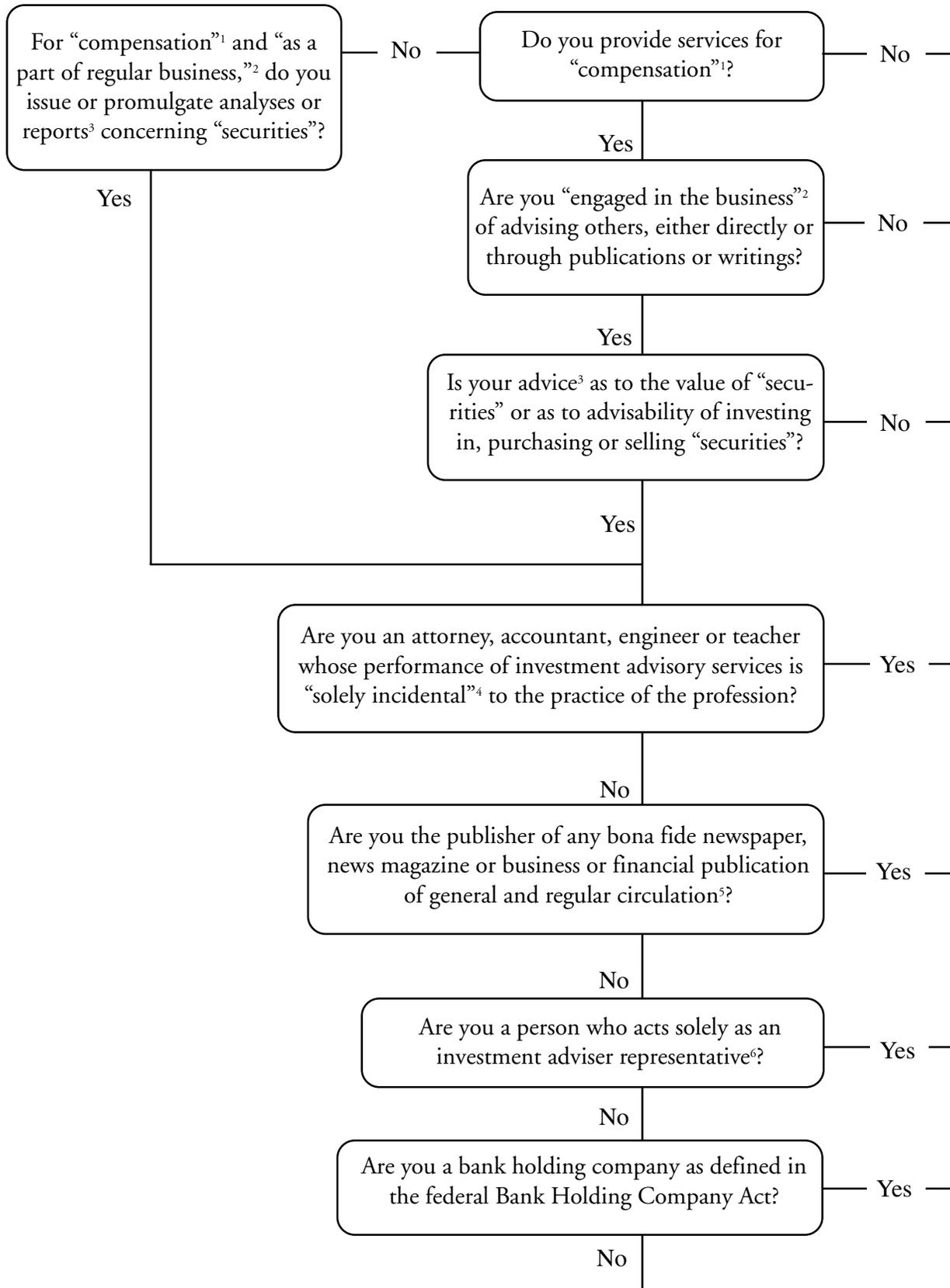
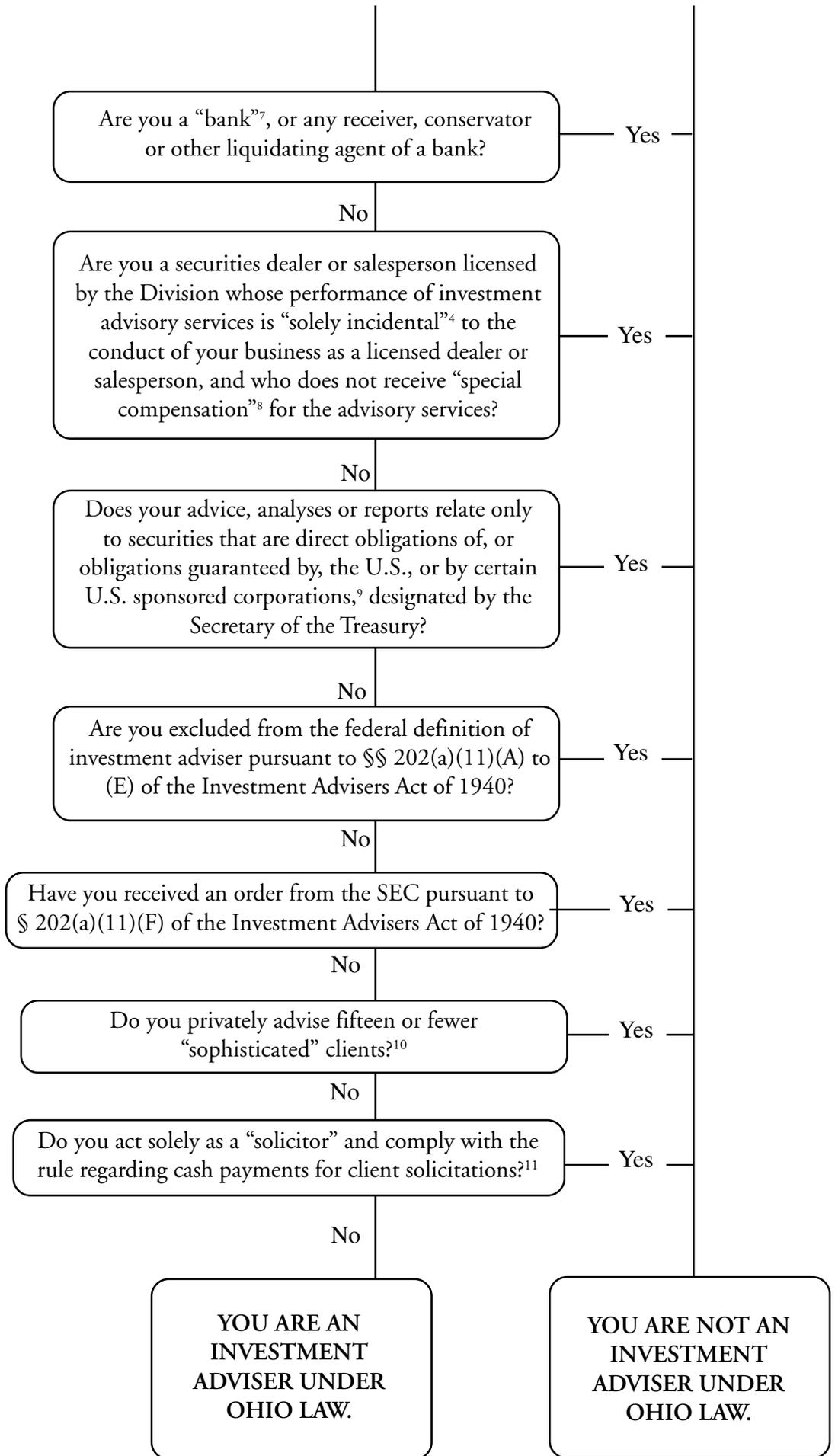


ARE YOU AN INVESTMENT ADVISER UNDER OHIO LAW?

(R.C. 1707.01(X))

(The accompanying notes are an integral part of this flowchart.)





NOTES TO “ARE YOU AN INVESTMENT ADVISER UNDER OHIO LAW?”

1. “Compensation” is construed broadly and means the receipt of any economic benefit, whether in the form of an advisory fee or some other fee relating to the total services rendered, commissions, or some combination of the foregoing. It is not necessary that an adviser’s compensation be paid directly by the person receiving investment advisory services, but only that the investment adviser receive compensation from some source for the services. See SEC Release No. IA-1092, § II.A.3. (October 8, 1987).
2. “As a part of regular business” and “engages in the business” both require a “business” element and are to be construed in the same manner. The determination to be made is whether the degree of the person’s advisory activities constitutes being “in the business.” Whether a person giving advice about securities for compensation would be “in the business” depends upon all relevant facts and circumstances. In general, a person is considered to be “in the business” if the person (i) holds himself or herself out as an investment adviser or as one who provides investment advice; or (ii) receives any separate or additional compensation that represents a clearly definable charge for providing advice about securities; or (iii) on anything other than rare, isolated and non-periodic instances, provides specific investment advice. See SEC Release No. IA-1092, § II.A.2. (October 8, 1987).
3. The advice, report or analyses need not be with respect to particular securities. Rather, for example, advice concerning the relative advantages and disadvantages of investing in securities in general as compared to other investments would be “advice” for purposes of this prong of the definition. See SEC Release No. IA-1092, § II.A.1. (October 8, 1987).
4. Whether an exclusion from the definition of investment adviser is applicable depends on the relevant facts and circumstances. For example, an attorney or accountant who holds himself or herself out to the public as providing financial planning or advisory services would not appear to fall within this “solely incidental” exclusion. See SEC Release No. IA-1092, § II.B. (October 8, 1987). In general, three factors are relevant to the determination of whether the “solely incidental” exclusion is available: (i) whether the person holds himself or herself out to the public as an investment adviser, financial planner or other provider of advisory services; (ii) whether the advisory services are rendered in connection with and reasonably related to the professional services; (iii) whether the fee charged for advisory services is based on the same factors as those used to determine the fee for the professional services. See, e.g., *Hauk, Soule & Fasani, P.C.*, SEC No-Action Letter (April 2, 1986); *Milton O. Brown, P.C.*, SEC No-Action Letter (August 28, 1983).
5. This exclusion does not include bulletins that are issued from time to time in response to episodic market activity, advertisements that “tout” particular issues, advertised lists of stocks “that are sure to go up” that are sold to individual purchasers or publications distributed as an incident to personalized investment service. *Lowe v. SEC* 472 U.S. 181 (1985). The *Lowe* court did hold that this exclusion was applicable to a newsletter that was “completely disinterested” and “offered to the general public on a regular schedule.” *Id.* at 206. The definition of “investment adviser” encompasses publishers as well as authors. See SEC Release No. IA-563 (January 10, 1997). This exclusion, if it is available, would extend to authors.
6. A person may act as both an investment adviser and an investment adviser representative. See R.C. 1707.161(B)(2). However, a person who acts solely as an investment adviser representative is excluded from the definition of investment adviser. “Investment adviser representative” is defined in R.C. 1707.01(CC).
7. “Bank” is defined in R.C. 1707.01(O). This exclusion extends to an employee of a bank to the extent that the employee is acting in his or her capacity as an employee. See, e.g., *Harbor Springs State Bank*, SEC No-Action Letter (March 3, 1986). This exclusion does not extend to a bank employee acting in his or her individual capacity. *Id.*
8. “Special compensation” for investment advice is compensation to the dealer or salesperson in excess of that which he or she would be paid for providing a brokerage or dealer service alone. Consequently, “special compensation” exists where there is a clearly definable charge for investment advice. See SEC Release No. IA-626, § V. (April 27, 1978).
9. For example, the Government National Mortgage Association (“GNMA”).
10. See O.A.C. 1301:6-3-01(L)(1). To qualify for this limited exclusion, you must, during a twelve month period, (i) have fifteen or fewer clients; (ii) not hold yourself out generally to the public as an investment adviser; and (iii) have as clients only the sophisticated, trust or family entities specified in the rule.
11. See O.A.C. 1301:6-3-01(L)(2). A solicitor is any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser or investment adviser representative. The rule regarding cash payments for client solicitations is contained in O.A.C. 1301:6-3-44(C)(1) and requires, among other things, a solicitor who receives cash payments to provide a written solicitation disclosure document to clients.