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September 19, 2004

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Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC 20549-0600.



RE: File Number S7-25-99

Regarding the proposed measure, I think that there has been, and is currently, a misconception by the SEC of the definition of "advice" and "financial planning" as well as a breach of duty by the FPA et al in soliciting changes under the guise of a "fiduciary duty" (see attached letter to FPA President Jetton).

I believe some background is in order. Some of the background is listed above. In addition, I have taught the Series 6, 7, 22, 24, 27, 52, etc. and have held licenses 7, 24, 27 and 63 up to the early 90s I have been an SEC RIA till about 2000 where I converted to the State regs. I have also taught courses for CFPs for the University of California and still teach continuing education classes for insurance agents. I was a NASD arbitrator for over 10 years and offer expert testimony on suitability issues now. I offer only NON discretionary advice to clients. I am one of about 40 Life and Disability Insurance Analysts in California. Further, and a legal issue that the SEC needs to position in its review of commentary is that most of the B/D firms are already illegal. And therein is a problem the SEC has to address no matter the outcome of S7-25-99.

First the comments about the requirements of a broker. Every sale must be suitable. No matter under the NASD rules, NYSE or whatever, a sale must be suitable. It is irrelevant whether the broker OR the client presents the product. Even though a client may inquire about a product, the broker is still liable for the suitability and needs to be an RIA if they offer fee advice of any type. No matter if the accounts are non discretionary, I can assure you that the clients are still focusing on the advice of the broker. When I deal with my clients, the advice is no less important, no less researched than if I controlled the accounts directly. It is certainly no less financially devastating if it is incomplete or incompetent. Actually, the effort with non discretionary clients requires MORE work since there is more interaction with the client and more effort on both parts to make sure the end result is completed properly. Simply stated, if you want to receive a fee, you are an RIA. Anything less is absurd.

But an even more egregious inaction by the SEC is to allow the use of term such as "financial planning" in any advertising- fee or otherwise.

First, the term "financial planning" has at all times encompassed more than just investments (see material for CFPs, ChFCs, NAPFA and so on). It covers estate issues, retirement planning, taxes, and, most importantly, all the issues with insurance- life and disability insurance, long term care, annuities and more. If you offer "financial planning", you have, ipso facto, stated to the public that you will cover this most contentious and

difficult area as part of the planning. You have not simply presented yourself as an "Investment Adviser" with a focus just on investments. You have committed a direct statement that you are competent and LEGAL to perform the functions addressed. (That is the same for any B/D firm that charges fees for "financial planning"). Let's assume that the broker is an RIA. So what. In order to offer "financial planning", the broker will have to have an insurance license if they wish to tackle that area. All states require a regular license offering such services with a commission. But we are talking fee services. Therein lies a breach of duty by the SEC and, in fact, literally all the entities that have recently submitted comments regarding S7-25-99. In short, it is a violation in most states to offer fee services on insurance issues without first obtaining a separate insurance license as mandated by state statutes. They are Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Puerto Rico, South Dakota, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming.

Let's take California. While hard to believe, I am the only CFP in the entire state who is fully licensed and legal to offer comprehensive fee services. I am the only California CFP who has ever taken and passed the exam. The state statutes are enclosed. The requirements of five years of experience, a minimum of 115 hours of continuing education and the passing of a most comprehensive and difficult exam are mandatory if you want to offer "financial planning". "Life and disability insurance analyst means a person who, for a fee or compensation, paid by or derived from any person or source other than an insurer, advises, purports to advise, or offers to advise any person insured under, named as a beneficiary of, or having any interest in, a life or disability insurance contract, in any manner concerning that contract or his or her rights in respect thereto." If you are NOT incorporating insurance, you are NOT a financial planner nor can you present yourself as such. If you are not licensed, you are a fraud. Period.

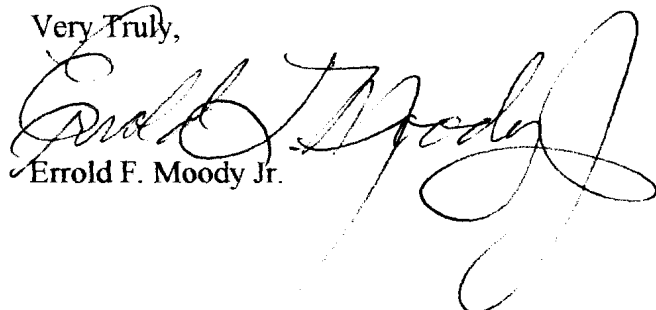
No major B/D firm in this state is legal. Period. There are no brokers in the state who can offer a financial plan for a fee, no matter for \$500 or \$5,000. Not Merrill, American Express, Prudential, whoever. There are no brokers/planners who are legal in even stating that they can do financial planning. Period.

Why the problem? Because the exam is hard. It certainly encompasses far more than that required of a series 7 exam. It requires the same amount of study time to pass the Analysts exam as it does to the CFP in total. Again, it is hard. So nobody does it. And they get away with it irrespective of the state's involvement in demanding compliance. No matter- the activity of offering fee financial planning services violates the law. The SEC has condoned such activity in the past (I assume without knowledge of the illegal activity), but the continuance of such activity with knowledge aforethought would violate SEC rules and fiduciary duty to consumers.

As stated, it's not just California. Over 30 other states have similar laws and requirements. They are rarely being adhered to by literally all the B/Ds nor any of the planners. I know since I have not only followed this issues for years but have instigated investigations by the various planning entities to make sure their agents adhere to the law, provide fiduciary services and, certainly, comply with the ethical standards they all demand. Actually, I have not gotten anywhere with such investigations since no organization demands adherence to the law- be it NAPFA, CFP Board of Standards, NAIFA, the FPA or even the SEC or NASD. These laws are not obscure- California just had the exam updated. But it won't do any good if the governmental agencies do not themselves adhere to legal, ethical and fiduciaries duties.

I short, you cannot allow the term "financial planning" to be used by any entity that violates the law. You will have conspired with all the other entities that justify ethical and legal violations with useless rhetoric. And registration as an RIA is mandatory for anyone involved with fee advice, no matter the presumed innocence in the offering. Suggesting that a non discretionary account is free from fiduciary duty is erroneous.

Very Truly,



Errol F. Moody Jr.

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April 17, 2004

Elizabeth Jetton, President  
Financial Planning Association  
Suite 400, 4100 E. Mississippi Ave.  
Denver, CO 80246

RE: FPA, SEC, DOI and selective hypocrisy; Life and Disability Insurance Analyst

Dear Ms. Jetton,

I have watched with bemused interest the IAFP, CFP Board of Standards, NAPFA, CPA society play selective hypocrisy to fiduciary responsibility, ethics and certainly the law for well over a decade. And you continue the facade with your recent request to write the SEC regarding reduced duty.

Years ago in the mid 90s, the ICFP, in particular, petitioned various state legislators to get attorneys and CPAs under the umbrella of the RIA because they were offering investment advice as part of their regular routine. Yet, at the same time, the majority of officers and directors of these many organizations were engaging in every type of deception, rationale and fraud with illegal activity in the majority of states- certainly in the most populous state in the nation. No matter how you attempt to explain away the illegal and unethical activity, the laws in California (and over 35 more states) are already in place and require adherence. That the requirements of the law (knowledge and testing) are far more demanding than the material for CFPs is no excuse for the outright fraud being perpetrated by CFPs. NAPFA members, officers and directors of the Board of Standards and FPA, CPA PFS and more. In California, one has to take a 52 hour course to get a license and then take 25 hours of continuing education each year for the next four years and 30 hours each two years after that. That is pretty extensive. If you want to provide **insurance advice for a fee**, you need five years worth of experience, take an extensive to become licensed as a Life and Disability Insurance Analyst (insurance code Section 32.5). That encompasses at least 167 hours of mandatory schooling before one is able to offer fee advice on insurance. This has been the law since 1957. However, literally every comprehensive fee planner in California (check statutes for your state specific laws- Currently, at least 32 states have licensing requirements for advisers who want to provide fee-based insurance advice. They are Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Puerto Rico, South Dakota, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming.) have refused to adhere to this law since they didn't want to have anything to do with insurance or commissions- further that it would taint their background. Or were simply incapable of passing the exam. So they have been offering fee advice on literally all areas of insurance under the guise of whatever rationale they could find. None of it true. Due to

your position, you must have been fully aware of this subterfuge by membership. That said, you also have also turned a blind eye to proper enforcement of ethics- certainly the fiduciary duty you now relate to. I point to **Board Rule 606**; In all professional activities a CFP Board designee shall perform services in accordance with:( a ) Applicable laws, rules and regulations of governmental agencies and other applicable authorities. And **Rule 609**; **A CFP Board designee shall not practice any other profession or offer to provide such services unless the CFP Board designee is qualified to practice in those fields and is licensed as required by state law.** Just what part of those rules do you and other officers not understand?

You note in your communique, the “Financial Planning Association represents the interests of the financial planning profession on key legislative and regulatory issues in Washington..... The proposed rule permits the marketing of fee-based financial planning services without holding the broker-dealer to the fiduciary and disclosure standards of the Advisers Act.” Yet under the already in place Life and Disability Insurance Analyst license in California, any attempt for a FPA member to offer any comprehensive fee services is a violation of law. A violation of ethics. And a clear violation of fiduciary duty. There is no California FPA member, outside of myself, who can offer comprehensive fee services. That includes your past president- a fact that can be fully and completely documented by Duane Thompson who attended the meeting with the California Department of Insurance in 1997. In addition to the past president being in default of duty, so are representatives of your ethics staff. I am the only CFP to have ever taken and passed the Analyst exam. The point is not that I did it but the fact that effectively all others have repeatedly refused to participate in legal activity because the effort was hard and the knowledge base required far beyond the education of CFPs. Just how do you validate the FPA as an entity for consumer protection where officers are violating the law?

You also note, “In reviewing any regulatory proposal, FPA relies on its governing principles and *CFP Code of Ethics and Professional Responsibility* in developing a position and whether a proposed regulation is consistent with these core values. In its review of the SEC proposal, FPA identified two concerns: 1) the rule reduces investor protection; and 2) the rule dilutes the standards of conduct for the financial planning profession by permitting the delivery of advisory services at a lower regulatory standard than for financial planners registered under the Advisers Act.

It is notable that the offering of any comprehensive services, the use of a non licensed FPA member reduces consumer protection. The delivery of services by any other FPA than myself permits delivery of (illegal) services that is clearly below California regulatory standards. Any attempt to suggest that compliance with a state law is irrelevant, useless or whatever justification for illegal activity the FPA membership wishes to authenticate is unethical and a fraud within itself. At the simplest level, it is a breach of integrity. To wit, the FPA notes; **Integrity-** We strive to have ever more congruence between our words and deeds, and to deliver genuine value to those whom we serve. Integrity demands honesty and candor, which must not be subordinated to personal gain and advantage. Within the characteristic of integrity, allowance can be made for innocent error and legitimate difference of opinion; but integrity cannot co-exist with deceit or subordination of one's principles.

The CFP Board of Standards Rule 101 notes A CFP Board designee shall not solicit clients through false or misleading communications or advertisements: (I am the only CFP offering legal comprehensive fee services.)

( a ) *Misleading Advertising:* A CFP Board designee shall not make a false or misleading communication about the size, scope or areas of competence of the CFP Board designee’ practice or of any organization with which the CFP Board designee is associated; (Yet every offering of fee services is a violation of law) and

( b ) *Promotional Activities:* In promotional activities, a CFP Board designee shall not make materially false or misleading communications to the public or create unjustified expectations regarding matters relating to financial planning or the professional activities and competence..... (CFP offering of comprehensive fee services is significantly below the competency level of any Analyst in California)

**Rule 102**

In the course of professional activities, a CFP Board designee shall not engage in conduct

involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a false or mis-leading statement to a client, employer, employee, professional colleague, governmental or other regulatory body or official, or any other person or entity. (Already identified)

Your Email also noted that the FPA .....supports a level playing field in professional standards. The securities industry has changed significantly since the current BD exemption was approved by Congress more than 60 years ago. The disclosure requirement of the new rule is insufficient in helping investors understand the difference in protections offered under the Advisers Act and NASD suitability rules, and does not provide any disclosure of conflicts of interest. Further, the SEC has never offered any guidance on what investment advice is solely incidental to brokerage services before the rule was proposed, or in the discussion of the rule. Nor has the SEC ever clarified the distinctions between comprehensive financial planning and brokerage services. The problem is exacerbated by the SEC allowing brokerage firms to use the exemption without any assurance on when it will adopt a final rule, and what, if any, changes it will make to the original proposal.

Well, the insurance industry has changed radically. The California DOI has instituted laws, policies and licensing requirements that far exceed the limited knowledge base and capability of CFPs. The offering of comprehensive financial planning absolutely incorporates a review of any existing insurance. The mere intent to do so is a violation of law and a violation of basic fiduciary duty.

You have known (or should have known) of this issue for years. How to you justify the FPA's selective hypocrisy? You cannot go after an organization or group for reduced duty where you stand, and have stood, for even less.

I await your response.

Very Truly,

Errold F. Moody Jr.

CC: Lori Pizzani

Commissioner John Garamendi

In July 27, 1995, Patricia Staggs, Assistant General Counsel and Chief, Compliance Bureau of the Legal Division, Compliance Bureau of the California Department of Insurance, wrote regarding Investment Advisers:

That exemption appears at Insurance Code Section 1831(e) and provides an exemption to the chapter regarding life and disability analysts for "an investment adviser as defined in section 25009 of the Corporations Code, when acting in that capacity." Section 25009 of the Corporations Code provides as follows:

"Investment adviser means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of regular business, publishes analyzes or reports concerning securities. "Investment Adviser" does not include (a) a bank, trust company or savings and loan association; (b) an attorney law, accountant, engineer or teacher whose performance of these services is solely incidental to the practice of his profession; (c) a broker-dealer whose performance of the services is solely incidental to the conduct of his business as a broker-dealer and who receives no special compensation for them; or (d) a publisher of any bona fide newspaper, news magazine or business or financial publication of general, regular and paid circulation and the agents and servants thereof, but this clause (d) does not exclude any person who engages in any other activity which would constitute him as an investment adviser within meaning of this section.

A life and disability insurance analyst is defined in insurance code 32.5 as follows:

"Life and disability insurance analyst" means a person who, for a fee or compensation, paid by or derived from any person or source other than an insurer, advises, purports to advise, or offers to advise any person insured under, named as a beneficiary of, or having any interest in, a life or disability insurance contract, in any manner concerning that contract or his or her rights in respect thereto."

The Department's view to that exemption set forth in insurance code 1831(e) is that an investment adviser need not submit to regulation by the Department of Insurance so long as the activities engaged in by the investment adviser fall within the defined activities of an investment advisor as set forth in Corporations Code section 25009. **It is noteworthy that the definition of an investment adviser contains no reference to insurance related activities (emphasis mine).** Therefore, any activities included within the definition of life and disability analyst, such as advising as the life insurance products, are clearly outside the "capacity" of an investment adviser, and would subject the person to the provisions of law relating to life and disability insurance analysts.

Very Truly Yours,

Patricia Staggs

CALIFORNIA DEPARTMENT OF INSURANCE

February 3, 1998

On July 30, 1997, a discussion concerning the life and disability insurance analyst license was held between the California Department of Insurance (CDI) and members of the financial planning industry. As you participated in this dialog, I am writing to communicate CDI's policy on this matter.

The focal point for this issue is consumer protection, not the interests of the individual factions. With all parties based in customer service, it is sad that this detail has been lost in much of the discussion. As defined by insurance code Section 32.5, a life and disability insurance analyst is

"... a person who, for a fee or compensation of any kind, paid by or derived from any person or source other than the insurer, advises, purports to advise, or offers to advise any person insured under, named as beneficiary of, or have any interest in, a life or disability insurance contract, in any manner concerning that contract or his or her rights in respect thereto."

The fact that there are only 46 life and disability analyst in California is not a valid argument for repealing this code. In fact, the limited number of licensees and population in noncompliance begs for increased education and enforcement. While the easy solution for those in noncompliance may be to repeal this law, consumers who pay for fee advise on insurance matters deserve an analyst educated in insurance per CDI standards. The current licensing requirements ensure that relationship. Any legislative effort to repeal this law will likely be opposed, on the basis that such action is harmful to consumers, by consumer groups, insurers, agents and brokers, and the California Department of Insurance.

At the July 30, 1997 meeting, representatives from the financial planning industry raised two additional suggestions concerning CDI's examination requirement. The first seeks to allow issuance of a Life and Disability Analyst license to Certified Financial Planners and Certified Public Accountants following the successful completion of their own professional examinations. Again, this is an idea that requires legislation and will certainly face opposition. CDI's position remains at only those individuals who pass CDI's exam are to be issued a life and disability analyst license. CDI is the agency charged with enforcing this license and will remain, via its examination and related or regulatory functions, the authorizing agency for this license.

The final suggestion request a waiver of the requirement than an examinee must have five (5) years experience as a life licensee, or employment experience under said licensee, to sit for CDI's examination. Again, this is an idea that requires legislation. CDI will reserve judgment until the full breadth of this proposal has been introduced to the state legislature.

Despite some groups interest in changing current law, there is an existing law which is, and has always been, quite clear. While a financial planner may be illegally engaging in insurance analyst activities and may not be aware of their violation, it is my hope that this the explanation of policy will provide them with the impetus to come into compliance or cease the illegal activity immediately. Per insurance code Section 1844, " any person who acts, offers to acts, assumes to act, as a life and disability insurance analyst when not licensed by the commissioner per this article..... is guilty of a misdemeanor." Consistent with current practice, information obtained on individuals in noncompliance will be aggressively pursued.

Jeffrey Kenny, Assistant Ombudsman and Legislative Liaison