



# Wyoming Secretary of State

**Chuck Gray**  
Secretary of State

**Jesse Naiman**  
Deputy Secretary of State

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July 19, 2023

Governor Mark Gordon  
Wyoming State Capitol  
200 West 24<sup>th</sup> Avenue  
Cheyenne, WY 82002

Dear Governor Gordon:

Thank you for your letter dated May 16, 2023 and for providing approval to proceed with rulemaking for Chapters 2, 4, 5, and 10 of the Secretary of State's Securities Rules. While I understand and appreciate the efforts you have taken thus far on voicing opposition to Environmental, Social, and Governance ("ESG") factors in investment strategies, Wyoming must take concrete action to protect consumers vulnerable to this radical push. This is exactly why our office came out with these rules, which present the first action with the force and effect of law targeting ESG. With that in mind, and after careful review and consideration of the points you raised in your letter, I wanted to address each of your concerns in turn.

First, as to your apprehension with the "extremely broad reach" of the proposed rules, I respectfully disagree. The definition of social criteria was carefully crafted to provide clear boundaries that place reasonable broker-dealers, investment advisers, and securities agents on notice about whether they are engaging in investment strategies that are not focused on achieving their core objective: maximization of financial return for their clients. For nearly 100 years, state and federal securities law has been adamant that retail investors should be provided with complete and adequate information when trusting professional advisers and brokers to make financial decisions on their behalf, and that state and federal authorities should further transparency in this regard to prevent fraud or deceit. The proposed disclosure rules fortify these principles by increasing transparency in the investment process.

Second, a thorough preemption analysis reveals that federal preemption is not at issue. Preemption is rooted in Article VI, Clause 2 of the U.S. Constitution, otherwise known as the Supremacy Clause. The Supremacy Clause provides that federal law is "the supreme Law of the Land" notwithstanding any state law to the contrary. Bearing in mind that courts often invoke the canon against a finding of preemption absent clear statutory language to the contrary, the Supreme Court of the United States has generally identified two ways a federal law may preempt a state statute or rule. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when its structure and purpose implicitly reflect Congress's preemptive intent. Implied preemption can further be broken down into two subcategories: conflict preemption and field preemption. Conflict preemption occurs when compliance with both federal and state regulation

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is impossible. By contrast, field preemption occurs when a federal scheme is so pervasive that it essentially precludes supplementary state regulation, or when a state attempts to regulate a field where the federal interest is dominant.

The proposed security rules raise no express preemption concerns because there is no federal law containing explicit language preventing states from requiring disclosure for ESG investments, especially increased disclosure focused on protecting investors and allowing for fully informed decision-making. On the contrary, the plain text of federal statutes governing securities and investment advisers provide that states are not prohibited from regulating the industry to prevent fraud or deceit. *See* 15 U.S.C. § 77r(c)(1); 15 U.S.C. § 80b-3a(b)(2). Likewise, there is no implied preemption of our proposed rules. Conflict preemption is not a concern because investment advisers, broker dealers, and securities agents would not be prevented from complying with any federal securities law by complying with these enhanced disclosure rules. In contrast, the proposed rules would work in concert with any such regulations and disclosures already required by federal and state authorities, because they simply add an additional requirement for consent. The same is true for field preemption. While securities are federally regulated, there is no “pervasive scheme” set in place such that states are prevented from also requiring increased disclosure for ESG investment strategies to prevent against fraud or deceit. In fact, courts have made clear that “states enjoy broad powers to regulate such diverse subjects as: the registration of securities; the registration of broker-dealers, agents, and investment advisers; and fraud in the sale or purchase of securities and the rendering of investment advisory services.” *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (citing L. Loss, *Fundamentals of Securities Regulation* 8-25 (2d ed. 1988)). Were this not the case, the Wyoming Uniform Securities Act and applicable securities rules would be rendered null and void.

Third, your concern that the language within the disclosure and consent may provide comprehensive permission for a broker dealer or other advisor to invest in ESG-related funds writ large has some merit. I, too, am cognizant that investment advisers, broker dealers, and securities agents may view such a disclosure as a blanket waiver they can weaponize if there is no mechanism for a customer or client to revoke at their discretion. Therefore, our office has amended the disclosure and consent language in subsection (c) of Chapters 4, 5, and 10 to provide that, in addition to the periodic review and renewal of the disclosure and consent, the customer or client may revoke their consent for future investment decisions at any time, at their discretion. I am confident this additional language addresses any such potential abuses.

Since these changes are substantive in nature, I have re-submitted the initial rules packet for your review and approval. Enclosed please find the following:

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1. Initial Memorandum;
2. Statement of Principal Reasons;
3. One clean and one strike and underscore copy of the rules (as revised); and
4. Constitutional Takings checklist.

Once again, I thank you for your thoughts and comments concerning our proposed rule. This disclosure requirement is a key first step in combatting ESG and I look forward to working with you on it.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Gray".

Chuck Gray  
Wyoming Secretary of State

Copy: Betsy Anderson  
Kit Wendtland  
Jesse Naiman