Securities Regulation Daily Wrap Up, INVESTMENT ADVISERS—Massachusetts says robo-advisers fail fiduciary duty standard,(Apr. 8, 2016)

By Jay Fishman, J.D.

The Massachusetts Securities Division has issued a policy statement proclaiming that because automated robo-advisers, unlike traditional human investment advisers, cannot provide fiduciary duties to clients, the Division will evaluate their Massachusetts registration applications on a case-by-case basis.

Definition. The Division defines a "robo-adviser" as either a fully automated adviser or an investment adviser that uses asset allocation algorithms combined with human services. The policy statement applies primarily to fully automated advisers, but with either type, a robo-adviser must be evaluated on a case-by-case basis to ensure that it meets its fiduciary obligation to clients when advising them for compensation.

Fiduciary duty. Inherent in the Division's "case-by-case evaluation mandate" is the belief that robo-advisers cannot meet the fiduciary duty because:

- They do not meet with or conduct significant (or any) due diligence on their clients;
- They often provide totally depersonalized investment advice;
- They fail to meet the high standard of care needed to make appropriate investment decisions for their clients; and
- They specifically decline to act in their clients' best interests by disclaiming this and other obligations in the electronic client agreement.

The Division also based its decision on the following SEC/FINRA caution to investors: "An automated tool may rely on assumptions that could be incorrect or do not apply to your individual situation … An automated investment tool may not assess all of your particular circumstances, such as your age, financial situation and needs, investment experience, other holdings, tax situation, willingness to risk losing your investment money for potentially higher investment returns, time horizon for investing, need for cash, and investment goals. Consequently, some tools may suggest investments (including asset-allocation models) that may not be right for you."

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