

# Compliance Update

Date: November 13, 2009



## Reminder about giving investment advice

The purpose of this communication is to remind all producers that state securities authorities continue to be concerned that insurance agents are dispensing investment advice without the required securities registration/licensure. Aviva previously published a [Compliance Update](#) dated July 10, 2008 on this topic. That update described several circumstances under which regulators may conclude under the laws of a particular state that an agent is providing investment advice, including:

- An agent recommends the liquidation of a security (for example, to provide a source of funds for the purchase of an indexed product) or
- An agent advises a customer of the relative advantages and disadvantages of investing in securities as directly compared to an indexed life insurance or annuity product.

The Arkansas Insurance Department recently issued [Bulletin No. 14-2009](#), in which it joined with the Arkansas Securities Department in notifying all insurance producers/agents that “the recommendation to replace securities such as mutual funds, stocks, bonds and various other investment vehicles defined as securities under the Arkansas Securities Act is the offering of investment advice. It is unlawful to offer investment advice unless one is registered (licensed with the Arkansas Securities Department as an investment advisor or investment advisor representative.”

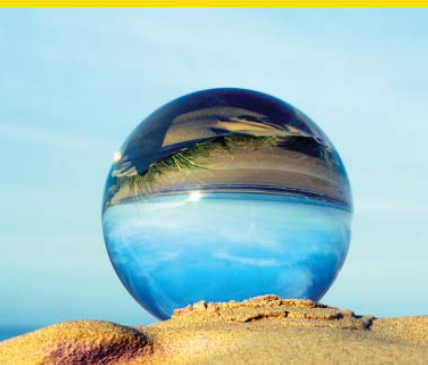
The Bulletin goes on to describe the legislative authority under which both the Insurance Commissioner and the Securities Commissioner may take action in the form of levying fines, suspending licenses, and seeking injunctive relief. It also makes a specific reference to the application of the Insurance Department’s authority by stating that “the Insurance Commissioner intends to take action against insurance producers who improperly engage in transactions involving securities.”

All producers should understand Arkansas is not the only state in which the insurance and/or securities regulators have made such pronouncements or expressed similar positions. For your benefit, we repeat some of the recommendations that we outlined in last year’s Aviva Compliance Update for agents who are not licensed as an investment advisor:

1. Do not provide specific advice about, or recommend, the liquidation or “replacement” of a security.
2. Consider using a [disclosure form](#) that clearly reinforces what service you do and do not provide.
3. Clearly indicate the services you are, and are not, licensed to provide to the customer without using phrases that may lead the customer to believe otherwise.
4. Obtain a clear acknowledgement from the customer that any decision they make to liquidate securities to provide some or all of the funds for the purchase of an insurance product is their independent decision and choice, and not the result of any specific recommendation on your part.
5. Be clear with the customer that if they require investment advice, they should seek the advice of a properly licensed securities professional in conjunction with the liquidation of any securities.

Comments or questions may be directed to Maureen Closson, Chief Compliance Officer, Aviva USA.

Doing business the Aviva way!



July 10, 2008

Number: 0308

## Investment Advisor Issues

Sales of indexed products have received increased scrutiny due to the concern that agents are giving investment advice when the customer liquidates a security to fund the index product purchase. Aviva is committed to helping our agents understand the regulatory environment; however it is constantly changing so please be aware of your own state's regulations.

### Investment Advisor

Investment advisors are registered and regulated at both the federal and state levels. But what do the laws say is investment advice that requires registration? Whether an agent is giving investment advice that requires registration depends on the circumstances, but will generally be considered to have been given if the agent: \*

- Recommends the liquidation of a security;
- Recommends a specific asset allocation amongst asset classes;
- Advises customers on the relative advantages and disadvantages of investing in securities as directly compared to an indexed product. This would be advice to help a customer evaluate whether securities are better or worse suited for their particular objectives.

Other activities that may indicate securities advice has been given include:

- Discussions that emphasize or focus solely on the risks of the stock market;
- Providing assistance in the completion of paperwork to liquidate a security;
- Use of the term "investment advisor" or other similar terms that lead the customer to believe the agent is licensed to advise on and sell securities;
- Use of professional designations considered misleading;
- Describing indexed products as "investments."

*continued*

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\* The test is actually a 3-part test: 1) **Receiving compensation.** This is easily met because of the broad interpretation of the phrase that includes any sale, including the sale of the fixed product. 2) **Being engaged in the business.** This is also easily met because it includes holding yourself out as providing financial advice and anything other than advice given on rare, isolated and non-periodic occasions. 3) **Providing Advice.** This depends on the factors listed above.



### Recommendations to Fixed Agents not licensed as an investment advisor

- 1) Do not provide specific advice as to the liquidation of a security
- 2) Consider using a disclosure form that clearly reinforces what service you do and do not provide (attached is a sample disclosure)
- 3) Clearly state the services you are, and are not, licensed to provide to the customer without using phrases that may lead the customer to believe otherwise
- 4) If the customer requires investment advice the agent should refer them to an independent securities professional that will apply appropriate suitability rules
- 5) Do not recommend allocating a certain percentage of assets to securities, although a general discussion of different asset classes should be proper
- 6) Limit discussions to the general characteristics of different types of securities
- 7) Do not charge advisory or other management fees

### Issues with becoming an Investment Advisor

Aviva provides no advice on whether an agent should become an investment advisor. Becoming an investment advisor may broaden the scope of an agent's services but comes with drawbacks such as:

- Investment advisors hold a fiduciary relationship with their customers, which is a high standard of trust with additional requirements
- Some states require an investment advisor to have a disclosure form signed by the customer purchasing insurance products that clearly discloses the investment advisor's fees, that the investment advisor is an insurance agent and that they will receive a commission in addition to their planning fees.

Please see the attached Appendix for a discussion of common scenarios to be aware of involving the liquidation of securities; and the attached Sample Disclosure for help in forming a disclosure for agent's use.

Comments or questions may be directed to Maureen Closson, Chief Compliance Officer, Aviva USA.

Aviva would like to present this Sample Disclosure as an example of a form the agent can use with their customers. This Sample Disclosure should be discussed and amended with the agent's attorney so it fits the specific circumstances, goals and local requirements of the agent.

## Sample Disclosure Form

**1. Source of Funds.** I have made a decision to liquidate all or part of my securities portfolio and use the proceeds to purchase life insurance or annuity products offered by Aviva Life and Annuity Company ("Aviva"). I acknowledge that neither Aviva nor Aviva's agents, representatives, nor employees have suggested I liquidate securities, or otherwise provided any investment advice or recommendations related to any securities liquidation. I have been advised to discuss the liquidation of securities with a properly registered investment advisor or registered representative of a broker/dealer.

**2. Broker Charges and Surrender Fees.** I understand that in liquidating certain securities holdings, the broker/dealer or the securities product may assess charges, fees or surrender charges in connection with any liquidation transaction. I have been advised to consult with the liquidating broker/dealer regarding any questions or concerns I may have concerning my request for liquidation of securities and the impact of any charges or fees on liquidation.

**3. Tax Consequences.** I understand that certain securities holdings I have instructed my broker/dealer to liquidate may be subject to capital gains taxes, or similar taxes, and that I am responsible for the tax consequences of these transactions. I have been advised to consult with my broker/dealer and/or tax adviser regarding the impact of the liquidation of certain securities.

**4. Role of Insurance Agent.** I understand and acknowledge that the Aviva insurance agent that solicited me for an Aviva life insurance or annuity policy served solely as insurance agent for Aviva and is not licensed to sell securities or offer any investment advice regarding my securities portfolio.

**5. Seek advice of other professionals.** I acknowledge that the Aviva insurance agent has advised me that I should consult with a registered investment advisor or other qualified professional licensed in the securities industry regarding my securities portfolio if I have any questions or concerns regarding my securities portfolio.

**Execution. By signing below, I acknowledge that I have read and fully understand this information and that I have received a duplicate copy of this Disclosure.**

Owner's Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Spouse/Jt. Owner (if applicable): \_\_\_\_\_

Date: \_\_\_\_\_

## Appendix

### Common Scenarios

Here are common scenarios where fixed agents have had trouble in the past and what a agent can do to avoid running afoul of securities laws.

#### 1) Selling Against Securities

Fixed agents may stray into investment advice if they explore the advantages and disadvantages of investing in securities as directly compared to fixed products. This may be advice because it will help a customer evaluate the products and make a decision between the two.

#### 2) Recommending Securities Allocation

Securities advice could also include a recommendation that a customer allocate a specific percentage of their assets to different asset classes. Therefore, the fixed agent must be careful not to recommend specific allocation percentages of securities and instead focus on the characteristics of the fixed product and general allocation issues.

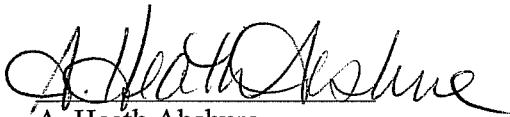
#### 3) Finding Funding Sources

After a fixed agent presents a suitable fixed product and the customer agrees with this recommendation, there is often a discussion of what assets should be used to provide the funding. It is natural for the customer to inquire about the advisability of selling certain equities or classes of assets. However, the recommendation to sell a stock or a particular class of equities will probably be considered securities advice. The fixed agent is limited to discussing the generic ideas of asset allocation, the positive characteristics of the fixed product and directing the customer to an investment advisor for advice on liquidating any securities.

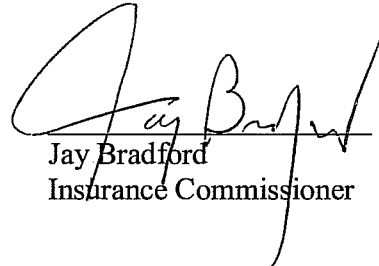


received in connection with each violation. In the case of a violation involving a senior citizen sixty-five years old or older, the fine can be as much as \$20,000 per violation or twice the amount of money received per violation.

This bulletin is intended to notify you of some potential pitfalls that could subject you to civil litigation by investors and action by the Insurance Commissioner and Securities Commissioner, including criminal prosecution. Please protect yourself and your clients.



A. Heath Abshure  
Securities Commissioner



Jay Bradford  
Insurance Commissioner