

Report From Agency

NOTIFICATION AND REPORT TO LEGISLATURE RELATING TO PROPOSED ORDER OF THE DIVISION OF SECURITIES DEPARTMENT OF FINANCIAL INSTITUTIONS STATE OF WISCONSIN AMENDING, ADOPTING AND REPEALING RULES

To amend DFI-Sec 4.02(2)(i), and to create DFI-Sec 4.06(1)(w), 5.06(24), and Chapter DFI-Sec 10; relating to making it a dishonest or unethical practice for securities licensees to make use of misleading designations or certifications purporting to demonstrate special expertise in the financial or retirement needs of seniors.

Pursuant to the statutory authority specified below under the Wisconsin Uniform Securities Law, the Division of Securities of the Department of Financial Institutions amends, adopts and repeals rules interpreting those sections as follows:

SECTION 1. DFI-Sec 4.06(1)(w) is created to read:

DFI-Sec 4.06(1)(w) Using any term or abbreviation thereof in a manner that misleadingly states or implies that a person has special expertise, certification, or training in financial planning, including the misleading use of a senior-specific certification or designation as set forth in ch. DFI-Sec 10.

SECTION 2. DFI-Sec 4.06(2)(i), as affected by Clearinghouse Rule 08-077, is amended to read:

DFI-Sec 4.06(2)(i) Engaging in any of the practices specified in sub. (1) (a), (b), (c), (d), (e), (f), (g), (h), (o), (p), (q), (r), (t) ~~and (v)~~ and (w) .

SECTION 3. DFI-Sec 5.06(24) is created to read:

DFI-Sec 5.06(24) Using any term or abbreviation thereof in a manner that misleadingly states or implies that a person has special expertise, certification, or training in financial planning, including the misleading use of a senior-specific certification or designation as set forth in ch. DFI-Sec 10.

SECTION 4. Chapter DFI-Sec 10 is created to read:

Chapter DFI-Sec 10 USE OF SENIOR-SPECIFIC CERTIFICATIONS AND PROFESSIONAL DESIGNATIONS.

DFI-Sec 10.01. Purpose of chapter. The rules in this chapter apply to the use of senior certifications and designations.

DFI-Sec 10.02. Use of Senior-Specific Certifications and Professional Designations.

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(1) The use of a senior - specific certification or designation by any person in connection with the offer, sale, or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person shall be a dishonest and unethical practice in the securities, commodities, investment, franchise, banking, finance, or insurance business within the meaning of s. 551.412(4)(m), Stats.

(2) The prohibited use of certifications or professional designations described in sub. (1) include any of the following:

(a) Use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use the certification or designation.

(b) Use of a nonexistent or self-conferred certification or professional designation.

(c) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have.

(d) Use of a certification or professional designation that was obtained from a designating or certifying organization where any of the following criteria are present:

1. The organization is primarily engaged in the business of instruction in sales or marketing or both.
2. The organization does not have reasonable standards or procedures for assuring the competency of its designees or certificants.
3. The organization does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct.
4. The organization does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

(3) There is a rebuttable presumption that a designating or certifying organization is

not disqualified under par. (2)(d) when the organization has been accredited by any of the following:

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(a) The American National Standards Institute.

(b) The National Commission for Certifying Agencies.

(c) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" if the designation or credential issued by the organization does not primarily apply to sales or marketing or both.

(4) In determining whether a combination of words, or an acronym standing for a combination of words, constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered include the following:

(a) Use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "registered," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation.

(b) The manner in which the words in par. (a) are combined.

(5) (a) In this subsection, "financial services regulatory agency" includes an agency that regulates broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.

(b) For purposes of this chapter, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title does either of the following, or both:

1. Indicates seniority or standing within the organization.
2. Specifies an individual's area of specialization within the organization.

(6) Nothing in this chapter shall limit the division's authority to enforce existing provisions of law.

* * * * *

The rules and amendments contained in this Order shall take effect as provided pursuant to s. 227.22(2)(b), Stats., on the date that the emergency rules previously issued on this subject expire, which date will be prescribed by the Division in a statement filed with the final, adopting rule-making Order.

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Dated at Madison, Wisconsin, this _____ day of _____, 2009

[SEAL]

PATRICIA D. STRUCK
Administrator
DFI-Division of Securities

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REPORT ITEMS

(a) Relevant Preface Information Items

1. Statutes Interpreted:

Under Current Chapter 551: s. 551.34(1)(g), Stats.

Under 2007 Wisconsin Act 196: s. 551.412(4)(m), Stats.
(effective January 1, 2009)

2. Statutory Authority:

Under Current Chapter 551: ss. 551.63(1) and (2), Wis. Stats.

Under 2007 Wisconsin Act 196: ss. 551.605(1)(b), (2) and 551.608(1), (2) and (3)(i),
(effective January 1, 2009) Wis. Stats.

3. Explanation of Agency Authority:

Under the Division's authority to license securities broker-dealers and their sales agents, as well as investment advisers and their representatives, the Division has the ability to establish and define, by rule, specific types of practices by such licensees that would constitute "dishonest or unethical business practices" that would provide a basis for denial, suspension or revocation of a securities license.

4. Comparison with Federal Regulations

There currently are no federal statutes or regulations dealing with this specific issue. However, shortly after NASAA detected in 2004 the misleading senior

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certifications/designations problem that was occurring on a multi-state basis, Senator Herb Kohl of Wisconsin, who chaired (and continues to chair) the US Senate Committee on Aging, called a series of hearings in 2006 on various aspects concerning older investors, one of the results of which was Senator Kohl's interest in creating federal legislation to limit the use of misleading certifications/designations. However, based upon NASAA's intent to create a Model Rule for its members to adopt on a uniform basis throughout the states, the Senator instead drafted legislation that recognizes the need for developing a uniform, model rule, and which rewards individual states for adopting such a model rule. The legislation, S. 2794, the Senior Investor Protection Act of 2008, would establish a grant program under which a State may receive a grant of up to \$100,000 per year if it has "adopted rules on the appropriate use of designations in the offer or sale of securities or investment advice, which ... conform to the minimum requirements of the NASAA Model Rule."

5. Comparison with Rules in Adjacent States

To date, Iowa is the sole state adjacent to Wisconsin to have adopted the NASAA Model Rule. Nationally, several non-adjacent states have already adopted the NASAA Model Rule, including Virginia, Washington, New Hampshire, Texas, Alabama and California. It is important to note the need for uniform treatment in dealing with the problem, as highlighted by a few states who undertook separate rule-making actions using divergent approaches in 2007 (before the NASAA Model Rule was completed), thus creating difficulties for large securities firms with brokers and advisers across the country trying to comply with non-uniform approaches to the problem. Those firms, justifiably, have asked for a single, uniform rule that would make it possible to design systems to facilitate compliance throughout all state jurisdictions. Consequently, Wisconsin has determined to follow the NASAA Model Rule in conducting rulemaking on this subject.

6. Summary of Factual Data and Analytical Methodologies

The NASAA Model Rule which provides the template for the proposed rules being adopted in Wisconsin covers a broad array of practices. It prohibits licensees from using any non-existent or self-conferred certification. Also prohibited would be any designation that "indicates or implies a level of occupational qualification obtained through education, training, or experience" that the person doesn't actually have. Furthermore, the proposed rule would disallow designations obtained from organizations that are "primarily engaged in the business of instruction in sales and/or marketing." Additionally, reasonable standards for competency would be required, along with monitoring designees and minimum continuing-education standards. Also included is a listing of nationally recognized accrediting agencies whose

accreditation of an organization creates a rebuttable presumption that the organization's accreditation would not be disqualified under the Model Rule.

7. Analysis and Supporting Information to Determine Effect on Small Business

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Types of small businesses that could be affected by the proposed permanent rules are broker-dealer and investment adviser registrants under both the current, as well as the (new) repealed and recreated Wisconsin Uniform Securities Law (2007 Wisconsin Act 196, effective January 1, 2009), with fewer than 25 full-time employees who meet the other criteria of sec. 227.114(1)(a), Wis. Stats. However, the proposed Prohibited Conduct rule provisions are made applicable equally to all broker-dealers and investment advisers -- irrespective of the size of the firm -- because the provisions involved are for the protection and benefit of Wisconsin customers of those firms. All Wisconsin customers of licensed securities broker-dealers and investment advisers are entitled to the public investor protection benefits of such Prohibited Conduct rule requirements, irrespective of the size of the firm providing the securities services.

There are no new or additional reporting, bookkeeping, or other procedures are contained in the proposed rules.

8. Fiscal Estimate Summary

A summary of the fiscal effects of the proposed rule revisions is as follows: (i) No one-time revenue fluctuations; (ii) No annual fiscal effects; (iii) No long-range fiscal implications; (iv) No fiscal effect on local units of government.

(b) References to Applicable Forms

None.

(c) Need for the Proposed Rule

The rule-making procedures under Chapter 227 of the Wisconsin Statutes are being implemented for the purpose of adopting permanent rules to be in effect upon expiration of identical emergency rules on the subject issued by the Division on September 11, 2008 (identical except for revised numbering of applicable rules and statutes referenced therein to reflect the January 1, 2009 effectiveness of the repealed and re-created Wisconsin Securities Law resulting from 2007 Wisconsin Act 196, together with revised administrative rules thereunder). The emergency rules became effective September 15, 2008 upon publication in the official state newspaper and compliance with other emergency rule-making requirements. The emergency rules, as well as the proposed permanent rules, are being enacted for the purpose of protecting seniors in Wisconsin from being misled through the use by securities licensees of designations and credentials that imply or represent that a person has special expertise, certification, or training in

financial planning for seniors, but where such designations and/or credentials are either non-existent or do not involve significant education, testing, training or experience, and in reality are marketing ploys.

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(d) Basis and Purpose of the Proposed Rules

The Division's rulemaking is based on a "Model Rule On the Use of Senior-Specific Certifications and Professional Designations," developed by the North American Securities Administrators Association, Inc. ("NASAA Model Rule"), and adopted by the NASAA membership, including Wisconsin, with an effective date of April 1, 2008. The Wisconsin rule-making involves amending the list of "dishonest or unethical business practice" provisions applicable to broker-dealers, agents, investment advisers and investment adviser representatives to provide that the misleading use by licensees of senior designations or certifications -- as particularized in the rules -- can be a basis for denial, censure, suspension or revocation of a license.

Because the "senior designation/certification problem" is current and ongoing, and represents a serious source of potential harm for seniors in Wisconsin, the Division used the emergency rule-making procedures to adopt the NASAA Model Rule to be able to have such rule in place immediately to protect Wisconsin seniors, rather than using the regular, permanent rule-making process which requires a 5-6 month process to complete.

Additional justification for this rule-making action relates to the discussion in the Preface Item paragraph 4 above which described the need for acting on a uniform, Model NASAA Rule basis, and the involvement of U.S. Senator Herb Kohl who has expressed interest in this problem and has introduced federal legislation to promote action by individual states to adopt the uniform, NASAA Model Rule.

The background of the discovery by NASAA of the current and ongoing "senior designation" problem and development of the NASAA Model Rule began in 2004 when licensing examiners for the Securities Divisions in a number of states across the U.S., including Wisconsin, noted while conducting office examinations of securities professionals that some securities agents and advisers were using sets of various, new acronyms in their marketing materials. Such acronyms relate to numerous different certifications or designations to make it appear that the salesperson has special qualifications or specialized education in addressing the needs of senior citizens or retirees in areas of finance, financial planning, estate planning, or investing, and thus are used by those licensees to provide an edge in attracting seniors who are nearing retirement, or are in retirement, to become clients/customers.

As previously stated, the proposed permanent rules are being enacted for the purpose of protecting seniors in Wisconsin from being misled through the use by securities licensees of designations and credentials that imply or represent that a person has special expertise, certification, or training in financial planning for seniors, but where such designations

and/or credentials are either non-existent or do not involve significant education, testing, training or experience, and in reality are marketing ploys.

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(e) List of Persons Who Appeared or Registered For or Against the Proposed Rule at the Public Hearing

-- Jeanne Benink, AARP Wisconsin State Program Coordinator, Madison, Wisconsin, provided public hearing testimony in support of the proposed rules.

-- John Hendrick, Staff Attorney, Elder Financial Empowerment Project, Coalition of Wisconsin Aging Groups Madison, Wisconsin, provided public hearing testimony in support of the proposed rules.

-- Jack Mitchell, US Senate Special Committee on Aging, Washington, DC, provided public hearing testimony in support of the proposed rules.

-- Staff Member Ben Nerad, on behalf of Wisconsin State Representative Thomas Nelson, from Representative Nelson's Capitol Office in Madison, Wisconsin, provided public hearing testimony in support of the proposed rules.

-- Lorrie Heinemann, Secretary of the Wisconsin Department of Financial Institutions registered in support of the proposed rules.

-- Lynn Welsh from the Office of the Wisconsin Commissioner of Insurance registered in support of the proposed rules.

(f) Summary of Public Comments to the Proposed Rule and the Agency's Response to the Comments

The only letter received from the public regarding the proposed rules was from Kim Chamberlain, Managing Director and Counsel, State Government Affairs, Securities Industry and Financial Markets Association, Washington, DC, which letter supported adoption of the proposed rules and did not contain any comments/recommendations for modifications to the proposed rules. Consequently, there were no substantive comments for the agency to respond to.

(g) Modifications Made As a Result of Public Comments or Public Hearing Testimony

Because there was no public hearing testimony provided nor comment letters received that made recommendations for modifications to the proposed rules, the agency has not made any modifications to the proposed rules as a result of the public hearing testimony or comment letters.

(h) Responses to Legislative Council Recommendations in Rules Clearinghouse Report

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(1) Acceptance of recommendations in whole:

Under 2. Form, Style and Placement in Administrative Code

- Consistent with the Rules Clearinghouse comment in paragraph a., the Rules Preface is revised to follow the structure found in s. 1.02(2) of the Administrative Rules Procedures Manual.
- Consistent with the Rules Clearinghouse comment in paragraph b., the word "Chapter" is replaced by the notation " ch." in both ss. DFI-Sec 4.06(1)(w) and DFI-Sec 5.06(24)
- Consistent with the Rules Clearinghouse comment in paragraph c. which stated that rule text should avoid use of the terminology "including, but not limited to," that terminology was deleted from ss. DFI-Sec 4.06(1)(w), DFI-Sec 5.06(24), DFI-Sec 10.02(2), and DFI-Sec 10.02(5)(c).
- Consistent with the Rules Clearinghouse comment in paragraph d., the treatment clause for s. DFI-Sec 4.06(2)(i) is amended by adding the language "as affected by Clearinghouse Rule 08-077," prior to the language "is amended to read:"
- Consistent with the Rules Clearinghouse comment in paragraph e., the treatment clause relating to SECTION 5 is deleted.
- Consistent with the Rules Clearinghouse comment in paragraph f., section DFI-Sec 10.02 (intro.) is revised using the language suggested, and pars, (a) through (c) each are revised to conclude with a period.
- Consistent with the Rules Clearinghouse comment in paragraph g., in DFI-Sec 10.02(2)(a), the word "such" was replaced by "the."
- Consistent with the Rules Clearinghouse comment in paragraph h., in DFI-Sec 10.02(3)(c), the word "and" was replaced by "if," and "therefrom" was replaced by "by the organization."
- Consistent with the Rules Clearinghouse comment in paragraph i., in DFI-Sec 10.02(4)(intro.), the words "shall" and "without limitation" were deleted, and the parenthetical notations in the paragraph were replaced with commas.

- Consistent with the Rules Clearinghouse comment in paragraph j., in DFI-Sec 10.02(4)(b), the phrase "those words" was replaced by the phrase "the words in par. (a)"

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- Consistent with the Rules Clearinghouse comment in paragraph k., Section DFI-Sec 10.02(5)(intro.) was renumbered as sub (5)(b). The word "rule" was replaced by the word "chapter." The phrase "(a) or (b) below," was replaced by "of the following." Section DFI-Sec 10.02(5)(a) and (b) were renumbered as sub.(5)(b)1. and 2. Section DFI-Sec 10.02(5)(c) was renumbered as (5)(a). The phrase "For purposes of" was replaced by the word "In," and the phrases "The term" and "but is not limited to" were deleted.

Under 5. Clarity, Grammar, Punctuation and Use of Plain Language

- Consistent with the Rules Clearinghouse comment in paragraph a., in s. DFI-Sec 10.02(1), a hyphen was inserted between the words "senior" and "specific."
- Consistent with the Rules Clearinghouse comment in paragraph b., in s. DFI-Sec 10.02(3)(intro.), the phrase "solely for the purposes of" was replaced by the word "under," and the word "above" was deleted.
- Consistent with the Rules Clearinghouse comment in paragraph c., in s. DFI-Sec 10.02(6), the word "rule" was replaced by the word "chapter."

(i) Regulatory Flexibility Analysis

No final regulatory flexibility analysis is required to be included on the basis that the Division of Securities has determined, after complying with s. 227.114, Wis. Stats., as particularized in Preface information item 7. above, that the rules will not have a significant economic impact on a substantial number of small businesses.

No economic impact report was required to be prepared for purposes of s. 227.137, Stats.

No changes are required to the Fiscal Estimate previously prepared for the Proposed Rules (see attached Fiscal Estimate).

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