Exclusions From "Investment Advice": What Counts and Who is Counting?

If the scope of who may be considered a fiduciary is expanded, has the definition of who is excluded from that definition changed too?

As of November of 2017, the latest guidance from the Department of Labor ("DOL") on the Fiduciary Rule includes that Firms and advisors must do their best to comply with the rule and exemptions. If the scope of who may be considered a fiduciary is expanded, has the definition of who is excluded from that definition changed too? A key point in looking at this issue is that both the DOL and the Securities Exchange Commission ("SEC") have a say in exclusion from the definition of Investment Advice.

The first question may be, what counts as investment advice? Under DOL rules, interactions concerning a recommendation to hold or dispose of securities or how to invest them may be subject to the DOL's fiduciary rule. So too will recommendations for managing securities or other investment products. The key is to look at the content, context and presentation. This seems to spill over into how the DOL rule looks to exclusions from the rule too.

> *"Widening the definition of Investment Advice, under the new Fiduciary rule, may come with new exceptions and exemptions. These exceptions and exemptions may track those already in place by SEC regulations."*

First, the key to the DOL exclusions is that they are category based, not action based. That is, so long as interactions fit within the categories described below, whether the content of the interaction is investment-related advice is not an essential element. These categories include:

The simplest of the exclusions involves general **communications**. Where information is given out that includes generic commentary made to a wide audience, such as in speeches and conferences, it will not be considered an investment recommendation. This also includes marketing information such as portfolio performance and general market data. This won't include an exception if the marketing communication makes a specific recommendation about how to handle investments or sets out a strategy or plan.

Platform providers, those who offer access to a selection of investment funds, are exempt when they market their investments without regard to the specific needs of a plan or its participants. This includes those who act as third party administrators handling record keeping tasks.

Investment Education also is excluded from the fiduciary rule. Under this safe harbor, where guidance is given to plan participants, it won't trigger fiduciary status if it is about plan information, general financial or retirement information, discusses models or modeling which can include investment calculators and other interactive tools. This includes using hypothetical situations, but care should be exercised here if the hypothetical is too specific to a particular IRA. Most interestingly, those who sell to institutional investors, will be excluded from the definition of fiduciary.

Additionally, some communications may fall within an exemption from fiduciary status, if the person involved in the interaction has not acknowledged that they are a fiduciary (through a writing or otherwise). Some exemptions, not fully discussed here, require that the investment advisor disclaim in writing that they are a fiduciary (along with other requirements). Other exemptions include those involved in security-based swap transactions. There are exemptions for employees of plan sponsors and fiduciaries so long as those employees do not receive compensation based on that advice (other than their salary).

Other exemptions apply that allow a fiduciary to acknowledge their

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status but adopt policies designed to mitigate as reasonably as possible the risk of conflicts of interest, among other requirements. This requirement comes with a new standard of care for what constitutes the best interest standard however and is limited to specific asset types.

How does this match up with other registration rules? Under the SEC's Investment Advisor Registration Rule, other exclusions apply, including: banks and bank holding companies, professionals, like lawyers or teachers, who do not receive compensation for recommendations and whose advice is incidental to the performance of their duties; magazine and news publishers and broker-dealers whose advisory services are incidental to the performance of their duties, basically, those who manage a transaction and receive a fee per transaction. Other exclusions include investment advisors whose only clients are insurance companies.

A quick comparison makes it clear that the platform based exception under the DOL's fiduciary rule tracks the SEC's exception for transaction-focused broker-dealers, and also those who advise only institutions.

The SEC's definition of investment advisor is, by the SEC's own documents, construed broadly, and includes individuals who provide "advice about market trends; advice in the form of statistical or historical data (unless the data is no more than an objective report of facts on a non-selective basis); advice about the selection of an investment adviser; advice concerning the advantages of investing in securities instead of other types of investments; and a list of securities from which a client can choose, even if the adviser does not make specific recommendations from the list." The SEC, like the DOL, excepts generic communications, that is those that provide "impersonal advice … not tailored to the individual needs of a specific client…." Furthermore, the SEC exempts advisors who provide advice to charitable organizations, whereas the DOL rule might not. Additional restrictions and exemptions may apply where an investment advisor is regulated by a state, under so called "Blue Sky Laws" – state based securities laws for smaller investments and those with smaller pools of investors. ■