

Clearinghouse Rule 08-095

**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), Chapter DFI-Sec 10, and DFI-Sec 10.01 and 10.02; 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:

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.

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)

Analysis Prepared by the Division of Securities

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numbering of applicable rules and statutes referenced therein to reflect the January 1, 2009 effectiveness of the repealed and re-created Wisconsin Securities Law resulting from 2007 Wisconsin Act 196, together with revised administrative rules thereunder).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

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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.

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 following paragraphs which describes 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.

Comparison with Federal Regulations

There currently are no federal statutes or regulations dealing with this specific issue.

However, shortly after NASAA detected the misleading senior certifications/designations

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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."

Comparison with Rules in Adjacent States

Currently, no states adjacent to Wisconsin have adopted the NASAA Model Rule. However, the need for uniform treatment in dealing with the problem was 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. Several non-adjacent states have already adopted the NASAA Model Rule, including Virginia, Washington, New Hampshire, Alabama and California.

Summary of the Rule Provisions

The NASAA Model Rule 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.

Fiscal Estimate Summary

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

Initial Regulatory Flexibility Analysis

1. Types of small businesses that could be affected by the proposed permanent rules are:

(i) 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(l)(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 requirements 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.

2. Reporting, bookkeeping and other procedures required for compliance with the rules.

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

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Following is the text of the proposed permanent rules:

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 but not limited to, the misleading use of a senior-specific certification or designation as set forth in Chapter DFI-Sec 10.

SECTION 2. DFI-Sec 4.06(2)(i) 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

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states or implies that a person has special expertise, certification, or training in financial planning, including but not limited to, the misleading use of a senior-specific certification or designation as set forth in Chapter 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.

SECTION 5. DFI-Sec 10.01 and 10.02 are created to read:

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.

(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 such certifications or professional designation includes, but is not limited to, the following:

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

(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

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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 solely for purposes of par. (2)(d) above when the organization has been accredited by any of the following:

(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" and the designation or credential issued therefrom 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 shall include, without limitation, 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 those words are combined.

(5) For purposes of this rule, 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 (a) or (b) below, or both:

- (a) Indicates seniority or standing within the organization.
- (b) Specifies an individual's area of specialization within the organization.
- (c) For purposes of this subsection, the term "financial services regulatory agency" includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.
- (6) Nothing in this rule shall limit the division's authority to enforce existing provisions of law.

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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.

Dated at Madison, Wisconsin, this _____ day of _____, 2008

[SEAL]

PATRICIA D. STRUCK
Administrator
DFI-Division of Securities