NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION

LEGISLATIVE AGENDA FOR THE 117TH CONGRESS

North American Securities Administrators Association
Washington D.C.

About NASAA

The oldest international organization devoted to investor protection, the North American Securities Administrators Association, Inc. ("NASAA") was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. NASAA is the voice of securities agencies responsible for grass-roots 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 and fluid securities market.

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PRINCIPLE I

Congress must place the interests of investors front-and-center and prioritize measures to protect and empower retail investors.

Congress must pursue meaningful protections and opportunities for investors in the modern securities marketplace, and proactively confront efforts to roll back the rights and protections afforded to the investing public. The securities markets should be regulated such that they operate fairly and meet the needs of all investors, especially retail investors, who may otherwise not be adequately equipped to protect themselves.

1. **Ensure Appropriate Regulation of Private Placement Brokers and Finders.** Fraud and other harms frequently occur where unregistered persons promote unregistered products to retail investors.[1] The SEC's push to expand the private markets by making private offerings more accessible to retail investors, including the deregulation of private placement brokers, often referred to as "finders," has increased the need for scrutiny of the role played by the individuals and firms that specialize in these deals.[2] The registration process for intermediaries serves as an essential gatekeeping function to keep bad actors out of the securities industry and protect investors.[3] Congress should prohibit the SEC from taking steps to broadly and unilaterally deregulate federal oversight of "finders" and direct the SEC to instead work collaboratively with state securities regulators to explore an appropriately tailored registration framework addressing persons who act as "finders." Above all, Congress should reject any limitation on state authority over the firms and individuals who engage in these activities.

2. **Empower Investors by Halting the Proliferation of Forced Arbitration Contracts.** Mandatory or "forced" arbitration contracts impede the basic right of investors and consumers to seek a redress of harms through the U.S. judicial system. Private rights of action play an important role in allowing defrauded investors to pursue compensation for their losses. In fact, shareholder class action lawsuits have historically provided a fair and procedurally protected process that ensures the integrity of securities disclosure standards, as well as the development of the common law governing investors' rights. Further, this judicial process complements and supplements the work of state securities regulators and the SEC to detect, punish, and deter fraud. Despite this important function, investors' rights to sue in court have recently been under assault.[4] Fortunately, the 116th Congress saw the introduction of legislation in the House and Senate aimed at curtailing the use of such arbitration contracts in the securities industry.[5] The 117th Congress must build on this momentum

and ultimately enact legislation to empower investors and protect their access to the judicial system as a means of dispute resolution.

3. **Strengthen and Safeguard the Independence of the SEC's Investor Advocate and Investor Advisory Committee.** In 2010, Congress enacted legislation to establish, within the SEC, the Office of the Investor Advocate and the Investor Advisory Committee (IAC or Committee). The role of the IAC, according to Congress, is "to assist the SEC by advising and consulting on regulatory priorities."[6] Although the SEC already had an advisory committee tasked with similar responsibilities, Congress opted to pass new legislation that replaced the Commission's existing committee with the IAC in order to provide "a statutory foundation and set congressional prerogatives for the Committee's composition and function."[7]

   Given Congress's direct role in creating the IAC, and the clarity with which Congress spoke in regard to both the Committee's mandate and composition, Congress should take exception to a series of new guidelines approved by the SEC in August 2020 that undermine the IAC and the intent of Congress. The new guidelines, which give the SEC staff extraordinary influence regarding all appointments to the IAC, interfere with the will of Congress and threaten the independence of the IAC and its ability to offer honest commentary from the investor's perspective, whether in support or potential critique of the SEC's policies and priorities.[8] Moreover, these prescriptive procedures are inconsistent with existing practices and procedures that the Commission uses to identify and appoint members to other advisory committees and marginalize the role of the Office of the Investor Advocate, which traditionally works most closely with the IAC.[9] The 117th Congress should direct the SEC to repeal or revise its recent guidelines, and take such additional steps as may be necessary to accord the Investor Advocate and the IAC the independence and autonomy that Congress intended.

4. **Ensure Transparency and Accuracy in Broker-Dealer Dispute Resolution.** Today, professionals in the securities industry can seek expungement of customer complaint information and other information from their regulatory records using arbitration proceedings and uncontested civil actions, which shields prior misbehavior from investors, regulators, and potential employers. The 117th Congress should examine this process and consider measures to prevent the removal of this important information from the records of financial professionals.

5. **Enhance Penalties to Reduce Recidivism in the Securities Markets.** For enforcement to be effective as a deterrent, the costs to violators must be meaningful as a punishment. Federal securities laws currently limit the civil penalties that the SEC may impose on an institution or individual that violates federal securities laws.[10] NASAA supports, and Congress should pursue, legislation to establish a new, fourth tier of monetary penalties for recidivists who have been held criminally or civilly liable for securities fraud within the preceding five years.[11]

PRINCIPLE II

Congress should work to restore the preeminence of the U.S. public securities markets and enact reforms to enhance regulatory oversight of the private markets.

The U.S. public markets remain the gold standard among the world's capital markets in large part due to the high standards for companies in reporting material information. In recent years, the private securities markets have eclipsed the public markets in the capital raised for new and emerging companies. Congress should ensure the preeminence of the U.S. public markets, including resisting measures to water-down current regulatory standards while also enacting measures to provide greater transparency of the private markets. As private markets expand as the result of regulatory policies pursued by the SEC, Congress has an obligation to review the rules under which these markets operate and the protections in place for investors.

1. **Reinforce the Primacy of the Public Securities Markets**. Over the course of the last decade, there has been an unprecedented expansion of the private markets, which has reduced the number of initial public offerings (IPOs) and thereby concentrated retail investors in larger companies.[12] Additionally, there has been a significant increase in the number of so-called "Unicorns" or privately held companies with a valuation of a billion dollars or more.

   The investing public has a strong interest in robust public securities markets, which continue to be comparatively vibrant and healthy. If these markets are to remain so in the coming years, however, Congress must ensure that large and rapidly growing companies have appropriate incentives to raise capital via the public securities markets.

   Companies, investors, and the public more broadly, all benefit when companies operate in the public securities markets. Investors receive transparency and equitable access to the markets, while companies gain greater access to capital, with more accountability and more robust corporate governance. Regulators and policymakers, in turn, are provided real-time market information to guide their decision-making.

   As Congress considers how best to promote growth in the number of companies in the U.S. public markets, its first step should be to reform Section 12(g) of the Exchange Act, [13] which specifies financial reporting thresholds. Congress raised the initial reporting threshold from 500 shareholders to 2000 shareholders in 2012,[14] which now encourages large, privately-held companies to remain private for extended periods, or even indefinitely.[15] Congress should revise and reform this rule to align its incentives with the goal of vibrant public markets.

2. **Reform the Private Securities Markets.** Congress should enact long-overdue improvements to promote greater transparency for investors and regulators in the marketplace for private offerings under Rule 506 of Regulation D under the Securities Act of 1933 (Securities Act). Specifically, Congress should require the SEC to gather important data regarding the private placement markets through enhancements to the "Form D," and require the filing of the form as a condition of relying on the relevant exemption. This and similar protective revisions to the rule would benefit not only investors, but legitimate issuers and promoters who use private offerings to raise capital.[16] Indeed, the Commission itself has recognized the acute problem surrounding the lack of reliable data regarding Regulation D offerings[17] – the largest segment of the exempt offerings markets – but has nevertheless not taken steps to gather more relevant data, such as requiring prefiling and post-closing Form D filings from issuers to obtain more complete data.

3. **Revise the Accredited Investor Definition.** Congress and the SEC should be focused on promoting and expanding the public markets rather than incentivizing issuers to raise capital in the private markets. In 2020, the SEC missed an opportunity to realign incentives toward public offerings and thereby failed to fulfill its mandate to protect investors, by neglecting to address long-overdue changes to the wealth and income standards defining accredited investors. Instead, the Commission adopted sweeping new rules aimed at expanding the number of natural persons who qualify as accredited investors. After nearly four decades of inaction by the SEC, the 117th Congress should enact legislation to update the existing income and net-worth standards used to determine accredited status,[18] while prohibiting the SEC staff from further expanding the accredited investor definition pursuant to authority established in its 2020 rule adoption.

4. **Standardize Environmental, Social, and Corporate Governance (ESG) Disclosures.** Securities laws currently require the disclosure of information material to investors in their decision-making process. Increasingly, investors view a company's environmental impact as a material metric for determining whether to invest.[19] To date, however, there are no uniform standards for reporting on environmental impact. In the absence of such standards, companies may make selective or misleading disclosures about the environmental benefits of their products or services to make the company appear to its investors to be more environmentally friendly than it really is, a phenomenon also known as "greenwashing." The result is investor confusion.

The time has come to provide investors that are seeking to understand factors such as a company's environmental impact with the ability to accurately understand and weigh ESG risks in their investment decisions, and Congress can play an important role in this regard.[20] Congress should direct the SEC to promptly develop a uniform standard for all reporting by public companies regarding climate risks so that investors can understand companies' real environmental impact record, and make "head-to-head" comparisons between competing investments.[21] Congress should also consider passing legislation that would direct the SEC to establish a task force to consolidate, to the extent possible, themes from existing reporting frameworks and standards in order to catalyze faster progress toward standardization. Such an approach has proven constructive in other nations, and there is reason to believe it could play an important role in "moving the ball forward" in the U.S. as well.[22]

5. **Enhance Cybersecurity Risk Disclosures.** Congress should incentivize publicly traded companies to consider whether they have appropriate cybersecurity expertise on their governing body.[23] Doing so is a common-sense way to promote greater attention to cybersecurity risk by public corporations. Investors and customers are well-served by policies that encourage companies to consider such risks proactively, as opposed to reacting to a data breach that has already occurred and harmed investors and customers.[24]

PRINCIPLE III

Congress should promote policies designed to enhance diversity and inclusion in all aspects of the capital markets, take steps to prevent exploitation of elderly investors, and address the unique challenges facing Millennial investors.

Critical conversations surrounding racial and gender inequality and inequity have shown that the financial services industry, like many others, suffers from a lack of meaningful minority representation and inclusion at all levels of decision-making. Not only is there a growing demand for increased diversity and inclusion at financial agencies and their regulated entities, but leading research also indicates that greater diversity correlates with sound corporate governance and performance. Congress has an important role to play in addressing this pervasive and overarching problem throughout our country, especially with respect to the financial services industry and vulnerable investor groups.

1. **Encourage Corporate Board Diversity**. Research shows that board diversity enhances the performance of the company, and investors increasingly regard corporate board diversity as an indication of good governance that improves corporate performance and investor relations.[25] Indeed, corporate board diversity is a material investment consideration. However, many companies continue to struggle, or may be reluctant, to diversify their boards in any meaningful way.[26] Congress should examine the current state of corporate board composition with an eye toward encouraging greater diversity. At a minimum, Congress should direct the SEC to require public companies to disclose information that demonstrates the diversity on their boards, or the lack thereof, as well as information regarding the diversity of their corporate operations.

2. **Examine Diversity in Venture Capital.** Gender, racial, and ethnic equity in the financial services industry lags diversity in society more broadly, and that is especially the case for diversity in venture capital (VC). Moreover, recent decades have seen "venture" funding emerge as a major source of funding for startup businesses, and access to VC investor networks, or the lack thereof, can be the difference between success or failure of many of the most promising businesses, particularly in rapidly emerging or evolving industries. However, remarkably, as of 2020, only nine of the 100 top VC partners worldwide are women, and women make up only 11 percent of VC partners in the U.S., according to a recent report by Deloitte.[27] Congress should consider new initiatives that promote diversity and inclusion in VC, particularly initiatives that

have the potential to tap into new markets and fund a diverse set of startups and entrepreneurs.

3. **Examine Diversity in the Brokerage and Asset Management Industry.** Despite overwhelming evidence that a diverse workforce enhances a company's ability to employ the best talent, build employee engagement, innovate, and ultimately succeed, the financial services industry continues to lag other large segments of our economy regarding the inclusion of women and people of color. Congress has a critical role to play in advancing diversity, equity, and inclusion. [28] The 116th Congress conducted significant oversight of diversity in the banking industry during the 2019-2020 session, and NASAA urges the 117th Congress to build on that momentum by monitoring the specific actions broker-dealers and asset managers are taking to make their workplaces more inclusive.[29] The new Congress should also consider how regulators can help facilitate greater diversity.

4. **Enact Policies that Address the Exploitation of Elderly Investors.** The 117th Congress should take further action to evaluate and respond to evolving trends and threats impacting senior investors. The COVID-19 pandemic has placed many seniors at greater risk, financially and medically, as they spend more time in isolation to protect themselves from infection. Congress should foster industry efforts targeted at protecting aging investors from potential exploitation. As a starting point, Congress should enact common-sense legislation that aims to prevent increased financial exploitation of the elderly and provides necessary compensation for any financial loss experienced by senior victims of fraud.

    - *The Senior Security Act.* Congress should enact the Senior Security Act, a bipartisan, bicameral bill that will establish a federal Senior Investor Taskforce within the SEC to consult with state securities regulators and law enforcement authorities regarding scams impacting seniors.[30] This Taskforce would facilitate direct dialogue and information sharing between federal regulators and policymakers, and state and local officials. This legislation also mandates a comprehensive Government Accountability Office (GAO) study of the costs, causes, and barriers to reporting the financial exploitation of seniors. When completed, such a study would significantly enhance the understanding of the unique challenges and risks facing senior investors and inform future policy initiatives to combat the growing problem of senior financial exploitation.

- *The Edith Shorougian Senior Victims of Fraud Compensation Act.* Congress should enact bipartisan, bicameral legislation to amend the Victims of Crime Act of 1984 (VOCA) to establish eligibility for seniors victimized by financial exploitation to be reimbursed from state victim compensation programs.[31] Such legislation would significantly benefit senior victims of fraud by creating incentives for states to provide compensatory restitution to elderly victims when no means of comparable financial recovery is possible.

5. **Address Emerging Risks for Millennial Investors.** The 117th Congress should direct more attention to the unique challenges and risks to Millennial investors. Due to compounding economic calamities and generational circumstances, Millennials are especially susceptible to financial insecurity and disproportionately at risk of being targeted by bad actors.[32] For example, in December 2020, the Massachusetts Securities Division brought a complaint against Robinhood Financial – an online trading platform popular with Millennials – for "aggressive tactics to attract inexperienced investors, its use of gamification strategies to manipulate customers, and its failure to prevent frequent outages and disruptions on its trading platform."[33]

   To better assist Millennials in achieving financial security, Congress should monitor emerging areas that pose a greater risk to this generation, including online and mobile "app" based trading platforms, and ensure that adequate investor protections are in place to safeguard them and their financial futures from abuse. Initially, Congress should examine novel investment services and innovations that target Millennials and Generation Z and consider where enhanced levels of oversight or legislation would be appropriate.[34] Congress should also consider enacting programs that will further incentivize members of these generations to save and invest responsibly.

PRINCIPLE IV

Congress should vigorously exercise its oversight authority on behalf of the investing public – including, and especially, retail investors.

Congress has a responsibility to shine a spotlight on risks to investors and examine potential solutions to address these risks. When there is insufficient objective data to inform policymaking, Congress should exercise its authority to collect the requisite data or require the SEC to do so. Similarly, Congress should insist that the SEC prioritize issues impacting retail investors.

1. **Oversight of Self-Directed Individual Retirement Accounts (SDIRAs).** SDIRAs allow individuals to use tax-deferred retirement funds from their IRAs to purchase "alternative" investments, such as real estate, private company stock, "over-the-counter" securities, promissory notes, and oil and gas offerings that cannot be purchased through traditional IRAs. Certain SDIRAs allow investments in "digital assets," which include crypto-currencies and coins and tokens, such as those offered in so-called initial coin offerings (ICOs).[35] Because SDIRAs are designed to appeal to self-directed investors, often with particular expertise or interest in certain non-traditional investments, SDIRA custodians generally do not perform the same services as a traditional IRA custodian.[36] Specifically, SDIRA custodians generally do not have the fiduciary duties associated with investment advisers. This lack of services, and protections, is fertile soil for scammers.

   A significant number of enforcement actions taken by state securities regulators each year involve scammers accessing retirement funds in SDIRAs.[37] These schemes allow the scammers to access an investor's 401(k) and IRA savings after they have been rolled over into the SDIRA, and they can be devastating to an investor's retirement. The problem is amplified by the fact that custodians generally do not evaluate the quality of any investment in the SDIRA or its promoters. The 117th Congress should examine the relationship between SDIRAs and fraud, including what, if any, steps the industry is taking to address these problems or whether legislation may be in order.

2. **Oversight of SEC Regulation Best Interest.** To ensure that Regulation Best Interest (Reg BI) meaningfully improves broker conduct to the benefit of the investing public, Congress must conduct rigorous and robust oversight of Reg BI's implementation. Further, such oversight should include direct scrutiny of the SEC and FINRA's implementation activities, including examination findings and enforcement actions, and make improvements to the Regulation as needed to ensure that brokers are putting their clients' interests first. Congress

should hold hearings to examine the industry's implementation of the new standard and encourage the GAO and other independent entities to evaluate whether investors are adequately protected. Finally, Congress should require the SEC and FINRA to periodically report on Reg BI's impact on complex and high-risk products, such as private securities, variable annuities, non-traded real estate investment trusts (REITs), and leverage- or inverse exchange traded funds (ETFs), and account for any investor confusion and harm emanating from these products including how they are sold.

3. **Oversight and Reform of Exchange Act Rule 10b5-1 Trading Plans.**[38] The securities laws prohibit insider trading because, among other things, it undermines investor confidence in the fairness and integrity of our securities markets. Rule 10b5-1 under the Exchange Act provides an affirmative defense to insider trading liability for insiders who, in good faith, enter prearranged plans to buy or sell securities in the future and who are not at the time in possession of material nonpublic information. Although simple in concept, the rule has proven extremely difficult to enforce.[39] Today, it is comparatively easy for corporate insiders to manipulate the rule in order to engage in conduct that might otherwise appear to be insider trading by, for example, belittling the potential materiality of nonpublic information or instituting trading plans that can be modified or canceled prior to execution.[40] Congress should examine the benefits of possible new restrictions, including restrictions on when issuers and issuer insiders can establish trading plans within an issuer-adopted trading window, how many trading plans they can adopt, and the number of permissible modifications to those trading plans.

4. **Oversight of Special Purpose Acquisition Companies (SPACs).** Special Purpose Acquisition Companies, or SPACs, are companies without assets or operations that are incorporated with the sole purpose of raising capital in an IPO to acquire or merge with a private operating company and thereafter take it public. The number of SPAC offerings grew dramatically in 2020, with the number of US-listed SPACs nearly tripling this past year.[41] SPACs can be attractive because they allow sponsors to access capital through a process that is faster than a traditional IPO and retain a potentially lucrative stake in the equity of the acquired company.[42]

   The proliferation of SPACs warrants close attention from Congress. At a minimum, SPACs deprive investors of protections afforded by traditional public company registration under the Securities Act and the Exchange Act. Further, because they bring to market companies that have bypassed the traditional IPO protocols and the associated scrutiny, SPACs present risks to retail investors, who are unaware of what company a SPAC will acquire when making their investment[43] or whether that acquisition will close at a realistic valuation.[44] In addition, as the number and size of SPACs increase, SPACs will, out of necessity, compete for a finite number of profitable deals,[45] which, in turn, will create pressure on SPACs to accept less favorable terms or inflated valuations.

5. **Oversight of Direct Listings.** Like SPACs, direct listings are another way to bypass the traditional IPO process. Direct listings have become increasingly popular because they do not require the participation of underwriters, thereby making it easier, faster, and less costly to become a publicly-traded company. Further, unlike the SEC comment review found in the traditional IPO process, direct listing companies are required only to meet the listing requirements of an exchange. The price of securities offering through a direct listing is entirely market-driven, and with no underwriter-imposed lockup periods, insiders can "cash out" as soon as the company's shares begin trading.[46] Because direct listings have the potential to expose retail investors to significant new risks, the 117th Congress should conduct rigorous oversight of the policies and protocols that the SEC and relevant self-regulatory organizations are developing in regard to these types of offerings to ensure that investor protection is adequately considered.

6. **Oversight of Multi-Class Share Structures.** Today, Facebook, Google, Snap, and a whole host of other companies, have dual,[47] and in some cases, multi-class stock structures.[48] The recent proliferation of multi-class share structures, designed to empower founders and executives by allowing them to take companies public while preserving control over their boards, has changed corporate incentives and behavior in worrisome ways. Congress should evaluate measures that could mitigate these problems, including a requirement that public companies with dual or multi-class share structures utilize "sunset clauses" that could require shareholders of all share classes to periodically vote on whether to extend the multi-class structure.

PRINCIPLE V

Congress should support small and emerging businesses by helping them raise capital responsibly from investors.

For the benefit of the U.S. economy, Congress should support efforts to promote responsible capital formation by small and emerging businesses that are consistent with investor protection principles. Given the abundance of capital raising options already available to promising small businesses, Congress should make coordination and outreach by federal agencies to these businesses a priority, especially for businesses that may be at a disadvantage due to factors such a race, gender, or geographic location.

1. **Education and Outreach to Small Businesses Seeking to Raise New Capital.** Today, there are more avenues than ever for small businesses to raise capital, including newly enacted or expanded securities law exemptions and grant and loan programs. Indeed, from the JOBS Act of 2012, to recent and sweeping rules adopted by the SEC in relation to the harmonization of the exempt offering framework,[49] to state crowdfunding statutes and exemptions,[50] there have never been more viable options for raising capital available to U.S. businesses.

   One of the lessons from the states' ongoing experiment with intrastate crowdfunding laws is that there can be a direct and powerful correlation between the amount of outreach conducted by regulators and government agencies tasked with administering securities laws, and the utility and success of these exemptions. For example, state-led outreach campaigns undertaken in Georgia and Vermont appear to have directly resulted in dozens of small-sized offerings in these states.[51]

   The 117th Congress should explore ways to support outreach by federal and state authorities to local businesses seeking capital. Congress should specifically examine the role of the Small Business Administration (SBA) and other federal agencies in working with the SEC in reaching out to small businesses across the country to educate small business entrepreneurs about the myriad of programs available to them.

2. **Responsibly Improve and Support Markets for "Crowdfunding" and Other Small-Sized Offerings.** NASAA continues to support legislative efforts to improve the federal crowdfunding marketplace, including through increased protections and transparency for consumers. For example, NASAA has supported adjustments to federal crowdfunding laws, including authorizing certain special purpose vehicles (SPVs) in the fundraising process,[52] and has urged Congress to direct the SEC to coordinate with the states more closely in this area to unify or harmonize certain federal and state exemptions.

3. **Proactive Education and Outreach to Underserved and Minority Entrepreneurs.** From their position on the ground in all U.S. states and territories, state securities regulators have a strong appreciation for the positive impact of expanding access to capital for women and minority founders to create change within diverse communities. State regulators also understand the challenges women and minority founders face, especially if they do not have an existing network of wealthy friends and family. [53] Congress should encourage the SEC to proactively work with state regulators, state small business agencies, state and local development agencies, and other stakeholders to develop outreach programs targeted toward diverse investors, communities, and small businesses.

ENDNOTES

[1] "[O]fferings linked to SEC enforcement actions more likely involved an unregistered intermediary or a recidivist, or solicited from unsophisticated investors." *See* Rachita Gullapalli, *Misconduct and Fraud in Unregistered Offerings: An Empirical Analysis of Select SEC Enforcement Actions*, SEC Division of Economic and Risk Analysis (Aug. 2020), *available at* https://www.sec.gov/files/Misconduct%20And%20Fraud%20In%20Unregistered%20Offerings.pdf.

[2] *See* NASAA Outlines Opposition to SEC's Proposed Federal Broker-Dealer Exemption for Private Placement Finders, NASAA News Release (Nov. 13, 2020), *available at* https://www.nasaa.org/56150/nasaa-outlines-opposition-to-secs-proposed-federal-broker-dealer-exemption-for-private-placement-finders/?qoid=current-headlines.

[3] 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 fifty for active brokers. Furthermore, brokers selling private placements are six times more likely than 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).

[4] For instance, the Delaware Supreme Court held on March 18, 2020 in *Salzberg, et al. v. Sciabacucchi* that the exclusive federal-forum provisions (FFPs) in certificates of incorporation for three Delaware corporations were not facially invalid. The decision provides Delaware-incorporated defendants that have adopted FFPs with grounds to seek dismissal when sued in state court for violations of the Securities Act of 1933. Likely counteracting the jurisdictional implications of the US Supreme Court's decision in *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund (2018)*, the 2020 decision may result in a decrease in the number of Securities Act claims brought in state court, along with a decrease in the bifurcation of federal securities actions. The extent to which other state courts will follow remains to be seen.

[5] The Investor Choice Act of 2019, S.2992 / H.R.5336, 116th Congress (2019).

[6] *See* The Restoring American Financial Stability Act Of 2010, 111 S. Rpt. 176 (Apr. 30, 2010) at 103, *available at* https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf.

[7] *Id.* at 104.

[8] As SEC Commissioner Allison Herren Lee observed during the SEC open meeting held to approve new nominating procedures for the IAC: "we are singling out the IAC, which has at times been critical of the Commission, and subjecting it to a process unlike that for any other committee. The new process marginalizes participation by the office best situated to handle the process—the Office of the Investor Advocate—and restricts functional membership categories in a way that fails to prioritize the most pressing needs of investors." *See* SEC Commissioner Allison Herren Lee, Statement on the Investor Advisory Committee Nominating Process (Aug. 5, 2020), *available at* https://www.sec.gov/news/public-statement/lee-statement-investor-advisory-committee-nominating-process

[9] For example, though the SEC's new guidelines preclude the SEC's Investor Advocate from exercising significant influence over the appointment of IAC members, the SEC's Advocate for Small Business Capital Formation is currently allowed to "select nominees for the Small Business Capital Formation Advisory Committee." *Id.*

[10] Specifically, under existing law, the SEC can only penalize individual violators a maximum of $181,000 and institutions $905,000 per offense.

[11] For example, NASAA strongly supports the Strengthening Fraud Protection Provisions for SEC Enforcement Act, or H.R.3701 (116th Congress), which would update and strengthen the SEC's authority to impose civil penalties for securities law violations, including by directly 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. Separately, NASAA also supports legislation that would allow the SEC to in some cases assess these penalties through administrative action, not just in federal court.

[12] Incredibly, private offerings once comprised just a small fraction of the overall market for securities, but today they serve as the primary source of investment capital for many businesses and have vastly exceeded the capital raised in public markets. According to the SEC, in 2018, public offerings accounted for $1.4 trillion of new capital, compared to the approximately $2.9 trillion that the SEC has estimated was raised through exempt offering channels.

[13] Section 12(g) of the Securities Exchange Act of 1934 establishes the thresholds at which an issuer is required to register a class of securities with the SEC.

[14] 15 U.S.C. §78l(g).

[15] *See* Written Testimony of Renee M. Jones, Associate Dean for Academic Affairs and Professor of Law at the Boston College Law School, at the HFSC Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets hearing on Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment (Sept. 11, 2019), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-jonesr-20190911.pdf.

[16] *See* Letter from NASAA President Christopher Gerold to Vanessa Countryman, *Re: File No. S7-08-19: Concept Release on Harmonization of Securities Offering Exemptions* (Oct. 11, 2019) at 5, *available at* https://www.nasaa.org/wp-content/uploads/2019/10/NASAA-Comment-Letter-re-SEC-Exempt-Offerings-Concept-Release-10-11-19-1.pdf.

[17] *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, SEC Rel. Nos. 33-10884; 34-90300 (Nov. 2, 2020), *available at* https://www.sec.gov/rules/final/2020/33-10844.pdf.

[18] For the past 38 years, the Commission's failure to index these standards to account for inflation has eroded the investor protections they were designed to provide. Each year the Commission fails to address these standards only expands the pool of accredited investors, including investors who only meet the wealth standard based on their accumulated retirement savings.

[19] For example, "BlackRock, the world's largest asset manager, with assets under management of $7.4 trillion as of December 31, 2019, announced recently that it would be asking the companies that it invests in on behalf of its clients to (1) publish disclosure in line with industry-specific Sustainability Accounting Standards Board (SASB) guidelines, or disclose a similar set of data in a way that is relevant to the particular business, and (2) disclose climate-related risks in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). State Street, with assets under management of $3.1 trillion as of December 31, 2019, announced the launch of a system for evaluating the performance of a company's business operations and governance vis-à-vis what State Street had identified as financially material and sector-specific ESG issues, based on the SASB materiality framework and data from third-party providers. State Street explained that it uses this system to help clients understand their portfolio exposures, as well as inform its own investment and voting decisions." *See* Rick A. Fleming and Alexandra M. Ledbetter, *Making Mandatory Sustainability Disclosure a Reality,* SEC Office of the Investor Advocate White Paper (2020) at 2, *available at* https://www.sec.gov/files/making-mandatory-sustainability-disclosure-a-reality-white-paper.pdf.

[20] As SEC Investor Advocate Rick Fleming recently observed "the case for ESG disclosure has become only stronger [in 2020]," however "adoption and implementation of prescriptive ESG-related disclosure requirements is extremely challenging when there is so much variation among the private-sector frameworks because the SEC may be reluctant to choose one model over the others in the absence of a clear consensus surrounding any particular framework. Without a critical mass of support for a particular model, it may require an act of the U.S. Congress to determine which standards should become the official metrics for ESG disclosure in the United States." *Id.*

[21] *See* SEC Chairman Jay Clayton discussion with Sen. Elizabeth Warren during the Senate Banking Committee Hearing (Nov. 17, 2020).

[22] *See* Toward Common Metrics and Consistent Reporting of Sustainable Value Creation, World Economic Forum Consultation Draft (Jan. 2020), *available at* https://www.weforum.org/whitepapers/toward-common-metrics-and-consistent-reporting-of-sustainable-value-creation.

[23] Deloitte's 11th Global risk management survey of financial institutions found that "sixty-seven percent of respondents named cybersecurity as one of the three risks that would increase the most in importance for their business over the next two years, far more than for any other risk. Yet, only about one-half of the respondents felt their institutions were extremely or very effective in managing this risk." *See* https://www2.deloitte.com/content/dam/insights/us/articles/4222_Global-risk-management-survey/DI_global-risk-management-survey.pdf.

[24] NASAA supports the bipartisan Cybersecurity Disclosure Act (S.592), which would require publicly traded companies to include in their SEC disclosures to investors information on whether any member of the company's Board of Directors possesses "cybersecurity expertise," as that term is defined, and if not, why having such expertise on the Board of Directors is not necessary because of other cybersecurity steps taken by the company. A copy of NASAA's letter expressing support for the legislation is *available at* https://www.nasaa.org/wp-content/uploads/2019/06/NASAA-Letter-Re-Cybersecurity-Disclosure-Act-of-2019-Final-in-PDF-June-18-2019.pdf.

[25] According to PwC's 2019 Annual Corporate Directors Survey, 84% of board directors surveyed indicated that a diverse board improves relationships with investors and 76% agree that board diversity enhances the performance of the company. However, the Institution Shareholder Services (ISS) reported only 19% of Russell 3000 board seats are held by women, and approximately 10% of directors belong to an ethnic minority group.

[26] Although the qualitative and quantitative benefits of boardroom diversity are compelling, too few U.S. public company boards include a meaningful number of diverse directors. A 2019 study by the Alliance for Board Diversity showed that women and minorities combined represented just one-third of Fortune 500 directors, which means that two-thirds of Fortune 500 directors are white males. An even smaller percentage of small-cap company directors are diverse—one study shows that board diversity in small-cap companies is at least a decade behind the progress made by large-cap companies." *See* https://news.bloomberglaw.com/corporate-governance/steps-for-corporate-boards-serious-about-improving-diversity-in-the-boardroom.

[27] *See* https://www2.deloitte.com/us/en/pages/audit/articles/diversity-venture-capital-human-capital-survey.html.

[28] Matt Krentz, *Survey: What Diversity and Inclusion Policies Do Employees Actually Want?*, Harvard Business Review (Feb. 5, 2019), *available at* https://hbr.org/2019/02/survey-what-diversity-and-inclusion-policies-do-employees-actually-want.

[29] In 2019, the House Financial Services Committee conducted a landmark analysis of diversity in the banking industry. This examination including hearings, and an analysis of relevant data requested by the HFSC from all bank holding companies and savings and loan holding companies with assets over $50 billion. *See* HFSC Subcommittee on Diversity and Inclusion hearing entitled "Good for the Bottom Line: A Review of the Business Case for Diversity" (May 2019). The HFSC's examination culminated in a Committee Report released in February of the following year. *See* Diversity and Inclusion: Holding America's Large Banks Accountable, Committee Staff Report (Feb. 2020), *available at* https://financialservices.house.gov/issues/diversity-and-inclusion-holding-america-s-large-banks-accountable.htm#Purpose%20of%20Bank%20D%20Data).

[30] *See* Senior Security Act, S. 1719, 116th Congress (2019) and NASAA's Letter to Sens. Kyrsten Sinema (D-AZ) and Susan Collins (R-ME) regarding S. 1719 (June 5, 2019), *available at* https://www.nasaa.org/wp-content/uploads/2019/06/NASAA-Letter-Re-Senior-Security-Act-S-1719-060519.pdf.

[31] During the 116th Congress, the Edith Shorougian Senior Victims of Fraud Compensation Act of 2020 (S.3487 / H.R. 7620) was sponsored in the Senate by Sens. Tammy Baldwin (D-WI) and Bill Cassidy (R-LA), and in the House by Reps. Suzanne Bonamici (D-OR) and Peter King (R-NY). A copy of NASAA's letter expressing support for the legislation is *available at* https://www.nasaa.org/wp-content/uploads/2020/06/NASAA-Letter-Re-Ediths-Bill-62520l-1.pdf

[32] According to a survey from Prudential Financial, roughly 1 in 3 Millennial workers have exhausted their emergency savings during the course of the COVID-19 pandemic, compared to just 16 percent of Baby Boomers and 27 percent of Gen X-ers. Millennials were also more likely to: withdraw from their retirement plans to make ends meet, notice an increase in debt over the last year, and delay a professional goal because of their financial concerns. *See* Pulse of the American Worker Survey: Road to Resiliency, Prudential Financial Inc. (January 2021), *available at* https://news.prudential.com/presskits/pulse-american-worker-survey-road-to-resiliency.htm.

[33] *See* https://www.sec.state.ma.us/sct/current/sctrobinhood/MSD-Robinhood-Financial-LLC-Complaint-E-2020-0047.pdf.

[34] Specifically, Congress should consider clarifying the duty of care that online and app-based brokers should owe to investors who invest through their services, especially platforms that utilize "push" notifications and other features designed to encourage frequent trading and/or trading in certain securities.

[35] *See* SEC Investor Alert: Self-Directed IRAs and the Risk of Fraud. (Aug. 8, 2018), *available at* https://www.sec.gov/investor/alerts/sdira.html.

[36] For example, investors often wrongly assume the custodian has vetted the promoter and has approved the investment. In fact, SDIRA custodians typically do not investigate the assets or the background of any promoter.

[37] Most recently, in 2020, 30 states and the CFTC obtained an asset freeze and a receivership in a $185-million precious metals scam targeting senior citizens nationwide that made use of SDIRAs to execute the scheme.

[38] In the 116th Congress, NASAA expressed support for legislation that would reform 10b5-1. *See* NASAA's Letter to HFSC Chairwoman Maxine Waters and Ranking Member Patrick McHenry Regarding H.R.624 (Jan. 23, 2019), *available at* https://www.nasaa.org/wp-content/uploads/2019/05/NASAA-Letter-to-Chair-Waters-and-Ranking-Member-McHenry-Re-H.R.624-January-23-2019.pdf.

[39] As a practical matter, because all information related to Rule 10b5-1 trading plans is maintained by a corporation, insiders – i.e., the corporate officers or directors – are in effect policing themselves.

[40] The Wall Street Journal published a series of articles in 2012 that highlighted suspiciously fortuitous trading patterns under Rule 10b5-1 plans adopted by corporate insiders. The investigation found that more than 1,400 executives, including some with 10b5-1 plans, had made profitable and well-timed trades in the days before their companies released "material, potentially market moving" announcements. *See* https://www.cooley.com/news/insight/2012/is-the-level-of-profitable-trading-by-insiders-under-10b51-plans-just-serendipity.

[41] As of December 2, 2020, more than 200 SPACs had listed in 2020, raising a record $66.3 billion. The Financial Times. *See* https://www.ft.com/content/faedd2a1-2008-4f1e-9198-7694fba791b0.

[42] Unlike traditional IPOs, SPACs do not have commercial operations at the time of the IPO. As a result, SPAC IPOs are faster and face less regulatory scrutiny, and their financial and business disclosures are substantially shorter than traditional IPOs. *See* SPAC IPO: Background and Policy Issues, CRS Report (Sept. 29, 2020) *available at* https://crsreports.congress.gov/product/pdf/IF/IF11655.

[43] SPAC investors place trust in the sponsors to identify acquisition targets. They do not know the details of a SPAC's future investment at the time of its IPO. In contrast, investors in a traditional IPO purchase shares in a specific operating company.

[44] Over 65% of SPACs issued since 2015 have positive returns. During the same period, the median SPAC lost approximately 36% of its value while traditional IPOs gained 37%.

[45] *See* https://dealbook.nytimes.com/2007/06/11/its-hard-out-there-for-a-spac/.

[46] The SEC recently approved a new NYSE rule that has the potential to drastically expand the appeal of direct listings and reduce the incentive for companies to use the traditional IPO process.

[47] *See* https://www.mondaq.com/unitedstates/Finance-and-Banking/739314/Super-Voting-Stock-What-Is-It-And-How-Can-I-Get-It.

[48] *See* https://www.sec.gov/news/speech/fleming-dual-class-shares-recipe-disaster.

[49] On November 2, 2020, the SEC voted to adopt a series of major changes to the exempt offering framework. According to the SEC, the new rules "address gaps and complexities in the exempt offering framework that impede access to capital for issuers and access to investment opportunities for investors." The new rules are aimed at capital formation activity for businesses of all sizes, "from raising seed capital for new businesses to growth capital for companies of all sizes, including those on the path to a registered initial public offering." *See* https://www.sec.gov/news/press-release/2020-273.

[50] For additional information about intrastate crowdfunding, *See* https://www.nasaa.org/industry-resources/securities-issuers/instrastate-crowdfunding-resources/.

[51] For example, the Invest Georgia Program (IGP) is a long-term investment program, backed by the State of Georgia, that is designed to help grow and mentor current, new and future Georgia venture capital investment funds in the state of Georgia. The goal of the program is to "create new Georgia companies, new Georgia entrepreneurs and long-term, high-paying Georgia jobs." As of December 2020, the IGP had directly facilitated capital raises by some 70 companies, resulting in the creation of an estimated 2,200 new jobs in the state. *See* https://investgeorgia.net

[52] *See* NASAA Legislative Agenda for the 116th Congress, Principle 3 (2019) at 6, *available at* https://www.nasaa.org/wp-content/uploads/2019/03/NASAA-Legislative-Agenda-for-116th-Congress.pdf.

[53] Ilene H. Lang and Reggie Van Lee, *Institutional Investors Must Help Close the Race and Gender Gaps in Venture Capital,* Harvard Business Review (Aug. 27, 2020) *available at* https://hbr.org/2020/08/institutional-investors-must-help-close-the-race-and-gender-gaps-in-venture-capital.