

Reg. of Investment Advisers § 1:8

Regulation of Investment Advisers

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Chapter I. Registration of Investment Advisers

§ 1:8. Who must register?—The investment adviser definition: Section 202(a)(11)—Advice, analyses, or reports about securities—General advice about securities

More difficult questions arise under this element where a person gives advice less specific than noted above. For example, a person may be deemed to be giving advice about securities even if the advice does not relate to specific securities, but rather relates to the benefits of investing in securities as compared with non-securities such as real estate or insurance.<sup>1</sup> In addition, the SEC staff has taken the position that to be considered advice about securities, the advice need not be in the form of buy or sell recommendations for particular securities, but can be analyses or valuations of particular securities or of the securities markets generally.<sup>2</sup> Likewise, a person who provides asset allocation or timing advice (i.e., advice about when a client should have a higher or lower percentage of his assets in certain securities or types of securities, such as equity mutual funds or money market funds) is viewed as giving advice about securities.<sup>3</sup> Similarly, a person who advises clients as to the selection of an investment adviser, or who evaluates the performance of investment advisers for clients, may be considered to be indirectly giving advice about securities.<sup>4</sup> However, the SEC staff has given relief to unique programs that provide information on various advisers in a manner that is not highly selective or structured to recommend particular advisers.<sup>5</sup>

A person providing statistical or historical data about securities may be considered to be giving advice about securities *unless* the data provided is readily available in its raw state, the categories of information presented are not highly selective, and the information is not organized or presented by the adviser in a manner that recommends or suggests the purchase or sale of securities.<sup>6</sup> Under this analysis, providing certain securities pricing services for actively traded securities would not bring a person within the definition of an adviser. However, if the pricing service relates to infrequently traded securities (for which information may not be readily available in its raw state), the provider may be considered an investment adviser.<sup>7</sup>

The SEC staff has not required certain providers of computer software services offering calculations and pricing models to register as an adviser. In granting this relief, the staff considers the sophistication of the users, the degree to which the users—as opposed to the software package—perform the calculations, the degree to which the product is prepackaged and not personalized for each customer, and whether the calculations or models are based on traditional or standard calculations.<sup>8</sup>

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Footnotes

<sup>1</sup> See [New Directions Group, Inc., SEC No-Action Letter, 1985 WL 53997](#) (Mar. 6, 1985, reconsidered and reaffirmed May 2, 1985); [Richard K. May, SEC No-Action Letter, 1979 WL 13296](#) (Dec. 11, 1979).

<sup>2</sup> See, e.g., [Dow Theory Forecasts, Inc., SEC No-Action Letter, 1978 WL 9779](#) (Feb. 2, 1978).

<sup>3</sup> See [Maratta Advisory, Inc., SEC No-Action Letter, 1981 WL 25117](#), Fed. Sec. L. Rep. (CCH) ¶77,035 (July 16, 1981).

<sup>4</sup> See [Greater Cleveland Hospital Ass'n, SEC No-Action Letter, 1995 WL 329621](#) (May 11, 1995); [Sebastian Assoc. Ltd., SEC No-Action Letter](#) (pub. avail. Aug. 7, 1985).

<sup>5</sup> See [National Football League Players Assoc., SEC No-Action Letter, 2002 WL 100675](#) (Jan. 25, 2002).

<sup>6</sup> See, e.g., [RDM Infodustries, Inc., SEC No-Action Letter, 1996 WL 272425](#) (Mar. 25, 1996); [Media Gen. Fin. Servs., Inc., SEC](#)

No-Action Letter, 1992 WL 198262 (Aug. 20, 1992).

- <sup>7</sup> See *Wilson Assoc.*, SEC No-Action Letter, 1988 WL 234362 (May 25, 1988); *Butcher & Singer*, SEC No-Action Letter, 1987 WL 107434 (Jan. 2, 1987). The SEC staff will no longer respond to requests for interpretive or no-action letters regarding whether the presentation of securities information constitutes an analysis or report concerning securities, unless they present novel or unusual issues. See *Missouri Innovation Ctr., Inc.*, SEC No-Action Letter, 1995 WL 643949 (Oct. 17, 1995).
- <sup>8</sup> See *EJV Partners, [REDACTED]*, *UniVu System*, SEC No-Action Letter, 1992 WL 372147 (Dec. 7, 1992); *Executive Asset Mgmt., Inc.*, SEC No-Action Letter, 1988 WL 235366 (Dec. 15, 1988). The general view is that the Advisers Act does not apply to general investment banking activities or to persons who provide “financial advisory” services—i.e., advice relating to an entity’s financial or capital structure, rather than investments—although it is difficult to generalize on this issue. See L. Loss & J. Seligman, *Fundamentals of Securities Regulation*, 75 (Aspen, 3rd ed. 1995).

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