

# RIA Compliance Consultants



## Conflicts of Interest

## Strategic Alliance Members



### **Bridge Financial Technology**

Automation-focused software designed to streamline back office functions.



### **Unitifi**

Modern solution for financial professionals to fulfill their fiduciary responsibility to know and understand their client.



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Insurance Solutions for member based organizations.

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# 2021 RIA Compliance Connection

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## Agenda

- Fiduciary Duty
  - What is a Conflict of Interest?
- Identifying Conflicts of Interest
  - How to Find Conflicts
- Recent Enforcement Actions
- List of Example Conflicts
- Developing Disclosures & Mitigation
- Where to Disclose Conflicts of Interest
- Resources

## Need to Own Your Conflicts of Interest Review

- Only the Officers & Key Personnel within a Firm (After Consulting with Supervised Persons) Will Have Sufficient Info to Identify All of a Firm's Conflicts of Interest
- Third-Parties Such As Compliance Consultant Won't Be Able to Identify All of Your Conflicts of Interest
  - Not Aware of All Your Business Arrangements and Practices
  - New Type of Conflict Not Previously Subject to Enforcement Action Won't Be on Their Radar
- RCC Relies Solely Upon You for Identifying Conflicts

## Fiduciary Duty

- Some definitions and background:
  - Any person entrusted with the property of another party and in whose best interests the fiduciary is expected to act when holding, investing or otherwise using that party's property.
  - Duty of utmost good faith to act solely in the best interest of the other party.
- Purpose of this duty is to eliminate conflicts of interest and prevent an investment adviser from taking unfair advantages of a client.
- Under SEC's recent interpretation of fiduciary duty, an investment must make full and fair disclosure of all material facts (i.e., duty of loyalty) and eliminate or mitigate the conflict of interest (i.e., duty of care).
- By definition, regulators deem investment advisers to be fiduciaries.
  - The U.S. Supreme Court has held Section 206 of the Investment Advisers Act of 1940 imposes a fiduciary duty upon all investment advisers. See *SEC v. Capital Gains Research Bureau, Inc.*
  - Must act in client's best interest at all times. See *Constellation Financial Mgmt. LLC (Jan. 9, 2003)*.

## Fiduciary Duty - What is a Conflict of Interest?

- A scenario where a person or firm has an incentive to serve one interest at the expense of another interest or obligation.
- Placing your interests ahead of any client's interest.
- A conflict of interest could be:
  - (a) serving the interest of the investment adviser firm over the client,
  - (b) serving the interest of one client over another client, or
  - (c) an employee/rep or group of employees/ reps serving their own interests over the firm or its clients.



## Identifying Conflicts of Interest – How to Find

- Include Compliance in Meetings and Business Development
- Compliance needs to be integral part of the firm
- Compliance should regularly review:
  - Business model,
  - Business practices,
  - Revenue sources,
  - New services,
  - New service providers,
  - Cross-selling by affiliated companies and supervised person's outside business activities

## Identifying Conflicts of Interest – How to Find

- Start with “Follow the Money Trail”
  - Understand and know how your firm makes money and to whom your firm pays money. Follow the revenue.
- Ask: Does the firm or supervised person have the ability to vary its/his/her compensation by the recommendation made to a client?
- Understand and know related companies (i.e. companies that own the firm, are owned by the firm, or are under common ownership with the firm).

## Identifying Conflicts of Interest – How to Find

- Understand and know all outside business activities (OBA) being conducted by the firm and advisory personnel.
- Understand and know non-investment advisory activities being provided by the firm, an affiliate of the firm, an employee's OBA, or a non-affiliate recommended by the firm
- Understand and know business arrangements.
  - Identify and log all business agreements, contracts and relationships.
  - Is the relationship provided by an affiliated company or non-affiliated company

## A Recent SEC Enforcement Action Wrap Fee/Share Class

- Wrap Fee Program Allowed 3<sup>rd</sup> Party Money Managers to Select Mutual Funds from No Transaction Fee Program of Clearing Firm
  - Not Disclosed by RIA
- RIA Received Share of Revenue Paid by MF to Clearing Firm
  - Not Disclosed by RIA
- RIA Received 12b-1 Fees
  - Insufficient Disclosure on these Practices
- Client Invested Generally in More Expensive Share Class
  - Lower Cost MF Shares Were Available than Actual MF Shares Selected by 3<sup>rd</sup> Party MM
  - RIA Failed to Disclose Less Expensive Share Classes Available
- RIA Agreed to Pay for Execution Costs
  - But By Limiting 3<sup>rd</sup> Party MM to NTF MFs, RIA Avoided Execution Costs
  - Failed to Disclose that In Fact It Didn't Pay Execution Costs Because Limited to NTFs
- RIA Didn't Disclose Its Conflicts

## **A Recent SEC Enforcement Action Wrap Fee/Share Class (Continued)**

- SEC entered into a cease-and-desist proceeding against an SEC registered investment adviser firm for allegedly failing to disclose material conflicts of interest related to its mutual fund share class selection practices, receipt of revenue sharing, avoidance of transaction fees, 12b-1 fees, and failure to seek best execution.
- RIA Censured by SEC, Required to Pay Penalty of \$19M

## Risk Alert - Investment Advisers Managing Client Accounts That Participate In Wrap Fee Programs (7/21/21)

### Areas of Examination

- Consistency with Fiduciary Duty Obligations
  - Reasonable Basis for Believing Wrap Fee Program in Client's Best Interest – Initially & Ongoing Basis
  - Undisclosed Transaction Charges
  - Little to No Trading for an Extended Period
- Adequacy of Disclosures
  - Fees, Expenses, Conflicts of Interest & Involved Entities
  - Which Parties Will Be Fulfilling Certain Core Responsibilities
- Effectiveness of Compliance Programs
  - Whether Investment Adviser Assessed Whether Wrap Fee Program/Accounts Were in Best Interest of Clients

### Observations

- Failure to Monitor for Additional Trading Away Charges
- Recommended Clients Participate In Wrap Program **Without** Assessment Whether in Best Interest
  - Or, Conducted an Initial Assessment But Not Ongoing Whether Still in Client's Best Interest
- Inconsistent Disclosures on Same Topic in Various Documents
- Omitted Disclosures
  - Investment Adviser Recommended/Selected Investments That Resulted in Higher Costs In Order to Avoid Paying Execution Costs
  - Didn't Disclose that Accounts with Low Trading Volume, High Cash Balance or Significant Fixed Income Position, May Be Able to Receive Less Expensive Services than Wrap Program

## Whether to Offer Wrap Program

- RCC Has Observed Significant Regulatory Scrutiny of Investment Advisers Sponsoring Wrap Accounts
  - SEC Is Finding Significant Deficiencies During Examinations and Requiring Sizable Reimbursements of Clients
- Due to Challenges of Sponsoring Wrap Accounts and Regulatory Scrutiny/Corrective Action, ***RCC Recommends Investment Advisers Avoid Sponsoring Wrap Programs***
- If Keeping Wrap Accounts, Need to Review SEC Risk Alert & Scrutinize/Update Practices, Agreements and Disclosures



## SEC Enforcement Action IRA Rollover (7/13/21)

- Investment Adviser Represented It Was a Fiduciary, Objective and Non-Commissioned
- Investment Adviser's P&P Required the Rep to Present 4 Options for Rollovers: (i) leaving the client's assets in the plan; (ii) rolling over the assets into a self-directed individual retirement account ("IRA") or managed IRA account; (iii) rolling over the assets to a new employer's plan; and (iv) cashing out the account value/taking a lump sum distribution
- However, Investment Adviser Presented Rollover as Only Option
- Investment Adviser Trained Staff to Avoid Discussing Fees Associated with Rollovers
- Investment Adviser Did Not Review Rollover Recommendations Or Act as a Fiduciary
- Investment Adviser Did Not Disclose Incentive Compensation for Rollover



## SEC Enforcement Action IRA Rollover (7/13/21)

- Investment Adviser Placed Negative Pressure on Reps to Maintain and Grow Assets
- Supervisors Discouraged Non-Managed Accounts for Rollovers and Gave Praise & Recognition for IRA Rollovers
- Some Reps Didn't Meet Goals, Were Place on Performance Improvement Plans and/or Terminated
- Supervisors Directed Reps to Promote Managed Account as Solution for 100% of Clients
- SEC Asserts Claims of Objective & Non-Commissioned Are Misleading Because Financial Incentives and Differential Compensation Provided Even More Incentive
- SEC Also Asserts that Claims of Putting Client First and Acting in Client's Best Interest Were Misleading Because Investment Adviser Didn't Ensure that Recommendations in Client's Best Interest
- Rollover Recommendation Lacked Any Documentation Supporting Recommendation Relating to Fees and Expenses to Rollover IRA or Existing Plan

# Fiduciary under ERISA/IRC

## Five-Part Test

1. Render advice to the plan, plan fiduciary, or IRA owner as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property,
2. On a regular basis,
3. Pursuant to a mutual agreement, arrangement, or understanding with the plan, plan fiduciary, or IRA owner, that
4. The advice will serve as a primary basis for investment decisions with respect to plan or IRA assets, and that
5. The advice will be individualized based on the particular needs of the plan or IRA.

# Fiduciary under ERISA/IRC

## What Is Advice on “Regular Basis”

- A single, discrete instance of advice to roll over assets from an employee benefit plan to an IRA would not meet the regular basis prong of the 1975 test.
- When the investment advice provider has been giving advice to the individual about investing in, purchasing, or selling securities or other financial instruments through tax-advantaged retirement vehicles subject to ERISA or the Code, the advice to roll assets out of the employee benefit plan is part of an ongoing advice relationship that satisfies the regular basis prong.
- When the investment advice provider has not previously provided advice but expects to regularly make investment recommendations regarding the IRA as part of an ongoing relationship, the advice to roll assets out of an employee benefit plan into an IRA would be the start of an advice relationship that satisfies the regular basis requirement.

## No Conflicted Advice without PTE

Under ERISA and the Internal Revenue Code, parties providing fiduciary investment advice to plan sponsors, plan participants, and IRA owners may not receive payments creating conflicts of interest, unless they comply with protective conditions in a prohibited transaction exemption.

## DoL's Prohibited Transaction Exemption (PTE) 2020-02

- *Investment Adviser and Rep Acknowledge their fiduciary status under ERISA in writing,*
- *Disclose their services and material conflicts of interest,*
- *Adhere to Impartial Conduct Standards requiring that they*
  - ✓ *Investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would (i.e., their recommendations must be “prudent”),*
  - ✓ *Act with undivided loyalty to retirement investors when making recommendations (in other words, they must never place their own interests ahead of the interests of the retirement investor, or subordinate the retirement investor’s interests to their own),*
  - ✓ *Charge no more than reasonable compensation and comply with federal securities laws regarding “best execution,” and*
  - ✓ *Avoid making misleading statements about investment transactions and other relevant matters,*
- *Adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and to mitigate conflicts of interest that could otherwise cause violations of those standards;*
- *Document and disclose the specific reasons that any rollover recommendations are in the retirement investor’s best interest; and*
- *Conduct an annual retrospective compliance review.*

## List Example Conflicts

- Receive Forgivable Loans from Broker-Dealer
- Charge Due Diligence Fee or Other “Platform” Fees to Product Sponsor or Service Provider
- Share or Receive Revenue from a Product Sponsor or Service Provider
  - Receive Support Services, Tools, Technology, Software, Research (Primarily for Benefit of Investment Adviser) from Qualified Custodian (QC)
  - Receive Marketing Support or Reimbursements from Third-Parties (e.g., product sponsor, third-party money manager, platform provider, qualified custodian)
  - For example, Payment or Reimburse of Expenses by Product Sponsor or Service Provider for Due Diligence/Education Trips Recommend/Select QC Which Is an Affiliate

# List of Example Conflicts

- Selecting an Affiliated Service Providers
- Dual Registrants or Using Affiliated Broker/Dealers
  - Receive % of the Mutual Fund Revenue Received by Clearing Firm/Qualified Custodian for NTF Program
  - Use an Affiliate as Intro B/D Which Has a Marked-Up Ticket Charge Over Clearing Firm's Charge
  - Implementing Agency Cross Transactions and/or Cross Trades
  - Implementing Principal Transactions
  - Receive Commissions or Trails on Advisory Assets
- Using Affiliated Third-Party Money Managers
- Using Affiliated Insurance Agency, Law Firm, Accounting Firm



# List of Example Conflicts

- Trustee and Other “Full” Power of Attorney Situations
- Rollover of Retirement Plan Assets to IRA or Other Retirement Account
- Switch from Broker/Dealer (B/D) Commission to Investment Adviser Fee Arrangement
- Wrap Fee Programs
  - Offering Both Wrap and Non-Wrap Accounts
  - Sponsor Wrap Fee Program with Per Transaction Formula for Paying QC
  - Sponsor Wrap Fee Program with Both Related Person Portfolio Managers and Unaffiliated Portfolio Managers



## List of Example Conflicts

- Use Sub-Adviser & Bundle Adviser and Sub-Adviser's Fee
  - Recommend Third-Party Money Managers or Sub-Advisers Which Pay Different Referral Fees and/or Marketing Support
- Utilize Different Fee Rates Based Upon Asset Classes
- Charging Different Fee Rates for Different Program/Service Offerings
- Recommend or Select Proprietary Product (e.g. Mutual Funds, ETFs, Hedge Funds, Real Estate Opportunities, Publicly Traded Company, Privately Offered Securities)
- Make Specific Investment Recommendations in Financial Plans Which Could Result in Additional or Variable Compensation

## List of Example Conflicts

- If Voting Client Securities (i.e. Proxy Voting), identify Conflicts of Interest Between Investment Adviser and Clients with respect to Voting Client Securities
- Precarious Financial Situations (Any Financial Condition that is Reasonably Likely to Impair Investment Adviser Firm's Ability to Meet Contractual Commitments to Clients)
- Investing in the Same Securities Recommended to Clients
- Trading Personal Accounts Ahead of Client Accounts

# List of Example Conflicts

- Allocating Initial Public Offerings (IPOs), and Private Placements (with Limited Availability and Made Available Due to Clients' Business), and other Limited Offerings to Investment Adviser's Proprietary Accounts or Supervised Persons' Personal Accounts
- Solicitor/Referral Arrangements
- Receipt or Payment of Bonuses Based, at least in part, on the Number or Amount of Sales or New Accounts
- Outside Business Activities (OBAs)

## OBA Conflicts of Interest

- An OBA Which Requires Significant Time or Attention from IAR
- An OBA Which Involves Recommending or Soliciting an Investment Advisory Client. Examples from Form ADV Part 1:
  - A. Registered Representative of Broker-Dealer, Futures Commission Merchant, Commodity Pool Operator, or Commodity Trading Advisor
  - B. Employee or Affiliated Person of Investment Company (e.g. Mutual Fund) or Other Pooled Investment Vehicle (e.g. Private Fund, Hedge Fund)
  - C. Sponsor of Investment Opportunities such Limited Partnerships, Limited Liability Companies, and Trusts form for Investment Purposes

## OBA Conflicts of Interest

- An OBA Which Involves Recommending or Soliciting an Investment Advisory Client. Examples from Form ADV Part 1: (continued)
  - D. Insurance Broker or Agent
  - E. Real Estate Broker, Dealer, or Agent
  - F. Bank Employee
  - G. Trust Company Employee
  - H. Accountant or Accounting Firm
  - I. Lawyer or Law Firm

## Review: Determining to Eliminate or Disclose & Mitigate

- Evaluate the conflict to determine if it should be eliminated (not approved) or will be approved with disclosure and mitigation strategy.
- Issues to Consider whether to eliminate or mitigate
  - Ability to Make Recommendations/Decisions in Client's Best Interest
  - Feasibility of Objectively Verifying/Testing Whether Recommendations/Decisions in Client's Best Interest
  - Ease of Documenting Such for Each Client
  - Likelihood of Client Confusion
  - Whether Conflict Is Covered by Errors and Omissions (E&O) or Other Insurance

## Review: Determining to Eliminate or Disclose & Mitigate

- Issues to Consider whether to eliminate or mitigate (cont.)
  - Expertise Level of Investment Adviser Regarding the Conflicted Activity
  - Underlying Risk Involved in Conflicted Activity
  - Whether Conflict Triggers Other Issues Such as Custody or Increases Firm's Risk Profile with Regulator
  - Public/Market's Perception If Investment Adviser Continues In the Conflicted Activity
  - Amount of Time and Resources Required to Conduct On-Going Supervision and Monitoring of Activity

## Goal Is To Eliminate Conflicts of Interest

- Conflicts of Interest Are Extremely Difficult to Disclose in a Manner that Satisfies Regulators
- Conflicts Are Even Harder to Mitigate & Show Investment Adviser Is Acting Impartially and in Client's Best Interest Despite Conflict of Interest
- Regulator's Standard Shifts with Respect Conflicts of Interest – Previously Disclosed Conflicts May Subsequently Get Challenged by Regulator Even Though No Previous Scrutiny
- Disgruntled Employees/Reps Will Blow Whistle on Problems
- There's No Safe Harbor for Conflicts of Interest – Always at Risk
- ***RCC Strongly Recommends That Your Investment Adviser Firm Eliminate All Conflicts of Interest***



## Review: Determining to Eliminate or Disclose & Mitigate

- If the conflict of interest is not going to be eliminated in its entirety, log the conflict of interest.
- Implement disclosure of conflict of interest in terms a lay person could understand
  - Include All Details
  - Fully Acknowledge Conflict & Bias – No Use of “May” or “Potential”
  - Securities Regulator Will 2<sup>nd</sup> Guess Thoroughness of Disclosure
- Prepare a policy and procedure to mitigate the conflicts of interest.
  - Heighten supervision of the issue
  - Pre-approval of all or certain activities
  - Due diligence

## **Review: Determining to Eliminate or Disclose & Mitigate**

- Train employees on conflict of interest and how such conflict is mitigated.
- Test policy/procedure(s) to determine whether the conflict is in fact being mitigated.
- Based upon the test, re-adjust, as necessary, any policy/procedure(s) to mitigate a conflict of interest and/or re-evaluate whether to eliminate the conflict in its entirety.

## Review: Determining to Eliminate or Disclose & Mitigate

- Monitor regulatory exam priorities, summary of exam results, risk alerts, speeches by regulators and enforcement actions regarding conflicts of interest.
  - Carefully review all newsletter articles by RIA Compliance Consultants, Inc. (RCC), listen to RCC monthly webinars and attend RCC's annual conference.
- Periodically, re-review all known conflicts of interests, disclosures and mitigations.
- Train and encourage front line employees to report new conflicts of interest

## Developing Disclosures & Mitigation

- Explicitly acknowledge that there is a conflict of interest.
- Avoid using terms such “may”, “might”, “generally”, “typically” or “potential” when describing the conflict of interest in the Form ADV and client agreement. For example, if you have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, indicate as such *instead of* disclosing that you “may” have the conflict or engage in the practice.
- Clearly describe what constitutes the conflict and acknowledge that it is in fact a conflict.
- Explain to the client the conflict so that a lay person would understand the conflict.
- Provide guidance to client about how investment adviser firm mitigates the conflict of interest.

## Developing Disclosures & Mitigation

- Even if a conflict disclosure is made to the client, a securities regulator will require an investment adviser firm to show how it actually mitigated the conflict and acted in impartial manner that's in the client's best interest.
- There are new business trends, developments and permutations involving investment advisers. Likewise, securities regulators change their priorities/focus and interpretations on a periodic basis, and correspondingly a securities regulator's expectations regarding disclosures/mitigation of conflicts of interest can change over time. As a result, an investment adviser firm should continuously monitor published examination priorities, risk alerts and enforcement actions in order to determine whether to eliminate certain conflicts or improve disclosure/mitigation of remaining conflicts.

## Where to Disclose Conflicts of Interest (The More, The Better)

- Part 2A of Form ADV: Firm *Disclosure Brochure*
- Part 2A Appendix 1 of Form ADV: *Wrap Fee Program Brochure*
- Part 2B of Form ADV: *Brochure Supplement*
- Part 3 of Form ADV: *Relationship Summary*
- Other Written Disclosures
  - Email/Correspondence
  - Presentation Disclosures
  - Marketing/Advertising Disclosures
  - Letters of Understanding
  - Client Agreement
- Verbal Disclosures
  - Take Contemporaneous Notes

## Commission Interpretation - Standard of Conduct for Investment Advisers

*<https://www.sec.gov/rules/interp/2019/ia-5248.pdf>*

## Resources Related to U.S. Department of Labor's New Interpretation of Fiduciary (IRA Rollovers) under ERISA/IRC

- ***PTE 2020-02:***  
<https://www.federalregister.gov/documents/2020/12/18/2020-27825/prohibited-transaction-exemption-2020-02-improving-investment-advice-for-workers-and-retirees>
- ***FAQs on New Fiduciary Advice Exemption:***  
<https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption>



## RCC Resources

- *Conflicts of Interest - Checklist*
- *Conflicts of Interest - Cash Sweep Program*
- *Conflicts of Interest – Fixed Indexed Annuities*
- *Conflicts of Interest – Log*
- *Conflict of Interest – Financial Planning – Recommending Products with Varying Commissions*
- *Conflict of Interest - Financial Planning - Varying Compensation for Insurance/Securities - Client Acknowledgement*
- *Outside Business Activity – Investigation Checklist*
- *Form ADV – Sample Language – Rollover Recommendation*
- *Suitability – Retirement Plan Rollover – Client Acknowledgement*
- *WSP/CoE Section Update – IRA Rollover Recommendations*
- *Suitability - Broker-Dealer (Commission) v. RIA (Fee) Account - Client Acknowledgement*
- *WSP/CoE Section Update - Account Type Suitability (Commission vs. Fee)*
- *Suitability - Wrap vs. Non-Wrap Account - Client Acknowledgement*
- *WSP/CoE Section Update - Wrap v. Non-Wrap Account*
- *Annual Compliance Training – Case Studies – Conflicts of Interest, Social Media, Alternative Investments*

## Strategic Alliance Members



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Automation-focused software designed to streamline back office functions.



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