



May 15, 2013

*VIA E-MAIL ONLY*

Office of the Secretary of the Commonwealth  
Attn: Proposed Regulations  
Securities Division, Room 1701  
Boston, MA 02108

RE: Comments to Proposed Rules Concerning Investment Adviser Representative Application Requirements

Dear Sir/Madam:

Please accept our comments to the proposed rule by the Office of the Secretary of the Commonwealth's (the "Commonwealth") regarding Investment Adviser Representative ("IAR") Application Requirements. We believe the Commonwealth's interests in protecting investors should be balanced against the business interests of investment advisers and the corollary costs with initiating and maintaining their businesses, which are particularly burdensome for smaller firms. While MarketCounsel supports the Commonwealth's attempt to afford more protection to investors, respectfully, we believe that the Commonwealth has not done any cost benefit analysis to determine if the benefit of the proposed requirements would outweigh the burden. Alternatively, we believe that, should the Commonwealth proceed with the proposed rule, two changes are required to bridge the gap between affording effective investor protection and allowing investment advisers to provide services to their clients without the burdens of significant delays.

MarketCounsel is a business and regulatory compliance consulting firm to some of the country's preeminent entrepreneurial investment advisers. In addition, our affiliated law firm, the Hamburger Law Firm, renders coordinated legal services to a similar but more expansive universe of clients. All told, we render professional services to more than 700 investment advisers. We host an outsourced regulatory compliance platform for registered investment advisers ranging from start-ups with little or no assets under management to firms managing billions of dollars.

#### **BACKGROUND**

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Currently, IARs are required to disclose a range of criminal and disciplinary events as part of the standard application process. The proposed rule changes seek to require an IAR applicant to additionally complete, sign, notarize and return to the Commonwealth a "CORI Acknowledgement Form" which authorizes the Commonwealth to conduct a review of the Massachusetts Criminal Offender Record Information ("CORI") for the applicant.

We understand that reviewing the CORI of an applicant will provide additional protection against unscrupulous or negligent IAR applicants that do not provide proper information on their application.

However, as Massachusetts is not the first state to require a similar procedure, we are keenly aware of additional issues that arise from such a procedure. .

## **ISSUE**

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We have experienced significant delay in processing IAR applications in jurisdictions that already conduct background searches of IAR applicants. Individuals that are filing applications to be registered as IARs in Massachusetts are generally doing so because of an immediate business opportunity. They are either joining a new firm, being engaged by new clients, or opening a new office in the Commonwealth. In all circumstances, any delay directly impacts their ability to immediately conduct business and, in the case of individuals, to start a new firm. Under the proposed rule, the process will delay them from pursuing these business opportunities because they are prohibited from conducting such business until approved by the Commonwealth.

In other jurisdictions that employ a process similar to the rule proposal, IAR approvals can be delayed by weeks or even months. Delays have been attributed to administrative constraints, unavailability of state and federal resources, or even a smudged fingerprint card. Other times the delay is caused by a minor criminal issue that turns out to be immaterial or not disclosable. Either way, the approval is significantly delayed which is problematic for both the IAR and their prospective clients.

## **PROPOSAL**

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MarketCounsel does not support the Commonwealth's proposed rule. The rule proposal does not provide any support for the necessity of the changes. While investor protection is undisputable a noble pursuit, we respectfully submit that the Commonwealth should provide a cost benefit analysis that ensures that the proposed rule would, in fact improve such protections while not unduly burdening investment advisers. Perhaps the Commonwealth could either anecdotally cite its examination experience where verifications of prior disclosures have turned up discrepancies or furnish empirical evidence from other states as to the benefit in requiring background searches.

Alternatively, if the Commonwealth does proceed with the proposed rules, we request that two modifications. MarketCounsel requests that the Commonwealth revise its proposed rule to permit temporary or conditional registration of the IAR while the background search is underway. We believe the Commonwealth's examiners can make a preliminary determination based upon information provided by an investment adviser which will allow for "temporary" or "conditional" registration. Once the CORI materials are reviewed, the temporary or conditional registration can be made permanent or, if there are issues, the registration can be revoked suspended. As mentioned above, this can save weeks or months of waiting for IAR applicants and their clients.

We further request that any of the background information that the Commonwealth requires of IAR applicants be provided via electronic means. Electronic fingerprinting has become commonplace for most background checks. Broker-dealers, the SEC and the US judicial system typically allow or even require electronic fingerprinting due to their efficiencies. In fact, many of our clients have complained of being unable to find a place to get physical fingerprint cards processed since it is no longer a common request. Aside from the accessibility, paper fingerprint cards often have to be submitted multiple times in order to be properly read whereas electronic fingerprints are verified by the technician prior to submission. The unavailability of paper fingerprint processors and unreliability of the quality of paper fingerprint cards has led to delays for several months.

## **RECCOMENDATION**


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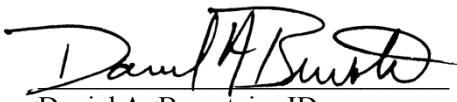
For the reasons set forth above, MarketCounsel is unable to support the Commonwealth's current proposed rule regarding Investment Adviser Representative Application Requirements in its current form.

We encourage the Commonwealth to do a cost benefit analysis or modify the proposed rule to include our proposed modifications which we believe will adequately protect investors while allowing investment advisers and their representatives to conduct business without significant delays. Please keep in mind that many investment advisers that will be subject to this proposed rule are small businesses run by entrepreneurs that are just planting their flag as a new investment adviser. They often need to be registered quickly in order to limit any gap between their most recent employment and their new business.

MarketCounsel thanks the Commonwealth for the opportunity to comment on this proposed rule and we hope that our comments, made on behalf of us and our entrepreneurial, closely-held, independent investment adviser clients prove beneficial to this process. Should you have any questions or require any additional information, we remain available at your convenience.

Best regards,  
MARKETCOUNSEL, LLC

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