

MEMO# 35806

August 15, 2024

Federal District Court Strikes Down Missouri Securities Division Rules

[35806]

August 15, 2024

TO: ICI Members

Broker/Dealer Advisory Committee

ESG Advisory Group

Investment Advisers Committee SUBJECTS: State Issues RE: Federal District Court Strikes Down Missouri Securities Division Rules

On August 14, 2024, the US District Court for the Western District of Missouri ordered that a set of challenged Missouri Securities Division rules, which required specified financial professionals to obtain a client's written consent on state-scripted documents before providing advice that "incorporates a social objective or other nonfinancial objective," should be enjoined, statewide, and in their entirety.[\[1\]](#)

The rules[\[2\]](#) were challenged on the grounds that they are preempted by the National Securities Markets Improvement Act of 1996 (NSMIA) and by the Employee Retirement Income Security Act of 1974 (ERISA). The challenge further asserted that the rules violate the protection against compelled speech provided by the First Amendment of the United States Constitution and are unconstitutionally vague.

The Court agreed with all of these arguments and found that the rules "are preempted by NSMIA and ERISA, are unconstitutional under the First and Fourteenth Amendments of the United States Constitution, and are impermissibly vague under the Fourteenth Amendment of the United States Constitution."

Count One - The Rules are Preempted by NSMIA

The Court found that the rule covering broker-dealers (B-D Rule) is "expressly preempted by NSMIA because it requires broker-dealers to make and keep record[s] that differ from—and are in addition to—federal requirements." The opinion noted that "[p]ut simply, the B-D Rule requires broker-dealers to make and keep a new document that is not required by federal law." It further stated that the "signature requirement ... is also new and not required by federal law," and as such, "[t]hese requirements are preempted by NSMIA."

The Court found that the rule covering investment advisers (IA Rule) is also preempted by

NSMIA, noting that "[s]imilar to the B-D Rule, the IA Rule is preempted because it impermissibly imposes new and different State regulatory obligations that are not required by federal law." The opinion stated that "the IA Rule ... impermissibly regulates investment advisers by creating compliance obligations for advisory firms" and that "the requirements of the IA Rule far exceed NSMIA's authorization for states to 'license, register, or otherwise qualify any investment adviser representative.'"

Count Two - The Rules are Preempted by ERISA

The Court found that the rules "'relate to' an ERISA plan by having 'a connection with such plan'" and "interfere with ERISA by restricting what investments may be recommended or selected, and by mandating disclosure and recordkeeping requirements not required by ERISA." The Court agreed with the challenger's argument that "[b]y creating a non-ERISA prohibition against ERISA-compliant fiduciary advice, the Rules undermine ERISA's exclusive enforcement scheme and are therefore preempted."

Count Three - The Rules Violate the First Amendment

The Court found that the written consent requirement of the rules failed the legal tests for evaluating whether "whether disclosure requirements violate the First Amendment" as the compelled speech "is misleading" and "not uncontroversial." It further found that "the Rules are more extensive than necessary," and "could have been more narrowly and carefully worded to avoid being inaccurate and/or misleading."

Count Four - The Rules are Unconstitutionally Vague

The Court found that the rules failed the "void-for-vagueness" legal test. The Court agreed that the rules "fail to adequately define 'nonfinancial objective'" and "leave many concepts in this definition unexplained." The opinion stated that the rules "are unconstitutionally vague" and the vagueness "is particularly troublesome given the penalties for failure to comply."

Conclusion

The opinion noted that the challenger "has shown irreparable harm absent a permanent injunction." The Court found that the rules "are preempted by federal law and violate [the challenger's] constitutional rights." The Court stated that "[t]his significant harm outweighs any interest Defendants may have in the Rules and enforcing them," and that "[t]he balance of harms factor weighs in favor of a permanent injunction."

Finally, the Court declared that the rules are "preempted and unconstitutional" and issued "a statewide permanent injunction ... prohibiting Defendants and their officers, employees, and agents from implementing, applying, or taking any action whatsoever to enforce" the rules.

Joshua Weinberg
Associate General Counsel, Securities Regulation

Notes

[\[1\]](#) The Court's order is attached hereto. ICI's summary of the complaint in the matter of Securities Industry and Financial Markets Association vs. John R. Ashcroft and Douglas M. Jacoby, Civil Action NO. 2:23-cv-4154 (Aug. 10, 2023) can be viewed at

<https://www.ici.org/memo35414>.

[2] The rules made it a dishonest or unethical business practice in Missouri for broker-dealers, agents, investment advisers, and investment adviser representatives to fail to disclose to any client or prospective client if such financial professional "incorporates a social objective or other nonfinancial objective" into: (i) a discretionary investment decision to buy or sell a security or commodity for a client; (ii) advice or a recommendation and/or solicitation to client for the purchase or sale of a security or commodity; or (iii) the selection, or advice or a recommendation to a client regarding the selection, of a third-party manager or subadviser to manage the investments in the client's account.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.