THE FATE OF STATE INVESTOR PROTECTION

Benjamin P. Edwards[*]

Abstract

In June 2019, the Securities & Exchange Commission made significant changes to the regulation of investment advice, issuing regulations and new interpretations of the Investment Advisers Act of 1940. Industry advocates have argued that states lack power to enact their own regulations on the theory that various federal statutes and regulations combine to preempt and sharply limit state authority. This article examines the current state of reforms around the country and the policy and legal arguments for and against limiting state efforts to raise the standards for investment advice.

[*]Associate Professor, University of Nevada, Las Vegas, William S. Boyd School of Law; J.D., Columbia Law School. For helpful comments and conversations, special thanks to participants of the Business Law Conference at the University of Tennessee.

INTRODUCTION

American retirements are supported by what has been termed a three-legged stool: (i) defined-benefit pensions; (ii) Social Security; and (iii) personal savings. As employers shifted from defined-benefit plans to optional defined-contribution plans, more and more Americans lost access to traditional defined-benefit pensions.[1] Functionally, this has meant that more Americans must now balance their retirement on two legs—Social Security and whatever limited savings they have been able to accumulate. It also means that instead of having American retirement funds pooled and managed by dedicated professionals, almost all Americans now have to develop savvy investing or face the consequences.[2]

For many, retirement looks bleak; the United States faces a growing retirement crisis. Each day, approximately, 10,000 Americans turn 65.[3] Many of them will reach 65 without significant savings. One report clocked the median retirement account savings for persons aged 65 or older at just $58,035.[4] For those without sufficient savings, the realities can be grim. One recent report found that as of 2017, about 7.7% of American seniors were food insecure.[5] The same report also found that the number of food insecure American seniors has more than doubled since 2001, a statistic which partially reflects America's ballooning senior population.[6]

Even though helping Americans save, invest, and prepare for retirement remains critical to addressing this slow-moving problem, the United States lacks any broad, coherent regulation for financial and

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[1] For a description of this change and its implications, see generally JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM (Oxford Univ. Press 2008).

[2] *See* Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35 (2015) (describing how the current system forces unsophisticated Americans to make complex financial decisions).

[3] D'Vera Cohn & Paul Taylor, *Baby Boomers Approach 65 – Glumly*, PEW RESEARCH CENTER (Dec. 20, 2010), https://www.pewsocialtrends.org/2010/12/20/baby-boomers-approach-65-glumly/ ("On January 1, 2011, the oldest Baby Boomers will turn 65. Every day for the next 19 years, about 10,000 more will cross that threshold.").

[4] VANGUARD, *How America Saves 2019* 51 (JUNE 11, 2019), https://institutional.vanguard.com/iam/pdf/HAS2019.pdf.

[5] FEEDING AMERICA, *The State of Senior Hunger in America in 2017* 3 (May 2019), https://www.feedingamerica.org/sites/default/files/2019-06/The%20State%20of%20Senior%20Hunger%20in%202017_F2.pdf.

[6] *Id.*

investment advice.[7] Regulatory authority for financial advice has been split between, various state agencies, different federal regulators, and financial self-regulatory organizations largely controlled by industry firms.

On the whole, our system poorly serves the American public. The financial services industry remains inefficient and riddled with entrenched conflicts of interest.[8] Financial advisers often deliver substandard advice and skew investment decisions toward financial products paying commissions and kickbacks to the financial services firms employing the advisers.

Substandard financial advice drives enormous costs for retirement savers. According to one relatively recent study from the White House Council of Economic Advisers, "the aggregate annual cost of conflicted advice is about $17 billion each year" for retirement savers.[9] Functionally, bad advice means that retirement savers will run out of money in retirement years sooner than they would if they had received better advice.

Efforts to meaningfully address conflicted investment advice at the federal level have largely been unsuccessful. As Part I explains, a series of federal rulemakings have resulted in little meaningful change and offer only dim hope for real reform in the near term.

The latest federal rulemaking round generated Regulation Best Interest and some other new rules and interpretations from the Securities & Exchange Commission (SEC). The SEC's release anticipated that states might see the SEC's tweaks to existing standards as insufficient and noted that it could not predict whether its new rules would preempt current or future state attempts to raise standards on their own. It provided no guidance, only declaring that "the preemptive effect of Regulation Best Interest on any state law governing the relationship between regulated entities and their customers would be determined in future judicial proceedings based on the specific language and effect of that state law."[10]

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7 *See* Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47, 48 (2014).

8 *See* Benjamin P. Edwards, *Conflicts & Capital Allocation,* 78 OHIO ST. L.J. 181, 184 (2017) (arguing that the current "incentive structures do not merely hurt individual investors and reward advisors, but in fact, drive the creation of needlessly complex financial products and retard economic growth").

9 COUNCIL OF ECON. ADVISERS, THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS 2 (Feb. 2015).

10 Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 34-86031, 17 C.F.R. pt. 240 (Jun. 5, 2019), https://www.sec.gov/rules/final/2019/34-86031.pdf.

Faced with federal inaction, state legislatures and regulators have begun to step forward to increase standards. One SEC Commissioner praised state leadership, noting that states with fiduciary duties deliver better results for their citizens.[11] Citing recent research, Commissioner Jackson recognized that states with more meaningful protections deliver substantially better outcomes for their citizens.[12] He explained that in states with fiduciary duty protections, "investors saved 51 basis points each year by getting better advice."[13] Functionally, investors with the ability to put $100,000 aside for twenty years would end up with over $50,000 more than if they had been steered into an investment with higher costs and fees.[14]

Functionally, there are three main ways a state can impose a fiduciary duty on investment advice in the state: (i) common law judicial decisions; (ii) state statutes; or (iii) state regulatory action. As to the common law route, some states already impose fiduciary duties under state common law through court decisions recognizing that persons providing investment advice owe a fiduciary duty to their customers.[15] Because nearly all investor cases now go through arbitration, gradual common law reform remains unlikely to occur in the near term.[16]

The second two options now face some controversy. On the statutory front, Nevada moved first, amending its laws to impose a fiduciary duty on broker-dealers and investment advisers. Recently, New Jersey also moved forward with its state securities regulators launching a rulemaking

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[11] Robert Jackson, *Statement on Final Rules Governing Investment Advice*, U.S. SEC. & EXCHANGE COMMISSION (June 5, 2019), https://www.sec.gov/news/public-statement/statement-jackson-060519-iabd.

[12] *Id.*; *see also* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice* (National Bureau of Econ. Research, Working Paper No. 25861, 2019).

[13] *See* Jackson, *supra* note 11.

[14] *Id.*

[15] *See* Benjamin P. Edwards, *Fiduciary Duty and Investment Advice: Will A Uniform Fiduciary Duty Make A Material Difference?*, 14 J. BUS. & SEC. L. 1, 15 (2014) ("Certain states, such as California, already impose fiduciary duties on Brokers and broadly declare that they are fiduciaries").

[16] For a description as to how industry-wide arbitration now displaces public courts and substantially lowers the probability that state courts will impose higher standards, *see* Benjamin P. Edwards, *Arbitration's Dark Shadow*, 18 NEV. L.J. 427, 433 (2018) ("If allowed to consider these disputes today, courts might craft different doctrine. For example, because brokers now regularly portray themselves as trustworthy financial advisers, courts might craft doctrine to hold brokers accountable for breaches of that trust." (citation omitted)).

initiative designed to improve the quality of financial advice provided to New Jersey residents. Part I reviews the current state of play for state fiduciary law.

As explained below, these initiatives now face well-financed challenges arguing that States lack the power to pass these laws because some federal law or regulation somehow preempts state authority. Part II of this essay offers an early look into some of these challenges. Using a request for state records, I obtained all of the comment letters that had been submitted either in favor of or against New Jersey's draft fiduciary regulation. Where I could, I also gathered publicly available comment letters addressing Nevada's draft fiduciary regulations. Reviewing these letters reveals a coordinated industry effort to push a few common preemption arguments—including that existing federal law from the National Securities Markets Improvement Act (NSMIA) prohibits states from increasing the substantive standards applicable to brokerage firms. This short essay takes a look at this particular argument in context.

I. THE FEDERAL FIDUCIARY FIGHTS

For decades, federal policymakers have wrestled with questions about how to compensate financial advisers and how to structure incentives for the distribution of financial products and advice.[17] Often, financial advisers are simply stockbrokers ("Brokers") selling products on commission. Many of the problems in this space flow from the incentives created by the differential commissions paid to these Brokers.[18] When Brokers get paid more for steering their customers to one product over another, they tend to lead their customers to buy the products most profitable for themselves and their brokerage firms. Disclosure solutions tend to work poorly in this context.[19]

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[17] COMMITTEE ON COMPENSATION PRACTICES, REPORT OF COMMITTEE ON COMPENSATION PRACTICES 7–8 (1995), https://www.sec.gov/news/studies/bkrcomp.txt ("[P]articular concern is the practice of firms offering higher payouts when [brokers] sell proprietary mutual funds instead of funds of a similar class managed by outside investment companies.").

[18] *See* Donald C. Langevoort, *Brokers As Fiduciaries*, 71 U. PITT. L. REV. 439, 447–48 (2010) (discussing how differential commissions can lead brokers to recommend costlier products to their customers because they make more money for selling them).

[19] *Id.* ("The larger challenge of any disclosure-oriented strategy to manage fiduciary conflicts is overcoming the sales efforts, whether via the media or-probably more powerfully-through the interpersonal skills of sales people trained (and highly motivated) to elicit trusting responses from their customers").

Conflicts of interest in the distribution of financial advice and financial products pose a complex problem. The differential commission dynamic plainly does not tend to pair customers with the best products available for them on the open market.[20] Of course, financial advisers do not work for free and some investors might be better off receiving conflicted financial advice than no financial advice at all.

Registered Investment Advisers ("Advisers") also provide advice about securities. They are registered under the Investment Advisers Act of 1940. Well-settled law establishes that these Advisers already owe a fiduciary duty to their clients. The scope of that duty and the SEC's commitment to protecting it remains uncertain with recent guidance from the SEC indicating that most Adviser conflicts of interest may be addressed simply through disclosure.[21]

A. Dodd-Frank

In the aftermath of the 2008 financial crisis, Congress authorized the SEC to make changes to harmonize standards between Brokers and Advisers and to "protect consumers from abusive financial services practices."[22] The expansive Dodd-Frank statute called on the SEC to to review and report on the standards of care for broker-dealers and Advisers giving advice to retail customers.[23] The SEC released the study in 2011—with its staff recommending that the SEC use authority granted by Dodd-Frank to impose a fiduciary duty on the brokerage industry.[24] Notably, Dodd-Frank also limited the SEC's power by specifying that whatever standard the SEC imposed, "receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard applied to a broker, dealer, or investment adviser."[25]

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[20] *Id.* at 445 ("We could simply be cynical, of course: pushing excessively costly investment strategies is profitable for the industry, and it expends political resources to protect those profits").

[21] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248, 17 C.F.R. pt. 275 (June 5, 2019).

[22] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[23] *Id.* The commission regulates both Brokers and Advisers.

[24] STAFF OF THE SEC, STUDY ON INVESTMENT ADVISERS AND BROKER DEALERS i (2011), http:// www.sec.gov/news/studies/2011/913studyfinal.pdf.

[25] § 913(g)(1), 124 Stat. at 1828–29.

Although the SEC gained its power to regulate at this time, it did not attempt to make use of it until 2018 when it launched its Regulation Best Interest rulemaking initiative.

B. Department of Labor

As the SEC dithered over whether to exercise its authority, the Department of Labor launched an ambitious rulemaking agenda aimed at improving the quality of advice given to Americans with assets held in retirement accounts.[26] Using its authority under Employee Retirement Income Security Act (ERISA), the Department of Labor proposed to hold all personalized investment advice affecting assets in retirement accounts to a high standard.[27]

But the rulemaking initiative did not survive intense opposition. After the election of President Trump, a new Labor Secretary declared his opposition.[28] Later, the Fifth Circuit eventually struck down the rule down as an "arbitrary and capricious exercise of administrative power."[29]

C. SEC

Against this backdrop, the SEC established its own rulemaking initiative in 2018, which eventually culminated with the series of rules and interpretations presented as raising standards for financial advice. Although the SEC's initiative involves four components, this essay only describes Regulation Best Interest and the duties it created for brokerage firms.[30]

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[26] *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule--Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 10, 2016) (codified at 29 C.F.R. pts. 2509, 2510, 2550), https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice.

[27] Notably, Labor's rulemaking captured financial advice from insurance agents as well as securities-licensed financial advisers.

[28] Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too: As the Labor Department acts to revise the Fiduciary Rule and others, the process requires patience*, WALL ST. J., May 22, 2017, https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029.

[29] *See* Chamber of Commerce of United States of Am. v. United States Dep't of Labor, 885 F.3d 360, 388 (5th Cir. 2018), judgment entered sub nom. Chamber of Commerce of Am. v. United States Dep't of Labor, No. 17-10238, 2018 WL 3301737 (5th Cir. June 21, 2018) (vacating Labor's Fiduciary Rule).

[30] Other components include a new interpretation of the duties owed by Advisers, an expansive interpretation of the exception for brokerage firms under the Advisers Act, and a new disclosure requirement for Brokers and Advisers.

Promoted as increasing standards for the brokerage industry, Regulation Best Interest instructs that a Broker must "act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the [Broker or brokerage firm] making the recommendation ahead of the interest of the retail customer."[31] Curiously, the regulation does not say that a Broker or brokerage must put a customer's interest first—rather that it may not put its interest ahead of the customer. This leaves substantial room for Brokers and brokerage firms to consider their own interests.

Brokerages may satisfy the regulation by complying with four obligations: (i) a disclosure obligation; (ii) a care obligation; (iii) a conflict of interest obligation; and (iv) a compliance obligation.[32] Among other things, the "disclosure obligation" requires Brokers to inform customers of "[a]ll material facts relating to conflicts of interest that are associated with the recommendation."[33] The care obligation largely enshrines the Financial Industry Regulatory Authority's ("FINRA") existing suitability standards, directing Brokers and brokerage firms to conduct the same sort of analysis for pairing customers with securities as currently required by FINRA's suitability rule and existing guidance.[34] The conflict of interest and compliance obligations simply require brokerage firms to mitigate, and in some cases eliminate, conflicts of interest and set up an appropriate compliance structure.[35]

To some extent, the changes have incrementally improved the pre-existing regulatory scheme. But brokerage firms remain free to subject their sales force to conflicts of interest that is likely to skew their recommendations. Remarking on the changes, a committee of securities law professors described them as "taking an ambiguous position that may raise the standard for brokers marginally."[36]

But the new regulation does raise questions about state law. The same committee explained that Regulation Best Interest came with some risks

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31 17 C.F.R. § 240.15l-1(a)(1).

32 17 C.F.R. § 240.15l-1.

33 *Id.* at (a)(2)(i)(B).

34 *Id.* at (a)(2)(ii).

35 *Id.* at (a)(2)(iii).

36 Drafting Committee, *Statement of Concerned Securities Law Professors Regarding Investment Advisers and Fiduciary Obligations*, THE CLS BLUE SKY BLOG (June 25, 2019), http://clsbluesky.law.columbia.edu/2019/06/25/statement-of-concerned-securities-law-professors-regarding-investment-advisers-and-fiduciary-obligations/.

that it "may be read to preempt state laws and rules that do clearly impose a higher fiduciary duty."[37]

D. Department of Labor, Again

With the SEC regulation set to phase in, the Department of Labor has indicated that it will undertake a new rulemaking initiative with respect to fiduciary duty. Although the precise scope of it remains unclear, the informed observers speculate the administration will largely defer to the SEC's standard.

II. STATE REGULATION

With federal regulation largely failing to meaningfully increase standards, state securities regulation has grown in importance. This part overviews some state common law, statutory, and regulatory developments.

A. State Common Law

Many states impose fiduciary duties on Brokers through their state common law. This can happen either as a suite of duties applicable to all Brokers operating in the state or to Brokers giving advice in particular circumstances. One leading study found that the law in twenty-three different states treated Brokers as fiduciaries to some degree.[38]

B. The Nevada Statute

As the federal battle played out over whether the Department of Labor could impose a fiduciary duty through its authority to regulate retirement accounts, Nevada moved first to pass its own fiduciary statute. Nevada enacted a fiduciary duty for Brokers by modifying an existing statute imposing a fiduciary duty on financial planners.[39]

Although Nevada has released draft regulations under the statute, it has not yet promulgated a new draft or given any indication as to when it will establish final regulations.

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[37] *Id.*

[38] Finke, Michael S. and Langdon, Thomas Patrick, The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice (March 9, 2012). Available at SSRN: https://ssrn.com/abstract=2019090 or http://dx.doi.org/10.2139/ssrn.2019090.

[39] N.R.S. 628A.

C. Other Draft Regulations

At present, New Jersey and Massachusetts have also begun to press forward with rulemaking initiatives to clearly impose fiduciary duties on Brokers operating within their borders.

III. THE NSMIA PREEMPTION ARGUMENT

Many of the arguments against more deliberate state investor protection efforts have centered on the preemptive scope of The National Securities Markets Improvement Act ("NSMIA"). In particular, the argument tends to rely heavily on a particular section of the Securities Exchange Act of 1934 ("Exchange Act"). NSMIA added Section 15(i)(1) to the Exchange Act. When the Securities Industry and Financial Markets Association ("SIFMA") cites the provision in correspondence to state regulators, it provides the following excerpt:

> No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, *making and keeping records*, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers *that differ from, or are in addition to, the requirements in those areas established under* [the Exchange Act]" (emphasis added).[40]

For reasons which remain unclear, the SIFMA letter truncates its quotation to omit the subsection's final sentence, which provides that "*[t]*he Commission shall consult periodically the securities commissions (or any agency or office performing like functions) of the States concerning the adequacy of such requirements as established under this chapter."[41] This language seemingly contemplates that the SEC may, from time to time, amend its requirements to ensure that brokerages capture information necessary for documenting compliance with state laws.

Based on the limited quotation of the Exchange Act section cited above, the SIFMA Letter argues that Nevada's draft fiduciary regulations would be preempted by NSMIA because they would be "state regulations

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[40] Letter from Kevin M. Carroll, Managing Director & Associate General Counsel, SIFMA, to Diana Foley, Nevada Secretary of State's Office, Securities Division (Mar. 1, 2019) (quoting 15 U.S.C. § 780(i)(1) (emphasis added by SIFMA)) [hereinafter "SIFMA Letter"].

[41] 15 U.S.C. § 780(i)(1) (emphasis added).

that by their nature require [brokerages] to make and keep new or different records than those required by federal law and FINRA rules."[42] Based on this, SIFMA told Nevada regulators that its draft regulation "would be unlikely to survive a legal challenge on NSMIA grounds."[43]

Similar arguments have been made in letters to the New Jersey Bureau of Securities. For example, Morgan Stanley's letter opposing New Jersey's rulemaking effort incorporates arguments made by SIFMA and also claims that any additional sales-practice regulation "would clearly impose new recordkeeping obligations upon [brokerages] as they attempt to document compliance."[44]

A. Preemption & Securities Law

Generally, federal law may preempt state law in a few different ways. In areas where Congress has authority, it could write laws expressly preempting and displacing state laws. If Congress has not expressly preempted state law, it remains possible for federal law to so thoroughly occupy a field as to leave no real room for state law.[45] Federal law may also preempt state law if it somehow conflicts with state law.[46]

Securities law has historically involved both state and federal law, with states playing a vital role in securities regulation.[47] Thus, for state securities laws to be preempted by federal law, there must be some clear, irreconcilable conflict between state and federal law. In analyzing Supreme Court precedent on conflict preemption, one scholar explained that "conflict exists if either (1) compliance with both the state and federal law

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42 SIFMA Letter at 10.

43 *Id.*

44 Letter from Anne Tennant, Managing Director, General Counsel of Morgan Stanley Wealth Management, to Christopher W. Gerold, Bureau Chief, New Jersey Bureau of Securities, June 13, 2019 (on file with author).

45 *See* Pennsylvania R. Co. v. Pub. Serv. Comm'n of Com. of Pennsylvania, 250 U.S. 566, 569, 40 S. Ct. 36, 37, 63 L. Ed. 1142 (1919) ("when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them").

46 *See* Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) (explaining that preemption may occur if there is "an irreconcilable conflict between the federal and state regulatory schemes").

47 *See* Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101, 1107 (4th Cir. 1989) ("It is well-settled that federal law does not enjoy complete preemptive force in the field of securities."); Chanoff v. U.S. Surgical Corp., 857 F. Supp. 1011, 1015 (D. Conn. 1994), aff'd, 31 F.3d 66 (2d Cir. 1994), and aff'd, 33 F.3d 50 (2d Cir. 1994) ("It is settled, however, that Congress did not act to occupy the field of securities; rather, the federal law preserved the states' broad powers to regulate areas within the field.").

is 'a physical impossibility' or (2) state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[48]

B. NSMIA Preemption

In instances where Congress wanted to preempt state law, NSMIA explicitly preempted state requirements, predominantly those applicable to the issuers of national market securities.[49] Although NSMIA expressly preempted some state laws, it also explicitly preserved state authority "to investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions."[50] This savings clause leaves substantial room for states to protect their citizens from deceptive conduct.

Consider a California case, *People v. Edward D. Jones & Co.*, for example.[51] Edward Jones, a brokerage firm, had entered into agreements where it accepted undisclosed compensation in exchange for giving preferential marketing to particular mutual fund shares.[52] California sued on the theory that by failing to disclose the compensation it received, Edward Jones withheld material facts from its customers about the basis for its recommendation.[53] Edward Jones argued that because federal securities law did not mandate the disclosure, California could not treat it as a material omission.[54] The appellate court rejected Edward Jones's argument, finding that California's suit was the "type of action expressly permitted by the NSMIA" and that it "cannot be implicitly prohibited" because it was expressly authorized by the savings clause.[55] The California court recognized that withholding the information could be fairly characterized as the sort of fraud or deceit states retained the power to address.

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[48] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) (citing Supreme Court precedents).

[49] Hazen, § 8:9.State Blue Sky Laws—Partial Federal Preemption of State Securities Laws by Federal Law, 2 Law Sec. Reg. § 8:9 (explaining that NSMIA preempted much issuer-focused law including "registration and reporting requirements applicable to securities transactions").

[50] 15 U.S.C. § 77r(c) (2000).

[51] People v. Edward D. Jones & Co., 154 Cal. App. 4th 627 (2007).

[52] *Id.* at 630–31.

[53] *Id.* at 631.

[54] *Id.*

[55] *Id.* at 637–38.

California courts rejected another NSMIA-premised challenge in *Capital Research & Mgmt. Co. v. Brown*.[56] That case drew a sensible line by recognizing that while NSMIA was targeted at state registration requirements, it also aimed "to encourage the continued participation of the states in preventing fraud in securities transactions, particularly with regard to broker-dealers."[57]

These precedents tend to support a continued role for state regulators in policing brokerage sales practices.

C. NSMIA's History

NSMIA's legislative history adds to the inference that it should not be read to limit state authority to police broker-dealer sales practices. Indeed, a House committee report made this intention explicit, stating that "The Committee does not intend . . . [to] limit [states'] ability to investigate, bring actions, or enforce orders, injunctions, judgments or remedies based on alleged violation of State laws that prohibit fraud and deceit or *that govern broker-dealer sales practices* . . . ."[58]

D. Inconsistency with Existing State Securities Statutes

Many of the NSMIA-themed arguments could also be applied to other widely enacted state securities regulation. For example, the North American Securities Administrators Association released a model legislation to protect vulnerable adults from financial exploitation.[59] A number of states have already adopted the legislation. For example, Alabama passed the legislation and created a mandatory duty for brokerage employees to report suspected financial exploitation.[60] Were the NSMIA-preemption argument to be accepted, it would, by extension, mean that states could not enact these types of ordinary protective measures.

E. General Consistency with Regulation Best Interest

Despite the criticisms, most proposed state-level fiduciary initiatives appear largely consistent with regulation Best Interest. Regulation Best

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56 Capital Research & Mgmt. Co. v. Brown, 53 Cal. Rptr. 3d 770, 778 (2007).

57 *Id.*

58 H.R. REP. NO. 104-622, at 30 (1996) (emphasis added).

59 *See* NASAA, *NASAA Members Adopt Model Act to Protect Seniors and Vulnerable Adults* (Feb. 1, 2016), https://www.nasaa.org/38777/nasaa-members-adopt-model-act-to-protect-seniors-and-vulnerable-adults/.

60 ALA. CODE §§ 8-6-170–179 (2016).

Interest has been criticized for merely seemingly to offer a framework for addressing and mitigating conflicts of interest, but leaving the scope of that effort up to brokerage firms. Allowing the content of state law to shape those compliance and disclosure obligations within Regulation Best Interest's framework appears entirely consistent with the SEC's regulation and stated investor protection goal.

CONCLUSION

Ultimately, arguments that states lack authority to regulate broker dealer sales practices because of NSMIA's books and records provision appear overstated. If Congress had wanted to prohibit states from regulating broker-dealer sales practices, a books and records provision would be an odd way to do it.

On balance, a NSMIA preemption argument premised on its books and records provision appears unlikely to succeed. States retain authority to regulate sales practices within their borders and a brokerage firm may comply with state law without violating federal law or frustrating NSMIA's core purpose.