

March 1, 2019

Via Electronic Submission

Diana Foley
Securities Division
Office of the Secretary of State
2250 Las Vegas Boulevard North, Suite 400
North Las Vegas, NV 89030

Re: Notice of Draft Regulations and Request for Comment

Dear Ms. Foley:

The Investment Adviser Association¹ (IAA) appreciates the opportunity to comment on the Securities Division's draft regulations regarding fiduciary duty. The IAA's members are exclusively investment adviser firms registered with the U.S. Securities and Exchange Commission (SEC) under the Investment Advisers Act of 1940 (Advisers Act). We therefore have a strong interest in ensuring that the Securities Division does not extend an additional layer of substantive regulation to SEC-registered investment advisers (SEC Advisers), which would be contrary to the National Securities Markets Improvement Act of 1996 (NSMIA). We urge the Securities Division to make clear that any final regulations do not apply to SEC Advisers or their representatives, consistent with NSMIA.² We provide suggested language below that we believe will make this clear.

NSMIA Prohibits States from Directly or Indirectly Imposing Substantive Regulation on SEC Advisers

As we discussed in our letter to you dated October 2, 2017,³ Congress enacted NSMIA to address its concerns about the overlap in regulation and duplication of regulatory resources at the federal and state levels. Congress's goals in enacting NSMIA were to "moderniz[e] and

¹ The IAA is a not-for-profit association dedicated to advancing the interests of investment adviser firms registered with the Securities and Exchange Commission (SEC). The IAA's more than 650 member firms manage more than \$25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information please visit our website: www.investmentadviser.org.

² The IAA supports statements made by the Investment Company Institute in its letter dated March 1, 2019 regarding SEC Advisers.

³ See Letter from Gail Bernstein and Paul Glenn, IAA, and Tamara K. Salmon, Investment Company Institute, to Diana J. Foley (October 2, 2017), available at <https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/IAA-ICI-Letter-Nevada-12-2-2017.pdf>.

rationaliz[e] aspects of the regulatory scheme, including the respective responsibilities of [f]ederal and [s]tate governmental authorities over the securities markets,”⁴ and to “eliminate[e] the costs and burdens of duplicative and unnecessary regulation.”⁵

Title III of NSMIA, the Investment Advisers Supervision Coordination Act (**Coordination Act**), broadly preempts state regulation of SEC Advisers.⁶ States retain some limited authority over such advisers, only in that they may: (i) require the registration, licensing, or qualification – and related payment of state filing fees – of any individual investment adviser representative with a place of business in the state; (ii) require the filing of documents filed with the SEC, but only for notice purposes; and (iii) investigate and bring enforcement actions against SEC Advisers for fraud.⁷ States may *not* adopt any regulations, interpretations, or guidance that would have the effect of substantively regulating SEC Advisers.

Nor may states indirectly regulate activities of SEC Advisers by deeming violations of state requirements related to business conduct to be fraudulent unless the conduct involved would be fraudulent even if the state requirements did not exist.⁸ The SEC has explicitly stated that states are precluded from “indirectly regulating the activities of [SEC]-registered advisers by applying state requirements that define ‘dishonest’ or ‘unethical’ business practices unless the prohibited practices would be fraudulent or deceptive absent the requirements.”⁹

⁴ H.R. Rep. No. 104-622 at 16 (1996), available at <https://www.congress.gov/congressional-report/104th-congress/house-report/622/1>.

⁵ The House Hearing report included references to testimony that indicated that there continues to be a substantial degree of duplication between federal and state securities regulation, and that this duplication tends to raise the cost of capital to American issuers of securities without providing commensurate protection to investors or our markets. Indeed, when President Clinton signed NSMIA into law, he stated that:

This legislation will more efficiently divide responsibility for regulation between the Federal and State governments. The SEC will be charged with responsibility for . . . large investment advisors. States will have responsibility for . . . investment advisors with smaller portfolios, while retaining their authority to take enforcement actions against fraudulent conduct in all situations.

Statement by President Clinton on signing H.R. 3005, p. 1, October 11, 1996.

⁶ See *SEC Rules Implementing Amendments to the Investment Advisers Act of 1940*, SEC Rel. IA-1633 (May 15, 1997) (**1997 Release**), at text accompanying n. 146, available at <https://www.sec.gov/rules/final/ia-1633.txt>.

⁷ Advisers Act Section 203A(b).

⁸ The Coordination Act includes a savings clause that explicitly preserves antifraud investigation and enforcement authority for states. The SEC has made clear its view that the very fact of the savings clause manifests Congress’s intent that other authorities, including the authority to adopt any conduct regulations, are preempted. See 1997 Release.

⁹ 1997 Release at text accompanying n. 152.

The Nevada draft regulations apply to “investment advisers.” It is not clear as written whether that term includes only investment advisers registered or required to be registered in the State of Nevada, or also SEC Advisers, which would be preempted by NSMIA. To clarify that the regulations do not and are not intended to apply to SEC Advisers or representatives of SEC Advisers, we suggest adding to Section 10 of the regulation, entitled “Authority to conform to federal or state rules/interpretation,” a new subsection 3 that includes one of the three alternatives below. While any of these alternatives would be acceptable, we believe the first two are the most straightforward.

1. *The term “investment adviser” in these regulations does not include any “federal covered adviser,” as defined in NAC 90.042.*
2. *The term “investment adviser” in these regulations refers to an investment adviser licensed or required to be licensed pursuant to NRS 90.330.¹⁰*
3. *With regard to investment advisers and their representatives, these regulations shall be interpreted and applied in accordance with the Investment Advisers Act of 1940 and the National Securities Markets Improvement Act of 1996.*

States Cannot Circumvent Preemption by Arguing that their Rules are the Same as the SEC’s Rules

Any state attempt to substantively regulate SEC Advisers is not saved by the fact that its rules track or purport to track existing SEC rules because the state’s rules cannot be enforced against SEC Advisers. States may investigate and bring enforcement actions with regard to fraud and deceit against SEC Advisers, but they may not regulate the conduct of SEC Advisers. As we discuss above, a key reason for the enactment of NSMIA was to eliminate duplicative regulation. Thus, absent a clear statement that the rules do not apply to SEC Advisers, simply having duplicative rules on the books raises concerns. First, it imposes burdens on SEC Advisers that do business in that state to determine whether and how those rules might apply to them. Second, maintaining such rules also imposes an ongoing obligation on the state to keep track of all related SEC developments, including guidance and interpretations from the SEC or SEC staff, to ensure that the state’s rules remain fully consistent with the corresponding SEC provisions.

The Advisers Act framework provides for fulsome regulation of SEC Advisers. Several provisions in the draft regulations are duplicative of regulations that SEC Advisers are already subject to under the Advisers Act regime. First and most important, while the draft regulations would seek to apply a fiduciary duty to investment advisers and include the concept of best interest, SEC Advisers already owe their clients a fiduciary duty under the Advisers Act that requires that they act in their clients’ best interest. Disclosure of conflicts of interest is another issue addressed in the draft regulations, and SEC Advisers already have a duty to fully and fairly disclose their conflicts of interest. Other examples of rules in the draft regulations that are

¹⁰ This is comparable to the approach used in NAC 90.387 regarding recordkeeping requirements.

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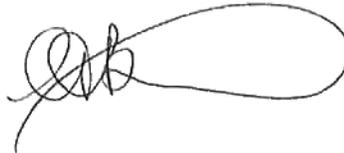
duplicative and not entirely consistent with corresponding SEC rules include the disclosure requirements related to “gains” that include advisory fees, finder’s fees, and referral fees. SEC Advisers are already required to disclose fees and related conflicts of interest, and Rule 206(4)-3 under the Advisers Act addresses cash payments for client solicitations. We would not be concerned with the substance of these rules if the Securities Division makes explicit that the rules are not applicable to SEC Advisers.

We urge the Securities Division to amend the draft regulations as described above to clarify that they do not and are not intended to apply to SEC Advisers or their representatives. Failure to do so would contravene the broad preemption provided for under NSMIA.

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We appreciate your consideration of our comments on this important issue. Please contact the undersigned at (202) 293-4222 if we may provide any additional information or assistance in this regard.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'GCB', enclosed within a large, horizontal oval shape.

Gail C. Bernstein
General Counsel
Investment Adviser Association

cc: SEC Chairman Jay Clayton
SEC Commissioner Robert J. Jackson Jr.
SEC Commissioner Hester M. Peirce
SEC Commissioner Elad L. Roisman
Dalia Blass, Director, SEC Division of Investment Management