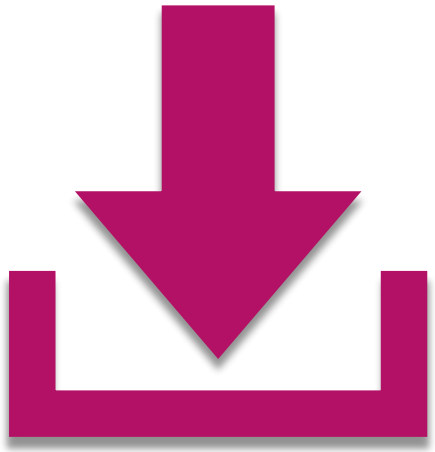
Fixed Indexed Annuities & Fiduciary Duty of Investment Advisers:

EFFECTS OF JURY VERDICT IN SEC ENFORCEMENT ACTION

Download Our Slides

https://www.ria-compliance-consultants.com/FIA-Jury-Verdict-SEC



Important Disclosures

Please carefully review the following disclosures and limitations of this course.

- Although the sponsor of this course, RIA Compliance Consultants, Inc. ("Sponsor"), is an affiliate of a law firm and Sponsor may have an individual on its staff that is also licensed as an attorney providing legal services in a completely separate capacity, Sponsor is **not** a law firm and does **not** provide legal services or legal advice. A consulting relationship with Sponsor does not provide the same protections as an attorney-client relationship.

- This course is offered for educational purposes only and should not be considered an engagement with Instructor or Sponsor. This presentation should not be considered a comprehensive review or analysis of the topics discussed today. These educational materials are not a substitute for consulting with an attorney or compliance consultant in a one-on-one context whereby all the facts of your situation can be considered in their entirety.



Key Point: *Taking this educational course does not create an attorney-client relationship or a compliance consulting relationship between you and your Instructor or the program Sponsor. If you have questions about your particular circumstances, we encourage you to discuss them with your compliance professional and/or your attorney.*

Please Read Our Fine Print

- Instructor and Sponsor make all reasonable efforts to ensure the educational material is current and accurate at the time of presentation. Instructor and Sponsor are not be under an obligation to advise you of any regulatory developments or subsequent changes to educational material presented in this IAR CE course.

- Information provided during this course is provided "as is" without warranty of any kind, either express or implied, including, without limitation, warranties and merchantability, fitness for a particular purpose, or non-infringement. Instructor and Sponsor assume no liability or responsibility for any errors or omissions in the content of the presentation.

- There is no guarantee or promise that concepts, opinions and/or recommendations discussed will be favorably received by any particular court, arbitration panel or securities regulator or result in a certain outcome.



Key Point: *Laws and regulations change over time, and it is impossible to predict how a court, arbitration panel, or securities regulator will act in the future. After taking this course, you should be alert for future regulatory developments.*

Keep in Mind…

- Communication with Instructor is not protected from discovery by third-parties during litigation or regulatory proceedings. Please keep questions during this course in a hypothetical form.

- Reviewing the slides and/or attending this course does not create a consulting engagement with RIA Compliance Consultants, Inc. A consulting relationship can be established only after the following two events have been completed: (1) our thorough review with you of all the relevant facts pertaining to a potential engagement; and (2) the execution of a written engagement and fee agreement and our advance receipt of any retainer required under such an agreement. The slides and/or course should not be regarded as a complete analysis of the subjects discussed. The information on these slides and in the course should not be relied upon as a substitute for one-on-one compliance advice. Often times, a party needs professional advice that applies to his or her specific situation. Your investment adviser firm should retain a compliance professional and/or attorney to provide you with specific guidance regarding your firm's situation.



Key Point: *Do not disclose confidential or proprietary information during this course. If you have questions about your particular circumstances, we encourage you to discuss them with your compliance professional and/or your attorney.*

Live Course Not Yet Submitted to NASAA

RCC Has Not Yet Submitted This Live Presentation to NASAA for Approval as an IAR CE Course

If Approved, RCC Will Contact Attendees About Next Steps for Obtaining IAR CE Credit

NASAA Disclosure

NASAA does not endorse any particular provider of investment adviser representative continuing education courses. The content of this course and any views expressed are our own and do not necessarily reflect the views of NASAA or any of its member jurisdictions.



Live Course Requirements

- **Login** – You must be logged in during the live presentation under your email address.
- **View Entire Live Presentation** – You are required to watch the entire live presentation the course. If you do not watch the entire live presentation, you will have to watch the recorded version in its entirety.
- **Attendance Codes** - As you watch the live presentation, you will receive two attendance codes, each containing three alphanumeric characters. Save these codes. You will need to enter the full six-character attendance code prior to accessing the final quiz.
- **Purchase CE Course** – If the course is approved by NASAA for IAR CE, you will then need to purchase the course at *https://www.CE4Advisers.com* .
- **IAR Acknowledgement** – Sign the IAR CE Acknowledgement & Attestation.
- **Final Quiz -** You must complete each lesson and receive a score of **70%** on the final quiz (within 3 times) to receive IAR CE credit (assuming the course has been approved by NASAA).

Content Questions & Technical Help

If you have questions about the content of this course or need technical help, please contact us via the email address below:

ContEd@ria-compliance-consultants.com

Your Instructor



Bryan Hill, President
RIA Compliance Consultants, Inc.

Bryan has over 28 years of experience working with investment advisers, broker-dealers and investors as a compliance consultant, attorney and executive.

bhill@ria-compliance-consultants.com
877-345-4034 x 101

Course Overview

- ***Regulatory Resources***
- ***SEC Enforcement Action***
  - Facts & Circumstances
  - Causes of Action & Relief Sought
  - Verdict
- ***Limited Review of Fiduciary Duty***
  - Background
  - Application of Fiduciary Duty
  - Waiver of Fiduciary Duty
  - Duty of Care
    - Components
    - Client's Best Interest
  - Duty of Loyalty
    - Disclosure of Conflicts of Interest & Mitigation/Elimination
    - Disclosure of Capacity
- ***Best Practices for Disclosing & Mitigating Conflict of Interest with IAR Selling FIAs***
  - Separate Client Disclosure & Acknowledgement
  - Developing Conflict of Interest Disclosure for Form ADV & Client Agreement
  - Eliminating/Mitigating Conflict of Interest
    - Change IAR Compensation for FIA Sales
    - FIA Sales Supervision

Regulatory Resources

U.S. Securities and Exchange Commission Enforcement Action, Civil Action No. 1:23-cv-10589 (D. Mass. filed March 17, 2023)

- Litigation Release No. 25669 / March 17, 2023 at https://www.sec.gov/litigation/litreleases/2023/lr25669.htm
- SEC Complaint at https://www.sec.gov/litigation/complaints/2023/comp25669.pdf
- SEC Statement on Jury Verdict (04/24/2025) at https://www.sec.gov/newsroom/speeches-statements/waldon-statement-042425

Investment Advisers Act of 1940

- Section 206(4) Prohibited Transactions by Investment Advisers at https://www.law.cornell.edu/uscode/text/15/80b-6

SEC Rule 206(4)-7

- Compliance Procedures and Practices at https://www.ecfr.gov/current/title-17/chapter-II/part-275/section-275.206(4)-7

U.S. Supreme Court

- SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) at https://supreme.justia.com/cases/federal/us/375/180/

Regulatory Resources

U.S. Securities and Exchange Commission:

- *Commission Interpretation Regarding Standard of Conduct for Investment Advisers* at https://www.sec.gov/rules/interp/2019/ia-5248.pdf

SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers:

- *Care Obligations* at https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers
- *Conflicts of Interest* at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest
- *Account Recommendations for Retail Investors* at https://www.sec.gov/tm/iabd-staff-bulletin

SEC Office of Investor Education and Advocacy

- *Updated Investor Bulletin: Indexed Annuities (7/31/2020)* at https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_indexedannuities
- *Annuities* at https://www.investor.gov/introduction-investing/investing-basics/investment-products/insurance-products/annuities

Regulatory Resources

SEC Rule 151A: Status of Indexed Annuities Under the Federal Securities Laws

- *A Small Entity Compliance Guide* at https://www.sec.gov/rules/final/2009/33-8996-secg-151a.htm

American Council of Life Insurers

- *Map of States Adopting Best Interest Laws or Regulations for Annuity Transactions* at https://consumerprotection.life/#map

Limited Focus

Fiduciary Duty

Although this course will discuss certain aspects of an investment adviser's fiduciary duty, our coverage will be limited and should not be considered a comprehensive analysis or education about an investment adviser's fiduciary duty under the Investment Advisers Act of 1940 as amended.

Insurance Laws & Regulations Outside Scope of Course

This course will **not** cover state insurance laws and regulations with respect to the recommendation and sale of fixed indexed annuities. In particular, the instructor will not address in detail the recent changes to the applicable state insurance laws and regulations which add a best interest revision to the NAIC Suitability in Annuity Transaction Model. You should consult your local attorney and/or state insurance regulator for further details.

Limited Focus (Continued)

ERISA/IRC Prohibit Transactions Not Covered in This Course

This course will **not** cover whether the recommendation to purchase a fixed indexed annuity (with proceeds from retirement plan rollover or inside an IRA account) which pays an IAR a commission is a prohibited transaction under Employee Retirement Income Security Act ("ERISA") or Internal Revenue Code ("IRC").

SEC Enforcement Action Disclosure

RIA Compliance Consultants, Inc. and this course's instructor have not verified the accuracy of the SEC's complaint filed in the U.S. District Court.

The attorney for the defendants in this enforcement action is denying the SEC's allegations:

> *"The SEC is flat out wrong on the facts and the law….This case is about trying to hold [the investment adviser firm] to a standard above and beyond what is required of the industry in terms of disclosure. It's ultimately using [the investment adviser firm], a small family-run business, as a means to get a toehold into regulating the insurance industry."*

See https://www.investmentnews.com/sec-charges-advisor-with-failing-to-disclose-annuity-commissions-235332 .

RIA Compliance Consultants, Inc. and the course instructor are not offering any opinion whether the allegations made by the SEC in this enforcement proceeding are accurate and valid. It should be noted that the jury verdict only supported one of three causes of action asserted by the SEC.

SEC Enforcement Action - Snapshot

- SEC alleges that Rep "… engaged in a pattern of deception designed to steer his investment advisory clients to certain insurance products over other investment options, while concealing his financial motive to do so in breach of his fiduciary duties as an investment adviser."
- SEC explained that it brought charges against the Investment Adviser Firm and Rep for the following:
  - Rep and Investment Adviser Firm allegedly recommended that advisory clients invest in insurance products that paid Rep a substantial up-front commission without adequately disclosing Rep and Investment Adviser Firm's financial incentive to sell the products;
  - Rep allegedly made false statements in applications for the insurance products; and
  - Rep allegedly made false statements to at least one client regarding commission compensation.

SEC Enforcement – Failure to Disclose Commissions versus Fees (As Asserted by the SEC)

- Rep Received a Fee of Approximately 1.5% to 2.0% on Assets Under Management
- Rep Received a Commission on a Fixed Indexed Annuity Sale of Approximately 7% of the Annuity's Total Value
- Rep Failed to Disclose to Client
  - Up-Front Nature of the Fixed Indexed Annuity Commissions
  - How the FIA Commissions Compared to Asset-Based Annual Advisory Fees

SEC Enforcement
Failure to Disclose Conflict of Interest When Surrendering Existing FIA
(As Asserted by the SEC)

- Rep "Schemed" to Get New Advisory Clients to Replace Annuities As Soon As They Became Clients
  - Trolled Replacement Options Before Meeting with Clients and Having Any Knowledge of Circumstances Justifying Replacements
  - Rep and Investment Adviser Firm's Employees (at Rep's Direction) Filled Out Replacement FIA Applications Before Meeting with Clients and Then Directed Clients to Sign with No or Little Discussion
- Rep Recommended Surrendering FIAs Already Owned & Use Funds to Purchase a New FIAs Which Generated New Commissions for Rep
  - Some Clients Incurred a Surrender Charge for Such Recommendations
  - Some Clients Had Purchased their Original FIA through Rep

SEC Enforcement
Failure to Disclose Conflict of Interest When Surrendering Existing FIA
(As Asserted by the SEC)

- Rep Recommended Replacement of 81 FIAs Between 2018 – 2022
  - 38 of 81 FIAs Recommended Replacement Were Previously Sold by Rep
  - 34 of 81 FIAs Recommended Replacement Were Made Before Surrender Period Expired
  - These Clients Incurred $640,000 In Surrender Charges
  - Rep Received $974,497 in Commissions on These Replacement FIAs
- For These FIA for the Replacements, Rep Only Recommended One Insurance Company Which Offered a Bonus for Hitting Certain Level of Sales
  - In 2020, Rep Received At Least An Additional $9,000 in Bonus
- Rep Failed to Adequately Disclose Its Conflict of Interest with Such Transactions

SEC Enforcement – Misrepresentations (As Asserted by the SEC)

- Rep Allegedly Misrepresented Certain Clients' Financial Circumstances in Annuity Applications to Insurance Companies to Help Ensure Applications Would Be Approved
  - Rep Crafted Carefully Worded, False and/or Misleading Justification for the Annuity Switch to Avoid Red Flags in Suitability Review
    - Falsely Claimed Client No Longer Needed an Income Rider
    - Falsely Claimed Client's Investment Objectives Changed
- Rep Supposedly Misrepresented to at Least One Client the Percentage of Commission on the FIA Sale

SEC Enforcement - Breach of Fiduciary Duty Claim (As Asserted by the SEC)

Failure to Disclose Compensation + Conflicts = Breach of Fiduciary Duty

Rep and Investment Adviser Firm Breached their Fiduciary Duties to Never Place Their Own Interest Ahead of Their Clients, to Disclose All Material Conflicts of Interest and to Obtain Client's Informed Consent to Those Conflicts

SEC Enforcement – Failure to Disclose Marketing Support (As Asserted by the SEC)

- Rep and Investment Adviser Firm Also Allegedly Failed to Disclose the Receipt of Over $1.1 Million in the Following Categories from Third-Party Marketing Organizations that Provided Rep and Investment Adviser Firm with FIA Sales Support:
  - Free Marketing Services (e.g., Designing & Maintaining Websites, Sending Blast Emails, Preparing Marketing Materials, Assisting with Newspaper Articles and Radio Shows, Creating Brochure, Social Media Advertising) and
  - Payments Styled as Expense Reimbursements (But SEC Claims that These Payment Were Actually Commissions)
  - Additional Commissions Between 1% to 1.5% Beyond 7% Commission Already Paid by Insurance Company
- Rep and Investment Adviser Firm "Abrogated" Their Fiduciary Duty of Loyalty to
  - Make Full and Frank Disclosure of All Conflicts of Interest to Their Advisory Clients and
  - Obtain Their Clients' Informed Consent to These Conflicts of Interest

SEC Enforcement Action
Charges & Relief Sought by SEC in Federal District Court

- Charged Investment Adviser Firm with Violating Antifraud Provisions of Section 206(1) & 206(2) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 206(4) of the Advisers Act and Rule 206(4)-7
- Charged Rep with Violating Sections 206(1) and 206(2) of the Advisers Act and aiding and abetting Investment Adviser's Violation of Section 206(4) and Rule 206(4)-7
- Sought Permanent Injunctions, Disgorgement of Ill-Gotten Gains Plus Prejudgment Interest, and Penalties

Section 206(4) of Investment Advisers Act of 1940:

It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1)to employ any device, scheme, or artifice to defraud any client or prospective client;

(2)to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

*****

or

(4)to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

See https://www.law.cornell.edu/uscode/text/15/80b-6 .

Rule 206(4)-7
Compliance Procedures and Practices

If you are an investment adviser registered or required to be registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3), it shall be unlawful within the meaning of section 206 of the Act (15 U.S.C. 80b–6) for you to provide investment advice to clients unless you:

(a) Policies and procedures. Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Act and the rules that the Commission has adopted under the Act;

(b) Annual review. Review, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation; and

(c) Chief compliance officer. Designate an individual (who is a supervised person) responsible for administering the policies and procedures that you adopt under paragraph (a) of this section.

See https://www.ecfr.gov/current/title-17/chapter-II/part-275/section-275.206(4)-7 .

Excerpt of Actual Jury Verdict Form

First Claim:

A. Violation of Section 206(1) of the Advisers Act

1. Did the Plaintiff the Securities and Exchange Commission (the "SEC") prove by a preponderance of the evidence that Defendants Cutter Financial Group, LLC ("CFG") and Mr. Jeffrey Cutter directly or indirectly employed a device, scheme or artifice to defraud a client or prospective client and acted at least recklessly or knowingly with the intent to defraud in violation of Section 206(1) of the Advisers Act?

Yes ___ **No** X

B. Violation of Section 206(2) of the Advisers Act

2. Did the Plaintiff the SEC prove by a preponderance of the evidence that Defendants CFG and Mr. Jeffrey Cutter directly or indirectly employed a device, scheme or artifice to defraud a client or prospective client and acted at least negligently in violation of Section 206(2) of the Advisers Act?

Yes X **No** ___

Second Claim:

A. Violation of Section 206(4) of the Advisers Act and Advisers Act Rule 206(4)-7

3. Did the Plaintiff the SEC prove by a preponderance of the evidence that Defendant CFG directly or indirectly failed to adopt and implement written policies reasonably designed to prevent violations of the Advisers Act and the rules promulgated thereunder, in violation of Section 206(4) of the Advisers Act and Advisers Act Rule 206(4)-7?

Yes ___ **No** X

Jury Decision – Key Findings

- Found rep and firm **liable for violating Section 206(2)** of the Investment Advisers Act due to **negligent disclosure failures.**
- **Did not find liability** for charges under Sections 206(1) (intentional fraud) and 206(4) (compliance procedures).
- Concluded Cutter negligently failed to adequately disclose substantial upfront commissions earned from fixed indexed annuity (FIA) sales.

Jury Decision – Regulatory Impact

- Reinforces critical importance of **full and fair disclosure** of all conflicts of interest, especially commissions earned from FIA sales.
- Highlights ongoing SEC scrutiny of advisory firms recommending annuity replacements.
- However, in my opinion, does not fully clarify adviser obligations regarding fiduciary duty, particularly related to dual roles as investment advisers and insurance agents.

Cutter's Position on Verdict

"Today, the jury found what we have been saying for more than four years: that we did not intentionally or recklessly defraud any clients," Cutter said in a news release. "The jury also found that we complied with applicable SEC rules about compliance policies and procedures. These are claims that should never have been brought in the first place. It is very difficult for a small business to stand up to federal government regulators and prevail. But that's what we did today."

See https://insurancenewsnet.com/innarticle/jury-delivers-split-decision-in-jeffrey-cutter-annuity-sales-trial

Fiduciary Duty – Background

- Investment Advisers Act of 1940 Creates Federal Fiduciary Duty
- Not Specifically Defined by Statue or Rule
- Based on Equitable Common Law Principals
- Congressional Intent to Eliminate and/or Disclose Conflicts & Eliminate Abuses of Clients
- SEC Re-Commits in the Interpretation to Fiduciary Principal Based Standard
- SEC Expressly Rejects Rule Text in Interpretation
- SEC Prefers Principal Based Standard Because Allows Effective Standard with Flexibility in How Achieved

See *Commission Interpretation Regarding Standard of Conduct for Investment Advisers* at https://www.sec.gov/rules/interp/2019/ia-5248.pdf .

Application of Fiduciary Duty

- Fiduciary Duty Applies to Entire Relationship Between Client and Investment Adviser
- Fiduciary Duty Must Be Viewed in Context of Agreed-Upon Scope of the Relationship Between Investment Adviser and Client
- Specific Obligations that flow from Investment Adviser's Fiduciary Duty Depend Upon What Functions Adviser, As Agent, Has Agreed to Assume for Client, Its Principal

Waiver of Fiduciary Duty

- May Not Waive Federal Fiduciary Duty
- Following Waiver Provisions Are Problematic
  - Statement that Investment Adviser Will Not Act As Fiduciary
  - Blanket Waiver of the Conflict of Interest
  - Waiver of Specific Provision of the Investment Advisers Act of 1940
- Fiduciary Duty Will Apply in a Manner that Reflects Agreed-Upon Scope of Relationship

Fiduciary Duty – Components

- Duty of Care
- Duty of Loyalty

See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) at https://supreme.justia.com/cases/federal/us/375/180/ .

Duty of Care

- Duty to Provide Advice that Is in Best Interest of Client
- Duty to Seek Best Execution of a Client's Transactions When the Investment Adviser
- Duty to Provide Advice & Monitor Over Course of Relationship

Duty of Care – Best Interest of Client
How Does an Investment Adviser Provide Advice in Best Interest of Client

- Reasonable Understanding of Client's Objectives
  - Investment Profile for Retail Client – Reasonable Inquiry into Financial Situation, Level of Sophistication, Investment Experience and Financial Goals
  - Investment Adviser Needs to Update Retail Client's Investment Profile to Reflect Any Change Circumstances
  - Frequency Depends Upon Facts and Circumstances

Reasonable Belief Advice Is in Best Interest
Independent & Reasonable Investigation of Security

- Investment Adviser Required to Make Independent & Reasonable Investigation of Security Before Recommending
- Reasonable Investigation Includes
  - Cost
  - Investment Strategy
  - Investment Objectives
  - Characteristics (including any special or unusual features)
  - Liquidity
  - Risks and Potential Benefits
  - Volatility
  - Likely Performance in a Variety of Market and Economic Conditions
  - Time Horizons
- Costs of Exit

Advice In Best Interest Application

- Fiduciary Duty Applies to & Includes All Advice About Investment Strategy, Engaging Sub-Adviser and Account Type
- Account Type Includes
  - Commission-BD vs. Fee-RIA account
  - IRA Rollover
  - Wrap v. Non-Wrap
  - Different Investment Advisory Programs Offered by Firm
- Investment Adviser Should Acknowledge When Account Type Not in Client's Best Interest

Duty of Loyalty

Disclosing Conflicts of Interest

- Disclosure Should Put Client in Position to Be Able to Understand & Provide Informed Consent to the Conflict
- It Is Not Consistent with an Investment Adviser's Fiduciary Duty to Infer or Accept Client Consent Where Adviser Was Aware or Reasonably Should Have Been Aware that Client Didn't Understand Nature of Conflict
- In Some Circumstance, the Disclosure May Not Adequately Convey the Material Facts or Magnitude of Conflict for a Client's Consent
- When an Investment Adviser Cannot Fully or and Fairly Disclose a Conflict So That Client Can Provide Informed Consent, Investment Adviser Should Either Eliminate or Mitigate the Conflict

Duty of Loyalty
Full & Fair Disclosure

- Investment Adviser Must Eliminate or at Least Expose Through Full & Fair Disclosure of All Conflicts of Interest Which Might Incline an Investment Adviser to Render Advice Which Isn't Disinterested
- Full & Fair Disclosure
  - Sufficiently Specific So Client Is Able to Understand Material Fact & Conflict
  - "May" Is Inappropriate When Conflict Exists with Respect to Some (But Not All) Types or Classes of Clients, Advice, or Transactions without Additional Disclosure Specifying Types or Classes of Clients, Advice, or Transactions
  - Disclosure May Differ Between Retail and Institutional Clients Because Institutional Clients Have Greater Capacity & Resources – Regardless of Nature of Client, Disclosure Must Be Clear & Detailed

Duty of Loyalty

Disclosing Conflicts of Interest

- Disclosure Should Put Client in Position to Be Able to Understand & Provide Informed Consent to the Conflict of Interest
- It Would Not Be Consistent with an Investment Adviser's Fiduciary Duty to Infer or Accept Client Consent Where Adviser Was Aware or Reasonably Should Have Been Aware that Client Didn't Understand Nature or Import of Conflict
- In Some Circumstance, the Disclosure May Not Adequately Convey the Material Facts or Magnitude of Conflict for a Client's Consent
- When an Investment Adviser Cannot Fully or and Fairly Disclose a Conflict of Interest So That Client Can Provide Informed Consent, Investment Adviser Should Either Eliminate the Conflict or Adequately Mitigate the Conflict

Duty of Loyalty – Conflict Mitigation

- If Conflict of Interest Is Not Going to be Eliminated in Its Entirety, Log Conflict
- Implement Disclosure of Conflict so a Lay Person Could Understand
- Prepare Policy & Procedure to Mitigate Conflict
  - Heighten Supervision of Issue
  - Pre-Approval of All or Certain Activities
  - Due Diligence
- Train Supervised Persons About Conflict and P&P
- Test P&P To Determine If Conflict Is Mitigated

Duty of Loyalty Requires Disclosure of Capacity

"To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship. ***Material facts relating to the advisory relationship include the capacity in which the firm is acting with respect to the advice provided.*** *This will be particularly relevant for firms or individuals that are dually registered as broker dealers and investment advisers and who serve the same client in both an advisory and a brokerage capacity. Thus, such firms and individuals generally should provide full and fair disclosure about the circumstances in which they intend to act in their brokerage capacity and the circumstances in which they intend to act in their advisory capacity. This disclosure may be accomplished through a variety of means, including, among others, written disclosure at the beginning of a relationship that clearly sets forth when the dual registrant would act in an advisory capacity and how it would provide notification of any changes in capacity."*

See https://www.sec.gov/rules/interp/2019/ia-5248.pdf at pages 21 - 22.

Required to Disclosure Fiduciary Capacity When Recommending Account Type

*"**Do I need to disclose my capacity under both Reg BI and the IA fiduciary standard when making a recommendation?***

Yes. Under Reg BI, when making an account recommendation, you must disclose all material facts relating to the scope and terms of your relationship with the retail investor, including the capacity in which you are acting. Investment advisers have a similar obligation under the duty of loyalty to disclose all material facts relating to the advisory relationship, including the capacity in which they are acting. ***Where you have not yet established the capacity in which you will be acting, you should assume that both standards apply and disclose to the investor, prior to or at the time of the recommendation, that you are acting in both capacities.*** *Firms should provide clear guidance, through policies and procedures and other instructions to their financial professionals, on how to disclose capacity to retail investors."*

See https://www.sec.gov/tm/iabd-staff-bulletin at 1.b.

Disclosed Capacity May Not Be Determinative If Facts Differ

"How do I know which standard applies when providing advice and recommendations to such investors?

Whether Reg BI or the IA fiduciary standard applies to a particular recommendation made or advice provided by a dually registered firm and/or financial professional depends on a facts and circumstances analysis, with no one factor being determinative. The Commission considers, among other factors, the type of account, how the account is described, the type of compensation, and the extent to which the dually registered firm and financial professional made clear to the customer or client the capacity in which they were acting. In this vein, the disclosure obligations of both Reg BI and the IA fiduciary standard require a firm or financial professional to disclose to the retail investor the capacity in which the firm or financial professional is acting (e.g., broker-dealer or investment adviser). ***The staff caveats that the disclosure of capacity may not be determinative if the facts and circumstances suggest the financial professional was acting in a different capacity from the one disclosed.****"*

Possible Examples of Facts & Circumstances Which Are Contrary to Disclosed Capacity

- Advisory and Insurance Services Are Provided by the Same Entity or Sister Entity with a Similar Name at Same Location with Same Telephone Number
- IAR Providing Investment Advice Is Also the Insurance Agent Recommending the FIA Purchase
- The Recommendation to Purchase a FIA Is **Intertwined** with Investment Adviser's Advice About Securities
  - Information Gathered for the FIA Recommendation Is Part of the Information Gathering of Investment Adviser Firm
  - FIA Recommendation Incorporated into Financial Plan
  - Presentment of Recommendation for the FIA Is Done at the Same Time as Advisory

Best Practices

Developing FIA Conflict Disclosures: Form ADV & Client Agreement

- ✓ First and foremost - attempt to eliminate the conflict of interest
- ✓ If unwilling to eliminate, explicitly acknowledge that there is a conflict of interest
- ✓ Avoid using “may”, “might”, “generally”, “typically” or “potential” when describing the conflict
- ✓ Clearly describe what constitutes the conflict and acknowledge that it is in fact a conflict
- ✓ Explain the conflict so that a lay person would understand
- ✓ **Disclose the rate and amount of the FIA commission plus bonuses**
- ✓ If non-cash compensation is provided, there should be a detailed description of this arrangement and the corresponding benefits including an estimated annual value
- ✓ Provide guidance about how firm mitigates the conflict of interest
  - Cannot merely “disclose away” a conflict of interest; mitigation is required if there’s a conflict
- ✓ Create written procedures to ensure that IAR is acting in the best interests of client
- ✓ Test annually whether disclosure and mitigation are actually addressing the underlying conflict and ensuring the best interests of client are being met

Best Practices

Separate Client Disclosure & Acknowledgement

- Compare Advantages/Disadvantages of Separately Managed Account versus FIA
- Discloses Annual Asset Management Fee Including
  - Percentage Rate
  - Actual Amount Under Relevant Example
- Discloses Compensation for New FIA Including
  - Commission Rate
  - Bonus Rate
  - Actual Amount Under Relevant Example
  - If Replacing Existing FIA Previously Sold by IAR, Disclose Previous Compensation Received and Any Surrender Charges Which Will Be Incurred
- Disclose Any Indirect Compensation (e.g., Marketing, Practice Management) from IMO or FMO
  - Include Detailed Description of Services & Estimated Value on Annual Basis
- Acknowledge Conflict of Interest
- Disclose Specific Reasons for FIA Recommendation
- Disclose Whether FIA Recommendation Is Performed as OBA Away from Investment Adviser
  - If FIA Is OBA, Disclose
    - Investment Adviser Firm Is Not Supervising the Transaction
    - IAR Is Not Acting as Fiduciary Under IAA'40 or State Securities Act When Recommending/Selling FIA
- Require Client and IAR to Sign Acknowledgement

Best Practices for FIAs Offered Outside of RIA Entity

Offered Through Affiliated Insurance Entity

- Clearly disclose affiliate relationship, shared financial interests, and any indirect financial benefits.
- Maintain separate and distinct documentation and branding to clearly communicate the separate capacities and entities.
- Establish formal inter-entity agreements delineating responsibilities and compensation structures.
- Provide clear written client acknowledgment of the capacity in which services are provided.

Offered Independently (Outside Business Activity)

- Require written OBA disclosures and firm approvals.
- Explicitly disclose to client that FIA sales are not supervised by the investment adviser firm and do not fall under fiduciary obligations under the Advisers Act.
- Ensure client acknowledgment forms explicitly recognize independent capacity.
- Prohibit use of RIA's resources, branding, or implied affiliation for independent FIA sales.

Conflict of Interest - Mitigation
Best Practice – Examples of FIA Sales Supervision

- Standard Allocation of Client's Portfolio Between FIA and Separately Managed Account Should Be Based Upon Client's Objectives, Risk Tolerance & Financial Circumstances
  - Do Not Permit IAR to Use Any Pre-Conceived Standards or Assumptions Requiring a Certain Portion of a Client's Portfolio in FIA
  - Educate Client of Different Account Types (e.g., Separately Managed Account, FIA) and Offer Choice for Client Between Account Types
- Conduct & Document Regular Due Diligence on FIAs Available
- Utilize Objective Criteria So Can Demonstrate that the FIAs Recommended Are In Client's Best Interest and Satisfy Best Execution
- Recommend/Compare 3 Best FIAs for Client
- Supervise Against Churning/Twisting When Replacing an Existing FIA
  - Verify Any Changes in Client Financial Circumstances
  - Compare Features/Costs of Existing FIA Against Proposed FIAs
  - Disclose to Client Commission Received for Previous FIA Sale and Surrender Charge Which Client Will Incur
- Require Principal with Sufficient Expertise to Review/Approve Any FIA Recommendations Prior to Presentment to Client

Best Practices

Change IAR Compensation

Eliminate and/or Mitigate Conflict of Interest

- Do Not Pass on Firm's FIA Conflicts to IARs or Executives
- Eliminate IAR's Financial Incentive to Recommend FIAs Over Separately Managed Accounts
  - Re-Design IAR's Payout So Level with Asset Management Compensation
    - *Example - Only Pay Out 1/5 of FIA Commission to an IAR Each Year for 5 Years*
    - *Example – Credit Amount of Any Commission Received for FIA Against Ongoing Advisory Fees*
    - *Example – Recommend No-Load FIAs Which Do Not Pay Commissions*
  - Avoid Payout Grids
    - *If Using Payout Grid, Increases in Compensation Rate Should Be Gradual & Only for Future Business*
  - Eliminate Any Internal Quotas or Performance Standards Requiring IAR to Sell FIAs
  - Prohibit IAR from Participating in Any FIA Sales Contests
  - Require IAR to Decline Incentive Trips or Complimentary Tickets to Entertainment or Sporting Events from Third-Parties Marketing FIAs
  - Do Not Accept Free Marketing or Practice Management Support from IMOs & FMOs Marketing FIAs

Questions

Please submit any question online or email with any questions about the content of this course.

ContEd@ria-compliance-consultants.com



Thank You

