

Reg. of Investment Advisers § 1:5

Regulation of Investment Advisers
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Chapter I. Registration of Investment Advisers

§ 1:5. Who must register?—The investment adviser definition: Section 202(a)(11)—Engaged “in the business”

The “in the business” element of the investment adviser definition looks to the frequency and regularity with which a person gives advice about securities or engages in other advisory activities. The SEC generally deems a person giving advice about securities to be in the business of being an investment adviser unless:

- (1) **Solely Incidental**—the advice being given is solely incidental to a non-advisory business;
- (2) **Not Specific**—the advice does not specify particular securities; and
- (3) **No Special Compensation**—the person does not receive special compensation for the advice.¹

As with the compensation element, the SEC staff has traditionally taken an expansive view of what activities satisfy the “in the business” element. Generally speaking, this element will be satisfied if a person gives specific advice about securities other than in rare, isolated, and non-periodic instances.

It is not necessary that giving investment advice be the primary or even a major activity for a person to satisfy the “in the business” element.² Rather, a person may actively or even primarily engage in another business, yet be considered in the business of being an investment adviser. In making this determination, the SEC staff looks at all the circumstances surrounding a person’s activities to determine if this element is satisfied. Among the factors deemed relevant to this determination are the following:

- (1) **Holding Out**—whether the person represents or otherwise holds himself out to the public as an investment adviser.
- (2) **Compensation**—whether the person receives compensation for rendering investment advice.
- (3) **Frequency and Regularity of Advice**—the frequency or regularity of the investment advice given.³

In considering and applying these factors, the SEC staff also looks to whether other types of financial services the person provides complement or fit in with the person’s advisory activities in such a way that the person should be considered to be in the business of being an investment adviser. For example, the SEC staff may deem a person to satisfy the “in the business” element if the person gives specific advice about securities in the capacity of an insurance agent but only general advice in the capacity of a financial planner.

However, the SEC staff has deemed the “in the business” element not to be satisfied where an entity provides administrative services in connection with the establishment of employee benefit programs, provided no investment advice is given regarding investments.⁴ The SEC staff has also determined that the “in the business” element is not satisfied by employer-sponsors of defined contribution plans that provide investment-related educational information to plan participants.⁵ This position, coupled with the position of the Department of Labor’s (DOL) Pension and Welfare Benefits Administration⁶ (now called the Employee Benefits Security Administration), facilitates employers’ ability to provide information to plan participants without being deemed a plan fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA).

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Footnotes

¹ See [Investment Advisers Act Release No. 1092 \(Oct. 8, 1987\)](#).

² See [Hauk, Soule & Fasani, P.C., SEC No-Action Letter, 1986 WL 66619, Fed. Sec. L. Rep. \(CCH\) ¶78,311 \(May 2, 1986\)](#).

³ See [Zinn v. Parrish, 644 F.2d 360, Fed. Sec. L. Rep. \(CCH\) ¶97920 \(7th Cir. 1981\)](#).

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- ⁴ See *Automatic Data Processing, Inc.*, SEC No-Action Letter, 1991 WL 176900 (Apr. 22, 1991).
- ⁵ See Letter to Olena Berg, Assistant Secretary, DOL Pension and Welfare Benefits Admin., from Jack W. Murphy, Associate Director, SEC Division of Investment Mgmt. (Dec. 5, 1995); Letter to Olena Berg, Assistant Secretary, Pension and Welfare Benefits Admin., from Jack W. Murphy, Associate Director, SEC Division of Investment Mgmt. (Feb. 22, 1996).
- ⁶ See DOL Interpretive Bulletin 96-1 (May 30, 1996).

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