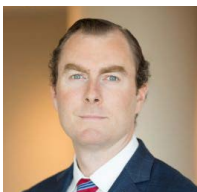


SEC and DOL Working Together on Retirement Advice Rules

A Lexis Practice Advisor® Practice Note by
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This article discusses the Interpretations to Enhance Protections and Preserve Choice for Retail Investors in Their Relationships With Financial Professionals (the SEC Package) issued by the Securities and Exchange Commission (SEC) on June 5, 2019. 84 Fed. Reg. 33,318 (July 12, 2019). The SEC Package provides guidance broadly on the standards of care owed by registered investment advisers and broker-dealers. The SEC Package also imposes new disclosure requirements. In light of recent regulatory focus (including the Department of Labor's (DOL) vacated 2016 fiduciary rule on individual retirement accounts (IRAs) and rollovers from ERISA covered plans to IRAs, in particular), this article discusses how the SEC Package may impact recommendations and investment advice in the retirement savings space.

While the SEC Package represents final rules that have compliance dates of June 30, 2020, the DOL has indicated in its Spring 2019 regulatory agenda that it is also working on new rules related to the standard of care investment professionals must comply with when interacting with retirement plans, and those rules may also impact IRAs and rollover recommendations.

Background

Regulating rollovers and interactions with investment professionals by IRA investors has been a priority of various regulators for the past decade. Prior to issuing the SEC Package, the DOL had spent the better part of a decade drafting rules designed to regulate broker-dealers and registered investment advisers who interact with retirement savers. The DOL issued an initial fiduciary proposal in 2010, a second proposal in 2015, and released a final rule on April 6, 2016. 81 Fed. Reg. 20,946 (Apr. 8, 2016). That final rule sought to change the standard of care owed by broker-dealers and registered investment advisers and also sought to bring the IRA market further into DOL's regulatory orbit. In 2018, the U.S. Court of Appeals for the Fifth Circuit struck down DOL's rule. See *Chamber of Commerce of the United States v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018). See also [Expert Interview – Unwinding the Department of Labor's Fiduciary Rule](#).

Simultaneously, the SEC was evaluating whether the standard of care owed by broker-dealers should be modified. In July 2009, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) into law. Pub. L. No. 111-203. Section 913 of Dodd-Frank directed the SEC to conduct a study regarding the standards of care for broker-dealers and registered investment advisers. Subsections of Section 913 then gave the SEC the ability to issue rules that could either impose a uniform standard of care on broker-dealers and registered investment advisers or to maintain separate standards but to amend the standards. Finally, Section 913 contained language indicating that Congress was not seeking to ban commissions for broker-dealers. In 2011, the SEC issued a report where SEC staff recommends that the SEC adopt a uniform standard of care for broker-dealers and registered investment advisers. [SEC, Study on Investment Advisers and Broker-Dealers](#).

In releasing the SEC Package, the SEC ultimately decided against similar, but not identical, standards for broker-dealers and registered investment advisers.

Retirement Impact

For broker-dealers and registered investment advisers interacting with retirement plans and plan participants, the SEC Package offers clarity in a number of areas.

Significantly, the SEC clarifies when broker-dealers are required to comply with Regulation Best Interest when working with retirement plans, plan fiduciaries, and plan participants. The SEC also clarifies when registered investment advisers and broker-dealers must furnish the Form CRS when working with retirement plans and individual retirement accounts (IRAs). See [Form CRS and Instructions](#). With limited exceptions, plans and plan fiduciaries are not considered “retail investors/customers” under the SEC Package. This means that some of the new compliance rules and disclosure rules will not apply to interactions with plans or plan fiduciaries. However, the SEC Package provides more nuanced guidance on interactions with participants themselves. For investment advisers and broker-dealers who provide services directly to participants, this warrants a close look at the rules.

Rollovers from Retirement Plans to IRAs

Another major change made in final Regulation Best Interest is its treatment of IRA rollover recommendations. Under Regulation Best Interest, not only does a broker who recommends a rollover have to comply with Regulation Best Interest and consider a number of factors outlined in its “care obligation,” but the SEC makes clear that in recommending a rollover to a retirement plan participant, a broker must consider:

- 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

The SEC is explicit that “best interest” considerations include recommendations (1) to open an IRA or other brokerage account and (2) to roll over or transfer assets from one type of account to another (e.g., a workplace retirement

plan account to an IRA). 84 Fed. Reg. 33,339. The SEC warns broker-dealers against short-circuiting their analysis by quickly concluding that an IRA is in the investor’s best interest because it has “more investment options.” 84 Fed. Reg. 33,383.

Solely Incidental Standard

A third area where there is the possibility of a major impact that could go overlooked is the SEC’s new interpretation of “solely incidental.” 84 Fed. Reg. 33,341. The SEC narrowed the level of discretion and monitoring that a broker-dealer may maintain regarding a retail investor’s account while still being able to rely on the broker-dealer exception to the Investment Advisers’ Act’s requirements. As a result, broker-dealers may want to review the services they offer to evaluate whether they can still rely on the exclusion.

Looking Ahead

Over the next 12 months, there is an expectation that the SEC and FINRA will provide sub-regulatory guidance designed to assist broker-dealers and registered investment advisers in complying with the SEC Package. As an example, in late June 2019, the SEC clarified that registered investment advisers can continue to describe themselves as fiduciaries. This responded to concerns that the language in the SEC Package did not make this clear.

In addition to understanding the SEC Package, broker-dealers and investment advisers may want to begin considering the terms that would be acceptable in DOL’s alignment package. The DOL is expected to propose its alignment package in the next two months. After its release, there will likely be an opportunity to submit comments before the alignment proposal is finalized. Many in the industry would like clarity on how Regulation Best Interest and the new interpretation of solely incidental will impact ERISA fiduciary status. The DOL can also provide clarity that the SEC did not around preemption over state rules.

Broker-dealers and investment advisers would be well served by moving quickly to comply with the SEC Package. Regulation Best Interest and Form CRS become effective shortly, and the transition period extends only until June 30, 2020. Consumer advocacy groups and others have already signaled that they would like to see these rules challenged in court and/or revisited by future administrations. Unless investment advisers and broker-dealers can show that compliance with the SEC Package really does result in best interest recommendations and advice, those calls will likely continue.

Related Content

- [Expert Interview – Unwinding the Department of Labor’s Fiduciary Rule](#)
- [ERISA Fiduciary Duties](#)

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