March 20, 2020

Ms. Linda Cena
Chair
IAR CE Committee
North American Securities Administrators Association
750 First Street, NE, Suite 1140
Washington, D.C. 20002

Re: **Notice of Request for Public Comments Regarding a Proposed Investment Adviser Representative Continuing Education Program and an Implementing Model Rule under the Uniform Securities Acts of 1956 and 2002**

Dear Ms. Cena:

The Investments and Wealth Institute f/k/a Investment Management Consultants Association ("IWI" or "Institute")[1] appreciates the opportunity to submit comment to the North American Securities Administrators Association ("NASAA") and offers conditional support for its proposed continuing education ("CE") requirement for investment adviser representatives ("IARs") under the proposed Model Rule (the "Model Rule" or "Proposal"). While IWI believes a CE requirement for IARs is appropriate and long overdue, the proposed implementation process is flawed for several material reasons. Both IWI's support for the concept and its concerns with certain operational aspects of the Proposal are discussed in greater detail below.

Support for the CE Concept

The Institute commends NASAA for introducing a proposed CE requirement inasmuch as it would address the need for ongoing competency by IARs who, as fiduciaries to their clients, are obligated to provide investment advice consistent with a fiduciary duty of care.[2] A

[1] Investments & Wealth Institute was established in 1985 to deliver premier investment consulting and wealth management credentials. IWI's 12,000 members manage approximately $2.5 trillion in assets for individual and institutional clients. IWI members represent a broad spectrum of financial advisors working within a variety of financial services business models: full-service brokerage, national and regional independent brokerage, independent registered investment advisers, and asset management firms, as well as banks, trust companies, and independent institutional consultants or their affiliates.

[2] *See, e.g.*, NASAA Model Rule 102(a)(4)-1 (as amended), that states "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." *See* also SEC "Study on Investment Advisers and Broker-Dealers (January 2011), that states investment advisers are fiduciaries. "Included in the fiduciary standard are the duties of loyalty and care…" at iii. In addition, ERISA imposes a fiduciary duty with roughly analogous duties of loyalty and care – or as the latter is called

robust CE requirement would bookend the longstanding examination requirement for IARs by ensuring that a minimum competency standard earned by successful passage of the Series 65 or 66 exams is maintained over multiple decades in the financial services industry.

Moreover, the Model Rule would cover not only IARs of state-registered advisory firms, but also IARs of federally registered advisory firms. Under the National Securities Markets Improvement Act of 1996, Congress permitted state securities administrators to "license, register, or otherwise qualify any investment adviser representative (including those IARs affiliated with an advisory firm registered with the Securities and Exchange Commission) ("SEC") who has a place of business located within that State…"[3]

For more than 25 years the majority of states have required successful passage of an examination to qualify an IAR for licensing. However, neither the states nor the SEC have ever mandated a CE requirement, notwithstanding the constantly evolving and increasing complexity of products and services over this time, as well as increased attention paid by regulators, Congress and state securities administrators to the appropriate standard of conduct covering retail investment advice. Compounding this competency gap is the fact that IARs – unique among the ranks of professional fiduciaries – are not required to hold a high school degree in order to be licensed to provide investment advice. By implementing an ongoing CE requirement for IARs, investor protection will be significantly elevated under the duty of care long after the financial intermediary has met a state's initial exam requirements.

Two (2) Significant Concerns with the Proposed Framework

The Institute believes that while certain aspects of structuring the CE requirement are sound, NASAA should revise two areas of the Proposal: 1) eliminate a pending conflict of interest under the Proposal that would allow state regulators to compete with the private sector as content vendors; and 2) what appears to be a near-blanket exemption from the CE requirement for a limited group of professional certifying organizations whose designees have been waived from having to take the Series 65 or 66 exams.

1. NASAA and Its Members Should Not Be Course/Content Providers

Sec. II.B. of the Proposal sets out the framework for evaluating and approving CE course/content providers ("CE Providers") and course/content offerings ("CE Offerings"). The Proposal notes that "anyone could become an approved course provider," including "NASAA members [and] NASAA itself…."[4]

NASAA and its members are securities regulators, and should not be in the business of competing with the private sector in providing continuing education services to the industry it oversees. Under the proposal, NASAA would be able to appoint itself as a content provider or the states that adopt the Model Rule. We see several problems with this arrangement, including management of conflicts of interest.

First, the Proposal would require potential CE Providers to pay an unspecified fee for each course or other CE content submitted to NASAA for review and approval. The Institute

---

under ERISA, a duty of prudence – that typically applies to IARs who advise qualified plans or the individual retirement accounts of plan participants.

[3] Public Law No: 104-290, sec. 203A(a)(2)(1)(A).

[4] Proposal, at 4.

commends NASAA for proposing to utilize a third-party vendor for this review, but notes that the Proposal doesn't make clear whether the states acting as CE Providers (or NASAA) pay any fee for their submissions, thereby creating an un-level playing field from the outset between state government agencies and competing private sector vendors. Moreover, even if NASAA imposes a fee on states and private sector CE Providers, sec. (7) of the Model Rule allows the state securities administrator to "in its discretion, waive any requirements of this rule."[5]

Finally, picture the third-party vendor that receives sub-par CE Offerings from a state administrator. Will it be able to freely and objectively reject such Offerings without being concerned about repercussions to its business arrangement? We don't like this picture and respectfully urge NASAA to remove itself and its members from the CE Provider business that state securities administrators should oversee as objective and disinterested third-parties.

2. NASAA Should Open Its Exemption for Professional Designation Providers to Other Qualified Professional Designation Providers

NASAA's recent survey indicates the second-most common source of CE after FINRA is derived from professional designations, meaning the certifying organizations. While the Institute strongly commends NASAA for drafting specific language "recognizing that professional designation CE may also satisfy an individual's IAR CE requirement,"[6] that provision in sec. (3) of the Model Rule is limited to a handful of credentials that are waived from taking the Series 65 or 66 exam under Rule USA 2002 (412(e)-1(d)) ("Rule USA 2002"), subject to satisfying two conditions: 1) that the IAR completes the CE credits required for maintaining the credential; and 2) the CE credits are mandatory.

Given the exemption from the CE Products and Practice requirement for FINRA's CE program (subject to meeting certain baseline criteria), it follows that the Model Rule should not discriminate between professional certifications that otherwise meet or exceed content requirements for passage of the Series 65 or 66 exams with their own exams and CE requirements. The message in the Proposal appears to be contradictory. On the one hand the discussion of Professional Designation CE asks whether it "should include specific language recognizing that professional designation CE may also satisfy an individual's IAR CE requirement" but goes on to answer that question by stating that the Proposal "includes language to this effect"[7] without clearly describing the limitations it prescribes in sec. (3) of the Model Rule.[8]

For example, while sec. (3)(C) requires the content to meet NASAA quality-control requirements, sec. (3)(A) requires the IAR to complete the CE requirements that must be fulfilled in order to maintain the designation. Yet there is no clarifying language in the text of the rule or discussion in the Model Rule release addressing how a NASAA member should address certain waived designations that may not currently require CE, requires minimal CE credits that are materially less than is required under the Proposal, or in the future reduces the number of CE credits required for maintaining the designation.

---

[5] *Id.,* at 14.

[6] *Id.,* at 6.

[7] *Id.*

[8] *Id.*, at 13.

Separately, sec. (3)(C) of the Model Rule is not clear how CE hours are counted during the relevant Reporting Period (an annual reporting requirement based on registration timing) when some designations only require CE hours to be fulfilled and reported at the end of a two-year reporting requirement.

Moreover, the Institute believes the exception made for designations waived from the Series 65 or 66 exam is unfair and discriminatory inasmuch as designations like the CIMA® and CPWA® designations require passage of exams that are far more difficult and comprehensive than the Series 65 or 66 exam, and that also require far more overall CE hours than are required under the Model Rule.

In order to treat all designations and their certifying organizations equitably, NASAA should do one of two things: 1) include other credentialing organizations under sec. (3) of the Model Rule, to be listed on NASAA's website after an objective review of qualified applicants; or 2) consider additional exam waivers under Rule USA 2002 based on uniform criteria. Unlike the carefully crafted criteria that are listed in the Proposal[9] for assessing potential CE Providers and Offerings, NASAA's original waivers, as promulgated in 1999, failed to prescribe any criteria. Nor have any comprehensive reviews of the current waived designations or potential new ones been undertaken by NASAA in the past 20 years. Moreover, in past discussions with NASAA staff, NASAA indicated that changes would need to be made to Form U4, working with FINRA, to accommodate new designation waivers under Rule USA 2002. However, it would seem logical that, if NASAA is already working with FINRA currently to create an online tracking system to be used by CE vendors and IARs for reporting CE content, that it also could work with FINRA to modify the coding necessary for changes to Form U4.[10]

In addition to this long-neglected waivers review, the CE initiative raises the question of whether the Proposal has a regulatory gap within the aforementioned exemption under Rule USA 2002, given that certain professional designations grandfathered into the waiver program two decades ago may have fewer CE hours required to maintain the designation than are required under the Model Rule. This prospect would defenestrate, at least in part, NASAA's stated overall goal "to ensure that [IARs] receive continuing education on the securities business relevant to their duties and obligations."

The Institute strongly encourages NASAA to turn its attention to this regulatory gap in its proposed CE program and, in the interest of fairness to other certifying organizations with comparable exam and CE programs, to open up the Series 65/66 waivers as mentioned above or, alternatively, include qualified certifying organizations under the sec. (3) exemption.

Summary

In summary, IWI supports the concept of requiring IARs affiliated with both state and SEC-registered advisory firms to be subject to an ongoing education program designed to hone their advisory skills, keep abreast of new market products and services, and to know the law governing fiduciary conduct. With only some minor changes to the rule – albeit significant in eliminating material conflicts and updating its waiver exemption so that it affords a safe harbor

[9] *Id.,* at 4.

[10] *See* Uniform Application For Securities Industry Registration or Transfer, Rev. Form U4 (05/2009), "Professional Designations," at 7.

for all qualified professional designation providers – then IWI could offer its unconditional support for the Proposal.

We are happy to respond to any questions you may have with regard to our comments.

Sincerely,

Sean R. Walters, CAE
Chief Executive Officer