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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Trade Group Says SEC Overstepped In Annuities Sales Suit

By **Sydney Price**

Law360 (September 6, 2023, 6:08 PM EDT) -- A trade group for the fixed annuities industry has urged a Massachusetts federal judge to dismiss the U.S. Securities and Exchange Commission's suit accusing an investment adviser of hiding the lucrative upfront commissions he made on his clients' indexed annuities, arguing the agency relies on flawed reading of the Investment Advisers Act and previous, irrelevant enforcement actions.

The SEC sued Jeffrey Cutter and his advisory firm, Cutter Financial Group LLC, in March. The agency claims he violated the Advisers Act by **keeping clients in the dark** about upfront commissions he made from 2018 to 2022 by selling them fixed-index annuities, and later tweaking the insurance products for clients to bank new rounds of incentives. The agency pushed back against the defendants' motion to dismiss the suit in July.

The National Association for Fixed Annuities argued in an **amicus brief** Tuesday on behalf of Cutter that the SEC's reasons for bringing the case are invalid.

First, NAFA argues that the SEC and other state securities regulators do not have the authority to regulate indexed annuities transactions. Indexed annuities pay interest based on market performance and are only subject to state insurance regulation, it said.

The SEC previously argued in its July opposition to Cutter's motion to dismiss that the Advisers Act **governs all of his conduct** with his advisory clients, even when it involves the sale of annuities. But NAFA said Tuesday this reasoning would make any act of an insurance agent susceptible to a fraud claim under the 1940 law, as long as there is a "backdrop" of an advisory-client relationship.

"The SEC's interpretation reflects no attempt to distinguish insurance matters from securities ones, thereby impermissibly relegating for itself jurisdiction over insurance matters that are governed by state regulation," NAFA said.

It also said the cases the SEC relies on to support its interpretation of the Advisers Act are immaterial. For example, NAFA argues that a case involving Voya Financial Advisors that the SEC cites only makes claims involving investment advice, and does not support the agency's assertion that the Advisers Act can be violated when an adviser is working on non-securities-related activities.

"None of the cases cited by the SEC provide much if any precedential support for its interpretation of the Advisers Act, in particular its assertion that defendants need not even be acting in the capacity of an investment adviser in connection with the alleged violations," NAFA said. "The SEC's failure to cite to meaningful authority belies its assertion that its interpretation is neither extraordinary nor novel."

Additionally, NAFA argues that the SEC's regulation of indexed securities is preempted by the McCarran-Ferguson Act, which was passed by Congress in 1945 and prohibits federal involvement in insurance regulation.

NAFA cites instances in which the U.S. Supreme Court upheld the act, including the 1981 case of **Western and Southern Life Insurance v. State Board of Equalization of California** , in which the high court said that the business of insurance is "a local matter" to be regulated by states.

Next, NAFA argues that the Dodd-Frank Act, which was passed in 2010 in the aftermath of the 2008

financial crisis, also precludes the SEC's regulation of indexed annuities.

"The Dodd-Frank Act's exemption from the Securities Act for indexed annuities means, among other things, that they are not subject to Securities Act registration and related disclosure requirements administered by the SEC and they may be sold by persons who are not registered with the SEC as broker-dealers," it said.

"Accordingly, contrary to the SEC's contention that defendants' arguments regarding the application of the Dodd-Frank Act are irrelevant, the Dodd-Frank Act requires the amended complaint to be dismissed," NAFA continued.

Counsel for Cutter told Law360 in an email Wednesday that their client is pleased to have the support of industry and consumer groups.

The SEC and counsel for NAFA declined to comment Wednesday.

NAFA is represented by Andrea Peraner-Sweet of Fitch Law Partners LLP, and Richard Choi and Justin L. Chretien of Carlton Fields PA.

The SEC is represented in-house by Susan Cooke Anderson and Amy Harman Burkart.

Cutter is represented by Ian D. Roffman, Mark C. Jensen and Ashley M. Paquin of Nutter McClennen & Fish LLP.

The case is Securities and Exchange Commission v. Cutter Financial Group LLC et al., case number 1:23-cv-10589, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Brian Dowling and Katryna Perera. Editing by Adam LoBelia.

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