

February 19, 2009

Via Email to brett.bordelon@state.mn.us

Brett Bordelon
Minnesota Department of Commerce
Suite 500
85 7th Place East
Saint Paul, MN 55101

**Re: Proposed Rules Governing the Regulation of Securities, *Minnesota Rules*,
Chapter 2876**

Dear Mr. Bordelon:

The Investment Adviser Association¹ welcomes the opportunity to comment on proposed replacement of chapter 2875 of the Minnesota Rules with chapter 2876.

We commend your efforts in drafting the proposed rules to better conform Minnesota investment adviser rules to the Uniform Securities Act and federal law. The IAA has long supported uniformity of state laws as well as uniformity of state and federal law. We have specific concerns, however, about four proposed provisions that would have the effect of substantively regulating federal covered advisers in contravention of the Investment Advisers Supervision Coordination Act (Coordination Act), Title III of the National Securities Markets Improvement Act of 1996 (NSMIA):

1. Proposed Rule 2876.5022 Governing Contracts. This proposed rule would impose substantive requirements on the contents of investment advisory contracts entered into by federally-registered investment advisers. Although the provision is prefaced with the statement that it applies to federal covered investment advisers “to the extent permitted by” NSMIA, this entire provision is clearly contrary to NSMIA.

The purpose of the Coordination Act was to eliminate overlapping and duplicative regulation by allocating regulatory responsibility for larger investment advisers to the SEC and responsibility for smaller advisers to the states. Congress accomplished this goal by preempting “all regulatory requirements imposed by state law on Commission-registered

¹ The IAA is a not-for-profit association that exclusively represents the interests of investment adviser firms registered with the SEC. Founded in 1937, the Association’s members manage assets for a wide variety of institutional and individual clients, including pension plans, trusts, investment companies, endowments, foundations, and corporations. For more information, please visit our website: www.investmentadviser.org.

advisers relating to their advisory activities or services,”² subject to four specific exceptions: (1) states may require SEC-registered advisers to notice file; (2) states may require SEC-registered advisers to pay filing fees; (3) states may investigate and bring enforcement actions for fraud and deceit against SEC-registered investment advisers; and (4) states may license, register or otherwise qualify investment adviser representatives who have a place of business located in that state.

The plain language of the Coordination Act and accompanying legislative history unequivocally prohibit states from imposing a second layer of regulation on SEC-registered advisers. Thus, for example, key senators contemporaneously stated that Congress intended the Act to “preempt not only a state’s specific registration, licensing or qualification requirements, but *all regulatory requirements imposed by state law* on investment advisers relating to their advisory activities or services, except for those activities specifically identified in the statute [*i.e.* fraud or deceit].”³

The Minnesota Department of Commerce’s proposed rule regarding investment advisory contracts would apply to *all* investment advisers, rather than solely investment advisers that are licensed in Minnesota. Thus, this proposed rule does not conform to the Coordination Act. We therefore respectfully request that this provision be amended to remove the reference to “federal covered investment advisers.”

2. Proposed Rule 2876.5023 on Prohibited Conduct. This proposed rule would impose a list of prohibited practices, much of which constitutes substantive regulation (*e.g.*, requirements regarding solicitation, privacy, advertising, development of policies and procedures) on SEC-registered investment advisers. The SEC has correctly interpreted the Coordination Act to prohibit states from re-regulating SEC-registered advisers through the back door of defining “dishonest or unethical” business practices, except to the extent those practices would otherwise constitute actual fraud or deceit.⁴ Thus, despite the prefatory language regarding “to the extent permitted by” NSMIA, proposed rule 2876.5023 should not apply at all to federally registered advisers.

3. Proposed Rule 2876.5024 on Regulation of the Business of Financial Planning. This proposed rule would impose a list of prohibited practices regarding the advertisement of “any person” engaged in the business of financial planning. For the reasons set forth above, we respectfully request that this provision be narrowed to exclude “federal covered investment advisers,” or, in the alternative, be amended to include the qualification “to the extent permitted by” NSMIA.

² Rules Implementing Amendments to the Investment Advisers Act of 1940, 62 Fed. Reg. 28112 at 28125 (May 22, 1997) (Implementing Release).

³ Letter dated April 25, 1997 to SEC Chairman Arthur Levitt from former Senator Phil Gramm (R-Tex) and Senator Christopher J. Dodd (D-Conn), at p. 1 (emphasis added).

⁴ 62 Fed. Reg. 28112 at 28125 (May 22, 1997) (Implementing Release).

4. Proposed Rule 2876.5025 on Prohibited Uses of Senior-Specific Certifications and Professional Designations. This proposed rule would impose a list of prohibited uses by “any person” of senior-specific certifications and professional designations that mislead any person. For the reasons set forth above, we respectfully request that this provision be narrowed to exclude “federal covered investment advisers,” or, in the alternative, be amended to include the qualification “to the extent permitted by” NSMIA.

We truly appreciate your consideration of our comments. Please do not hesitate to call me at 202-293-4222 or by email at paul.glenn@investmentadviser.org if you have any questions or would like to discuss these issues further.

Sincerely,

A handwritten signature in cursive script that reads "Paul Glenn".

Paul Glenn
Counsel