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October 2, 2017

*Via Electronic Submission ([fiduciaryduty@sos.nv.gov](mailto:fiduciaryduty@sos.nv.gov))*

Diana J. Foley, Esq.  
Securities Administrator  
Securities Division  
Office of Secretary of State  
555 East Washington Avenue, Suite 5200  
Las Vegas, NV 89101

**Re: Nevada Revised Statutes 628A and 90 and Regulations Relating to Fiduciary Duty for Financial Planners, Broker-Dealers, and Investment Advisers**

Dear Ms. Foley:

The Investment Adviser Association (IAA)<sup>1</sup> and the Investment Company Institute<sup>2</sup> appreciate the opportunity to respond to the Nevada Securities Division's (Division's) request for comments<sup>3</sup> on recently amended Chapters 628A and 90 of the Nevada Revised Statutes

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<sup>1</sup> The IAA is a not-for-profit association that represents the interests of investment adviser firms registered with the U.S. Securities and Exchange Commission (SEC). The IAA's membership consists of more than 600 firms that collectively manage approximately \$20 trillion for a wide variety of clients that are individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit [www.investmentadviser.org](http://www.investmentadviser.org).

<sup>2</sup> The Investment Company Institute (ICI) is the leading association representing regulated funds and their advisers globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US\$20.4 trillion in the United States, serving more than 95 million US shareholders,

<sup>3</sup> <http://nvsos.gov/sos/licensing/securities/new-fiduciary-duty>.

(Amendments), effective July 1, 2017.<sup>4</sup> The Amendments, adopted pursuant to Nevada Senate Bill 383, purport to subject SEC-registered investment advisers to new regulations under Nevada law including a fiduciary duty and related penalties. Both the IAA's and the ICI's members are exclusively SEC-registered investment adviser firms and are fiduciaries under the Investment Advisers Act of 1940 (Advisers Act). We therefore have a strong interest in ensuring that, in its implementation of the Amendments, the Division recognizes that Nevada's substantive regulation of SEC-registered investment advisers is preempted by federal law. For the reasons discussed below, we ask that any regulations promulgated by the Division under the Amendments expressly exclude SEC-registered investment advisers.

### **Federal Law Preempts Nevada's Regulation of SEC-Registered Investment Advisers**

Prior to 1996, the SEC and state securities regulators each had jurisdiction over investment advisers, and therefore most investment advisers were regulated by both the SEC *and* one or more states. Congress enacted the National Securities Markets Improvement Act of 1996 (NSMIA) to address its concerns about the overlap in regulation and duplication of regulatory resources. NSMIA sought to "moderniz[e] and rationaliz[e] aspects of the regulatory scheme, including the respective responsibilities of Federal and State governmental authorities over the securities markets,"<sup>5</sup> and to "eliminat[e] the costs and burdens of duplicative and unnecessary regulation."<sup>6</sup> Title III of NSMIA, the Investment Adviser Supervisory Coordination Act (Coordination Act), divided oversight and regulatory responsibility for investment advisers between the SEC and the state securities regulators. Most of the provisions amending the Advisers Act to allocate regulatory responsibilities between the SEC and state governments have been codified in Section 203A of the Advisers Act.

Under Section 203A, as modified by the Dodd-Frank Act in 2010, most large advisers and advisers to mutual funds must register with the SEC (absent an exemption). Conversely, most small and mid-sized advisers are subject to state regulation and, with some exceptions, are

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<sup>4</sup> Nev. Senate Bill No. 383, Sess. 79 (2017), *available at* [https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB383\\_EN.pdf](https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB383_EN.pdf).

<sup>5</sup> H.R. Rep. No. 104-622 at 16 (1996), *available at* <https://www.congress.gov/congressional-report/104th-congress/house-report/622/1>.

<sup>6</sup> The House Hearing report included reference to testimony that indicated 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 Federal and State governments. The SEC will be charged with responsibility for . . . large investment advisers. States will have responsibility for . . . investment advisers with smaller portfolios, while retaining their authority to take enforcement actions against fraudulent conduct in all situations.

prohibited from registering with the SEC.<sup>7</sup> All advisers, regardless of their SEC-registration status, are subject to the Advisers Act antifraud provisions.

To give effect to Congress's intent to eliminate duplicative regulation, the Coordination Act preempts state regulation of SEC-registered investment advisers. States retain some limited authority over SEC-registered 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-registered advisers for fraud.<sup>8</sup> However, states may not adopt any regulations, interpretations, or guidance that would have the effect of substantively regulating SEC-registered investment advisers.

In every preemption analysis, “[t]he purpose of Congress is the ultimate touchstone.”<sup>9</sup> Congress's intent when it enacted the Coordination Act is not ambiguous. The manifest purpose of the Coordination Act was to eliminate overlapping and duplicative regulation of large advisers by the SEC and the states. This purpose was achieved by dividing regulatory responsibilities between them: the SEC regulates larger advisers and the states regulate most smaller and mid-sized advisers. Congress's intent could not have been clearer. Put simply, under the Coordination Act, the states are prohibited from imposing a second layer of regulation on SEC-registered advisers.

The SEC has similarly interpreted federal preemption under the Coordination Act to preempt not only a state's specific registration, licensing, or qualification requirements for SEC-registered advisers, but *all* regulatory requirements imposed by state law on SEC-registered advisers “relating to their advisory activities or services,” except those that are specifically preserved by Section 203A.<sup>10</sup> In its release adopting rules to implement Section 203A, the SEC logically observed that if the Coordination Act's preemption provisions were read narrowly to cover only these specific requirements, the effect of these provisions and of the application of uniform federal rules to SEC-registered advisers could be nullified.<sup>11</sup> As the SEC pointed out, if a narrow reading was Congress's intent, it “would not have had to preserve the authority of states

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<sup>7</sup> Advisers Act Section 203A(a).

<sup>8</sup> *Id.* Section 203A(b).

<sup>9</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

<sup>10</sup> See *SEC Rules Implementing Amendments to the Investment Advisers Act of 1940*, Rel. No. IA-1633 (May 15, 1996), available at <https://www.sec.gov/rules/final/ia-1633.txt>. We note that Section 203A(c) gives the SEC broad authority, by rule or upon its own motion, to construe “the purposes of this section” to permit SEC-registration of smaller advisers if it determines state registration would be inconsistent with those purposes.

<sup>11</sup> See *id.* at text accompanying n.145.

to investigate and enforce fraud.”<sup>12</sup> The very fact of the savings clause preserving antifraud authority for states manifests Congress’s intent that other authorities are preempted.

Nor may states indirectly regulate activities of SEC-registered 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. The SEC has asserted 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.”<sup>13</sup>

If the Division construes the Amendments to apply to SEC-registered investment advisers, it would be violating the preemption provisions of the Coordination Act and frustrating the clear Congressional intent in enacting NSMIA.

Nor would the Division be adding any protections to clients of SEC-registered investment advisers doing business in Nevada since all such advisers are already subject to a well-established and robust fiduciary duty to their clients under the Advisers Act. This fiduciary duty is an affirmative duty of utmost good faith; it includes the duties of loyalty and care, as well as full and fair disclosure.<sup>14</sup> In addition, this fiduciary duty has always applied to SEC-registered advisers that provide investment advice about securities to both retail and institutional investors and to retirement and not-retirement accounts. Clients of SEC-registered investment advisers in Nevada and elsewhere are thus already protected by the highest standard of conduct.

For these reasons, we respectfully request that any regulations promulgated by the Division under the Amendments expressly exclude SEC-registered investment advisers. Failure to do so would seek to substantively regulate SEC-registered investment advisers in Nevada, contrary to the broad preemption provided for under the Coordination Act.

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<sup>12</sup> *Id.* at text accompanying n.151.

<sup>13</sup> *Id.* at text accompanying n. 152.

<sup>14</sup> The fiduciary duty under the Advisers Act was first articulated over 50 years ago by the U.S. Supreme Court. *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963).

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We appreciate your consideration of our comments on this important issue. Please contact the undersigned representatives of the IAA at (202) 293-4222 or Tamara Salmon of ICI at (202) 326-5825 if we may provide any additional information or assistance in this regard.

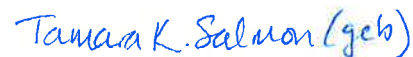
Respectfully,



Gail Bernstein  
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Investment Adviser Association



Paul D. Glenn  
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Investment Adviser Association



Tamara K. Salmon  
Associate General Counsel  
Investment Company Institute

cc: Nevada Legislative Counsel Bureau  
SEC Chairman Jay Clayton  
SEC Commissioner Michael Piwowar  
SEC Commissioner Kara Stein  
Dalia Blass, Director, SEC Division of Investment Management