

DISCUSSION OF REASONS FOR, AND OBJECTIVES OF, NEW REGULATIONS REGARDING USE OF SENIOR DESIGNATIONS

I. Introduction

Massachusetts General Laws, Chapter 110A, subsections 412(a) and (b) state in relevant part:

(a) The secretary may from time to time make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this chapter

(b) No rule, form, or order may be made, amended, or rescinded unless the secretary finds that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this chapter . . .

The Massachusetts Securities Division has noticed a marked increase in the use of various designations and purported credentials potentially targeting senior citizens by, among others, broker-dealer agents and investment adviser representatives. Some of these purported professional designations appear to be part of a larger, systemic trend of aggressively marketing investments to investors with pre-retirement concerns as well as those who are looking for ways to reduce taxes or supplement a fixed income. Specifically, the Division has seen many instances of a purported senior specialist using credentials or professional designations, as well as other marketing tools, to give seniors the impression that he or she is acting as their unbiased, knowledgeable and independent advisor when the real objective is to convince them to sell financial assets in order to purchase a product the specialist offers. Investors often have insufficient information when trying to decide which designations represent a meaningful achievement by the agent or representative and which designations are simply empty marketing devices. The Division is particularly concerned about the use of designations that falsely conveys a certain expertise in matters dealing with seniors and their special financial needs.

II. Examples of Customer Confusion and Harm Caused by Misleading Use of Senior Credentials Encountered by the Division

One example is the regulatory enforcement action initiated by the Division against Brokers Choice of America (“BCA”) and Senior Benefit Centers Network (“SBCN”) (Docket No. E-2002-47, filed on September 25, 2002). The Division alleged in its complaint that, in an effort to cloak its agents with legitimacy as financial advisers, BCA and SBCN fraudulently touted their financial planning skills, investment expertise and knowledge. Moreover, these companies used such specious titles as “Certified Elder Planning Specialists” (“CEPS”) to mislead the elderly and disguise the fact that the associates were simply insurance salesman. The Division further alleged that Respondents conducted “Senior Financial Survival Workshops” as part of an unethical

and dishonest scheme to deceive, coerce, and frighten the elderly into purchasing annuities. As part of a settlement with the Division and in addition to other relief, the entities agreed to no longer grant the designation “CEPS” in Massachusetts.

As another example, a designation that appears to have created substantial confusion is the Certified Senior Advisor (“CSA”) designation. This designation has surfaced in a number of customer complaints and recent administrative actions, as broker-dealer representatives are using it to connote that they are certified as having bona-fide expertise in investment advising with respect to senior citizens. For example, in the administrative action initiated by the Division against Michael DelMonico, Workman Securities Corporation, Paul Maxa and Robert Vollbrecht (Docket Number E-2007-0020, filed on March 6, 2007, a copy of which is available on the Division’s website) the Division alleged multiple violations of the Massachusetts Uniform Securities Act by Michael DelMonico, an annuity salesman (who was also registered with the Division as a broker-dealer representative) who masqueraded as an unbiased advisor to seniors.

Among the marketing tools DelMonico used to convince seniors that he was a bona fide senior financial advisor was his designation as a “Certified Senior Advisor”. Marketing materials distributed by DelMonico stated: “Mike is one of 7,000 Certified Senior Advisors (CSA) in the U.S. and therefore is well trained in many issues especially senior finances.” One of the complainants (a woman in her seventies) against DelMonico indicated that the CSA designation was instrumental in her decision to purchase the annuity products he was selling. At that time DelMonico wrote a letter for her to sign to her existing financial advisor thanking him for his service and telling him that she was moving her assets over to DelMonico. The letter stated: “I am presently making some life changes and I am going to be working with a retirement specialist. He is well known and fully accredited to work with seniors.” In her subsequent complaint letter to the Division, the victim stated that when she began to express dissatisfaction with a particular product, “[DelMonico] points out his credentials in senior financial services or something to that affect” and tells her that the product is, in fact a good investment.

DelMonico used the CSA designation and other marketing tools (discussed below) to present himself to seniors as an unbiased, objective advisor who was acting in their interests. The advice he provided was invariably to sell their existing securities and other assets in order to fund the purchase of high-commission equity-indexed annuities and other annuities and insurance products. Many of these products were sold without regard to suitability to the particular client’s age, tax situation or cash flow needs. (Suitability issues are discussed in more detail below.) DelMonico made more than \$700,000 selling annuities and other financial products in 2005, one of the years that he held his CSA designation.

One of the materials distributed by DelMonico and other registered representatives of his broker-dealer Workman Securities Corporation was a handbook, written by CSA Michael Kasselnak (founder of Piece of Pie, discussed below), called “Sins Of Omission: Things that Your Broker Should be Telling You”. The book stated:

“Fortunately, there are designations for planners who work with seniors, such as the Certified Senior Advisor (CSA). The CSA is offered by the Society of Certified Senior Advisors, and in order to earn the certification, an advisor must attend training, learn about the special needs of seniors who invest, and understand the opportunities available to senior citizens.”

The Division has, in the course of its investigations, encountered other persons using senior designations to burnish their credibility as investment advisors. One such person John Huck (against whom the Division has filed an administrative complaint, In the matter of John Christopher Huck, Docket Number 2006-0109, filed on March 6, 2007, a copy of which complaint is available on the Division’s website) was, like DelMonico (discussed above), primarily an annuity and insurance salesman dressed up as an advisor with expertise in senior financial issues. Huck held “Senior Financial Workshops” and “Senior Financial Survival Workshops”. His promotional materials stated that “is a **Certified Senior Advisor** who has spent 15 years in the study, presentation and service of Finance and financial related products.” (Emphasis in original). In fact, the only study he engaged in after college was the minimal study required to obtain the CSA designation. In the same promotional materials he listed the telephone number of the Society of Certified Senior Advisors, along with the Better Business Bureau, the Massachusetts Division of Insurance and Massachusetts Securities Division. The Division took testimony of a customer of Huck who was in her seventies who had expressed concern about an annuity that Huck had sold her. When the customer was attempting to determine whether to follow Huck’s advice (and purchase the equity-indexed annuity he was selling), she called the Society of Certified Senior Advisors and was informed that he checked out as a senior financial advisor. She testified as follows:

A. . . . there’s one of these, Denver Colorado, here, Society of Senior Advisors. I told him I had contacted them about him.

Q. What was the nature of that conversation?

A. Well that was – see somebody gave me their name. Well there are the four places that he said I could call and check on him so I looked up that and I called them and she said that he had passed whatever tests or exams they take to become a senior financial advisor . . . She just said they had no problem with him. That everything that he went through with them was fine.

Q. And by they you mean this Society of Senior –

A. Society of Senior Advisors out in Denver, Colorado.

In a subsequent telephone conversation with Division personnel, she indicated that she thought Huck had the proper state registrations to provide investment advice, based on her telephone conversation with the Society of Certified Senior Advisors—despite the fact that he was not registered as an investment adviser representative with the Division. This helped her decide to follow Huck’s advice and purchase the annuities he was selling. The customer subsequently expressed concern she did not understand how the interest rate worked or that the product was not FDIC insured and that she had not been explained the surrender fees and lock-up period.

In addition, Huck routinely compared himself to a prospective client's existing investment advisor. One of the "dings" he would refer to in relation to the existing advisor was that such advisor was not a CSA like Huck was. Specifically, the testimony discussing certain "dings" indicated in the notes Huck took of a meeting with one of his prospective customers:

Q. And the reference [to] the CSA with a question mark?

A. I asked him if his advisor was a certified senior advisor.

Q. And the answer was no?

A. Well, I had a question, mark so, I wasn't sure if --

Q. Would that be -- would that be—is the idea that -- would that be a ding on the current advisor if he wasn't a CSA?

A. I think people should know how to handle seniors money and that is one indication of having an education on how to help seniors as well as not having too much risk of your life savings at risk in stock.

Q. Right. So was the idea that you'd be better at advising [client] than the current advisor because you had the special expertise associated with the CSA when [client's] existing advisor didn't.

A. I think my expertise in working exclusively with seniors gives me an advantage sometimes when somebody doesn't work exclusively with seniors.

Q. Was the idea that you were -- when you were talking to [client] that -- when you were talking to [client] did you suggest to him that because you were a CSA and [client's] existing advisor wasn't a CSA, that you might be a more appropriate person to advise [client]

A. That was one of the several things that I brought up.

Q. And was that one of the several things that you brought up to suggest that you would be a better advisor to [client] than his existing advisor?

A. I think any education I get that can help me learn more how to service my clients and provide them with good information is better.

Q. So the answer to my question [is] yes?

A. Yes.

In this case, Huck's client (a man now in his eighties), based on Huck's advice, purchased an equity-indexed annuity that he is, to this day, unhappy with due to the lengthy surrender periods, the high lock-up fees and the disadvantageous tax consequences.

Another potential Huck client, a 72-year-old man who was advised by Huck to sell virtually his entire portfolio of mutual funds in order purchase an equity indexed annuity, was asked by the Division whether he thought Huck he had any particular credentials. The answer was: "I know he had some sort of degree like a certified financial analyst or something of that sort. It sounded impressive." Huck has never had a certified financial analyst degree but was using the "CSA" designation.

The Division takes administrative notice of the fact that the requirements to obtain professional designations, and the monitoring of people who have obtained those designations, can vary greatly. For example, in order to get the Chartered Financial Analyst designation that the potential Huck client described in the previous paragraph mistook the CSA designation for, candidates must undertake a minimum of 250 hours of independent study and to take and pass Level I, II, and III exams. The core curriculum includes quantitative methods, economics, financial statement analysis, corporate finance, accounting and portfolio management and ethics and professional standards. Applicants for membership in the CFA Program must generally be sponsored by a supervisor and have 48 months of work experience in the investment decision making process. Candidates will generally take one exam per year over three years. These exams are written at a postgraduate level for experienced financial professionals. Exams are six hours and challenging, with only 39% passing the Level I exam in December 2006. The June 2006 Level I Exam resulted in a worldwide pass rate of 40%; The Level II and III passing rates for 2006 were 48% and 76% respectively. The CFA Institute, the governing body for CFA charterholders and members, enforces the Code of Ethics and Standards of Professional Conduct and the rules and regulations established by the CFA Institute Bylaws. Once a member of the CFA Institute, one is required to annually complete and sign a Professional Conduct Statement, disclosing any allegations of professional misconduct, litigation, arbitration, or customer complaints. All alleged violations of the code and standards are investigated by a designated officer, a regular member of the CFA Institute appointed by the CFA Board of Governors. The investigator may recommend disciplinary sanctions like private censure, public censure, suspension of membership, suspension of use of the CFA designation, revocation of membership, revocation of the CFA designation, or suspension from further participation in the CFA program. Notices of disciplinary sanction are published in CFA Magazine.

The CSA designation is obtained by paying a fee to take either the three-and-a-half-day live course, or a home study course, followed by a multiple-choice examination. Part of the syllabus includes marketing to seniors.¹ The home study option allowed

¹ The Society of Certified Senior Advisors has a Senior Marketing Systems division ("SMS"), which, according to its website, offers "a wide range of effective programs to assist with your marketing efforts". CSA Senior Marketing Systems offers CSAs a "Premium Marketing Package", which includes assistance in building a website and holding seminars (which, according to the csamarketingsystems.com website, helps CSAs get "in front of new prospects"), and providing publications "personalized with your picture and ad". It even offers a "monthly article, written on your behalf, with either a financial, or health/social topic for use in newsletters, seminar handouts, web site, or publication in a local paper". CSA Senior Marketing Systems boasts: "With almost no effort on your part, and for a very competitive price, we will mail publications with your photo and contact information printed on each copy, to your list or lists, one, two or three times per quarter." According to a page of a CSA-related web site titled "CSA Senior Marketing Systems, Smart CSA Marketing", CSA's may reserve a territory in which to operate. According to the web page: "The purpose of having territories is to limit, as much as possible, the potential for participants to encounter each other in their marketing activities." Senior Resource Alliance offers "a discounted package of marketing programs to take your business to the next level". The website also states: "Society of Certified Senior Advisors has an exclusive agreement with Business Printing, Inc. (BPI) to offer marketing programs to CSAs." The existence of SMS appears to contradict SCSA's statement, in its October 30, 2006 comment letter to the Division (discussed below) that "SCSA has no affiliation, through common ownership or otherwise, with any persons or entities who sell or market products or services."

participants to select their own proctor for the examination. It costs approximately \$1195 (for the online self-study course) or \$1395 (to take the classroom course) to obtain CSA's certification. Additionally, there is an annual renewal fee of approximately \$195. No prior financial or other experience is required to obtain the CSA designation. According to the SCSA website, there is also an ethics-based component to the CSA designation. Currently on the CSA website, it states:

Any professional who wants to become a Certified Senior Advisor (CSA)[®] must first agree to follow the *CSA Code of Professional Responsibility*.

Why? Because SCSA wants only **ethical, honest, principled** professionals among its members. Those are the only kind of people who should be working with seniors. [Emphasis in original]

However, SCSA does not appear to have had meaningful mechanisms to police the CSA Code of Professional Responsibility. Despite the CSA designation having been in existence since 1997, no CSA had ever been disciplined prior to 2006.² Among the individuals who have had their designation revoked after a formal board review one CSA (Donna Vogt) of Wisconsin, a former broker-dealer agent who amassed approximately thirty-three customer complaints, investigations, and regulatory actions prior to the CSA Board determining, in September 2006, she did not meet their ethical standards. (On February 21, 2007, the NASD permanently barred Ms. Vogt from the industry for urging senior to buy unsuitable mutual funds and variable annuities, and for disregarding age, risk tolerance and investment needs in advising clients.)

The following is testimony that was taken in the Division's recently settled administrative action against Investors Capital Corp. ("ICC") (Docket No. E-2005-0190, filed November 16, 2005, settled December 19, 2006; copies of the administrative complaint and the settlement agreement are available on the Division's web site). Murray Miller was an ICC-registered representative. Miller ran a business called Miller Insurance and Financial Strategies. Miller held himself out to the public as being in the business of providing expert assistance on investments, insurance products, financial planning services, asset analysis, estate planning, and more. Miller is not a registered investment adviser representative. Miller held himself out as a "Certified Senior Advisor" as part of his marketing himself as an expert in senior financial matters. The following victim (a woman in her sixties), referred to anonymously in the ICC complaint, went to Miller thinking she was getting a financial plan. She provided the following testimony:

Q. Well, it was your understanding that Mr. Miller did have some credentials, right?

A. Right.

Q. What did you understand him to --

² The SCSA disputes this fact—see discussion at footnote 7 below.

A. Well, he was a senior planner or whatever, senior, whatever it says on this, certified senior advisor, and you know, I figured that was something that was okay.

Q. And this is information he provided to you.

A. Right.

Q. And this discusses, some of this information, at least, discusses his employment, where he works --

A. Right.

Q. -- and his credentials.

A. Right, and his credentials. I mean, at some point, it even says you can call the Better Business Bureau if you have any questions about me. I don't see it here, but I've seen it. Maybe it's on his website. So, I just -- oh, it does say so at the bottom. So, I just took that as something I could believe without going any further.

Q. So, it sounds as though, and I don't want to put words in your mouth, you go to the seminar, he speaks to estate planning issues and savings and nursing home issues, issues that speak to your current situation. You see that he has credentials, and so you see it's someone that you may want to speak with.

A. Right.

The customer was advised by Mr. Miller to purchase an equity-indexed annuity—a high-commission product that proved to be unsuitable because the lengthy lock-up period prevented her from accessing funds that she needed for life expenses.

Another ICC registered representative operating with a similar approach was Thomas Alan Nix. Nix is not a registered investment adviser representative. Nix ran his own business, Nix Elder Planning. Nix held himself out as having expertise in financial planning, long term care planning, estate planning, and tax planning. Nix held himself out to the public as having more than sixteen years of experience creating financial plans, and that he was “committed to providing the best professional advice.” Nix also used such titles as “Certified Elder Planning Specialist” and “Certified Senior Advisor” in his public advertisements. Nix and Nix Elder Planning purported to offer comprehensive financial planning. Nix and Nix Elder Planning held seminars and/or workshops targeted to senior citizens in Massachusetts. At least one such seminar was billed as a “Senior Citizen Town Meeting.” Nix himself described the seminar as a forum to discuss “investment alternatives.”

At least one Massachusetts resident who attended the seminar ultimately purchased two equity-indexed annuities from Nix. This Massachusetts resident contacted the Division to file a complaint against Nix. Nix has stated that he met with this customer after the seminar and “did a full financial and estate planning review. I reviewed her existing investments, established her goals and her risk tolerance.” Under the guise of a “full financial review,” Nix ultimately recommended and sold the seventy-one year old customer two equity-indexed annuities totaling more than \$700,000. Both equity-indexed annuities carried exorbitant surrender fees for a surrender period of fifteen years.

Both equity-indexed annuities required a twenty-five percent surrender penalty during the first five years, which would amount to more than \$175,000 if assessed. Nix recommended the customer liquidate, transfer, and/or exchange securities to fund the purchase of the more than \$700,000 in equity-indexed annuities. On or near October 16, 2001, Nix presented the customer with a large amount of paperwork, requiring her to sign several pages consecutively without the opportunity to meaningfully review the content of that paperwork. The customer subsequently expressed that she expected to be required to surrender at least one of the equity-indexed annuities to meet her current income needs, and will be forced to pay surrender fees of possibly twenty-five percent, totaling amounts in excess of \$175,000. The Division believes that the selling of securities to purchase more than \$700,000 in equity-indexed annuities was unsuitable given the customer's age, investment objectives, financial situation, and needs.³

The Division recently received a complaint from an 86-year old Massachusetts resident who alleges that when he was 83 years old, and a few weeks after the death of his wife, he met with an annuity salesman bearing the "Certified Elder Planner" and "Certified Senior Advisor" designations and was advised to transfer his investment portfolio from traditional stocks and mutual funds to annuities which have large surrender penalties and lock-up periods of up to ten years. This matter is currently under investigation.

The examples set forth above are illustrative of the type of confusion seniors in The Commonwealth of Massachusetts have experienced with purported professional designations and the potential harm incurred as the result of the indiscriminate sale of unsuitable products. Over the past five years, the majority of investments sold by DelMonico, Miller, Nix and Huck to elderly Massachusetts investors were equity-indexed annuities and other annuity products. These investments are frequently funded with the sale of a security, at the advice of these salesmen that are purported to be experts in senior financial affairs. These products are so complicated that it is virtually impossible for a lay senior citizen to understand how they truly work and, as a result, the investor has to rely on the "advisor" who is recommending the purchase to explain the terms—which explanation often deemphasizes or entirely skips the unattractive features of the instrument such as the lock-up periods and surrender fees. While equity-indexed annuities purport to provide risk-free returns based on the performance of a securities market index, the policies are often laden with a variety of devices designed to reduce the real rate of return. Also, unlike index mutual funds, equity-index annuities do not typically provide for investor participation in the dividends accumulated on the securities represented by the index. Often, those annuities prove to be unsuitable for an elderly person, who finds his or her money locked up and subject to long surrender periods (typically ranging from 9 to 11 years) and large surrender fees (up to 25 percent of the

³ The equity-indexed annuities sold by Nix, discussed here, were issued by Midland National Life Insurance Company. The Division takes note of the fact, reported in the February 26, 2007 edition of "Investment News" ("Class Action Litigation Looms as New Hurdle for EIA Insurers"), that Midland National Life Insurance Company is the subject to two class-action lawsuits pertaining to unsuitable sales of its equity-indexed annuity products and that a number of other such lawsuits are pending against other issuers of equity-indexed annuities.

amount of the investment, but typically around 9 to 15 percent during the first year and decreasing over time) —many of which are glossed over or not disclosed in process of closing the sale. These lock-up periods and surrender fees can prevent a senior from accessing money needed to pay unexpected costs of living.

In addition, the Division has received a number of calls from senior purchasers of fixed annuities which had a teaser interest rate that was very favorable, but which dropped precipitously after the first year, the result of which being that a number of seniors who have called the Division find themselves wondering why they are locked for 6, 8 or 10 years into a product that is paying 3 ½ percent or 3 ¾ percent interest when they could go to the bank and take out a one-year Certificate of Deposit at a higher 5 percent rate of interest. A recent study commissioned by the Securities Litigation and Consulting Group, titled “An Overview of Equity-Indexed Annuities” (Craig McCann, PhD and Dengpan Luo, PhD 2006), studied the economics of equity-indexed annuities and concluded as follows:

We estimate that between 15% and 20% of the premium paid by investors in equity-indexed annuities is a transfer of wealth from unsophisticated investors to insurance companies and their sales forces. . . . Equity-indexed annuities are complicated investments sold to unsophisticated investors without the regulatory safeguards afforded to purchasers of similar investments. If brokers and agents told investors of the effect equity-indexed annuities’ shaving of index returns and extraordinary costs, the market for these products would dry up.

In addition, selling securities in order to purchase equity-indexed and other annuities can have significant disadvantageous tax consequences. Annuities are typically taxed at the ordinary income rate, not the lower capital gains rate that mutual fund and stock distributions and dividends pay. Moreover, mutual funds and stocks typically have the benefit of a stepped-up tax basis on death and equity-indexed and other annuities typically do not have a stepped-up basis upon death. The result is that if the purchaser (who is often in his or her seventies or eighties at the time of sale) dies during the lock-up period, his or her heirs will be taxed based on the initial basis of the annuity, without the benefit of a stepped-up basis. The Division’s experience has been that these tax consequences are virtually never explained to the purchaser. The Division believes that, in many instances, the purported senior specialist does not have the requisite background to understand the often-complex tax implications of the advice he gives and the products he sells.

When senior purchasers attempt to question the salesman about the transaction, the salesman cites his “expertise” in senior affairs (and the legitimacy conferred by the credential or designation) to reassure the purchaser that these really are suitable products. If that doesn’t work, the fine print disclaimers and other contractual documentation that the senior signed (again, at the advice of the purported senior specialist) is used to prevent the purchaser from escaping from the terms of the policy.

III. Senior Designations Fit Within a Broader Pattern of Deceptive Marketing to Seniors

Deceptive use of senior designations is part of a larger pattern of senior abuse through sophisticated and misleading marketing campaigns geared towards senior citizens. These campaigns often include a turnkey approach involving free meals and seminars where a person who is primarily an annuity and insurance salesman presents himself to potential senior clients as an objective, knowledgeable and unbiased advisor who has been certified as having expertise in senior issues and senior financial issues. After the seminar, the salesman typically holds a series of pre-structured, scripted meetings with the clients where no product sale is attempted at first. Instead, the salesman uses the first couple of meetings to obtain an understanding of the targets' finances and to gain their trust as an advisor. Then, after trust is established, the "advice" provided to the target is almost always to sell their assets in order to buy high-commission annuities and insurance products—despite the fact that such annuities are often unsuitable to the person's age, tax situation and financial circumstances.

As illustrated in Section II above, senior designations such as the ones discussed herein have been used to help further the salesman's image as being a qualified, expert or certified advisor to seniors. However, the Division wishes to emphasize that such designations are only part of the larger problem. Sophisticated marketing techniques have been designed to scare and manipulate seniors into purchasing annuities. For example, DelMonico (discussed in Section II above) uses the Piece of Pie marketing program. Piece of Pie is a Minnesota-based marketing organization with a marketing program that is geared towards selling annuities and other products to the senior marketplace. The program is provided to representatives in exchange for a share of commissions (through a set of contracts among DelMonico and other Piece of Pie representatives, Piece of Pie and the insurance wholesaler). The representative obtains an exclusive territory in which to use the Piece of Pie materials in exchange for a commitment to sell \$3,000,000 of annuities and insurance annually.

According to the Piece of Pie website, it is "a unique marketing system for selling financial products and services to seniors." The Piece of Pie marketing program consists of an initial free lunch or free dinner seminar and multiple meetings (all scripted by Piece of Pie) in which the salesman convinces potential clients that he is acting as their advisor and begins the process of gaining their trust. Under the Piece of Pie marketing system, it is not until the third or fourth meeting that the salesman, having used the seminar and initial meetings to have gained the trust of the target, finally advises the target to sell their existing assets and purchase annuities. According to the Piece of Pie website,

[t]he concept is simple: Inform Seniors about investment concepts that their present financial advisor has more than likely overlooked or failed to explain. This not only allows our associates to distinguish themselves from other financial advisors, it also allows them to begin a relationship that will in a short time make the prospect feel uncomfortable discussing any financial matters with their current advisor!

At another point in the website, the training allows users to “eliminate other advisors from the picture” and “get the client’s commitment to move all of their brokerage accounts to you.” Piece of Pie brags that through its teleconferences, “you’ll discover . . . how to get your prospects to distrust and want to leave their current advisor . . . and “how to make prospects eager – even impatient – to move all their wealth to you”.

Piece of Pie provides materials that enable the salesman who uses them to discredit the existing financial products held by the senior citizens they are targeting as potential sales clients. For example, DelMonico utilized a Piece of Pie seminar which discredits investing in bank products and securities, including in the accompanying handouts such comments as “Weapons of mass destruction that banks hold,” the idea that stocks protect you from inflation “is a myth,” “Problem with B & C shares,” “Problem with variable annuities,” and “Problem with bonds.” Piece of Pie’s presentation includes slides indicating that banks may not be safe. Other slides suggest that the concept of an average rate of return in the stock market is “a big lie”, the idea that stocks protect you from inflation is “the big misunderstanding” and that stocks give you big returns over time is “the big misinterpretation”.

Piece of Pie materials frequently bootstrap their criticisms of non-annuity financial products to other issues of concern to seniors, from bird flu to identity theft, the high cost of food and gasoline, safety issues and potential medical concerns. All of these are geared towards allowing the salesman to further his image of a friend and advocate of seniors. For example, another Piece of Pie information sheet circulated by DelMonico in May of 2005 to his senior clients is titled “GAS PRICES?!? What about Food? How to save \$2,000 a year on groceries . . . Timely tips from Michael DelMonico”. The mailer states:

[W]hat if I could show you simple changes in how you buy groceries that could save over \$2,000 a year? These are real life savings that a recent shopping demonstration brought to life. To follow you will find simple and easy ways to put more money in your pocket.

-- Do your own chopping

-- Store brands are perfectly good . . .

The flyer goes on to state:

Another place to save thousands of dollars per year is to eliminate the hidden fees in mutual funds and variable annuities. A study done in 2004 by Wake Forest University and the University of Florida concluded that the 30 largest mutual fund families are charging their investors 43% more on their funds than they are reporting to their investors.

On a typical \$100,000 account that would add up to about \$2,791 per year that an investor would pay . . . most of which they have no idea is being sucked out of the mutual fund or variable annuity by the company!

If you have mutual funds or variable annuities on which you would like to have a detailed analysis of fund charges, hidden or not, please give us a call. . . . This is a service that we do only for friends of DelMonico Financial Associates.

Piece of Pie representatives also give to prospective clients a book called “Sins of Omission, Things Your Broker Should be Telling You” written by the founder of Piece of Pie, who formerly held the CSA designation. The Piece of Pie founder’s biography reads in part: “After his wife’s grandmother entered a nursing home, [Founder] discovered an alarming lack of financial expertise available to seniors.” This part of his biography has been distributed to, and reproduced by, many Piece of Pie representatives. For example, a Piece of Pie representative operating in Massachusetts, circulated to potential senior clients, a biography which states, in part: “Several years ago, after his grandparent entered a nursing home, he discovered a lack of expertise available to seniors when it came to financial matters.”⁴

DelMonico made over \$700,000 in annuity and insurance sales in 2005 using the CSA designation and the Piece of Pie marketing platform.

Similarly, a marketing platform used by Huck has been created by Javelin Marketing, Inc. (“Javelin”), a California-based for-profit company that specializes in marketing insurance products to senior citizens. On its website, Javelin describes itself as follows:

Marketing is simple when you think from your prospect's view of the world. They don't care about products or services. They have problems they would like solved and if your marketing revolves around those emotional problems, then you will attract plenty of clients. . . .

Only once the prospect tells you that they need solutions and reveals their emotional problems do you mention that you can provide anything. In

⁴ Piece of Pie is a sponsor of the National Ethics Bureau (“NEB”), another purported credential that the Division has recently seen in connection with its investigations and enforcement actions. Because it does not directly target the senior market, and therefore would fall outside of the new amendments to the Division’s regulations, NEB is discussed only tangentially herein. NEB is a Colorado-based for-profit organization that purports, on its website, to be “an independent organization that promotes consumer confidence by providing a one-stop source to verify the business ethics of insurance and financial advisors”. On its website, the NEB boasts that all of its members “have an exemplary background of professional ethics” and “believe in transparent and above-board dealings with their clients”. The NEB designation was used by DelMonico to gain the trust and confidence of the people to whom he sold annuities. It is discussed in detail in the administrative action initiated by the Division against Michael DelMonico, Workman Securities Corporation, Paul Maxa and Robert Vollbrecht (Docket Number E-2007-0020, filed on March 6, 2007), a copy of which is available on the Division’s website.

fact, you should close the sale (get the prospect's agreement that they need something to guard against the emotional problems they reveal) BEFORE you explain anything about products. Most financial planners do it the other way round--they explain the product and service details, going through page after page of the product brochures or explanations and then try and close after the prospect's head is filled with confusing new information. You can get their commitment first before you even explain what you do.

Huck circulates a newsletter called "SeniorFinances", which it describes as a newsletter "designed for people approaching age 60 and older". Javelin provides the fully-written newsletter to Huck, who simply appends his picture and name on the first page, to give the impression that Huck has written the newsletter. Every month, Huck circulates a different newsletter addressing a different financial or tax topic of concern to seniors. On its website, Javelin advertises SeniorFinances newsletters as something that "positions you as a specialist". Specifically, on its website, Javelin describes the benefits of the SeniorFinances newsletters as follows: "You position yourself as a desirable specialist when you select one of the focused newsletters. For example, the General SeniorFinances newsletter positions you as a retirement specialist, the annuity newsletter as an annuity specialist, etc." At another point, the website states: "[W]hen you stay in front of them with a newsletter that positions you as a specialist, you insure that they remember you and you solidify your standing as the go-to financial advisor. You separate yourself from the others that contact them." The "specialist" does no more than append his name and picture to the article, as Huck did on numerous occasions. Huck testified before the Division that he does not make it a practice to tell his clients that he himself did not write the articles. He would only tell a client that he did not write the article if the client specifically asked.

Similarly, Broker's Choice of America⁵ (discussed above; referred to herein as "BCA") provided marketing materials to Huck (discussed above). BCA is a Colorado-based marketing organization geared towards teaching its "associates" sell annuities to senior citizens. In BCA's training manual, attached as an exhibit to the Administrative Complaint mentioned above (filed in 2002), "One on One One Call One Close Annuity Sales Presentation Manual," associates first learned that the best way to target seniors was to "Assume you are selling to: A 12 year old who is blind yet smart." According to the manual (authored by BCA's founder Tyrone Clark), agents had to keep it simple ("kiss - keep it simple stupid") for seniors. As alleged in the complaint and the exhibits thereto, associates learned that the best way to obtain senior prospects is through the seminar system offered by BCA. A major tenet in the training manual was that BCA's

⁵ The Respondents BCA, SBCN and Tyrone M. Clark entered into a Consent Order on December 20, 2002, in which they, without admitting or denying any facts or allegations in the complaint, agreed to cease and desist from further violations of the Act and regulations, to pay a fine of \$30,000, to be barred from effecting any transactions in securities and doing business as investment advisors or investment advisor representatives in the Commonwealth of Massachusetts, and to no longer grant the designation "Certified Elder Planning Specialist" to any Massachusetts resident.

associates must “probe and disturb” the elderly client. Associates learned how to alarm seminar attendees by preying on their emotions. “Remember, they’ll change when you hit their Fear, Anger and Greed buttons.” Associates were taught to begin by asking general questions which ultimately lead into more disturbing questions. According to the manual, “You’re probing and asking questions based on their problems. You then dig deeper with that problem(s) and enhance it. Then you bring up the issues which disturb them further. Now use one or all of them.” Throughout the BCA training manual, Respondents reinforced this overall objective: “PROBE, THEN DISTURB, THEN ENHANCE THE PROBLEM!”

Looking for anything that was a sign of emotional concern and financial worry, BCA trainees were instructed in the training manual to intentionally terrify the attendee in order to present BCA’s solution. Suggested scripts in the BCA’s training manual included fear-inducing phrases like:

“[M]any Senior Citizens in America today will end up penniless,”
“Today many seniors are being forced into poverty...” and
“Are you paying the ‘sneaky tax’? This is where the government lied to you and takes back your Social Security income from you through taxes.”

BCA, through its training manual, instructed associates to relay stories of the Great Depression and ask seniors if they recall what happened to people who had money in the banks during that time. “THEY LOST IT!” Noticeably absent was any reference to FDIC insurance protection that protects bank deposits. Associates further frightened attendees to sell securities and buy annuities by focusing on the volatility of stocks, mistrust of Wall Street, and the erosion of assets in a bear market. Associates were taught to deliberately advise seniors of the disadvantages of investing in securities as compared to other investments. Instructed by the training manual to be careful not to use the term “annuity” when making recommendations, agents misled seniors to believe in the desirability of investing in an “Insured Interest Deposit, Insured Interest Account, Section 72, CD Annuity, or Insured Deposit Account.” As alleged in the complaint, agents were instructed not mention the negative downsides, such as higher commissions, withdrawal or penalty fees, or tax implications associated with annuity products. Above all, BCA’s associates were taught to zero in and find the money. “Cash in on the spot...money market accounts, bond refunds, treasury bonds, treasury bills, mutual funds, stocks.” The complaint further alleged that every aspect of the seminar system was calculated to locate and transfer investment funds into an annuity. Regardless of suitability, age, financial status, time horizon, or investment returns — an annuity was presented as the only solution.

BCA associates were instructed to convince seniors not to let anyone — neighbors, kids, brokers or other financial professionals, know about their decision to purchase an annuity. Part of the BCA training manual’s instruction included the recommendation that associates state the following to their targets: “While we are waiting for the monies in your CD to be transferred to the Insurance Company...I would like to ask that you not mention a word about this to your kids.” This sales tactic not only

enabled associates to protect their annuity sales from any outside interference, but also makes it less likely that the senior will rescind his or her annuity decision without incurring a financial penalty during the allotted grace period offered by the insurance company. Even if a senior was unable to make a decision regarding his/her investments, associates learn “to make the decision for them. So when you close, you don’t ask, you automatically enroll them.” Agents were trained, “You’re like a Kamikaze Pilot. Focus, when you find your target then zoom in...Strike, Hit or Close!”

As mentioned above, designations and purported credentials implying an expertise in senior matters is only one small part of the burgeoning industry of aggressively and deceptively marketing annuities and other insurance products to senior citizens. Yet, the Division believes it is important to understand the particular issue of designations and purported credentials in the context of the broader industry trends discussed herein.

IV. Inquiries with Other State Regulators and Regulatory Advisories Issued by Other Regulators With Respect to Senior Designations

Inquiries with other states have indicated that that they have experienced similar issues with senior designations. In particular, one state has recently indicated that it has an open investigation into the Certified Senior Advisor (“CSA”) designation that reveals a similar pattern to that seen in Massachusetts. In that state, people have called in after having been convinced by CSAs to liquidate investments and buy fixed annuities. Another state has reported an issue with CSAs who continued to use the designation after it had lapsed. (This is something that DelMonico did in Massachusetts as well, suggesting that adequate mechanisms are not in place to monitor and prevent unauthorized use of the designation.) The Nebraska Department of Banking and Finance has issued a Special Notice for all Nebraska registered broker-dealers, their agents, and all federally covered and state registered investment advisors and their investment advisor representatives in the state of Nebraska, stating:

The Department has noticed a marked increase in the use of various designations, particularly related to senior citizens, by both broker-dealer agents and investment adviser representatives. From senior-oriented seminars to mass mailings and business cards, prospective investors often have insufficient information when trying to decide which designations represent meaningful achievement by the agent or investment adviser representative or which designations simply use empty marketing devices.

The Vermont Department of Banking, Insurance, Securities, and Health Care Administration in December 2005 issued a release stating that “regulators note a growing problem with certain so-called ‘senior specialists’ who hold themselves out as experts on issues of importance to the elderly. Some senior specialists lack proper credentials or training for the advice they are giving . . . Some of these specialists target senior investors through seminars where they offer to review seniors’ assets, including investment portfolios, and the specialist then recommends liquidating some or all of the

assets and using the proceeds to purchase only those products the specialist offers.” Arizona has issued a similar warning. Specifically, in a publication dated April 3, 2006 titled “Commission Issues ‘Dirty Dozen’ List of Investor Traps During Saving & Investing Month,” the Arizona Corporation Commission stated:

Senior Specialists. Individuals calling themselves “senior specialists” and other designations can create a false sense of security among investors. In some cases, these special designations consist of training that involves nothing more than marketing techniques and sales tips for certain investment products being targeted to seniors. In fact, the individuals touting these investments may not be properly licensed to sell securities or give financial advice at all.

In addition, the National Association of Securities Dealers encourages senior investors to carefully review designations to “ensure that a professional designation is more than just a string of letters”. The Securities and Exchange Commission also published a release warning investors as follows:

Some financial professionals use designations that imply that they are experts at helping seniors with financial issues. Many seniors, however, don't understand the sets of initials that may follow the names of these financial professionals or the meaning of the titles - such as "senior specialist" or "retirement advisor" - they use to market themselves.

The education, experience, and other requirements for receiving and maintaining a "senior" designation vary greatly. In some cases, a financial professional may need to study and pass several rigorous exams - after working in a designated field for several years - to receive a particular designation. In other cases, it may be relatively easy in terms of time and effort to receive a "senior" designation, even for an individual with no relevant experience.

In addition, the North American Securities Administrators Association issued a release dated December 2005 regarding senior credentials stating:

“Individuals may call themselves ‘senior specialists’ to create a false level of comfort among seniors by implying a certain level of training on issues important to the elderly. But the training they receive is often nothing more than marketing and selling techniques targeting the elderly,” said NASAA President and Wisconsin Securities Administrator Patricia D. Struck. . . .

NASAA’s Investment Adviser Operations Project Group has observed a significant increase in designations claiming to provide the holder with expertise in providing services to investors 55 years and older. “Although there are legitimate organizations whose members must complete rigorous

programs of study, pass extensive examinations, and have practical experience in order to receive their designations, a number of entities formed in the last few years have created designations with less stringent requirements”, Struck said.

V. Articles and Studies Regarding Senior Designations

The Division takes administrative notice of a number of articles and media reports addressing the issue of misleading senior designations. The following are examples of the types of information the Division has taken notice of.

- February 2007 *Consumer Reports* note: “Beware of bogus senior specialists who are targeting boomers’ investments” (“The seminar might include a free meal at a hotel or restaurant, and the pitch comes from a so-called senior specialist who claims expertise in investments for those over age 55. During the seminar, the specialist reviews seniors portfolios and typically recommends they liquidate stocks and invest instead in variable or equity indexed annuities. Both investments are high-commission vehicles with long holding periods and gigantic early-withdrawal penalties, making them inappropriate for seniors.”)
- September 4, 2006 *Investment News* article: “Some firms drop CSA designation” (“Citing regulatory concerns and questionable educational substance, one of the most popular ‘senior specialist’ certifications used in the financial services industry has been banned by a growing number of firms”).
- September 2006 *Kiplinger’s Retirement Report* article: (“Beware ‘Specialists’ Spinning Bad Advice”) (“Frequently, so-called senior specialists who run . . . seminars have little training or expertise in financial matters, according to regulators who have filed more than two dozen enforcement actions against advisers. . . . Indeed, regulators note, there’s been an explosion in recent years in designations that claim to show that advisers have these qualifications -- certified retirement financial adviser (CRFA), chartered senior financial planner (CSFP) and certified financial gerontologist (CFG), just to name a few. However, training requirements vary among certifications, from years of study to several hours of online coursework”)

The Division notes that the website of the Society of Certified Retirement Financial Advisors (“SCRFA”), one of the commentators discussed below, sets forth the results of a purported study of seniors. The Division does not have any sense of the degree of rigor involved in the study, yet finds it interesting that the SCRFA published the study. The question presented was: “When selecting a financial advisor, how important to you are each of the designations or titles listed below?”. Certain titles such as stockbroker, financial planner, registered investment advisor, etc. were provided as options. The results indicated that the title “Certified Retirement Financial Advisor” was rated as being of “High Importance” among 50% of those responding with respect to that

option. The purpose of publishing the study appears to be to evidence how effective the designation can be.

VI. Broker Dealer Limitations on Use of Certain Senior Designations

The Division takes administrative notice of the fact that certain broker-dealers have expressed concerns about the use of certain senior designations and have either prohibited or limited use of them. The Division notes the following examples:

- In December 2006, MetLife imposed restriction on the use of the “Certified Senior Advisor” designation
- The September 4, 2006 edition of Investment News reported that Genworth Financial Inc. “became the latest company to ban its employees and agents from using the Certified Senior Advisor designation”
- The Chief Compliance Officer of Workman Securities Corp., which had a number of registered representatives in Massachusetts using the “Certified Senior Advisor” designation, recently testified before the Division that the company would not let any registered representative use a designation with the word “advisor” in it unless they had passed the Series 65 exam.

VII. Discussion of Comments Received During Informal and Formal Promulgation of Rule and Changes to Rule Made in Response to Comments

A. Comments Received in Response to Initial, Informal Circulation of the Proposed Regulations

The Division informally promulgated an initial draft of the proposed regulations in October 2006. In response, the Division received a total of eight (8) comment letters. Most of the comment letters were supportive of the Division’s approach. Nonetheless, the Division amended the proposed rule in response to comments received.

1. Comments Leading to Changes in Initial Draft of Proposed Rule

Specifically, in response to comments received the following changes were made to the initial draft of the proposed rule:

- In response to comments from the Society of Certified Retirement Financial Advisors, Inc. and the Securities Industry and Financial Markets Association suggesting that the age of 50 was too young for one to be considered a “senior investor” or a “senior citizen”, the age used in the definition of “senior investor” and “senior citizen” was increased from 50 to 60;
- In response to comments from the Financial Planning Association expressing concern with respect to a perceived lack of clarity with respect to precisely which credentials and designations would be subject to the rule, proposed subsection (2) of 950 CMR 12.204(2)(i) and proposed

subsection (b) of 950 CMR 12.205(9)(c)(15) were added in order to provide additional guidance as to when a purported credential or professional designation indicates or implies that a broker-dealer agent has special expertise, certification or training in advising or servicing senior investors;

- In response to comments from the Society of Certified Retirement Financial Advisors suggesting that it would be unfair to deny use of a credential or designation while the sponsor of the designation is undertaking a good-faith effort to get credentialed, proposed subsection (3) of 950 CMR 12.204(2)(i) and proposed subsection (c) of 950 CMR 12.205(9)(c)(15) were added providing a grace period of between six to twelve months.

2. *Discussion of Other Comments Received in Response to Initial Promulgation of Rule and Other Ideas for Protecting Senior Investors*

In response to comments by the Financial Planning Association and the Securities Industry and Financial Markets Association that the Division should work with the Massachusetts Division of Insurance to develop a coordinated regulatory approach, the Division agrees with such comments and intends to continue its discussions with the Division of Insurance.

Two comment letters, from the Financial Services Institute and the Society of Certified Senior Advisors, Inc., suggested that the regulation is too burdensome and that the regulation would deprive seniors of helpful information. At the outset, the Division states that rather than prohibiting the use of questionable designations outright, the regulation permits users of such designations to continue their business so long as they meet the requirements set forth in the regulation. Moreover, the Division believes, based on other comments received, its discussions with industry personnel and its inquiry into the accreditation process, that the accreditation process would not be unduly burdensome for legitimate designations that merely need to become accredited. A hollow designation that would have to reinvent itself from the ground up in order to obtain accreditation may, indeed, find the process to be burdensome. The grace period described above is intended to mitigate any such burden and to permit users of such designations to continue using them during the accreditation process.

Similarly, the Division does not believe that the result of this regulation will be to deprive seniors of helpful information because it should not be unduly burdensome for legitimate credentials and designations to become accredited as provided in the rule. Moreover, the rule provides a grace period in order to allow use of the designation during the accreditation process.

Comments from the Financial Planning Association and the Society of Certified Retirement Financial Advisors requested that the Division include or exclude certain specific standards or requirements for a credential or professional designation. However,

the Division does not believe that it is in the best position or has the most appropriate expertise to decide what requirements or standards would be required in order to separate legitimate credentials or professional designations from sham ones. For this reason, the Division has chosen to rely on accreditation organizations that have the expertise to make these determinations. Comments received from National Organization for Competency Assurance (“NOCA”) and the American National Standards Institute have confirmed the Division’s understanding of the capabilities of those organizations. In addition, those organizations operate in a transparent fashion, as the standards they apply to their accreditation process are readily available to the public.⁶ Further, the Division understands that certain industry participants already incorporate standards provided by NOCA and other credentialing organizations and that at least some industry participants are already working with the accreditation agencies. For example, recently, in a letter dated January 26, 2007 from the Society for Certified Senior Advisors (one of the commentators whose comments are discussed herein) requesting information, the SCSA discussed certain safeguards it uses from NOCA:

[T]he safeguards we use to protect [our] exam are recommended by the National Organization for Competency Assurance, whose conferences we attend with some regularity and whose standards your office suggests we should meet should Secretary Galvin’s proposal regarding designations be adopted.

The Society for Certified Retirement Financial Advisors has requested, in certain comments, that “there be no additional requirements in excess of the very complete requirements for accreditation by the National Organization for Competency Assurance or the America National Standards Institute.” The Division agrees that the actual standards to be applied should be left to the third-party professional accreditation organizations which would apply those standards on a nationwide basis.

A comment the Division received from the Society for Certified Senior Advisors urged the use of a disclaimer in connection with the designation. However, it is doubtful that the use of disclaimers would mitigate consumer confusion in this context. First, the subject population is senior citizens who (based on the information discussed in sections II-V above) can be particularly vulnerable to some of the more sophisticated marketing methods of the organizations targeting them. If a designation is not a valid one, then one can infer that it was essentially created to deceive, i.e. to convince seniors that someone has education or expertise that they do not. It is doubtful that a purveyor of a spurious designation or credential could be trusted to come up with a meaningful disclaimer and not present it in a deceiving matter. Also, because many of these designations appear on (in addition to business cards and stationary) coffee mugs, pens, letter-openers, shirts and other paraphernalia, it is difficult to discern how a disclaimer would work other than as a reference to the website of the sponsor of the designation. The Division has had ample experience with disclaimers in websites being incomplete, difficult to find, or placed in a context where there is other, conflicting information that renders the disclaimer

⁶ See the NOCA’s October 30, 2006 comment letter, which is posted on the Division’s website, discussing in great detail NOCA’s credentialing process and standards.

meaningless. (See, for example, In the matter of Geoffrey Eiten et al., Docket No. 2006-0056, filed in September 6, 2006, which complaint appears on the Division's website).

The Society for Certified Senior Advisors--which was the commentator suggesting the use of a disclaimer instead of the proposed regulation--wrote a letter dated October 23, 2006 to the Division indicating it has put a disclaimer on its website to clarify that the CSA designation is not a financial designation (irrespective of how such designation is actually used in the financial planning context, illustrated in Section II above). The disclaimer states:

Important: Certified Senior Advisors (CSA) have supplemented their individual professional licenses, credentials and education with knowledge about aging and working with seniors. You should ask what those licenses, credentials and education signify. The CSA designation alone does not imply expertise in financial, health or social matters.

For a number of reasons, this disclaimer will not prevent seniors from being confused by misleading uses of the CSA designation. First, the disclaimer is buried on the CSA website and one has to click through a number of pages to find it. (Something that many in the senior target audience may not be able to do, given that many people in this population are not computer- and internet-proficient.) Second, on the same page of the website, there is information that directly contradicts (or, at a minimum, renders confusing) the disclaimer. Specifically, on the same page as the disclaimer quoted above, the following is stated:

When you work with a professional who has added the CSA designation to his or her achievements, you know you're working with someone who has invested time and effort in learning about the things that are important to *you*. Certified Senior Advisors (CSAs) are the only professionals who have: . . . **Demonstrated knowledge** of the key health, financial and social issues of the most importance to seniors. . . . [Emphasis in original]

Thus, a senior who has access to a computer and the internet and is able to find his way to the right page on the CSA website will be informed that the CSA has "demonstrated knowledge" but not "expertise" in financial issues.

In addition, the Division's experience generally has been that fine-print disclaimers are often not effective in the context of selling insurance or financial products to senior citizens. For example, the DelMonico victim referenced in Section II above wrote to the annuity company requesting to get out of one of the annuities DelMonico had sold her. She said that she was concerned that her money had been tied up in a product with a long lock-up period and large surrender fees when she had living expenses to pay. The fact that her money was going to be tied up had not been properly explained to her. In response, the annuity company denied her request. To justify the denial, the insurance company stated:

As part of the application, you signed the Confirmation Statement. By signing this Confirmation Statement, you confirmed that you had read the summary and understood the descriptions of the Loyalty Rewards Escalator 12 index annuity features. You also confirmed, by signing this Confirmation Statement, that neither Fidelity and Guaranty Life nor your agent has made any guarantees or promises regarding future index changes, or index credits under this policy. . . . Included with your applications for the above-mentioned policy, was a signed Senior Annuity Suitability Acknowledgement form. By signing this form, you confirmed that you understood that this annuity was not a short term investment. In addition to the Senior Annuity Suitability Acknowledgement form, as part of your application is a surrender schedule attached to the Confirmation Statement page showing when the surrender charges apply.

The Division has a multitude of examples of senior citizens calling in to express dissatisfaction with aspects of a financial product only to have the broker pull out fine-print disclaimers that the senior had signed or initialed but obviously had not understood.

Certain other means of protecting senior investors from spurious designations have been considered by the Division. For example, the National Association of Securities Dealers (the "NASD") has chart on its website titled "Understanding Professional Designations" which lists the various designations and, in tabular form, delineates the requirements in order to obtain the designations and provides certain other information regarding the designations. However, while the information in the chart is certainly helpful, the Division does not believe that a chart such as NASD's in and of itself adequately protects senior investors from the use of spurious senior designations described herein. None of the seniors discussed in Section II above checked NASD's "Understanding Professional Designations" chart in connection with the transactions described above. Many seniors do not use the Internet and do not have sufficient experience and ability searching on the Internet to locate the chart. In addition, the chart, while it certainly provides some helpful information, does not provide sufficient information to allow seniors to judge the validity of a given designation. In addition, the Division recently received testimony from DelMonico's broker-dealer (Workman Securities Corp.) indicating that they mistook NASD's chart describing the various designations for a list of approved designations. (When asked if the NASD chart describing the various designations constitutes designations approved by the NASD, Workman's President Robert Vollbrecht testified: "My understanding of the list is yes, that those are titles that registered reps are allowed to use.").

Consistent with the tenor of a number of comments received, the Division will continue to coordinate its efforts with those of other states with the ultimate goal of implementing a uniform regulatory regime. In the process of developing the regulation, the Division has conferred, and will continue to confer, with regulators in other states and in the federal government. Also, Massachusetts is represented on the working group of the North American Securities Administrators Association that is addressing this issue and is actively communicating with the members of the working group on this issue. (In

a March 12, 2007 article in Investment News titled “Galvin leads charge against senior fraud”, James Nelson, the Assistant Secretary of state for Business Regulations and Enforcement in the state of Mississippi, who heads NASAA’s special committee on senior designations, described the Massachusetts proposal as a “good model” and a “a huge step forward”.) However, given the immediate and continuing harm to investors that the Division has seen (examples of which are provided in Section II above), there is a current need to adopt a regulation addressing this issue (especially given the lengthy grace period written into the rule in response to comments received). The Division would be willing to consider altering any rule it adopts in order to harmonize it with uniform multi-state regulations when those are eventually developed. In addition, as discussed in detail above, the Division has declined to follow the suggestion of one commenter that a state-specific disclaimer would be the most appropriate regulatory response, as the Division believes that reference to national accreditation organizations will promote uniformity among the states.

B. Comments Received in Response to Formal Promulgation of Proposed Regulations

This subsection will focus on comments received in response to the formal promulgation of the proposed regulations in March 2006. The Division received a total of 26 comment letters. Comments were received from the Society of Certified Senior Advisors, Inc., Public Investors Arbitration Bar Association, the Woburn Council on Aging, the South Hadley COA, the Investment Management Consultants Association, the Waltham Council on Aging, the Massachusetts Division of Insurance, Elder Services of the Merrimack Valley, Inc. the Life Insurance Association of Massachusetts, the Sturbridge Council on Aging, the Financial Planning Association, the Pension Action Center of the University of Massachusetts Boston, the Society of Financial Service Professionals, Northwestern Mutual Life Insurance Company, Massachusetts AARP, MASSPIRG, the American National Standards Institute, the Securities Industry and Financial Markets Association, the Financial Services Institute, Inc., Pace Investor Rights Project and the Securities Arbitration Clinic, Wachovia Securities, LLC, the Massachusetts Attorney General’s Office, Fidelity Investments, the Center for Insurance Research (which comments were supported by Bonnie Burns, Training and Policy Specialist, California Health Advocates, Karrol Kitt, Bill Newton, Executive Director, Florida Consumer Action Network, Amy Bach, Esq., Executive Director, United Policy Holders, and Barbara van Kerkhove, Empire Justice Center)⁷, Dr. Jesse Arman (VP of Academic Affairs for the College of Financial Planning and Elder Services in West Bridgewater, Massachusetts).

To avoid repetition and redundancy, the Division will not discuss, to the extent possible, comments that are reiterations of those discussed in subsection VII(A) above.

The Division received a number of comments (from, among others, the Life Insurance Association of Massachusetts, Fidelity Investments and the Securities Industry

⁷ One of the attorneys employed at the Massachusetts Securities Division sits on the Board of Directors of the Center for Insurance Research, Inc.

and Financial Markets Association (“SIFMA”)) expressing concern that the regulation could be triggered by, and inadvertently require accreditation of, customary in-house job titles conferred by a broker-dealer or an investment adviser that use the word “senior” to connote seniority or specialized expertise within an organization. In response to those comments, the Division has modified the rule to clarify that it is not intended to apply to job titles provided by a broker-dealer or investment advisor specifying one’s area of specialization within an organization unless the facts and circumstances associated with the provision or use of such job title indicate that it improperly suggests or implies certification or training beyond that which the titleholder possesses or that it otherwise misleads investors. The Division also clarified that is also not intended to apply to job titles provided by a broker-dealer indicating seniority within an organization.

The Division received comments from the American College indicating that there should be an exemption for designations issued by educational institutions such as the American College that have been accredited by regional accreditation agencies. The Division also received comments from the, American National Standards Institute articulating the difference between a “certificate” received by an educational institution evidencing successful completion of an academic program and a “certification”, which implies that the person has been certified as having the requisite experience, education and ethics to accomplish a task. ANSI’s comments regarding the distinction between a “certificate” and “certification” program are as follows:

Anyone in the United States can develop a personnel certification program. In fact, over 3,000 agencies in this country say they “certify” individuals to perform a job. However, there are currently no governmental standards or requirements that provide for the evaluation and quality control of organizations operating personnel certification programs. The only current mechanism to identify if a certification body meets some nationally generally accepted standards/requirements is if the agency has undergone third-party evaluation and has been accredited. Increasingly, credentialing organizations seek third-party accreditation in order to enhance the credibility, quality and competitiveness of the programs they offer.

At times, agencies that refer to themselves as a “personnel certification body” really have what most professionals in the field of credentialing would call a “certificate” program. Although certificate programs are often times appropriate for use in determining qualifications for a job/profession, they should not be confused with certification programs. They are very different and care should be taken in defining “certification”.

The following are some generally accepted characteristics of a “Certificate Program” and a “Certification Program”:

CERTIFICATE PROGRAM

1. Generally associated with training or educational courses
2. There may or may not be an examination at the end of the training or educational courses
3. If an examination is given, it is designed to measure if the student learned the content taught in the course
4. The examination is generally developed by the instructor
5. Courses/training are designed by an instructor or group of subject matter experts
6. The certificate given is for “life” – it has no time limit
7. Most of the time there is no mechanism to take a certificate back from an individual for unethical or incompetent behavior

CERTIFICATION PROGRAM

1. Certification is based on a scientific study of the job/practice of the profession
2. Based on the scientific study; knowledge, skills and personal attributes are identified that are required to perform the job/practice successfully
3. The identified competencies are transformed into certification requirements such as passing an examination(s), meeting a code of ethics/conduct, and satisfying pre-requisites for taking the examination(s)
4. The identified competencies create the test(s) outline(s)
5. The examination outline is followed to write test questions or to create a performance-based practicum (observed behavior) by which to evaluate and measure an individual’s knowledge, skills, and attributes
6. The examination has to meet nationally accepted examination standards and provide statistical evidence in order to validate that the examination is fair, measures what it is suppose to measure, and gives consistent results.
7. There is a time limit on the awarded certification. Re-certification is required on an on-going basis.
8. Due process mechanisms for removing certification from an individual for unethical behavior must be place.
9. There is often a Code of Conduct that the applicant must sign and attest they will follow as long as they are certified.

The Division agrees that the regulation should not limit one’s ability to advertise certificates or degrees that one has earned, unless the facts and circumstances associated with the provision or use of such degree or certificate indicate that it improperly suggests or implies certification or training beyond that which the degree holder or certificate holder possesses or that it otherwise misleads investors. As a result, the Division has

added subsection 4 which states: “Subsection 12.204(2)(i) shall not apply to a degree or certificate evidencing completion of an academic program at an accredited institution of higher education unless the facts and circumstances associated with the provision or use of such degree or certificate indicate that it improperly suggests or implies certification or training beyond that which the degree holder or certificate holder possesses or that it otherwise misleads investors.”

The Division received a comment from SIFMA suggesting that the criteria in subsection 2 should be revamped so that the factors referred to in the initial draft as the primary factors in determining applicability of the regulation should not be the primary factors—but should be factors to be considered among others—in determining applicability of the regulation. A number of commentators (including SIFMA, Fidelity Investments, and the Life Insurance Association of Massachusetts and Northwestern Mutual) objected to the use of the word “retirement” in the title of designation being one of the primary factors in determining whether the rule applied, because retirement planning often occurs well in advance of the age of 60 and one could therefore be marketing “retirement” planning services to people much younger than 60. In response to these comments, the Division has revamped this section as follows:

2. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a purported credential or professional designation indicating or implying that a broker-dealer agent has special certification or training in advising or servicing senior investors, factors to be considered shall include: (a) use of one or more words such as “senior,” “retirement,” “elder,” or like words combined with one or more words such as “certified,” “chartered,” “adviser,” “specialist,” or like words in the name of the credential or professional designation; (b) how those words are combined; and (c) whether they are capitalized. Subsection 12.204(2)(i) is not intended to apply to job titles provided by a broker-dealer specifying one’s area of specialization within an organization unless the facts and circumstances associated with the provision or use of a job title indicate that it improperly suggests or implies certification or training beyond that which the titleholder possesses or that it otherwise misleads investors. It is also not intended to apply to job titles provided by a broker-dealer indicating seniority within an organization.

Section 2 is intended to guide the determination of whether a combination of words (or an acronym standing for a combination of words) constitutes a purported credential or professional designation indicating or implying that a broker-dealer agent has special certification or training in advising or servicing senior investors. The use of the word “retirement” in the designation is not conclusive—rather it is one factor among a number of factors to consider.

The Division received comments from SIFMA and Fidelity Investments to the effect that it is difficult to know the extent to whether they support or oppose the regulations when they do not know which accreditation agencies will be recognized by the Secretary. This commenter requested that the Division issue a list of recognized accreditation agencies in advance of promulgation of the final rule. The Division does not believe that this would be possible, as it is only when the final rule is effective that the Secretary will be empowered to recognize accreditation agencies pursuant to the terms of the rule. However, the Division does believe that it would be unfair for the restrictive provisions of the rule to go into effect prior to accreditation agencies having been recognized by the Secretary. The Division has addressed the timing issue by adding an additional two-month grace period commencing with the date that at least one accreditation agency is recognized by the Secretary.

The Division also received commentary from the Massachusetts Division of Insurance, which agreed that the misleading use of credentials or professional designations by securities or insurance professionals with senior consumers in a fashion which conveys unfounded expertise in matters related to seniors and their financial concerns is inappropriate and should be prohibited. The Division of Insurance also agreed that accreditation requirements would help alleviate the problem by ensuring that if a senior relies on or values a designation, the designation would represent a level of training, education or expertise that warranted that reliance or dependence.

The Division also received commentary from the Massachusetts Financial Planning Association, which strongly supports limitation of designations to those which meet a commonly understood baseline such as accreditation by NOCA. The Massachusetts Financial Planning Association (as well as other commenters) emphasized that the Certified Financial Planner (“CFP”) designation is accredited by NOCA’s certification arm (the National Commission for Certifying Agencies (“NCCA”). In addition, the Division received testimony from the American National Standards Institute which described the accreditation process and benefits of accreditation.

Certain commenters, including the American College, asserted that the cost of having to get a designation accredited would be extreme, yet provided no specific numerical evidence supporting that claim. The Division notes that the NCCA’s website lists a number of programs and designations that have been accredited, all of which presumably found the wherewithal to obtain such accreditation.⁸ In addition, the

⁸ These include designations such as the American Association of Critical-Care Nurses Certification Corporation’s CCNS, CCRBN and Progressive Care Certified Nurse designations, the American Association of Medical Assistants’ Certified Medical Assistant designation, American College of Sports Medicine’s Certified Personal Trainer, Exercise Specialist and Health/Fitness Instructor designations, the American Council on Exercise’s Clinical Exercise Specialist, Group Fitness Instructor, Lifestyle and Weight Management Consultant and Personal Trainer designations and many others, including the Certified Financial Planner Board of Standards, Inc.’s Certified Financial Planner designation. For a list of the NOCA accredited designations, see <http://www.noca.org/ncca/accredorg.htm>. Similarly, ANSI has accredited a number of designations, such as, for example, the Board of Certified Safety Professionals’ Certified Safety Professional designation. For a list of the ANSI-accredited designations, see http://www.ansi.org/conformity_assessment/personnel_certification/accredited_programs17024.aspx?menu

Division received comments from Edythe Pahl, Executive Director, Investment Management Consultants Association, which stated in part:

Do not be persuaded that third-party accreditation is difficult (it is not), expensive (it is not), time consuming (it is not), not consumer-focused (it very much is). The recommended accreditors are professional, centered, consumer-oriented, and non-political. I have personally worked with both organizations, as a volunteer and as a paid sub-contractor. If any designation that is currently being used in the senior financial advisory field is not meeting these accreditation standards, it should want to meet these standards as an attestation to professionalism and citizen-protection. Arguments to the contrary are hollow and meaningless.

In addition, the Division received comments from the Society of Certified Senior Advisors (“SCSA”), which repeated many of the comments it had previously submitted (and discussed in Section VII(A) above). However, because the designation sponsored by SCSA appears so frequently in Section II of this administrative record, the Division believes that it is appropriate to respond in greater detail to the SCSA’s comments.

The SCSA argues that the regulation does not advance the asserted governmental interest. In support of that argument, SCSA suggests that that the real problem is that seniors are getting advice that is unsuitable to their financial position and needs and that the proposed regulation does not address that issue. The focus of the SCSA’s comments is the following distinction:

The Discussion of Reasons does not suggest that the problem of unsuitable recommendations is due to a lack of understanding by salespeople of the financial needs of seniors. To the contrary, the examples provided . . . all involve allegations that unscrupulous persons are intentionally and fraudulently advising seniors to engage in transactions which such persons know are unsuitable. An accreditation process that is designed to enhance the understanding of those advising seniors will not have any effect on persons who knowingly make improper recommendations.

However, this comment does not address the point, set forth in great detail in Section II of this and the previously published draft of the administrative record, that the designations at issue enable certain providers of unsuitable advice to seniors by allowing them to imply that they have expertise and credentials that they may not have and to establish credibility using a certification that may not have much substance behind it. The Division has seen numerous instances (some of which are discussed in Section II above) of annuity salesman dressing themselves up as investment advisors in order to obtain the trust and confidence of senior citizens in the Commonwealth only to have the

“advice” provided consistently to be to sell other financial products and to buy the annuities that the “advisor” happens to be selling. Specifically, such designations enable unscrupulous salesmen to obtain credibility and gain the trust and confidence of their victims.

Moreover, the SCSA’s comments do not address the point in the administrative record that many designations imply an ethical seal of approval that might not be warranted or properly monitored. For example, the SCSA’s own marketing materials make a great deal out of its “Code of Ethical Responsibility”. However, SCSA does not appear to have had meaningful mechanisms to police the CSA Code of Professional Responsibility. Despite the CSA designation having been in existence since 1996 and there being approximately 25,000 thousand CSA’s, no CSA had ever been disciplined prior to 2005 or 2006.⁹ As discussed above, among the individuals who have had their designation revoked after a formal board review one CSA, Donna Vogt, of Wisconsin. Vogt was a former broker-dealer agent who amassed approximately thirty-three customer complaints, investigations, and regulatory actions prior to the CSA Board determining, in September 2006, she did not meet their ethical standards.

Whether sponsors of designations effectively monitor the people to whom the designation has been granted to ensure compliance with the requirements of the designation will be one of the factors that accreditation agencies will look to when determining whether to accredit a credential or professional designation.

The SCSA also argues that that there should be a “regulatory safe harbor” when there has been a sufficient disclaimer because (a) Massachusetts has a “disclosure-based regulatory scheme” and (b) requiring disclaimers would be less burdensome than requiring accreditation. The SCSA did not refute, or otherwise respond to, the discussion in the initially published draft of the administrative record (and above in Section VII(A)(2)) of how ineffective and potentially misleading to seniors its proposed disclaimer was—other than saying that they thought the disclaimer was “beneficial and reasonable” and that the Division could set forth requirements for a proper disclosure.

⁹ In a comment letter submitted on April 20, 2007, the SCSA, through its attorney, disputed the fact, set forth in the initial draft of the administrative record, that no CSA had been disciplined prior to 2006. The letter stated that “prior to 2006, there were 16 revocations, 18 suspensions, and 25 lesser forms of sanction, such as censure.” However, prior to publishing the initial draft of the administrative record, the Division made repeated attempts to obtain information from the SCSA, but was not provided with most of the information it requested. Specifically, when the Division, in a letter to the SCSA dated December 12, 2006, requested information regarding SCSA’s disciplinary proceedings, the CSA responded, in a letter dated January 4, 2007, that, “[a]ny and all restrictions placed on CSAs with regard to the use of a CSA and or/related marketing materials can be found on our web site, http://www.society-csa.com/docs/csa_code.pdf.” That web link contains a link for “disciplinary actions” which states: “The CSA Board of Standards (“Board”) publishes names of certain persons who have had their right to use the CSA designation permanently revoked as a result of formal Board review. To see this list, click [here](#).” When one clicks on that link, there is no reference to any enforcement action prior to 2006. Accordingly, there is a discrepancy between the SCSA’s response to the Division’s information request and statements made by its attorney on this point and, for the purposes of this administrative record, the Division does not know which statement is correct.

The Division does not believe, given the broad panoply and rapid propagation of senior-specific credentials and designations, that it would be effective to attempt to draft one-size-fits-all disclaimer requirements for all designations. In addition, the Division believes that relying on accreditation by nationally-recognized accreditation organizations will promote uniformity.

Moreover, the SCSA also did not address the Division's discussion in the administrative record (or the examples supporting that discussion) that disclaimers are often not effective with the senior population. It is the Division's observation that many seniors are credulous and trusting and are prone to believe what a senior "advisor" tells them (especially when that advisor is using an impressive-sounding credential). Moreover, we observe that seniors often do not read (or, if they do read it, do not understand) fine-print disclaimers. This point is reinforced by comments received from the Pace Investor Rights Project, which states:

We have seen firsthand in our clinic that the elderly are particularly vulnerable to investment fraud. Senior citizens can be easily impressed by credentials, and particularly susceptible to trust those with fancy labels and beefed-up qualifications, and are more willing to listen to sales pitches.¹⁰

As pointed out by certain commenters, this has been the topic of an NAIC (National Association of Insurance Commissioners) study group. In the August 17, 2006 draft of NAIC Disclosure Guidelines and Process, one of the findings was "[c]onsumers indicated limited understanding of the insurance disclosures they read. Even among those who said they understood part or all of the disclosures, subsequent comments often revealed how limited their understanding actually was." More troubling is the fact that "[i]n general, many consumers said they would like to have someone explain the disclosure to them. Many indicated they would expect that to be their insurance agent. They often said they didn't read disclosures." The Division believes that these characteristics are especially true of senior citizens and that it is important to evaluate the effectiveness of a potential disclosure not in a vacuum but in the actual, real-life context in which it would be used. See Weil, Fung, Graham, Fagotto, "The Effectiveness of Regulatory Disclosure Policies", *Journal of Policy Analysis and Management*, Vol. 25 No. 1 (2006) (effectiveness of a disclosure varies depending on the context in which the disclosure is made). Accordingly, the Division believes that even if it set forth highly detailed requirements for how a disclaimer could properly explain the limitations of a credential or designation, the purveyor of the credential could bury it amidst contradictory information on its website (as the SCSA has done) and the agent using the designation could render the disclaimer ineffective by providing a conflicting verbal explanation of the meaning of the credential.

¹⁰ In support of this point, the commenter cites The Consumer Fraud Research Group, *Investor Fraud Study, Final Report* (May 12, 2006), http://www.nasdfoundation.org/WISE_Investor_Fraud_Study_Final_Report.pdf.

The Division also received comments from the Public Investors Arbitration Bar Association (“PIABA”) supporting the regulation. PIABA’s comments stated in part:

Over the course of the past few years, our members have experienced, firsthand, the financial devastation that senior citizens have been subjected to when their financial resources, accumulated over a lifetime of savings and effort, are decimated by the improper and illegal activities of purported professionals who improperly claimed to have had a special expertise or training in the unique needs of older Americans . . .

[It] is at the “point of sale” where we believe that it is simply unconscionable that a salesman can obtain a purported certification and/or designation which would suggest or imply to a senior citizen that he or she has special training, special qualifications or some other form of special expertise when, in fact, the requirement to obtain that special designation is unregulated, illusory and nothing more than a self-serving marketing mechanism that falsely conveys an unbiased expertise to senior citizens.

The University of Massachusetts Boston, Gerontology Institute submitted comments which suggested deleting the grace period in order to immediately curtail the use of hollow designations. However, the Division believes that basic principles of reasonableness and regulatory fairness require that an entity sponsoring a designation be allowed to apply for accreditation and should not have to interrupt its business while undertaking in good-faith the accreditation process (which the Division understands can take as long as one year, or, potentially longer). In fact, the Division has amended the rule to expand the discretionary grace period that the Secretary may confer from six months to twelve months (upon a showing of substantial progress in the accreditation process and a showing that such additional time is needed to complete the accreditation process), which is in addition to the initial two month grace period (discussed above) and the automatic six month grace period for any entity that has applied for accreditation.

The Division believes that it is important to address the status of certificants that obtained a credential or designation prior to such designation or credential becoming accredited, i.e. whether “grandfathering” is allowed. Included in the comments NOCA submitted to the Division on October 31, 2006 were the NCCA Standards for the Accreditation of Certification Programs. Standard 8 states: “The certification program must award certification only after the knowledge and/or skill of individual applicants has been evaluated and determined to be acceptable.” One of the essential elements is that “[i]f any current certificants (at the time the application for accreditation is made) were granted certification without having to meet the examination requirements for certification, a rationale must be provided to explain how the competence of those individuals was evaluated and found to be sufficient.” Another essential element is: “Once a program is accredited, ‘grandfathering,’ or any other procedure for granting a credential in the absence of evaluating the knowledge and/or skill of an individual, is not acceptable.” The Division takes administrative notice of materials posted on the website of the American National Standards Institute (“ANSI”), the other accreditation agency

that submitted comments to the Division, which indicate that ANSI also addresses this issue an essential component of the accreditation process. Generally speaking, it is the Division's understanding that these two accreditation organizations do not allow grandfathering because it would allow preexisting certificants who have not met the more rigorous requirements that are often required by the accreditation organizations to hold the designation and would therefore dilute the effectiveness of the accreditation. However, it is the Division's understanding that the accreditation organizations allow a certain amount of flexibility such as, for example, allowing the sponsor of the designation to demonstrate how preexisting certificants can meet the higher standards through the recertification process instead of having to resubmit a new application to obtain the designation. Because the Division believes that this is an important issue, the Division has expanded the factors the Secretary considers when determining whether to recognize an accreditation organization to include the following language: "whether the organization has standards to address the status of designees who obtained the credential or designation prior to accreditation."

Finally, in response to repeated comments by a number of parties, the Division has raised the age used in the definition of "senior investor" and "senior citizen" to 65. Sixty-five is the age at which people born in 1937 or earlier are eligible for full social security benefits.

VIII. Conclusion

While the Division does not suggest that the regulations adopted today represent a comprehensive cure for the broad range of senior-abuse concerns outlined above, we believe that they will effectively prevent certain abusive practices, in particular those described in Section II above. The Division acknowledges that the regulations adopted today do not address the issues the Division and other regulators are confronting of sham designations that are not specifically targeted to senior citizens. They also do not directly address many of the deceptive and misleading marketing tactics described in Section III above. However, because the Division believes that the regulations will prevent certain abusive practices associated with questionable credentials and professional designations, discussed herein, the Division finds that promulgating the regulations is in the public interest and is necessary and appropriate for the protection of investors and is consistent with the policy and provisions of the Massachusetts Uniform Securities Act.