

## Steps to Prepare for 2021 Compliance Issues

Perspective is key to the new year, but stay on guard with regulators.

**O**n New Year's Eve, I looked back at a tumultuous 2020 and tried to put things in perspective, and then look forward. In March, what appeared to be the start of a global market disaster turned into a very good year for the vast majority of advisory firms.

Technology was the biggest blessing for advisory firms, permitting them to work almost seamlessly during the global pandemic. However, we can't forget that countless others haven't been as fortunate, and may not be so in the foreseeable future.

For those who lost loved ones and friends, an up market was no consolation. At the end of the day, unless those around you are safe and healthy, little much else matters. Let's be guarded and cautious, while looking forward to a safer, more secure, 2021.

With the above framework, what should advisors be thinking about in 2021? Most important, remain guarded: The Securities and Exchange Commission continues to conduct examinations at a fast pace, and those continue to be more aggressive.

It seems the new push is: *How can we find a way for you to reimburse clients?* Many Deficiency letters have taken on a more accusatory tone, citing violations where no such rule or requirement currently exists. Quick to allege breach of fiduciary duty.

What is an advisor to do? Some thoughts:

- **Push back.** But do this *tactfully*, relative to findings and/or allegations that you believe to be incorrect, unfair or unjust. The SEC makes mistakes, and at times, will reconsider its conclusions or required actions.

However, the optimal time to initially



do so is prior to receipt of a Deficiency letter. Rebut as the exam is in progress; in writing, if necessary. Use the Exit interview as your opportunity to understand the Commission's issues and reasoning.

Don't hesitate to *respectfully* challenge exit interview findings, in writing, swiftly thereafter. But, make sure you have good counsel. Know why and how to address;

- **Be proactive.** Whether right or wrong, fair or otherwise, based in rule or not, you can and should be ready for examination issues. Consider a *real* (attorney-client privileged) compliance review to address what issues the Commission will most likely raise based upon your advisory operations. No blunderbuss, one size-fits-nobody, approach.

This is not science. If it was, I would be underqualified. Within an hour of meeting a new firm, I can generally pinpoint the focus of the Commission's examination issues, and then prepare the firm to address them;

- **Disclose.** Clear and conspicuous disclosure is an advisor's best friend. Every advisor has actual or potential conflict(s), disclose them.

I like to do so boldly, and at the end of each such disclosure, end with an invita-

tion for the reader to address any questions regarding the disclosed conflict directly with the firm's chief compliance officer;

- **Document.** During an examination, the SEC will want to see confirmation. Unless you can show the SEC you did it, it will assume (allege) you didn't.

I like to make it easy for our advisors, constructing a written Protocol to be followed on an ongoing basis. The purpose of the Protocol is to make clear for the firm, and to the Commission, what the firm, based upon its *actual* operations, does and/or considers at the commencement of a new client engagement, the hiring of a new employee, the engagement of a new vendor, and regularly on a daily, weekly, monthly, quarterly, annual and ongoing basis.

If the firm follows (and updates) the Protocol, as necessary, it will not miss a compliance task, and will be prepared to demonstrate the completion thereof; and,

- **Educate.** Compliance is only as good as the eyes and ears of your employees. Educate them as to important issues. Remind them that there is never a stupid question. Maintain an *open-door* policy.

In addition to an annual compliance meeting, schedule regular shorter meetings — 12 months is a long compliance year. **IA**

*Thomas D. Giachetti is chairman of the Investment Management and Securities Practice Group of Stark & Stark, a law firm with offices in Princeton, New York and Philadelphia that represents investment advisors, financial planners, BDs, CPA firms, registered reps and investment companies, and is a regular contributor to Investment Advisor. He can be reached at [tgiachetti@stark-stark.com](mailto:tgiachetti@stark-stark.com).*