

Who Regulates Financial Planning?

BY MARILYN SPONZO

In its persistent crusade to cast financial planning as an investment advisory activity beyond the scope of broker-dealer regulation, the Financial Planning Association (FPA) recently challenged a FINRA enforcement action against Ameritas Investment Corporation for failing to supervise a registered representative who developed misleading financial plans. The plans in question recommended that customers use mortgages and home equity loans to fund variable universal life policies intended for college expenses and retirement. Ameritas was fined \$100,000 and the registered representative was fined \$60,000 and suspended for nine months. Although Ameritas was dually registered as a broker-dealer and investment adviser, the representative who produced the misleading plans was not registered as an investment adviser representative.

In a letter to SEC Chairman Mary Schapiro, the FPA expressed concern over FINRA's expansion of regulatory jurisdiction to include financial planners, and urged the SEC to clarify that financial planning is an investment advisory activity subject to a fiduciary standard of care. In a cautiously worded response, SEC General Counsel David Becker declined to directly address the FPA's concerns, although a FINRA press release announcing the enforcement action trumpeted FINRA's intention to "aggressively pursue firms and individuals who use misleading financial plans to induce customers to purchase securities."

Adding to the confusion are statements made by the SEC and its staff over the years suggesting that investment advice provided by a broker-dealer in connection with financial planning services is not solely incidental to broker-dealer activity and therefore is subject to investment adviser regulation. And the SEC's Rule 202(a)(11)-1 specifically provided as much until it was vacated in its entirety in 2007 by the D.C. Circuit Court of Appeals. The court acted for reasons not relating to this issue, however, and the status of financial planning under the federal securities laws remains unclear.



Waiting to see who's on call

Largest Madoff "Feeder" Agrees to Settlement

BY LIAM BURKE

The largest "feeder" to Bernard Madoff's Ponzi scheme, Fairfield Greenwich Group, recently agreed to settle civil charges brought against it by Massachusetts regulators. Fairfield Greenwich agreed to pay \$8 million to settle fraud charges alleging that it failed to conduct adequate due diligence on Madoff's securities firm while misrepresenting to investors that it had conducted "rigorous" due diligence.

Reportedly, the \$8 million will be used to reimburse the Massachusetts investors that the State was able to identify who became Madoff victims by investing through Fairfield Greenwich. The settlement apparently will provide full reimbursement of the victims' losses due to Fairfield Greenwich's Madoff investments, plus interest. Massachusetts regulators had previously rejected a similar settlement offer of \$6 million from Fairfield Greenwich because officials were still trying to identify additional victims. While the settlement is clear

that Fairfield Greenwich neither admits nor denies the allegations, Fairfield Greenwich agreed to pay a \$500,000 civil penalty in addition to the \$8 million in reimbursement. Massachusetts regulators have touted the settlement as the first investor relief ordered by a regulator in the Madoff scandal.

Fairfield Greenwich is still facing far more substantial litigation and has reportedly been in settlement discussions with additional parties including Irving Picard, the trustee liquidating Madoff's business. Picard filed suit against Fairfield Greenwich alleging that it realized more than \$3 billion in fake profit from Madoff's Ponzi scheme. Moreover, additional suits have recently been brought against other parties as a result of their ties to Fairfield Greenwich and its association with Madoff. For example, recently Standard Chartered Plc was sued for allegedly negligently placing money with a fund run by Fairfield Greenwich.