

## Publications

## Can the SEC and DOL Sing in Harmony?

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“Harmonization” is the buzzword that we keep hearing from regulators of the retail advice space. The SEC used the word in the title of its recent concept release on private securities offering exemptions. DOL Assistant Secretary Preston Rutledge used the same word in recent comments on the SEC’s Reg BI by stating that DOL’s goal is to “align, build up, and harmonize with [the SEC’s agenda].” In the coming months, both the SEC and DOL are expected to begin issuing a number of new rules and proposals as these “harmonization” efforts come into daylight. Key areas of focus may include rollover recommendations, electronic disclosure, and permissible investments.

First, rollover recommendations have in the past been and remain a key focal point for the SEC and DOL. At times, it has seemed as though the two agencies have both sought to be the primary regulator.

In 2005, DOL issued an advisory opinion claiming that some rollover recommendations are “fiduciary” recommendations within DOL’s regulatory orbit. Later, in its later-nullified 2016 Fiduciary Rule, DOL asserted significant oversight of rollover recommendations generally.

Last year, the 5th Circuit struck down DOL’s attempt to expand its oversight of the rollover market stating that Congress “with[held] from DOL ... regulatory authority over IRA plans.” In June 2019, the SEC, in Reg BI issued special rules, containing new investor protection for brokers who make rollover recommendations.

Because rollovers have been an area where both regulators have independently issued guidance, any “harmonization” may well start here.

Second electronic disclosure is another area where the SEC and DOL could harmonize to reduce plan and adviser compliance costs without negatively impacting retail investors. Over the last few years, the SEC has begun modernizing its electronic disclosure framework.

Most recently, in June 2018, the SEC adopted new rules that allow mutual fund companies to more easily transmit shareholder reports to shareholders electronically.

This was a welcome development as paper delivery generates expensive printing costs and can be less effective as paper mail takes time and can become lost.

In August 2018, President Trump issued an executive order directing DOL to study whether “broader use of electronic delivery” would “improve the effectiveness of disclosures” and “reduce their associated costs and burdens.” Because DOL rules were crafted long before the current day era of mobile internet and widespread broadband adoption, increased harmonization of SEC and DOL rules is a significant potential opportunity.

Third, the SEC has identified another area where retail investors could benefit from the harmonization of rules surrounding retirement plans. Right now, defined benefit plans can invest in private funds. In most cases, defined contribution plan participants cannot. The disconnect in how the SEC’s accredited investor rules treat defined benefit plans versus how the rules treat defined contribution plans has created a landscape where defined benefit plans have greater access to diversifying asset classes.

In its recent “Concept Release on Harmonization of Securities Offering Exemptions”, the SEC appears to be considering giving defined contribution plan participants access to the same types of investments that have historically been limited to defined benefit plans.

Whether the SEC and DOL are able to release final rules or updated guidance in any of these areas remains to be seen.

However, there is reason to be optimistic that over the next few months we will begin to see proposed rules and subregulatory guidance that provides for a more unified regulatory framework for defined benefit and defined contribution plans as well as more complimentary rules in areas where the DOL and SEC both exercise jurisdiction.

Kevin Walsh is a principal at the Groom Law Group. He advises clients on a wide range of “standard of care” matters. His practice encompasses helping retirement plan service providers, including registered investment advisers and broker-dealers, comply with the Department of Labor’s fiduciary rules, the Securities Exchange Commission’s best interest rules, FINRA’s suitability rules, and evolving state care standards.

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