

Publications

Is a New Era Coming for Robo-Advice? SEC Requests Information

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On August 27, 2021, the Securities and Exchange Commission (“SEC”) issued its [Request for Information](#) (“RFI”) on matters related to broker-dealer and advisory firm’s usage of digital engagement practices (“DEPs”), which includes, among other things, design elements and features intended to engage with retail investors on digital platforms and the analytical and technological tools behind them, as well as usage of technology to develop and provide investment advice to retail investors. SEC guidance in the area of DEPs and digital advice is of great interest to the retirement community and could provide a roadmap for future DOL guidance in this area.

More specifically, given the growth of digital investment platforms and robo-advice, the SEC would like to understand these new technological advancements in investing and assess whether existing statutes, regulations, and rules effectively capture the use of DEPs, algorithm-based investment advice models, and other technological developments used by broker-dealer and advisory firms.

Currently, investment advisers are subject to the Investment Advisers Act of 1940 and the SEC’s interpretation of their fiduciary duties, and the disclosure and reporting obligations of Form ADV and Form CRS. Similarly, broker-dealers are subject to the best interest standard under Regulation Best Interest (“Reg. BI”) in addition to the disclosure and reporting obligations of Form CRS. For more information on Reg. BI and other rules discussed above, please see our [client alert](#).

The SEC requests information on broker-dealer and advisory firms’ compliance with their obligations under the federal securities laws and regulations, the extent of disclosures provided, and the provision of investment advice and recommendations in connection with the use of DEPs.

Recently, the Department of Labor (“DOL”) issued Prohibited Transaction Exemption 2020-02 (“PTE 2020-02”) that provides an exemption for financial institutions and personnel that provide investment advice, imposing best interest standards and other disclosure and reporting requirements that are in harmony with the SEC’s Best Interest and fiduciary statutes, regulations, and rules. Frustratingly, the DOL excludes robo-advice from PTE 2020-02’s exemptive relief. For more information on PTE 2020-02, please see our [client alert](#).

Given the relative dearth of guidance regarding the use of robo-advice from the DOL side, the SEC's steps here are likely to be influential on the retirement side, particularly with regard to IRA rollover recommendations. Specifically as the SEC asks several times in the RFI about the use of DEPs on promoting long-term investing such as retirement contributions. Therefore, it may be helpful for those focused on retirement to follow and participate in comment efforts in connection with this RFI.

The information that is shared as a result of the RFI may be very much of interest to the DOL. If the SEC is supportive of robo-advice or DEP in connection with retirement savings as a result of this RFI, the DOL may get onboard too—which could be very helpful for getting digital rollover recommendations covered by PTE 2020-02 .

The SEC requests that comments are received on or before October 1, 2021. If there is anything we can do to help you with comments or staying abreast of these rulemakings, please let us know.

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