INVESTMENT COMPANY INSTITUTE

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March 1, 2019

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

Re: Draft Regulations Pertaining to
NRS 90.576 and NRS 628A.010 et seq.

Dear Ms. Foley:

The Investment Company Institute[1] appreciates having the opportunity to comment on the draft regulations that the Nevada Securities Division has proposed to implement provisions recently added to the Nevada Financial Planning Act (the "Act"), Section 628A.010 et seq. of the Nevada Revised Statutes. The Institute commends the Division for proposing regulations that attempt to respect the limits that the National Securities Markets Improvement Act of 1996 ("NSMIA") imposes on the State's authority over the persons that will be subject to these new regulations – *i.e.,* broker-dealers, investment advisers, and their representatives. Indeed, we were pleased to see the Division expressly referenced in Section 10 of the proposed regulations NSMIA's impact on the regulations' application.

While we appreciate the Division attempting to conform the regulations to the Division's authority under NSMIA, we are concerned that the Division's approach to this issue is both incomplete and fraught with uncertainty. To address these concerns, we recommend that, prior to adopting final regulations, the Division provide additional clarity regarding NSMIA's impact on the regulations' application, as discussed in more detail below.

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[1] The Investment Company Institute (ICI) is the leading association representing regulated funds 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$21.9 trillion in the United States, serving more than 100 million US shareholders, and US$6.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

SECTION 10 OF THE PROPOSED REGULATIONS

Section 10 of the proposed regulations attempts to address NSMIA's impact on the application of the proposed regulations. While NSMIA includes preemptive provisions applicable to Federally-registered investment advisers, broker-dealers, and state-registered investment advisers, Section 10 only addresses NSMIA's impact on the Division's regulation of broker-dealers. It does so by stating that the proposed regulations "shall be interpreted and applied in harmony with the Securities Exchange Act of 1934, as amended by [NSMIA] relating to state regulation of broker-dealer's books and records." For the reasons discussed below, we strongly recommend that, in the final regulations, the Division expressly address the regulations' impact on Federally-registered advisers and state-registered advisers and that it clarify their impact on broker-dealers.

FEDERALLY-REGISTERED ADVISERS

NSMIA added new Section 203A to the Investment Advisers Act of 1940 to prohibit any state from requiring the registration, licensing, or qualification of any Federally-registered investment adviser. As explained in the SEC Release implementing NSMIA's changes to the Investment Advisers Act, "section 203A(b) preempts not only a state's specific registration, licensing, or qualification requirements, ***but all regulatory requirements imposed by state law on Commission-registered advisers relating to their advisory activities or services, except those provisions that are specifically preserved by [NSMIA]***."[2] In other words, NSMIA's preemption extends to any duties a state securities administrator attempts to impose on any Federally-registered investment adviser. The only regulatory authority preserved to the states under NSMIA is the authority to "investigate and bring enforcement actions with respect to fraud and deceit."[3] This being the case, we strongly recommend that the proposed regulations affirm, consistent with NSMIA, that they do not apply to any Federally-registered investment adviser. We understand that the Investment Adviser Association has made a similar recommendation to the Division and offered language to achieve this result.[4] We support their proposed solutions to address this concern.

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[2] *See Rules Implementing Amendments to the Investment Advisers Act of 1940,* SEC Release No. IA-1633 (May 15, 1997). [Emphasis added.] NSMIA preserved to the states the authority to investigate and bring enforcement actions with respect to fraud and deceit.

[3] NSMIA codified this preservation by creating Section 203A(b)(2) of the Investment Advisers Act of 1940.

[4] See letter from Gail C. Bernstein, General Counsel, Investment Adviser Association, to Diana Foley, Securities Division, Nevada Office of the Secretary of State (March 1, 2019).

STATE REGISTERED ADVISERS

By only referencing broker-dealers, Section 10 of the proposed regulations fails to acknowledge or incorporate provisions in NSMIA that limit the ability of one state to impose recordkeeping requirements on an investment adviser that maintains its principal place of business in another state (*i.e.,* an out-of-state adviser). In particular, NSMIA added Section 222 to the Investment Advisers Act of 1940 to prohibit any state from imposing on any out-of-state adviser any requirement to maintain books and records if that adviser is (1) registered in the state where it maintains its principal place of business *and* (2) in compliance with such state's recordkeeping requirements. Consistent with this provision, we strongly recommend that the Division revise Section 10 to expressly acknowledge that the Division's regulations will not require an out-of-state investment adviser to maintain records that are not required by the adviser's home state.

BROKER-DEALERS

As noted above, the Division has attempted to recognize the limits NSMIA imposes on its authority over Federally-registered broker-dealers by including Section 10 in the proposed regulations. Section 10 would require the regulations to be "interpreted and applied in harmony" with the limits NSMIA imposes on the states' regulation of broker-dealers. We strongly recommend that the Division provide greater clarity regarding how it intends broker-dealer registrants to reconcile this provision with the provisions within the proposed regulations that are clearly inconsistent with the recordkeeping requirements imposed on broker-dealers under Federal law. These provisions include the following:[5]

- Section 7, Disclosure of gain at the time advice is given. Subsection (1) of this provision would require broker-dealers, investment advisers, and their representatives to disclose specific information to a client regarding certain "gains" as defined in the regulation. Similarly, Subsections (2), (3), and (5) of Section 7 require specific disclosures relating to the disclosure of the registrant's "gains." The only way a broker-dealer or investment adviser could document compliance with this disclosure requirement would be by maintaining records to demonstrate that it was provided to a client. However, because such disclosure is not required of broker-dealers, they currently would not be required to maintain records documenting such disclosure. As such, this requirement appears to run afoul of NSMIA. To address this concern, we recommend that the regulation clarify that such disclosure is not required of any federally-registered broker-dealer.[6]

[5] We note, unless the home state of an out-of-state investment advisers also requires the adviser to maintain such records, these provisions would also run afoul of the preemptive provisions of Section 222 of the Advisers Act as enacted by NSMIA.

[6] Similarly, with respect to an out-of-state investment adviser, the regulations should clarify that, if the adviser's home state does not require this disclosure, the adviser would not have a duty to maintain documentation demonstrating that it was provided to the adviser's clients.

- Section 8, Breaches of the fiduciary duty. Section 8 of the proposed regulations defines conduct that would be considered a breach of the fiduciary duty of a broker-dealer, investment adviser, or their representatives. Subsections (e), (f), (g), and (i) of Section 8 would define a breach of the fiduciary duty to result from a failure to provide the client certain specified information.[7] As with our above discussed concerns with Section 7, the only way a broker-dealer, investment adviser, or their representatives could document compliance with these disclosure requirements would be by maintaining records documenting that the disclosure has been provided to the client. And yet, such disclosure is not required of broker-dealers so they would not be required to maintain such records under federal law.[8] We strongly recommend that the Division clarify in its proposal that these provisions shall not be applied to any Federally-registered broker-dealer.[9]

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The Institute appreciates having the opportunity to comment on the Division 's proposed regulations. We again commend the Division for recognizing the limits of NSMIA in the application of these regulations. For the reasons discussed above, we strongly recommend that the Division expressly clarify the impact of the proposed regulations on Federally-registered advisers, broker-dealers, and out-of-state advisers. Should you have any questions concerning these comments or require additional information about them, please do not hesitate to contact us.

Sincerely,

Tamara K. Salmon
Senior Associate General Counsel

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[7] The disclosure that would be required by these subsections are: Subsection (e), a current offering document; Subsection (f), whether the product recommended is a proprietary product; the advice was based upon a limited pool or products; and all material risks or features of the recommended product; Subsection (g), all information concerning a potential conflict of interest; and Subsection (i), any "bad actor" disqualifications as defined in Regulation D, Rule 506.

[8] With respect to out-of-state advisers, unless the adviser's home state requires the adviser to maintain such records, the Division cannot require the adviser to maintain them.

[9] Similarly, with respect to an out-of-state investment adviser, the regulations should clarify that it will only be applied if the adviser's home state requires the adviser to maintain records documenting compliance with similar disclosure requirements.