

**Securities Industry Association**

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February 28, 1997

Jonathan D. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Mail Stop 6-9
Washington, DC 20549

Re: NASAA Comment Letter Regarding Rules Implementing Amendments to the Investment Advisers Act of 1940 (Release No. IA-1601, File No. S7-31-96)

Dear Mr. Katz:

The Investment Adviser Committee of the Securities Industry Association ("SIA")¹ has reviewed with significant concern, the above referenced letter submitted by the North American Securities Administrators Association, Inc. ("NASAA") on February 7, 1997. Our concern stems from the fact that NASAA contends that the Commission's rule proposals, in several respects, exceed the statutory mandate given to the Securities and Exchange Commission (the "Commission") under the National Securities Markets Improvement Act of 1996 ("NSMIA"). We believe that these contentions are unfortunate, incorrect, and threaten to undermine the effectiveness and Congressional intent of one of the most important pieces of securities legislation in the last-half century. Therefore, we believe it is appropriate for us to respond to these contentions. We will not, however, address NASAA's substantive comments on the rule proposals since we have already availed ourselves of the opportunity to comment on the proposals.

OBJECTIVES OF NSMIA

As part of NSMIA, Congress enacted the Investment Advisers Supervision Coordination Act (the "Coordination Act") which among other things:

- Requires investment advisers with assets under management of \$25 million or more to register exclusively with the Commission;
- Requires investment advisers with less than \$25 million in assets under management to register with any state in which they have a place of business (as defined by the Commission), unless they have a place of business only in a state(s) not requiring such registration, in which case Commission-registration is required;
- Prohibits states from imposing any law on Commission - registered investment advisers regarding the registration, licensing or qualification of such investment adviser or supervised person of the adviser, except that states may continue to license an

investment adviser representative of a Commission - registered investment adviser, if the investment adviser representative has a place of business in the state. States may also investigate and bring enforcement actions against an adviser or person associated with an investment adviser with respect to fraud or deceit.

- Amended Section 202(a) of the Investment Advisers Act of 1940 to include a definition of the term "supervised person", which definition encompasses any partner, officer, director or employee of an investment adviser, or other person who provides investment advice on behalf of the investment adviser and is subject to the supervision and control of the adviser.

Other provisions of NSMIA exempt nationally traded securities and investment companies registered under the Investment Company Act from state regulation. Additionally, there are provisions of NSMIA which prohibit states from establishing or enforcing any law, rule, regulation or other administrative action regarding capital, custody, margin, financial responsibility, recordkeeping, bonding or financial or operational reporting requirements for broker-dealers, other than those established under NSMIA.

Given the above it seems beyond dispute that a major goal of Congress, in adopting NSMIA in general, and the Coordination Act in particular, was to promote uniformity of securities regulation through preemption of state law, as well as to amplify federal securities laws, as appropriate and necessary, to accomplish that goal. A companion goal is to provide a more effective regulatory framework in which the states and the Commission will each focus their efforts on those areas they are in the best position to regulate. An additional goal of preemption is to relieve investment advisers, and their supervised persons, including investment adviser representatives, from redundant, sometimes contradictory or merely differing state regulation. The issue here is not whether state or federal securities laws are better, but rather Congress' perception of the need for uniformity. Regardless of NASAA's sincere efforts to achieve more uniformity among state securities laws, the fact remains that there are fifty different state standards, and only one federal one. Therefore, we believe Congress fully intended, through the Coordination Act, to preempt state securities laws related to investment advisers, except to the extent specifically preserved to the states, just as it did with other aspects of NSMIA, i.e. - securities registration. Otherwise, the Act will not eliminate the burdens on interstate commerce flowing from the multiplicity of state securities laws.

It is against the backdrop of the above congressional goals and objectives that we offer the following comments:

SCOPE OF PREEMPTION

It is well known that the Coordination Act was the last portion of NSMIA to be finalized prior to passage. As a result there is little or no legislative history specifically addressing it. Nonetheless, in light of the overall Congressional objectives and the content of other provisions of NSMIA, we believe that the Commission's view that state law is preempted with respect to Commission-registered advisers, except as specifically preserved, is the correct one. However, as discussed below, even if one were to accept NASAA's view on preemption, the Commission was acting well within the scope of its authority in the rule changes and interpretations it has proposed to implement provisions of the Coordination Act.

DEFINITION OF INVESTMENT ADVISER REPRESENTATIVE

While NASAA makes some constructive recommendations regarding the content of the Commission's definition of "investment adviser representative,"² at the same time it contests the Commission's statutory authority to define the term. NASAA's position appears to be based on the fact that only the states have historically licensed investment adviser representatives and they have retained the right to license investment adviser representatives of Commission-registered investment advisers under the provisions of the Coordination Act. They also contest the Commission's assertion that defining the term "investment adviser representative" is within the scope of its rule making authority under Sections 211(a) of the Investment Advisers Act.³ While the scope of the Commission's authority under Section 211(a) may be a subject of legitimate debate, the outcome of such debate is irrelevant in this instance, since the Commission's authority was clearly delineated in the Coordination Act when Congress added Section 202(a)(25) to the Investment Advisers Act, defining the term "supervised person." Since an "investment adviser representative" is clearly a category or subset of supervised person⁴ the Commission's authority to define the latter term clearly encompasses the former.

DUALLY-LICENSED AGENTS

For the reasons stated above, it is clear that the Commission, under Investment Advisers Act Section 202(a)(25), has the authority to define the term "investment adviser representative." It similarly has the authority to exclude certain classes of persons from the definition i.e.-those already licensed as sales agents. It is interesting to note that NASAA raises no objection to excluding from the definition those who only provide impersonal services or services other than on a "regular" basis. Also, while NASAA strongly endorses dual - licensing on the theory that investment adviser representatives require distinctly different skills than "sales agents," it undermines its own argument when it points out that over 50% of the states that otherwise require investment adviser representative licensing, already provide some form of relief or exemption from dual-licensing.

CONCLUSION

We strongly believe that the Commission has acted within its authority and consistent with Congressional intent in proposing the rules and interpretations set forth in Release IA-1601. While, we do not necessarily agree with the content of all of the Commission's proposals, or necessarily believe they are superior to state law alternatives, (and we have previously offered constructive alternatives where we deemed it appropriate), we consider it imperative in the interest of uniformity of regulation, that the preemption process go forward as Congress intended.

Sincerely,

Burton M. Fendelman
Chairman
Investment Adviser Committee

cc: Barry P. Barbash, Esq.; Robert Plaze, Esq.; Stuart J. Kaswell, Esq.; Michael D. Udoff, Esq.; Mark J. Griffen

Footnotes

1 The Securities Industry Association brings together the shared interests of more than 760 securities firms throughout North America to accomplish common goals. SIA members -- including investment banks, broker-dealers, specialists, and mutual fund companies -- are active in all markets and in all phases of corporate and public finance. In the U.S., SIA members collectively account for approximately 90 percent, or \$100 billion, of securities firms' revenues and employ about 350,000 individuals. They manage the accounts of more than 50-million investors directly and tens of millions of investors indirectly through corporate, thrift and pension plans.

2 NASAA Comment Letter at 9

3 NASAA Comment Letter at 23 to 25

4 NASAA does not appear to dispute that a supervised person would include a investment adviser representative. See NASAA letter at 9.