

REQUEST FOR PUBLIC COMMENT REGARDING A PROPOSED
MODEL RULE AMENDMENT TO THE UNETHICAL BUSINESS PRACTICES OF INVESTMENT
ADVISERS, INVESTMENT ADVISER REPRESENTATIVES, AND FEDERAL COVERED
ADVISERS MODEL RULE TO INCLUDE INVESTMENT ADVISER ACCOUNT ACCESS UNDER
THE UNIFORM SECURITIES ACTS OF 1956 AND 2002

July 25, 2017

The North American Securities Administrators Association, Inc. (“NASAA”) is requesting public comment on a proposed model rule amendment to the NASAA model rule on Unethical Business Practices of Investment Advisers and Investment Adviser Representatives and Federal Covered Advisers to address investment advisers accessing client accounts with the client’s own unique identifying information (such as username and password) (“Proposed Rule Amendment”).

Public Comment Period

Comments are due on or before August 25, 2017. To facilitate consideration of comments, please send comments to Andrea Seidt (Andrea.Seidt@com.state.oh.us), Investment Adviser Section Chair; Elizabeth Smith (Elizabeth.Smith@dfi.wa.gov), Investment Adviser Regulatory Policy and Review Project Group Chair; and A.Valerie Mirko (nasaacomment@nasaa.org), NASAA General Counsel. We encourage, but do not require, comments to be submitted by e-mail.

Hard copy comments can be submitted at the address below.

NASAA Legal Department
A.Valerie Mirko, General Counsel
NASAA
750 First Street, NE, Suite 1140
Washington, DC 20002

Note: After the comment period has closed, NASAA will post to its website the comments it receives as submitted by the authors. Parties should therefore only submit information that they wish to make publicly available. Further, the following notice will appear on NASAA’s website where comments are posted: NASAA, its agents, and employees accept no responsibility for the content of the comments posted on this Web page. The views, expressions, and opinions expressed in the comments are solely those of the author(s).

Proposed Rule Amendment

Background

The purpose of this Proposed Rule Amendment is to address the practice of investment advisers and investment adviser representatives accessing various client accounts with the client’s own unique identifying information (such as username and password), rather than accessing these accounts through a separate log-in created for the adviser. As many investment advisers need access to a host of different client retirement accounts, brokerage accounts, and other online accounts to inform their advice, some advisers accept or specifically ask clients for the clients’ own usernames and passwords to access the

clients' accounts online. When an investment adviser accesses a client's account in this manner, the investment adviser is in effect impersonating this client and has the same access to the account as the client. There are multiple concerns with this type of access, including but not limited to custody and recordkeeping obligations as well as violations of the clients' own user agreements and fraud protection policies with the online companies.

Custody is often the first compliance issue that both regulators and investment advisers think of when exploring the issues involved when investment advisers access client accounts with client usernames and passwords. Analyzing the extent to which an investment adviser's access to a client account constitutes custody requires the consideration of a number of factors. Ultimately, however, such access can and generally will rise to the level of having custody if the investment adviser has any authority to obtain possession of (or the ability to appropriate) client funds or securities. Likewise, there is no easy way for the adviser or regulators to distinguish between log-ins initiated by the adviser versus the client for recordkeeping and transactional purposes when the same username and password are shared on an account.

Outside of custody and recordkeeping problems, another cause for alarm for regulators that is often overlooked by investment advisers and the investing public is that this type of access may cause clients to violate their own user agreements with the company or website provider. This, in turn, may void the clients' online account fraud protections. It is a common cybersecurity measure for user agreements to prohibit clients from providing another person with the client's username and password. Indeed, this type of access may represent a violation of the company's online fraud policies (which may be outside of the client's agreement with the company), creating the potential for both client and company liability.

The foregoing cybersecurity policies often provide for some fraud protections but require that the client takes reasonable steps to safeguard client usernames and passwords. In a sharing scenario, the impacted company could use the adviser's access to disclaim liability and/or care that the company would otherwise owe the client in the event a problem arises with the account. Setting the client up for these unwelcome outcomes by accepting or requesting client usernames and passwords would appear to constitute a breach of the adviser's fiduciary duty to the client. In no event should an investment adviser be accepting the client's username and password in a manner that would cause the client to forfeit protections afforded by the company in cases of cyberattack or identity theft or, worse, expose the client to liability for fraud on the account.

Summary

While states may be able to regulate investment advisers' use of client account access information through existing state statutes (such as Section 102 of the Uniform Securities Act of 1956 or Section 502 of the Uniform Securities Act of 2002) or rules, based on the nature of this practice, NASAA is proposing amending the existing investment adviser unethical business practices model rule to specifically address investment advisers and investment adviser representatives accessing client accounts online with the client's own unique identifying information (such as username and password).

The NASAA investment adviser unethical business practices model rule contains a non-exclusive list of unethical business practices. This list provides guidance and clarification for investment advisers of prohibited conduct. The Proposed Rule Amendment adds "[a]ccessing a client's account by using the

client's own unique identifying information (such as username and password)" to the non-exclusive list of prohibited practices.

Request for Comment

We seek public comment on the Proposed Rule Amendment. In addition to comments regarding the specific questions below, NASAA welcomes any general comments on the Proposed Rule Amendment from all potentially affected groups regardless of whether they are potentially subject to investment adviser registration by state securities regulators. Accordingly, NASAA seeks comment from investment advisers, as well as additional stakeholders, including broker-dealers, custodians for investment adviser accounts, employee benefit plan administrators, banks, credit unions, other financial or data service providers, investors, and investor advocacy groups. One of the purposes of this public comment period is to facilitate meaningful feedback to ensure that any final rule amendment properly addresses both investor protection and industry impact.

- Do you support the Proposed Rule Amendment? As part of your response, please include your reasons why or why not.
- Would you recommend any changes to the Proposed Rule Amendment? As part of your response, please include your reasons and explanations.
- Please provide comment on any additional relevant investor protection concerns not covered by the Proposed Rule Amendment.
- Are there alternative methods that would effectively address the noted investor protection concerns?
- How would the Proposed Rule Amendment affect you (whether in your individual capacity or your firm/entity as a whole) or the investment adviser industry at large?
- Do you have any information regarding this account access practice including, but not limited to, how you have encountered this issue, its prevalence, and any specific examples?

Proposed Rule Amendment

Proposed Rule Amendment to [NASAA Model Rule Unethical Business Practices of Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers](#):

[Introduction] A person who is an investment adviser, an investment adviser representative or a federal covered adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. The provisions of this subsection apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser or an investment adviser representative and its clients and the circumstances of each case, an investment adviser, an investment adviser representative or a federal covered adviser shall not engage in unethical business practices, including the following:

...

[\(v\) Accessing a client's account by using the client's own unique identifying information \(such as username and password\).](#)

...

The conduct set forth above is not inclusive. Engaging in other conduct such as non-disclosure, incomplete disclosure, or deceptive practices shall be deemed an unethical business practice. The federal statutory and regulatory provisions referenced herein shall apply to investment advisers, investment adviser representatives and federal covered advisers to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).