# NASAA'S LEGISLATIVE AGENDA FOR THE 116th CONGRESS

North American Securities Administrators Association
Washington, D.C.
www.nasaa.org

## Learn More About NASAA

The North American Securities Administrators Association, Inc. (NASAA) is the oldest international organization devoted to investor protection. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands, and its mission is to serve as the voice of securities agencies responsible for grassroots investor protection and responsible capital formation. The Association's members have carried out this mission for over a century through various administrations in Washington, D.C.

- Collectively and individually, state securities regulators enforce state securities laws by investigating suspected investment fraud, and, where warranted, pursuing enforcement actions.

- State securities regulators ensure honest financial markets by licensing registrants – both firms and investment professionals – and conducting ongoing compliance inspections and examinations.

- State securities regulators also work with issuers to ensure that securities offerings include legally required disclosures, resulting in a transparent securities market.

## Contact Us

For more information about NASAA's legislative priorities, contact:

Michael Canning | Director of Policy & Government Affairs
202-737-0900 | mc@nasaa.org

Suzanne Riopel | Government Affairs Analyst
202-737-0900 | sr@nasaa.org

# CONTENTS

# PRINCIPLE 1

## Putting Main Street Investors First

*In crafting and prioritizing policies that affect securities markets and securities professionals, Congress must place the interests of the investing public front-and-center by strengthening investor protection and participation in the U.S. capital markets.*

**Support Enhanced Standards of Conduct for Broker-Dealers.** Investors deserve a duty of care that requires financial professionals, such as broker-dealers and investment advisers, to act in their clients' best interests. NASAA strongly supports efforts to elevate the broker-dealer standard of care for recommendations to investors about securities or investment strategies. At a minimum, the 116th Congress should conduct rigorous oversight of the SEC's Regulation Best Interest rulemaking process to ensure that any final rule has robust investor protection and, if a final rule is adopted, to make sure it is being effectively implemented. Congress should also examine investment adviser fiduciary standards and evaluate the gaps that exist between broker-dealer and investment adviser duties. To the extent Congress concludes that investors are not being adequately protected, Congress should consider whether additional legislative strengthening of these duties is warranted.

**Encourage, Monitor, and Responsibly Regulate Financial Innovation.** The rapid expansion of technological innovation in the financial services industry ("Fintech") has brought new opportunities to the financial marketplace but also significant investor protection concerns. Fintech holds the potential to improve and expand access to investment services and products. At the same time, the public's interest in the benefits of innovation cannot supersede its risk or justify exempting innovators from the requirements of longstanding investor protection laws and regulations. The 116th Congress must carefully evaluate proposed legislation designed to promote innovation to ensure that it does so in an informed and thoughtful way that adequately protects investors and users. Investor protections must not be diminished at the state or federal levels for the sake of potential yet unproven innovation in the financial services industry. Congress should, therefore, refrain from preempting any protections afforded to investors under state law.

- *Regulatory "Sandbox" Proposals.* Congress should be cautious in considering proposals to establish so-called regulatory sandboxes.[1] Sandbox proposals that are not carefully constructed may create new risks, including regulatory arbitrage, and it is often not clear that such policies are necessary or beneficial. Further, many federal agencies already have flexibility under their existing authority to establish sandboxes or similar arrangements to accommodate and encourage bona fide financial innovation without the need for federal legislation.[2] To the extent federal agencies do exercise such flexibility, the 116th Congress has a duty to carefully review agency actions to ensure that they reflect appropriate investor protection safeguards. Finally, risks arising from financial innovation generally should be shouldered by sophisticated or institutional investors, not retail investors who can ill-afford the consequences of a failed investment.

- *Cryptocurrency and ICOs.* Congress should conduct rigorous oversight of fraud and investor exploitation regarding the sale of digital instruments such as coins, tokens, and cryptocurrencies. Scams in this marketplace were the subject of numerous coordinated state enforcement actions in 2018, and the risk in this area is not receding.[3] Further, Congress should consider taking additional steps to require the SEC to provide guidance about the treatment of ICOs under federal securities laws and take other steps to limit the risk to investors that is inherent in these products, including minimizing opportunities for price manipulation of cryptocurrencies and similar assets.

**Address Intergenerational Investor Issues.** Intergenerational issues range from a general distrust of the capital markets by millennials to the scourge of financial exploitation of senior investors. The 116th Congress should proactively confront these and related challenges. Securities markets must serve the needs of all investors, and most especially those who do not have the bargaining power to gain the advantages enjoyed by some investors. This is especially true for generational groups, such as seniors and millennials, who are very different in many respects but are disproportionately at risk of being targeted by bad actors.

- *Elderly Investors.* The 116th Congress should give special attention to policies that will address the unique challenges and risks associated with aging. As a starting point, Congress should direct the GAO to initiate a comprehensive study exploring all aspects of senior financial exploitation and evaluating the problem in terms of the cost to victims and society. By doing so, the study would help inform and guide future policy initiatives aimed at reducing increased financial exploitation of the elderly in the United States. Second, Congress should hold hearings to examine current industry efforts to better protect senior investors and deal with an aging workforce. Finally, Congress should promptly reauthorize and fund the senior financial exploitation grant program established by Section 911 of the Dodd-Frank Act.[4]

- *Millennial Investors.* Congress should also increase its focus on the unique challenges and potential risks arising from the emergence of the millennial generation both in the workforce and in the marketplace. Investor education is the first line-of-defense in protecting millennial investors, who disproportionately lack experience with investment options and risks.[5] As a starting point, Congress should direct the GAO to conduct a study on the state of financial literacy programs in workplaces and secondary and higher education targeted to Millennials (defined as persons born between 1981 and 1996) and Generation Z (persons born from 1997 to present), respectively. Based on GAO findings and Congress's own oversight, Congress should consider whether legislation in this area is necessary and appropriate.

# PRINCIPLE 2

## Ensuring the Integrity of our Capital Markets

*Congress must protect the U.S. capital markets by fully supporting state and federal efforts to prevent and deter fraud and other forms of misconduct.*

**Maintain Enforcement Independence of State Securities Regulators.** Strong enforcement is the best deterrence. Investors and markets are best served by robust enforcement of securities laws at the state and federal levels. Congress must not enact any laws that will weaken or diminish existing regulatory oversight of the capital markets or any participants, such as issuers, broker-dealers, or investment advisers. States are leaders in civil and administrative enforcement actions and criminal prosecutions of securities violators.[6] States regulators also serve a vital gatekeeper function by screening out bad actors before they have a chance to conduct business with unsuspecting investors.[7] Congress must never take state regulators off the securities beat, or any portion thereof, or otherwise limit a state's discretion and autonomy in pursuing bad actors through enforcement actions and prosecutions.

**Protect Regulatory Remedies.** Congress should promptly pass legislation authorizing disgorgement claims brought by the SEC, which the agency currently requests as an equitable remedy. Any statute of limitations attached to disgorgement should correct the harmful impact of the U.S. Supreme Court's decision in *Kokesh v. SEC*, which bars the agency from seeking disgorgement past five years. The SEC has reportedly not been able to seek disgorgement of at least $800 million in ill-gotten gains since the decision, which is a significant amount considering that the agency collected $3 billion in disgorgement and penalties in FY 2016.[8]

**Ensure Oversight of Private Placement Brokers and Finders.** Congress must refrain from taking any action that could limit state regulatory oversight of "finders" and "private placement brokers."[9] While significant differences exist in the functions commonly associated with traditional broker-dealer representatives, private placement brokers, and finders, such differences do not support exempting any of these individuals from regulatory oversight. The securities laws correctly recognize that individuals who receive compensation directly tied to the sale of securities are functioning as securities brokers, regardless of any actual or apparent differences in the services or functions performed by particular securities salespersons and promoters.[10]

**Provide State Securities Regulators Access to Suspicious Activity Reporting.** Suspicious Activity Reports ("SARs") are an effective tool for regulators of financial institutions to identify and investigate possible violations of the Bank Secrecy Act. Since the enactment of the Bank Secrecy Act, financial institutions (including broker-dealers) are now able to notify regulators of suspected elder financial abuse, and the Treasury Department has proposed subjecting investment advisers to the same rules.[11] However, many state securities regulators do not directly have access to SARs, and Congress should consider amending the Bank Secrecy Act to allow them to have access to it.

**Prevent and Deter Fraud through Effective Penalties.** Federal securities laws limit the amount of civil penalties the SEC can impose on an institution or individual. Hearings in the wake of the financial crisis established that these statutory limitations significantly constrain the SEC in performing its enforcement duties and deterring fraudulent conduct.[12] NASAA urges the 116th Congress to enact legislation that will update and strengthen the SEC's authority to impose civil penalties for securities law violations, including linking such penalties to the scope of harm and associated investor losses, increasing the statutory limits on monetary penalties, and increasing the cap for repeat securities law violators.

# PRINCIPLE 3
## Fostering Capital Formation and Market Transparency

*Congress must examine the relationship between public securities markets, quasi-public securities markets and private securities markets, and promote more cohesive policies that balance investor protection and capital formation.*

**Examine Public and Private Offering Regimes.** Decisions by policymakers and federal agencies have enormous implications for decisions by issuers on when, how, and from whom to raise capital, and in turn, for investors. Recently enacted laws and rules designed to expand the private markets have come at the expense of the public markets, and ultimately, retail investors. Congress should hold hearings to examine the impact of the JOBS Act of 2012 and other laws that expanded the private markets along with the appropriate role of and relationship between the different types of offering registration exemptions. Congress should consider measures to halt the "blurring" of the distinction between the public and private securities marketplace.[13]

**Enact Responsible Policies to Encourage Small Business Capital Formation.** NASAA members are at the forefront of fostering capital formation for small businesses, entrepreneurs, and investors in their states. State regulators provide a level of accessibility to small businesses and investors that is unavailable from any federal regulator. We wholeheartedly share Congress's desire to enhance the U.S. economy by improving access to capital for small and emerging businesses and strongly support efforts by Congress to enact sensible reforms to securities laws this area that are consistent with investor protection. One step that 116th Congress should take in is enacting common sense legislation that exempts M&A brokers from federal registration requirements. Congress might also consider limited adjustments to federal crowdfunding laws, including authorizing certain special purpose vehicles ("SPVs") in the fundraising process.[14] Further, we urge Congress to direct the SEC to coordinate with the states more closely in this area in order to unify or harmonize certain federal and state exemptions.

**Modernize the Accredited Investor Definition.** The 116th Congress should take steps to expand opportunities for retail investors to participate in U.S. private markets without exposure to unnecessary or undue risk. To that end, Congress should modernize the "accredited investor" definition, as it relates to individual investors, in a manner that reflects both an investor's financial wherewithal to invest in private offerings and ability to measure the amount of risk involved in such offerings.[15] NASAA has offered detailed suggestions to the SEC and Congress on how to revise the current accredited investor definition to more accurately measure investor sophistication and improve regulatory oversight of this important segment of the capital markets.[16] To the extent Congress retains any income or net worth standards under the current rule, it must account for some portion of the inflation that has occurred since the standards were originally adopted in 1982, and index them to account for inflation going-forward.[17] For certain investors, Congress should also consider limiting the investment amounts to a percentage of their income or net worth, either in the aggregate, or per offering.

**Reduce Fraud and Improve Transparency in the Private Markets.** The 116$^{th}$ Congress should make it a priority to reduce fraud and promote greater transparency in the marketplace for private offerings under Rule 506 of Regulation D. Revisions to the rule stand to benefit, not only investors, but legitimate issuers and promoters who rely on the exemption. Specifically, Congress should direct the SEC to immediately develop meaningful penalties for issuers that fail to file Form D.[18] Congress should also ensure state regulators have the information needed to police the private offering marketplace to discourage fraud and protect retail investors by mandating the filing of Form D prior to or concurrent with the first sale of a security in a 506(b) offering, and prior to or concurrent with the commencing of general solicitation in a 506(c) offering.[19] Finally, in order to provide some measure of transparency, Congress should mandate the filing of a closing amendment upon the conclusion of such offerings.[20]

# PRINCIPLE 4
# Ensuring Investor Rights in a 21st Century Marketplace

*Congress must reaffirm the rights of investors in the modern securities marketplace and ensure our securities laws effectively protect these rights.*

**Secure Investor Choice and Transparency in Dispute Resolution.** Investor confidence in fair and equitable recourse is critical to the success of the securities markets and long-term participation in these markets by retail investors. Among other things, investor confidence means that they have a choice of forum when it comes to resolving disputes with their investment professionals. Unfortunately, investors have little-to-no choice today, as virtually all disputes against broker-dealers must be resolved in an arbitration forum administered by the Financial Industry Regulatory Authority ("FINRA"). Investor rights are limited in this way because almost all broker-dealers include a mandatory arbitration clause in their customer service agreements.

- *Mandatory Arbitration.* The 116th Congress should discourage the proliferation of mandatory arbitration provisions in contracts used by financial services firms. Broker-dealers enjoy powerful advantages over retail investors in dispute resolution, and their use of mandatory arbitration contracts to deprive investors of access to the judicial system only serves to compound that inequity, which makes it difficult or impossible for investors to obtain fair and equitable recourse. NASAA supports legislation that would ban the use of mandatory pre-dispute agreements by broker-dealers and investment advisers that limit investors' ability to pursue recourse in any forum.[21]

- *Transparency and Accuracy in Dispute Resolution.* Investors deserve transparency when it comes to the financial professionals they entrust with their hard-earned money, and regulators must have access to accurate, complete information on the individuals they register and license. Today, financial professionals can seek expungement of customer complaint information from their regulatory records, using arbitration proceedings and uncontested civil actions. The 116th Congress should examine this process and consider measures to prevent the removal of this important information from the records of financial professionals.

- *Forced Arbitration in IPOs.* The 116th Congress should make clear that mandatory arbitration clauses limiting shareholder recourse have no place in initial public offerings. SEC Chairs and Commissioners appointed by both political parties have for decades recognized and affirmed the vital role that private litigation plays in compensating fraud victims and supplementing its own enforcement efforts. However, the Commission has not formed a definitive view on mandatory arbitration clauses included in a company's governing documents submitted in connection with an IPO, and currently reviews these clauses on a case-by-case basis.[22] To remedy this, Congress should enact legislation requiring the SEC to ensure that these clauses are not included in pre-IPO filings, or alternatively, prohibit acceleration of the effective date of an issuer's registration statement pursuant to Section 8(a) of the Securities Act of 1933.

**Make Harmed Investors Whole.** The 116th Congress should take steps to reduce and eventually eliminate unpaid judgments resulting from disputes between investors and securities firms. Unpaid arbitration awards are an on-going, well-documented investor protection concern.[23] By failing to pay arbitration awards, broker-dealers fail to comply with their legal, regulatory, and ethical obligations, and gain an unfair competitive advantage over those broker-dealers who honor their financial responsibilities to customers. NASAA has long supported measures to address the problem of unpaid awards, and we encourage Congress to make it a priority to fix this problem.[24]

**Safeguard Shareholder Rights.** The 116th Congress should affirm its commitment to shareholder rights through increased scrutiny of practices that may be employed by issuers and others that disadvantage or limit shareholder rights.

- *Multiclass Shares.* The 116th Congress should scrutinize multi-class securities structures that concentrate voting power with small groups of company insiders, especially in connection with public offerings.[25] While these structures can have certain advantages, they fundamentally contradict the traditional "one-share, one-vote" principle of corporate governance and limit the ability of shareholders to hold company officers and executives accountable. The 116th Congress should evaluate measures to address this problem including whether to require public companies with dual-class share structures to attach "sunset clauses," which would require – at some pre-determined time after the IPO and/or upon some event occurring – that shareholders of low-vote share classes vote on whether to extend the dual-class structure.

- *Proxy Advisor Oversight.* Proxy advice is critical for investors as they decide how to vote their shares on important corporate governance matters, such as director elections or the sale of the company, and proxy advisory firms are an essential tool for investors. However, relative lack of transparency at proxy firms makes it difficult to understand how they are impacting shareholder return, and how they manage conflicts of interest. Given that proxy advisor firms exert considerable influence over shareholder decisions, while at the same time operating as for-profit entities, with inherent potential for conflicts of interest, the 116th Congress should consider whether legislative action may be warranted in order to better ensure that investors can confidently rely on their advice. One avenue Congress should explore is legislation that would require SEC registration of proxy advisory firms and enactment of fiduciary standards of conduct for such firms. Such steps could help ensure proxy advisory firms act in investors' best interests.

**Data Security and Privacy.** Cyberattacks on U.S. companies continue to increase in both frequency and sophistication. The 116th Congress should continue to explore multiple avenues to encourage the financial services industry and publicly-traded companies to proactively limit their cybersecurity risk, and thereby, limit the exposure of their clients, customers, and investors. At the same time, Congress must be very careful about imposing any federal requirements and account for how cybersecurity risk varies among different types of firms and market participants.

- *Responsibilities of Public Companies and Financial Firms.* NASAA supports legislation that would promote greater attention to cybersecurity risk by public corporations. Investors and the financial industry as a whole are well-served by policies that encourage companies to consider such risks proactively rather than after a data breach has occurred and the harm has been done.

- *State Securities Registrants.* State securities authorities, who regulate almost two-thirds of investment advisory firms, ensure that those firms and their representatives address cybersecurity risks inherent in their business model. NASAA appreciates Congress's exploration of new structures that allow information-sharing and consistency between law enforcement agencies and regulators, and government and the financial services industry.[26] To be effective, state regulators need to be a part of such a framework, and to that end, NASAA continues to urge Congress to include state securities, insurance, and banking regulators as part of state and federal multi-agency working groups. Furthermore, any federal framework developed by Congress must, at a minimum, provide that state securities regulators continue to exercise exclusive administrative, examination, and enforcement authority with respect to state-registered advisers.[27]

###

[1] The term "regulatory sandbox" refers to a special framework set up by one or more regulators to allow Fintech startups or other innovators to experiment in a controlled environment under a regulator's supervision. The goal of sandboxes is to "allow fintech firms to offer products on a limited scale and provide valuable knowledge about products and risks to both firms and regulators." See: https://www.gao.gov/assets/700/691290.pdf.

[2] For example, the CFTC's LabCFTC, the OCC's Fintech Bank Charter, and the CFPB's Project Catalyst are initiatives that encourage innovator-regulator engagement based upon the concept of a regulatory sandbox.

[3] In April 2018, NASAA organized a task force of its member state and provincial securities regulators to begin a coordinated series of investigations into ICOs and cryptocurrency-related investment products. NASAA members from more than 40 jurisdictions participated in this coordinated initiative, known as "Operation Cryptosweep," which to date has resulted in more than 200 inquiries and investigations and nearly 50 enforcement actions related to ICOs or cryptocurrencies since the beginning of May. NASAA members are conducting additional investigations that may result in enforcement actions. Additional information is accessible at http://www.nasaa.org/regulatory-activity/enforcement-legal-activity/operation-cryptosweep/.

[4] In July 2010, Congress enacted legislation to establish a program within the CFPB to award grants to states for the purpose of protecting investors. Unfortunately, although Congress authorized funding for such grants, the CFPB's exclusion from the appropriations process precluded Congress from appropriating resources for the program. Nonetheless, the basic framework envisioned by Congress in 2010 was sound and, had the program been implemented and funded as intended, senior investors would have benefited greatly. The 116$^{th}$ Congress should reauthorize and fund this program and consider expanding the scope of the program to include protection of millennial investors. See: Section 989A, "Senior Investor Protections" of the Dodd-Frank Act, available at http://www.dodd-frank-act.us/Dodd_Frank_Act_Text_Section_989A.html.

[5] According to a recent study by the FINRA Foundation and CFA Institute, most millennials surveyed lacked financial literacy and did not own investment accounts other than a 401K, which means that if they do choose to invest, they may be subject to exploitation.

[6] NASAA's most recently compiled enforcement statistics reflect that in 2017 alone, state securities regulators conducted 4,790 investigations, leading to more than 2,000 enforcement actions, including 255 criminal actions. Moreover, in the same year, among licensed financial professionals, NASAA members reported 270 broker-dealer firms and agents named in enforcement actions (-11% from 2016) and 377 investment adviser firms and representatives named in enforcement actions (+32% from 2016).

[7] In 2017, a total of 3,578 securities license applications were withdrawn as a result of state action, and an additional 878 licenses were denied, revoked, suspended, or conditioned.

[8] As SEC Chairman Jay Clayton recently testified to the Senate Banking Committee, "The unanimous Supreme Court decision in *Kokesh v. SEC*, however, has impacted our ability to return funds fraudulently taken from Main Street investors… as I look across the scope of our actions, including most notably Ponzi schemes and affinity frauds, I am troubled by the substantial amount of losses that we may not be able to recover for retail investors… I welcome the opportunity to work with Congress to address this issue to ensure defrauded retail investors can get their investment dollars back." See: hearing entitled, "Oversight of the U.S. Securities and Exchange Commission," on December 11, 2018, available at https://www.banking.senate.gov/imo/media/doc/Clayton%20Testimony%2012-11-18.pdf)

[9] The term "private placement broker" typically describes a person who act as a broker of privately issued securities while the term "finder" may be used to describe an intermediary who assists a broker in identifying accredited investors who may purchase the securities.

[10] There is a well-documented relationship between private offerings sold by brokers and an elevated risk of fraud, and a disproportionate percentage of persons acting as brokers in the private offering marketplace are brokers with red flags in their record. For example, based on a 2018 analysis performed by the Wall Street Journal, one in eight brokers marketing private placements in the past decade had three or more red flags on their records, such as an investor complaint, regulatory action, criminal charge, or firing, compared to one in 50 for active brokers. Furthermore, brokers selling private placements are six times more likely as the average broker to have at least one reported regulatory action against them. See*:* Jean Eaglesham and Coulter Jones, A Private Market Deal Gone Bad: Sketchy Brokers, Bilked Seniors and a Cosmetologist, The Wall Street Journal (May 7, 2018).

[11] In August of 2015, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") proposed a rule to add registered investment advisers to the definition of "financial institution" for the purposes of anti-money laundering ("AML")

program requirements established by the Bank Secrecy Act. The proposed rule would apply only to investment advisers that are required to register with the U.S. SEC. FinCEN did indicate, however, that it may consider a future expansion of the BSA to include investment advisers that are not registered or required to be registered with the SEC. See: https://www.fincen.gov/news_room/nr/html/20150825.html.

[12] See, for example, hearing entitled "Examining the Important Role of the Securities and Exchange Commission in Protecting Investors by Aggressively Enforcing Federal Securities Laws." U.S. Senate Committee on Banking, Housing and Urban Affairs. (May 7, 2009). Available at https://www.govinfo.gov/content/pkg/CHRG-111shrg53779/pdf/CHRG-111shrg53779.pdf

[13] While the JOBS Act was broadly designed to facilitate access to capital, it ultimately had competing priorities – allowing more companies to stay private, while at the same time, encouraging a greater number of companies to become public. Despite the JOBS Act's well-intentioned goals, recent studies have shown that the number of U.S. publicly listed companies has continued to decline significantly since its peak in 1997. As University of Mississippi Law School Professor Mercer Bullard explained in testimony to the Senate Banking Committee in July 2018,

> "The JOBS Act required the SEC to authorize general solicitation and advertising under the nonpublic offering exemption despite the fact that these were inherently incompatible concepts. In other words, although general solicitation and advertising are quintessentially "public" in nature, Congress chose to cram the square peg of an essentially public offer into the round hold of the nonpublic offering exemption... The JOBS Act further diluted the public-private distinction by authorizing online crowdfunding, raising the Reg A offering limit from $5 to $50 million and precluding state regulation of large Reg A offerings. Crowdfunding sites now offer a combination of crowdfunding, Reg A and Reg D offerings, each with different disclosures and investor eligibility requirements. Crowdfunding issuers have routinely raised capital under the Reg A, Reg D, crowdfunding, and intrastate exemptions, and through donative funding on Kickstarter and Indiegogo. They promote their offerings on Facebook and Twitter. This mingling of different offerings and freewheeling public distribution has further undermined nonpublic nature of private offerings."

See: https://www.banking.senate.gov/imo/media/doc/Bullard%20Testimony%206-26-18.pdf.

[14] See S. 488, 115th Congress, Title XXXII - Crowdfunding Amendments (addressing some problematic requirements in the SEC's final rule, promulgated pursuant to Title III of the JOBS Act, by authorizing special purchase vehicles ("SPVs") as investors).

[15] The "accredited investor" definition is a central component of Regulation D. The definition is "intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary." Qualifying as an accredited investor is significant because accredited investors may, under SEC rules, participate in investment opportunities that are generally not available to non-accredited investors, such as investments in private companies and offerings by hedge funds, private equity funds and venture capital funds. Under existing SEC rules, adopted in 1982, individuals are accredited investors if their income exceeds $200,000 in each of the two most recent years (or $300,000 in joint income with a person's spouse) and they reasonably expect to reach the same income level in the current year or, if their net worth exceeds $1 million, excluding the value of their primary residence. (See: Regulation D Revisions; Exemption for Certain Employee Benefit Plans, Release No. 33-6683. Jan. 16, 1987).

[16] For example, See NASAA's November 1, 2017 letter to House Leadership regarding H.R. 1585, the Fair Investment Opportunities for Professional Experts Act of 2017. See: http://www.nasaa.org/wp-content/uploads/2013/10/NASAA-Letter-to-House-Leadership-Re-HR-1585-11-1-17.pdf.

[17] According to the SEC's Division of Economic and Risk Analysis, 1.8% of American households qualified as "accredited investors" in a 1983 survey, while 9.9% of American households qualified as such in a 2013 survey. See: https://www.sec.gov/news/statement/spch121714laa.html#_ednref3.

[18] Office of Inspector General, U.S. Securities and Exchange Commission, *Regulation D Exemption Process* 10 (2009) (stating that "there are simply no tangible consequences when a company fails to file a Form D").

[19] NASAA has consistently advocated that the SEC require the filing of Form D prior to the sale of securities in reliance on Rule 506 – especially prior to the use of any type of general solicitation. The information contained in a Form D is crucial to state securities regulators who regularly encourage investors to "investigate before you invest." When investors contact their state regulators with questions about an offering they may have learned about through an advertisement or solicitation, a Form D filing is often the only information the state can use to determine if an issuer is conducting the offering in compliance with a lawful exemption.

[20] In July 2013, the SEC proposed rules that would have established precisely these reforms. Unfortunately, the SEC has never acted on the proposed rules. See: http://www.gpo.gov/fdsys/pkg/FR-2013-07-24/html/2013-16884.htm.

[21] For example, NASAA was pleased to support the Investor Choice Act of 2017 and would support similar legislation should it be introduced in the 116th Congress.

[22] Brief Amici Curiae of Former SEC Commissioners: Chairmen William Donaldson and Arthur Levitt, and Commissioner Harvey Goldschmid, Stoneridge Investment Partners v. Scientific-Atlantic, 552 U.S. 148 (2008), https://bit.ly/2nEFozM.

[23] According to FINRA, in the five years from 2012 through 2016, a total of 268 awards (27% of the cases where investors were successful) or $199 million in awards (29% of total damages awarded to investors) have gone unpaid. See: https://www.finra.org/arbitration-and-mediation/statistics-unpaid-customer-awards-finra-arbitration.

According to data from the Public Investors Arbitration Bar Association (PIABA), in 2017, 36% of the investors who won their cases collected nothing, and 28 cents of each dollar awarded have gone unpaid. (See: https://piaba.org/piaba-newsroom/unpaid-awards). The data reveal that the problem is not fixing itself, and the steps taken by FINRA thus far have not effectively addressed the problem.

[24] The question of what to do about unpaid awards was the subject of an SEC Investor Advisory Committee meeting on December 13, 2018. The recommendations from this discussion could help frame NASAA's position on the question in the Agenda. It should also be noted that Sen. Warren has sponsored legislation in the Senate that would address the problem by effectively requiring firms to pay them and FINRA to backstop the firms.

[25] Multi-class, dual-class, and other entrenching governance structures allow for a concentration of voting power in the hands of company insiders through a disproportionate allocation of voting rights among shareholders. Under such structures, insiders can control the company while owning a smaller number of shares than would be necessary in a traditional one-share, one-vote structure. Recently, an influential 50-member Investor Stewardship Group ("ISG"), overseeing $22 trillion in assets, demanded a total elimination of dual-class stock. The U.S. Council of Institutional Investors (CII), representing managers of $25 trillion assets, recently demanded limiting any company's dual-class share structure to seven years. See: Letter from Council of Institutional Investors to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc. (Oct. 24, 2018).

[26] NASAA is an active member of the Treasury Department's Financial and Banking Information Infrastructure Committee ("FBIIC"), which develops procedures and systems to allow federal and state regulators to communicate among themselves and with the private sector.

[27] For further explanation of NASAA's views on the question, see: NASAA Letter to Honorable Randy Neugebauer Regarding amendments to the Data Security Act of 2015, (Dec. 8, 2015).

**NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION**
750 First Street NE, Suite 1140 | Washington, D.C.
202-737-0900 | www.nasaa.org