September 20, 2021

Via E-Mail

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: **Petition to Reopen a Rulemaking Requiring Certain Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles**

Dear Ms. Countryman:

The Petitioner, XY Planning Network ("XYPN"), submits this Petition pursuant to Rule 192(a) of the Commission's Rules of Practice. XYPN respectfully requests the Commission to issue a modernized rule that provides interpretive guidance of 'investment counsel' in section 208(c) of the Investment Advisers Act. The Commission can do so by revisiting a 2018 proposed rulemaking that would have restricted the use of two related titles, i.e., "advisor" and "adviser," when acting in certain capacities.[1] XYPN respectfully requests that the Commission focus on title restrictions, both in name and with respect to the functions that are represented to consumers, in adherence to the approach originally taken by Congress in the Advisers Act.

As part of this rulemaking, Petitioner XYPN also respectfully requests the Commission to reinstate specific title restrictions in connection with the use of the title "financial planner" and also in

[1] *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles;* SEC Release No. 34-83063; IA-4888; File No. S7-08-18, Apr. 18, 2018. *See* "Use of the Term 'Adviser' or 'Advisor'" at 459-460.

representing the offer or delivery of financial planning services.[2] These restrictions were applicable to the financial planning activities of brokers offering fee-based advisory services under an exemption from Advisers Act registration, a rule that was later vacated by a federal appellate court.[3] Despite a stated intention by the Commission to revisit this financial planning title restriction, made in a related 2007 proposed rule,[4] neither regulatory initiative was finalized.

I. Background

There are three ways in which a profession or industry is regulated: 1) by title or name; 2) by function; or 3) both. For example, a fiduciary providing investment advice or investment management services to a retirement plan subject to the Employee Retirement Security Act of 1974 ("ERISA") is regulated by function, not title.[5] In contrast, the Commission and state securities administrators take the third approach, regulating investment advisers by function *or* title.[6]

In order to fully understand this important concept, we must go back to the legislative history of the Investment Advisers Act of 1940 (the "Advisers Act") and the statutory text to appreciate that Congress gave the Commission authority to regulate the use of titles and functions of someone providing investment advice. Read closely, Section 208(c) of the Advisers Act stipulates that both requirements (title *and* function) must be met:

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[2] *Certain Broker-Dealers Deemed Not To Be Investment Advisers*, Release Nos. 34-51523; IA-2376; File No. S7-25-99. *See* Rule text, § 275.202(a)(11)-1(b), 'Solely incidental to' provisions, at 116, Apr. 12, 2005. (Hereinafter referred to as "the 2005 Broker-Dealer Rule.")

[3] The 2005 Broker-Dealer Rule was vacated Mar. 30, 2007, by the Court of Appeals for the District of Columbia Circuit in *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 375 U.S. App. D.C. 389, 2007.

[4] *See*, i.e., "We have decided not to propose this provision as part of this rule, which many financial services firms found difficult to apply. Instead we plan to consider issues relating to financial planning in light of the results of a study we commissioned by the RAND Corporation…. The RAND Study is expected to be delivered to us no later than December 2007…" *Interpretive Rule Under the Advisers Act Affecting Broker-Dealers*, SEC Release No. IA_2652; File No. S7-2207, at 11. Sept. 24, 2007. (Hereinafter referred to as the "2007 Proposed Rule.)

[5] Section 3(21) of ERISA generally defines an ERISA fiduciary as someone who exercises any discretionary authority or control regarding the management of an employee benefit plan or the disposition of its assets, including an individual who renders investment advice in exchange for compensation and meeting several other criteria under the Department of Labor's five-part definition. In addition, an advisor who renders discretionary investment advice to an employee benefit plan is defined as an investment manager in Section 3(38) of ERISA.

[6] For an explanation of regulation of investment advisers by function, *see*, i.e., sec. 202(a)11 of the Investment Advisers Act of 1940 ("Advisers Act): ''Investment adviser'' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities…"For examples of other title restrictions adopted by the Commission, see *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons who Provide Investment Advisory Services as an Integral Component of Other Financially Related Services*, SEC Release No. IA-770, Aug. 13, 1981; and *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services*, SEC Release No. IA-1092, Oct. 8, 1987.

> [I]t shall be unlawful for any person registered under Section 203 **to represent that he is an investment counsel or to use the name 'investment counsel'** as descriptive of his business unless (1) his or its principal business consists of acting as investment adviser, and (2) a substantial part of his or its business consists of rendering investment supervisory services.[7] (Emphasis added.)

In other words, in drafting the Advisers Act, Congress recognized the need to enact legislation with respect to *both* the function of providing investment advice (in particular, the rendering of investment supervisory services),[8] and the titles and other marketing representations made when offering such services. Accordingly, Congress did not inadvertently repeat itself when it said, first, that it was unlawful to "represent that he is an investment counsel" and second "or to use the name 'investment counsel' as descriptive of his business…" Instead, Congress stipulated that if an individual or firm *either* holds out using the investment counsel title, *or* otherwise represents that they offer such functional services, they must actually be in the business of doing so (such that they would be held accountable to the associated fiduciary standard of care for such counsel).

The investment counsel business model only emerged in the post-World War I era,[9] at a time when the securities industry had virtually a single name – investment counsel – to describe the provision of advisory services and the individuals who delivered such services, as separate from full-service brokerage firms and their brokers. As such, in drafting the Advisers Act legislation, Congress simply focused on the term "investment counsel" – but did so both as a title *and* as a descriptor. Read in this way, the first part of sec. 208(c) refers to a prohibition on representing oneself as an "investment counsel" while the second part prohibits use of investment counsel "as descriptive of his business" unless registered under Sec. 203 of the Advisers Act (and whose principal business was providing investment advice and "rendering investment supervisory services"). This approach ensured that even if the *title* for such services were to change in the future under the second prong, the regulation of the *function* would remain under the first prong.

Further, for those persons *not* registered under the Advisers Act, sec. 208(d) offers a catch-all provision prohibiting:

> any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this title or any rule or regulation thereunder.[10]

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[7] *See* sec. 208(c) of the Investment Advisers Act of 1940.

[8] *See* sec. 202(13), which defines "investment supervisory services" as a subset of the broader delivery of investment advice, providing "continuous advice as to the investment of funds on the basis of the individual needs of each client."

[9] *See*, e.g., "The emergence of the investment counselors as an important independent occupation, or profession, did not occur until after the close of the World War." *Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisor Services,* Report of the Securities and Exchange Commission, at 3. (1939)

[10] Sec. 208(d), Advisers Act.

In other words, sec. 208(d) also prohibited someone from holding out as an investment counsel (or representing that they provide investment advisory services), unless registered under the Advisers Act.

The legislative history of the Advisers Act also supports the notion that Congress sought to protect the reputation of investment counselors separate from the brokerage house role as salespersons. As noted in testimony by Rudolph Berle, counsel to the recently formed Investment Counsel Association of America (" ICAA"):

> …a great many people held themselves out, as I understand it, as being investment counsel, when actually they had none of those qualifications and…had the entire range from the fellow without competence and without conscience at one end of the scale, to the capable, well-trained, utterly unbiased man or firm, trying to render a purely professional service, at the other end.[11]

A colleague, Dwight Rose, president of the ICAA, went further in his testimony before a House committee, stating that "Some of these organizations using the descriptive title of investment counsel were in reality dealers or brokers offering to give advice free in anticipation of sales and brokerage commission on transactions executed upon such free advice."[12]

On the next page Exhibit A, an interactive Google Books chart, graphically illustrates the dramatic rise in the use of the term "investment counsel" between 1920 and 1940. Below it, Exhibit B conversely documents the decline in subsequent years of the same term as the Advisers Act began to curtail its use to only those who genuinely offered such investment counsel services, and the corresponding rise of other titles, such as "financial planner" and "financial advisor", as an alternative label for those who provide advisory services.[13]

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[11] *Supra* note 9, at 23.

[12] Testimony of Dwight Rose, *The Advisers Act: Hearings on H.R. 10065 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 76th Congress, at 736.

[13] Google Books Ngrams can be created at https://books.google.com/ngrams/graph?content=investment+counsel%2Cfinancial+planner%2Cstock+broker%2Cfinancial+advisor&year_start=1920&year_end=2010&corpus=28&smoothing=3.

Exhibit A

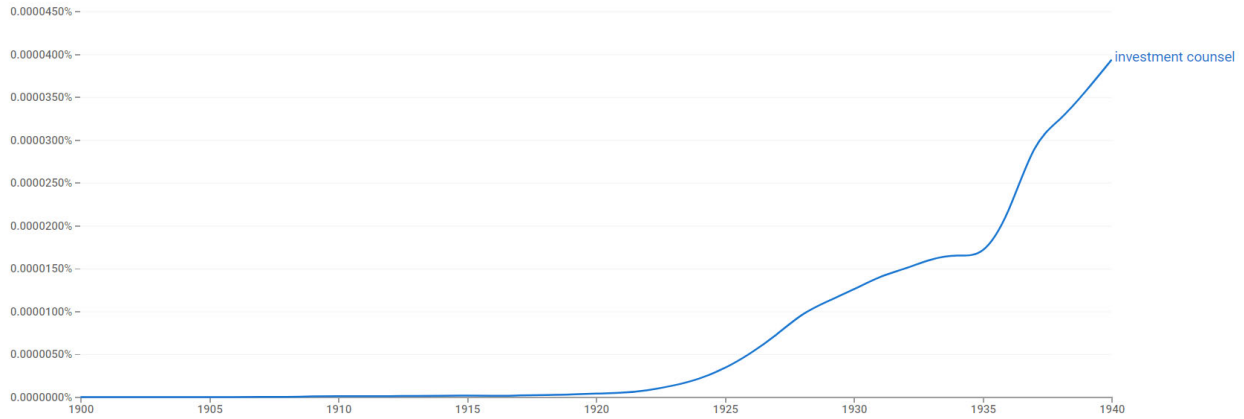
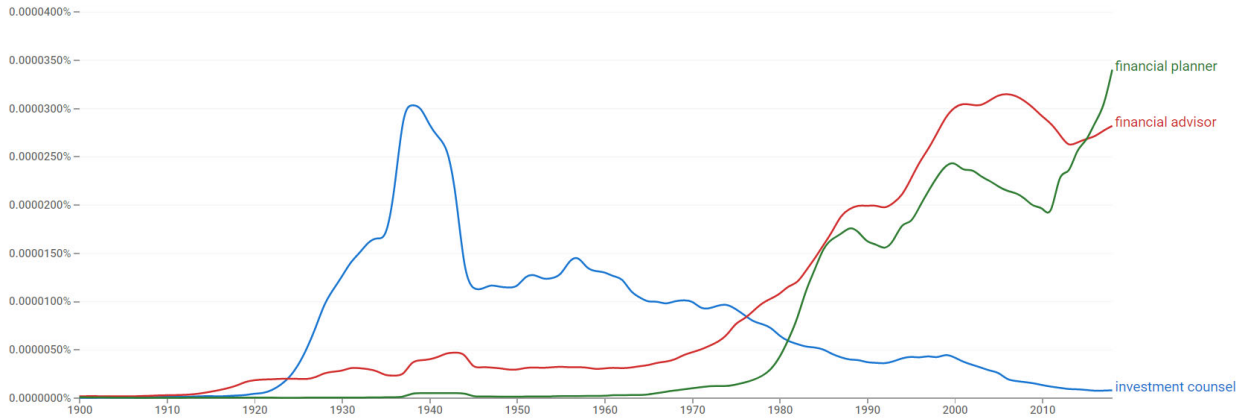


Exhibit B



As if to confirm the decline in common use of 'investment counsel', the ICAA, while remaining an active and respected advocate of the business of providing investment advice today, in 2005 changed its name to Investment Adviser Association.[14]

A. Recent Regulatory Background

On September 24, 2007, the Commission proposed an interpretive rule under the Advisers Act with respect broker-dealers and when their marketing activities and subsequent delivery of services may trigger registration as an investment adviser under the Act (the "2007 Proposed Rule").[15] The 2007 Proposed Rule was published in response to a federal appellate court decision[16] vacating the preceding 2005 Broker-Dealer Rule, which had raised questions about which provisions of the aforementioned rule the SEC would adopt going forward.

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[14] *See* "Background & Mission," Investment Adviser Association website. Available at https://www.investmentadviser.org/about/background-mission.

[15] *Supra* note 4.

[16] *Supra* Note 3.

In the original 2005 Broker-Dealer Rule, the Commission recognized the ongoing evolution of titles and functions provided by investment advisers over the previous six decades, stating that "financial planners today belong to a distinct profession, and financial planning is a separate discipline from, for example, portfolio management. This development has occurred only relatively recently, over approximately the last twenty-five years – well after the enactment of the Investment Advisers Act of 1940."[17]

Accordingly, the 2005 Broker-Dealer Rule stipulated that a broker-dealer would be required to register as an investment adviser if it either:

> "i) held itself out to the public as a financial planner or as providing financial planning services; or
> (ii) delivers to its customer a financial plan; or
> (iii) represents to the customer that the advice is provided as part of a financial plan or financial planning services."[18]

In other words, in a manner similar to Section 208(c) of the Advisers Act, the Commission chose to regulate both the title, and those who represent that they offer the function (even with a different title), explicitly noting "Under the rule, a broker-dealer would be subject to the Advisers Act if it portrays itself to the public as a financial planner or as providing financial planning services, whether it uses those particular terms or not." [19] The adopting release added that "the broker-dealer must also treat as advisory clients those customers to whom it represents that its advice is part of a financial plan even if it uses some other term to describe the plan."[20]

In its 2007 Proposed Rule, though, the Commission declared that it would not immediately reinstate the 2005 Final Rule provisions with respect to financial planning, opting instead to "consider the issues relating to financial planning in light of the results of a study we commissioned by the RAND Corporation (the "RAND Study")…"[21] Subsequently, the RAND Study did in fact show that financial planning is the most frequently provided advisory service after portfolio management, with 79% of registered representatives stating that they offered such services (without being dually registered as an investment adviser),[22] despite only 13% of consumers expecting to receive such services from brokers but 79% expecting such services from "financial advisors" or "financial consultants,"[23] showing that

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[17] *Supra* note 2, at 54.

[18] *Id.,* at 116-117.

[19] *Id.* at 57.

[20] *Id.*

[21] *Supra* note 4, at 11.

[22] See Angela Hung, et al, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* RAND Institute for Civil Justice, at Table 4.9. Jan. 3, 2008.

[23] *Id.*, Table 6.1.

consumers continue to rely on the marketing titles and representations of brokers and investment advisers to determine the services they will receive.

However, despite its promise to (re-)consider the issues relating to financial planning after the results of the RAND Study were delivered, in practice the Commission did not take up the issue again, instead allowing the 2007 Proposed Rule to remain in limbo for the next 14 years.

Nonetheless, on April 18, 2018, the Commission proposed a separate series of market conduct rules including: 1) a relationship summary disclosing information about brokerage and investment adviser firms to retail investors ("Form CRS"); 2) the aforementioned section proposing title restrictions that would have restricted the use of the title "advisor" or "adviser" by brokerage firms and associated registered representatives (the "Titles Rule");[24] and 3) other disclosures requiring broker-dealers and investment advisers, and their associated natural and supervised persons, to inform retail investors of their registration status with the Commission.[25] We refer to the combined rulemaking package as the "Proposing Release."

According to the Proposing Release, various studies and consumer focus groups commissioned by the SEC over the past decade had found

> …that the line between investment advisers and broker-dealers has become further blurred, as much of the recent marketing by broker-dealers focuses on the ongoing relationship between the broker and the investor as brokers have adopted such titles as 'financial advisor' and 'financial manager.'[26]

Form CRS was subsequently approved by the Commission and took effect June 30, 2019. However, the two other parts of the rulemaking proposing certain disclosures and restricting titles used by broker-dealers were again not adopted. Instead, the Commission integrated the registration status disclosure in Form CRS, which it said obviated the need for a separate, affirmative disclosure and, separately, stated that the title restrictions were not needed due to other disclosure requirements under another part of the Commission's regulatory package, Regulation Best Interest ("Reg BI").[27]

In the adopting release of Reg BI, the Commission stated

> …in light of the disclosure requirements under Regulation Best Interest, we do not believe that adopting a separate rule restricting these terms is necessary, because we presume that

[24] *Supra* note 1.

[25] *Id.* at 1-2.

[26] *Id.* at 166.

[27] *Regulation Best Interest: The Broker-Dealer Standard of Conduct,* SEC Release No. 34-86031; File No. S7-07-18, June 5, 2019.

the use of the term "adviser" and "advisor" in a name or title…to be a violation of the capacity disclosure requirement…"[28]

B. <u>Rationale for a New Rulemaking.</u>

XYPN disagrees with the alternative approach adopted above. Restricting the use of just two related terms (adviser and advisor) is only a small part of the universe of titles used today in the brokerage industry.[29] For instance, the RAND Study showed that the mere use of the title "financial planner" leads 88% of consumers to believe they will receive financial planning services (which the Commission in its 2005 Final Rule recognized goes far beyond the delivery of brokerage services), and independent research has similarly found that the "financial planner" title does the most to convey an implied relationship of trust and confidence,[30] yet the Commission did not restrict the use of such titles by registered representatives. As such, even with diligent enforcement of Reg BI's Disclosure Obligation, the Commission's 2018 rulemaking efforts will not resolve the "blurring" issue by restricting the use of only a limited handful of titles.[31]

Furthermore, the Commission's limitation on titles pertained only to registered representatives who were solely registered as such, and not those who are also dually registered as investment advisers, stating that it is only a violation of the Disclosure Obligation with respect to titles for "(1) a broker-dealer that is not also registered as an investment adviser or (2) a financial professional that is not also a supervised person o an investment adviser."[32] Yet despite allowing the full use of "financial advisor" titles for dual registrants, and stipulating that an "investment advisers' fiduciary duty generally applies to the entire relationship,"[33] the Commission ultimately declared that "where a financial professional who is dually registered… is making an account recommendation to a retail customer, whether Regulation Best Interest or the Advisers Act will apply will depend on the capacity in which the financial professional is making the recommendation is acting"[34] and that "a dual registrant is an investment adviser solely with respect to those accounts for which a dual registrant provides investment advice or receives compensation."[35] In other words, under Regulation Best Interest, dual registrants are permitted to use a title that conveys a fiduciary standard of care with respect to the entire advisor-client

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[28] *Id.* at 149.

[29] *See*, e.g., "For instance, the Nevada Securities Division recently proposed that a more comprehensive list of terms be regulated, including titles that contain any of the following: adviser, financial planner, financial consultant, retirement consultant, retirement planner, wealth manager, or counselor." Derek Tharp, Ph.D., CFP®, "How Financial Advisor Titles Shape Consumer Perceptions," *Nerd's Eye View*, Aug. 30, 2021. Available at https://www.kitces.com/blog/financial-advisor-titles-tharp-stockbroker-advertising-disclosure-best-interest-fiduciary-form-crs/.

[30] Tharp, "Consumer Perceptions of Financial Advisory Titles in the United States and Implications for Title Regulation," June 8, 2020. Available at https://doi.org/10.1111/ijcs.12597.

[31] *Id*. *See* also the consumer confusion issues cited in the Commission's research, *supra* note 1, footnote 5, at 8.

[32] *Supra* note 27.

[33] *Id.* at 60.

[34] *Id.* at 99.

[35] *Id.* at 126.

relationship, but in practice will only be held accountable to that standard for particular *accounts* that the dual registrant manages, and without any separate obligation to disclose, in real time, when that capacity changes.

Furthermore, the SEC's approach in the Proposing Release still fails to consider Section 208(c) of the Investment Advisers Act, which limits the ability to even *represent* that an individual provides investment counsel services "unless his or its principal business consists of acting as an investment adviser."[36] Which is important, because if the services of the financial advisor (who represents themselves as such) must be *principally* acting as an investment adviser, then subsequent implementation of recommendations as a broker could never be "solely incidental" to its brokerage services. As in the end, it's logically impossible for an advice service to be both a "principal business" and a "solely incidental" one; accordingly, under Section 208(c)(1), when titles and/or representations of investment counsel services are made, the dual registrant would have to be a fiduciary with respect to the entire relationship – and not just the account – because of its prior titling and marketing representations to the client.

Thus, XYPN believes that in conjunction with a related Petition that it also submitted today,[37] which would further clarify the scope of the broker-dealer 'solely incidental' exemption from adviser registration (not just with respect to titles as discussed here, but also more broadly with respect to financial planning services offered by brokers), the Commission could make significant strides in clearing up decades of consumer confusion with regard to the aforementioned regulatory approach combining functional and title regulation. By revisiting the original legislative purpose for restricting titles under Section 208(c), and limiting 'solely incidental' advice as intended by Congress to a narrow, functional role, we believe the Commission will greatly enhance investor protection with a greatly expanded fiduciary 'net' that also serves a twin purpose of preserving the reputations of registered investment advisers ("RIAs"), including dual registrants.[38]

II. The Petitioner

XY Planning Network is a national network of fee-for-service financial planners. XYPN provides members with technology, compliance, and business consulting services, representing more than 1,500 independent financial planners in all 50 states.

XYPN members serve primarily Generation X and Generation Y investors, providing financial planning advice for which XYPN members receive fee-only compensation for their services, without asset minimums or product sales.

[36] Sec. 208(c)(1)

[37] *See* XYPN *Petition for a Rulemaking to Finalize Proposed Interpretive Rule Under the Advisers Act Affecting Broker-Dealers et al,* September 20, 2021.

[38] By 'dual registrants' we use the same terminology in the Form CRS adopting release, i.e., "an associated person of a broker-dealer and a supervised person of an investment adviser…" *Form CRS Adopting Release*, at 99.

As noted by the SEC in a 2005 rulemaking, "Typically what distinguishes financial planning from other types of advisory services is the breadth and scope of the advisory services provided."[39] Given that the investment advice component is integrated with other services as part of the financial planning process, unless an exemption is available, since the emergence of financial planning as a discipline in the 1970s, individuals holding out to the public as financial planners are subject to oversight by state securities administrators or the SEC.[40] As such, XYPN members are primarily registered as investment adviser representatives of state RIAs, but remain subject to Commission authority "with respect to fraud or deceit against an investment adviser or person associated with an investment adviser."[41]

In addition, as a condition of membership XYPN members must sign a fiduciary oath and receive only fees paid directly by their clients in compensation for financial planning services.

XYPN members are directly impacted by the failure of the Commission to restrict the use of advisor-like names and titles in two primary ways. First, XYPN's business model depends in substantial part on financial planners needing to register as RIAs in order to be compensated for their financial planning advice. By allowing natural persons associated with broker-dealers to hold out as financial planners or use similar advisor-like titles, and to provide the same scope of financial planning services as XYPN members, but without being subject to a fiduciary standard or registration as an investment adviser, the absence of comprehensive title restrictions thereby reduces the likelihood that such persons associated with broker-dealers will register as investment advisers, resulting in a loss of business for XYPN.

Second, the SEC's lack of a comprehensive rule or guidance prohibiting the use of the title 'financial planner' or similar advisor-like titles poses a competitive threat to XYPN's members. In subjecting broker-dealers to a lower standard of conduct under Reg BI, the absence of clear prohibitions on fiduciary-like titles (in addition to permitting communications marketing financial planning and similar investment counsel services) allows brokerage firms to imply they, too, will deliver such advisory services. This regulatory vacuum creates (or rather formalizes) an unlevel playing field in which natural persons associated with broker-dealers can hold out as financial planners, or use similar titles to claim that they will provide identical financial planning services to consumers, and yet be subject to a lower standard of care and benefit from reduced legal exposure.

Stated another way, by failing to properly address title restrictions, the current regulatory scheme under Regulation Best Interest ("Reg BI") allows non-fiduciary salespersons[42] to hold out as trusted advisors by using fiduciary-advice-sounding titles like "financial planner,"[43] creates an

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[39] *Supra* note 2 at 54.

[40] *See,* e.g., *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons who Provide Investment Advisory Services as an Integral Component of Other Financially Related Services,* SEC Release No. IA-770, Aug. 13, 1981; and *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services*, SEC Release No. IA-1092, Oct. 8, 1987.

[41] *See* State and Federal Responsibilities. Sec. 203A(b)(2) of the National Securities Markets Improvement Act of 1996 (15 USC 80b-3a.)

[42] Here we refer to securities brokers and state-licensed insurance producers as 'non-fiduciary salespersons.'

[43] *See*, e.g., *"Consumer Perceptions of Financial Advisory Titles in the United States and Implications for Title Regulation"*, International Journal of Consumer Studies, June 8, 2020, available at

expectation that the consumer will receive unbiased financial planning advice or other investment counsel services with fiduciary accountability, only to end in a 'shell game' in which, for example, a dual registrant acting as broker is not obligated to adhere to the fiduciary standard of care for their subsequent advice implementation, nor obligated to provide 'real-time' disclosure of the change in capacity to salesperson.

Nor does Form CRS dispel the fog with its failure to clearly distinguish between advisors and salespersons by attempting to focus solely on an explanation of the functions that brokers and investment advisers provide, and the standards of care under which they operate, without limiting the titles and other marketing representations about the nature of the services to be provided before Form CRS is delivered.[44] In other words, the Commission's current approach effectively allows consumers to have an expectation that they will receive fiduciary advice services – based on the titles used and other marketing representations made – for which consumers are expected to subsequently read disclosures that explain a substantively different nature to the relationship, after the expectation is already set (such that some consumers may not even feel the need to read such disclosures, having already – albeit incorrectly – drawn inference by the title and marketing representations alone as to the nature of the relationship).

By curbing the unfettered use of various names and titles, the Commission can substantively enhance investor protection by establishing a clear demarcation between product sales and stand-alone investment advice.

A. <u>Discussion</u>

The majority of XYPN members are registered as investment advisers with state securities administrators and not the Commission. However, the SEC exerts significant influence on state regulatory policy in two ways, through: 1) promulgation of rules that may be adopted in similar form by the states;[45] and 2) state regulations that incorporate SEC rules by reference.[46] Moreover, state securities administrators have also promulgated rules governing titles. More than a decade ago state regulators focused on protecting vulnerable seniors by adopting a model rule restricting the use of certain designations (i.e. titles) that imply specialty training when "advising or servicing senior citizens or

https://doi.org/10.1111/ijcs.12597, which showed that "financial advisor" titles, and in particular the "financial planner" title, creates a substantively different expectation of trust and competency when used to describe a financial salesperson than using actual sales-oriented titles.

[44] For example, the proposing release of Form CRS required investment advisers to state that they are held to a fiduciary standard. *See* Appendix E, Sample Firm, "Our Obligations to You." However, the final instructions removed the reference to a fiduciary standard. Instead the final release requires an identical, milquetoast boilerplate description of a broker-dealer's legal obligations and those of an investment adviser, i.e., "…we have to act in your best interest and not put our interest ahead of yours."

[45] *See*, e.g., *NASAA Model Rule for Investment Adviser Written Policies and Procedures Under the Uniform Securities Act of 1956 and 2002,* North American Securities Administrators Ass'n., Adopted Nov. 24, 2020. NASAA's request for public comment on the proposal noted that the SEC had required investment advisers under its purview "to adopt and implement written policies and procedures…since February 5, 2004."

[46] *See*, e.g., Ohio Laws & Administrative Rules, Sec. 1707.20(2) that states, "Notwithstanding sections […] of the Revised Code, the division may incorporate by reference into its rules any statute enacted by the United States congress or any rule, regulation, or form promulgated by the securities and exchange commission…in a manner that also incorporates all future amendments to the statute, rule, regulation, or form."

retirees," including special review of word combinations that include "senior" with other adjectives or nouns such as "adviser," "consultant" and "planner."[47]

As such, XYPN believes the Commission should update its guidance to Section 208(c) of the Advisers Act, in recognition that the "investment counsel" title may no longer be in common use, but the functional service of "investment counsel" remains as applicable as ever… such that the investment adviser and brokerage marketplace today needs more current guidance about how to apply Section 208(c) in the current environment, and the facts and circumstances that the Commission would use today to determine whether the individual or firm has "represented that he is an investment counsel" under Section 208(c) of the Advisers Act.

Engaging in updated guidance of Section 208(c) would also likely necessitate revisiting the title restrictions part of the Proposed Rulemaking and the unresolved 2007 Proposed Rule; and expand the titles restrictions (including prohibiting misleading communications to investors) in a new rulemaking to clear up this long-running problem with 'blurring' of sales and advisory roles that dates to the mid-1990s, if not earlier. XYPN believes the alternative adopted by the Commission, to deem use of the titles 'adviser' or 'advisor,' to be a violation of the Disclosure Obligation in Reg BI, simply fails to address the myriad other advisor-like titles commonly used today that exacerbate consumer confusion, particularly with respect to the proliferation of the term "financial planner" that the Commission itself previously acknowledged to be a "separate and distinct" discipline.[48] The Commission should be commended for at least exploring the titles issue, but the current solution has hardly touched the surface of a problem that has been around for decades.

A comprehensive rulemaking is needed even more so given the ongoing growth of financial planning over the years. After determining that persons using the title of financial planner should be registered as investment advisers because they typically provide investment advice as part of their services, and more generally that financial planning is a distinct advice profession unto itself, the title issue was placed on a regulatory backburner until the SEC adopted the 2005 Broker-Dealer Rule that at least did not exempt brokers holding out as financial planners, or offering financial planning services.[49] However, despite the fact that the Commission did take steps as part of the 2005 rulemaking to regulate individuals with respect to both function and title in offering financial planning services, those restrictions were eliminated along with vacatur of the rule in 2007,[50] and have not been revisited since. In the meantime, though, the number of CFP ("CERTIFIED FINANCIAL PLANNER™") certificants has nearly doubled, from less than 50,000 in 2005 to more than 90,000 today.[51]

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[47] *NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations*, North American Securities Administrators Association, adopted Mar. 20, 2008.

[48] *Supra* note 2, at 11.

[49] *Supra* note 2.

[50] *Supra* note 3.

[51] *See*, e.g., CFP Board Demographics, at https://www.cfp.net/knowledge/reports-and-statistics/professional-demographics.

Finally, the Gramm-Leach-Bliley Act, enacted by Congress in 1999, exacerbated this issue through repeal, in part, of the Glass-Steagall Act of 1933, that permitted the creation of bank holding companies and the cross-marketing of a variety of investment products that generated additional conflicted advice to retail investors under the rubric of various advisor-like titles used to market what were ultimately engagements for product sales.

The Commission does not have to wait another 80 years for Congress to act again in addressing title restrictions. It can do so on its own, based on its rulemaking authority under sec. 208(c) of the Advisers Act.

For these and many other reasons addressed in the Petition, we respectfully request the Commission to undertake a comprehensive rulemaking that modernizes Section 208(c), clarifies when a broker or investment adviser will be deemed to be "representing that he/it is an 'investment counsel'" in the marketing of their business,"[52] prohibits the use of certain names and titles implying an advice relationship (and the attendant) fiduciary status (with respect to both the profession of investment counsel, and the newly distinct profession of financial planning) unless the individual is registered with the Commission to provide such advice, and extends that advice relationship to the *entire* relationship with the client.[53]

We provide sample language below for the text of the rule.

III. Statement Setting Forth the Substance of the Proposed Rule

XYPN respectfully submits the follow draft language (with additions and deletions so noted) for consideration in amending the 2018 Proposed Titles Rule:

§240.15*l*-2 Use of ~~the~~Certain Terms, Including "Adviser," ~~or~~ "Advisor" and "Financial Planner."
(a) A broker or dealer, or a natural person who is an associated person of a broker or dealer shall be restricted, when communicating with a retail investor, from using as part of a name, ~~or~~ title, or holding out as offering advisory services ~~the term "adviser" or "advisor"~~ listed in sections (b),(c) and (d) unless any such:

(1) broker or dealer is an investment adviser registered under Section 203 of the Investment Advisers Act of 1940 or with a State, or

(2) natural person who is an associated person of a broker or dealer is a supervised person of an investment adviser registered under Section 203 of the Investment Advisers Act of 1940 or with a State, and such person provides investment advice on behalf of such investment adviser.

(b) Uses the title or name "adviser," "advisor," "consultant," "counselor," "planner," in association with the terms "investment," "financial" or "retirement."

(c) Holds out generally to the public as providing financial planning services; or

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[52] Sec. 208(c) of the Advisers Act.

[53] *See,* e.g., "The fiduciary duty to which advisers are subject is broad and applies to the entire adviser-client relationship." *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, SEC Release No. IA-5248; File No. S7-07-18, June 5, 2019, at 6.

(i) provides advice as part of a financial plan or in connection with providing financial planning services; or

(ii) delivers to the customer a financial plan; or

(iii) represents to the customer that the advice is provided as part of a financial plan or in connection with financial planning services; or

(d) Uses any other title, name, or combination thereof implying investment counsel or investment advice services, that may create a fiduciary relationship of trust and confidence between the retail investor and the natural person using such title or name, that the Commission shall determine is misleading or otherwise acts as a fraud or deceit under sec. 206 of the Advisers Act in providing any advisory services subject to the aforesaid Act.

(e) For purposes of this section, "financial planning" is defined as a process used to help a retail investor meet his or her financial goals and objectives, which may include managing assets and liabilities, cash flow, the financial impact of health considerations, and to provide for educational needs, achieve financial security, preserve or increase wealth, identify tax considerations, prepare for retirement, pursue philanthropic interests, and address estate and legacy matters.

(f) The term *retail investor* has the meaning set forth in §240.17a-14.

By the Commission.

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In summary, XYPN respectfully requests that the Commission consider the title restrictions issue expeditiously and initiate a new rulemaking process as soon as practical.

Of course, XYPN is happy to provide any additional information that may be requested by the Commission or its staff in consideration of this Petition.

Respectfully,

Michael Kitces
Executive Chairman and Co-Founder, XY Planning Network