

# Wyoming Secretary of State

## Chuck Gray



January 16, 2024

*Via Hand Delivery and Email*

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

***Re: Administrative Rule Review – ARR23-056***

Dear Governor Gordon:

This letter concerns the Report of Management Council Action on Agency Rules pursuant to W.S. 28-9-106(a) and the Management Council's failure to obtain a majority vote to adopt the administrative rule review analysis and recommendation performed by the Legislative Service Office pertaining to our office's adoption of amendments to Chapters 2, 4, 5, and 10 of our Securities Rules to require investment advisers, broker-dealers, and securities agents to disclose to their customers or clients whether they are incorporating environmental, social, and governance (ESG) investing strategies into investment decisions made on their behalf. Our understanding is that House Majority Floor Leader Chip Neiman, Senate Vice President Dave Kinskey, and Senate Majority Floor Leader Larry Hicks objected to the LSO recommendation, and voted for approval of the rules as submitted.

After careful review of the LSO recommendation, I disagree with the analysis, as the proposed rules fall squarely within the scope of statutory authority delegated to our office, and are within the scope of the legislative purpose of the statutory authority as required by W.S. 16-3-103(d)(i) and (ii).<sup>1</sup> As illustrated further below, the proposed rules also present a necessary and common-sense approach to protecting investors by ensuring transparency in investment decisions which do not solely consider maximization of financial return for clients whose hard-earned money is being invested. It is pivotal that Wyoming take concrete action to protect consumers vulnerable to this radical push.

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<sup>1</sup> The recommendation does not contest that the proposed rules have been adopted in compliance with the Wyoming Administrative Procedure Act, as required by W.S. 16-3-103(d)(iii).

***A. The proposed rules are within the scope of the statutory authority delegated to the Secretary of State.***

First, I disagree with the recommendation's finding that the rules do not appear to be within the scope of statutory authority granted to the Secretary of State, as required by W.S. 16-3-103(d)(i). The proposed rules fall squarely within the Secretary of State's authority granted by the Wyoming Uniform Securities Act, because they carry out the Act's purpose of protecting investors from practices of fraud and deceit.

The Wyoming Uniform Securities Act allows the Secretary of State to "adopt and amend rules necessary or appropriate to carry out this act[.]" W.S. 17-4-605(a)(i). To adopt a rule, the Secretary must find that the rule "is necessary or appropriate in the public interest or for the protection of investors and is consistent with the purposes intended by this act." W.S. 17-4-605(b).

Contrary to the findings in the recommendation, the Act provides a comprehensive regulatory framework for securities beyond simply a mechanism for "the establishment of registration requirements for securities[] agents, broker-dealers, and investment advisers," as the recommendation suggests. As applicable to the proposed rules, the Act furthers the protection of investors by prohibiting investment professionals from engaging in fraud and deception with respect to the sale of securities. *See, e.g.*, W.S. 17-4-501(a)(ii) ("It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly...make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading[.]"); W.S. 17-4-502(a) ("It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities: (i) To employ a device, scheme, or artifice to defraud another person; or (ii) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.").

Moreover, the Act authorizes the protection of investors against attempts by investment professionals to mislead investors through fraud or deceit by prescribing means designed to prevent investment professionals from engaging in acts which are fraudulent or deceptive. For instance, W.S. 17-4-502(b) and (c) allow the Secretary of State to "define an act, practice, or course of business of an investment adviser or an investment adviser representative ... as fraudulent, deceptive, or manipulative, and prescribe means reasonably designed to prevent investment advisers and investment adviser representatives ... from engaging in acts, practices, and courses of business defined as fraudulent, deceptive, or manipulative" and to "specify the contents of an investment advisory contract entered into, extended, or renewed by an investment adviser."

The proposed rules are appropriate and necessary to carry out the Act's purpose of protecting investors because the required disclosures protect investors, and the public, from

misleading investment strategies that do not prioritize maximizing an investor's financial return. In fact, in our current political and economic climate, I can think of nothing more necessary for the securities profession than requiring investment professionals to keep their customers or clients informed if they are using their hard-earned money to make investments which incorporate a social objective, rather than focusing solely on achieving the highest financial return. In this way, the increased transparency and disclosure of investment strategies which consider ESG investment strategies is necessary and appropriate to carry out the purposes of the Act. As such, the proposed rules fall squarely within the statutory authority delegated under the Act.

***B. The proposed rules are within the scope of the legislative purpose and intent of the statutory authority.***

I also disagree with the recommendation's finding that the proposed rules are not within the legislative purpose and intent of the statutory authority granted by the Wyoming Uniform Securities Act. They are.

The purpose of securities laws, both federally, and in states which have adopted uniform securities laws similar to Wyoming, has long been clear: to protect investors from fraud through increased disclosure. In fact, the Securities Act of 1933, 48 Stat. 74, stated that its purpose was to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof..." The Supreme Court has further recognized that "an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry." *Herman & MacLean v. Huddleston*, 459 U. S. 375, 389 (1983). See also *State v. Rivera*, 223 P.3d 951, 962 (N.M. App. 2009) (noting that "the purpose of the securities laws generally, and the purpose of the licensing of broker-dealers and the securities registration laws specifically, [is] to protect all potential investors.").

The same is true with respect to states that have adopted similar statutory schemes to Wyoming's uniform securities laws, which include disclosures to protect investors. In fact, state regulations requiring disclosures to investors, particularly disclosures mandating particular language in a disclosure to investors, are commonplace in the field of securities regulation. *E.g.* S.D. Admin. Code 20:08:04:115(3)(h) and 20:08:07:24(5); Ore. Admin. Code 441-065-0222(6); 3 Alaska Admin. Code 08.515(f); Wis. Admin. Code DFI-Sec. 3.03(2)(h). See also 7 TX ADC 139.26; ME ADC 02-032, Ch. 506 § 6; VT ADC 4-4-8:3-2. Thus, using rulemaking under the Act to mandate disclosures to investors is not only supported by the text of the Act, the practice is commonplace in other jurisdictions. The practice is also common at the federal level. *E.g.* 17 CFR § 227.201 (mandating the content of disclosures to investors).

There is also no question that the proposed rules fall squarely with the legislative intent behind the Wyoming Uniform Securities Act, because they protect investors. "Legislative intent must be ascertained initially and primarily from the words used in the statute." *Allied-Signal, Inc. v. Wyoming State Bd. of Equalization*, 813 P.2d 214 (Wyo. 1991). "When the words used are clear and unambiguous, a court risks an impermissible substitution of its own views, or

those of others, for the intent of the legislature if any effort is made to interpret or construe statutes on any basis other than the language invoked by the legislature.” *Id.* As noted above, both the Act’s broad authority, paired with its purpose of protecting investors against fraud and deceit, render the proposed rules well within the scope of legislative intent.

The recommendation cannot point to any legislation which preempts or otherwise evidences a legislative intent not to protect investors through increased disclosure of investments which incorporate a social objective. Moreover, the legislation cited by the recommendation (2022 Senate File 108, 2023 Senate File 159, 2023 Senate File 172, and 2023 House Bill 210) have nothing to do with requiring investment advisers, broker-dealers, or securities agents to disclose to their customers or clients whether they are incorporating a social objective, i.e. whether they are considering social criteria, in the investment or commitment of customer or client funds. Simply because a bill was not passed by the Legislature which share the same general subject matter as a rule (e.g. transportation, military, etc.), does not render all rulemakings of the same type outside the scope of legislative intent. In this way, the recommendation’s citation to legislation which relates to ESG has no bearing on any lack of legislative intent for the proposed rules.

***C. The proposed rules comply with, and are not preempted by, federal law.***

Although the recommendation did not determine whether the rules comply with federal law, our office has engaged in extensive analysis in this area, and has determined that the proposed rules comply with federal law.

As more fully set forth in our office’s summary of public comments and agency responses, the proposed rules raise no express preemption concerns because there is no federal law containing explicit language preventing states from requiring disclosure for investments incorporating a social objective, especially increased disclosure focused on protecting investors and allowing for fully informed decision-making. The National Securities Markets Improvement Act (NSMIA) provides preemption of many aspects of what a state may propose, but also recognizes state power and authority in many other aspects relevant here, such as the regulation of the securities industry in order to prevent “fraud and deceit.” 15 U.S.C. § 77r(c)(1)(A)(i); 15 U.S.C. § 80b-3a(b)(2). As the proposed rules are acting to require disclosure, they fundamentally are concerned with the prevention of “fraud and deceit,” which is explicitly reserved to the states by federal law, including NSMIA. Likewise, there is no implied preemption of the proposed rules through conflict or field preemption. The inclusion of the disclosures such as those included in the proposed rules are both contemplated and anticipated by the existing federal regulations; thus, they are clearly not preempted.

Nor do the rules create records, as contended by some arguing preemption. There is no new recordkeeping requirement imposed by the proposed rules. The SEC already requires the creation of a “Customer Account Record” (CAR) which contains extensive and multitudinous information, and specifically includes “investment objectives.” See 17 C.F.R. § 240.17a-3(a)(17). The purpose of this CAR is to reduce misunderstandings, is not standardized, and “may consist of more than one document.” The inclusion of the disclosures such as those of the

proposed rule in the already federally-mandated CRA is both contemplated and anticipated by the existing federal regulations; thus, they are clearly not preempted.

Finally, the proposed rules do not place restrictions on the sale of entities covered by federal law. The final rules were carefully amended so as they only cover investment advisers already regulated by the State of Wyoming and investment adviser representatives who operate in the State of Wyoming, as opposed to federally-covered investment advisers.

***D. Conclusion***


The proposed rules satisfy the requirements set forth in W.S. 16-3-103(d). They are also crucial to ensuring Wyoming proactively protects investors from the harmful impacts of ESG investing through increased transparency. ESG investments maliciously target Wyoming's core industries by divesting from our coal, natural gas, and agricultural sectors. With an increasing trend of mutual funds and brokerage firms being pressured by radically left-wing politicians to offer investment products which employ the ESG agenda, we must take an active role to protect our state and consumers.

Simply put, we cannot stand idly and let the people of Wyoming fall victim to the latest left-wing trends. Rather, we must take action to protect investors from the fraud that is the woke ESG agenda. This starts by ensuring, at the very least, informed consent of investment decisions which incorporate ESG criteria. Our office engaged in a robust public comment period where a majority of comments supported the rulemaking. Per your letter from May 16, 2023, our office also had a public comment hearing where the majority of comments supported the rulemaking.

Accordingly, I respectfully request our proposed amendments to Chapters 2, 4, 5, and 10 of our Securities Rules to require investment advisers, broker-dealers, and securities agents to disclose to their customers or clients whether they are incorporating environmental, social, and governance (ESG) investing strategies into investment decisions made on their behalf be approved as submitted.

Please let me know if you have any questions.

Sincerely,



Chuck Gray  
Wyoming Secretary of State