disclosure Obligation, as well as nine questions on the proposed requirement to disclose all material conflicts of interest associated with the recommendation. However, none of the questions solicited comment on the relationship between the timing of the Disclosure Obligation and the timing of the prospectus delivery and confirmation delivery requirement. Furthermore, while the SEC referenced the requirement under the Investment Advisers Act of 1940 (Advisers Act) that an investment adviser must disclose to the client in writing before completion of the transaction that it is trading as principal with the client and must obtain the client's consent to the transaction in order to engage in a principal transaction with a client, it failed to note that the timing of the Disclosure Obligation for a broker-dealer not subject to a fiduciary obligation preceded the timing of the Advisers Act disclosure obligation for an adviser acting as a fiduciary.[12]

The Adopting Release—the Issue Is Resolved (Or Is It?)

The Issue Is Framed

The SEC notes in the Reg BI Adopting Release that many commenters sought greater clarity with respect to whether disclosures to satisfy the Disclosure Obligation should be before, at the same time as, or after a recommendation was made, as well as whether a broker-dealer could satisfy the Disclosure Obligation by complying with other existing disclosure requirements.[13]

The SEC states that, in response to comments received, one modification to the Disclosure Obligation from the Reg BI Proposing Release would articulate the SEC's view regarding what it means to provide "full and fair" disclosure to retail customers, including the form and manner and timing and frequency of such disclosure.[14] The SEC states that the Reg BI Adopting Release outlines a method to address oral disclosure and written disclosure provided after a recommendation.[15]

The Reg BI Adopting Release's Resolution

The SEC first notes that, as proposed, the Disclosure Obligation would have required a broker-dealer to:

- reasonably disclose
- in writing
- to the retail customer
- the material facts relating to the scope and terms of the relationship with the retail customer and all material conflicts of interest associated with the recommendation
- prior to or at the time of the recommendation.[16]

The Reg BI Adopting Release notes that, in response to comments received, the SEC revised the Disclosure Obligation to require a broker-dealer to:

- provide *full and fair disclosure*
- in writing
- to the retail customer
- of all material facts relating to the scope and terms of the relationship with the retail customer and all material conflicts of interest associated with the recommendation
- prior to or at the time of the recommendation.[17]

The Reg BI Adopting Release states that while Reg BI requires a broker-dealer to disclose all material facts relating to the scope and terms of the relationship with the retail customer and relating to conflicts of interest that are associated with the recommendation not later than the time of the recommendation, the SEC recognizes that in certain circumstances, elements of disclosure responsive to the Disclosure Obligation are provided to a retail customer "pursuant to an existing regulatory obligation, such as the delivery of a product prospectus or a trade confirmation, after the execution of a trade."[18]

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The Reg BI Adopting Release sets forth a procedure for a broker-dealer to continue to rely on post-execution prospectus and confirmation delivery while timely meeting its Disclosure Obligation requirements. As discussed further below, a broker-dealer would be required to first provide an initial disclosure in writing that identifies each material fact that has not been fully disclosed and describes the process through which that fact may be supplemented, clarified or updated.[19] The Reg BI Adopting Release suggests that a broker-dealer, for example, could first provide a retail customer with standardized disclosure articulating product-level fees generally (reasonable dollar or percentage ranges) and explain that further specifics for particular products sold will appear in the product prospectus, which will be delivered to the retail customer after the transaction has been executed.[20] The Reg BI Adopting Release concludes that the methodology set forth "highlights for retail customers a useful summary of information while allowing for the practical realities of the process by which securities recommendations are made and transactions are executed and leaving longstanding existing disclosure regimes, particularly those relating to product issuer disclosure, undisturbed."[21]

The SEC argues that requiring broker-dealers to deliver product disclosures earlier than is currently required would not meaningfully improve fee disclosure.[22] However, the SEC encourages broker-dealers, as a best practice, to highlight product-level fees with particularity in order to raise a customer's awareness of product-level fees.[23]

The Buried Facts Doctrine

The "buried facts doctrine" posits that disclosure is inadequate if its overall significance is obscured. The significance of a fact may be obscured because it is buried in a footnote or an appendix.[24] More importantly for our purposes, courts have applied the buried facts doctrine when information has been scattered in various portions of a single document or in various documents in a manner "which prevents a reasonable shareholder from realizing the 'correlation and overall import of the various facts interspersed throughout' the document."[25] One court specifically addresses the issue of disclosures interspersed among various documents:

> We cannot accept the premise that prior disclosure in one communication will automatically excuse omissions in another. As we indicated above, the adequacy of disclosure is a function of position, emphasis, and the reasonable anticipation that certain future events will occur. Perception of future events may take on a different cast as the future approaches, and, what is more important, later correspondence may act to bury facts previously disclosed. A balance once struck will not ensure a balance in the future. As new communications add a dash of recommendation, a pinch of promise, and a dusting of repetition, the scale may be tipped. To prevent an injustice to the shareholders, the elements must be weighed each time that the shareholders are requested (or encouraged) to make a new decision.[26]

However, not all instances in which disclosures are interspersed in various places within a particular document, or among multiple documents, give rise to a claim that a violation of the buried facts doctrine has occurred. According to the buried facts doctrine, disclosure is inadequate only if there is a reasonable danger that a reader would fail to realize the correlation and overall import of facts.[27]

Post-Recommendation Disclosures and Buried Facts

At the outset, it is necessary to note that the buried facts doctrine could be invoked even in instances where a broker-dealer provides all disclosures required by the Disclosure Obligation not later than the time it issues a recommendation to a retail

customer. In particular, the Reg BI Adopting Release states that:

> [T]he Commission is providing guidance to permit a broker-dealer to utilize existing disclosures and standardized documents, such as a product prospectus, relationship guide, account agreement, or fee schedule to help satisfy the Disclosure Obligation. The Commission recognizes that broker-dealers are subject to disclosure requirements other than the Disclosure Obligation and Form CRS, and believes utilizing such existing disclosures where appropriate is a reasonable and cost-effective way to satisfy the requirements of the Disclosure Obligation, and can also help avoid duplicative or voluminous disclosure by not requiring the creation of new disclosure documents.[28]

The SEC stated that it believes that the Relationship Summary, by itself, generally would not be sufficient to satisfy the Disclosure Obligation because it would not address all material facts required to be addressed under the Disclosure Obligation.[29] The Reg BI Adopting Release states that the SEC is of the view that many broker-dealers could rely on existing disclosure documents, such as account opening documents, on stand-alone documents, or on a combination of existing and stand-alone documents, to achieve compliance with the Disclosure Obligation.[30] Interestingly, the Reg BI Adopting Release discourages the use of a single stand-alone disclosure document due to concern that the document could overwhelm the retail customer with disclosures related to potential investment options that the retail customer may not be qualified to pursue.[31] The SEC also urges broker-dealers to consider repeating or highlighting disclosures already made in order to satisfy components of the Disclosure Obligation when making a recommendation to a retail customer.[32]

However, while the buried facts doctrine could be invoked even in instances where all disclosures are provided at once, or all disclosures are provided before a recommendation is made, the greatest risk of a retail investor "losing the plotline" is likely to occur in instances in which: (1) a broker-dealer discloses certain facts only after the recommendation is made; and (2) relies on a product prospectus to provide the investor with information not disclosed before making the recommendation.

The SEC describes its methodology for satisfying the Disclosure Obligation in these instances as follows:

> In the limited instances where existing regulations permit disclosure after the recommendation is made (e.g., trade confirmation, prospectus delivery), a broker dealer may satisfy its Disclosure Obligation regarding the information contained in the applicable disclosure document by providing such document to the retail customer after the recommendation is made. Before supplementing, clarifying or updating written disclosures in the limited circumstances described above, broker-dealers must provide an initial disclosure in writing that identifies the material fact and describes the process through which such fact may be supplemented, clarified or updated.[33]

The Reg BI Adopting Release states that with regard to product level fees, a broker-dealer could provide an initial standardized disclosure of product-level fees generally (for example, reasonable dollar or percentage ranges), noting that further specifics for particular products appear in the product prospectus, which will be delivered after a transaction in accordance with the delivery method the retail customer has selected, such as by mail or electronically.[34]

A hypothetical example may highlight the risk that the approach outlined by the SEC would run

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afoul of the buried facts doctrine. In our hypothetical example, a retail customer visits a broker-dealer in order to open a retirement savings account. The retail customer is provided with the broker-dealer's Form CRS and account opening documentation. During the customer's visit with the broker-dealer, the registered representative tells the customer that, depending upon the customer's financial situation and goals, the representative may recommend one or more of:

- a mutual fund;
- an exchange-traded fund (ETF);
- a variable annuity supported by underlying mutual funds, each with its own investment objectives, policies and strategies; or
- a variable annuity not registered under the Investment Company Act of 1940 (1940 Act) offering investment options (Hybrid Annuity).

The registered representative provides the retail customer with a disclosure indicating the range of sales charges and product level fees in each product, and where in the prospectus or confirmation the customer can find disclosure of the fees or sales charges. One layer of complexity is added by virtue of the fact that sales charge information for some of the recommended products will be disclosed in confirmations, whereas sales charge information for other products will be disclosed in prospectuses.[35] In particular, sales charge information for "clean" mutual fund shares, ETFs and Hybrid Annuities would be disclosed in confirmations, whereas sales charge information for other mutual funds and variable annuities would be disclosed in prospectuses. Yet another layer of complexity is added because most variable annuities charge contingent deferred sales charges (CDSCs) rather than front-end sales charges, and different insurers use different methods for assessing CDSCs.[36] Unless and until the variable annuity issuer utilizes the newly-adopted variable annuity summary prospectus, any disclosure about fees and charges associated with a variable annuity will need to direct a retail customer to both a variable annuity prospectus and to each underlying mutual fund prospectus in order for the retail customer to obtain a complete picture of all of the fees and expenses associated with a purchase of a variable annuity contract.

Moreover, while the Reg BI Adopting Release correctly notes that the federal securities laws currently do not require product prospectuses to be delivered until after a trade is executed,[37] the release fails to take into account the impact of Rule 159 under the Securities Act. Rule 159 effectively requires that investors in offerings other than

Exhibit 1

Product	**Location of Fee and Cost Information**	**Timing of Prospectus Delivery**
Mutual Fund— Load Shares	Prospectus	Confirmation of Sale
Mutual Fund— Clean Shares	Confirmation (Sales Charges) Prospectus (Fees and Expenses)	Confirmation of Sale
ETF	Confirmation (Sales Charges) Prospectus (Fees and Expenses)	Confirmation of Sale
Variable Annuity	1. Variable Annuity Summary Prospectus or Variable Annuity Prospectus 2. Underlying Fund Prospectus	Confirmation of Sale
Hybrid Annuity	Confirmation	Point of Sale

continuously offered registered investment company securities receive all material information—in other words, a prospectus—by the time they place purchase orders.[38] As a Hybrid Annuity is not registered under the 1940 Act, Rule 159 arguably requires that a Hybrid Annuity prospectus be delivered not later than the time that the Hybrid Annuity is sold.

In summary, when assessing our example against the buried facts doctrine, we are confronted with an initial disclosure that presents at least four path-dependent disclosures with respect to the location(s) where fee and cost information may be found and when a prospectus is delivered (*see* Exhibit 1).

Our hypothetical retail customer would need to return to the initial disclosure, select the product purchased, and then review the correct document, or documents. Alternatively, the broker-dealer would need to prepare a supplemental disclosure directing the customer to the relevant sections of the confirmation and prospectus(es).[39] In either case, it would be hard to argue that information has not been scattered in various portions of a single document or in various documents in a manner "which prevents a reasonable shareholder from realizing the 'correlation and overall import of the various facts interspersed throughout' the document."

The SEC may have been aware of the issue, because the Reg BI Adopting Release touches on the timing issue in the Economic Analysis. The Reg BI Adopting Release states that:

> [T]he Disclosure Obligation may be satisfied by providing documents that broker-dealers are already required to produce or voluntarily produce under the baseline, such as prospectuses, in which case they may only incur costs associated with determining the timing and method by which they deliver these disclosures. For example, under the baseline, broker-dealers may currently deliver prospectuses to retail customers after the completion of a transaction under the baseline, but would need to deliver them prior to or at the time of a recommendation under Regulation Best Interest, unless made under the circumstances outlined in Section II.C.1, Oral Disclosure or Disclosure After a Recommendation, allowing them to rely on delivery of information after the fact.[40]

However, the Reg BI Adopting Release does not estimate the number or percentage of broker-dealers that will seek to deliver product prospectuses prior to or at the time of a recommendation, versus those that will seek to rely on the SEC's methodology to identify omitted material facts before a recommendation while continuing to deliver a product prospectus after a transaction is executed. Nor does the Reg BI Adopting Release attempt to quantify costs associated with either alternative.

When May the Buried Facts Doctrine Be Asserted?

As noted above, a broker-dealer may proactively determine that if it attempts to follow the guidance set forth in the Reg BI Adopting Release, it will not be able to effectively disclose the possible range of product level fees, charges and expenses in light of the range of products considered, the types of fees, charges and expenses that could be incurred and the various possible locations in prospectuses and confirmations where fees, charges and expenses are disclosed. Consequently, the broker-dealer will elect to deliver product prospectuses not later than the time the particular recommendation is made.

Alternatively, another broker-dealer may determine that it will rely on the SEC's methodology to identify omitted material facts before a recommendation while continuing to deliver a product prospectus after a transaction is executed. The SEC's Office of Compliance Inspections and Examinations (OCIE) already has stated that it "intends to assess the implementation of the requirements of Regulation Best Interest, including policies and procedures regarding conflicts disclosures."[41] The Financial Industry

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Regulatory Authority (FINRA) has similarly stated that it intends to review member firms for compliance with Reg BI and, as a component of that review, it intends to assess whether a member firm has policies and procedures to provide the disclosures required by Reg BI.[42] It is possible that OCIE or FINRA Staff examining a broker-dealer may, at a minimum, closely scrutinize those disclosures of product-level fees, charges and expenses that seek to disclose the possible range of product level fees, charges and expenses of a variety of products that may be recommended and the various possible locations in prospectuses and confirmations where fees, charges and expenses are disclosed.

Conclusion—Proceed at Your Own Risk

A broker-dealer that, as the SEC suggests, provides an initial disclosure in writing that identifies a range of product-level fees and directs the reader to the product prospectus for disclosure of the product-level fee associated with the particular product purchased, should be able to provide reasonably clear initial disclosure if: (1) it recommends only one particular product type (for example, mutual funds); and (2) the product prospectus includes all relevant disclosures (true of ordinary mutual funds; not true of "clean" mutual fund shares). However, as broker-dealers add more product types to the menu of products potentially recommended, it becomes more difficult to direct the reader to the proper location(s) to find the relevant product-level fees. This is particularly true with respect to variable annuities supported by multiple mutual funds, as well as recommendations of multiple products. In these instances, information about sales charges, product fees and product expenses, and the manner in which they are assessed, can be interspersed among multiple documents, hindering a customer's ability to assess the total amount of fees and expenses incurred. Consequently, disclosure may not be fair even if it is full. As a practical matter, then, a broker may need to deliver a product prospectus, or information that replicates the information in the product prospectus, not later than the time of the recommendation, notwithstanding the SEC's methodology for providing post-recommendation disclosures.

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NOTES

1 J. Heller, Catch 22 (S&S Classic Edition 1999), p. 73.

2 *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, Securities Exchange Act Release No. 86031 (June 5, 2019), 84 Fed. Reg. 33318 (July 12, 2019) (Reg BI Adopting Release).

3 *Id.*, 84 Fed. Reg. at 33320.

4 *Id.*, 84 Fed. Reg. at 33321.

5 *Id.*

6 *Id.*, 84 Fed. Reg. at 33348.

7 *Frequently Asked Questions on Regulation Best Interest*, Disclosure Obligation, FAQ 1, Securities and Exchange Commission, Division of Trading and Markets (*https://www.sec.gov/tm/faq-regulation-best-interest#disclosure*) (visited Feb. 11, 2020) (*Reg BI FAQs*).

8 Werner v. Werner, 267 F.3d 288, 297 (3d Cir. 2001) (*Werner*) (*quoting* Kas v. Fin. Gen. Bankshares Inc., 796 F.2d 508, 516 (D.C. Cir. 1986) (*Kas*)).

9 *See* Reg BI Adopting Release, *supra* n.2, 84 Fed Reg. at 33326.

10 *Regulation Best Interest*, Securities Exchange Act Release No. 83062 (Apr. 18, 2018), 83 Fed. Reg. 21574, 21605 (May 9, 2018) (*Reg BI Proposing Release*).

11 *See id.* at 21605-06.

12 *Id.*, 83 Fed. Reg. at 21605 n. 217 and accompanying text.

[13] Reg BI Adopting Release, *supra* n.2, 84 Fed. Reg. at 33324.

[14] *Id.*, 84 Fed. Reg. at 33326.

[15] *Id.*

[16] *Id.*, 84 Fed. Reg. at 33346.

[17] *Id.*, 84 Fed. Reg. at 33346-47.

[18] *Id.*, 84 Fed. Reg. at 33348.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id.*, 84 Fed. Reg. at 33355.

[23] *Id*.

[24] *Commission Guidance on the Use of Company Web Sites*, Securities Exchange Act Rel. No. 58288 (Aug. 1, 2008), 73 Fed. Reg. 45862, 45869 n. 68.

[25] *Werner*, 267 F.3d at 297, *quoting Kas,* 796 F.2d at 516).

[26] Smallwood v. Pearl Brewing Company, 489 F.2d 579, 605-606 (5th Cir. 1974), *citing* Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 365 n. 18. (2d Cir. 1973).

[27] *Kas,* 796 F.2d at 516.

[28] Reg BI Adopting Release, *supra* n.2, 84 Fed. Reg. at 33367.

[29] *Id.*, 84 Fed. Reg. at 33347, 33367; *Reg BI FAQs*.

[30] *Id*.

[31] *See* Reg BI Adopting Release, *supra* n.2, 84 Fed. Reg. at 33370.

[32] *Id.*

[33] *Id.*, 84 Fed. Reg. at 33348.

[34] *Id.*

[35] *See Mutual Fund Distribution Fees; Confirmations*. Investment Company Act Rel. No. 23967 (July 21, 2010), 75 Fed. Reg. 47063, 47083 and n. 218 (a broker-dealer may omit from confirmations of mutual fund transactions information about sales charges or third-party remuneration, so long as the customer receives a fund prospectus that adequately discloses that information).

[36] *Form N-4, Registration Statement of Separate Accounts Organized as Unit Investment Trusts, Guide 9 – Deferred Sales Loads*:

> The description of a deferred sales load should also explain whether, in the case of a partial redemption, the amount deducted will be a percentage of the amount requested by the contractowner or the total amount withdrawn, and whether the sales load will be deducted from the amount requested or the amount remaining after the contractowner has received the amount requested. For example, if the sales load is 7% and the contractowner has requested $100, the description should make plain whether:
>
> (a) the contractowner receives $93 and the sales load is $7 for a total withdrawal of $100 (i.e., the sales load is 7% of both the amount requested and the total withdrawal and is deducted from the amount requested);
>
> (b) the contractowner receives $100 and the sales load is $7 for a total withdrawal of $107 (i.e., the sales load is 7% of the amount requested and is deducted from the contract value remaining after the contractowner is paid the amount requested); or
>
> (c) the contractowner receives $100 and the sales load is $7.53 for a total withdrawal of $107.53 (i.e., the sales load is 7% of the total withdrawal and is deducted from the contract value remaining after the contractowner is paid the amount requested).

[37] Reg BI Adopting Release, *supra* n.2, 84 Fed. Reg. at 33348.

[38] *See* Bancroft, One Act and Two Scenes: The Securities Act and Delivery of Mutual Fund Prospectuses," Vol. 17 *Investment Lawyer*, No. 1-2 (January 2010).

[39] *Cf.* Reg BI Adopting Release, *supra* n.2., 84 Fed. Reg. at 33370 ("we continue to encourage broker-dealers to consider whether it would be helpful to repeat or highlight disclosures already made

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pursuant to the Disclosure Obligation at the time of the recommendation.")

40 *Id.*, 84 Fed. Reg. at 33442 (citations omitted).

41 *2020 Examination Priorities*, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission (Jan. 7, 2020) *https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf* (visited March 3, 2020).

42 Financial Industry Regulatory Authority, *2020 Risk Monitoring and Examination Priorities Letter* (Jan. 9, 2020) *https://www.finra.org/rules-guidance/communications-firms/2020-risk-monitoring-and-examination-priorities-letter* (visited March 3, 2020).

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