

MEMO# 35649

March 18, 2024

Wyoming Finalizes ESG Investing Rules

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TO: Broker/Dealer Advisory Committee
ESG Advisory Group
ESG Task Force
Investment Advisers Committee
SEC Rules Committee RE: Wyoming Finalizes ESG Investing Rules

Parts of the rules package proposed by Wyoming Secretary of State Chuck Gray on Environmental, Social, and Governance ("ESG") investment disclosure and consent went into immediate effect on February 27, 2024 and require compliance as of that date. Wyoming Governor Mark Gordon issued line item-vetoes of portions of the amendments and stated in a letter to Secretary Gray that the "vetoed language is outside of the scope of the securities regulatory authority delegated under Wyoming statute" and that the "vetoed language likely runs afoul of federal securities law and principles of preemption."[\[1\]](#) With the exception of the vetoed portions, the amendments were adopted as proposed.[\[2\]](#)

ICI commented on the proposal, recommending that Wyoming withdraw the proposed amendments, noting a number of issues with the proposal.[\[3\]](#)

Summary of the Final Rules' Requirements for Investment Advisers[\[4\]](#)

Following the Governor's line-item vetoes, the rules now reflect a pared-back definition of a social objective and require written disclosure for some ESG-related investments, but they do not require client consent.

In a change from the proposal, the term "incorporates a social objective" now means "the consideration of social criteria in the investment or commitment of customer or client funds." In a further change from the proposal, the term "social criteria" now "include any criterion that is intended to further, or is branded, advertised, or otherwise publicly described as furthering, any of the following: (a) International, domestic, or industry agreements relating to environmental or social goals; (b) Corporate governance structures based on social characteristics; (c) Social or environmental goals."

Investment advisers that "incorporate a social objective" into investment decisions, advice, or recommendations must disclose to their clients the existence of such incorporation. The disclosure obligation will be satisfied by providing clear and conspicuous disclosure, via written communication. In a change from the proposal, the contents of the written

communication are not prescribed. The disclosure must be provided to the client on an annual basis and whenever the investment adviser undergoes a suitability review with a client. In a change from the proposal, and consistent with ICI's comments, client consent is no longer required.

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Notes

[1] See 24-2-27 Securities Rules 2, 4, 5, 10 Letter to Sec. Gray, available at: <https://drive.google.com/file/d/1DM21eP1ufCDVXZzpbMa8WF6UxGX6dokf/view>.

In the letter, the Governor also noted "express limits contained in federal laws on the state regulation of (1) federally covered securities, (2) broker dealers, (3) federally covered investment advisors, (4) investment advisor representatives, and (5) securities agents."

[2] Governor Gordon Issues Line-Item Vetoes to Secretary of State's ESG Investing Rules (February 27, 2024), available at: <https://governor.wyo.gov/news-releases/governor-gordon-issues-line-item-vetoes-to-secretary-of-state-s-esg-investing-rules>.

[3] See ICI Recommends Withdrawal of Wyoming's Proposed Amendments Prescribing ESG-Related Advisory Disclosure (September 29, 2023), available at <https://www.ici.org/system/files/2023-09/35457a.pdf>. ICI noted that if adopted, the proposed amendments would be subject to legal challenges under the National Securities Markets Improvement Act of 1996 ("NSMIA"). ICI stated that NSMIA would pre-empt the proposed amendments to the extent that they cover federal covered investment advisers or their representatives, and further noted that the First Amendment of the US Constitution prohibits Wyoming from requiring advisers to make misleading statements. ICI additionally noted its belief that the proposed amendments, as drafted, were unworkably vague, unnecessary, and would be costly to implement.

[4] For simplicity, the terms "investment advisers" or "advisers" include both investment advisers and investment adviser representatives. Parallel amendments containing the same substance were proposed, and finalized, for broker-dealers and their agents.