

May 16, 2008

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File Number S7-10-00, Amendments to Form ADV

Dear Ms. Morris:

The Financial Planning Association (“FPA”)¹ welcomes the opportunity to comment on the Securities and Exchange Commission’s (“Commission” or “SEC”) proposed amendments to Form ADV, Part 2 (“Part 2”). In 2000, FPA commented² on the SEC’s original proposal to amend Part 2, a proposal that was later withdrawn.

Most of FPA’s 28,000 members would be affected directly, or indirectly, by the proposed rule. Nearly one-half of FPA members are affiliated with SEC-registered investment advisers, and nearly one-quarter with state-registered advisers. The proposed amendments to Part 2 would significantly affect the manner in which advisers meet their disclosure obligations to clients. These disclosures are both central to the client-adviser relationship and a cornerstone of adviser regulation. We share the Commission’s view that “it is critical that clients and prospective clients receive sufficient information about the adviser and its personnel to permit them to make an informed decision about whether to engage an adviser, and having engaged the adviser, how to manage that relationship.”³

The majority of FPA member-practitioners, including individuals who are not affiliated with investment adviser firms, are subject to similar disclosure requirements under professional

¹The Financial Planning Association is the largest organization in the United States representing financial planners and affiliated firms, with approximately 28,000 individual members. Most are affiliated with investment adviser firms registered with the Securities and Exchange Commission or state securities administrators, and more than one-half are affiliated with broker-dealers. FPA is incorporated in Washington, D.C., where it maintains an advocacy office, with headquarters in Denver, Colo.

² Comment Letter of the Financial Planning Association (June 13, 2000)(“FPA Letter”).

³ *Amendments to Form ADV*, Investment Advisers Act Release No. 2711 (March 3, 2008). [73 FR 13958 (March 14, 2008)] (“Proposing Release”), at p. 4.

ethics rules.⁴ These standards require full and effectual disclosure to all clients and prospective clients of the individual planner's professional background, conflicts of interest, and indirect sources of compensation, consistent with current federal disclosure requirements.⁵

A. The Brochure- Form ADV, Part 2A.

I. Generally.

Current Form ADV, Part II (under the proposed new form and hereinafter "Part 2A" or "brochure") is a primary document used to communicate information about an advisory firm to clients. The information it contains includes everything from the types of advisory services the firm provides and fees it charges, to its methods of analysis and investment strategies, to the firm's balance sheet. The brochure is primarily a "check-the-box" form which advisors are required to give to new clients and to annually offer to provide to existing clients. The brochure must be updated to reflect any material changes.

As proposed, Form 2A would look substantially different than it does today. The SEC is proposing that the brochure present the required disclosures in a plain English, narrative format, describing the adviser's services, fees, business practices, and conflicts of interest. We strongly support the move to a narrative, plain-English format and agree that, done properly, it will improve the ability of clients to evaluate advisers and their personnel.

As with the original proposal in 2000, however, we remain concerned that if the brochure becomes too lengthy, clients will not read it, rendering all of the disclosures essentially useless. There are three primary factors that could contribute to an overly lengthy brochure: 1) the number and type of disclosures the Commission is requiring; 2) the complexity of the adviser's business, i.e., the length that will be *required* to properly comply; and 3) the adviser's "over-disclosure," i.e., the length that advisers *choose* to make their disclosures.⁶ We would encourage the SEC to consider, generally, how it can help keep the brochure a brief, comprehensible document that clients are likely to read. As discussed below, it is helpful that firms will not be required to disclose the same information in response to multiple questions. The SEC suggests that firms may

⁴ See CFP Code of Ethics and Professional Responsibility (current requirements); CFP Board's Standards of Professional Conduct (eff. Date July 1, 2008); and FPA Bylaws, Article IV, available at www.fpanet.org.

⁵ Rule 401 of the CFP Code states that, in addition to compliance with applicable laws in connection with the financial planning engagement, a CFP designee shall disclose to the client "material information relevant to the professional relationship, including but not limited to conflict(s) of interest(s), changes in the CFP designee's business affiliation, address, telephone number, credentials, qualifications, licenses, compensation structure and any agency relationships, and the scope of the CFP designee's authority in that capacity." Rule 402 requires "timely written disclosure of all material information relative to the relationship."

⁶ Over-disclosure may be driven by an overly broad interpretation of what is required, a choice to include information beyond what is required, and/or concerns about liability for failure to disclose sufficient information.

have multiple brochures, since certain information will only be relevant to certain clients. On its face, this solution is beneficial to both the firm and the client; however, we question whether it is practical from a cost and compliance perspective.

II. Delivery.

An adviser is currently required to deliver a brochure prior to or at the time it enters into a contract with the client, and to annually deliver **or offer to deliver** its current brochure. The SEC now proposes that the adviser must annually deliver (not merely offer to deliver) the current brochure, with a clear disclosure on the cover page, or in a separate document, of any material changes since the last annual update. Additionally, during the course of the year, advisers would also be required to deliver an “interim update” to clients if there is a newly reportable disciplinary event or material change in a previously reported disciplinary event.

Anecdotal, but consistent comments from FPA members over many years suggests that the current form is not widely read by prospective clients (even though it should be read). Given the likelihood that Part 2 will still result in a lengthy document, FPA questions whether any meaningful benefit will accrue to investors by requiring annual delivery of the current brochure, and whether the costs of annual delivery (absent a client request) is therefore justified. Clients with whom the adviser has a relationship would presumably be interested in any material changes to the initial disclosure document. As noted above, the SEC proposes that those material changes be highlighted on the cover page of the current brochure or in a separate document accompanying the brochure. FPA suggests that such a separate document, or “sticker” should suffice as an adequate disclosure update, obviating the need for an annual delivery of the underlying disclosure document. The annual delivery of this “sticker” should inform the client that the updated brochure is available upon request (or is accessible through the internet). We further suggest that the cover page or sticker highlight *all* changes to the brochure. Almost by definition, the disclosures required by Part 2A are material, and most changes would therefore be highlighted. While some changes would fairly be determined to be non-material, we think they would still be worth highlighting for two basic reasons: 1) clients would likely prefer to determine for themselves what is “material” or important to them, and 2) the extra efforts, expenditures and, most importantly, risks involved in a firm making a judgment call about what is “material” are not likely to be offset by any benefit from excluding “non-material” information.

In sum, we believe that advisers can achieve meaningful disclosure of material changes to the brochure with an annual disclosure highlighting changes to the brochure and offering delivery of the updated brochure. The significant costs and administrative burden of annual disclosure of the current brochure can be avoided without compromising meaningful disclosure of material information. And, the annual disclosure should highlight all changes to the brochure.

Further, FPA agrees with the SEC that “fiduciary advisers have an ongoing obligation to inform their clients of any material information that could affect the advisory relationship.

As a result, advisers may be required to disclose material changes to clients between annual updating amendments even if those changes do not trigger delivery of an interim update.”⁷ We note generally, that an adviser’s fiduciary obligation to disclose virtually all of the information being required by Part 2A, whether orally or in writing, exists as part of a fiduciary’s duties of care and loyalty separate from the brochure requirement.

We strongly support the SEC’s proposal to require interim updates on Part 2B, the brochure supplement where a new disciplinary event is reported (discussed below). Clients would want to know – and should know – if their personal adviser has had a significant disciplinary event. We ask, however, that the SEC consider whether certain disciplinary events may be material enough to include in Part 2A, the firm’s brochure, yet not rise to the level that would warrant the costs of a separate interim update. So, for example, a settlement with an SRO for a sales practice violation, resulting in a \$3,000 fine, may be considered material for purposes of reporting in the brochure. Will it always be significant enough to warrant a mass mailing to clients? The SEC should consider whether a more flexible standard would be appropriate in determining when an interim update is required for disciplinary events. And we note again that advisers are required to disclose material information to clients, independent of the requirements of this proposal.

III. Disclosures.

FPA believes the Commission has done a commendable job in identifying material information that advisers should be disclosing to clients and information that clients would be interested in knowing. We are also pleased that advisers will not be asked to make duplicative disclosures in response to different questions. This alone will help keep the brochure to a more manageable, user-friendly size.

FPA suggests that one proposed disclosure item in particular be dropped. Item 4E requires disclosure of client assets under management. This disclosure does not seem to be particularly relevant to clients and FPA considers it to be immaterial. If its purpose is to suggest the higher the assets under management, the more experience or successful the adviser might be, it could in fact be misleading. There are many experienced advisers who are more interested in managing client relationships, not assets. Too many assets and clients would interfere with their ability to work effectively with a smaller set of clients.

Second, it only indicates the firm’s assets under management, not the assets managed directly by the individual adviser. Individual adviser representatives of one firm may personally manage vastly different amounts of assets, thereby making this disclosure meaningless.

At best, if the intent is to disclose the relative amounts that are managed on a discretionary versus non-discretionary basis, the disclosure should be modified to require or allow disclosure on a percentage basis. The actual dollar amount is not

⁷ Proposing Release, *Footnote 148*, at p. 50.

relevant in that it merely is indicative of the “size” of the adviser. If the adviser believes that the amount of assets under management is relevant, it would remain free to make such a disclosure. We also note that the Commission would not require a particular method for calculating the assets under management. With advisers employing different methodologies to calculate the assets, the disclosure is rendered even less meaningful.

We believe it is important that the SEC recognizes that advisors offering different services to different clients should not be required to disclose all information about all services and fees to each client.⁸ In fact, to do so would be counterproductive in that it would provide clients with information that is not relevant to them, and would unduly increase the size of the brochure, making it less likely that the brochure will be read and understood by the client. Instead, the Commission suggests that separate brochures be developed and delivered, containing the information relevant to particular clients. FPA questions whether this is a practical solution, given the costs involved with creating multiple brochures and managing the proper delivery of those brochures, including updating and notification of “material changes.” How, then, to balance over disclosure and customer confusion against what is likely the impractical solution of maintaining multiple brochures? We suggest that the SEC solicit further specific comments on this issue.

IV. Conclusion.

FPA supports the move to a narrative, plain English format for Part 2A. It will provide flexibility for advisers to explain their business, compensation and conflicts, and result in an improved client understanding of their adviser and the relationship. We largely support the content requirements of Part 2, but believe the SEC and advisers alike will share responsibility for ensuring the brochure does not become so lengthy as to defeat the goal of providing clients with comprehensive, critical information in a format that is user-friendly and highly likely to be read. We do not believe, however, that an annual delivery requirement of the firm’s the-current brochure is the most effective, or cost-effective way of informing existing clients of material changes to the disclosure document. We support requiring an annual disclosure of changes to the brochure, as well as a continued requirement that the brochure be offered at least annually.

B. The Supplemental Brochure- Part 2B

I. Generally.

Form ADV, Part 2B (“Part 2B” or “supplement”⁹) is a new part of Form ADV intended to provide clients with relevant information regarding supervised persons that are directly providing advice to the client. As when this was originally proposed in 2000, FPA strongly supports this disclosure because it provides critical retail information concerning an adviser’s qualifications. At that time we expressed reservations that the average length could be held to one page, as suggested by the SEC. With six items requiring

⁸ Proposing Release, *Footnote 19*, at p. 9.

⁹ We understand that some are concerned about using the term “supplement,” because it may be confused with an update or “supplemental” filing of Form 2A. It is also suggested that a more using an accurate term (e.g., “biography”) may be more helpful for the client as well as the firm. FPA would support using different terminology to refer to the Form 2B information.

disclosure in Part 2B, and some advisers likely to utilize Part 2B as a marketing tool to showcase their qualifications, limiting this section to one page may not be practical.

However, even if the disclosure is slightly longer, we nonetheless believe it will serve as the most widely read disclosure, since we are not convinced that prospective clients will be interested in reading Part 2A if it remains a lengthy document. Moreover, although many clients will be attracted to a firm because of branding and marketing efforts, we believe that they will be more interested in the qualifications and background of their prospective personal advisor, not the overall firm. Therefore careful consideration should be given to the disclosure requirements for Part 2B.

We note, as with Part 2A, FPA members and other advisers are likely to be making many of these disclosures to clients already, in absence of the requirements of Part 2B. Such disclosures would be necessary in fulfilling their fiduciary obligations under the Investment Advisers Act.¹⁰

We recognize that for larger firms, including many FPA institutional members, the creating, maintaining and updating, and distributing the brochure supplements will be difficult and costly. To the extent these costs and burdens can be mitigated through additional flexibility in creating, maintaining and delivering the information required, FPA would support such efforts, provided clients continue to receive the information they need to make informed choices and effectively manage their relationships with their advisers and supervised persons. Flexibility in compliance, however, should not effectively establish a multi-tiered system that disadvantages some advisers. And the costs must be measured against the significant benefit that we anticipate will accrue to advisory clients.

II. Supervision.

Item 6 of Form 2B requires an explanation of “how” the advice of the supervised person is monitored, as well as a name and contact information for the person responsible for supervising the supervised person.

FPA suggests that this is not the type of information a client would normally want or expect. The explanation of supervision could be rather arcane and it would be difficult for advisers to determine how deep they would have to go in explaining the “how” of their supervision. Further, unlike much of the other information the SEC would require, details relating to supervision would not routinely be disclosed in the fiduciary relationship.

As for providing the name and contact information for a supervisor, we strongly suggest that a general contact number (toll free) and email address be provided for clients who want more information or wish to complain about a supervised person. If the supervisor is required to be personally named, the supplemental brochure will need to be more frequently updated. Also, in many firms, there may be more than one person

¹⁰ And, see Footnotes 4 and 5, for reference to other applicable professional standards.

supervising a particular investment adviser representative. General contact information should suffice for the clients' purposes.

III. Updating for Disciplinary Events.

As mentioned above, FPA believes the brochure supplement is the disclosure document of greatest interest to the client, insofar as it provides information specific to the person(s) with whom the client is dealing. For this very reason, we believe the individual's disciplinary history, as opposed to the firm's, will be of greatest interest to the client. As we have discussed throughout this letter, notwithstanding the requirements of 2B relating to disciplinary history, FPA believes that most, if not all of the information being required would have to be disclosed to clients as part of the adviser's fiduciary obligations and consistent with professional standards. We understand that for larger firms in particular, the disciplinary updating and delivery may be difficult and costly. We would support flexibility in updating and delivery, consistent with providing complete and timely information to clients, and not establishing different standards for certain classes of advisers.

C. Additional Items for State-registered Advisers.

Both Part 2A and Part 2B include an additional disclosure item that must be completed by state-registered advisers, only. Item 20 of Form 2A and Item 7 of Form 2B are additional disclosures relating to disciplinary items to be reported for the firm and for the individual, respectively. FPA would like to provide comments on this aspect of the proposal, and we will be providing the North American Securities Administrators Association ("NASAA") with a copy of this letter. As mentioned above, nearly one-half of FPA members are affiliated with SEC-registered investment advisers, and nearly one-quarter are affiliated with state-registered firms.

FPA understands that the SEC consulted with NASAA as it was developing this proposal. We believe the fact that there are only two additional items for state-registered advisers is reflective of the degree of cooperation between NASAA and the SEC and we commend both organizations for their efforts.

Nonetheless, FPA must object to requiring state-registered advisers to make additional and different disclosures than are required of SEC-registered advisers. A dual standard of disclosure is neither fair, nor is it consistent with the intent of this proposal. Part 2 is intended to provide clients and potential clients with comprehensive, yet brief and understandable information they can use in selecting and advisers (whether state- or SEC registered) and managing their relationship. Central to a client's ability to make informed decisions, is the ability to make a comparative assessment of firms and individuals based on the information contained in the brochure and brochure supplements. Requiring additional and different disclosures by state-registered advisers undercuts this goal.

From a public policy perspective, bifurcated disclosure makes absolutely no sense. We understand that the Commission is considering raising the threshold level for SEC registration from \$25 million to a significantly higher figure. What is the difference in

client characteristics, we would ask, between investors who one day were clients of an SEC-registered investment adviser with \$100 million under management and the next day suddenly clients of a state-registered investment adviser because of a rule changing the threshold amount for SEC registration?

As for the subject-matter of the state disclosures, we question their value to clients in that they are simultaneously too broad and too narrow, capturing information that may not be of interest to clients, but failing to capture information that would be material. For example, given the scope of events required to be reported, including the low dollar threshold of \$2,500 in *alleged* damages for arbitrations, state-registered advisers are likely to be reporting at least some items that are arguably not material. Conversely, it appears that settlements would not be captured in this reporting, even if highly relevant.

We note again, that advisers are required to disclose material information to their clients. If firms and individuals (state- and SEC-registered) are complying with this baseline requirement, the additional items are not needed to provide clients with the information they need. In fact, these items will add to client confusion in that comparison between state- and SEC-registered advisers will be uneven.

Finally, we note that for the basic disciplinary reporting information (Part 2A, Item 9 and Part 2B, Item 3), the firm or individual is *presumed* to have to report the specified items, but may rebut that presumption. This is a requirement for both state- and SEC-registered advisers. However, the additional disciplinary disclosure items for state-registered advisers are absolute and do not appear to permit firms or individuals to determine that an event is not material. At a minimum, the additional items should be redrafted to indicate that the events listed are presumptively reportable.

In conclusion, FPA commends the SEC and NASAA for their cooperative efforts to date. After reviewing comments we strongly urge both to agree to a common disclosure regime, to avoid having separate standards for state- and SEC-registered advisers that will only add to client confusion.

D. Conclusion.

FPA supports a transition to a narrative, plain-English disclosure document for adviser clients and potential clients. We believe the SEC proposal goes a long way toward providing investors with information they need in a comprehensive and comprehensible format. We hope our comments will be productive as the Commission considers refining the proposal.

If you have any questions, or if FPA can provide additional information, please contact me at 202-449-6343, or dan.barry@fpanet.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Barry', with a long horizontal line extending to the right.

Daniel J. Barry
Director of Government Relations

Cc: Russ Iuculano, Executive Director
North American Securities Administrators Association