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Public Markets: Drivers and Implications”

Introduction

Good morning. Thank you for the opportunity to speak today.

My name is Faith Anderson, and I am the Chief of Registration & Regulatory Affairs in the Securities Division of the Washington Department of Financial Institutions. My staff and I have a lot of experience with small business capital formation because we are responsible for reviewing applications for registration in small public offerings, non-traded REITs, business development companies, and other types of offerings. I currently serve as Chair of the Small Business/Limited Offerings Project Group of the North American Securities Administrators Association (“NASAA”). I also am a member of NASAA’s Committees on Corporation Finance, the Electronic Filing Depository, and State Legislation. I have participated in the development of many NASAA comment letters on SEC rule proposals, and I led NASAA’s project to create a coordinated, multi-state review program for Regulation A (“Reg A”) offerings. However, I must make clear that my comments today reflect my personal views and do not necessarily represent the official positions of NASAA or any of its committees or project groups.

Today, I want to discuss the challenges that retail investors face in our markets. First, I will explore the growth of private offerings under Regulation D (“Reg D”), Rule 506 and how that has affected retail investors. Then, I will turn to Regulation Crowdfunding (“Reg CF”) and Reg A because they are intended to give retail investors access to earlier-stage companies. For greater detail about these and other related issues, please consider reviewing NASAA’s new Report and Recommendations for Reinvigorating Our Capital Markets.¹

¹ [NASAA Report and Recommendations on Reinvigorating Our Capital Markets](#) (Feb. 7, 2023). See also [NASAA Letter to Committee Leadership Regarding Opportunities to Strengthen Diversity in Our Capital Markets](#) (Dec. 12, 2022); [NASAA Letter to Committee Leadership Regarding Securities Policy Riders](#) (Dec. 1, 2022); [NASAA Letter to Committee Leadership Regarding Lessons from the FTX Bankruptcy](#) (Nov. 30, 2022); [Prepared Remarks of Andrea Seidt for the SEC Small Business Capital Formation Advisory Committee Regarding Secondary Market Liquidity](#) (Aug. 2, 2022)

The Consequences of the Growth of Private Offerings for Retail Investors and Our Securities Markets More Generally

As this committee knows, private offerings of securities under Rule 506 have eclipsed the amount of registered offerings by public companies. This is worth reflecting upon because what was intended as an exception to the general rule has now become the dominant form of capital formation in this country. In the 1930s, the federal securities laws were built upon a simple bargain—if a company wanted to raise money from the general public, then it had to provide fulsome disclosure of all material facts to the public by registering its securities with the Commission. Originally, Congress created an exception for non-public offerings, or offerings to limited numbers of people who were in a position to fend for themselves in the absence of registration. The Commission built upon that exception in Rule 506. Over time, however, by loosening the restrictions on general solicitation and resales, as well as their failure to reset dollar thresholds to adjust for inflation, the Commission and Congress have made it possible for companies to raise unlimited capital from hundreds of investors without having to complete the registration process.

Why should we care about this? Because the growth in our private markets comes at the expense of our public markets and ultimately retail investors. Allowing companies to raise all the capital they need privately and stay private indefinitely reduces the size, diversity, and growth of companies in our public markets. Most retail investors are excluded from directly investing in private offerings, so ultimately it is the retail investors who are affected.

Often, commentators—and even policymakers—suggest an easy solution to this problem: allow non-accredited retail investors to have greater access to offerings that are exempt from registration. So, I want to take a moment to explore just a few of the practical implications of that option.

- **Investors in the Private Markets Receive Inferior Disclosures.** In a registered offering, a company is required to disclose a wide range of information, such as the company’s financial performance, the strength of its internal controls, and management’s view of challenges facing the company. The information must be presented in a way that makes it easier to make comparisons between companies, and the information must be updated as circumstances change. In contrast, as the SEC explained in a 2019 Concept Release, issuers in Rule 506 offerings “are not required to provide any substantive disclosure”.² If information is provided at all, it need not be in a fashion that is uniform in content, making comparisons between companies difficult, and the information need not be updated as circumstances change. Voluntary disclosures are prone to greater error and can be influenced by overly optimistic assumptions about future prospects.
- **Issuers in the Private Markets Favor Some Investors Over Others.** Another distinction between public and private markets is that public companies must comply with Regulation Fair Disclosure, which requires information about a company to be

² SEC, [Concept Release on Harmonization of Securities Offering](#) (June 18, 2019) at 33 (emphasis added).

distributed in a non-discriminatory fashion to all investors. For private companies and their insiders, though, they are free to provide information only to favored investors. Investors in private offerings are left to fend for themselves to obtain unbiased information about the company. Small retail investors are especially unlikely to have the clout to insist on access to important information.³

- **Price Discovery in the Private Markets Is Practically Impossible for Some Investors.** Ultimately, the fulsome disclosures provided by public companies are used by investors and investment professionals to establish a fair price for a security, and all investors benefit from that price discovery mechanism, including less sophisticated investors. However, in the absence of mandatory disclosure, investors in the private market are expected to conduct their own due diligence to determine a fair price for a security. Depending on the circumstances, conducting such due diligence is prohibitively expensive, extremely difficult, and/or practically impossible for a retail investor who can only make a relatively small investment.
- **Retail Investors Have Less Negotiating Power in the Private Markets.** Another advantage of the public market is that, when a public company is listed on a stock exchange, retail investors are entitled to and should receive the best available price for a security, no matter how small the investment. In the private market, larger or well-known investors can—and often do—receive more favorable terms, and the best deals may only be available to the largest and most influential investors. Prominent venture capital firms often negotiate for preferred stock, contractual protection against dilution of their shares in future funding rounds, and representation on the board of directors. Realistically, retail investors cannot negotiate for such advantages and therefore may enter into private investments at a severe disadvantage.
- **Retail Investors in the Private Markets Typically Cannot Diversify Their Investments.** To minimize their risk, venture capital firms and other large investors diversify their investments in early stage companies, so their losses on many investments can be overcome by gains on other investments. Promising start-ups often require significant minimum investment amounts, so retail investors with limited resources will be unable to diversify their investments and would be taking much greater risk as a result.
- **Retail Investors Are Exposed to More Fraud in the Private Markets.** Year after year, state regulators identify unregistered offerings as a top method for conducting fraudulent schemes. Of course, fraud occurs in the public markets, but the process of becoming

³ Previous proposals to expand the private markets have cited the ‘increasing availability of information’ as a general reason to ease private market restrictions. While there certainly is more information than ever, it remains the case that the most salient investment information about most private companies is kept out of public view and is difficult for less influential investors to access.

registered or a public reporting company helps weed out issuers that are problematic, including, without limitation, those with poor management, lackluster corporate governance, unacceptable conflicts of interest, and bad actors. Problematic offerings may not come to fruition or issuers may be forced to make improvements in response to the light shone on them. And, if fraudulent practices develop after a company goes public, then the requirements under the securities laws for strong internal controls, audited financial statements, and other investor protections reduce the likelihood that frauds will remain undiscovered for long.

In sum, while state regulators believe that retail investors deserve access to high-quality investment options, the unregulated nature of the private market stacks the deck against them. In the private market, small retail investors lack the clout to insist on access to important information, face prohibitive costs for the necessary level of due diligence, typically receive less favorable terms than larger investors, lack the resources to lower risk through diversification, and are vulnerable to higher levels of fraud.

Observations from a State Securities Regulator of Reg A and Reg CF Offerings

Reg A and Reg CF offerings are designed to give early-stage companies access to retail investors without going through the full-blown registration process. Unfortunately, experience has shown that retail investors have limited interest in these offerings. I want to touch upon just a few of the issues that make offerings under Reg A and Reg CF unappealing to most retail investors.

- **To Begin With, Reg A and Reg CF Offerings Are Unappealing to Most Retail Investors Because the Disclosure Tends to Be Poor Quality.** Indeed, the disclosure I see tends to lack specific information about risks, uses of the offering proceeds, and other important matters. Moreover, these offerings tend to include financial projections that are improbable, to put it mildly. The poor quality of the disclosures is despite the fact that companies are required to make certain disclosures as a condition of these exemptions.
- **Investors in Reg A and Reg CF Offerings Receive Little Protection Against Conflicts of Interest Between Themselves and Company Insiders.** In contrast to public companies that are required by exchange listing standards or market pressures to adopt reasonable corporate governance measures, companies utilizing these exemptions tend to lack those controls. For example, there may be high salaries (including accrued salaries) for promoters, a lack of independent directors, unequal shareholder voting rights with a lack of any preferences as to dividends and distributions, and significant affiliated transactions that are likely to impact the financial success of the company. These offerings may also lack a reasonable minimum offering amount, which means that the company can take investor money even though the offering raised too little money to achieve the company's stated goals.
- **Reg A and Reg CF Offerings Typically Give Retail Investors the Leftovers.** Companies raise more than 1,000 times as much money through Rule 506 than Reg A and Reg CF combined. This is not surprising because company founders typically would

prefer to raise a lot of money from a few large investors rather than a little money from a lot of small investors, so founders turn first to Rule 506 and may only use Reg A or Reg CF as a last resort. This means that retail investors who want to invest in newer companies and those with the potential for high growth are left to invest in the offerings that have been passed over by institutional and other sophisticated investors.

The Regulatory Gap Caused by Preempting State Securities Regulators

As a result of decisions that Congress and the SEC have made in the 41 years since Regulation D was adopted,⁴ state securities regulators have little authority left to protect retail investors in private markets. We have been preempted from reviewing offerings or placing any conditions upon offerings under Rule 506 of Reg D, Tier 2 of Reg A, and Reg CF. While state regulators retain authority to bring actions after fraud has been committed, as I explained in my introduction, most capital is now raised in Rule 506 offerings and the role of states in the promotion of responsible capital formation has been diminished.

What's more, while Congress and the SEC have tied the states' hands with respect to these offerings, the SEC is not making up for the work the states used to perform. By way of example, the SEC conducts no substantive review of Rule 506 offerings. Rather, they merely require a notice filing with little information about the offering. The SEC's failure to enforce this minimal requirement encourages issuers to ignore it. And, while the SEC could review the disclosure documents required to be filed in Reg A and Reg CF filings, the Commission seems to be devoting few of its limited resources to this work, as evidenced by the "no review" letters that are available on EDGAR.

Recommendations for the Commission and Congress

To conclude, I want to address the main question of this panel: How do we give retail investors access to a wider array of investment options? The best answer is not to expose them to the private market, where the deck is stacked against them, but rather to pursue policies designed to increase the number of companies offering transparency to investors in the public market. Instead of making it easier for companies to raise money in the private market until long past their growth stage, the Commission and Congress should begin nudging companies into the public market earlier in their life cycle.

To do that, a good starting point would be for the SEC to conduct a comprehensive study of the companies in these markets. The study should examine the costs and benefits associated with the monumental shift from public to private markets and, in particular, the performance of offerings conducted under Reg A, Reg CF, and Reg D, as well as the effect of recent changes to the SEC's definition of accredited investor. I am confident that a study of this nature would lead to the conclusion that the definition of an accredited investor should be strengthened, not weakened. A second place to start is to require companies of a certain size to satisfy the ongoing reporting

⁴ SEC, Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales, (Mar. 16, 1982).

requirements for public companies. This requirement would be regardless of the methods the companies use to raise capital.

These and other recommendations are included in NASAA's new Report and Recommendations for Reinvigorating Our Capital Markets, which I have attached to my written testimony.

Conclusion

Thank you again for the opportunity to speak today. Should you decide to incorporate some or all of my comments into a recommendation to the SEC, I'd be delighted to engage with you further on the specifics. In the meantime, I look forward to any questions you might have for me. Thank you.



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION

**NASAA REPORT AND
RECOMMENDATIONS
FOR REINVIGORATING
OUR CAPITAL MARKETS**

Published February 7, 2023



About NASAA

Organized in 1919, the North American Securities Administrators Association (“NASAA”) is the oldest international organization devoted to investor protection. NASAA is a voluntary association whose membership consists of the securities regulators in the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands (collectively referred to below as “state securities regulators”), as well as the 13 provincial and territorial securities regulators in Canada and the securities regulator in México. In the United States, NASAA is the voice of state securities regulators that protect investors, promote responsible capital formation, and support inclusion and innovation in the capital markets. NASAA members license firms and their agents, investigate alleged violations of securities laws, file enforcement actions when appropriate, and educate the public about investment fraud. NASAA members also participate in multi-state enforcement actions and information sharing. For more, visit: <https://www.nasaa.org/>.

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Introduction

State securities regulators play several vital roles in our capital markets. In addition to serving on the front lines of protecting Main Street investors, we are on the front lines of helping Main Street businesses understand their capital-raising options. Our work to promote responsible capital formation translates into job creation and other economic support for local communities throughout our states.

Released in April 2022, the draft Jumpstart Our Business Startups Act of 2022 (the “JOBS Act 4.0”) is made up of various legislative proposals intended to build upon the original Jumpstart Our Business Startups Act that was enacted in 2012 (the “2012 JOBS Act”).¹ As explained in this report and the Appendix hereto, we are concerned that a majority of the proposals in the JOBS Act 4.0 would erode our public markets further and adversely affect the businesses and investors that rely on those markets to raise investment capital and build sound financial futures. Moreover, the ideas would move us further away from important foundational principles in our system of securities regulation and undermine the longstanding efforts of state securities regulators to strengthen our public markets, support a healthy ecosystem for entrepreneurs and small businesses to raise capital successfully, and increase opportunities for investors.

As detailed in Part IV below, we urge Congress to oppose the JOBS Act 4.0 as published in April 2022 and as modified during the 118th Congress.² Relatedly, we urge Congress to join NASAA

¹ [2012 JOBS Act](#), Pub. L. No. 112-106, 126 Stat. 306 (2012). Following the 2012 JOBS Act, Congress passed the Fixing America’s Surface Transportation Act (the “FAST Act”), Pub. L. No. 114-94 (2015), which was unofficially dubbed “JOBS Act 2.0.” On July 17, 2018, the U.S. House of Representatives passed the “JOBS and Investor Confidence Act of 2018,” Pub. L. No. 114-94, S.488, 115th Congress (2017-2018); it was a compilation of 32 bills and was considered “JOBS Act 3.0.” See Glenn Pollner, Elizabeth Ising & Thurston Hamlette, [JOBS Act 3.0](#), Harvard Law School Forum on Corporate Governance (Aug. 6, 2018).

² The House Financial Services Committee (“HFSC”), Subcommittee on Capital Markets has noticed related bills, all marked discussion draft, in connection with two hearings that it will hold on February 8, 2023. Some of them were included in the JOBS Act 4.0 published in April 2022—specifically, (1) the [Gig Worker Equity Compensation Act](#); (2) the [Increasing Investor Opportunities Act](#); (3) the [Equal Opportunity for All Investors Act of 2023](#); (4) the [Improving Crowdfunding Opportunities Act](#); (5) the [Small Entrepreneurs Empowerment and Development Act of 2023](#); (6) the [Developing and Empowering Our Aspiring Leaders Act of 2023](#); (7) the [Unlocking Capital for Small Businesses Act of 2023](#); and (8) to [direct the SEC to update its definitions of “small entities”](#). NASAA’s position on each of them is set forth in the Appendix hereto. The following bills were not included in the April 2022 JOBS Act 4.0: (1) the [Fair Investment Opportunities for Professional Experts Act](#); (2) the [Accredited Investor Definition Review Act](#); (3) the [Accredited Investor Self-Certification Act](#); (4) the [Investment Opportunity Expansion Act](#); (5) to [expand the definition of “accredited investor”](#); (6) to [preempt blue sky laws for off-exchange secondary trading](#); (7) the [Improving Capital Allocation for Newcomers Act of 2023](#); (8) the [Regulation A+ Improvement Act of 2023](#); (9) to [amend the Investment Advisers Act of 1940 to increase the exemption from registration threshold](#); and (10) the [Helping Angels Lead Our Startup Act of 2023](#). As explained in the Appendix hereto with respect to the Equal Opportunity for All Investors Act, NASAA has serious concerns with proposals to expand the universe of persons who qualify as an accredited investor. Congress should direct the SEC to study, in consultation with NASAA, the anticipated consequences for the U.S. capital markets of legislation to expand the universe of accredited investors. Further, NASAA strongly opposes the proposal to preempt state blue sky laws for off-exchange secondary trading

and state securities regulators in prioritizing proposals that will reinvigorate our capital markets. For example, stronger regulatory coordination is critical to the preservation of our capital markets. Accordingly, we support the Promoting Opportunities for Non-Traditional Capital Formation Act,³ which would expand the functions of the Office of the Advocate for Small Business Capital Formation at the U.S. Securities and Exchange Commission (“SEC,” “Commission” or “agency” as appropriate) and require meetings with state securities regulators at least annually.⁴

In addition to better coordination, better data, especially on the private markets, is desperately needed. Regulators have almost no visibility into private offerings, and for years, we have urged the SEC to amend its rules so it can collect critical data about these offerings to support evidence-based rulemaking.⁵ Congress should require the SEC to make these changes and, further, should direct the SEC to conduct a holistic study of the capital markets and how best to restore the primacy of the public markets. This study, we believe, would illustrate the need for bolder action, including passage of the Private Markets Transparency and Accountability Act,⁶ which would restore balance between public and private markets by requiring large companies to start filing public reports.

I. Strengthening Public Markets

From its inception in the 1930s, federal securities regulation has been built upon a philosophy of disclosure. This philosophy involves a fundamental bargain: if a company wishes to sell its securities to the general public, then it must disclose detailed information about the business publicly.⁷ Under this approach, all material facts and associated risks of an investment are fully disclosed to prospective investors so they can make informed investment decisions. Access to this information empowers investors to educate and defend themselves.

for the same reasons we oppose similar legislation such as the [Facilitating Main Street Offerings Act](#), which was introduced during the 117th Congress and included in the April 2022 JOBS Act 4.0.

³ H.R. 7977, [Promoting Opportunities for Non-Traditional Capital Formation Act](#), 117th Congress, 2nd Session. See also [NASAA Letter to Congress Re: H.R. 7977](#) (June 10, 2022).

⁴ Section 19(d) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. § 77s, provides that the Commission is authorized to cooperate and share information with NASAA, and the Commission is required to conduct an annual conference to facilitate such cooperation. The Promoting Opportunities for Non-Traditional Capital Formation Act would enhance the existing coordination by facilitating more direct communication between NASAA and the SEC’s Office of the Advocate for Small Business Capital Formation.

⁵ See [NASAA Letter to Congress](#) Regarding the JOBS Act 2.0 (May 6, 2014).

⁶ S. 4857, [Private Markets Transparency and Accountability Act](#), 117th Congress, 2nd Session.

⁷ See Usha Rodrigues, [Financial Contracting with the Crowd](#), 69 EMORY L.J. 397 (2019) at II.A (“For years, an equilibrium of sorts existed in the securities world, one rooted in a strict divide between two markets. On one side of the divide lay private markets, policed by fraud, which allowed for relatively small-scale fundraising from wealthy individuals and institutions. Resale of securities was both legally and practically difficult. On the other side lay public markets, policed by disclosure, which allowed companies to raise millions of dollars and enjoy a liquid secondary market.”)

More specifically, a public reporting company must register with the SEC by filing a Form 10 that describes its business in detail, including its financial condition, and thereafter must make periodic filings (*e.g.*, Forms 10-K, 10-Q, and 8-K) to disclose ongoing developments related to its finances and business environment. A public reporting company also must comply with proxy regulations that give shareholders the ability to cast informed votes on important matters related to the governance of the company, including executive compensation and the election of board members. Once registered, the company can make an initial public offering (“IPO”) of its securities and, if the company chooses to list its securities on a national securities exchange, it must meet minimum quantitative and qualitative listing standards, including requirements related to independent directors, conflicts of interest, and shareholder approval of certain corporate actions.

A. Public Disclosure Is Valuable

The disclosure requirements in the United States provide important protections for investors and serve as the foundation for a vibrant marketplace that is often described as the envy of the world.⁸ Our public equity markets are the deepest and most liquid, and they provide efficient engines for companies to raise trillions of dollars in capital. While our markets are not flawless, and we believe certain market structure reforms would be helpful, it is important to remember that our public markets are the best in the world for both businesses and investors.

Our country’s reputation as the gold standard for securities markets is due, in large part, to our emphasis on investor protection. Investor protection is often misunderstood as merely the prevention of fraud or other unethical conduct. While prevention is important, the concept of investor protection runs much deeper. If, for example, there is little public information about a company, it will be difficult and prohibitively expensive for investors—and especially retail investors—to confidently determine a value for the company’s shares or evaluate the risks presented by an investment in the company. By requiring robust disclosures, our laws protect investors by facilitating an efficient price discovery mechanism. This, in turn, bolsters confidence in our markets and makes people more willing to invest in job-creating enterprises. In this and many other ways, investor protection encourages capital formation.

Historically, public policy has favored the public markets over the private markets, where companies raise money through private offerings by taking advantage of exemptions from the registration and disclosure requirements. Unfortunately, as described below, we have seen a

⁸ See [Joint Securities Law Professor Comment Letter](#) Regarding the SEC Concept Release on Harmonization of Securities Offering Exemptions (“Joint Professor Letter”) (Sept. 24, 2019) (“Any consideration of the regulatory web of transaction exemptions should begin with an acknowledgement that public securities markets, which are the product of SEC-registered offerings, remain the standard against which securities offerings and markets should be judged. Since the end of World War II, U.S. public securities markets have been the envy of the world in terms of size and liquidity and as engines for capital formation. This status owes not just to the economic might of the United States, but moreover to the legal architecture of federal securities laws, built over eight decades, which has protected investors.”)

monumental shift in recent years toward the private markets. In our view, the best way to revitalize our markets is to reinforce the time-tested fundamental bargain by which companies can enjoy broad access to investors in return for fulsome disclosure.⁹ We encourage lawmakers to pursue policies that strengthen our public markets by enhancing efficiency, transparency, and a level playing field, rather than policies that pull companies and investors away from the public markets.

B. Private Offerings Under Rule 506 Are Now Dominant

We, along with many other commentators,¹⁰ are concerned that public offerings of securities are no longer the dominant form of capital formation in the United States. Over time, Congress and the SEC have expanded the ability of companies to raise large sums of capital privately and stay private longer, without providing the type of disclosure that is required for a public offering.

From the beginning of the federal securities laws, there have been exceptions to the general rule that offerings conducted in the United States must be registered with the SEC, and offerings meeting certain conditions have been exempted from mandatory disclosure requirements. The most notable of these exemptions was for offerings that did not involve a “public offering” of securities.¹¹ Conceptually, fulsome public disclosures were considered unnecessary when a sale of securities did not involve an offer to the public.¹²

Of course, this begs the question: what types of transactions do not involve a “public offering”? In a seminal case addressing this question, the Supreme Court in 1953 considered an offering to employees of the issuer and noted that “the number of offerees is not determinative of whether an offering is public.”¹³ According to the Supreme Court, to be a transaction not involving a public offering, it must be directed to persons who “do not need the protection of

⁹ See George S. Georgiev, [The Breakdown of the Public-Private Divide in Securities Law: Causes, Consequences, and Reforms](#), 18 N.Y.U. J.L. & Bus. 221, 240 (Fall 2021) (“Breakdown of the Public-Private Divide Paper”) (“On a conceptual level, becoming a public company entails a bargain: a heretofore private company gains access to large and highly liquid pools of public capital, which enables it to raise funds quickly, efficiently, and at low cost, but, in return, the company becomes subject to an extensive federal regulatory regime. The foundational rationale for this regime’s existence is the need to protect the ‘investing public’ — the investors, *i.e.*, suppliers of capital, who buy and sell securities on the public markets.”).

¹⁰ See, *e.g.*, Joint Professor Letter; [Consumer Federation of America Comment Letter](#) Regarding the SEC Concept Release on Harmonization of Securities Offering Exemptions (“CFA Comment Letter”) at 9-13. See also Craig McCann, Susan Song, Chuan Qin & Mike Yan, [HJ Sims Reg D Offerings: Heads, HJ Sims Wins - Tails, Their Investors Lose](#), SLCG Economic Consulting (2022). See also [Inactive and Delinquent Reg D Issuers](#) (2022); [Regulation D Offerings Summary Statistics](#) (2022) and [Broker-Sold Regulation D Offerings Summary Statistics](#) (2022), all by Craig McCann, Chuan Qin & Mike Yan.

¹¹ Section 4(a)(2) of the Securities Act (formerly section 4(2) and, earlier, section 4(1)), 15 U.S.C. § 77d(4)(a)(2).

¹² See SEC v. Ralston Purina Co., 346 U.S. 119, 122 (1953), citing H.R. Rep. No. 85, 73rd Congress, 1st Session.

¹³ See SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

the [Securities Act of 1933]” because they are able to “fend for themselves.”¹⁴ Further, in view of the broadly remedial purposes of the Securities Act, the Supreme Court held that it is reasonable to place on an issuer the burden of proving that purchasers of its securities had access to the kind of information which registration under the Securities Act would disclose.¹⁵

Using its exemptive authority, the Commission adopted Rule 506 of Regulation D in 1982.¹⁶ In general, Rule 506 provided that sales of securities to unlimited numbers of accredited investors and up to 35 sophisticated non-accredited investors would not be considered a public offering that requires registration, but only if the offeror did not use any form of general solicitation. Accredited investors were defined as individuals with a net worth in excess of \$1,000,000 (either alone or together with a spouse) or an income of \$200,000 per year (or married couples with a combined income of \$300,000).

In 2011, Congress altered the calculation of net worth to remove a person’s primary residence. However, the income and net worth thresholds have not otherwise been changed by Congress or the Commission since 1982. Given the effects of inflation, we note that an exemption that originally allowed unregistered securities to be sold to 1.6 percent of the U.S. population now allows those sales to approximately 13 percent of the population.¹⁷

Beyond the failure to adjust the accredited investor definition for inflation, Congress and the Commission have taken other steps to expand the scope of the exemption under Rule 506. Taken together, these steps have strayed well beyond an exemption that was specifically designed for transactions that do not involve a public offering. For example, the Commission long held that an offering limited to investors with a pre-existing substantive relationship with the issuer would not involve a public offering, but over the years the Commission has made it easier and easier for a company to establish such relationships with prospective investors. It is now possible to utilize a broad internet-based solicitation to establish a purported “relationship” with a wide range of prospective investors and then use that relationship to avoid the prohibition on general solicitation in subsequent securities offerings.¹⁸ Another major development was in 2013 when the Commission adopted Rule 506(c) to satisfy a mandate imposed by Congress in the 2012 JOBS Act. Rule 506(c) provides that a company can broadly solicit and generally advertise an offering and still be deemed in compliance with the exemption of Rule 506, so long as the company takes steps to verify that all investors are

¹⁴ *Id.* at 124-25.

¹⁵ *Id.* at 126-27.

¹⁶ SEC, Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Release No. 33-6389, 47 FED. REG. 51 (Mar. 16, 1982).

¹⁷ SEC Proposed Rule, [Amending the “Accredited Investor” Definition](#) (“Proposed Accredited Investor Definition”), Release Nos. 33-10734 and 34-87784 (Dec. 18, 2019), at 77, 134.

¹⁸ Stephen Quinlivan, [SEC Explains How to Form a Pre-Existing Relationship Using the Internet; New CDI’s Issued, Stinson Corporate & Securities Law Blog](#) (Aug. 7, 2015).

accredited investors.¹⁹ More recently, the Commission adopted amendments classifying certain individuals as accredited investors by virtue of their “sophistication,” without regard to their financial wherewithal.²⁰

In 1996, the National Securities Markets Improvement Act (“NSMIA”)²¹ preempted state regulation of Rule 506 offerings. Thereafter, companies were allowed to raise unlimited amounts of capital from unlimited numbers of accredited investors with no specific disclosure obligations and no regulatory review at either the federal or state level. This also had the effect of dis-incentivizing companies from pursuing exchange listings in order to avail themselves of exemptions available under state law for exchange-listed securities.

Originally, the purchaser of a security in an offering under Rule 506 was restricted from reselling it for a period of two years.²² In 1997, the holding period was shortened to one year, if certain conditions were met, and the conditions were removed in 2007.²³ Then, in 2015, a provision of the FAST Act allowed immediate resale of restricted securities to other accredited investors, a designation which now applies to a sizable portion of the overall investing public. Together, these changes dramatically reduced the need for companies to turn to the public markets in order to provide a way for founders, early investors, and employees to sell their shares. Moreover, the changes made it far more likely that unregistered securities would be widely distributed to the general public.²⁴

In summary, the exemption in Rule 506 was intended to allow sales to a limited number of people who were able to “fend for themselves” and did not need the protections inherent in the registration requirements because they possessed the bargaining power or financial wherewithal to overcome the normal informational asymmetries between buyers and sellers of securities.²⁵ However, the exemption no longer meaningfully limits offerings to this type of person, and the conditions on this exemption for “non-public offerings” have nothing to do with the size, economic importance, or disparate ownership of the company.

As a result of these developments, what was meant as an exception to the general rule has become the primary means of raising capital in this country. A 2020 study of Regulation D by the SEC revealed that, in the preceding decade, there had been a steady increase in the number

¹⁹ See SEC, [Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings: A Small Entity Compliance Guide](#) (last modified Sept. 20, 2013).

²⁰ See SEC Final Rule, [Accredited Investor Definition](#), Release Nos. 33-10824 and 34-89669 (Aug. 26, 2020).

²¹ Pub. L. No. 104-290, 110 Stat. 3416 (1996).

²² See [Letter from Keith F. Higgins](#), Chair, Committee on Federal Regulation of Securities, American Bar Association, to John W. White, Director, SEC Division of Corporation Finance (Mar. 22, 2007).

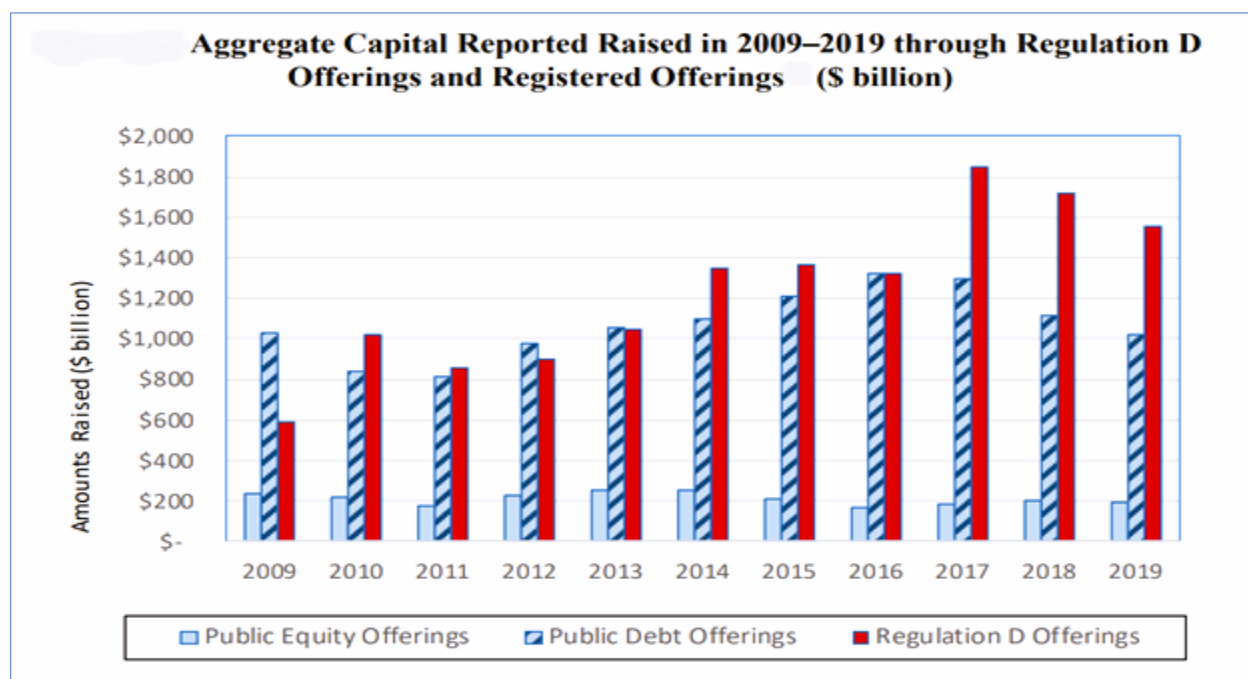
²³ See Renee M. Jones, [The Unicorn Governance Trap](#), 66 U. PA. L. REV. ONLINE 165 (2017).

²⁴ *Id.* The FAST Act created a new Section 4(a)(7) under the Securities Act, which preempted state law to facilitate secondary trading by establishing a nonexclusive safe harbor for private resales under the so-called “Section 4(a)(1½)” exemption.

²⁵ See CFA Comment Letter at 9-13.

of offerings and amounts raised in Rule 506 offerings. As shown in Table 1, Regulation D offerings—99.9 percent of which are under Rule 506—have eclipsed the amounts raised in public offerings.²⁶

Table 1



Source: SEC Reg A/Reg D Report.

The growing dominance of the private markets has systemic implications. Specific disclosures are not mandated under Rule 506, and voluntary disclosures are often tainted with inaccuracies or overly optimistic projections that lead to mispricing of the securities. Even the most sophisticated investors often lack the information needed to make informed investment decisions, and this can lead to market-wide bubbles that cause widespread harm when they burst. Additionally, founder-friendly terms that are common in private offerings can lead to weak corporate governance and internal controls, making fraud or other misconduct more likely. Other stakeholders, such as companies in the issuer’s supply chain, also suffer from the lack of public disclosure because it is more difficult to assess the risk of their commercial partners. In turn, the supplier’s own disclosures may become inaccurate or misleading. Furthermore, regulators lack a line of sight into these markets, so their rulemaking, examination, enforcement, and education work suffers. As the private market continues to

²⁶ Regulation D includes a second exemption under Rule 504, but Rule 506 offerings make up more than 99.9 percent of offerings conducted under Regulation D. See SEC, [Report to Congress on Regulation A / Regulation D Performance As Directed by the House Committee on Appropriations in H.R. Rept. No. 116-122](#) (“SEC Reg A/Reg D Report”) (Aug. 2020) at 16.

expand, these and other consequences undermine responsible capital formation generally, and the virtues of fairness and efficiency that undergird our public markets become fleeting.

C. The 2012 JOBS Act Did Not Achieve Its Goals for the Public Markets

It is clear from its legislative history that Congress intended for the 2012 JOBS Act to incentivize more companies to enter the public markets. Members of Congress took steps to address what some saw as the deterioration of the public markets, pointing to the slackening pace of IPOs and the decline in the number of companies listed on exchanges which, in turn, yielded fewer attractive investment opportunities for retail investors. To curb this trend, Title I of the 2012 JOBS Act created a new “IPO on-ramp” to reduce the perceived burdens of becoming a public company and thereby encourage more companies to conduct an IPO.

Title I of the 2012 JOBS Act lowered a number of the requirements for an “emerging growth company” (“EGC”) to become a public company. An EGC was defined as a company with total annual gross revenues of less than \$1 billion in its most recent fiscal year—a definition that would have encompassed the vast majority of companies that had gone public before the 2012 JOBS Act.²⁷ EGCs were allowed to go public while disclosing two prior years of audited financial statements instead of three, and EGCs were exempted from the requirement to disclose executive compensation for five years following the IPO. Title I also allowed EGCs to “test the waters” by communicating with investors prior to the launch of an IPO, eliminated firewalls that prevented research analysts from communicating with their own firm’s IPO bankers and their bank’s IPO clients, and allowed companies to seek confidential review by SEC staff of draft registration statements prior to making them available to the public. Following an IPO, and for as long as the company maintains its EGC status (up to five years), the company remains exempt from mandatory audit firm rotation and is not subject to auditor attestation under Section 404 of the Sarbanes-Oxley Act of 2002.²⁸

Although the 2012 JOBS Act included the IPO on-ramp to encourage companies to enter our public markets, the remainder of the legislation contained provisions that ran counter to that purpose. Instead of attempting to stem the rising tide of exempt offerings, the 2012 JOBS Act made it even easier for companies to raise unlimited amounts of capital in the private markets and forestall indefinitely the need to become a public reporting company. In Title II, Congress eliminated the longstanding prohibition against the use of general solicitation by those who engage in private offerings under Rule 506, as described above. Title III created a new exemption to allow companies to raise capital through “crowdfunding”—selling small amounts of securities to large numbers of investors—and Title IV directed the SEC to expand the ability of companies to raise capital under Regulation A. All three of these titles allowed companies

²⁷ Lori Schock, Director, SEC Office of Investor Education and Advocacy, [Remarks at InvestEd 2012 Conference: Outline of Dodd-Frank Act and JOBS Act](#) (June 9, 2012).

²⁸ 2012 JOBS Act at §§ 102-108.

to, in effect, raise money from the general public without having to produce critical initial disclosures and periodic reports that are the hallmark of public companies.

Titles V and VI of the 2012 JOBS Act altered Section 12(g) of the Securities Exchange Act of 1934 (“Exchange Act”). Prior to these changes, Section 12(g) required companies to become public reporting companies, regardless of the method used to distribute the shares, if they had assets of \$10 million and a class of securities that were “held of record” by at least 500 persons.²⁹ According to the SEC, “the registration requirement of Section 12(g) was aimed at issuers that had ‘sufficiently active trading markets and public interest and consequently were in need of mandatory disclosure to ensure the protection of investors.’”³⁰ Title V of the 2012 JOBS Act raised this threshold to 2,000 total shareholders or 500 non-accredited shareholders, excluding those who received shares as part of an employee compensation plan. Title VI made similar changes for banks and bank holding companies.³¹

Limiting the thresholds in Section 12(g) to shares “held of record” has a significant impact. A shareholder of record is one who holds official title to the shares, but that shareholder could be an entity such as a brokerage firm or private fund that holds securities on behalf of numerous beneficial owners who hold the contractual right to sell or vote the shares.³² As a practical matter, then, the new thresholds have given companies the ability to stay private indefinitely, no matter how widely held and widely traded their shares.³³

The impacts of the 2012 JOBS Act have been decidedly mixed in large part because the legislation pursued contradictory goals. Nevertheless, two things are apparent: (1) as shown above in Table 1, exempt offerings have continued their astronomical growth,³⁴ and (2) as shown below in Table 2, the legislation was not successful in getting more companies to

²⁹ Usha Rodrigues, [The Once and Future Irrelevancy of Section 12\(g\)](#), 2015 U. ILL. L. REV. 1529, 1530.

³⁰ SEC, Reporting by Small Issuers, Release No. 23,407, 1986 WL 703825 at *2 (July 8, 1986). See also Anat Alon-Beck, [Mythical Unicorns and How to Find Them: The Disclosure Revolution](#), Columbia Business Law Review (2022 Forthcoming), Case Western Reserve University Research Paper Series in Legal Studies, Paper No. 2022-6, at 22 (“Disclosure Revolution Paper”) (“The original intent behind instituting limits on shareholders of record was to capture firms which [were] already broadly trading.”).

³¹ SEC, [Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act: A Small Entity Compliance Guide](#) (May 24, 2016).

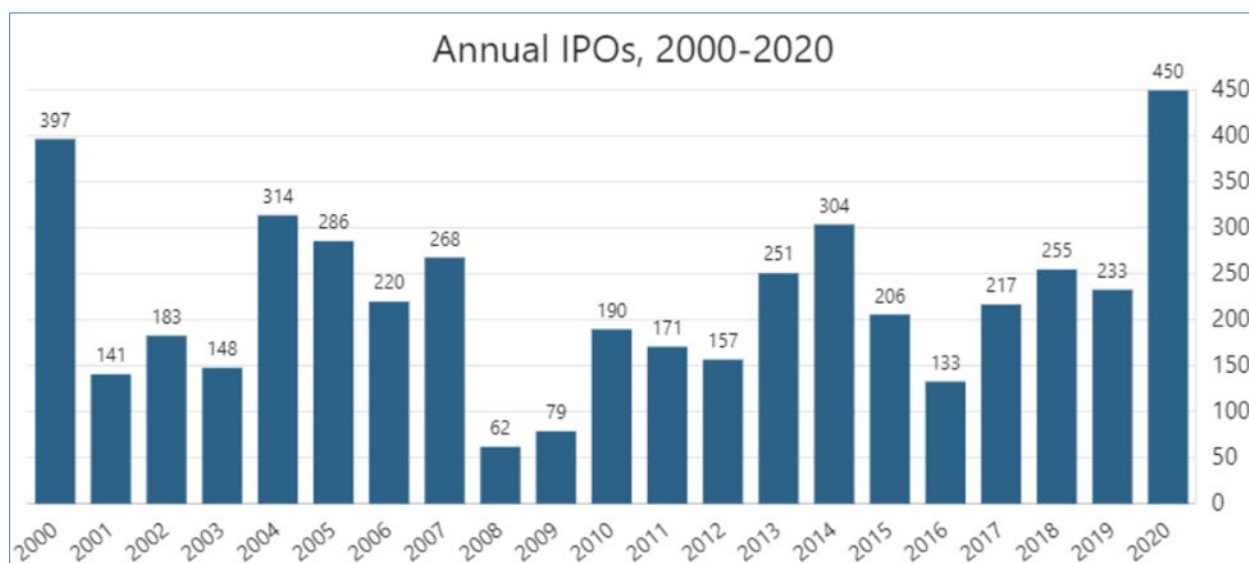
³² See [NASAA Letter to Congress](#) in Support of Reed Amendment #1931 (Mar. 22, 2012).

³³ Contrary to the claims of 2012 JOBS Act proponents, a subsequent analysis of IPOs between June 1, 2000, and May 16, 2013, revealed that only 2.6 percent of those companies were approaching the 500 shareholder limit in Section 12(g). According to Professor Usha Rodrigues, who conducted the study, “the post-JOBS Act Section 12(g) will be unlikely to affect more than a handful of firms.” This means that what was already a weak mechanism for ushering private companies to the public markets has been rendered virtually meaningless. See Disclosure Revolution Paper at 5 (Section 12(g) “was amended in 2012 via the Jumpstart Our Business Startups Act (“JOBS Act”) to remove what little regulatory teeth it had left.”).

³⁴ Table 1 reflects the usage of only one alternative to public offerings—offerings that are exempt from registration under Rule 506. For details regarding the usage of other exemptions, including Regulation A and Regulation Crowdfunding, see SEC Reg A/Reg D Report and [SEC Staff Report to the Commission Regarding Regulation Crowdfunding](#) (June 18, 2019).

conduct IPOs.³⁵ We encourage the current Congress, before pursuing a JOBS Act 4.0, to objectively examine the impacts of the 2012 JOBS Act and particularly the unintended consequences it has had on the public markets.

Table 2



Source: Tim Fries, [Despite Pandemic, 2020 Saw 450 IPOs Raise Over \\$156 Billion](#), The Tokenist (Dec. 14, 2020).

Table 2 reveals that the volume of IPOs did not increase significantly after the “IPO on-ramp” took effect in 2012. IPO volumes in 2013 and 2014 were higher, but the subsequent declines suggest that IPO volumes are largely attributable to economic conditions rather than the passage of the IPO on-ramp. Even more recently, the number of IPOs has increased substantially in 2020 and 2021, but those increases are driven overwhelmingly by the explosion in the proliferation of Special Purpose Acquisition Companies (“SPACs”).³⁶

Since the adoption of the 2012 JOBS Act, several academic studies have been conducted to examine its effects. In short, the academic findings show that the 2012 JOBS Act failed to

³⁵ One notable exception has been found in the biotech industry, a major proponent of the JOBS Act. An analysis by Craig Lewis and Josh White showed that “annual biotech IPO volume from 2012 to 2018 increased by 219 percent over a similar period before the JOBS Act. Moreover, biotech companies account for just under 40 percent of all IPOs in the U.S. after the JOBS Act.” Craig Lewis & Josh White, [Deregulating Innovation Capital: The Effects of the JOBS Act on Biotech Startups](#), Review of Corporate Finance Studies (forthcoming) (Nov. 13, 2022).

³⁶ See Jay R. Ritter, [Special Purpose Acquisition Company \(SPAC\) IPOs Through 2021](#) (July 14, 2022). NASAA generally supports rules to encourage companies to bring their securities to the public market through registered offerings. We have expressed concerns regarding the use of SPACs and have supported a number of SEC proposals to address those concerns. See, e.g., [NASAA Comment Letter to SEC](#) Regarding File No. S7-13-22: Special Purpose Acquisition Companies, Shell Companies, and Projections (June 13, 2022).

reduce costs of issuance and lead to a sustained recovery in IPO activity. The following quotations illuminate the research findings:

We examine the effects of Title I of the Jumpstart Our Business Startups Act for a sample of 312 emerging growth companies (EGCs) that filed for an initial public offering (IPO) from April 5, 2012 through April 30, 2015. We find no reduction in the direct costs of issuance, accounting, legal, or underwriting fees for EGC IPOs. Underpricing, an indirect cost of issuance that increases an issuer's cost of capital, is significantly higher for EGCs compared to other IPOs. More importantly, greater underpricing is present only for larger firms that are newly eligible for scaled disclosure under the Act. Overall, we find little evidence that the Act in its first three years has reduced the measurable costs of going public.... [Our] results are consistent with a large body of literature that shows that investors value transparency and, in its absence, issuers are penalized by lower prices for their securities.

Susan Chaplinsky, Kathleen Weiss Hanley & S. Katie Moon
[The Jobs Act and the Costs of Going Public](#)
 Journal of Accounting Research, Vol. 55, No. 4 (2017)

The Jumpstart Our Business Startups (JOBS) Act has not led to a sustained recovery in IPO activity, but to poorer-quality firms raising public equity. Firms going public under the Act are largely cash-starved, pay dearly to raise equity, and often rely on further public issues to avert financial distress. Proceeds raised are used to do more hiring, repay debt, and boost executive pay, but not to increase investments. Many firms lose exemptions sooner than allowed by the Act, whereupon they face higher compliance costs. The JOBS Act has not revived public equity markets and may have even undermined their attractiveness.

Anantha Divakaruni & Howard Jones
[Can Lowering the Bar Revive Public Markets? Evidence from the JOBS Act](#)
 Aug. 28, 2020

EGCs have both lower financial performance and a lower Tobin's Q-ratio [(the ratio of a company's equity market value to its book value)] compared to the financial performance and Tobin's Q-ratio of non-EGCs. Moreover, the value relevance of accounting information for EGCs is lower than the value relevance of accounting information for non-EGCs. This study contributes to the accounting regulation literature by documenting the inferior market performance and financial information quality of EGCs, i.e., the unintended consequences of the JOBS Act.

Ji Yu, Zabihollah Rezaee & Joseph H. Zhang
[The Accounting and Market Consequences of the JOBS Act of 2012: An Early Study](#)
 27 Asian Review of Accounting 49 (2019)

[The JOBS Act] was designed to reduce IPO costs by allowing eligible firms to test the waters with investors and reduce disclosure, both of which increase firms' information advantage over investors. We model firm behavior in response to this increased information advantage and using a difference-in-difference setting, we show that while these changes have benefited some firms, they have led to a decrease rather than an increase in the number of firms going public.

Michelle Dathan & Yan Xiong
Too Much Information? Increasing Firms' Information Advantages in the IPO Process
April 7, 2022

The JOBS Act allows certain analysts to be more involved in the IPO process but does not relax restrictions on analyst compensation structure. We find that these analysts initiate coverage that is more optimistically biased, less accurate, and generates smaller stock market reactions. Investors purchasing shares following these initiations lose over 3% of their investment by the firm's subsequent earnings release. By contrast, issuers, analysts, and investment banks appear to benefit from this increased bias, as optimism is more positively associated with proxies for firm visibility and investment banking revenues when analysts are involved in the IPO process.

Michael Dambraa, Laura Casares Field, Matthew T. Gustafson & Kevin Pisciotta
The Consequences to Analyst Involvement in the IPO Process: Evidence Surrounding the JOBS Act
65 Journal of Accounting & Economics 302 (April-May 2018)

Thanks to the increase in Section 12(g) thresholds and the easing of exempt capital raising restrictions under Regulation D, it is far easier for companies to stay private longer and grow to staggering sizes. Using our hand-collected data from public filings with the Securities and Exchange Commission ("SEC"), we have found the average number of shareholders of record in unicorn IPOs has nearly doubled in the decade since the passage of the JOBS Act. Valuations for unicorn IPOs have continued to soar higher every year.

Anat Alon-Beck
Mythical Unicorns and How to Find Them: The Disclosure Revolution
Columbia Bus. L. Rev. (2022 Forthcoming)
Case Western Reserve Univ. Research Paper Series in Legal Studies, Paper No. 2022-6, at 5

Title I of the Jumpstart Our Business Startups (JOBS) Act provides newly public firms broad-scale regulatory relief but limits the benefits to a certain subset of firms named "Emerging Growth Companies (EGCs)." One of the EGC criteria is based on a \$700 million public float threshold. We find evidence that firms appear to bunch up their public float at IPO issuances below the \$700 million threshold and repurchase their shares after the issuances to be eligible for the EGC status. Firms staying below the threshold are more likely to substitute public equity with debt. We further find that the leverage effect persists over time (the leverage ratchet effect) even when EGCs lose their status.

Khaled Alsbah & Katie Moon
IPO Regulation and Initial Capital Structure: Evidence from the JOBS Act
July 14, 2020

NASAA urges Congress to consider these academic findings as it evaluates whether and how to advance legislation during the 118th Congress. Moreover, as explained in greater detail in Part IV of this report, NASAA urges Congress to require and fund a comprehensive study on public and private markets led by the SEC's Division of Economic and Risk Analysis. Agency staff could use these academic papers to inform their work on the comprehensive study.

D. The Current Incentives to Go Public Are Minimal

The growing dominance of the private markets over the public markets was well underway by the time the 2012 JOBS Act was enacted. Congress could have chosen to reverse these trends by tightening the exemptions from the securities registration requirements, thereby nudging more companies into the public sphere. Instead, it chose a counterproductive solution to the problem. In what could fairly be described as a proverbial race to the bottom, Congress attempted to grow both the public and private markets at the same time by expanding exemptions—rather than tightening them—while reducing the disclosure requirements for public companies.

As described above, the federal securities laws originated with a simple bargain: disclosure in exchange for investors.³⁷ A company was expected to disclose substantial amounts of information in return for the ability to solicit members of the general public, and a company was required to enter the public sphere if it attracted a large shareholder base. There were substantial benefits to becoming a public company because a private company wishing to raise capital faced many barriers, including a prohibition on advertising and severe limitations on resales of the securities.

³⁷ Elisabeth de Fontenay, [The Deregulation of Private Capital and the Decline of Public Companies](#), 68 HASTINGS L.J. 445, 447-48 (2017) ("Deregulation of Private Capital Paper").

This disclosure bargain has largely been eliminated.³⁸ There are now few benefits to becoming a public company because Congress and the SEC have expanded exemptions to the point that they include few meaningful barriers, and a company can raise capital from broad swaths of investors in offerings that are exempt from registration. Indeed, in some instances, issuers have successfully raised funds from more than 1,000 investors in “non-public” offerings under Rule 506.³⁹ Investors in these offerings receive little or no disclosure about the company, and the company may find that moving from this environment into the daylight of the public markets can be difficult. WeWork, for example, had little difficulty finding investors in the private market, but its IPO imploded when details about its corporate governance and financial condition were exposed to the public.⁴⁰

For decades now, Congress and the SEC have lowered investor protections in both the public and private markets in pursuit of contradictory policy goals. On the one hand, policymakers have tried to incentivize companies to go public by lowering the regulatory burdens and costs associated with being a public company. At the same time, however, the steady expansion of exemptions has wiped away the disadvantages of staying private, and there is relatively little burden or cost associated with exempt offerings. In this environment, it should be no surprise that more companies are choosing to stay private longer, and it is predictable that further efforts to incentivize companies to go public by reducing regulatory burdens are unlikely to work.

Despite this predictable result, the JOBS Act 4.0 contains provisions that unfortunately would continue the race to the bottom by, for example, trying to attract more companies to go public by extending EGC status to 10 years, among other things, while making it easier for companies to raise capital through exempt offerings and stay private longer. This mix of public market incentives in the form of weakened regulatory requirements and private market expansions will logically have the same result as the 2012 JOBS Act; namely, the public markets will continue to suffer while the private markets expand yielding no benefit to public capital formation.

In our view, efforts to revitalize U.S. capital markets for the benefit of companies, investors, and the overall economy should focus on restoring the primacy of the public markets. This will necessarily involve a reconsideration of the exemptions from registration, especially Rule 506 and the definition of an accredited investor, as well as a restoration of a meaningful threshold in Section 12(g) whereby large companies are pushed into the public markets.

³⁸ *Id.*

³⁹ See, e.g., [Form D filing for PE Premier Blackstone Strategic Partners VIII Onshore Feeder LP](#) or [PE Premier Blackstone Life Sciences V Onshore Feeder LP](#). These are their initial Form D notice filings. There may be many more investors who were acquired after the initial filing.

⁴⁰ See, e.g., Rani Molla & Shirin Ghaffary, [The WeWork Mess, Explained](#), VOX (Oct. 22, 2019).

II. Helping Small Businesses and Entrepreneurs

Early-stage companies, and especially the truly Main Street businesses that state regulators are most focused upon, need options to raise seed capital and fund the early growth of their companies. Several options currently exist, and they have been expanded recently by states, Congress, and the SEC in the hopes of jumpstarting capital formation.

Regulation A has two offering tiers: Tier 1, for offerings of up to \$20 million in a 12-month period; and Tier 2, for offerings of up to \$75 million in a 12-month period.⁴¹ There are certain basic requirements applicable to both Tier 1 and Tier 2 offerings, including company eligibility requirements, bad actor disqualification provisions, disclosure, and other matters. Additional requirements apply to Tier 2 offerings, including limitations on the amount of money a non-accredited investor may invest in a Tier 2 offering, requirements for up to two years of audited financial statements, and the filing of ongoing reports.⁴² Issuers in Tier 2 offerings are not required to register or qualify their offerings with state securities regulators, and issuers seeking less than \$20 million can elect to proceed under either Tier 1 or Tier 2.⁴³

Issuers may also raise capital through state crowdfunding laws or the federal regime that in many respects borrowed from state laws. Federal Regulation Crowdfunding currently allows a company to raise up to \$5 million in a 12-month period, and all transactions must take place online through an SEC-registered funding portal or broker-dealer. The issuer must disclose specified information about the business, and if the issuer is a first-time user of Regulation Crowdfunding, this includes two years of financial statements that are reviewed by a public accountant but not audited.⁴⁴

As described above, small businesses and entrepreneurs can also take advantage of the exemption available under Rule 506 of Regulation D.⁴⁵ Issuers can raise an unlimited amount from accredited investors with no specific disclosure requirements. Issuers can also sell securities to as many as 35 sophisticated non-accredited investors, provided the issuer does not

⁴¹ 17 C.F.R. §§ 230.251 et seq.

⁴² See, e.g., SEC, [Amendments to Regulation A: A Small Entity Compliance Guide](#) (revised Feb. 4, 2019).

⁴³ The states, under the auspices of the NASAA, have created coordinated review protocols for Tier 1 offerings. Coordinated review programs for state registration of securities or franchise offerings streamline the process for an issuer seeking to undertake a multi-state registration of its securities or franchise offering. In addition to establishing uniform review standards, coordinated review is designed to expedite the registration process, saving the issuer time and money. Coordinated review is voluntary, and there is no additional cost for choosing to register an offering through coordinated review. For more information, visit NASAA's Coordinated Review website: coordinatedreview.org.

⁴⁴ 17 C.F.R. §§ 227.100 et seq.

⁴⁵ 17 C.F.R. § 230.506.

use general solicitation⁴⁶ and provides the non-accredited investors with the same type of information that is available to investors under Regulation A.⁴⁷

A. Regulation A and Regulation Crowdfunding Cannot Compete with Regulation D

In August 2020, the SEC issued a report—as mandated by Congress—on the performance of Regulation A and Regulation D. In the report, Commission staff examined Regulation A offerings conducted between June 2015, when the exemption was expanded pursuant to the 2012 JOBS Act, and the end of 2019.⁴⁸ During this time period, the total amount raised under Regulation A was \$2.4 billion, including \$2.2 billion under Tier 2 and \$230 million under Tier 1.⁴⁹ Issuers sought an average of \$30.1 million in Tier 2 offerings, but raised on average only \$15.4 million. In Tier 1 offerings, issuers sought an average of \$7.2 million and raised \$5.9 million.⁵⁰ Data is not available to show the extent to which retail investors other than accredited investors were participants in these offerings.

The Commission staff found that the typical issuer does not experience an improvement in profitability, continuing to realize a net loss in the years following an offering that utilizes Regulation A. This was based on available data, which necessarily overstated the success rate because it only included issuers that continued to file periodic reports after the offerings and not those that ceased operations and reporting.⁵¹ And despite the infusion of investor capital, only 45.8 percent of issuers continued filing periodic reports for three years following the offering.⁵²

Regulation Crowdfunding has produced even more modest results. In June 2019, the Commission staff undertook a study on the impacts of Regulation Crowdfunding. The study found that during the reviewed period, from May 16, 2016, through December 31, 2018, issuers raised a total of \$107.9 million under Regulation Crowdfunding.⁵³ Of the offerings that were reported completed, the average offering sought a maximum amount of \$577,385 and raised

⁴⁶ 17 C.F.R. § 230.506(c).

⁴⁷ 17 C.F.R. § 230.502.

⁴⁸ SEC Reg A/Reg D Report.

⁴⁹ *Id.* at 91.

⁵⁰ *Id.* at 88-89.

⁵¹ *Id.* at 94.

⁵² *Id.* at 98.

⁵³ SEC, [Staff Report to the Commission Regarding Regulation Crowdfunding](#) (June 18, 2019) (“SEC Crowdfunding Report”) at 4.

an average of \$208,300 (with a median of \$107,367), well below the \$1.07 million offering size that was permissible under Regulation Crowdfunding at that time.⁵⁴

According to academic researchers, crowdfunding can provide access to capital for small businesses that are not usually served by angel investors and venture capital firms.⁵⁵ Regulation Crowdfunding may be appealing, for example, to a business whose loyal customers want to support the business by investing in it. On the other hand, it appears that many small businesses utilize crowdfunding because they are unable to attract funding from traditional angel or venture capital sources, leaving them with no other options. The equity crowdfunding market faces severe adverse selection, meaning that the least promising firms are likely to utilize the exemption, and this limits the appeal of these offerings. Moreover, relative to angel-backed firms, crowdfunded firms are less likely to progress through additional stages of financing that ultimately provide an exit to investors.⁵⁶

Offerings under Regulation A and Regulation Crowdfunding have experienced modest growth in recent years, but those gains are eclipsed by the explosive growth of offerings under Rule 506. Rule 506 offerings continue to raise 1,000 times more capital than Regulation A and Regulation Crowdfunding combined, and it is hard to imagine that the other exemptions will ever compete with Rule 506. Regulation A and Regulation Crowdfunding, sometimes considered “quasi-private offerings,” require specific disclosures that are not required under Rule 506, and this can make them less appealing from the perspective of issuers. Rule 506 sales must be made primarily to accredited investors, but this is not a significant impediment for founders of start-ups who generally prefer to raise large amounts of money from a few investors rather than small amounts from many investors. Further, given the growth of the number of issuers using Rule 506 and the amount of capital raised, it is clear that this market is in need of neither investors nor capital.

Given the ease with which funds can be raised under Rule 506, promising companies will continue to choose it, and the less attractive early-stage companies will be left to the retail investors in offerings under Regulation A and Regulation Crowdfunding. Unless policymakers are willing to place additional restrictions on Rule 506, and thereby encourage more promising early-stage businesses to use Regulation A or Regulation Crowdfunding, offerings utilizing those exemptions will remain unappealing and continued efforts to expand the exemptions will not work.

⁵⁴ *Id.* at 3. Despite the modest usage of the exemption, the Commission expanded the allowable offering size to \$5 million in 2020. See SEC Final Rule, [Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets](#), Release No. 33-10884 (Nov. 2, 2020) (“SEC Harmonization Rule”).

⁵⁵ Iman Dolatabadi, Cesare Fracassi & Lin Yang, [Equity Crowdfunding in the U.S.](#) (Oct. 1, 2021).

⁵⁶ *Id.*

B. Companies Need a Stronger Public Market, Not More Ways to Stay Private

At this point, when it comes to capital formation, what small companies need most is a healthy public market to grow into, and the further expansion of exemptions will defeat this purpose. This is a lesson of the 2012 JOBS Act, which stripped away important investor protections in an effort to induce more companies to enter the U.S. public markets. As described above, the number of IPOs did not increase, in part because the 2012 JOBS Act undercut its own goal by expanding the options to remain private. Consequently, more money is now raised under Rule 506 than in public offerings, and promising U.S. tech companies are now staying private an average of 11 years before an IPO as opposed to the 7.8 year average before the 2012 JOBS Act took effect.⁵⁷ If this trend continues, the only companies in our public markets will be corporate behemoths long past their growth stage.⁵⁸

The JOBS Act 4.0 contains the same internal inconsistency as the 2012 JOBS Act—for instance, compare “Title I. Encouraging Companies to be Publicly Traded” with “Title II. Improving the Market for Private Capital.” In effect, the bill perpetuates a flawed approach to capital formation by stripping away additional investor protections to spur IPO activity, then it undermines that goal by expanding opportunities for companies to stay private indefinitely. Predictably, the new JOBS Act 4.0 is likely to produce the same disappointing results.

Again, before pursuing a new JOBS Act 4.0, we urge Congress to undertake an objective review of the impacts on our capital markets from the 2012 JOBS Act. We also urge Congress to require an SEC study of our capital markets, including the utility of the various exemptions for capital formation by operating companies, the growth of the private markets vis-à-vis the public markets, and ways to reinvigorate the public markets. After reviews of this nature, we are confident that Congress will see the need for a different approach to helping small businesses. In our view, all market participants, including the start-ups and other small businesses in our states, would be best served by a rebalancing that returns us closer to the original principles of the securities laws, where “firms that chose to ‘go public’ took on substantial disclosure

⁵⁷ See Breakdown of the Public-Private Divide Paper.

⁵⁸ See Speech, SEC Commissioner Allison Herron Lee, [Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy](#) (Oct. 12, 2021) (“Current estimates vary, but generally put the number of Unicorns worldwide at roughly 900, up from an estimated 39 in 2013. The list now includes not just Unicorns (those with an estimated valuation of at least \$1 billion) but also so-called “Decacorns” (estimated valuations of \$10 billion) and even “Hectocorns” with valuations approaching and exceeding \$100 billion. Although some of these large firms are subject to industry-specific regulation, such regulation does little to address financial transparency, and may be quite sparse (as with the growing number of crypto-related Unicorns).”).

burdens, but in exchange were given the exclusive right to raise capital from the general public.”⁵⁹

C. Preemption Harms Small Business Capital Formation

State securities regulators have a strong record of leadership in protecting retail investors and taking enforcement actions when unscrupulous activities would undermine responsible capital formation. Consider, for example, our recent record in matters involving digital assets. About a decade ago, NASAA began warning investors about scams tied to digital assets.⁶⁰ The first state enforcement actions against a fraudulent digital asset scheme occurred soon thereafter when state regulators issued orders to stop an initial coin offering (“ICO”) by BitConnect. This work evolved into Operation Cryptosweep, which was a task force comprised of U.S. and Canadian NASAA members who produced significant enforcement results related to ICOs and other cryptocurrency-related investment products.⁶¹ Most recently, state regulators have been at the forefront of cases involving the unregistered offerings of securities in the form of interests in so-called crypto-lending programs like those offered by BlockFi, Celsius, and Voyager.⁶² The harms we are currently encountering in the digital asset space undoubtedly would be worse if the federal government had to act alone.⁶³

⁵⁹ Deregulation of Private Capital Paper at 451.

⁶⁰ See NASAA, Informed Investor Advisory: Virtual Currency (Apr. 2014). For additional NASAA advisories, see, e.g., Informed Investor Advisory: Decentralized Finance (DeFi) Defined (Dec. 6, 2021); Informed Investor Advisory: Protecting Your Online Accounts (Sept. 16, 2021); Informed Investor Advisory: Social Media, Online Trading and Investing (Apr. 1, 2021); Informed Investor Advisory: Initial Coin Offerings (Apr. 16, 2018); Informed Investor Advisory: Cryptocurrencies (Apr. 13, 2018); Informed Investor Advisory: The Next Big Thing (Nov. 9, 2015). [Access NASAA's Investor Advisories](#).

⁶¹ See, e.g., NASAA, [Operation Cryptosweep Results as of 2018](#). Upon the indictment of the founder of BitConnect in 2022, the U.S. Department of Justice (“DOJ”) described the ICO as a “massive cryptocurrency scheme” that defrauded investors of more than \$2 billion. See DOJ, [Founder of Fraudulent Cryptocurrency Charged in \\$2 Billion BitConnect Ponzi Scheme](#) (Feb. 25, 2022).

⁶² See, e.g., [NASAA Letter to Congress](#) Regarding the Digital Commodities Consumer Protection Act of 2022 (Sept. 9, 2022); [Written Testimony of NASAA President and Maryland Securities Commissioner Melanie Senter Lubin Delivered to the U.S. Senate Committee on Banking, Housing, and Urban Affairs](#) (July 28, 2022); [NASAA and SEC Announce \\$100 Million Settlement with BlockFi Lending, LLC](#) (Feb. 14, 2022).

⁶³ See, e.g., Alex Nguyen, Cryptocurrency Firm FTX, Billionaire CEO Focus of Texas Securities Investigation, *The Texas Tribune* (Oct. 17, 2022); Francis Yue, ‘I Just Wake Up and Cry’: Voyager and Celsius Bankruptcies Have Destroyed Some Crypto Investors’ Confidence in Centralized Platforms, *MarketWatch* (July 15, 2022); Maria Ponnezhath and Tom Wilson, Major Crypto Lender Celsius Files for Bankruptcy, *Reuters* (July 14, 2022); Cheyenne Ligon, Texas, Other States Open Investigation Into Celsius Network Following Account Freeze (June 16, 2022); Five States File Enforcement Actions to Stop Russian Scammers Perpetrating Metaverse Investment Fraud (May 11, 2022); Sand Vegas Casino Club Located in the Metaverse Is Soliciting Investors to Invest Real Money in Un-Registered Investments (Apr. 13, 2022); New Jersey Bureau of Securities Orders Cryptocurrency Firm Celsius to Halt the Offer and Sale of Unregistered Interest-Bearing Investments (Sept. 17, 2021). See also NASAA Reveals Top Investor Threats for 2022 (Jan. 10, 2022); NASAA Announces Top Investor Threats for 2021 (Mar. 3, 2021); NASAA Announces Top Investor Threats for 2020 (Dec. 23, 2019).

As the recent implosions of several crypto firms demonstrate, fulsome regulatory oversight is actually a benefit to promising companies because it provides the necessary safety and stability to maintain investor confidence in the market ecosystem. And, as the regulators closest to Main Street businesses and the people who invest in them, the states are prepared to carry a significant share of the regulatory load, much like we have in the crypto space. However, instead of embracing the states as valued partners, all too often Congress and the SEC propose further preemption of state law with little regard to the impact of such actions on investor protection and capital formation.

For the most part, states coordinate and seek consistency. Where beneficial, however, states and their legislatures meet local challenges with local solutions rather than the one-size-fits-all nature of federal regulation. Relatedly, many states provide considerable guidance to small businesses and help them understand their capital-raising options. Consistent with this guidance, the best option for some small businesses may well be registration. Early-stage local businesses are typically less complex than large companies. As a result, the registration process can be much easier.

Many in the securities industry have found it convenient to blame state securities laws for various ills but, upon deeper examination, these laws are seldom the real problem. For example, the SEC's Small Business Capital Formation Advisory Committee recently explored the relative lack of liquidity for secondary trades of securities that were issued under Regulation A. State regulators were once again made the scapegoat for this problem, even though panelists identified a number of more substantive impediments that would not be cured by preempting state law, such as inefficiencies in share transfer recordkeeping and the common practice of issuers demanding a right of first refusal before shares can be resold.

In recent decades, Congress has divided certain regulation between the states and the federal government to achieve efficiencies. This generally has worked well in the context of investment advisers where typically the states register and regulate the small and mid-sized investment advisers and the SEC registers and regulates the large investment advisers.⁶⁴ In our view, Congress should build on this concept of complementary regulation by preserving and expanding the responsibility of states with respect to small offerings in our respective states. As a practical matter, small-dollar offerings typically involve local or regional businesses.⁶⁵ State regulators are far more likely to handle any enforcement actions for frauds arising out of those offerings. It is not far-fetched to suggest that expanding the role of the states with respect to small offerings would prevent fraud and, relatedly, strengthen local economies.

⁶⁴ See [NASAA Letter to Congress](#) Regarding the July 28, 2022, Hearing Questions for the Record (Sept. 14, 2022).

⁶⁵ The median distance between a company and the lead investor in a seed round is 94 miles, and the vast majority of angel investments are made with companies in the same region. See SEC, [Office of the Advocate for Small Business Capital Formation Annual Report for Fiscal Year 2022](#) at 30.

III. Increasing Opportunities for Investors

State regulators interact daily with retail investors. We favor policies to give investors the freedom to choose from a wide range of investment options. However, we believe in full and fair disclosure as a foundational principle that gives investors a realistic chance to be successful in achieving important financial goals. We are very concerned with many of the provisions in the JOBS Act 4.0 because, on whole, they would undermine the disclosures that are currently available in the public markets and make it more likely that investors will suffer harm from the inherent disadvantages in the private markets.

A. Investors Are Well-Served by the Public Markets

Efforts to increase investment opportunities for investors should start with policies designed to make the public markets more attractive to companies and their investors. We agree with the sentiments expressed in a Joint Explanatory Statement accompanying the Financial Services and General Government Appropriations Act, 2020: “The Committee believes public markets offer certain valuable benefits to investors that private and quasi-public markets do not provide, including more robust transparency, better pricing efficiency, more accurate valuations, deeper levels of liquidity and lower trading costs, and stronger accountability mechanisms.”⁶⁶

These are extremely important benefits to investors and, by extension, our capital markets. Of course, there are costs associated with being a public company, but our markets are the deepest and most liquid in the world because investors can be confident in their ability to judge the risks of a public offering and assign an appropriate value to a security without having to bear the expense of rigorous due diligence. Investors and their advisors utilize corporate disclosures to gain insight into a wide variety of important issues, such as the company’s financial performance, the strength of its internal controls, and management’s view of challenges facing the company. This contributes to an efficient price discovery mechanism that benefits all investors, including less sophisticated investors who lack awareness or understanding of the disclosures. Unfortunately, however, the advantages of our public markets are easily forgotten because the voices of investors are too often drowned out by those who seek to lessen regulatory requirements despite the proven benefits.

The 2012 JOBS Act is a case in point. While Congress may have hoped for both the private and public markets to thrive as a result of the 2012 JOBS Act, the legislation failed to accomplish the latter. The evidence, as outlined above, shows that the 2012 JOBS Act did not lead to a sustained increase in IPOs. Although it eased the disclosure burdens for companies, it did not

⁶⁶ [H. Committee Print of Consolidated Appropriations Act, 2020](#), Comm. on Approp., 116th Congress, 2nd Session, No. 38-678 (Jan. 2020), at 652. The Committee directed the SEC’s Division of Economic and Risk Analysis to study the performance of Reg A+ and Reg D offerings and within 180 days issue a public report comparing the performance of Reg A+ and Reg D offerings versus all other offerings.

make those companies more attractive to the investors who had to, among other things, assign values to the securities of those companies. Moreover, it expanded the availability of exemptions, which increased the likelihood that companies would stay private longer if not indefinitely.

If, as proposed in the JOBS Act 4.0, Congress continues the trend toward loosening the rules governing the private markets, there is no amount of “easing the disclosure burden” that will entice companies to enter the public market. Ultimately, because companies are able to raise all the capital they need in exempt offerings—through all stages of a company’s typical growth cycle—and there is no meaningful legal requirement to move from the private to public sphere, the typical company will not go public until it is long past its growth stage. The end result of this trend is that retail investors will be left with fewer attractive choices in the public markets.

The better alternative is to focus on strengthening the public markets. This requires a two-fold approach that goes in the opposite direction than the JOBS Act 4.0. First, Congress should scale back Rule 506, which is the primary cause for the explosion of the private markets, and refuse to further expand other exemptions at least until there is far greater data to demonstrate the need for the change and evaluate its deleterious effects on public markets. Second, Congress should establish an appropriate threshold, based on the size of the issuer, its trading activity, or some other metric, at which point a company is required to move from being private to public. In our view, it is time to reinvigorate the bargain that required companies to provide meaningful disclosure in exchange for access to a broad swath of investors.

B. Investors Are Not Missing Out on Private Market Opportunities

Many aspects of the JOBS Act 4.0 rest on the unproven and unlikely assumption that ordinary investors are missing out on great opportunities in the private markets. However, this argument is typically advanced by those who want to expand the pool of eligible investors to sell to, and not the other way around. In reality, retail investors operate in the private markets under extreme disadvantages that minimize their chances for success. Moreover, there is little if any evidence that the typical American household has a pent-up demand for private offerings.

1. The Inherent Disadvantages to Retail Investors in Private Offerings

To be sure, early-stage companies are an attractive option for certain investors. However, those investors must be equipped to withstand long holding periods, bargain for access to information, and overcome other challenges inherent in private offerings.

As the SEC explained in a 2019 concept release, “Issuers in [Rule 506] offerings are not required to provide any substantive disclosure.”⁶⁷ If information is provided at all, it need not be in a fashion that is uniform in content, making comparisons between companies difficult, and the information need not be updated as circumstances change. Voluntary disclosures are prone to greater error and can be influenced by overly optimistic assumptions about future prospects. Further, while Regulation Fair Disclosure⁶⁸ requires information about public companies to be distributed in a non-discriminatory fashion, private companies and their insiders are free to provide information to favored investors but not to other investors. In short, investors are left to fend for themselves to obtain unbiased information about the company, and small retail investors are unlikely to have the clout to insist on equitable treatment.

Retail investors enjoy many other benefits of the public markets that ensure a level playing field, and these protections simply do not exist in the private markets. For example, retail investors are assured of getting the best available price on a stock exchange, no matter how small the investment. In the private market, larger or well-known investors can—and often do—receive more favorable terms, and the best deals may only be available to the largest and most influential investors. Prominent venture capital firms, in particular, often negotiate for preferred stock, contractual protection against dilution of their shares in future funding rounds, and representation on the board. Retail investors cannot realistically negotiate for these advantages and therefore may enter into private investments at a disadvantage to other investors in the same company.

Retail investors may also be vulnerable to higher levels of fraud in the private markets. Year after year, state regulators identify unregistered offerings as a top method for conducting fraudulent schemes. Such offerings include ones that are required to be registered and ones that are not required to be registered. Of course, fraud occurs in the public markets, but requirements for strong internal controls, audited financial statements, and other investor protections reduce the likelihood that fraud will remain undiscovered for long. Recent events in the crypto market reveal the damage that can be done to investors in a “Wild West” environment, but state regulators have warned for many years of similar attitudes among unscrupulous actors promoting shares of private companies.

Another benefit of the regulatory framework for public markets comes in the form of important governance and accountability mechanisms that tend to strengthen companies. A tweet by the former President of the New York Stock Exchange, Thomas Farley, sums up how the public markets can prevent meltdowns that occur in poorly managed companies and wipe out billions of dollars of capital:

⁶⁷ SEC, [Concept Release on Harmonization of Securities Offering Exemptions](#), 84 FED. REG. 30460, 30470 (June 26, 2019).

⁶⁸ 17 C.F.R. § 243 (Aug. 2000).

Experiment (sic) of high-growth companies staying private an extra five years was a failure. Uber and WeWork floundered in private markets in last few years and would have benefited from being public. ...Uber. Public markets would not have tolerated lighting a couple billion on fire in futile China effort. Bad behavior by management would have been dealt with quicker. Focus on unit economics would have happened years ago. WeWork. Wave pools. Kindergarten. Questionable accounting. Self-dealing. Poor unit economics. The public market would have squashed this on first earnings call.⁶⁹

Retail investors deserve access to high-quality investment options, and the private market will never give them a realistic chance to compete for those options. Therefore, instead of expanding exemptions in an effort to entice retail investors into an environment where the deck is stacked against them, policymakers should instead look for ways to push more companies with promising growth prospects into the public markets.

2. The Lack of Retail Investor Demand for Private Offerings

Congress should carefully analyze whether the easing of regulatory safeguards in the JOBS Act 4.0, presumably at the cost of investor protection, would actually result in a countervailing benefit of significant capital formation. Realistically, the expansion of exemptions will yield little additional demand by retail investors for private offerings.

Data from the most recent Survey of Consumer Finances by the Board of Governors of the Federal Reserve System (“SCF”) suggests that companies are unlikely to raise significant capital from retail investors who do not already meet the definition of an accredited investor. According to the SCF, the top ten percent of U.S. households by net worth—a segment of the population that would include most accredited investors—hold 71 percent of the wealth in this country.⁷⁰ When one looks beyond that top decile of households, the likelihood of stock ownership falls off dramatically. Even more remote is the likelihood that a household would have a portfolio of securities that is large enough or diversified enough for a financial professional to reasonably recommend the purchase of securities that are exempt from registration. And, if this is the case, it makes little sense for policymakers to open the door for investors to engage directly in the type of activities that, if recommended by a financial professional, would violate the professional’s investor care obligations, including those under the SEC’s Regulation Best Interest.⁷¹

⁶⁹ See @ThomasFarley (Thomas Farley) Twitter (Sept. 22, 2019), available at <https://twitter.com/ThomasFarley/status/1175786943231254531>.

⁷⁰ Jesse Bricker, Sarena Goodman, Kevin B. Moore, and Alice Henriques Volz, [Wealth and Income Concentration in the SCF: 1989-2019](#) (Sept. 28, 2020).

⁷¹ See SEC, [Regulation Best Interest, Form CRS and Related Interpretations](#) (last modified Oct. 13, 2022).

Consider the amount of financial assets—which include all bank accounts, certificates of deposit, cash value life insurance, stocks, bonds, and pooled investment funds (including retirement accounts)—held by American households. For the households in the bottom quartile of household net worth, the median value of financial assets held is a mere \$1,380.⁷² For the next quartile of households (those between the 25th and 50th percentiles of net worth), the median value of financial assets held is \$11,220. The next quartile up (between the 50th to 75th percentiles) is a bit better off, but the median value of financial assets held is still only \$61,000. For three-fourths of American households, then, it is hard to imagine that there would be a significant demand for securities sold in the private markets. Indeed, their investments in high risk, illiquid, unregistered offerings are more likely to be the result of unscrupulous sales tactics rather than sound financial judgment.

Of course, the portion of the population lying just below the current accredited investor thresholds—which would likely include households between the 75th and 90th percentiles in terms of net worth—is more likely to have the financial wherewithal to invest in private offerings. For these households, the median value of financial assets held is \$301,000.⁷³ Consider, however, the investment portfolios of these households. For this segment of the population, the median value of retirement accounts is \$192,000, which means that most of these households' financial assets are in retirement accounts.⁷⁴ Moreover, barely one in four of these households hold stocks directly,⁷⁵ and for those that do, the median value of the holdings is \$30,000.⁷⁶

If a person has \$30,000 to invest directly in stocks, any opportunities available to them in the private markets would be especially risky. It would make little sense to undertake the expense necessary for the level of due diligence that is expected in the private markets, and the investor will be unable to achieve the level of diversification that is common for angel investors and is needed for a reasonable chance of success. Clearly, an investor with this size of investment also would be unable to exert meaningful power to bargain for fulsome disclosure and equitable terms.

As a practical matter, issuers that utilize Rule 506 prefer a small number of large investors rather than a large number of small investors. According to the SEC, Rule 506 offerings include an average of 10 investors and have an average offering size of about \$71 million.⁷⁷ Thus, changing the definition of an accredited investor to allow investors of modest means to invest is not likely to be an attractive alternative for promising start-ups, even if those investors are

⁷² Board of Governors of the Federal Reserve System, [Survey of Consumer Finances](#), 1989-2019.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ SEC Reg A/Reg D Report at 17.

interested. Instead, smaller investors are likely to be left to the sorts of offerings that cannot attract funding from larger, more sophisticated investors.

As described above, offerings conducted under Regulation A and Regulation Crowdfunding suffer from similar dynamics of adverse selection. Given the ease of raising money under Rule 506, promising start-ups should have little difficulty raising money from large, sophisticated investors. Companies conducting offerings under Regulation A or Regulation Crowdfunding tend to be companies that cannot attract those investors, which leaves the highest risk offerings to the smallest of retail investors.

Not surprisingly, existing data shows that investor demand for these offerings is modest, and it is becoming more and more clear that investors are faring poorly in them. As highlighted above, a comprehensive study of Regulation A by the SEC revealed that issuers have sought an average of \$30.1 million in Tier 2 offerings but raised on average only \$15.4 million. In Tier 1, issuers sought an average of \$7.2 million and raised \$5.9 million.⁷⁸ Only 45.8 percent of issuers survived at least three years,⁷⁹ and the typical issuer continued to realize net losses in the years following the offering.⁸⁰ Relatively few Regulation A issuers are listed on a stock exchange, but for those who are, the median annualized buy-and-hold return for their shares was a loss of 47.7 percent. For those listed on the OTC Market, the median loss was 23.9 percent.⁸¹

Less data is available to determine the amount of investor gains or losses in crowdfunding offerings, but the demand for these offerings is even less than for Regulation A offerings. An SEC study of offerings conducted from May 16, 2016, through December 31, 2018, showed that issuers raised a total of \$107.9 million under Regulation Crowdfunding,⁸² and the average offering sought a maximum amount of \$577,385 but raised only \$208,300 (with a median of \$107,367).⁸³ SEC staff found that crowdfunding securities were characterized by minimal liquidity, and that purchasers of shares had fewer ownership and control rights, such as shareholder voting rights, than was typical for angel- or venture-backed startups. Concern was also expressed that complex payoff structures and other common contractual terms could be difficult for investors to comprehend.⁸⁴

We understand the appeal of measures that appear to give retail investors access to the same types of offerings that are available to the wealthy. It can appear to be unfair to block investors from these deals. In reality, though, there is a wide discrepancy in the quality of offerings in the

⁷⁸ *Id.* at 88-89. The SEC raised the offering ceiling in 2020 from \$50 million to \$75 million, but data is not yet available to show the impact of this change. See SEC Harmonization Rule.

⁷⁹ SEC Reg A/Reg D Report at 98.

⁸⁰ *Id.* at 94.

⁸¹ *Id.* at 99.

⁸² SEC Crowdfunding Report at 4.

⁸³ *Id.* at 3. Despite the modest usage of the exemption, the Commission expanded the allowable offering size to \$5 million in 2020. See SEC Harmonization Rule.

⁸⁴ SEC Crowdfunding Report at 21-22.

private markets and all too often retail investors are far more likely to be harmed than helped by exposing them to unregistered offerings. For policymakers troubled by wealth inequality and limited options for building wealth, the continued expansion of exemptions is an unwise solution. The securities laws were originally designed to establish a public market that places retail investors on a level playing field with issuers, and the better approach would be to pursue policies designed to move issuers and investors back onto that field.

IV. NASAA’s Agenda for Reinvigorating the Capital Markets

NASAA supports an agenda designed to reinvigorate the public markets and improve opportunities for small businesses to thrive. But this will require a turn from the policies that have been pursued in recent decades—policies that were designed to expand the opaque, less regulated private markets. As described more fully in the current NASAA Federal Policy Agenda,⁸⁵ we urge Congress to develop legislation that would foster responsible capital formation, protect investors of all ages and backgrounds, and support inclusion and innovation in our capital markets.

A. Promoting Responsible Capital Formation

First, given the dearth of information that cripples the ability of policymakers to pursue data-driven reforms, we urge Congress to require and fund a comprehensive study on public and private markets led by the SEC’s Division of Economic and Risk Analysis. The study should examine the costs and benefits associated with the monumental shift from public to private markets and, in particular, review the performance of offerings conducted under Regulation A, Regulation D, and Regulation Crowdfunding, as well as the effect of recent changes to the SEC’s definition of an accredited investor.

Second, we call upon Congress to join us in our longstanding efforts to restore oversight and transparency to the private securities markets. Among other such efforts, last Congress, NASAA endorsed S. 4857, the Private Markets Transparency and Accountability Act.⁸⁶ This legislation would extend SEC reporting and disclosure requirements to companies that have (i) a valuation of \$700 million (excluding shares held by insiders) or (ii) 5,000 employees and \$5 billion in revenues. Such a change would establish a much-needed mechanism to push large companies into the public sphere and, importantly, could prevent a future company like FTX, WeWork, or

⁸⁵ [NASAA Federal Policy Agenda](#) (last updated Jan. 5, 2023).

⁸⁶ S. 4857, [Private Markets Transparency and Accountability Act](#), 117th Congress, 2nd Session. See also [Written Testimony of Michael S. Pieciak, Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment](#) (Sept. 11, 2019).

Theranos from raising billions of dollars from investors unless it discloses fulsome information about its governance and financial condition.⁸⁷

We also support the Promoting Opportunities for Non-Traditional Capital Formation Act,⁸⁸ which expands the functions of the SEC's Office of the Advocate for Small Business Capital Formation. Specifically, the legislation would require the SEC's Office of the Advocate for Small Business Capital Formation to (1) provide educational resources and host events to promote capital-raising options for underrepresented small businesses and businesses in rural areas, and (2) meet annually with representatives of state securities commissions to discuss opportunities for collaboration and coordination. Many state securities regulators have existing relationships with organizations that specialize in reaching rural and other hard-to-reach communities, and we believe that increased collaboration will result in better service at both the federal and state levels.

Finally, we call upon Congress to preserve the choice and authority of the states to register and regulate finders. The Unlocking Capital for Small Businesses Act, which was reintroduced in the 117th Congress and noticed in discussion draft form for a February 8, 2023, hearing of the HFSC Subcommittee on Capital Markets, would exempt "finders" from registration under federal law and prohibit the states from registering them.⁸⁹ Further, it would impose a broker-dealer-lite regulatory regime on private placement brokers. In other words, Congress would be placing additional blindfolds on state and federal regulators. We believe this legislation moves in the wrong direction, and we continue to encourage the SEC and FINRA to collaborate with state securities regulators on changes to the regulatory regime for finders.

B. Protecting Investors of All Ages and Backgrounds

To prevent investor harm in offerings that are by their nature high-risk, Congress should preserve the choice and authority of the states to register and regulate small offerings, especially ones under \$500,000. These offerings are not typically reviewed by federal authorities, yet the Small Entrepreneurs' Empowerment and Development Act ("SEED Act"), which was reintroduced in the 117th Congress and noticed in discussion draft form for a February 8, 2023, hearing of the HFSC Subcommittee on Capital Markets, would take away

⁸⁷ In the case of FTX, there is no doubt that stronger disclosure and corporate governance requirements in the private securities markets would have made it easier to spot or prevent the alleged fraud and other misconduct earlier. By way of illustration, under existing law, FTX Trading Ltd. submitted Form D notices to the SEC after raising over \$1.4 billion in capital from dozens of investors. Moreover, in these notices, the corporation only had to disclose basic information regarding it, the offering, the investors, and related fees. Had the law required more timely and fulsome disclosure, regulators and other market watchers may have identified the gaps and weaknesses in FTX's corporate governance earlier. See [NASAA Letter to Congress](#) (Nov. 30, 2022).

⁸⁸ H.R. 7977, [Promoting Opportunities for Non-Traditional Capital Formation Act](#), 117th Congress, 2nd Session.

⁸⁹ H.R. ____, [Unlocking Capital for Small Businesses Act of 2023](#), 118th Congress, 1st Session; S. 3922, [Unlocking Capital for Small Businesses Act of 2022](#), 117th Congress, 2nd Session.

existing state authority to protect investors and businesses.⁹⁰ The likely result is fundraising mistakes by well-meaning companies and fraud perpetrated against investors and entrepreneurs.

Similarly, Congress should prevent investor harm by preserving the choice and authority of states to require notices to the states of certain securities transactions. The Facilitating Main Street Offerings Act⁹¹ and the Improving Crowdfunding Opportunities Act,⁹² which were introduced in the 117th Congress, would prohibit state governments from using an important tool – regulatory notices called notice filings – to keep track of capital-raising efforts in their states and prevent harm to investors. The Improving Crowdfunding Opportunities Act was noticed in discussion draft form for a February 8, 2023, hearing of the HFSC Subcommittee on Capital Markets. Though the Facilitating Main Street Offerings Act was not noticed for the February 8 hearing, similar, more expansive legislation was noticed. Specifically, lawmakers noticed a bill in discussion draft form that would amend the Securities Act to exempt off-exchange secondary trading from state regulation where such trading is with respect to securities of an issuer that makes publicly available certain information required under federal securities laws.⁹³ If these or similar types of bills were to become law, dozens of state governments would no longer have the choice of using certain tools for investor protection, including notice filings.⁹⁴

To protect investors from bad actors and bolster oversight and accountability of Wall Street, Congress should strengthen the SEC’s ability to crack down on violations of securities laws. Under existing law, in some cases involving fraud with substantial losses, the SEC can only penalize individual violators a maximum of \$189,693 and institutions \$916,850.⁹⁵ In other cases, the SEC may calculate penalties to equal the gross amount of ill-gotten gain but only if the matter goes to federal court, not when the SEC handles a case administratively. We urge Congress to update and enhance the SEC’s civil penalties statute by increasing the statutory limits on civil monetary penalties, directly linking the size of these penalties to the scope of harm and associated investor losses, and substantially raising the financial stakes for repeat securities law violators.

Further, to assist state regulators in their efforts to protect investors, we urge Congress to require the federal financial regulators to establish a bad actors database and allow state and

⁹⁰ H.R. ____, [SEED Act of 2023](#), 118th Congress, 1st Session; H.R. 5458, [SEED Act of 2021](#), 117th Congress, 1st Session.

⁹¹ S. 3966, [Facilitating Main Street Offerings Act](#), 117th Congress, 2nd Session.

⁹² H.R. ____, [the Improving Crowdfunding Opportunities Act](#), 118th Congress, 1st Session; S. 3967, [Improving Crowdfunding Opportunities Act](#), 117th Congress, 2nd Session.

⁹³ H.R. ____, [To amend the Securities Act of 1933 to exempt off-exchange secondary trading from State regulation where such trading is with respect to securities of an issuer that makes publicly available certain current information, and for other purposes](#), 118th Congress, 1st Session.

⁹⁴ See [NASAA UFT Submission System - State Participation](#) (as of July 18, 2022).

⁹⁵ See SEC, [Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission](#) (as of Jan. 15, 2022).

local governments to participate in it. The Tracking Bad Actors Act,⁹⁶ which was introduced in the 117th Congress, would require the establishment of such a database.

C. Supporting Inclusion and Innovation in Our Capital Markets

The emergence of digital assets has brought innovation to our capital markets. It also serves as a cautionary tale as we have witnessed the implosion of what were touted as safe and promising investment opportunities. This underscores the importance of preserving the securities regulatory framework as Congress considers legislation relating to digital assets, and we urge Congress to resist calls to shift oversight away from the SEC or otherwise weaken the fulsome protections that investors deserve. We also note that state securities regulators, as the local “cops on the beat” who are often the first to observe troubling patterns or behaviors, should have a seat at the table in any digital asset working groups or other multi-agency efforts.

To further enhance federal and state collaboration in our mutual goals of investor protection, Congress should modernize the Financial Literacy Education Commission (“FLEC”).⁹⁷ Two decades after the creation of the FLEC, much has changed in the way people communicate, save, and invest, and Congress should consider ways to update and strengthen investor education. In conjunction with this effort, Congress should include a representative of state securities regulators as a member of FLEC. Current members include numerous federal government agencies and offices such as the SEC, the Federal Trade Commission, the Department of Education, and the Department of Defense, but there is no representation from state governments.

An important aspect of any agency’s investor protection mission is to educate and inform investors. State regulators work hard to reach investors, devoting time and energy to speak at senior centers, teacher conferences, and other events. They also try to take advantage of social media to spread the word about current scams and other dangers. In this digital age, though, it is challenging for state and federal regulators to compete with questionable “advice” offered through forums like WallStreetBets or the hype of the latest non-fungible token. We urge Congress to examine the resources that are devoted to investor education and pursue policies designed to bolster those efforts, including providing more resources to the SEC so that it can communicate its important message effectively.

Finally, as discussed above, the definition of an accredited investor is a critical component for protecting investors and restoring balance between our public and private markets. We therefore call upon Congress to reverse the deleterious impact of four decades of inflation on the existing net worth and income standards. To achieve this, Congress should raise the current income and net worth thresholds for natural persons and index those thresholds to inflation. Furthermore, just as a person’s primary residence does not count towards the \$1

⁹⁶ S. 3716, [Tracking Bad Actors Act of 2022](#), 117th Congress, 2nd Session.

⁹⁷ 20 U.S.C. §§ 9701-9709.

million net asset threshold required for accredited investor status, Congress should add an exclusion for the value of any defined benefit or defined contribution tax-deferred retirement accounts, as well as the value of agricultural land and machinery held for production. And, while we agree that sophistication of the investor should be considered a central aspect of the definition, metrics to measure sophistication should include demonstrable investment experience. Importantly, as this report makes clear, no amount of sophistication can substitute for meaningful access to information and the ability to withstand losses.

Appendix

NASAA Positions as of February 2023 Regarding the Proposals in the Draft JOBS Act 4.0 Published in April 2022⁹⁸

Section 101: Middle Market IPO Cost Underwriting Act

<p>117th Congress + S. 3980 (Lummis)</p> <p>115th Congress + S. 488 (Toomey) + H.R. 6324 (Himes)</p>	<p>+ Directs the SEC, in consultation with FINRA, to study the costs associated with underwriting IPOs and Regulation A, Tier 2 offerings for small- and medium-sized companies (less than \$700M initial public float)</p> <p>+ Directs the SEC to issue a report to Congress with findings and recommendations</p>	<p>QUALIFIED SUPPORT. This work should be done as part of a holistic study of the U.S. capital markets. Such a study would help the policymaking community make data-driven decisions on how best to restore the primacy of public markets in the United States and protect and empower investors.</p>
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⁹⁸ The far-left column of the chart lists present and prior versions of the legislation. NASAA included the bill even if it is not an exact match for the bill that is in the discussion draft of the JOBS Act 4.0. In many cases, the text of the bill has changed since its initial introduction. We also included the last name of the introducing lawmaker. Use the hyperlinks to the legislation to look up additional sponsors. In the center column, NASAA summarized the key provisions of the version of the bill that is in the discussion draft of the JOBS Act 4.0. In the far-right column of the chart, we provided a basic, high-level explanation of NASAA’s position.

Section 102: Emerging Growth Company Extension Act

<p>117th Congress + H.R. 3448 (Steil)</p> <p>116th Congress + H.R. 4918 (Steil)</p> <p>115th Congress + H.R. 6130 (Rothfus)</p>	<p>+ Extends the maximum period that EGCs (<i>i.e.</i>, newly public companies) have to undertake certain disclosure and other requirements from five to 10 years</p> <p>+ Directs the SEC to issue an interim final rule within 180 days to make the change yet prohibits the SEC when doing so from soliciting feedback relevant to the change</p>	<p>OPPOSE. Extending EGC status from five years to 10 years, thereby allowing a company to scale its disclosures and abstain from SOX internal control audits for a full decade, suggests that these disclosures and internal controls are of negligible value to investors. However, a lesson of the 2012 JOBS Act is that the reduction of the disclosure “burden” for EGCs did not lead to an increase in IPOs. Rather, the reduced disclosure made it more difficult for investors to price the securities. Ultimately, whatever companies saved in accounting and related expenses, they more than lost because their shares were underpriced by the market in IPOs and were more volatile post-IPO. If Congress proceeds further down the path of eroding the disclosure requirements for public companies, the likely outcome is a less attractive marketplace for Americans to invest. Instead, Congress should direct the SEC to study the supply side of the equation (<i>i.e.</i>, what can be done responsibly, particularly through technology, to lower the cost of going public) and the demand side of the equation (<i>i.e.</i>, what do investors want). This work should be done as part of a holistic study of the U.S. capital markets. This study would help the policymaking community make data-driven decisions on how best to restore the primacy of public markets in the United States and protect and empower investors.</p>
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Section 103: Dodd-Frank Material Disclosure Improvement Act		
<p>117th Congress + S. 3923 (Cramer) + H.R. 3276 (Huizenga) 115th Congress + H.R.10 (Hensarling) + H.R. 4519 (Huizenga) + H.R. 4289 (Mooney) + H.R. 4248 (Huizenga) 114th Congress: + H.R. 5983 (Hensarling)</p>	<p>+ Repeals the conflict minerals, mine safety, resource extraction, and pay ratio provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the rules promulgated thereunder + Prohibits the SEC from issuing rules that are substantially similar to the repealed rules</p>	<p>UNDER REVIEW. NASAA generally supports efforts to reform federal securities laws to promote greater transparency and comparability of information that is material to investors. We would oppose this legislation to the extent it interferes with the disclosure of material information to investors. As an alternative, Congress could give the SEC the authority to repeal these currently-mandated rules if the Commission finds, through investor testing, that the information is not material.</p>
Section 104: Reporting Requirements Reduction Act of 2022		
<p>117th Congress + S. 3919 (Tillis)</p>	<p>+ Allows public companies to disclose important financial and other information regarding the company on a semiannual basis rather than on a quarterly basis</p>	<p>OPPOSE. Survey data demonstrates that investors overwhelmingly oppose this idea. Current financial information is necessary to support price discovery in our markets, and trust in the markets in large part stems from the promise that our public companies will make certain information about themselves available to the investing public either promptly or periodically. Moving from quarterly to semi-annual reporting would weaken the markets because it would lead to greater price dislocation and volatility, which would stifle capital formation. Moreover, the COVID-19 pandemic was a helpful reminder of the important role that quarterly disclosure can serve in unexpected, evolving situations. For these and other reasons, it would be ill-advised to reduce the frequency of corporate reporting, but we generally are supportive of efforts to understand how technology could be used responsibly to lower the costs of quarterly reporting.</p>

Section 105: Restoring Shareholder Transparency Act		
<p>117th Congress + S. 3945 (Hagerty)</p> <p>115th Congress: + H.R. 10 (Hensarling)</p>	<p>+ Excludes all but the wealthiest shareholders from participating fully in the governance of public companies by imposing a requirement that a shareholder must hold at least 1% of the market value of the company's securities to submit a proposal for corporate reform</p> <p>+ Permits public companies to opt-out of SEC rules governing shareholder proposals</p> <p>+ Clarifies the applicability of certain SEC rules to investment professionals who provide advice to clients on how to vote on shareholder proposals</p>	<p>OPPOSE. Shareholders are the owners of companies. Policymakers should strengthen, not weaken, their right to raise issues with respect to the governance of the company. This section would allow only the largest shareholders to exercise that right. We oppose proposals such as this one that would reduce the costs of corporate governance through deregulation and exclusion. However, we generally support efforts to understand how technology could be used responsibly to lower the costs of corporate governance, increase participation in corporate governance, increase participation in our markets by people of all ages and backgrounds, and strengthen the rights of shareholders.</p>
Section 106: Increasing Access to Adviser Information Act		
<p>117th Congress + S. 3965 (Moran)</p>	<p>+ Allows larger providers of investment research with clients in Europe to avoid registration with the SEC as an investment adviser</p>	<p>OPPOSE. In a February 2022 SEC staff report regarding investment research, SEC staff observed that some larger providers of investment research with clients in Europe that were registered previously as broker-dealers have registered as investment advisers to ensure their compliance with U.S. and E.U. laws. Investment research providers with cross-Atlantic businesses should act promptly to ensure they are in compliance with U.S. and E.U. laws.</p>

Section 107: The Main Street Growth Act

<p>117th Congress + S. 3097 (Kennedy) + H.R. 5795 (Emmer)</p> <p>116th Congress + S. 2306 (Kennedy) + H.R. 2899 (Emmer)</p> <p>115th Congress + S. 488 (Toomey) + S. 3723 (Kennedy) + H.R. 5877 (Emmer)</p> <p>114th Congress + H.R. 5983 (Hensarling) + H.R. 4638 (Garrett)</p>	<p>+ Establishes a regulatory framework for registration with the SEC of national venture securities exchanges dedicated to the trading of “venture securities”</p> <p>+ Requires the SEC to promulgate regulations to ensure the issuers of and investors in venture securities are provided disclosures sufficient to understand venture securities-trading</p>	<p>OPPOSE. Venture exchanges have been tried before without success. Nothing in current law prohibits them, and a regulatory solution is unlikely to solve what is a market-based problem. In short, investors are not very interested in securities that are listed on an exchange with weak listing standards. In addition, institutional investors tend to avoid investing significant sums in small companies because the price can move dramatically against them when they try to exit the position. Even without a venture exchange, venture capital investments have flourished, and Congress should direct the SEC to study the many existing paths available for venture capital investments and make recommendations to Congress on ways to offer additional support to this part of the market. This work should be part of a holistic study on the U.S. capital markets. Such a study would help the policymaking community make data-driven decisions on how best to restore the primacy of public markets in the United States and protect and empower investors.</p>
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Section 108: The Intelligent Tick Study Act		
<p>117th Congress + S. 3947 (Kennedy)</p>	<p>+ Directs the SEC to study and submit to Congress a report that examines the transition to trading and quoting securities in increments other than \$0.01; the impact that the change in increment has had on liquidity and market quality for small, middle, and large capitalization company securities; and whether there is sufficient economic incentive to support trading operations in increments other than \$0.01</p> <p>+ Permits the SEC to conduct rulemaking to designate a minimum increment for EGC securities that is greater than \$0.01 but not more than \$0.25</p>	<p>UNDER REVIEW. Smaller tick sizes in liquid securities may yield better execution quality, so a study to determine the impact of potential changes to tick sizes should include a review of sub-penny quotes for highly liquid securities as well as ticks in excess of a penny for less liquid securities. Moreover, consistent with our view that Congress must place the interests of investors front-and-center, we urge lawmakers to consider alternative options for stimulating more research, particularly research on small cap companies. We are pleased to see that the SEC has issued a proposal to address illiquidity in certain securities due to tick sizes.</p>
Section 201: Expanding Access to Capital for Rural Job Creators Act		
<p>118th Congress + H.R. 298 (Mooney)</p> <p>117th Congress + S. 3503 (Kennedy) + H.R. 5128 (Axne)</p> <p>116th Congress + S. 566 (Jones) + H.R. 2409 (Axne)</p> <p>115th Congress + S. 488 (Toomey) + S. 2953 (Jones) + H.R. 4281 (Kihuen)</p>	<p>+ Requires the SEC Advocate for Small Business Capital Formation to identify any unique challenges that rural-area small businesses have with securing access to capital</p> <p>+ Requires the advocate to also report annually on the most serious issues encountered by rural-area small businesses and their investors</p>	<p>SUPPORT. While NASAA supports the text of this proposal as-is, we urge Congress to incentivize this SEC office to collaborate and coordinate better with NASAA and its members. Involving us in this important work would yield better results for Congress and the rural-area small businesses and investors that we are all trying to support. In addition, Congress should identify opportunities for improvement in the coordination between the Small Business Administration and the SEC on outreach to rural communities.</p>

Section 202: Expanding American Entrepreneurship Act		
<p>117th Congress + S. 3976 (Moran)</p>	<p>+ Expands the universe of qualifying venture capital funds that can exist without having to register with the SEC by increasing the maximum invested capital level and the number of investors + Increases the maximum invested capital level from \$10M to \$50M + Increases the number of permitted beneficial investors from 250 to 500</p>	<p>OPPOSE. Past changes to the securities laws governing investment funds have paved the way for a surge in private capital. The explosive growth of venture capital funds has created a seemingly bottomless source of capital for private companies, allowing them to substantially delay going public or remain private indefinitely. Rather than passing more deregulatory legislation that probably will expand our private markets again, Congress should direct the SEC to conduct a holistic study on the U.S. capital markets. This study would help the policymaking community make data-driven decisions on how best to restore the primacy of public markets in the United States and protect and empower investors.</p>
Section 203: Developing and Empowering Our Aspiring Leaders Act of 2022		
<p>118th Congress + H.R. _____</p> <p>117th Congress + S. 3914 (Rounds) + H.R. 4227 (Hollingsworth)</p> <p>116th Congress + H.R. 8603 (Hollingsworth)</p> <p>115th Congress + S. 488 (Toomey) + S. 3576 (Rounds) + H.R. 6177 (Hollingsworth)</p>	<p>+ Requires the SEC to expand the definition of qualifying investment for venture capital funds to include broader equity securities and venture capital investments in other funds + Allows venture capital funds to make these qualifying investments without having to register with the SEC as a registered investment adviser</p>	<p>OPPOSE. Past changes to the securities laws governing investment funds have paved the way for a surge in private capital. The explosive growth of venture capital funds has created a seemingly bottomless source of capital for private companies, allowing them to substantially delay going public or remain private indefinitely. Rather than passing more deregulatory legislation that probably will expand our private markets again, Congress should direct the SEC to conduct holistic study on the U.S. capital markets. This study would help the policymaking community make data-driven decisions on how best to restore the primacy of public markets in the United States and protect and empower investors.</p>

Section 204: Small Entrepreneurs' Empowerment and Development Act of 2022

<p>118th Congress + H.R. _____ (McHenry)</p> <p>117th Congress + S. 3939 (T. Scott) + H.R. 5458 (McHenry)</p> <p>115th Congress + H.R. 10 (Hensarling) + H.R. 2201 (Emmer)</p> <p>114th Congress + H.R. 5983 (Hensarling) + H.R. 2357 (Wagner) + H.R. 4850 (Emmer)</p>	<p>+ Enacts a micro-offering safe harbor that would exempt a sale of securities if the total amount of securities sold by the issuer during the preceding 12-month period sale does not exceed \$500,000</p> <p>+ Preempts state registration and notice filing authority for these securities</p>	<p>OPPOSE. We oppose the provisions of this legislation that weaken state investor protection laws. States should be recognized as the primary regulators of these offerings that tend to be localized economic development efforts. State securities regulators regularly witness firsthand the value that comes from having small businesses engage directly with local regulators regarding small-dollar offerings. This engagement helps entrepreneurs better understand their options for raising capital, avoid missteps, and deter fraud and other misconduct that can harm legitimate businesses and investors alike. Importantly, state regulation also facilitates investor access to information necessary to make informed investment decisions, thus enhancing the fairness and efficiency of our capital markets. We cannot protect investors if we lack a line of sight into companies selling these securities.</p> <p>In addition, we believe this legislation is unnecessary. There are more avenues than ever to raise capital, especially for an offering of \$500,000 or less. Before expanding those options, Congress should direct the SEC to conduct a holistic study on the U.S. capital markets. This study would help the policymaking community make data-driven decisions on how best to restore the primacy of public markets in the United States and protect and empower investors.</p>
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Section 205: Unlocking Capital for Small Businesses Act of 2022

<p>118th Congress + H.R.</p> <p>117th Congress + S. 3922 (Kramer) + H.R. 8998 (Budd)</p> <p>116th Congress + H.R. 3768 (Budd)</p> <p>115th Congress + H.R. 6127 (Budd)</p>	<p>+ Exempts “finders” from registration under federal law and prohibits state registration</p> <p>+ Permits securities brokers to be treated as a “finder” in a given calendar year if they are paid less than \$500K; conduct fewer than 16 unrelated transactions; or do deals valued at less than \$30M</p> <p>+ Imposes a broker-dealer-light regulatory regime on private placement brokers</p> <p>+ Defines “private placement broker” as one that introduces securities issuers and securities buyers engaged in private deals, and is not a finder</p>	<p>OPPOSE. We oppose bills that would prohibit or restrict state regulatory oversight of “finders” and “private placement brokers.” Prior to conducting business in our state, most securities brokers must go through a licensing and registration process. It is an essential opportunity for regulators to learn about these businesses and to have some confidence that the professionals understand the basics of state securities laws before they solicit investors. State securities regulators cannot protect investors or otherwise support responsible capital formation if we lack a line of sight into who is promoting securities in our state.</p> <p>Rather than legislating in this area, we urge Congress to call on the SEC and FINRA to work together and to work with state securities regulators on appropriate changes to the existing regulatory framework applicable to these market participants. As NASAA has stated in past letters to Congress and the SEC, we believe the more effective path forward is to have the regulators discuss and make appropriate improvements.</p>
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Section 206: Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2021		
<p>117th Congress + S. 3391 (Kennedy) + H.R. 935 (Huizenga)</p>	<p>+ Provides an exemption from registration with the SEC for a subset of brokers called merger and acquisition brokers (“M&A brokers”)</p>	<p>This legislation became federal law during the 117th Congress. NASAA supported the legislation.</p>
<p>116th Congress + H.R. 609 (Huizenga)</p>	<p>+ Restricts the universe of brokers who can qualify for this exemption to ones that, among other</p>	
<p>115th Congress + S. 488 (Toomey) + S. 3518 (Peters) + H.R. 10 (Hensarling) + H.R. 477 (Huizenga)</p>	<p>requirements, do not facilitate securities transactions with groups of buyers formed with the assistance of the M&A broker</p>	
<p>114th Congress + S. 1010 (Manchin) + H.R. 686 (Huizenga)</p>		

Section 301: Small Business Audit Correction Act		
<p>117th Congress + S. 4292 (Cotton)</p> <p>116th Congress + S. 2724 (Cotton) + H.R. 8983 (Hill)</p> <p>115th Congress + S. 3004 (Cotton) + H.R. 6021 (Hill)</p>	<p>+ Exempts privately held, non-custodial brokerage firms in good standing from a requirement to have a Public Company Accounting Oversight Board (PCAOB)-registered firm conduct their annual audit</p>	<p>OPPOSE. We oppose this legislation because it exposes investors and other market participants to possible fraud as a result of lax and inferior audit practices. Broker-dealers are important financial intermediaries and should be held to high standards, including audits by PCAOB-registered firms who must meet a widely recognized and uniform standard of expertise. Also, in our experience, the brokers that would be willing to cut costs in this way probably will cut costs in other ways—all to the detriment of their customers. For example, they probably are willing to cut corners on other books and records.</p>
Section 302: Access to Small Business Investor Capital Act		
<p>117th Congress + S. 3961 (Daines) + H.R. 5598 (Sherman)</p> <p>116th Congress + H.R. 7375 (Sherman)</p>	<p>+ Allows registered investment companies, such as mutual funds, to exclude specified fees and expenses from the fund’s fee table disclosure for investors and provide the information in a footnote instead</p> <p>+ Such fees are the ones the fund incurs indirectly when purchasing shares of a business development company, which is a type of fund that invests in financially distressed or developing firms</p>	<p>OPPOSE. We oppose this legislation because it obscures the “bottom-line” costs of investing in certain funds. The “bottom line” or “all-in” costs of investing in a fund are important to investors and fund disclosures should give investors that information in a form that is simple to digest.</p>

Section 303: Gig Worker Equity Compensation Act

<p>118th Congress + H.R. _____ (McHenry)</p> <p>117th Congress + S. 3931 (Lummis) + H.R. 2990 (McHenry)</p> <p>116th Congress + H.R. 8280 (McHenry) + H.R. 6254 (McHenry)</p>	<p>+ Requires the SEC to extend exemptions for securities that apply to employees of the issuer to individuals (other than employees) providing goods for sale, labor, or services for remuneration to an issuer, or to customers of an issuer</p>	<p>OPPOSE. Non-cash equity incentives have a reputation as “golden handcuffs” because a substantial part of an employee’s compensation may be tied up in these equity incentives. These Rule 701 offerings are illiquid and subject to valuation risk given the lack of public financial disclosure by non-reporting issuers. The shares awarded to employees may have inferior rights to those issued to founders or institutional investors, and the employee’s shares may suffer substantial dilution as a result of subsequent offerings. Instead of addressing these concerns, this legislation would allow companies to extend equity awards to gig workers or customers, who are even less likely than employees to have bargaining power and insights into the financial prospects of the company. This increases the risk that companies will take unfair advantage of them. It could also facilitate the use of stock compensation to incentivize promoters to improperly tout and “pump” the price of the issuer’s securities.</p>
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Section 304: Increasing Investor Opportunities Act

<p>118th Congress + H.R. _____ (Wagner)</p>	<p>+ In effect, expands the participation of closed-end funds in private funds</p>	<p>OPPOSE. Past changes to the securities laws governing investment funds have paved the way for a surge in private capital. Our private markets provide less disclosure, less liquidity, and weak price discovery. Rather than passing more legislation that probably will expand these markets, Congress should direct the SEC to conduct a holistic study on the U.S. capital markets. This study would help the policymaking community make data-driven decisions on how best to restore the primacy of public markets in the United States and protect and empower investors.</p>
<p>117th Congress + S. 3948 (Daines) + H.R. 4262 (Gonzalez)</p>	<p>+ Prohibits the SEC from restricting the investments of closed-end funds in private funds solely or primarily because of the private funds’ status as private funds</p>	
<p>116th Congress + H.R. 8786 (Gonzalez)</p>	<p>+ Prohibits exchanges from prohibiting the listing or trading of a closed-end fund’s securities solely or primarily by reason of the amount of the company’s investment in private funds</p>	

Section 305: Improving Crowdfunding Opportunities Act

<p>118th Congress + H.R. _____ (McHenry)</p> <p>117th Congress + S. 3967 (Moran) + H.R. 9478 (McHenry)</p>	<ul style="list-style-type: none"> + Prohibits state securities regulators from requiring securities issuers to report information to the states regarding trades of their securities made through funding portals + Reverses an SEC interpretation of Regulation CF that treats crowdfunding portals as issuers for liability purposes by stating portals will not be treated as issuers unless they knowingly lie or mislead investors or otherwise engage in a fraud upon them + Excludes funding portals from the recordkeeping and reporting requirements of the Bank Secrecy Act + Explicitly permits impersonal investment advice and recommendations by funding portals that does not purport to meet the objectives or needs of a specific individual or account 	<p>OPPOSE. We oppose efforts to weaken state investor protection laws. Our primary job is to protect investors and promote responsible capital formation in our states. While the SEC similarly protects investors and promotes capital formation, it does not take the kind of grassroots approach that is typical of state agencies. Given the SEC’s track record on crowdfunding rulemaking and enforcement, Congress should assume the SEC will not (1) take enforcement actions in crowdfunding-related cases that involve losses under \$1 million and (2) support local, small startups in all 50 states. Therefore, it would be unwise to preempt the states, who serve as the de facto primary regulator in these offerings. Furthermore, the restriction of portal liability will likely lead to more aggressive practices by funding portals and ultimately damage the credibility of offerings made under Reg CF.</p>
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Section 306: Equal Opportunity for All Investors Act

<p>118th Congress + H.R. _____ (McHenry)</p> <p>117th Congress + S. 3921 (Tillis) + H.R. 4776 (McHenry) + H.R. 4708 (Huizenga)</p>	<ul style="list-style-type: none"> + Expands the universe of persons who would qualify for accredited investor status + Directs the SEC to establish or approve an exam and permits an individual to certify she is an accredited investor by passing an exam approved by the SEC, a state securities regulator, or an SRO + Directs the SEC to treat (1) persons with at least \$500K worth of investments and (2) persons investing no more during a 12-month period than either (a) 10% of their total investments; (b) 10% of their annual income; or (c) 10% of their net worth excluding one’s home, as accredited investors + Defines terms for these purposes, including digital assets + Permits issuers to rely on self-certifications absent reckless disregard or knowledge of contrary information 	<p>UNDER REVIEW. NASAA has significant concerns regarding this legislation. The accredited investor definition plays a central role in our markets. Private issuers that limit their sales to accredited investors can raise unlimited money in a private offering without having to register those securities or otherwise comply with the full range of regulations designed to promote market transparency and integrity, the efficient allocation of capital, and the protection of investors. Self-certification can be abused by unscrupulous promoters who convince investors to make such representations to place them into high-cost, high-risk, illiquid, or fraudulent offerings.</p> <p>Congress should direct the SEC to study, in consultation with NASAA, the anticipated consequences for the U.S. capital markets of this legislation. A holistic study would help the policymaking community make data-driven decisions.</p> <p>If it were to act earlier, Congress should raise the current income and net worth thresholds for natural persons and index those thresholds to inflation. Just as a person’s primary residence does not count towards the \$1 million net asset threshold required for accredited investor status, Congress should add an exclusion for the value of any defined benefit or defined contribution tax-deferred retirement accounts, as well as the value of agricultural land and machinery held for production. And, while we agree that sophistication of the investor should be considered a central</p>
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		<p>aspect of the definition, metrics to measure sophistication should include demonstrable investment experience, and no amount of sophistication can substitute for meaningful access to information and the ability to withstand losses.</p>
<p>Section 307: Facilitating Main Street Offerings Act</p>		
<p>118th Congress + H.R. _____</p> <p>117th Congress + S. 3966 (Moran)</p>	<p>+ Undermines responsible capital formation and investor protection by preempting state securities regulation of secondary trading of Regulation A securities issued in Tier 2 offerings</p>	<p>OPPOSE. We strongly oppose efforts to weaken state investor protection laws, including this legislation and similar legislation that the HFSC noticed in discussion draft form in connection with a February 8, 2023, hearing of the Subcommittee on Capital Markets. See H.R. _____, to amend the Securities Act of 1933 to exempt off-exchange secondary trading from State regulation. The federal government’s previous decision to preempt the states from primary offerings conducted under Regulation A, Tier 2 did not improve either the quality or marketability of these offerings. In our experience, rather than suffering from an undue regulatory burden, this market suffers much more from a lack of demand because investors want to avoid high costs, high information asymmetries, and high investment minimums. Similarly, the secondary trading of these securities is hindered by a variety of factors such as inefficiencies in share transfer recordkeeping and the fact that the issuer usually has a right of first refusal. There is very little evidence that state regulation is a primary cause of illiquidity in these offerings, and preemption will not solve the problem. Instead, it will harm investors by removing state securities regulators’ line of sight into the trading of these securities.</p>

Section 308: Retirement Savings Modernization Act		
<p>117th Congress + S. 4973 (Toomey) + H.R. 9066 (Meijer)</p>	<p>+ Provides that the selection or maintenance of a multi-asset class investment vehicle as a designated investment alternative for an ERISA plan, including any fees or expenses associated with the vehicle or any of its investments, is not by itself a breach of fiduciary duties under ERISA</p>	<p>UNDER REVIEW. This legislation strives to remove barriers to private equity and other alternative investments, such as digital assets, in defined contribution plans. This would appear to expose retirement saving to a much higher level of risk for a questionable reward. Congress should rely on the Department of Labor to make these sorts of judgments after study regarding the potential impacts.</p>
Section 401: Small Entity SEC Update Act		
<p>118th Congress + H.R. _____ (Wagner)</p> <p>117th Congress + JOBS Act 4.0, Sec. 401</p>	<p>+ Directs the SEC, in consultation with the Small Business Capital Formation Advisory Committee, the Office of the Advocate for Small Business Capital Formation, and the Office of Advocacy of the Small Business Administration, to conduct a study of the definition of the term “small entity” and publish a report to Congress with its findings and recommendations</p> <p>+ Directs the SEC to engage in rulemaking to implement its recommendations</p> <p>+ Directs the SEC to repeat the study every five years</p>	<p>QUALIFIED SUPPORT. Congress should amend this legislation to require the SEC to consult with NASAA as well. For state securities regulators, small typically means America’s smallest businesses such as an ice cream store on Main Street. It does not mean an emerging growth company.</p>

Section 402: Increasing Opportunities for Retail Investors Act		
<p>117th Congress + S. 3916 (Rounds)</p> <p>116th Congress + H.R. 7834 (Hollingsworth)</p> <p>115th Congress + H.R. 10 (Hensarling) + H.R. 4263 (MacArthur)</p>	<p>+ Authorizes the SEC to increase any statutory exemption ceiling, such as those governing offering sizes, if the SEC determines it appropriate</p>	<p>OPPOSE. Congress already gave the SEC the authority to raise offering limits, and the Commission should be authorized to restrict, not just expand, existing exemptions. Instead of passing this legislation, Congress should direct the SEC to conduct, in consultation with NASAA, a holistic study on the U.S. capital markets. A holistic study would help the policymaking community make data-driven decisions on how best to restore the primacy of public markets in the United States and protect and empower investors.</p>
Section 403: Tracking Bad Actors Act of 2022		
<p>117th Congress + S. 3716 (Kennedy)</p>	<p>+ Requires the SEC, CFTC, OCC, FDIC, FINRA, and PCAOB to jointly establish a database of persons convicted or held liable in criminal, civil, and administrative actions relating to financial services brought by the named regulators, the DOJ, any SRO overseen by the named regulators, or any state or local criminal or regulatory agency that voluntarily submits information to the database</p> <p>+ The database will be available to the public, free of charge</p> <p>+ Expungement from the database is required if the action is overturned upon judicial review or withdrawn by the agency</p>	<p>SUPPORT. The proposed database would provide additional transparency to investors and likely would facilitate greater coordination among state and federal agencies. Before passing this legislation, Congress should revise the legislation to permit any state or federal government agency, such as a state securities regulator, or self-regulatory organization to make submissions to this database. In addition, Congress should revise the legislation to make clear that the database would include enforcement actions for institutions as well. Striving toward the use of a single, master database of public enforcement actions against individuals and institutions would save the government, financial services employers, and investors time and other resources.</p>

Section 404: Protecting Investors' Personally Identifiable Information Act		
<p>117th Congress + S. 1209 (Kennedy) + H.R. 2039 (Loudermilk)</p>	<p>+ Prohibits the SEC from requiring the use of personally identifiable information (“PII”) to satisfy the reporting requirements of the Consolidated Audit Trail + As an “exception” to the above, permits the SEC to require a national securities exchange, association, or a member of either to provide PII with respect to a market participant if the SEC makes a request for such information</p>	<p>QUALIFIED SUPPORT. We urge Congress to confine this bill to its primary objective: keeping PII out of the CAT database. Also, we urge Congress to make it clear that the legislation in no way limits or affects state investigative authority. Last, we urge Congress to explore opportunities to resolve related issues through oversight rather than legislation.</p>
Section 405: Administrative Enforcement Fairness Act of 2022		
<p>117th Congress + S. 3930 (Lummis)</p>	<p>+ Permits defendants in SEC administrative proceedings (except for registered entities like broker-dealers, investment advisers, and transfer agents) to transfer their case from the SEC to a federal district court</p>	<p>OPPOSE. Giving respondents a right of removal would invariably slow the SEC enforcement process, add to the caseload of an already overburdened federal judiciary, and drive up taxpayer costs. It also may preclude the SEC from obtaining certain kinds of necessary relief authorized in the SEC’s administrative enforcement forum, such as bars from association with registered broker-dealers and investment advisers.</p>

Section 406: Registration for Index Linked Annuities Act		
<p>117th Congress + S. 3198 (Smith) + H.R. 4865 (Adams)</p> <p>116th Congress + S. 3795 (Smith) + H.R. 6994 (Phillips)</p>	<p>+ Requires the SEC to create a new form for the registration of index linked annuities and incorporate the results of investor testing when designing the form</p> <p>+ Defines a registered index linked annuity as an annuity that is deemed a security, which must be registered with the SEC, and that is issued by an insurance company subject to state supervision</p> <p>+ Includes a rule of construction to clarify that nothing in the bill can be construed to preempt state law</p>	<p>This legislation became federal law during the 117th Congress. NASAA agreed with the spirit and much of the substance of this legislation. We applaud lawmakers for their use of an express preservation of state authority clause in this legislation.</p>
Section 407: Alleviating Stress Test Burdens to Help Investors Act		
<p>117th Congress + S. 5004 (Rounds) + H.R. 3412 (Loudermilk)</p> <p>116th Congress + H.R. 3987 (Loudermilk)</p> <p>115th Congress + S. 488 (Toomey) + S. 3574 (Rounds) + H.R. 4566 (Poliquin)</p>	<p>+ Exempts mutual funds and other types of non-bank financial companies from existing requirements under the Financial Stability Act of 2010 to conduct annual stress tests, which evaluate the ability of those companies to absorb losses as a result of adverse economic conditions</p> <p>+ Permits the SEC and the CFTC to require financial companies to conduct periodic stress tests</p>	<p>UNDER REVIEW. The failure of nonbank financial institutions like Bear Sterns, Lehman Brothers, and AIG Insurance was among the events that precipitated the 2008-2009 Financial Crisis. Had such institutions periodically evaluated their capacity to absorb and manage losses in an adverse economic environment, we might have avoided considerable investor harm and grave danger to our economy. Congress should ensure that the SEC maintains a body of regulations that ensures the failure of a large asset manager cannot cause the next financial crisis.</p>