Brey, Stephen (LARA)

From: Travis Johnson <travis@xyplanningnetwork.com>
Sent: Friday, July 31, 2020 3:00 PM
To: BouchardS@dca.njoag.gov; Brey, Stephen (LARA)
Subject: nasaacomments@nasaa.org

Mr. Bouchard and Mr. Brey,

We appreciate the opportunity to comment on the proposed Policies and Procedures Rule that NASAA's Investment Adviser Regulatory Policy and Review Project Group has worked so diligently on developing.

We represent XY Planning Network, which provides business support (including compliance consulting) services to more than 1,260 advisor members, of which nearly 98% are state-registered Investment Advisers providing financial planning advice in states across the country, and of which the overwhelming majority are "solo" investment advisers (where there is only one supervised person, who is also the CCO and owner of the firm).

Overall, we support the development of and contents of this Proposed Rule, and believe that it could provide much needed uniformity and consistency across different states as it relates to their state-registered Investment Adviser requirements.

We have addressed the eight questions the Project Group requested comment on below, and are available to address any additional questions you may have following the review of the public comments.

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?
    a. We agree with the proposed, consolidated structure of the rule, and believe the components of the rule are adequately designed to enhance compliance by state-registered investment advisers without placing undue burden on the investment adviser.
2. Should general policies and procedures and supervisory policies and procedures be set out in separate rules?
    . We believe that these rules will be more clearly understood when consolidated in a single rule. We support how the proposed rule breaks out the supervisory requirement, to put an emphasis on the need for state-registered investment advisers to reasonably supervise their employees and prevent violations by the adviser as a result of its supervised persons.
    a. However, it would be beneficial to add further clarification for Small Advisers indicating that rather than being required to establish **supervisory** policies & procedures (detailed in section II.1.B of proposed rule), "Small Advisers" or those firms with only one investment adviser representative should demonstrate that they have adequately established and implemented **compliance** policies & procedures (detailed in section II.1.A of the proposed rule). Please see our response to question 6 below for additional commentary around this.
3. Do you agree that NASAA should adopt model rules requiring the same kinds of policies and procedures as those required by the SEC with respect to proxy voting? Should proxy voting and code of ethics requirements be imposed in the manner proposed by the rule?
    . We do agree that NASAA should adopt model rules requiring the same kinds of policies and procedures as those required by the SEC with respect to proxy voting. We agree with the proposed rule on Proxy Voting Policies and Procedures and would support the requirement being imposed in the manner proposed. If the investment adviser elects to take on the authority

to vote client proxies, the requirements set out in the proposed rule, we believe, would adequately ensure that the adviser can develop reasonable policies and procedures, with minimal burden, that are designed to ensure that they are acting in the client's best interest.

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?
    . We do believe that the NASAA model rule should require the same policies, procedures, and recordkeeping obligations with respect to non-public information as those required by the SEC, if for no other reason, to provide uniformity and support ease of transition when an investment adviser relocates to another state and/or transitions to registration with the SEC. State-registered advisers, in many cases can have the same or similar access to non-public information that federal-covered firms and associated persons do, either through the adviser's clients, previous employment at a publicly traded company, certain outside business activities, having a spouse or partner who is employed by a publicly traded company, or through other centers of influence through which the investment adviser may obtain access to material non-public information. While it is more likely for federally registered firms and associated persons to have access and conflicts in this area, it is reasonable to believe that state-registered investment advisers can have similar access and conflicts with regard to non-public information.
5. Within the code of ethics requirement, should the NASAA model rule require holdings and transactions reports in the same manner the SEC requires?
    . We believe that NASAA's model rule should require holdings and transactions reports in the same manner the SEC requires. Though we strongly support that the exception listed in sub-bullet #3 under *Exceptions to Reporting Requirements* be imposed in order to clearly allow for state-registered firms to develop policies and procedures that enable access persons to provide quarterly statements and/or broker trade confirmations in place of a transaction report, as long as it covers the necessary information that would be obtained in a transaction report. Furthermore, we believe this practice can be reasonably implemented, and accomplishes the same objective as requiring transaction reports. We typically see this accomplished through the investment adviser requesting duplicate account statements and trade confirmations for the covered accounts of their access persons.
6. Should NASAA adopt the same small adviser exemption from holdings and transaction reports as that allowed by the SEC, or should it take a different approach? Should the reporting exemption be expanded such that advisers need not prepare the reports but only maintain records? Are there other ways to minimize burdens on small advisers?
    . Yes, NASAA should adopt the same small adviser exemption from holdings and transaction reports as that allowed by the SEC. We believe that it should be expanded to allow for those advisers to simply maintain adequate records and not be required to prepare reports while they are subject to this exemption.
    a. As we indicated earlier in response to question 2, we believe that Small Advisers with only one supervised person who is also the CCO and owner of the firm should not be required to establish, maintain, and enforce supervisory policies and procedures, as they will still be subject to the requirement to establish, maintain, and enforce compliance policies and procedures. We do not believe that there is any benefit to requiring a solo member firm to establish supervisory policies and procedures when they are the only supervised person in the firm. Effective compliance policies and procedures that the sole supervised person is expected to follow should be acceptable for these "Small Advisers".
    b. We would like to see NASAA thoroughly review the proposed model rule and ensure that all possible exceptions or alternatives have been considered as it relates to Small Adviser exemptions so that no undue burden is placed on smaller state-registered advisers that can reasonably ensure the protection of investors without additional regulatory requirements.
7. Is the "chief compliance officer" definition sufficient? If not, what should be added or removed?
    . We would recommend adding clarity around the "background" expectations, and explain how the designated person can either demonstrate or make up for a lack of "background" as it relates to investment adviser compliance, specifically in the instance of a small or single-person

firm. Suggesting how a Small Adviser can otherwise ensure that they meet these expectations in order to serve as CCO would provide clarity to those Small Advisers who may lack concrete experience in establishing, maintaining, and enforcing a firm's policies and procedures. These Small Advisers, in our experience, often consult with third party consultants either on a project or retainer basis for a period of time in order to develop and implement a successful compliance program that is adequately tailored for their firm.

8. Do you have any further comment(s) on the proposed rule?
    . We appreciate this proposed rule as an effort to clarify and standardize the policies and procedures requirements across states that advisers work very hard to ensure they comply with. The inclusion of Proposed Policies and Procedures Compliance Grid, and Instructions, will be of significant value to firms and industry consultants working to refine existing or develop and implement new policies and procedures that are effective and compliant regardless of the size of the firm, type(s) of services provided, and the number of locations of the investment adviser.

As a final note, XY Planning Network supports the proposed model rule as written and with the suggestions explained in our responses to the 8 questions above. However, we strongly urge NASAA and the committee responsible for forming this proposed rule to be mindful of the potential burdens and realities of Small Advisers.

We believe a culture of compliance and adequate policies and procedures is important for all registered investment advisers, both large and small, however single member firms with no additional supervised persons and oftentimes no additional access persons typically have substantially less conflicts of interest and activities that impact their ability to ensure the protection of investors.

We would like to see NASAA thoroughly review the proposed model rule and ensure that all reasonable alternatives/exceptions are considered for smaller advisers, including but likely not limited to the accepting of an access person's account statements in lieu of separate quarterly transaction reports, requiring compliance policies and procedures but no redundant supervisory procedures when not necessary or applicable based on the specific nature and size of the investment adviser.

Based on our experience working with new and established state-registered firms across the country, in order for advisers to confidently develop and implement policies and procedures and appropriate disclosures, they need to be confident in their understanding of the state's expectations and enforcement of those rules and regulations.

To that point, we would like to recommend that NASAA confront an increasing concern we have seen many state-registered advisers encounter in their first few years in business. On multiple occasions over the last 2-3 years we have assisted state-registered advisers across the country who are experiencing a lack of consistency in the enforcement of state regulations between those who reviewed and approved their initial investment adviser registration and those who conduct their regulatory examination(s) in the first few years that follow. In several instances there has even been inconsistency between examiners of the same securities division in how they interpret and enforce regulation during a routine audit. We feel that for advisers to build out a truly effective compliance program and have confidence in their policies and procedures they need to have confidence in the state's practices for enforcing regulation *consistently* and minimizing issues that contradict what was initially approved when the adviser initially applied for registration.

We would like to propose a couple options to address this issue with the first option being the development of a form of safe harbour provision indicating that advisers previously approved during the initial registration process should be granted a safe harbor that they cannot receive a deficiency notice unless the state formally introduces guidance that announces a change in regulatory policy regarding the issue. Another option could include an appeal process, or alternative way to seek redress, if a particular enforcement regulator opposes what a registration regulator previously approved and causes the adviser undue burden by requiring changes to policies and procedures and/or business practices that were previously deemed compliant by their state securities division.

Thank you again for the opportunity to participate in the public comment on this proposed rule!

Travis Johnson
Director of Compliance

Email: travis@xyplanningnetwork.com

XY Planning Network

www.xyplanningnetwork.com