

BY ELECTRONIC MAIL

December 10, 2007

Melanie Lubin
OAG, Securities Division
200 Saint Paul Place
Baltimore, Maryland 21202-2020
mlubin@oag.state.md.us

Rex Staples
NASAA
750 First Street, N.E., Suite 1140
Washington, D.C. 20002
rs@nasaa.org

Re: Proposed Adoption of Model Rule on Use of Senior-Specific Certifications and Professional Designations

Dear Ms. Lubin and Mr. Staples:

The Financial Planning Association (“FPA”®)¹ appreciates the opportunity to comment on a proposed model rule governing the use of misleading advisor titles to the public and, specifically, to senior citizens and retirees. We applaud the efforts of the state securities administrators who have been at the forefront of efforts to combat a surge in misleading and unsuitable sales of insurance products to one of the most vulnerable population segments of the United States. Moreover, since several states have undertaken separate approaches to this pressing issue, we are encouraged that the organization representing state and provincial securities administrators, the North American Securities Administrators Association (“NASAA”), now offers a uniform approach.

¹ The Financial Planning Association™ is the largest organization in the United States representing financial planners and affiliated firms, with approximately 28,000 individual members. FPA is incorporated in Washington, D.C., with administrative headquarters in Denver.

I. General Discussion of NASAA's Regulatory Approach

FPA strongly supports the need for a NASAA model rule ("Model Rule") in this area. The proliferation of misleading professional designations has generated a tremendous amount of public uncertainty regarding the objectivity and competence of an adviser. Although we believe that the broad antifraud and dishonest/unethical provisions of state securities law provide sufficient authority to take enforcement action against the misleading use of designations, we nonetheless support the need for a Model Rule given the need to focus on a pattern of recurrent abuses in the marketplace.

We applaud NASAA's approach to this problem, which is to focus on improper use of designations that are intended to mislead seniors, and others, into assuming an expertise or experience that the designee does not possess. However, we would urge NASAA members not to stray from its enforcement strengths, which as the "cop on the beat" traditionally has been to go after fraud and deceit committed by individual agents and/or their firms. Merit review of scores of designations is no substitute, we believe, for the more conventional, case-by-case approach to law enforcement of securities fraud. Aside from states lacking the resources to effectively and continually evaluate professional certification programs, we are concerned about an inverse problem with a public emphasis on designation review that might imply a state imprimatur to existing programs that have not been examined. Maintaining a traditional emphasis on individual fraud allows a securities regulator to address the misleading use of an otherwise "legitimate" designation, without effectively "blacklisting" the designation itself.

FPA strongly supports the Model Rule as a benefit the public and an encouragement to the financial services industry to limit the use of misleading designations. We believe that the Model Rule can be modified, however, to promote greater uniformity, a constant goal shared by NASAA. To that end, we would encourage NASAA to facilitate states' sharing of information that would encourage consistent application of the Model Rule, and to provide its assistance in identifying patterns of abusive use of certain designations.

By way of background, FPA has historically supported strong competency and ethics standards for persons who hold out as financial planners, or using similar titles to offer financial planning advice to the public. We believe the CFP® designation, the most widely recognized certification in financial planning, helps minimize confusion to the extent consumers embrace and understand the standards associated with the CFP marks. The education and examination process for CFP candidates includes several core areas related to senior citizens and their unique needs, such as mandatory income distributions, the appropriate use of annuities, tax issues related to moving to a retirement location, and Medicare, life, health, and long-term care insurance needs at a later stage of life. We are pleased that the CFP certification meets the educational requirements of the Model Rule. CFP Board of Standards, Inc., which administers the CFP marks, is the only financial services industry group certified by the National Commission for Certifying Agencies ("NCCA"), one of only two certifying organizations listed in the Model Rule.²

² See list of accredited certification programs of the NCCA, at <http://www.noca.org/NCCAAccreditation/AccreditedCertificationPrograms/tabid/120/Default.aspx>.

In summary, we believe the Model Rule should strike an appropriate balance between limiting the use of certain designations while preserving an individual's First Amendment right to commercial speech, as stipulated by the U.S. Supreme Court.³ We also encourage application of the rule in a manner that does not unduly inhibit the ability of financial planners who want to deepen their knowledge of specialty areas in their profession.

Our comments follow specific provisions of the Model Rule.

II. Discussion of Specific Provisions.

Section 1. Section 1 prohibits, in relevant part, "use [of] a certification or professional designation that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person." We are concerned that the rule does not contemplate that the use of the designation be *intended* to mislead senior investors. We do not wish to hinder effective application of the Model Rule by imposing too high an evidentiary standard. However, we are concerned that professionals using designations in good faith could be subject to administrative action that would become part of their disciplinary history⁴ without having the opportunity to voluntarily discontinue use of a designation in a manner determined to be misleading by the securities regulator.

Our concerns could be addressed by amending Section 1 to read:

Pursuant to the dishonest and unethical practices provisions of [USA (1956) (1985) (2002)] and the antifraud provisions of [USA (1956) (1985) (2002)], it is unlawful in connection with the offer, sale, or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, for any person to use a certification or professional designation that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in [Add: a manner intended] [Delete: *such a way as*] to mislead any person.

FPA believes that adding an element of intent would not unduly hinder regulators in enforcing the standards of the Model Rule. However, should

³ See *Silvia S. Ibanez v. State of Florida, Department of Professional Regulation, Board of Accountancy*, 512 U.S. 136 (1994). In 1994, the U.S. Supreme Court reviewed the appeal of Silvia S. Ibanez, CFP®, who was also a Florida attorney and certified public accountant. Ms. Ibanez was disciplined by the Florida State Board of Accountancy for using the CFP designation in a yellow pages ad and on stationery and business cards. As a basis for her legal challenge, she asserted the Accountancy Board's rules violated her right to freedom of speech. The Supreme Court agreed, holding that the Accountancy Board's censuring of Ibanez was incompatible with her First Amendment rights, and that use of the CFP and CPA designations qualified as commercial speech. According to the Supreme Court, a state could only ban such speech if it were false, deceptive or misleading.

⁴ Regulatory action by the securities regulator could require the person to amend his or her FINRA Form U4, for example, or require reporting a disciplinary event to CFP Board. This, in turn, can damage the career and reputation of an honest financial professional absent any advance notice to individuals licensed within a state.

NASAA decline to add an element of intent to the Model Rule, we urge you through guidance, or some other means, to encourage regulators to provide financial planners and other professionals a reasonable opportunity to discontinue “misuse” of designations without taking any action that would be deemed a reportable disciplinary event. This opportunity to voluntarily discontinue misuse of a designation could be limited to instances where there is no other indication of intent to mislead senior investors.

- A. **Secs. 1 (a) and (b).** FPA supports these provisions, which would make unlawful the use of designations not earned by a person or the use of a non-existent or self-conferred certification.
- B. **Secs. 1 (c) and (d).** These provisions require a subjective review of designations related to the level of education, examination and quality-control assurances of a certifying organization. We recommend modifying these provisions to simply prohibit use a certification or professional designation that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person. The Model Rule otherwise provides no guidance on the appropriate standards for assuring competency, experience, and disciplining certificants, which could encourage non-uniform interpretation by the states and designations that are permitted in one and not another.
- C. **Sec. 2.** FPA strongly supports this provision, which requires designating or certifying organizations to be accredited by the American National Standards Institute (“ANSI”) or the National Commission for Certifying Agencies (“NCCA”), as stated in paragraphs (a) and (b).

We recognize that paragraph (c) is intended to provide securities administrators with flexibility in approving any other “nationally recognized accreditation organization.” However, we believe the language in this paragraph should be clarified so that the organization’s standards are clearly comparable to either ANSI or NCCA, and not left up to the discretion of the administrator.

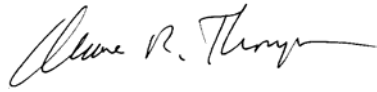
- D. **Sec. 3.** This section would prohibit the use of misleading terms used in various combinations, such as “senior,” with “certified” and “consultant.” FPA strongly supports this provision as a way of assuring that a fraudulent actor is unable to circumvent the Rule through creative use of the English language.

III. Conclusion

In summary, FPA strongly supports the efforts of NASAA to eradicate abusive marketing practices that have already caused catastrophic financial harm to an extremely vulnerable segment of the population. We believe that by eliminating some of the subjective elements of the rule that could lead to non-uniform enforcement activity, the Model Rule will serve to advance protection of the senior community. Finally, we recommend that NASAA amend the Model Rule or provide some guidance to ensure that financial professionals using designations in good faith are not subject to any discipline or sanction without reasonable notice or warning.

I am happy to respond to any specific questions or comments that you may have, and can be reached at 202.449.6341 if there are any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Duane R. Thompson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Duane R. Thompson
FPA Managing Director