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Melanie Lubin
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Rex Staples
NASAA
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RE: Proposed Adoption of a NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations

Dear Melanie and Rex:

The Securities Industry and Financial Markets Association (SIFMA)[1] appreciates the opportunity to comment on the proposed NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations.

SIFMA applauds NASAA for its ongoing efforts to protect all investors, including seniors. Our highest priority is to maintain the public's trust in the financial services industry and our professionals. Therefore, like you, we are concerned with reports that some unlicensed individuals are, as part of a bigger scheme to defraud vulnerable investors, using made-up or non-substantive designations to bolster their credentials with seniors. We strongly believe that anyone who knowingly and intentionally exploits seniors should be prosecuted to the fullest extent of the law.

We are similarly concerned with reports that a small percentage of licensed investment professionals are taking short courses of debatable value and then using designations created by the course sponsors to suggest an expertise in retirement planning or financial services for seniors when such expertise may not exist. We believe that federal and state

[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington, D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

regulators already have a variety of tools available to address deceptive or misleading behavior by licensed broker-dealers and their registered representatives. We, however, are pleased to provide input on model state regulations which enhance investor protection while avoiding fifty different states creating fifty different senior designation rules.

As you well know, SIFMA supports the development of a model rule. We believe that this draft is a good starting point but that some changes are necessary. Specifically, we believe that: (1) the model rule should be based on states' dishonest and unethical practices provisions and not on their antifraud provisions; (2) Section 2 should be clarified and the approval of other nationally recognized accreditation organizations should be streamlined; (3) entities should not need to further justify programs accredited by an organization on the U.S. Department of Education list; (4) Section 4 should recognize that a job title which reflects standing within an organization is not a professional designation and should make clear that the caveat to the individual's area of specialization would be seldom, if ever, used; and (5) the rationale behind the two different options in subpart 1 must be clarified. These issues are discussed in greater detail below.

I. The Model Rule Should Be Based on the States' Dishonest and Unethical Practices Provisions and Not on Their Anti-Fraud Provisions.

First, we are uncomfortable with the fact that authorization for implementation of the rule is derived from states' anti-fraud statutes. We believe that the provision is well-intended, and it is presumably designed to ensure that any senior designation rule applies not only to investment advisers and broker-dealers but to others who hold themselves out as offering investment advisory or financial planning services, including, perhaps, unregistered individuals and insurance agents. However, the improper use of a designation, in itself, should not be deemed a per se violation of the anti-fraud provisions of the Uniform Securities Act.

We can envision many scenarios in which characterizing the use of a designation as fraud would be grossly overstated and inappropriate. For example, suppose a designation is permissible in one state but not another, and the registered representative gives the wrong business card to a potential client. Certainly, this shouldn't be fraud. Likewise, a person who uses an unauthorized designation but gives advice which is beneficial and appropriate to the client should not be deemed to have engaged in a fraudulent act. Moreover, a person who genuinely doesn't know that a specific designation is inappropriate is not engaging in fraudulent conduct.

Once additional facts and circumstances are added, some senior designation violations may rise to the level of fraud. However, state regulators should be required to demonstrate that the elements of fraud are satisfied rather than being able to automatically characterize any senior designation violation as fraud. This is particularly important given the consequences for a registered representative if a violation is deemed fraudulent. If senior designation violations are per se fraudulent acts, a registered representative's inadvertent use of an unapproved designation would likely end his or her

career. A final order by a state securities commissioner based on violations of any laws or regulations that prohibit fraudulent, manipulative or deceptive conduct is grounds for statutory disqualification under Section 3(a)(39) of the 1934 Act. Even if statutory disqualification did not occur, the likelihood that a customer would use the services of a registered representative found to have engaged in fraudulent conduct is quite slim.

While we remain interested in ensuring that senior designation rules apply to more than just the investment adviser and broker dealer communities, we think that end can be accomplished without invoking the states' anti-fraud provisions. In particular, we believe that collaboration with state insurance regulators will achieve the desired results. We note that the senior designation issue is gaining increased attention among insurance regulators. The Iowa Insurance Department issued a Bulletin on the use of designations in early September,[2] and several other states are contemplating similar action. In addition, at its Annual Meeting this week in Houston, the National Association of Insurance Commissioners ("NAIC") circulated and discussed a draft bulletin and consumer notice on the "improper use of certain designations.[3]"

SIFMA strongly encourages NASAA and the NAIC to work together to develop a model rule that could apply to both the insurance and the securities sides of the business. Increased attention from different jurisdictional authorities is positive but creates the potential for inconsistent and contradictory rules. Cooperation is necessary to achieve strong, effective, and workable regulation of the use of designations. We would hate to see a situation where state insurance departments issue guidance on the use of designations that contradicts or is inconsistent with the NASAA Model Rule. We also encourage close coordination between state insurance and securities divisions.

If NASAA/NAIC coordination proves unproductive, we recommend modifying the NASAA model rule to strike the reference to anti-fraud provisions. Specifically, the language would read:

> *It shall be a dishonest and unethical practice under the provisions of [USA (1956)(1985)(2002)] for any person, 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 a promulgating analyses or reports relating to securities, to use a certification or professional designation that indicates or implies that the user has a special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person.*

We also are concerned that, if adopted in its current form, the rule will be challenged by one or more groups as going beyond the mandate of rulemaking. Rulemaking is typically limited to interpreting or implementing statutes. It is not used to create new statutory provisions. Currently, dishonest or unethical business practices are typically grounds for

[2] A copy of Bulletin 07-05, issued by Iowa Insurance Commissioner Susan E. Voss on September 7, 2007, is attached.
[3] Copies of the November 27, 2007 draft discussion documents are attached.

discipline but are not per se violations of the Act. The proposed rule elevates the improper conduct from grounds for discipline to an actual violation and thus, arguably, exceeds the scope of the statute.

II. Section 2 Should be Clarified and the Approval of Other Nationally Recognized Accreditation Organizations Should be Streamlined.

In Section 2, SIFMA believes that some clarification is necessary and that the approval of other nationally recognized organizations should be streamlined. On page 2, the proposed rule suggests that any organization accredited by The American National Standards Institute (ANSI), The National Commission for Certifying Agencies (NCCA) or by any other nationally-recognized accreditation organization designated by the Administrator by rule or order is presumed to be an educational organization that satisfies the requisite standards, procedures and continuing education requirements under 1(d). However, all of the subparts of 1 describe the unlawful use of a certification or professional designation and (1)(d) speaks specifically to standards, procedures and continuing education requirements that appear on their face to be acceptable but, in reality, are not. Rather than cross-referencing in a somewhat convoluted fashion to educational organizations, it would be cleaner to replace the current section 2 with one that states:

> *For purposes of this rule, the use of a designation created by a certifying organization that has been accredited by the American National Standards Institute, the National Commission for Certifying Agencies, or by any other nationally-recognized accreditation organization designated by the Administrator by rule or order is presumed appropriate.*

Even with this revision, however, firms that operate nationally or regionally will face the burden of applying to multiple state administrators for recognition of accrediting organizations other than ANSI or NCCA. We would therefore recommend that: (1) NASAA amend the rule to include an expanded list of presumptively appropriate accrediting organizations; (2) state securities administrators accept the designations or certifications approved by their regulator colleagues in other states; or (3) the designations permitted by the firm's home state are deemed controlling for that firm nationwide.

III. Entities Should Not Need to Further Justify Programs Accredited by an Organization on the U.S. Department of Education List.

We commend NASAA for the inclusion of a safe harbor for "a degree or certificate evidencing completion of an academic program at an institution of higher education that has been accredited by an organization that is on the United States Department of Education's list entitled 'Accrediting Agencies Recognized for Title IV Purposes.'" We, however, are concerned that the language beginning with "unless" and running to the end of the sentence renders the safe harbor virtually meaningless. In our view, the language leaves open the possibility that we would have to substantiate or justify every degree or

certificate from an organization on the Department of Education's list. In addition, the uncertainty over the availability of this safe harbor could have an unintended chilling effect, discouraging registered representatives from obtaining degrees that would enhance their ability to service senior investors. We would strongly encourage you to strike all language in number 5 on page 3 after the phrase "Title IV Purposes."

IV. Section 4 Should Recognize that a Job Title that Reflects Standing is not a Professional Designation and Should Make Clear that the Caveat Language Would Be Seldom, if Ever, Used.

Under section 4 on page three, we would propose two changes. First, we recommend amending 4(a) to read "indicates seniority or standing within the organization." The addition of the "or standing" language recognizes that an individual's accomplishments are not necessarily linked to his or her length of service. In 4(b), we fear that the "exception" language could subsume the rule. We therefore suggest either striking everything after the word organization or clarifying that only in extraordinary circumstances would the "facts and circumstances associated with the provision or use of a job title indicate that it improperly suggests or implies certification or training beyond that which the titleholder possesses or that it otherwise misleads investors."

V. Clarification of the Two Different Language Options under Subpart I is Necessary.

Finally, we would recommend further clarification as to why there are two different language options under Subpart I. It is our understanding that you believe the second alternative is preferable for the handful of states that vest their securities departments with jurisdiction over persons who, while not registered as investment advisers, hold themselves out as such. Additional discussion on the differences between the two versions would be helpful along with a list of which states would presumably pursue the second alternative.

Again, we appreciate the opportunity to provide input on this important issue. We look forward to working with you. Should you have questions, please contact me at 212-720-0611.

Sincerely,

Kim Chamberlain
Managing Director and Counsel
State Government Affairs

Cc: Karen Tyler
Russel Iuculano