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Andrea Seidt, Andrea.Seidt@com.state.oh.us

(Investment Adviser Section Chair)

Elizabeth Smith, Elizabeth.Smith@dfi.wa.gov

(Investment Adviser Regulatory Policy and Review Project Group Chair)

Valerie Mirko, nasaacomment@nasaa.org

(NASAA General Counsel)

Re: Request for Public Comment Regarding a Proposed Model Rule Amendment to the Unethical Business Practices of Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers Model Rule to Include Investment Adviser Account Access Under the Uniform Securities Acts of 1956 and 2002

Dear Ms. Seidt, Ms. Smith and Ms. Mirko:

CFA Institute¹ is pleased to comment on NASAA's proposed amendments to its model rule on Unethical Business Practices of Investment Advisers and Investment Adviser Representatives and Federal Covered Advisers (Model Rule). CFA Institute represents the views of those investment professionals who are its members before standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues that affect the efficiency, integrity and accountability of global financial markets.

Executive Summary

Investment advisers need all relevant account information in order to inform their advice to clients. However, we understand the issues relating to advisers using clients' unique identifying information (e.g., usernames and passwords) to access those client accounts online. We suggest that instead of officially labelling this an "unethical business practice," NASAA advise against this practice and provide guidance on alternative approaches.

Discussion

We appreciate the consultation's recognition that "many investment advisers need access to a host of different client retirement accounts, brokerage accounts, and other online accounts to inform their advice" to clients. Advisers and investment adviser representatives need to review

¹ CFA Institute is a global, not-for-profit professional association of more than 151,900 investment analysts, advisers, portfolio managers, and other investment professionals in 145 countries, of more than 145,600 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 148 member societies in 73 countries and territories.

relevant account information in order to provide their clients with information they need to make meaningful investment decisions. We also support relevant investor protections and recognize the potential problems with advisers having direct access to online client accounts through usage of clients' specific usernames and passwords (whether requested of, or volunteered by, the clients). In an age where businesses and investors alike suffer from unscrupulous infiltration of, and use of online information, taking all measures to ensure protection of online accounts is paramount.

We understand that NASAA's concerns fall within two primary areas. First, by supplying an adviser with "unique identifying information," clients may breach the user agreement they signed with their online institutions and thus forfeit the fraud protection those institutions provide if the accounts were to be "hacked into" or the assets misappropriated. Second, providing advisers with access to accounts raises questions of who has actual custody of those assets, and therefore may trigger related reporting obligations.

"Unethical Business Practice" List

As a threshold issue, we question whether the practice of accessing client accounts for the sole purpose of gleaning information to better serve a client in terms of providing investment advice should be termed a breach of fiduciary duty to that client. Similarly, we question whether the practice should officially be deemed "an unethical business practice," especially when use of access information was volunteered by the client.

The list of unethical business practices ("EBPs") within NASAA's Model Rule 102(a)(4)-1 includes things like: excessive trading in a client account; placing orders without client consent; charging unreasonable advisory fees; engaging in fraudulent, deceptive or manipulative practice; and engaging in unlawful conduct, among other things. We question whether the practice in question rises to the same level of egregious behavior attributable to practices in this list. Rather than a deceptive or fraudulent practice (or rising to that level of wrongdoing), an adviser may simply be using the information voluntarily supplied by the client to gather information to best serve that client's needs.

Therefore, instead of officially labelling it as "unethical," we suggest that NASAA consider calling this practice "inadvisable," "not recommended," or "prohibited" and point out the ethical implications of continuing the practice. NASAA could also support a uniform requirement that adviser compliance manuals prohibit use of unique identifying information without express disclosure and consent (as discussed below). This would avoid the harsh stigma that would come with association with other EBPs.

We urge NASAA to provide education and guidance to advisers that explore better methods for accessing and viewing the relevant information. We believe investment advisers generally have the technology to allow the creation of a separate name and password for "observer only" access. However, additional guidance is particularly important in cases where advisers may not have this capability to otherwise view the needed information in relevant accounts.

Defining "Access"

We also think it is important for NASAA to clearly define what is meant by "access." While we understand the example provided by NASAA where an adviser essentially "stands in the shoes"

of a client in terms of having the ability to initiate changes in the accounts (the proposal refers to this as “impersonating” the client), it is less clear how other practices would be viewed.

For example, we understand some advisers may rely on software that uses unique identifying information provided by the client to allow direct viewing of online accounts. While the adviser may know the user name, the password(s) are never revealed to the adviser. Instead, the software stores the password(s) and operates independently to access the client accounts. Moreover, while all information is readily viewable, the investment adviser would not be able to initiate actions in those accounts. In such a case, would an adviser still be deemed to have “access”? Given the range of operating programs available to, and used by, investment advisers, we encourage NASAA to provide explicit guidance on the factors it will weigh in finding “access” and to suggest alternatives.

In particular, we encourage consideration of any exceptions where clients can willingly waive their fraud protections during very limited time periods or emergency situations for the purpose of providing unique identifying account information to their advisers. In such situations where there are no apparent alternatives and clients determine the benefits outweigh the risks, clients could enter into contractual agreements with their advisers to provide express time- or occasion-specific permission. We suggest NASAA consider crafting a straightforward disclosure and consent form that clients could use in such exigent circumstances. State regulators could also be encouraged to work with financial institutions to enable access without negating their guarantees.

Conclusion

While we support NASAA’s efforts to address the practice of accessing client online accounts through protected identifying information, we urge a clear delineation of when access occurs and guidance on acceptable means for advisers to gain account information needed in the process of providing clients with their best advice. Should you have any questions about our position, please do not hesitate to contact Kurt N. Schacht, CFA at kurt.schacht@cfainstitute.org, 212.756.7728 or Linda Rittenhouse at linda.rittenhouse@cfainstitute.org, 434.951.5333.

Sincerely,

/s/ Kurt N. Schacht

Kurt N. Schacht, CFA
Managing Director, Advocacy
CFA Institute

/s/ Linda L. Rittenhouse

Linda L. Rittenhouse
Director, Capital Markets Policy
CFA Institute