

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

SECURITIES INDUSTRY AND
FINANCIAL MARKETS ASSOCIATION,

Plaintiff,

v.

JOHN R. ASHCROFT, in his official capacity
as Secretary of State of Missouri, and
DOUGLAS M. JACOBY, in his official capacity
as Missouri Securities Commissioner,

Defendants.

Case No. 2:23-cv-4154-SRB

**BRIEF OF THE INVESTMENT ADVISER ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT, DECLARATORY RELIEF,
AND PERMANENT INJUNCTION AND IN OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 7.1 and Federal Rule of Civil Procedure 7.1, the Investment Adviser Association (“IAA”) states that it is a non-stock Delaware corporation recognized by the Internal Revenue Service as a 501(c)(6) tax-exempt organization, with no shares or securities owned by any third party.

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

The IAA is the leading organization dedicated to advancing the interests of fiduciary investment advisers. For more than 85 years, the IAA has advocated on behalf of investment advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms are predominantly federally registered investment advisers that manage more than \$35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. Some of our federally registered investment adviser members and their supervised persons² are subject to, and adversely affected by, the Missouri Securities Division's investment adviser rule at issue in this case, 15 CSR § 30-51.172(3) (2023) ("IA Rule").

As the leading organization representing the interests of fiduciary investment advisers, we have a unique perspective on the issues before this Court. The IAA played a key role in passing the National Securities Markets Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, 110 Stat. 3416, which preempts state regulation of federally registered investment advisers and their supervised persons, with very limited exceptions. While NSMIA allows states to license and qualify certain representatives of federally registered investment advisers, and to investigate and punish fraud, the statute prohibits states from

¹ No counsel for any party authored this brief in whole or part, and no person or entity other than the *amicus*, its members, or their counsel made a monetary contribution intended to fund this brief's preparation or submission.

² As used herein, the term "investment adviser" refers to an investment advisory firm, while the terms "supervised person," "associated person," and "investment adviser representative" refer to individuals under the supervision of, or affiliated with, an investment advisory firm. See notes 5, 6 and 9, *infra*.

imposing substantive regulation on such parties. A clear division of responsibilities between state and federal regulators underpins NSMIA and is crucial for overseeing the investment adviser industry to avoid inefficient, duplicative or contradictory regulations that impose an unnecessary burden on investment advisers, and, ultimately, on the investors they serve.

The IAA has a strong interest in preserving NSMIA's jurisdictional mandates and protecting federally registered investment advisers and their supervised persons from unlawful state regulation like the IA Rule. Allowing Missouri to impose the IA Rule on federally registered advisers or their supervised persons will have widespread negative consequences for investment advisers with a national business, subjecting their fiduciary judgment to divergent and shifting political influences on an endless range of issues and flooding the field of investment adviser regulation with inconsistent, unpredictable, overlapping and costly state rules and regulations, creating an even more challenging situation than the one Congress outlawed 28 years ago.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns, among other things, the parameters of federal preemption regarding the regulation of investment advisers and their supervised persons. The specific issue addressed in this brief is whether the State of Missouri may impose substantive disclosure and consent requirements on individuals associated with, and supervised by, federally registered investment advisers.³ For the reasons explained herein, the answer is “no.”

Congress enacted NSMIA to allocate responsibility for the regulation of various aspects of the capital markets between the federal government and the states to reduce

³ This brief takes no position on any other issue raised in this case.

the burdens imposed by duplicative, and sometimes inconsistent, regulation. Title III of NSMIA, known as the Investment Advisers Supervision Coordination Act (“Coordination Act”),⁴ assigned primary responsibility for regulating investment advisers whose business affects the national markets and the supervised persons⁵ of such advisers to the U.S. Securities and Exchange Commission (“SEC” or “Commission”), while leaving the regulation of small, local advisers to the states. See S. Rep. 104-293, p. 4 (1996). To effectuate this jurisdictional split, the Coordination Act amended the Investment Advisers Act of 1940 (“Advisers Act”), 15 U.S.C. §§ 80b-1 *et seq.*, to broadly preempt state regulation of federally registered investment advisers and their supervised persons, subject to the narrow exceptions discussed below.

Immediately after NSMIA was passed, the SEC adopted a set of rules implementing the jurisdictional changes, including a rule defining the “investment adviser representatives” who remain subject to state licensing and qualification requirements. 17 C.F.R. § 275.203A-3. In so doing, the Commission confirmed that NSMIA pre-empts *all* regulatory requirements imposed by state law on federally registered advisers relating to their investment advisory services, except those specifically preserved to the states by the statute. *Rules Implementing Amendments to the Investment Advisers Act of 1940*, SEC Rel. No. IA-1633, 62 Fed. Reg. 28112, 28125 (May 22, 1997) (“Implementing Release”).

For over 25 years, the SEC and the states, as well as the investment advisers and

⁴ Unless otherwise specified, “NSMIA” and the “Coordination Act” are used interchangeably herein.

⁵ A “supervised person” includes a partner, officer, director or employee of an investment adviser, or another person who provides investment advice on the investment adviser’s behalf and is subject to the investment adviser’s supervision and control. 15 U.S.C. § 80b-2(a)(25).

supervised persons regulated thereby, recognized the broad scope of NSMIA's federal preemption of state regulation of federally registered investment advisers and their supervised persons. However, in 2023, in an explicit attempt to “rein in” ESG investing (Doc. #24-11, p. 2), Defendant Ashcroft issued the IA Rule imposing substantive disclosure and consent requirements on individuals associated with, and supervised by, federally registered investment advisers, and, by extension, on the federally registered advisers themselves. The IA Rule is preempted by NSMIA. Therefore, we support SIFMA's request for summary judgment and declaratory and injunctive relief regarding its NSMIA claim concerning the IA Rule. (Doc. #71, Count I.)

ARGUMENT

I. NSMIA Broadly Preempts Substantive State Regulation of Federally Registered Investment Advisers and their Supervised Persons

A. The Duplicative Regulation Problem and Split-Jurisdiction Solution

In the mid-1990s Congress began to look at ways to modernize and rationalize U.S. securities regulation. H. Rep. 104-622, p. 16 (1996). At that time, investment advisers were regulated by both the SEC and the states and most states also licensed advisers' associated persons⁶ who worked or had clients in those states. Congress determined that subjecting advisers to duplicative regulation in this fashion led to confusion, conflict and “a degree of overlap that may raise costs unnecessarily” for advisers and the investors they serve. S. Rep. 104-293, p. 2.

In a hearing before the Senate Committee on Banking, Housing and Urban Affairs, then-SEC Chairman Arthur Levitt explained that “[e]liminating Federal/State duplication”

⁶ A “person associated with an investment adviser” means a partner, officer, director, or employee of, or any other person directly or indirectly controlling or controlled by, the adviser. 15 U.S.C. § 80b-2(a)(17).

was among the “foremost” reforms “that would go a long way to reduce the costs of securities regulation.” S. Hrg. 104-681, p. 5 (1996). In addition to reducing costs, the Chairman predicted that relieving “[l]arger advisers, with national businesses . . . from State **registration and regulation**” would “improve the regulation of investment advisers” by allowing the SEC and the States to “focus their limited resources more effectively.” *Id.*, p. 155 (Response to Written Questions of Senator D’Amato from Arthur Levitt, Jr.) (emphasis supplied).

The IAA (then known as the Investment Counsel Association of America, or ICAA) echoed Chairman Levitt’s observations. Noting that 46 states then regulated investment advisers compared to just six when the Advisers Act passed,⁷ the ICAA explained that having to register in multiple States, “as well as monitoring differences in State laws and regulations, has developed into a cottage industry and resulted in significant additional expense and effort for firms that are already registered with the SEC, and are already subject to all of the SEC regulations” *Id.*, p. 153 (Testimony of Mark D. Tomasko, Exec. V. Pres., ICAA).

To rectify the problem of duplicative regulation and its attendant costs to regulated parties and strain on regulators’ resources, Congress created “a clear division of labor between the states and the federal government for supervision of investment advisers.” S. Rep. 104-293, p. 2. It did this by adding a new section 203A to the Advisers Act, stating in relevant part:

No law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person—

⁷ Today, all 50 states and the District of Columbia have investment adviser statutes.

(A) that is registered under section 203 as an investment adviser, or that is a supervised person of such person, except that a State may license, register, or otherwise qualify any investment adviser representative who has a place of business located within that State[.]

15 U.S.C. § 80b-3a(b)(1)(A).⁸

In adopting section 203A, Congress “remov[ed] an entire layer of regulation from investment advisers,” S. Rep. 104-293, p. 32, making clear its intent that “states should play an important and logical role in regulating small investment advisers whose activities are likely to be concentrated in their home state,” while larger advisers “should be registered with the [SEC] and be subject to national rules.” *Id.*, p. 4.

Section 203A’s broad preemption of state investment adviser laws—in this case, the Missouri Uniform Securities Act of 2003, Mo. Rev. Stat. §§ 409.1-101 *et seq.*—is subject to three narrow exceptions. First, as indicated above, section 203A grants the states limited licensing, registration and qualification authority over investment adviser representatives⁹ with a place of business in the states (hereafter, the “Qualification Exception”). 15 U.S.C. § 80b-3a(b)(1)(A). In addition, it allows states to investigate and bring enforcement actions with respect to fraud or deceit against any investment adviser or person associated therewith (the “Investigation and Enforcement Exception”). *Id.* § 80b-3a(b)(2). A third narrow exception permits states to require federally registered investment advisers to file—solely for “notice” purposes—copies of documents they file with the Commission and to pay fees (the “Notice Filing Exception”). *Id.* § 80b-3a note. This exception does not permit states to require federally registered advisers to create additional documents of any kind.

⁸ As originally enacted, NSMIA also preempted state regulation of any party excepted from the definition of “investment adviser” under section 202(a)(11) of the Advisers Act. 15 U.S.C. § 80b-2(a)(11). Two additional categories of preemption were added subsequently, as explained in note 11, *infra*.

⁹ “Investment adviser representatives” are a type of supervised person. 17 C.F.R. § 275.203A-3.

Read together, the various parts of section 203A establish a broad preemption of substantive state regulation of federally registered advisers and their supervised persons, a preemption that covers the disclosure and consent requirements at the heart of the IA Rule.

B. The SEC's Implementing Rules

Immediately after the Coordination Act was signed into law, the SEC adopted rules to effectuate Congress' intent. In so doing, the Commission confirmed that "[t]he structure and design of section 203A suggest Congress intended to broadly preempt state investment adviser law." Implementing Release at 28126. Federally registered advisers would "no longer be subject to 'overlapping' state and federal regulation, but instead be subject to uniform 'national rules.'" *Id.* (*internal footnote omitted*). The Commission made clear that section 203A(b) "preempts not only a state's specific registration, licensing or qualification requirements, but all regulatory requirements imposed by state law on [federally] registered advisers relating to their advisory activities or services, except those provisions that are specifically preserved by Coordination Act." *Id.*

State regulators, investment advisers and investment adviser representatives have understood and accepted the Commission's cogent interpretation of section 203A's plain language for almost three decades now. For example, in the wake of NSMIA, the State of Missouri adopted the 2002 version of the Uniform Securities Act, drafted by the National Conference of Commissioners on Uniform State Laws ("National Conference"), which had the "overarching theme of . . . achieving consistency with [NSMIA]." Uniform Securities Act of 2002, Preface p. 3. In this regard, the Missouri Uniform Securities Act of 2003 excludes federally registered investment advisers (which it calls "federal covered advisers") from the

statute's definition of "investment adviser" for *all* regulatory purposes, not just registration, licensing or qualification. Mo. Rev. Stat. §§ 409.1-102(6) and 102(15)(E). More recently, the Governor of Wyoming used a line-item veto on a rule imposing disclosure and consent requirements modeled after the IA Rule, expressing "significant concerns" that such requirements would conflict with NSMIA.¹⁰

Congress has tacitly endorsed the SEC's NSMIA interpretation as well. On three separate occasions, Congress revisited the scope of investment adviser regulation preemption without criticizing or questioning the SEC's reading of the Coordination Act.¹¹ This silence speaks volumes, for "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978); *Morriss v. BNSF Ry. Co.*, 817 F. 3d 1104, 1111 (8th Cir. 2016); *see also Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991) ("[B]ecause Congress has left undisturbed through subsequent reenactments of the [Tax] Code the principles of realization established [by the judiciary], we may presume that Congress intended to codify these principles....").

C. Defendants' Flawed Reading of NSMIA

Notwithstanding this Court's statement in its denial of Defendants' Motion to Dismiss

¹⁰ Letter from Mark Gordon, Governor of Wyoming, to Chuck Gray, Wyoming Secretary of State (Feb. 27, 2024) ("Given the requirements and prohibitions in [NSMIA], I believe the broad reach and application of the vetoed portions of the proposed rules would lead to conflicts with federal requirements, creating preemption concerns in the process."). (Doc. #72, Ex. 16., Jacoby Dep. Ex. 12.)

¹¹ In the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, Congress shifted section 203A's line of demarcation between federal and state investment adviser regulation by increasing the assets-under-management threshold for federal registration from the original \$25 million to \$100 million. In the FAST Act of 2015, Pub. L. No. 114-94, Congress expanded section 203A's state preemption to cover investment advisers that are exempt from SEC registration because they advise small business investment companies. 15 U.S.C. § 80b-3a(b)(1)(C). In the RBIC Advisers Relief Act of 2018, Pub. L. No. 115-417, Congress further extended the preemption provision to include advisers that are exempt from SEC registration because they advise rural business investment companies. *Id.* § 80b-3a(b)(1)(D).

that “it appears that Congress intended for NSMIA to broadly preempt state regulation of federally covered investment advisers except in three distinct areas”, (Doc. #39, p. 13), Defendants continue to argue that section 203A preempts only states’ authority to register, license or qualify federally registered advisers. (Doc. #70, p. 65.)¹² Defendants’ interpretation of NSMIA fails on every level, starting with the plain meaning of the statute.

The clearest indication that federal law supplants state law is a statutory preemption provision. When Congress expressly codifies its preemptive intent in statutory form, our analysis ‘begins with the language of the statute.’” *Jones v. Vilsack*, 272 F.3d 1030, 1034 (8th Cir. 2001) (*quoting Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001)). The intent of Congress is the “‘ultimate touchstone’ of preemption analysis.” *Vilsack*, 272 F.3d 1033 (*quoting Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)).

Section 203A(b) preempts the “law” of “any State”. Read in the context of Congress’ clearly expressed intent to remove “an entire layer of regulation from investment advisers,” S. Rep. 104-293, p. 32, it is clear that the words “registration, licensing or qualification” do not define the universe of preempted activities, but rather describe the type of law that is preempted: state blue sky law.¹³ Had Congress meant to preempt only state registration, licensing or qualification authority, it would have used the same wording for the general

¹² Defendants initially argued that NSMIA preempts only state registration, licensing or qualification “rules,” not the registration, licensing or qualification provisions of state “laws,” as they now assert. (Doc. #38, p. 8.) This change does not cure the defect in their original position. Elsewhere, Defendants link Advisers Act preemption to a contention that “NSMIA manifests a clear purpose to prevent the states from imposing separate and overlapping registration requirements on covered securities. . . .” (Doc. #70, pp. 61-62). We assume that statement was made in error; section 203A has nothing to do with covered securities. 15 U.S.C. § 80b-3a.

¹³ Without such clarifying language, NSMIA might be overinclusive and be read to preempt all state laws, including those pertaining to labor relations, health and safety and taxation. See Implementing Release at 28126, n. 150 and accompanying text.

preemption provision that it used for the Qualification Exception,¹⁴ but it did not.

Defendants' interpretation of section 203A preemption also violates "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); see also *Ameren Corp. v. FCC*, 865 F.3d 1009, 1013 (8th Cir. 2017). Had Congress intended to preempt only the specific registration, licensing, or qualification provisions of state investment adviser statutes, there would have been no need for the Investigation and Enforcement or Notice Filing Exceptions.

Defendants' reading of the Coordination Act's savings clauses fares no better. Defendants now acknowledge that the IA Rule does not relate to registration, licensing or qualification and thus does not regulate the areas covered by the Qualification Exception. (Doc. #70, p. 65.) Instead, Defendants assert that the IA Rule is "tethered to consumer protection: the prevention, detection, investigation, and enforcement of fraud." (*Id.*, p. 61.) In making this argument, Defendants ask this Court to interpret the Investigation and Enforcement Exception in a manner that contradicts the exception's plain language and eviscerates the intent behind NSMIA preemption.

The Investigation and Enforcement Exception is a narrow savings clause that allows states to *investigate and bring enforcement actions against* investment advisers and their supervised persons with respect to fraud or deceit. 15 U.S.C § 80b-3a(b)(2). It does not grant states authority to impose prophylactic consumer protection and business practice

¹⁴ Viz., "No State may license, register or otherwise qualify any person that is registered under section 203 as an investment adviser, or that is a supervised person of such person except that a State may license, register or otherwise qualify any investment adviser representative who has a place of business located within that State."

requirements (including disclosure and consent requirements) on federally registered advisers or their supervised persons. That authority is reserved to the SEC, and the Court should “[decline] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000)). “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

There is no “contrary legislative intent” here. In discussing a similar, but slightly broader, savings clause in the securities offering context,¹⁵ the Senate confirmed that Congress “clearly [did] not intend for the [retained] ‘policing’ authority to provide states with a means to undo the state . . . preemptions.” S. Rep. 104-293, p. 15. The House also confirmed its intent to prevent the states from “indirectly doing what they have been prohibited from doing directly” and from using their retained authority to “reconstruct in a different form the regulatory regime” that has been preempted. H. Rep. 104-622, p. 34.

Likewise, the SEC could not have been clearer that the Investigation and Enforcement Exception does not authorize states to adopt and enforce business practice rules as a means of combatting fraud, holding that the exception precludes

a state from indirectly regulating the activities of Commission-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 Under the design of the Coordination Act, Congress gave the responsibility of adopting and enforcing prophylactic rules with respect to Commission-registered advisers to the Commission. . . . [S]tates are denied the

¹⁵ Here, NSMIA preserved state authority to investigate and bring enforcement actions not only with respect to fraud or deceit, but also with respect to “unlawful conduct by a broker, dealer, or funding portal.” 15 U.S.C. § 77r(c). There is no reference to “unlawful conduct” in any savings clause under the Coordination Act.

ability to reinstitute the system of overlapping and duplicative regulation of investment advisers that Congress sought to end.

Implementing Release, p. 28126 (internal footnote omitted). The SEC implemented this interpretation by making its own prophylactic anti-fraud rules inapplicable to state-registered investment advisers, “in recognition of the clearly stated purposes of Congress in passing the Coordination Act.” *Id.*, n. 156; see also p. 28127 (“[A]fter the effective date of the Coordination Act, the application of these provisions to state-registered advisers is more appropriately a matter for state law.”).¹⁶

We respectfully urge the Court not to “read into the statute words that are not there”, *Schooler v. United States*, 231 F.2d 560, 564 (8th Cir. 1956), or “legislate by broadening the terms of” the Investigation and Enforcement Exception, *id.* NSMIA’s text, legislative history and contemporaneous administrative interpretation, as well as subsequent state actions all confirm the IA Rule’s preemption.

II. The IA Rule Exceeds the State’s Authority To Regulate the Investment Adviser Representatives of Federally Registered Investment Advisers

The breadth of NSMIA’s general preemption and the narrowness of its exceptions demonstrate that the states may not apply business practice rules like the IA Rule to the investment adviser representatives of federally registered investment advisers. This alone supports SIFMA’s request for summary judgment and declaratory and injunctive relief as to its NSMIA investment adviser preemption claim. However, in trying to refute this NSMIA analysis, Defendants provide even more support for SIFMA’s request.

¹⁶ In the face of this overwhelming evidence, Defendants’ reliance on the history of Regulation Best Interest (“Reg BI”), 17 C.F.R. § 240.15l-1, under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, to suggest that the SEC was agnostic as to the scope of NSMIA preemption is incomprehensible. Doc. #70, p. 66. Reg BI does not apply to federally registered advisers or their investment adviser representatives.

As noted above, Defendants now acknowledge that the Qualification Exception does not authorize the IA Rule, (Doc. #70, p. 65), and claim instead that the Rule is “expressly saved” under the Investigation and Enforcement Exception. (*Id.* p. 61.) The Missouri Uniform Securities Act and related rules foreclose this argument. To begin with, the IA Rule is part of 15 CSR § 30-51.172, a business conduct rule that defines “dishonest or unethical practices” that could serve as “[g]rounds for the discipline or disqualification of investment advisers or investment adviser representatives” for purposes of Mo. Rev. Stat. § 409.4-412(d). The IA Rule, therefore, does not purport to be an antifraud rule. Nor could it be, since Missouri’s statutory authority for anti-fraud rulemaking is found in Mo. Rev. Stat. § 409.5-502.

Section 409.5-502(a) forbids any person who renders investment advice for compensation to engage in fraud or deceit. Section 409.5-502(b) authorizes the adoption of rules defining fraudulent or deceptive conduct and prescribing means reasonably designed to prevent such conduct. However, this rulemaking authority explicitly extends *only* to the conduct of “investment advisers” (*i.e.* not federal covered advisers) and investment adviser representatives “*other than supervised persons of a federal covered investment adviser.*” (emphasis supplied.)

Section 409.5-502 is derived from the 2002 version of section 502 of the Uniform Securities Act, drafted by the National Conference, whose Official Comments are probative. See *Brady v. Ashcroft*, 643 S.W.3d 565, 585 (Mo. App. W.D. 2022). While noting that Uniform Securities Act section 502(a), titled “Fraud in providing investment advice,” reflects the states’ “retain[ed] . . . authority to investigate and bring enforcement actions with respect to fraud or deceit against all investment advisers and their associated persons,” the Official

Comments acknowledge that the “rulemaking authority under [Section] 502(b) [titled “Rules defining fraud”]. . . would provide the basis for existing [North American Securities Administrators Association] rules concerning investment advisers, *to the extent these rules are not preempted by the National Securities Markets Improvement Act of 1996.*” Uniform Securities Act of 2002 § 502, Official Comments at 3 (emphasis supplied).

In earlier suggestions, Defendants argued that § 409.5-502(b)’s prohibition against applying prophylactic anti-fraud rules to the supervised persons of federal covered advisers applies only to such adviser’s “non-[investment adviser representative] ‘supervised persons.’” (Doc. # 38, p. 9.) This argument flatly contradicts the statute’s plain text, which prohibits, without qualification, application of prophylactic anti-fraud rules to all “supervised persons of a federal covered investment adviser.” Furthermore, authorizing the regulation of investment adviser representatives other than “non-[investment adviser representative]” supervised persons makes no sense; investment adviser representatives are the only supervised persons covered by § 409.5-502(b) in the first place. In a tacit admission that their reading of § 409.5-502 is fatally flawed, Defendants’ suggestions in support of their motion for summary judgment ignore this statutory provision entirely. (Doc. #70.)

There is no basis under any provision of Missouri’s investment adviser law for the IA Rule to apply to any supervised persons of federally registered investment advisers. As this Court has found and Defendants now acknowledge, the IA Rule is not a registration, licensing or qualification rule and therefore does merit the Qualification Exception. Nor is the IA Rule an antifraud rule, since it addresses business conduct under 15 CSR § 30-51.172. Even if it tried to be an antifraud rule, it would not qualify for NSMIA’s Investigation and Enforcement Exception because: (i) that exception does not authorize states to adopt prophylactic anti-

fraud rules; and (ii) it is flatly prohibited by section 409.5-502, which recognizes this limitation.

For all these reasons, the IA Rule cannot be “saved”—expressly or otherwise—by applying the Investigation and Enforcement Exception to federally registered advisers’ investment adviser representatives.

III. The IA Rule Exceeds the State’s Authority to Regulate Federally Registered Investment Advisers

A. The IA Rule Cannot be Administered Without Federally Registered Advisers’ Participation

The argument that the IA Rule does not regulate federal covered advisers plainly fails. Defendants are engaging in back-door regulation, trying to do indirectly what they cannot do directly. The concept of “investment adviser representative” depends for its very existence on a relationship between the representative and the investment adviser firm being represented; an investment adviser representative is an investment adviser’s “supervised person.” 17 C.F.R. § 275.203A-3(a)(1); 15 U.S.C. § 80b-2(a)(25). An individual who performs investment advisory services “on behalf of, and under the supervision and control of, a [federally] registered adviser [is] not required to separately register as [an] investment [adviser],” which he otherwise would have to do. *Rules Implementing Amendments to the Investment Advisers Act of 1940*, SEC Rel. No. IA-1601, 61 Fed. Reg. 68480, 68487, n. 65 (Dec. 27, 1996), *citing Abid Mansoor* (Feb. 5, 1992) and *Corinne E. Wood* (Apr. 17, 1986).

From the federally registered adviser’s perspective, maintaining a relationship with an investment adviser representative entails a duty to supervise, the neglect of which exposes the adviser to liability for the representative’s violations of the federal securities laws. 15 U.S.C. § 80b-3(e)(6).¹⁷ The duty to supervise, in turn, entails a host of specific regulatory obligations,

¹⁷ Defendants should understand this risk because Missouri-registered investment advisers can be punished

including a duty to maintain extensive books and records. *Id.* § 80b-4; 17 C.F.R. § 275.204-2, and a duty to implement a comprehensive set of compliance procedures. *Id.* § 275.206(4)-7.¹⁸

Defendants would have this Court believe that an investment adviser representative registered in Missouri can satisfy the IA Rule's disclosure and consent requirements without the participation of her employer - the supervising investment adviser firm. That is not so. The SEC has made it abundantly clear that a federally registered investment adviser that allows its supervised persons to communicate with clients away from the adviser's supervision about the advice rendered violates its duty to supervise, its duty to maintain books and records and its duty to implement an effective compliance program. See *In the Matter of Senvest Management, LLC*, SEC Rel. No. IA-6581 (Apr. 3, 2024); *In the Matter of Guggenheim Securities LLC, et al.*, SEC Rel. No. IA-6551 (Feb. 9, 2024).¹⁹

Whether viewed from the perspective of the Advisers Act or the Missouri Uniform Securities Act, the supervisory bond between a federally registered investment adviser and its supervised persons is inviolable. Because the IA Rule cannot be administered without a federally registered adviser's active participation, the IA Rule is pre-empted by NSMIA.

B. The IA Rule Overlaps and/or Conflicts with Federally Registered Advisers' Obligations Under the Advisers Act

The Advisers Act establishes a principles-based regulatory regime anchored by fiduciary duties of care and loyalty. The duty of care obligates an investment adviser to render advice that is in the best interests of its clients, consistent with clients' particular

for failing to supervise their investment adviser representatives, too. Mo. Rev. Stat. § 409.4-412(d)(9).

¹⁸ The specific Advisers Act recordkeeping and compliance requirements created by the IA Rule are discussed in Section III.B., *infra*.

¹⁹ In addition, an individual who renders investment advice away from an investment adviser's supervision would risk being deemed an investment adviser subject to state or federal registration as such.

investment objectives, time horizons and instructions, if any. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, SEC Rel. No. IA-5248, 84 Fed. Reg. 33669, 33672-73 (Jul. 12, 2019) (“Fiduciary Standard Release”). The duty of loyalty obligates the adviser not to subordinate its clients’ interests to its own. This means that the adviser must “eliminate, or at least expose through full and fair disclosure all conflicts of interest which might incline [the] investment adviser—consciously or unconsciously—to render advice [that is] not disinterested.” *Id.*, p. 33676; *citing SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963). “To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship.” *Fiduciary Standard Release*, p. 33675, *citing Capital Gains*, 375 U.S. 200.

In addition to being principles-based, the Advisers Act regulatory regime is content-neutral, deferring to federally registered investment advisers’ professional expertise to meet their clients’ investment objectives in a careful and loyal fashion regardless of the investment strategy used. For example, the SEC has proposed its own ESG disclosure rule, which neither mandates nor prohibits any type of investment strategy but rather focuses on requiring client disclosures that the adviser determines adequately describe its strategies. *Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices*, SEC Rel. No. IA-6034, 87 Fed. Reg. 36654 (Jun. 17, 2022).

The SEC fully occupies the field with respect to disclosure by federally registered advisers and the states are preempted from imposing their own disclosure obligations on such advisers. Under SEC rules, federally registered advisers must provide each client a brochure containing the information required by Form ADV, Part 2A at or before the time

the adviser enters into an advisory agreement with the client.²⁰ 17 C.F.R. § 275.204-3. This brochure is also filed with the SEC as part of the adviser's registration application and is made available to the public through the Investment Adviser Public Disclosure Database at www.investor.gov. Material misstatements or omissions in an ADV brochure subject a federally registered adviser to liability under both the Advisers Act's general antifraud provision (section 206), 15 U.S.C § 80b-6, and section 207, *Id.* § 80b-7, which outlaws material misstatements and omissions in a registration application or report filed with the Commission.

Item 8 of the ADV brochure requires an adviser to describe its "methods of analysis and investment strategies" used in "formulating investment advice or managing assets." For each "significant investment strategy or method of analysis" used, the adviser must "explain the material risks involved." This description must be sufficiently detailed to enable clients and prospective clients to make an informed decision whether to hire the adviser and, if so, whether to select a particular investment strategy.

While NSMIA's narrow Notice Filing Exception allows states to receive, for notice purposes, documents that the federally registered adviser files with the SEC, including the ADV brochure,²¹ states may not dictate the contents of the brochure or mandate any additional disclosure. In addition to running afoul of NSMIA's general state law preemption, the IA Rule also conflicts with the federal disclosure regime in specific substantive and procedural ways.

The content of Missouri's mandatory script—that a client is surrendering returns for

²⁰ The ADV brochure covers a range of topics, including advisory services provided, fees charged and the adviser's ownership structure, affiliated relationships, conflicts of interest and disciplinary history.

²¹ As is the case with the Investigation and Enforcement Exception, there would be no need for the Notice Filing Exception if states could impose disclosure obligations on federally registered advisers or require them to file documents directly with the states.

other objectives²²—will often be inconsistent with the disclosures that a federally registered adviser would be required to make under the Advisers Act. For example, an adviser that has determined in its professional judgment that the economic effects of climate change are relevant to a risk-return analysis and, ultimately, to clients' long-term financial success risks making a material misstatement in violation of section 206 of the Advisers Act if its supervised persons distribute the IA Rule's scripted disclosure. 15 U.S.C. § 80b-6. If the script is incorporated into a Form ADV, such an adviser also could be subject to liability under Advisers Act section 207, *Id.*, § 80b-7, for making a false or misleading statement in an SEC filing.

On the procedural side, mandating the annual delivery of, and triennial consent to, the IA Rule's script is inconsistent with Advisers Act requirements, which obligate federally registered advisers to provide clients with annual updates to ADV brochures only in the case of material change. 17 C.F.R. § 275.204-3(b)(2). Moreover, the Advisers Act allows federally registered advisers to determine the best way to obtain their clients' informed consent to the advisers' disclosures. Fiduciary Standard Release at 33677 (“[A]n adviser could provide a client full and fair disclosure of all material facts relating to the advisory relationship . . . through a combination of Form ADV and other disclosure and the client could implicitly consent by entering into or continuing the investment advisory relationship with the adviser.”).

The IA rule also intrudes into the SEC's exclusive authority over recordkeeping and compliance requirements for federally registered advisers. The Advisers Act recordkeeping rule requires federally registered advisers to maintain originals of all written communications

²² According to Defendant Ashcroft, the IA Rule “requires consent from investors acknowledging their choice to surrender higher returns for non-financial objectives.” (Doc. #24-11, p.3.) Defendant Ashcroft has also substituted his judgment for that of expert investment advisers by opining that “financial common sense counsels against” asset managers' offering ESG products in Missouri. (Doc. # 24-12, p. 3.)

received and copies of all written communications sent by the adviser relating to “[a]ny recommendation made or proposed to be made and any advice given or proposed to be given.” 17 C.F.R. § 275.204-2(a)(7)(i). The disclosure and proof of consent required by the IA Rule meet this description. A federally registered adviser with investment adviser representatives registered in Missouri, therefore, would be obliged to maintain the Missouri documents for at least five years, *Id.* § 275.204-2(e), and make the records available to the SEC for examination. 15 U.S.C. § 80b-4(a).²³

The same result obtains under the Advisers Act compliance rule, which requires federally registered advisers to establish, maintain and enforce written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. 17 C.F.R. § 275.206(4)-7. At a minimum, a federally registered adviser with investment adviser representatives in Missouri would, as a result of the IA Rule, be required to establish, maintain and enforce procedures to ensure that its supervised persons’ compliance with the IA Rule does not violate the adviser’s fiduciary duty to act in its clients’ best interest or its duty not to make material misstatements to clients. Procedures relating to the adviser’s retention of the Missouri disclosure and consent records would be required as well.

These obligations are not theoretical. A SIFMA member’s deposition testimony in this case establishes that federally registered advisers are already creating policies and procedures, training personnel and creating and maintaining records they would not do in the absence of the IA Rule. (Doc. # 72-19, pp. 18-20 (David E. Horan Deposition Excerpts)).

²³ As noted above, an adviser who fails to capture Missouri disclosure and consent records could risk an SEC enforcement action. See *Senvest Management, supra*; *Guggenheim Securities, supra*.

Defendants argue that concerns about the IA Rule's ability to expose federally registered investment advisers to SEC enforcement action are overblown. (Doc. #38, p. 9.) They are not. The risk is not that the SEC will prosecute a federally registered adviser's failure to supervise compliance with state law, but that the SEC will prosecute an adviser's violation of its federal fiduciary duty, its recordkeeping and compliance program obligations, its duty not to distribute misleading disclosures, or its failure to supervise its employees' distribution of misleading statements to Missouri clients.

IV. Allowing the State of Missouri to Impose Substantive Regulation on Federally Registered Investment Advisers and Their Supervised Persons Would Invite Other States to Do the Same, Thereby Destroying the "Clear Division of Labor Between the States and the Federal Government" That NSMIA Created

If Defendants are permitted to ignore NSMIA preemption and intrude on the field of federal investment adviser regulation, other states are sure to follow. This, too, is not a theoretical concern. Several states have proposed regulations that would unlawfully impose substantive obligations on federally registered advisers²⁴ and, as noted above, at least one state tried to adopt a regulation similar to the IA Rule.

The reimposition of substantive state investment adviser law on federally registered investment advisers would have serious consequences. Not only would it recreate the costly, inefficient federal/state regulatory overlap of the mid-1990s, but it would subject the fiduciary judgment of investment advisers with a national business to disparate, local, shifting political influences on an endless range of issues. Investors who rely on federally registered advisers to save for retirement, educate their children or care for their loved ones will lose the most if the current system crumbles.

²⁴ See, e.g., Nev. Senate Bill No. 383, Sess. 79 (2017), available at https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB383_EN.pdf.

The IAA respectfully urges the Court not to let that happen.

CONCLUSION

For all the foregoing reasons, *amicus curiae* the Investment Adviser Association respectfully asks the Court to grant SIFMA's Motion for Summary Judgment, Declaratory Relief, and Permanent Injunction as to its claim for NSMIA investment adviser preemption and deny Defendants' Motion for Summary Judgment regarding same.

Dated: June 25, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2024, I electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system on all counsel of record.

/s/ Michael J. Kuhn