



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

750 First Street, NE, Suite 990
Washington, DC 20002
202-737-0900
www.nasaa.org

September 29, 2023

Submitted by SEC Webform (<https://www.sec.gov/comments/s7-13-23/s7-13-23#no-back>)

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: File No. S7-13-23: Exemption for Certain Investment Advisers Operating Through the Internet

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to U.S. Securities and Exchange Commission (“SEC” or the “Commission”) Release No. IA-6354, *Exemption for Certain Investment Advisers Operating Through the Internet* (the “Proposal”).² The Proposal would revise the internet advisers exemption (the “Exemption”)³ by requiring putative internet advisers to maintain an operational interactive website through which their services are provided exclusively, by defining how their advisory services must be rendered, and by eliminating the *de minimis* exception for non-internet clients.

For the reasons explained below, NASAA supports the Proposal generally and agrees that the Commission should eliminate the *de minimis* exception for non-internet clients and define “digital investment advisory service” as proposed. However, we think the Commission should reconsider whether it needs to add the word “operational” to “interactive website,” and we do not believe it needs to add another representation to Form ADV. Last, we believe the rule should state that internet adviser personnel can discuss matters other than investment advice with their clients.

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, the U.S. Virgin Islands, and Guam. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal is available at <https://www.sec.gov/files/rules/proposed/2023/ia-6354.pdf>.

³ Rule 203A-2(e) under the Investment Advisers Act of 1940 (the “Advisers Act”).

I. The Exemption Should Be Limited to Advisers Who Provide Services Online Exclusively.

The oversight of advisers is a shared responsibility among the Commission and state regulators that efficiently allocates advisers with a national presence to the Commission, while allocating advisers whose businesses are more local in nature to state regulators.⁴ As Chair Gensler noted, “the markets benefit” from the “good working relationship” between the Commission and state regulators.⁵ We are united in the goal to ensure that advisers are overseen properly.

NASAA therefore shares the Commission’s concern that the Exemption has been misused by advisers that do not meet its requirements, whether by failing to maintain active websites or by providing advisory services outside of those websites beyond the limits allowed for non-internet clients.⁶ Given the Commission’s representations that this deficiency has been “a common finding for many years,”⁷ and that the Exemption “has been used with increasing frequency” in recent years,⁸ we agree that this is an opportune time to revise the Exemption’s requirements.

Generally, if an adviser does not meet the monetary threshold for SEC registration, and no other exemption applies, it must register with any state in which it has a place of business and more than five clients.⁹ Further, an adviser that does not qualify for the multi-state exemption¹⁰ is more likely to be a smaller business whose clients would be better protected by state oversight. State regulators are opposed to allowing advisers to use federal exemptions to evade state scrutiny.

For those reasons, NASAA supports two aspects of the Proposal that should restrict, if not eliminate, misuse of the Exemption. First, we support the elimination of the *de minimis* exception for non-internet clients. Some advisers are serving clients directly and personally while ignoring the obligation to provide advice online. Eliminating the *de minimis* exception should remove that possibility. Second, we support the proposal to define “digital investment advisory service” as “investment advice to clients that is generated by . . . software-based models, algorithms, or applications based on personal information each client supplies”¹¹ This should limit the Exemption to firms whose advice is technologically rendered. Given that automated advice devoid of human discretion is certain to grow and raise new regulatory issues, it is appropriate to define the Exemption narrowly to apply to technology-based firms rather than mixed model firms.

⁴ Proposal at 6.

⁵ Gary Gensler, *Statement on Internet Investment Advisers* (July 26, 2023) at 1, available at <https://www.sec.gov/news/statement/gensler-statement-internet-advisors-072623>.

⁶ Proposal at 11-12.

⁷ *Id.* at 11 n.26.

⁸ *Id.* at 9.

⁹ Advisers Act Section 222(d).

¹⁰ Rule 203A-2(d) under the Advisers Act.

¹¹ Proposal at 74.

II. It Should Not Be Necessary to Add “Operational” to “Interactive Website.”¹²

If the Commission eliminates the *de minimis* exception for non-internet clients and defines “digital investment advisory service” as proposed, it should not need to add the word “operational” to the term “interactive website.” The current wording should be sufficient¹³ because a website cannot be “interactive” if it is not already “operational.”

While NASAA understands that the proposed addition is a reaction to examinations which found that advisers claimed the Exemption without maintaining “operational” websites,¹⁴ the apparent reason for such abuse is that the Exemption allows advisers to serve some clients offline. Eliminating the *de minimis* exception would force those advisers to either offer advice through interactive websites, find another exemption, or register with the states. The inclusion of the word “operational” should make no difference one way or another.

III. It Is Not Necessary to Add a New Representation to Form ADV.¹⁵

Form ADV Part 1A Item 2.A(11) already asks an adviser to indicate whether it is relying on the Exemption. An adviser that selects the Item represents affirmatively that it satisfies the Exemption’s requirements, however they may be defined by rule. An adviser who selects the Item mistakenly or falsely is already susceptible to an examination deficiency finding or an enforcement action. Adding a separate representation is not necessary to establish a non-compliant firm’s fault or liability, and it would therefore serve no regulatory purpose. On the other hand, singling out one of the Exemption’s requirements could give the impression that it is somehow more important, which could unintentionally cause advisers to neglect the Exemption’s other requirements.

¹² See Proposal at 23, Question 1 (“Should we amend the interactive website definition to ‘operational interactive website,’ as proposed?”).

¹³ NASAA does not take a position on the question of whether the Commission should use a broader term, such as “digital platform.” See Proposal at 25, Question 8. We recognize that a more generic term could stand up better against rapidly advancing technology, and we generally favor language that avoids the need for new rulemaking by being evergreen. However, we also believe that a whole new medium of investment advice not captured by the concepts of websites and mobile applications would be significant enough to require a refreshment to existing rules if not new rulemaking.

¹⁴ Proposal at 12.

¹⁵ See *id.* at 25, Question 9 (“Would requiring an affirmative representation on Schedule D to Form ADV that an adviser relying on the Internet Adviser Exemption has an operational interactive website, as proposed, be useful for advisers by reinforcing the conditions of the proposed rule?”).

IV. The Rule Should State What Direct Client Interactions Are Acceptable.¹⁶

The proposed language of amended Rule 203A-2(e)(1) – “[p]rovides investment advice to all of its clients exclusively through an operational interactive website at all times” – combined with the proposed definition of “digital investment advisory service,” reasonably state the principle that the Exemption would apply only to advice that is both rendered technologically and delivered online. What is not clear from the proposed rule text is the extent to which an internet adviser’s personnel can communicate with investors directly. These limits are partially described in the preamble as follows:

“The proposed amendments would not prohibit advisory personnel from all interactions with advisory clients. Advisory personnel could continue to assist clients with technical issues in connection with the use of the website (*e.g.*, accessing the website, *etc.*), including by assisting clients with explanations of how the algorithm generating the investment advice was developed or operates. Advisory personnel generally should be able to perform those services telephonically, through email, live electronic chats, and similar forms of electronic communication. As discussed below, the amended rule would not permit advisory personnel to provide investment advice of any kind to a client.”¹⁷

Language should be included in the rule to make clear to putative internet advisers that while their personnel cannot expand upon technologically generated advice, they can answer other questions¹⁸ and help clients navigate the website or application.

While we appreciate that creating a proviso in the rule could inject uncertainty, the proposed text risks giving advisers the impression that they cannot communicate directly with their clients without violating the Exemption’s requirements. Or worse, it may give advisers an excuse not to respond to their clients. Retail investors are human, and we have all had problems filling out online forms. Many investors have unique circumstances and sometimes they need to ask questions to provide the right information, which is critical for robo-advisers to allocate investments appropriately. Further, automated communication tools like chat bots may not be good enough to understand a client’s needs. Advisers should therefore have comfort, in the text of the rule itself, about the degree to which they can talk to their clients about non-advisory matters.

¹⁶ See Proposal at 23, Question 3 (“*Is it sufficiently clear that the amended rule is not designed to prevent advisory personnel from assisting clients with technical issues or from explaining how the adviser’s algorithm works?*”).

¹⁷ *Id.* at 22.

¹⁸ For example, the Commission refers to topics suggested by Morningstar. *Id.* at 21 n.58.

V. Conclusion

For the reasons explained above, NASAA supports the Proposal generally and agrees that the Commission should eliminate the *de minimis* exception for non-internet clients and define “digital investment advisory service” as proposed. However, we think the Commission should reconsider whether it needs to add the word “operational” to “interactive website,” and we do not believe it needs to add another representation to Form ADV. Last, we believe the rule should state that internet adviser personnel can discuss matters other than investment advice with their clients.

Should you have any questions about this letter, please contact either the undersigned or NASAA’s General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,



Claire McHenry
NASAA President and
Deputy Director
Nebraska Bureau of Securities