

## A PLAN FOR HOW TO DEAL WITH STAFF PURSUING OUTSIDE BUSINESS ACTIVITIES

Because conflicts can rear their ugly heads in the industry, it's incumbent upon firms to be aware of outside business activity by staff. Your approach likely will be shaped by whether you're at an investment adviser or a broker-dealer.

FINRA [rule 3270](#) requires a broker-dealer rep to receive written permission from his employer before engaging in outside business activity. The SEC doesn't directly address the issue in the Advisers Act. Rather, OBA would fall under an adviser's general duty to be aware of, disclose and mitigate conflicts as well as its fiduciary duty obligations.

"You really do need to know what your employees are doing," says **Heather Traeger**, a partner with **O'Melveny & Myers** in Washington, D.C.

Consider this scenario: Someone on your investment committee moonlights for a non-profit, advising the second entity on a different investment strategy from the one he supervises for the adviser.

If the person were a registered rep, he's going to fall under the FINRA rule via his affiliated broker, says **Jeremy Bartell** of **Bartell Law** in Washington, D.C. Rule 3270 "is a very blunt instrument" that defines OBA broadly. "You could be a pizza delivery person" in your spare time and trigger the rule, Bartell adds. He tells of an employee who did part-time marketing for a bank and wound up being fired by her broker and sanctioned by FINRA.

OBA remains a hot issue with the SRO ([IA Watch](#), April 7, 2014). "FINRA is more aggressive in bringing actions" than the SEC, says **Eliza Fromberg**, counsel with **Day Pitney** in New York. There's even evidence FINRA's intruding into dually-registered investment advisers to question OBA ([IA Watch](#), June 17, 2013).

## OBA BEST PRACTICES

**Aegon USA Investment Management** (\$113B in AUM), an RIA based in Cedar Rapids, Iowa, insists that employees pre-clear any outside activities before engaging in them. If the outside work produces even the appearance of a potential conflict, "we're going to say no," says CCO **James Mautino**.

"We would put some significant restrictions on the person" if we said yes, he adds. The person would be prohibited from using information or resources obtained from Aegon in the moonlighting role. The employee also would be instructed that if he feels conflicted at any time in the outside role to excuse himself and alert Aegon's compliance office of his concerns.

The employee further would be asked to attest in writing to the OBA and the conditions. Mautino keeps the records. At least annually, the employee would have to update the information and attest to the outside activity.

A common scenario features an investment pro who sits on a philanthropic board. The group raises funds and seeks the person's expertise on how to handle the money. That's a more comforting role than if the firm's investment pro picked securities for the non-profit, Mautino says.

Do your own investigation, recommends Fromberg. Go on **LinkedIn** and **Google** "every once in a while and check out your reps," she says. The exercise could expose undisclosed OBA.

Remember that Form ADV requires disclosure about financial industry affiliations, reminds Traeger. Form U4 filings also mandate the disclosure of OBA. That disclosure, according to Fromberg, requires the number of hours each month that the rep spends on the OBA.

## EXPLAIN WHAT OBA IS

Give examples of what constitutes outside work because reps “don’t realize that certain activity that they’re involved in could” present a conflict, says Fromberg. Explain what OBA is and “strictly enforce” your policy, she encourages.

Advisers can consider adding language about OBA in their code of ethics, says Traeger. Mautino recently revised his firm’s COE and held training sessions. He talked about OBA and discovered that many employees didn’t comprehend that what they were doing constituted outside business activity.

Bartell says a good question to put on your annual attestation to employees is “do you have any activities outside the firm that earn you income?” Even so, some will answer no when they should have checked yes, he adds.