FINANCIAL ADVISOR IQ

Advisor Charged with Annuity Scam Says SEC Is Outside Its Authority

Attorneys representing advisor and insurance agent Jeffrey Cutter argue that the SEC's fee-disclosure allegation fails because Cutter was acting as an insurance agent when he sold the annuities to advisory clients.

By Glenn Koch | July 24, 2023

"Stay in your lane," is a Massachusetts-based registered investment advisor's legal response to **Securities and Exchange Commission** charges that he fraudulently racked up more than $9 million in commissions from selling annuities.

Advisor **Jeffrey Cutter**, also a licensed insurance agent, failed to disclose to his advisory clients the up-front commissions of 7% to 8% he earned by selling fixed index annuities, according to the SEC, which in March announced charges against Cutter and his investment advisory firm, Falmouth, Massachusetts–based **Cutter Financial Group**, as **reported**.

According to the SEC, Jeffrey Cutter did not disclose to CFG clients the amount or up-front nature of the annuities' fees and did not explain that the fees differed from the annual asset-based advisory fee — typically about 1.5% to 2% — he received from CFG.

The SEC further alleges that Cutter often recommended that clients surrender annuities they owned — including fixed index annuities he had previously sold them — and use the proceeds to purchase a new fixed index annuity, thereby triggering another fee of 7% to 8% and, in some instances, causing clients to incur a surrender charge. According to the SEC, Cutter since 2014 has generated at least $9,340,302 from commissions on annuity sales.

The SEC asserts that Cutter and CFG violated the anti-fraud provisions of sections 206(1) and 206(2) of the Investment Advisers Act of 1940, that CFG violated section 206(4) of the Advisers Act and its rule 206(4)-7, and that Cutter aided and abetted those alleged violations.

Cutter's legal team earlier this month filed a motion to dismiss the charges, primarily based on a bifurcation of Cutter's roles as an investment adviser and an insurance agent. The filing asserts that Investment Advisers Act section 206 is inapplicable because Cutter's sales of fixed index annuities were conducted not as an investment advisor through CFG but as a licensed insurance agent, through an affiliated insurance company, **Cutterinsure Inc.**

The filing notes that the SEC's Regulation Best Interest specifies that a "dual-registrant is an investment adviser solely with respect to those accounts for which a dual-registrant provides investment advice or receives compensation that subjects it to the Advisers Act." According to the filing, CFG disclosed that its

personnel were separately licensed insurance professionals, that their compensation for selling insurance was separate and apart from advisor fees, and that their investment advisory services were limited to brokerage-account securities, which did not include fixed index annuities.

"Thus, even if it were true that Mr. Cutter engaged in a scheme to improperly sell FIAs, such conduct could not violate the Advisers Act because he was acting in his capacity as an insurance agent, not as an investment adviser," the filing asserts.

New York–based attorney **Jeff Kern**, of **Sheppard Mullin**, which is not involved in the case, called the argument "a game attempt" but not one likely to prevail.

"It has a lot of what I would call good surface reasoning, but I don't expect the court to go along with it because I think it flies in the face of a lot of precedent that allows government actors to get at conduct in a logical way that serves the greater good," said Kern, whose areas of practice include representing broker-dealers and associated persons in regulatory actions.

Cutter's attorneys also argue that there was no element of fraud in Cutter's annuity sales. They claim that CFG in its Form ADV filings fully disclosed that its advisors were also licensed insurance professionals who earn separate commissions for selling insurance-based products, thus presenting a conflict of interest, and they assert that the "SEC does not allege that Mr. Cutter received any compensation beyond industry standard commissions and marketing support or that Defendants' disclosures failed to comply with state insurance regulations."

Kern called that stance "a face-saving argument to serve the general proposition that [Cutter] wasn't trying to run anything by anybody. He put it out there."

"You're going to expect some 80-year-old guy living on the Cape to read the Form ADV? I wouldn't," Kern added.

Cutter's attorneys further claim that the annuities were suitable investments and that all the clients involved signed documents indicating that they understood the nature of the investments.

"Every one of the products mentioned in the SEC complaint has performed well, and no one has lost any money," one of Cutter's attorneys, **Ian Roffman**, of Boston-based **Nutter McClennen & Fish**, told FA-IQ at the time the original charges were filed. Roffman did not respond to a request for comment regarding the motion to dismiss.

Roffman believes that the SEC has overstepped its purview in this matter. "This case is about the SEC trying to hold CFG to a standard that is above and beyond what is required in the industry in terms of disclosure and is ultimately trying to hold CFG, which is a smaller company, as a toehold to try to get into the insurance industry."

Insurance News first reported the defendants' motion to dismiss.