

NAFA Enters the Game, Files Amicus Brief in SEC v. Cutter

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On August 23, 2023, the National Association for Fixed Annuities (NAFA) filed an amicus brief in the case of *SEC v. Cutter Financial Group LLC* in federal district court in Boston. The brief followed the filing of an amended complaint by the SEC in June, in which the SEC made a number of allegations against Jeffrey Cutter and Cutter Financial Group that raise significant issues for the insurance industry generally and fixed indexed annuities in particular. Carlton Fields represented NAFA in connection with the amicus brief. The SEC alleges that Cutter and Cutter Financial Group violated section 206, the antifraud provision of the Investment Advisers Act. Cutter is an investment adviser representative working for Cutter Financial Group, a registered investment adviser. Both are subject to SEC jurisdiction under section 206 for fraud. But Cutter is also a Massachusetts-licensed insurance agent with his own insurance agency. In other words, he is “dual-hatted” as both an investment adviser representative and a licensed insurance agent. Historically, securities have always been subject to federal regulation, while insurance products have always been subject to state regulation. But here, the SEC alleges that Cutter and Cutter Financial Group engaged in fraudulent activities involving securities and insurance products (i.e., fixed indexed annuities) with advisory clients: i.e., that he advised clients to sell securities on the one hand and then advised them to purchase annuities on the other hand. In so doing, the SEC alleges, Cutter failed to make certain disclosures with respect to the sales of securities and, with respect to the purchase of annuities, that he failed to make certain disclosures and made certain misstatements to insurance companies about the annuity transactions. Thus, the SEC’s allegations of section 206 fraud in the amended complaint cover activities involving both securities and fixed annuities. The SEC currently accommodates dual-hatted investment adviser representatives who are also registered representatives for broker-dealers by separating, for jurisdictional purposes, recommendations made for a particular transaction on a commission basis while wearing the “hat” of a registered representative from investment advice provided on a fee basis while wearing the “hat” of an investment adviser representative, even if they involve the same client. The SEC’s Regulation Best Interest applies to the former, the Advisers Act to the latter. But the SEC apparently is not accepting the “dual-hat” premise when an investment adviser representative is also an insurance agent. This is,

in our view, the incorrect approach. Just as transactions conducted for commissions under a best interest standard pursuant to Regulation Best Interest are beyond the reach of the Advisers Act, so too should transactions conducted under the best interest standards imposed by most states' insurance laws. First, the plain language of the Advisers Act does not support its application to insurance products. Second, Supreme Court precedent and several acts of Congress, including the McCarran-Ferguson and Dodd-Frank acts, expressly preserve state regulation of insurance and fixed annuities. Third, this issue implicates the "major question doctrine" that suggests that agencies like the SEC cannot extend their jurisdictional reach with such significant consequences without clear congressional authorization to do so. Such congressional authorization is absent here. Finally, the implications for the industry could be enormous. Should the SEC prevail, ad hoc application of the SEC's interpretations of the Advisers Act invariably would result in disparate treatment of consumers, as well as insurance producers, in respect of disclosures to be provided and the standard of conduct applicable to fixed annuity transactions, because they are not securities, and because not all insurance producers are investment adviser representatives. The foregoing is also contrary to the nationwide best interest standard sought by state insurance regulators and contrary to the best interests of the insurance industry and its customers. Stay tuned for updates.

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