December 18, 2024

NASAA Market and Regulatory Policy & Review Project Group
North American Securities Administrators Association, Inc.
750 First Street, N.E., Suite 990
Washington, D.C. 20002

Submitted electronically to nasaacomments@nasaa.org

Re: **Proposed amendments to the NASAA Model Rule, *Dishonest or Unethical Business Practices of Broker-Dealers and Agents***

To whom it may concern:

We write to the members of the Market and Regulatory Policy & Review Project Group (the "Project Group") of the Broker-Dealer Section of NASAA (the "Section") on behalf of XY Planning Network ("XYPN")[1] and the Financial Planning Association ("FPA")[2] to express our general support of the proposed amendments to the above Model Rule,[3] and in particular strong support for NASAA's proposed prohibition on the use of certain misleading titles by standalone broker-dealers and agents not registered as investment adviser representatives ("IARs").

The purpose of the proposed titles restriction, according to the NASAA release, would be to "prevent broker-dealers and agents from using the 'adviser' or 'advisor' titles without" appropriate licensure.[4] XYPN broadly supports efforts by NASAA and other regulators to clear up longstanding investor confusion regarding the delineation between product sales and investment advice, as embodied in the differing regulatory capacities of a registered investment adviser firm ("RIA" or "investment adviser") to provide investment advice, versus a registered representative of a broker-dealer selling securities products to consumers.

[1] XY Planning Network is a national advisor support network providing education, practice management, technology, and compliance support to more than 1,991 individual members representing 1,838 financial planning firms in all 50 states and comprised primarily of Generation X and Generation Y financial planners. Approximately 98 percent of XYPN members are affiliated with state-registered investment advisory firms ("state RIAs").

[2] The Financial Planning Association is the nation's leading membership organization for CFP® professionals and those engaged in the financial planning process. FPA supports nearly 17,000 members and 79 chapters and state councils. FPA's core members are CFP® professionals who are required to act in the best interest of their clients at all times when providing financial advice.

[3] "Proposed amendments to the NASAA Model Rule, Sec. II.B. of release (available at FINAL Request-for-Public-Comment Amendments-to-DU-Nov.-2024.pdf).

[4] Model Rule amendments, Release at 4.

Today, the financial services industry generally operates under two types of market conduct rules, one for RIAs providing advice that articulates twin duties of loyalty and care under a principles-based fiduciary standard, and the second a lower suitability standard for stockbroker/salespersons recommending investment products to retail investors. XYPN and FPA support these differing standards of conduct for advice versus product sales but believes that such standards are only effective when there are clear 'truth-in-advertising' protocols that prohibit salespeople from using advice-like titles such as "financial advisor" when not actually acting in the capacity of an investment adviser.

However, enforcement against the use of misleading titles that obfuscate the differences between sales and advice has been, at a minimum, inconsistent over the decades, despite the efforts of Congress in 1940 to create in legislation "[a] fundamental purpose, common to [the Investment Advisers Act *et al*]…to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."[5] Consequently, we believe that NASAA's proposal is both consistent with recent regulation, and the long-term legislative history as it pertains to the use of titles.

Background

Policymakers have used title restrictions in the past to clarify differences between fiduciary advisors and salespersons. As noted above, Congress was cognizant of the need to separate sales and advice as evidenced in hearings previous to enactment of the Investment Advisers Act of 1940 (the "Advisers Act"). At the time, there were both investment counselors who provided counsel (i.e., impartial advice) for a fee regarding the investments that their clients should own (or not), and stockbrokers working for broker-dealers who sold stocks and bonds for a commission and whose primary job was to execute those transactions.[6]

The end result was that, during congressional hearings, it was the advice-providers themselves – led by the Investment Counsel Association of America (ICAA, renamed the Investment Advisers Association in 2005) – who welcomed higher standards for themselves and their advice-giving peers, in the form of title protection for the term "investment counsel," including restrictions on representing that one was providing investment advice in the capacity of investment counsel, and a higher standard of care than that of a broker-dealer in providing those services.[7]

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[5] *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 186 (1963).

[6] As a core component of facilitating capital formation in public markets, brokerage firms and their agents "brokered" the primary issuance of securities and their subsequent purchase and sale in secondary markets. Agents also facilitated their firm's role as a dealer and market-maker in those securities. The term "broker-dealer" was a literal descriptor of the firm's transactional sales role while facilitating capital formation.

[7] *See* Sec. 208(c) of the Advisers Act which states: *"It shall be unlawful for any person registered [as an investment adviser] to represent that he is an investment counsel or to use the name 'investment counsel' as descriptive of his business unless: 1) his or its principal business consists of acting as investment advisers; and 2) a substantial part of his or its business consists of rendering investment supervisory services" (in which "investment supervisory services" are defined in Sec. 202(13) as "the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client").*

As Congress observed at the time, such regulation was necessary to "*protect the public from the frauds and misrepresentations of unscrupulous tipsters and touts and to safeguard the honest investment advisers against the stigma of the activities of these individuals… [and took] especial care… in the drafting of the bill to respect this relationship between investment advisers and their clients*."[8]

Sixty-five years later, when the Securities and Exchange Commission ("SEC" or "Commission") promulgated an exemption for broker-dealers providing investment advice for a fee, or "special compensation," it also created a prohibition on the use of the title "financial planner" by brokers who were not dually registered.

Accordingly, the 2005 broker exemption stipulated that a broker-dealer would be required to register as an investment adviser if it either:

> "i) holds itself out to the public as a financial planner or as providing financial planning services; or
> (ii) delivers to the customer a financial plan; or
> (iii) represents to the customer that the advice is provided as part of a financial plan or financial planning services."[9]

In other words, in a manner similar to title restriction for "investment counsel" in Section 208(c) of the Advisers Act, the Commission chose to regulate both the title, and those who represent that they offer the function (even with a different title). The adopting release added that "the broker-dealer must also treat as advisory clients those customers to whom it represents that its advice is part of a financial plan even if it uses some other term to describe the plan."[10] This particular rule was eventually vacated by the D.C. Circuit Court in 2007 on other grounds.[11]

Since the 1990s, brokerage firms have increasingly registered as dually licensed broker-dealer/RIA firms ("dual registrants"), further exacerbating well-documented consumer confusion over the capacity in which advice is provided and products sold, and in particular, advice provided in connection with commission-oriented products that were unsuitable and also resulted in heightened conflicts of interest. Over this same time period many brokers also became licensed as IARs, and even if they were not, the sales side of the industry strongly favored universal use of advisor-like titles implying a fiduciary-like relationship of trust with the customer. In fact, a 2017 study by the Consumer Federation of America found widespread efforts by 25 of the largest broker-dealer and insurance companies to convey to the public that

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[8] H.R. Rep. No. 76-2639 at 28 (1940).

[9] "Certain Broker-Dealers Deemed Not To Be Investment Advisers," SEC, Release Nos. 34-51523; IA-2376;at 116-117.

[10] *Id.*

[11] *See,* e.g., "U.S. court strikes down SEC broker exemption rule," Reuters, Aug. 9, 2007. Available at https://www.reuters.com/article/business/us-court-strikes-down-sec-broker-exemption-rule-idUSN30260419/ (as of Dec. 14, 2024).

they were "trusted advisors," through the use of both titles and marketing, even when solely operating in a sales capacity.[12]

In the SEC's 2018 rule package updating rules and regulatory guidance for the securities industry, it initially limited the use of the terms "adviser" and "advisor" by registered representatives to only those who were dually registered broker-dealer/RIAs in a proposed disclosure called Form CRS Relationship Summary ("Form CRS").[13] At the time, another important task of the SEC was strengthening the suitability requirements for brokerage firms under a related rule, Regulation Best Interest ("Reg BI").[14]

Form CRS, as proposed, included a stand-alone provision limiting the use of the titles "adviser" and "advisor" to individuals and their associated firms dually registered with the SEC as brokerage firms and under the Advisers Act, or with a state securities administrator. According to the Form CRS proposing release, "If firms and financial professionals that are not investment advisers are restricted from using 'adviser' or 'advisor' in their names or titles, retail investors would be less likely to be confused or potentially misled about the type of financial professional being engaged or nature of the services being received." [15]

However, in the final adopting release for Reg BI, the SEC chose not to explicitly limit the use of such titles, instead stating that "…in light of the disclosure requirements under Regulation Best Interest, we do not believe that adopting a separate rule restricting those terms is necessary, because we presume that the use of the term 'adviser' and 'advisor' in a name or title [by a standalone brokerage firm or registered representative not supervised by an IA firm]…to be a violation of the capacity disclosure requirement under [Reg BI's] Disclosure Obligation…"[16] In other words, to the extent that broker-dealers are required under Regulation Best Interest to disclose whether they are acting in their capacity as a broker or investment adviser, the SEC declared that it would be an inaccurate disclosure of the broker's capacity to use an "advisor" title that is not actually descriptive of the services being rendered, even without taking more explicit efforts to limit use of the title itself.

Discussion

As organizations that support clear disclosure of the capacity in which a financial intermediary is acting, in particular when the individual's regulatory capacity as a salesperson is masked by the use a fiduciary-oriented job title like "advisor," FPA and XYPN have longstanding concerns based on 1) diminution of the Commission's mission to protect investors after

[12] Hauptman, Michah, and Roper, Barbara, "Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways," Consumer Federation of America, Jan. 18, 2017. Available at https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf.

[13] §240.15l-2 Use of the Term "Adviser" or "Advisor," Form CRS Relationship Summary, Release No. 34-83063; IA-4888; File No. S7-08-18 (Apr. 18, 2018).

[14] *See* "Regulation Best Interest: the Broker-Dealer Standard of Conduct, Release No. 34-86031; File No. S7-07-18 (June 5, 2019).

[15] *See* Form CRS Relationship Summary discussion at 171-179 and 347-350.

[16] *Supra* Note 13, at 149.

decades of ignoring the misleading use of advisor-like titles by brokerage firms, including marketing services to consumers in ways implicating a fiduciary relationship; and 2) eroding a level-playing field for actual fiduciary advisors (who must compete against broker agents while held to a higher standard of conduct). As such, XYPN and FPA are strongly supportive of the Project Group's addition to the above Model Rule that would clearly prohibit the misleading use of certain advisor titles by salespersons.

The proposed text in Part 1.e. of the Model Rule amendments reads as follows:

> *e. Using a title, purported credential, or professional designation containing any variant of the terms "adviser" or "advisor" without licensure as either an investment adviser or an investment adviser representative, unless otherwise permitted by law.*[17]

As noted, the Disclosure Obligation in Reg BI does not directly reference a prohibition on the use of certain titles, and therefore the prohibition must be interpreted under Section (a)(2)(i) of Reg BI, which outlines the general conditions for satisfying the Disclosure Obligation, with additional information on the capacity issue to be found in SEC staff's FAQs.[18]

We believe that having the restrictions clearly spelled out in the final regulation as NASAA proposes in its Model Rule is a more effective solution by clarifying when and whether consumers are engaging with an advice-giver or a brokerage salesperson. As such, we are not surprised that NASAA has found disclosures lacking in this critical area, while the SEC's and FINRA's efforts to police the use of prohibited titles has come up empty.

SEC and FINRA Fail to Detect Title Violations

Consistent with our concerns that a more explicit restriction on titles is a more effective consumer protection, FPA and XYPN observe that since Reg BI and Form CRS went into effect in June 2020, no references to title restrictions can be found among the SEC's Division of Examination's subsequent 32 risk alerts and other published observations of compliance problems in the securities industry. A January 30, 2023, risk alert by the Division does reference failures by some brokerage firms in establishing policies and procedures requiring disclosure of the capacity in which their brokers are providing services to retail customers, but it does not reference problems with prohibited use of the two restricted titles 'adviser' or 'advisor.'[19] Nor can any reference to misleading use of these titles be found on a special summary of Reg

[17] *Supra* Note 3, Part 1.e.

[18] SEC staff has posted FAQs on use of titles by the brokerage industry since Reg BI was adopted, but these are included among 36 questions and answers in a single release. We believe these are not as effective as placing the restriction in the text of Reg BI. Moreover, under the SEC's FAQs for compliance under the Form CRS disclosure requirements, SEC staff does not mention title restrictions but cautions IAs not to modify the boilerplate language in Form CRS, and where its use "would be extraneous or unresponsive" to a particular disclosure requirement. *See* "Frequently Asked Questions on Regulation Best Interest," (questions posted between 2/11/20 and 4/20/20); and "Frequently Asked Questions on Form CRS," (posted 3/30/22), at SEC.gov.

[19] SEC Division of Examinations, "Observations from Broker-Dealer Examinations Related to Regulation Best Interest," Jan. 30, 2023. Available at https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.

BI/Form CRS enforcement activity on FINRA's website, which includes a combined 73 settlements for violations of either rule over the past four years.[20]

In contrast, NASAA members have undertaken a vigorous review of Reg BI compliance by more than 500 brokerage firms since 2020. In Phase II(A) of NASAA's examination initiative, the use of adviser/advisor titles by brokerage firms were examined as one of 10 priorities and compared to a 2018 sweep. In 2018, state securities examiners found that 29% of brokerage firms allowed their agents to use advisor-type titles while acting in a broker-dealer capacity and 46% of those firms had no prohibitions on using advisor titles, such as first requiring IAR registration of their brokers. In 2021, after Reg BI's compliance deadline, NASAA determined that the broker-dealers allowing use of those titles dropped to 7%. Stated another way, NASAA's 2018 sweep found that 83% of brokerage firms banned the use of those titles (or required dual licensure), and in 2021 that number increased to 93%.[21] Which shows progress, yet also highlights how title infractions remain among 7% of those not permitted to use them in such a manner, despite Regulation Best Interest's approach of overseeing titles through the Disclosure Capacity requirements alone.

The regulatory gap between FINRA and the SEC not reporting any enforcement issues, and NASAA's findings that inappropriate use of titles still remains, is important given numerous independent academic studies and focus groups under the supervision of the SEC continuing to find that the use of not only 'advisor' titles (and other similar titles such as 'wealth manager', 'financial consultant', and 'financial planner' which the SEC itself previously restricted), can still result in investor confusion and misplaced trust in a salesperson, including those dually registered as fiduciary advisors but failing to act in that capacity.

Studies Confirm Use of Advisor-Like Titles Mislead Consumers

Consumer research suggests that when salespeople use advisor-like titles, they typically create an expectation of a special – not arms-length – relationship of trust and confidence.

For example, research by Dr. Derek Tharp, entitled "Consumer perceptions of financial advisory titles in the United States and implications for title regulation" in the *International Journal of Consumer Studies,*[22] found that when consumers are asked about their expectations on various dimensions of Loyalty (a measurement of their trust in the advice relationship) and Competence (a measurement of how much confidence they believe they can have in the advice relationship), there is a material difference between advice-like titles and sales-like titles.

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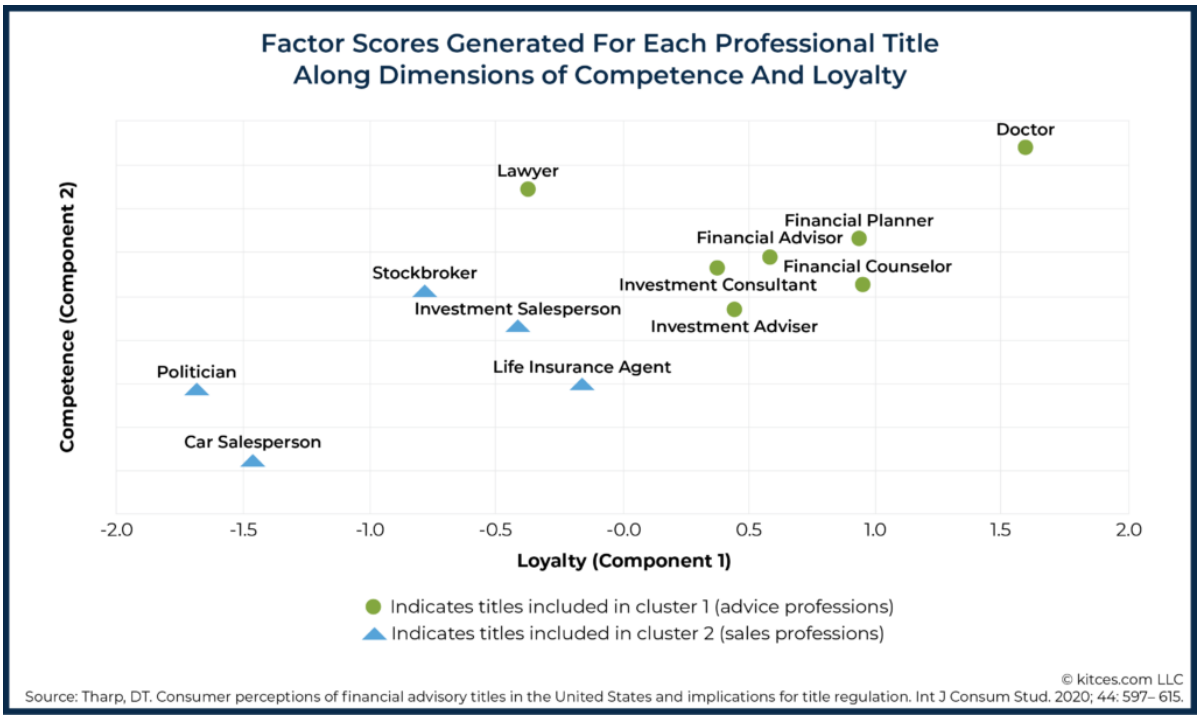
[20] "Reg BI and Form CRS Enforcement Actions," FINRA website at https://www.finra.org/rules-guidance/key-topics/regulation-best-interest#enforcement.

[21] "Report and Findings of NASAA's Regulation Best Interest Implementation Committee," November 2021. Available at https://www.nasaa.org/wp-content/uploads/2021/11/NASAA-Reg-BI-Phase-II-A-Report-November-2021_FINAL.pdf.

[22] Tharp, Derek, Ph.D., CFP®, CLU, RICP, "Consumer perceptions of financial advisory titles in the United States and implications for title regulation," June 8, 2020. (Available at https://onlinelibrary.wiley.com/doi/abs/10.1111/ijcs.12597, as of Dec. 14, 2024.)

The results showed that consumers place greater confidence in titles like financial advisor, financial planner, and investment adviser, than they do in titles like stockbroker, investment salesperson, and life insurance agent. Similarly, on the basis of titles alone, consumers accurately predicted who to trust, whether the professional's loyalty rested primarily with themselves and their company (a negative score on the Loyalty scale below in Exhibit A), or whether the professional's loyalty was tilted in the consumer's best interests (a positive score on the same scale).

Exhibit A



Which means, simply put, that consumers do in fact rely on the titles that both advisors and salespeople use when holding themselves out to the public, to infer who will be acting in a fiduciary capacity as an advice-provider versus a more caveat-emptor salesperson's standard.

Accordingly, our only concern as it relates to NASAA's proposed title restrictions is that it doesn't alleviate potential confusion for consumers whose financial intermediary is a dually registered broker-dealer and investment adviser who may simultaneously engage in a relationship of trust and confidence with the client as an investment adviser while also selling products to their customer as a broker. Because as the aforementioned consumer research shows, once a professional markets themselves as a financial advisor, it creates an expectation of a fiduciary relationship of trust and confidence (which the SEC itself has previously recognized to be broad and applying "to the *entire* adviser-client relationship), such that subsequent delivery of services in a brokerage capacity would *ipso facto* mean the prior advisor marketing was misleading with respect to subsequent brokerage account transactions.

To that end, we suggest that not only should NASAA limit the use of the advisor title to those who are registered as an investment adviser, but that it would similarly be deemed a misleading marketing practice by a dual registrant using an advisor/adviser title when subsequently providing non-investment-adviser (i.e., brokerage) services to the same client.

SEC Interpretive Guidance in the Reg BI Package Reinforces the Antifraud Provisions of the Advisers Act, Not Preemption Under NSMIA.

In addition, the objections of industry opponents in connection with NASAA's proposed title restrictions are misplaced, in which they assert that the earlier NASAA proposal was in "large part" federally preempted under 15 U.S.C. § 780(i)(1) based on a violation of a provision prohibiting state regulation of the SEC's books and records requirements. One commenter also suggested that the proposed language, "[u]sing a title…containing any variant of the terms 'adviser' or 'advisor' without licensure" as an IA or IAR by a broker-dealer agent would be in conflict with Reg BI.[23] Except that Reg BI's title restrictions have nothing to do with federal preemption of books and records requirements by state securities administrators, but rather comports with another provision in the National Securities Markets Improvement Act of 1996 ("NSMIA") that preserves a state securities commission's jurisdiction "to investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions."[24]

As such, we do not believe NASAA members would be prohibited from exercising state authority permitted under NSMIA for taking enforcement action against brokers using advisors titles that, as noted above, creates misleading expectations regarding the nature of the relationship with the client. Instead, we believe the use of misleading titles that imply a fiduciary relationship of trust and confidence constitutes a form of misleading marketing that fits appropriately under NSMIA's fraud or deceit section by providing state securities administrators with authority to take enforcement action, in particular since the SEC interprets the fiduciary capacity of an investment adviser to be broad and to apply "to the *entire* adviser-client relationship."[25] [Emphasis added.] The SEC went on to elaborate on the reasons Congress enacted the Advisers Act, which was in part to eliminate abuses "made enforceable by the [Act's] antifraud provisions…"[26]

[23] Carroll, Kevin, Securities Industry and Financial Markets Association ("SIFMA"), comment letter on Proposed Revisions to NASAA's Dishonest Or Unethical Business Practices of Broker-Dealers Model Rule," December 1, 2023, at 14-15.

[24] P.L. 104-290, Title I, Sec. 18(c)(1).

[25] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248, at 6, June 5, 2019. The interpretative guidance was approved by the Commission as part of the Reg BI package.

[26] *Id.* at 7. *See* also Footnote 17, at 6, e.g., "[O]nce an investment advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transactions connected to the advisory relationship."

Conclusion

In summary, the fundamental problem with permissive use of job titles associated with fiduciary accountability is that when salespeople are permitted to market themselves as such, they create an expectation by consumers of an advice relationship of trust and confidence.[27]

Accordingly, XYPN and FPA strongly support NASAA's efforts to clear up some of the confusion surrounding the use of fiduciary-like titles by registered representatives (both when operating as standalone brokers, and when operating as dual-registrants who market an advice relationship and then subsequently engage in a brokerage sales capacity) by promulgating a provision clearly prohibiting the misleading use of certain advisor titles in its Model Rule, *Dishonest or Unethical Business Practices of Broker-Dealers and Agents*.

Sincerely,

/S/

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[27] The literature covering title confusion is numerous. Among the more commonly cited studies are: 1) Hung, A., et al, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, RAND Institute for Civil Justice,* Jan. 3, 2008; 2) Kitces, M., "SEC Advice Rule Proposals: Regulation Best Interest, Disclosure Form CRS, & Title Reform," *Nerd's Eye View,* April 23, 2018; 3) Scholl B., and Hung, A., "The Retail Market for Investment Advice," SEC office of the Investor Advocate; and 4) Siegel & Gale, LLC, and Gelb Consulting Group, Inc., "Results of Investor Focus Group Interviews about Proposed Brokerage Account Disclosures," Mar. 10, 2005, available at https://www.sec.gov/files/rules/proposed/s72599/focusgrp031005.pdf (as of Nov. 11, 2024).