FINANCIAL PLANNING ASSOCIATION
The Heart of Financial Planning™

Suite 201
1600 K Street
Washington, D.C. 20006
Voice: 202.449.6340
800.322.4237
Fax: 202.449.6350

E-mail: fpa@fpanet.org
Web site: www.fpanet.org

August 17, 2009

The Honorable Mary L. Schapiro
Chairman
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Dear Chairman Schapiro:

I am writing on behalf of the Financial Planning Association® ("FPA")[1] seeking clarification on the limits of authority of the Financial Industry Regulatory Authority ("FINRA") with respect to certain financial planning activities. Our concern is prompted by a recent FINRA news release[2] announcing an enforcement action against a broker-dealer and registered representative involving the marketing, development and implementation of misleading financial plans. While we commend FINRA for acting to curb fraudulent activity, the SEC has long held financial planning services involving investment advice to be subject to the Investment Advisers Act of 1940 ("IAA").[3] FINRA, in turn, has long denied any authority to oversee advisory activities under the IAA.[4]

As the largest advocacy organization in the United States representing financial planners, FPA is a strong supporter of a fiduciary standard for financial planning services, separate and apart from services offered by other financial intermediaries. In addition, FPA has long expressed concern with FINRA expanding its regulatory jurisdiction to include investment

---

[1] The Financial Planning Association is the largest organization in the United States representing financial planners and affiliated firms, with approximately 25,000 individual members. FPA members directly manage more than $1.75 trillion in assets with a combined client base of 3 million. Approximately 48 percent of FPA members are affiliated with SEC-registered investment adviser firms and 24 percent with firms registered on the state level. Half of its individual members are also affiliated with broker-dealers. FPA is incorporated in Washington, D.C., where it maintains an advocacy office, with headquarters in Denver, Colo.

[2] *See* FINRA release, "Ameritas Fined $100,000 for Use of Misleading College Funding Plans to Sell Variable Life Products," http://www.finra.org/Newsroom/NewsReleases/2009/P119744.

[3] *See* "Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services," Investment Advisers Act Release No. 1092 (Oct. 8, 1987) [52 FR 38400 (Oct. 16, 1987)]; and Rule 202(a)(11)-1 of the IAA (later vacated by a court for unrelated reasons).

[4] *See*, e.g. "FINRA is not authorized to enforce compliance with the Investment Advisers Act. Authority to enforce that Act is granted solely to the SEC and to the states." Testimony of Stephen I. Luparello, Interim CEO, Financial Industry Regulatory Authority, before the Senate Committee on Banking, Housing and Urban Affairs, Jan. 27, 2008, at 2.

advisers and financial planners.[5] As such, FPA respectfully asks the Commission for guidance on two critical issues involving financial planning activity as a result of FINRA's recent enforcement action:

1. On what basis of statutory authority, and to what extent, does the SEC permit FINRA to take enforcement action for misleading or fraudulent financial planning activities of brokerage firms separate from the IAA; and
2. Where financial planning activity is clearly under the jurisdiction of the IAA, does the SEC have a policy in place for FINRA to refer cases?

Background

The financial planning process typically involves defining the scope of services provided; collecting data and working with the client to develop goals; analyzing, developing and presenting recommendations; if the client so desires, implementing some or all of the recommendations and monitoring the plan. Financial planning itself is unregulated under federal or state law, although the most common way state or federal regulators oversee financial planners is through their investment advisory activities.[6] As such, most financial planners are subject to registration as investment advisers by the SEC or the states.

The most common area of the financial planning process that is regulated under other financial services laws involves implementation of the financial plan, such as managing assets or selling investment or insurance products to help clients meet their long-term goals. Although many current laws do not require a fiduciary standard of care in the implementation of a plan's recommendations, including FINRA rules, FPA strongly supports application of a fiduciary standard to all phases of the financial planning process.[7]

As noted previously, financial planners have long been subject to registration as investment advisers with the SEC or the states because of the investment advice component of a plan. During the intervening years, many broker-dealers have begun providing financial planning services as well, leading many to dually register as investment advisers ("dual registrants"). As dual registrants, broker-dealers typically develop the financial plan under the affiliated investment adviser, while implementing certain financial planning recommendations, such as the purchase or sale of investment and insurance products, under other financial services laws.

As a result of this broker-dealer adaptation to an advisory model, application of FINRA and SEC rules to financial planning services has become increasingly difficult in recent years,

---

[5] One of FPA's predecessor organizations, the Institute of Certified Financial Planners, commented extensively in opposition to proposed application of NASD rules to outside business activities of registered representatives in Notice to Members 91-32, 94-44, and 96-33 and other related commentary to the SEC. These comment letters are available upon request.

[6] Comprehensive financial planning includes advice on many non-investment advisory issues, such as estate planning, cash-flow analysis and budgeting, selecting a college, evaluating insurance policy coverage for disability, home and property, liability, long-term care insurance, tax and charitable planning, etc.

[7] FPA's ethic rules require members to act as fiduciaries with respect to financial planning services. *See* Article IV, Sec. 4.1, "Ethics, Discipline, Referrals." http://www.fpanet.org/docs/assets/BylawsapprovedJune2008.pdf

evidenced by the Commission's inconclusive efforts to define the differences by rule or interpretation.[8] Nonetheless, SEC policy since the early 1980s has consistently maintained that financial planners are subject to investment adviser registration and a fiduciary standard of care. In the adopting release for Rule 202, the Commission went even further in identifying financial planning as a profession, separate and distinct even from investment management.[9]

Over the years, FINRA has complicated the debate by asserting broad jurisdiction over outside business activities of broker-dealers and their registered representatives.[10] The extent to which the financial planning activities of a registered representative must be supervised by a broker-dealer has never been resolved, particularly with respect to implementation of the plan. FPA's position over the years has been opposed to such outside supervision, and more recently supportive of a fiduciary standard applicable to the entire financial planning process.

While we respectfully request interpretative guidance from the Commission on this issue, at an absolute minimum we believe the SEC should rigorously enforce current industry best practices that apply to development of a financial plan, i.e., that data collection, analysis and developing and presenting the securities recommendations under a financial plan should take place under the IAA. Then, we believe the SEC should carefully assess whether implementation, i.e., certain transactions made as part of a financial plan's recommendations, should remain under the IAA or fall to the jurisdiction of other regulators. It is our fundamental belief that, due to the robust disclosure and fiduciary requirements of the IAA, consumers would be afforded greater protection under the IAA.

Given the numerous public statements of support by the Commission for a fiduciary standard applicable to common services of brokers and advisers, we believe the topic is ripe for review and clarification separate and apart from any future actions taken by Congress.

Discussion

The previously mentioned enforcement settlement by FINRA found advertising violations and failure of a broker-dealer to supervise the sale of unsuitable investments by an affiliated broker in connection with her financial planning recommendations. Also, while not mentioned in the news release, the broker agent was not registered as an investment adviser representative in providing financial planning services.

According to the Aug. 6, 2009, FINRA release, Ameritas Investment Corporation was fined $100,000 for these infractions and its broker was fined $60,000 and her license suspended for nine months. FINRA determined that the broker used misleading financial plans

---

[8] *See* Rule 202(a)(11)-1 (withdrawn), "Certain Broker-Dealers Deemed Not to Be Investment Advisers," SEC Rel. Nos. 34-51532; IA-2376, April 12, 2005; Letter of Dec. 16, 2005, (withdrawn) from Robert E. Plaze, Associate Director, Investment Management Division, to Securities Industry Association; and Release No. IA-2652, "Interpretive Rule Under the Advisers Act Affecting Broker-Dealers," (never adopted).

[9] *See* adopting release to Rule 202, at 54.

[10] *See* previous cited NASD notice to members 91-32, 94-44, 96-33, culminating in FINRA Rule 3040, "Private Securities Transactions of an Associated Person;" and Dec. 8, 1997, NASD memorandum to SEC, "Evolving Distribution Channels and their Regulatory Impact." An unintended consequence of FINRA's oversight of outside activities has been, according to numerous FPA members, broker-dealers charging fees to oversee the outside financial planning activities of their registered representatives over which the firms legally have no authority.

with more than 220 customers, resulting in unsuitable retirement and college planning recommendations that led to the purchase of variable universal life insurance policies from an affiliated Ameritas company. According to FINRA, the financial plans prepared by the broker "were extremely complicated and confusing and, to be successful, required customers to adhere strictly to all aspects of a detailed plan for 20 years."[11]

In order to fund the purchase of these products, the broker recommended customers refinance their homes or take out home equity loans. Ninety of her customers who received the financial plans purchased one or more VULs.[12] In two examples cited in the release, one customer was already heavily in debt and the other was financially able to pay for college without purchasing a VUL. According to the news release, Ameritas rescinded policies purchased by six of the customers prior to FINRA's action. While not stated specifically in the release, it appears that all 90 customers were sold unsuitable VULs. It does not mention whether any customers beyond the original six were refunded premiums and their policies canceled. In settling this matter, Ameritas and its broker neither admitted or denied the charges, consenting to the entry of FINRA's findings.

In addition to the settlement, a FINRA spokesperson stated that the self-regulatory organization "will aggressively pursue firms and individuals who use misleading financial plans to induce customers to purchase securities, particularly when those plans propose that customers refinance their homes or take out home equity loans to pay for the purchase of securities."[13]

Analysis

As a registered investment adviser, Ameritas is required to file Part 1 of Form ADV, a disclosure and data collection document, with the Commission. Ameritas' Form ADV indicated that it provides financial planning services, although the individual broker providing such services was not similarly registered with the state of New Jersey, where she had a place of business.[14] The FINRA news release did not mention any exemptions that would have precluded licensing of the broker as an investment adviser representative, nor did it mention any referral to state authorities or the SEC. Recommending securities in the context of a financial plan is suggestive of advice that is not solely incidental to the sale of securities, but rather falls squarely into the jurisdiction of the SEC under the Investment Advisers Act. Indeed, this was the position taken by the Commission in adopting Rule 202.[15]

---

[11] Aug. 6, 2009, FINRA news release.

[12] *Id.*

[13] *Id.*

[14] Aug. 14, 2009, FPA staff conversation with New Jersey Department of Law & Public Safety, Bureau of Securities.

[15] *See* Rule 202(a)(11)-1(b)(2). As noted previously, the overall rule, including this provision, was vacated by the Court of Appeals for the District of Columbia in *Financial Planning Association v. SEC,* 482 F.3d 481 (D.C. Cir. 2007). This particular provision restricted brokers from providing investment advice if provided as part of a financial plan or in connection with providing financial planning services; if the broker held itself out to the public as a financial planner or as providing such services; if it delivered a financial plan to a customer; or if it represented to the customer that the advice was part of a financial plan.

Further, it is unclear what analysis was used by FINRA in taking enforcement action for violation of its rules. If the development and recommendations for using home loan proceeds to purchase the securities came from the plan, then we believe these activities would fall under the IAA, including the broker's investment advice. Therefore, instead of simply being an unsuitable transaction under FINRA rules, a corresponding analysis under SEC authority may have contemplated a breach of the broker-adviser's fiduciary duty, making such claims more difficult to defend and perhaps covering a broader number of customers who purchased VULs. As an investment adviser representative, the broker would have been required to disclose in advance the inherent conflicts in offering products of an affiliated company, possibly even averting some of the questionable transactions.

Finally, in light of FINRA's recent announcement expressing conceptual support for a fiduciary duty to be applied to brokers providing investment advice,[16] and its call for greater coordination of cases with the SEC,[17] we are disappointed to see an absence of energetic follow up with respect to an enforcement action that involves both issues: 1) not referring an unregistered advisory activity to the New Jersey Bureau of Securities or SEC (unless this occurred and wasn't mentioned in the news release); and 2) not referring a potential breach of fiduciary duty for financial planning activity to the SEC.

Conclusion

Because of these questions, we seek clarification from the Commission on the extent to which FINRA can take enforcement action in connection with the financial planning recommendations of a broker-dealer representative separate from its authority to supervise transactions under FINRA rules. Secondly, we ask whether the SEC received a referral from FINRA for any financial planning violations of the dual registrant, and if not, whether it believes such a referral would have been appropriate. And finally, given the SEC's and FINRA's recent statements of support for a fiduciary standard for certain activities in which brokers and advisers offer similar services, we ask whether the SEC should assert a fiduciary standard under similar cases involving dual registrants to enhance investor protection.

Recent congressional questions regarding regulatory gaps in the Madoff case makes an examination of SRO jurisdiction even more pressing. During the Madoff hearings earlier this year, FINRA testified that Madoff's Ponzi scheme was implemented through an unregistered investment advisory business over which it had no authority.[18] Now, as FINRA publicly and repeatedly expresses strong interest in regulating investment advisers – and by implication – financial planners affiliated with such firms,[19] it apparently sees no ambiguity in exerting its

---

[16] *See, e.g.* "We agree with the Obama administration that a fiduciary standard should be established for broker-dealers when they are offering investment advice." Richard G. Ketchum, FINRA chairman and CEO, June 17, 2009, at the Exchequer Club, Washington, D.C. http://www.finra.org/Newsroom/Speeches/Ketchum/P119009

[17] *See*, e.g. "Since the SEC has broad jurisdiction to examine both the broker-dealer and investment adviser lines of business, we would propose a more formalized information sharing process between the SEC and FINRA to identify potential problems with dually registered firms." Luparello testimony, Jan. 27, 2009, at 5.

[18] Luparello testimony, at 5.

[19] *See, e.g.,* "[F]rom my perspective, FINRA is uniquely positioned to build an oversight program that ensures investment advisers are properly examined and their customers are adequately protected." Ketchum remarks, June 17, 2009.

authority over an advisory activity. We do not believe FINRA can have it both ways, claiming on the one hand that it had no authority over a highly publicized regulatory failure, Madoff, and on the other, clear and unambiguous oversight over the development and marketing of financial plans by an Ameritas broker.

In summary, absent any other facts that are publicly unavailable, we are troubled by FINRA enforcement under a lower standard of care instead of a referral to the SEC to apply a fiduciary standard to the case. This lack of cooperation raises doubts about FINRA's public commitment to a fiduciary standard, and its qualifications to oversee the advisory community.

Over the longer-term, FPA would prefer to see financial planning functionally regulated as a profession, and thereby avoid the current uncertainty related to enforcement matters.[20] While it is uncertain whether Congress will be able to accomplish comprehensive reform this year given the crowded legislative calendar, during the interim we strongly support the Commission doing what it can to enhance investor protection.

I am happy to respond to any questions or comments that you may have. These may be directed to Duane Thompson, managing director of FPA's Washington office, at 202.449.6341.

Thank you very much for considering this request.

Sincerely,

Richard Salmen, CFP®, CFA, EA
President

cc: Commissioner Kathleen A. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Richard G. Ketchum, FINRA Chairman and CEO

[20] *See* Apr. 27, 2009, letter of the Financial Planning Coalition, at http://www.fpanet.org/docs/assets/JointCoalitionUpdatetoStakeholders42709.pdf.