

October 30, 2006

VIA FEDEX

Honorable William Francis Galvin
Secretary of the Commonwealth
Attention: Proposed Regulations
Securities Division, Room 1701
One Ashburton Place
Boston, MA 02108

2006 OCT 31 AM 11:57
SECURITIES DIVISION
COMMONWEALTH OF MASSACHUSETTS

Re: *Comments on Proposed Regulations 950 CMR 12.204(2)(i) and 12.205(9)(c)(15) of the Massachusetts Securities Division (the "Proposed Regulations")*

Dear Secretary Galvin:

This letter provides comments on the Proposed Regulations which would be included as 950 CMR 12.204(2)(i) and 12.205(9)(c)(15), which list fraudulent and abusive practices in the securities industry that are bases for disciplinary action. Our firm is legal counsel to Society of Certified Senior Advisors, Inc. ("SCSA"), Denver, Colorado, which is the owner of the designations Certified Senior Advisor (CSA)® and CSA, and we appreciate the opportunity to participate in this process.

I. Background and Interest of SCSA in the Proposed Rulemaking

SCSA is an education company that provides instruction to professionals working in various disciplines about important aspects of aging, and how to work more effectively, beneficially and ethically with seniors. SCSA's curriculum was developed by gerontologists, doctors, attorneys, planners and others who specialize in aging; it covers twenty-three different subject areas comprising the health, financial, and social issues that most influence seniors' lives today.

More than 25,000 professionals from home health care, insurance, mortgage, law, accounting, securities brokerage, and other fields have enrolled in SCSA's course. Some 47 states, including Massachusetts, give life and health continuing education credit for SCSA's course. The National Association of State Boards of Accountancy recognizes and approves the course for continuing education credit, as does the Certified Financial Planner Certification Board and the National

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Continuing Education Review Service of the National Association of Boards of Examiners for Long-Term Care Administrators. The course has also been recognized and approved by PACE - Professional Achievement in Continuing Education.

The CSA designation is not, and does not purport to be, a financial designation; it is a designation representing that the holder has undergone training and examination regarding a variety of issues relating to aging. However, a significant number of CSAs are in financial services fields. SCSA's interest in this proceeding is limited to ensuring that its certification holders, and potential certification holders, may disclose their certification to a broad audience. SCSA has no affiliation, through common ownership or otherwise, with any persons or entities who sell or market products or services.

The public notice requesting comments on the Proposed Regulations reflects that the concern underlying the rule is that while some designations may represent a meaningful achievement, other designations may be marketing devices which falsely convey a certain expertise. However, the notice also reflects that the concern is based upon the adequacy of disclosure of information about a designation, when it states "..., investors often have insufficient information when trying to decide which designations represent a meaningful achievement... or... are simply empty marketing devices."

Implicit in the Division's proposal is a recognition that specialized training, including but not limited to specialized training in issues relating to senior citizens, will be beneficial to the investing public. Further, the ability to communicate through the use of a designation that specialized training exists will augment the ability of an investor to make a more informed decision regarding those with whom to do business.

The Division's promulgation of the Proposed Regulations in their current form, however, would result in an improper restriction on the free flow of information to which consumers are entitled. For that reason, the Proposed Regulation should not be adopted.

Flatly prohibiting the use of designations not issued by an accredited organization is an inappropriate response to the concern identified as the reason for the Proposed Regulations: a lack of information enabling consumers to make informed judgments about persons with whom they may seek to do business. Keeping potentially important information out of the marketplace is inconsistent with that concern. Further, an approach to regulation that limits information does not conform with the fundamental purpose of the Massachusetts Securities Act, which is to encourage full disclosure. Marram v. Kobrick Offshore Fund, Ltd., 809 N.E.2d 1017, 1025-1026 (Mass. 2004). Perhaps most importantly, the Proposed Regulations run afoul of the protections guaranteed by the First Amendment to the Constitution of the United States.

SCSA believes that while the goals of the proposed rulemaking are both appropriate and commendable, the means proposed to reach those goals are not. Rather than prohibiting the use of a designation unless the issuing organization has itself been accredited, SCSA believes that the establishment of "safe harbors" from existing statutory requirements best responds to the interests of all concerned.

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II. The Proposed Regulations Will Deprive Consumers of Information to Which They Are Entitled

The communication of credentials on a business card, or in a telephone book listing, or by displaying a certificate in an office, is a classic form of commercial speech that cannot be prohibited unless misleading. Potts v. Hamilton, 334 F.Supp.2d 1206, 1212 (E.D.Cal. 2004). In Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990), the Supreme Court noted that a certification was a fact, and not an unverifiable opinion of quality. While the Court noted that a certification which had been issued indiscriminately for a price, or where no inquiry into fitness had been made "could" be misleading, it rejected the general notion that a certification gave a greater suggestion of quality beyond that which can be inferred from an evaluation of its requirements. The Court also noted that commercial speech serves the interest both of the speaker and the consumers to which the speech is directed, stating "...disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information."

Where the government seeks to regulate commercial speech without prohibiting the speech in its entirety, the regulation must advance the governmental interest asserted, and be no more restrictive than necessary.

The Division's stated rationale for its interest in regulating the use of professional designations illustrates that the proposed rule does not advance that interest. The Division's stated interest is to ensure that investors have sufficient information to determine whether a designation represents a "meaningful achievement" as opposed to being "empty marketing devices." The Division also expressed its concern that designations were being misused to hide the fact that designees were also selling a product. However, the Proposed Regulations advance neither of those interests. A designee can misuse a designation regardless of the rigor of the requirements necessary to obtain the designation. Further, the proposed rule would not add to the information available to consumers; it would detract from it.

The Division's contemplated ban on any credential except those issued by an organization which itself has been accredited by a nationally recognized independent accrediting organization is much more restrictive than necessary to advance any legitimate governmental interest. An organization which has not received the accreditation contemplated by the proposed rule might nevertheless issue a designation that reflects a meaningful achievement. Further, the accreditation process contemplated by the regulation might involve substantial expense, or take a significant amount of time to complete, resulting in a total bar of the use of a credential that in every other way is equal to or even superior to the use of a credential which would not be barred.

We believe that the Division can achieve its regulatory goal under existing law, and within the confines of the First Amendment, through the establishment of "safe harbors," compliance with which would preclude a finding that the communication of a credential in and of itself was a fraudulent or abusive practice. In other words, acting within the requirements of a safe harbor would preclude a determination that the use of a credential would constitute a fraudulent or abusive practice.

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The regulations proposed, while objectionable as establishing a *per se* standard for conduct that is fraudulent or abusive, would not be objectionable as a safe harbor for conduct that would not be fraudulent or abusive.

We believe that additional safe harbors would be appropriate to facilitate the flow of non-misleading and potentially beneficial information. For example, we believe that the Division should establish a safe harbor for the use of a credential where there is detailed written disclosure 1) of the nature of the credentialing entity as being governmental or private; 2) of the requirements necessary to obtain and renew the credential; and 3) that the credential is not reflective of a license to sell securities or provide investment advice. Such a safe harbor might include other disclosure requirements as well.

We submit that such safe harbors will both encourage and facilitate the flow of non-misleading beneficial information to consumers without improperly restricting or chilling protected commercial speech. In addition, communication of the safe harbors to the investing public will provide guidance to potential investors and tend to discourage the use of meaningless credentials.

As we stated at the outset, we appreciate the opportunity to express these views on behalf of our client.

We stand ready to respond to any questions the Securities Division may have about the foregoing and to continue to participate in this process.

Thank you for your time and consideration.

Very truly yours,



David A. Zisser



Jon R. Tandler

cc: Society of Certified Senior Advisors, Inc.