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August 14, 2020

Mr. Stephen Bouchard, Co-Chair  
Mr. Stephen Brey, Co-Chair  
NASAA Investment Adviser Regulatory Policy and Review Project Group  
c/o State of Michigan, LARA  
Corporations, Securities & Commercial Licensing Bureau  
PO Box 30018  
Lansing, Michigan 48909

**RE: Proposed Model Rule - Investment Adviser Policies and Procedures**

Messrs. Bouchard and Brey:

On behalf of the Financial Planning Coalition<sup>1</sup> ("Coalition"), we are writing to provide comments concerning the model rule proposed by the North American Securities Administrators Association, Inc. ("NASAA"), and its Investment Adviser Regulatory Policy and Review Project Group ("Project Group"), to require investment advisers to establish, maintain, and enforce written policies and procedures tailored to the business models of state-registered investment advisers ("Policies and Procedures Rule").<sup>2</sup> The Coalition appreciates the opportunity to share its perspectives on this proposal.

As described generally in the preamble to the proposal, the Policies and Procedures Rule is intended to facilitate and improve compliance with state securities laws. It would require state-registered investment advisers to establish, maintain, and enforce policies and procedures that address compliance, supervision, proxy voting, physical and cyber security, a code of ethics, use of material non-public information, and

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<sup>1</sup> The Financial Planning Coalition is comprised of Certified Financial Planner Board of Standards, Inc. ("CFP Board"), the Financial Planning Association® ("FPA®"), and the National Association of Personal Financial Advisors ("NAPFA"). Information about the Coalition is available at <http://financialplanningcoalition.com/>. CFP Board is a professional body that sets competency and ethical standards for more than 87,000 CFP® professionals throughout the United States. FPA is the principal membership organization for CFP® professionals and those who support the financial planning process in the U.S. with 22,000 members nationwide. NAPFA is the nation's leading organization of fee-only comprehensive financial planning advisors with more than 3,800 members nationwide.

<sup>2</sup> Available at <https://www.nasaa.org/wp-content/uploads/2020/07/Notice-of-Request-for-Public-Comments-Proposed-IA-Policies-and-Procedures-Model-Rule-070220.pdf>.

business continuity and succession plans. Annual review of all policies and procedures would be required, as well as appointment of a chief compliance officer (“CCO”) responsible for enforcing the rule’s requirements.

## **1. CFP Board’s Code of Ethics and Standards of Conduct:**

Effective October 1, 2019, CFP Board adopted a new *Code of Ethics and Standards of Conduct* (“*Code and Standards*”), which articulates the ethical standards for CFP® professionals. Consistent with CFP Board’s mission to work in the public interest, and in furtherance of its strategic plan committed to a fiduciary standard, the newly-revised *Code and Standards* extends the application of the fiduciary duty to all “Financial Advice”<sup>3</sup> provided by a CFP® professional. This is in contrast to CFP Board’s previous standards, adopted in 2007, that imposed a fiduciary duty on CFP® professionals only when providing “Financial Planning”<sup>4</sup> services.

By virtue of their CFP® certification, members and stakeholders of Coalition organizations have committed to provide financial advice under a fiduciary standard of conduct. The more than 87,000 CFP® professionals hold registrations and/or licenses across business models as investment adviser representatives, registered representatives of broker-dealers and/or insurance agents, and in many instances hold dual or multiple registrations or licenses. Regardless of business or compensation model, CFP® professionals commit to provide financial advice under a fiduciary standard of conduct.

In the proposal, NASAA quotes the Securities and Exchange Commission’s (“SEC”) final rule release adopting the compliance procedures and practices rule for federally-registered investment advisers, Investment Advisers Act of 1940 (“Advisers Act”) Rule 206(4)-7:<sup>5</sup> “The rule requires advisers to consider their fiduciary and regulatory obligations under the Advisers Act and to formalize policies and procedures to address them.” Likewise, CFP Board’s *Code and Standards* includes policies and procedures that CFP® professionals must establish to meet their fiduciary commitment to CFP Board.<sup>6</sup>

## **2. Coalition Recommendations For The Proposed Model Rule**

The Coalition applauds NASAA’s efforts to develop and propose a model Policies and Procedures Rule for state-registered investment advisers that includes the regulatory flexibility to accommodate any business model. By consolidating and

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<sup>3</sup> The *Code and Standards* defines “Financial Advice” as (1) “[a] communication that, based on its content, context, and presentation, would reasonably be viewed as a recommendation that the Client take or refrain from taking a particular course of action with respect to: [t]he development or implementation of a financial plan; [t]he value of or the advisability of investing in, purchasing, holding, gifting, or selling Financial Assets; [i]nvestment policies or strategies, portfolio composition, the management of Financial Assets, or other financial matters; or [t]he selection and retention of other persons to provide financial or Professional Services to the Client; or (2) [t]he exercise of discretionary authority over the Financial Assets of a Client.”

<sup>4</sup> The *Code and Standards* defines “Financial Planning” as “[A] collaborative process that helps maximize a Client’s potential for meeting life goal through Financial Advice that integrates relevant elements of the Client’s personal and financial circumstances.”

<sup>5</sup> See, 17 CFR 275.206(4)-7.

<sup>6</sup> See, CFP Board *Code of Ethics and Standards of Conduct* available at <https://www.cfp.net/ethics/code-of-ethics-and-standards-of-conduct> and the library of compliance resources at <https://www.cfp.net/ethics/compliance-resources>.

streamlining existing NASAA model rules, while also addressing emerging compliance considerations, the proposed model rule should help state-registered investment advisers more easily comply with evolving state requirements.

The Coalition agrees with NASAA that requiring state-registered investment advisers to establish, maintain, and enforce comprehensive written policies and procedures should facilitate compliance with state securities laws and thus serve to protect the investing public. We believe, however, that the model rule should minimize and avoid creating undue regulatory burdens on state-registered advisers, and incorporate the following elements:

1. To the extent possible, the model rule should follow the requirements applicable to SEC-registered investment advisers. For example, a state-registered investment adviser may have been SEC-registered previously, or its business practices may be based on, or substantially reflect, established SEC guidelines. A model rule should build upon, not ignore, this pre-existing foundation of regulatory knowledge.
2. Where possible, the model rule should provide the same or substantially similar regulatory relief for state-registered investment advisers as is available to SEC-registered investment advisers.
3. The model rule should be designed to promote, wherever possible, harmonization of regulatory compliance requirements across state lines and with the SEC. This would help minimize compliance costs, burdens and confusion for state-registered investment advisers. In addition, uniform compliance standards should improve substantially the quality of state compliance inspections by providing regulators, investment advisers and compliance professionals “a common roadmap” to assess regulatory compliance.
4. To minimize and avoid potential regulatory ambiguities that could contribute to misinterpretation of compliance requirements, the Coalition recommends that the model rule clearly state that, unless otherwise indicated, the terminology, definitions, and concepts expressed in the rule are based upon and refer to the federal securities laws and regulations thereunder or, where appropriate, to the Uniform Securities Act, as amended. Thus, individuals who may not be compliance professionals, but who may become involved in compliance activities, could easily identify the laws upon which the model rule is based and seeks to implement.<sup>7</sup>

### **3. Project Group Requests for Comment**

The Project Group has requested public comment on all aspects of the proposed Policies and Procedures Rule and, in particular, on the following questions. It should be noted that the Coalition has not attempted to address every issue raised in the release. Instead, the Coalition has responded to questions where we have a point of view based on the practical experience of our members or stakeholders.

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<sup>7</sup> For example, the definition of “Access Person” should be expanded to include paraplanners, clerical and administrative staff, advisers to advisers, etc., who in the normal course of business may have access to non-public client information.

1. Do you agree with the proposed structure of the rule? Should all policies and procedures be included in one rule or should they be divided among a larger group of separate rules?

**Response:** Based upon a limited survey of state-registered investment advisers who are both CFP® certificants and members of Coalition organizations, the Coalition concludes that the structure of the proposed model rule is appropriate.

2. Should general policies and procedures and supervisory policies and procedures be set out in separate rules?

**Response:** No, general policies and procedures and supervisory policies and procedures should not be broken apart into stand-alone rules. Rather, maintaining a singular, streamlined rule will assist firms and decision-makers to understand the broader context, purpose, and interplay of the various subparts.

4. Should the NASAA model rule require the same policies, procedures, and recordkeeping obligations with respect to non-public information as those required by the SEC? Do you believe that state-registered advisers have the same access to and conflicts with respect to non-public information that federal-covered firms and associated persons do?

**Response:** Yes, the NASAA model rule should require substantially similar obligations with respect to non-public information as those required by the SEC. The same determination is reflected in CFP Board's *Code and Standards*.<sup>8</sup>

7. Is the "chief compliance officer" definition sufficient? If not, what should be added or removed?

**Response:** The proposed model rule states that the CCO "must be registered as an investment adviser representative and must have the background and skills appropriate for fulfilling the responsibilities of the position."<sup>9</sup> The proposed model rule should (i) clarify whether or not the CCO must be registered as an investment adviser representative of the investment adviser and, if so, (ii) provide guidance on "CCO for hire" situations where a person may be employed as CCO for more than one investment adviser.

8. Do you have any further comment on the proposed rule?

**Response:** The proposed model rule includes a description and a sample of a compliance grid that firms can use to confirm and record compliance with required policies and procedures. The description of the compliance grid includes a section on financial planning which states: "If your Form ADV describes financial planning as an option for clients to consider, then you must create policies and procedures for the financial planning process, even if you have never actually had a financial planning

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<sup>8</sup> See, CFP Board *Code and Standards*, at pp. 5-6, available at <https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/cfp-code-and-standards.pdf?la=en&hash=AFC0087B53EDE26B2A478BD84DF7DDA3>.

<sup>9</sup> *Supra*, n. 2 at p. 13.

client.”<sup>10</sup> The Coalition believes that state-registered investment advisers who choose to create policies and procedures addressing the financial planning process should be strongly encouraged to refer to the *Code and Standards* for guidance.

Additionally, the proposed model rule indicates as an example that, “if your firm manages investment portfolios but never produces written financial plans for its clients, it does not need a policy describing the financial planning process, fees and software used to create the plan.”<sup>11</sup> It is important to note that financial planning may exist without a written financial plan. The Coalition respectfully recommends that the model rule instead define financial planning in accordance with the *Code and Standards*<sup>12</sup> and require that appropriate policies and procedures be incorporated into the firm’s compliance program.

#### **4. Conclusion**

The Coalition appreciates the opportunity to comment on the proposed Policies and Procedures Rule and to highlight proposed state requirements, which, in our opinion, can be improved by greater clarification or by harmonization with federal requirements. Furthermore, we believe that the model rule will facilitate compliance with state securities laws and encourage the adoption of best practices that will benefit the public. Finally, the Coalition urges NASAA to strongly encourage state-registered investment advisers and state regulators to use the *Code and Standards*, where practicable, as a guide for drafting and evaluating firm policies and procedures with respect to the definition of “Financial Planning” and requirements thereunder.

Should you have questions, please contact Maureen Thompson, Vice President, Public Policy, CFP Board, at 202-379-2281 or [mthompson@cfpboard.org](mailto:mthompson@cfpboard.org).

Sincerely,



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CFP Board



Patrick Mahoney  
Interim CEO  
FPA®



Geoffrey Brown, CAE  
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<sup>10</sup> *Supra*, n. 2 at p. 26.

<sup>11</sup> *Id.*

<sup>12</sup> Financial Planning: A collaborative process that helps maximize a Client’s potential for meeting life goals through Financial Advice that integrates relevant elements of the Client’s personal and financial circumstances.