ORAL ARGUMENT NOT YET SCHEDULED
Nos. 15-1149, 15-1150

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1149

Monica J. Lindeen, Montana State Auditor, ex officio
Montana Commissioner of Securities and Insurance,
Petitioner,
v.
United States Securities and Exchange Commission,
Respondent.

Consolidated with No. 15-1150

William F. Galvin, Secretary of the Commonwealth of Massachusetts,
Petitioner,
v.
United States Securities and Exchange Commission,
Respondent.

Petitions for Review of Final Rule of the
United States Securities and Exchange Commission

AMICUS CURIAE BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

ANNE-VALERIE MIRKO, D.C. Cir. No. 56190
North American Securities
Administrators Association, Inc.
750 First Street, NE, Suite 1140
Washington, DC 20002
(202) 737-0900
vm@nasaa.org

Counsel for North American Securities Administrators Association, Inc.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*

Petitioners

William F. Galvin, Secretary of the Commonwealth of Massachusetts

Monica J. Lindeen, Montana State Auditor, ex officio Montana Commissioner of Securities and Insurance

Respondent

United States Securities and Exchange Commission

Amici

National Small Business United, d/b/a/ National Small Business Association

North American Securities Administrators Association, Inc.

(B) Rulings Under Review

These petitions challenge the Securities and Exchange Commission's final rule, *Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A)*, 80 Fed. Reg. 21,806 (Apr. 20, 2015) (to be codified at 17 C.F.R. §§ 200, 230, 232, 239, 240, 249, & 260).

(C) Related Cases

The cases under review have never previously been before this Court. Counsel is aware of no related cases currently pending in any other court.

CORPORATE DISCLOSURE STATEMENT

The North American Securities Administrators Association, Inc. ("NASAA") is a not-for-profit membership corporation formed and operating under the District of Columbia Nonprofit Corporation Act. NASAA's membership includes the state securities regulators in all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, the provincial and territorial securities regulators in Canada, and Mexico. NASAA further states that it has no parent corporation and that no publicly held corporation owns 10% or more of NASAA's stock.

/s/ Anne-Valerie Mirko

Anne-Valerie Mirko

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

GLOSSARY

1933 Act	**Securities Act of 1933**
1934 Act	**Securities and Exchange Act of 1934**
APA	**Administrative Procedures Act**
Commission	**U.S. Securities and Exchange Commission**
GAO	**U.S. Government Accountability Office**
JOBS Act	**Jumpstart Our Business Startups Act**
NASAA	**North American Securities Administrators Association**
NSMIA	**National Securities Markets Improvement Act of 1996**
Program	**NASAA's Coordinated Review Program for Regulation A Offerings**

STATUTES AND REGULATIONS

Except for the statutes and regulations included in the Addendum to this brief, all applicable statutes and regulations are contained in the Addendum to the Brief for Petitioners.

STATEMENT OF IDENTITY, INTEREST IN CASE, SOURCE OF AUTHORITY TO FILE, AND STATEMENT OF SEPARATE BRIEFING

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 67 members, including the securities regulators in all 50 states, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

NASAA members' fundamental mission is protecting investors and the members' principal activities include registering certain types of securities, licensing the firms and agents who offer and sell securities, investigating violations of state law, and, where appropriate, instituting enforcement actions. NASAA and its members also educate the public about investment fraud and advocate for the adoption of strong, fair, and uniform securities laws and regulations at both the state and federal level.

NASAA supports the work of its members by coordinating multi-state enforcement actions, offering training programs, publishing investor education materials, and presenting the views of its members in testimony before Congress and in comment letters to regulatory agencies on matters of securities regulation. Another core function of the association is to represent the membership's interests,

as *amicus curiae*, in significant cases involving the interpretation and application of securities laws and the rights of investors.

NASAA and its members have a substantial interest in the outcome of this matter, as the state securities regulators' ability to protect investors from illiquid, high-risk Regulation A securities offerings will be drastically reduced if the rule promulgated by the Securities and Exchange Commission ("the Commission") in *Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A)*, 80 Fed. Reg. 21,806 (Apr. 20, 2015) (to be codified at 17 C.F.R. §§ 200, 230, 232, 239, 240, 249 and 260) ("Adopting Release," "Final Rule," or "Final Regulation A Rule"), which preempts their ability to review and qualify many of these offerings, is allowed to stand.

NASAA also has an interest in this matter given the Commission's failure to adequately consider the benefits, increases in efficiency, and cost reductions related to NASAA's Coordinated Review Program for Regulation A Offerings, and the Commission's failure to fully consider the adverse impact to investors associated with preempting state review of many Regulation A offerings.

NASAA's authority to file this brief is derived from Circuit Rule 29 and the express consent of the parties. NASAA files this brief separately, pursuant to Circuit Rule 29(d), in order to present to the Court its views on the relationship

between state and federal securities laws and regulations that cannot be fully presented by any other potential *amici*.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

This brief complies with Fed. R. App. P. 29(c)(5) as neither party's counsel authored this brief in whole or in part. Nor did a party, a party's counsel, or any other person contribute money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. The Scope of Preemption in the Commission's Final Regulation A Rule Undermines the Joint State-Federal Securities Regulatory Framework that Congress has Preserved and is Contrary to Unambiguous Statutory Language.

In the United States, there is a dual securities regulatory system, where the Commission and state securities regulators work within a coordinated framework to protect investors and, through such action, promote fair, vibrant markets. The dual state-federal regulatory framework provides oversight to the regulation of securities offerings, those who sell securities, and those who provide investment advice, whether broker-dealers or investment advisers. State securities regulation—predating federal securities regulation by several decades—is integral to this dual state-federal regulatory framework, and Congress has long recognized the significant role of state securities regulators.

A. Congress Created and has Repeatedly Preserved a Joint State-Federal Securities Regulatory Framework.

The federal framework for securities regulation began with the adoption of the Securities Act of 1933, 15 U.S.C. § 77a *et seq*. ("1933 Act"), and the Securities and Exchange Act of 1934, 15 U.S.C. § 78a *et seq*. ("1934 Act"). Prior to the adoption of these federal statutes, securities regulation was solely in the province of the states. In adopting the federal statutes, Congress recognized the critical role states already played in protecting investors in the securities markets and sought to

build a federal framework that worked hand-in-hand with preexisting state regulation. *See* Francis J. Facciolo and Richard L. Stone, *Avoiding the Inevitable: The Continuing Viability of State Law Claims In The Face of Primary Jurisdiction and Preemption Challenges Under The Securities Exchange Act Of 1934*, 1995 COLUM. BUS. L. REV. 525, 553 (1995) ("But the legislative history [of the federal securities laws] does make clear that there was no intent to preempt the field of securities regulation and that section 18 was intended to preserve state regulation of securities.").

1. State Securities Law has Occupied a Foundational and Ongoing Role in Securities Regulation Since the Inception of Such Regulation More Than 100 Years Ago.

Securities regulation in the United States began at the state level, and it was not until more than 20 years after the first comprehensive state securities laws that Congress enacted federal legislation. 2 THOMAS LEE HAZEN, LAW SEC. REG. § 8.1 (database updated July 2015). Kansas passed the first comprehensive securities law in 1911, *id*. at 34, and by 1929 and the Great Depression, "virtually all the states had some sort of securities act." 12 JOSEPH C. LONG, BLUE SKY LAW § 1.1 (2005).

State securities laws have had a profound impact on the evolution of the federal securities laws. Federal courts, when interpreting federal securities acts, have looked to how state courts interpreted similar terms from their laws. For

example, the term "investment contract"—one of the most important definitional concepts in securities law—originated in state securities laws and judicial decisions dating back to the early 1900's, before Congress enacted the federal securities laws. *See SEC. v. W. J. Howey Co.*, 328 U.S. 293, 298 (1946). For this reason, the United States Supreme Court in *Howey* expressly adopted state judicial interpretations of the term "investment contract" as a guide to its meaning under federal law. *Id*. Federal courts have continued to routinely look to state courts when addressing state and federal securities law issues. *See, e.g*., *SEC v. Edwards*, 540 U.S. 389 (2004) (again looking to state law when examining the definition of investment contract); *Brown v. Earthboard Sports USA, Inc*., 481 F.3d 901 (6th Cir. 2007) (examining state decisions regarding the scope of certain preemptive rules).

Today, state securities laws have been refined and unified in a series of model statutes—the Uniform Securities Acts of 1956, 1985, and 2002— and the vast majority of states have adopted a version of these uniform laws. *See* 12A JOSEPH C. LONG, BLUE SKY LAW § 12.1 (2014) (identifying the states that have adopted versions of the Uniform Securities Act). All three model acts share fundamental similarities, as core provisions draw from corresponding language in the federal securities laws to promote both uniformity and state-federal coordination.

2. Congress has Preserved the Important Role of State Securities Regulators.

In recent years, Congress has refined the boundaries between federal and state securities regulation. Through various federal legislative acts, including the National Securities Market Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, 110 Stat. 3416, Congress has established certain limitations on the application of state securities laws. Prior to the enactment of NSMIA in 1996, however, the dual state-federal system created in the 1930s operated with little change, s*ee* Stefania A. Di Trolio, *Public Choice Theory, Federalism, and the Sunny Side to Blue Sky Laws*, 30 WM. MITCHELL L. REV. 1279, 1294 (2004), and state securities regulators played a central and important role in the regulation and oversight of securities offerings for most of the 20th century. *See* 12 JOSEPH C. LONG, BLUE SKY LAW § 5.1 (2005) (states exercised plenary parallel authority with federal regulators after 1933 and 1934 Acts). Equally important is Congress' expansion of the application of state securities laws, in turn reducing the role of the Commission. For example, Congress has expanded the states' role to fill regulatory gaps created by the Commission's limited resources in the oversight of investment advisers. *See* 15 U.S.C. § 80b-3a (increasing the threshold for state versus federal registration of investment advisers from $25 million in assets under management to $100 million in assets under management). The end result of this

evolution is a dual system of securities regulation in which state law continues to play a central role.

NSMIA altered the state-federal regulatory framework through its targeted preemptive provisions regarding state registration of securities offerings. When adopting NSMIA, Congress indicated that its goal was to simply unify existing state law exemptions that were already available to certain offerings, not to create new areas of preemption. *See* S. REP. NO. 104-293, at 15 (1996) ("For both the 'blue chip' stock and 'qualified purchaser' registrations, the legislation does not create a new category of exempt offerings. Instead, S. 1815 makes uniform existing preemptions by adopting a single standard."). Further, "Congress chose not to include broadly preemptive language when it enacted NSMIA . . . nor does the statute's text reveal an implied intent to preempt all state statutes in the field." *Brown v. Earthboard Sports*, 481 F.3d at 911-12.

Although Congress reduced the state role in registering certain national securities offerings with the passage of NSMIA, the states nevertheless continue to register certain securities offerings of both a local and national nature. *See generally* UNIF. SEC. ACT §§ 301-307 (2002) (provisions regarding securities registration). Even as to those securities where preemption of state registration laws is explicit, the states are entitled to receive notice filings, collect fees, and

issue stop orders in the event of non-compliance with these filing and fee requirements. UNIF. SEC. ACT § 302 (2002).

In Title IV of the Jumpstart Our Business Startups Act ("JOBS Act"), Pub. L. No. 112-106, 126 Stat. 307, Congress again recognized the joint state-federal securities regulatory structure and the key role played by state regulators, especially in referring to "qualified purchaser," a concept introduced into the federal securities laws by NSMIA. *See* H.R. REP. NO. 104-622 at 31 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 3877, 3893-94 ("In all cases . . . the Committee intends that the Commission's definition [of qualified purchaser] be rooted in the belief that 'qualified' purchasers are sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary."); *see also* S. REP. NO. 104-293 at 15 (1996) (describing qualified purchasers as those investors that, based on their wealth and sophistication, do not need the protections of state registration laws). Furthermore, in the JOBS Act, when considering the level of state review that should be applicable to Regulation A offerings, Congress rejected the broad preemption of state law in favor of a narrower construct that is consistent both with the dual nature of the state-federal regulatory structure and with the preservation of state oversight of Regulation A offerings. *See* 157 CONG. REC. H7231 (daily ed. Nov. 2, 2011) (statement of Rep. Peters) ("Regulation A securities can be high-risk offerings that may also be

susceptible to fraud, making protections provided by the state regulators an essential [feature]."); *see also,* Petitioners' Brief at 52-55 (discussing the legislative history of NSMIA and the JOBS Act).

3. The Commission has also Recognized the Critical Role of State Securities Regulation Including State Review and Registration of Certain Securities Offerings.

The Commission has also long recognized the contributions of state regulators to the oversight of securities offerings. For instance, the Commission relies on the crucial investor protection role played by state regulators in securities offerings made pursuant to Regulation D, Rule 504. Initially adopted in 1982, Regulation D and its related rules, Rules 504, 505, and 506, provide safe harbors to issuers, which, if certain provisions of the rules are satisfied, qualify the offerings as "non-public" offerings for the purposes of Section 4(a)(2) of the 1933 Act, exempting the offering from the 1933 Act's registration requirements. *Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales*, 47 Fed. Reg. 11,251 (Mar. 16, 1982) (codified at 17 C.F.R. §§ 230 and 239).

The purpose of Rule 504 offerings, as explained by the Commission, is for small companies to raise startup or "seed" capital, not unlike the purpose of Regulation A. In 1992, the Commission relaxed certain provisions in Rule 504. *Revision of Rule 504 Regulation D, the "Seed Capital" Exemption*, 64 Fed. Reg.

11,090 (Mar. 8, 1999) (codified at 17 C.F.R. § 230). Specifically, the Commission amended the rule to allow securities sold in Rule 504 offerings to be freely tradable in the secondary markets even if such offerings were not registered in the states, as the rule had previously required. *Id*. at 11,092. Then, in 1999, in response to the widespread fraud that had been occurring in securities of small, non-reporting companies that was facilitated by the relaxation of Rule 504's requirements, the Commission turned to state registration to protect investors. *Id*.

Recognizing that state registration was an important investor protection component of Regulation D Rule 504 offerings, the Commission again conditioned the free tradability of Rule 504 offerings on state registration. *Id.*; *see also* 17 C.F.R. § 230.504. In its final 1999 rulemaking for Regulation D Rule 504, the Commission specifically looked to state registration of these offerings:

> While Regulation D offerings are exempt from federal securities registration requirements, currently these offerings must be registered in each state in which they are offered unless a state exemption is available. The vast majority of states require registration of public Rule 504 offerings. In adopting Rule 504, we placed substantial reliance upon state securities laws because the size and local nature of these small offerings did not appear to warrant imposing extensive federal regulation.

Id. at 11,090. The Commission further stated:

> Requiring issuers to go through state registration and deliver disclosure documents to investors to issue freely tradeable securities in Rule 504 transactions provides information for prospective investors to make more informed investment decisions. . . . We believe the amendments

> to Rule 504 adopted today will deter abuses we have seen, while not impeding legitimate "seed capital" offerings.

Id. at 11,092. The Commission's reliance on state laws in the Rule 504 context demonstrates that when it comes to smaller offerings such as Regulation A offerings, state securities laws serve a critical investor protection role and are not the major hurdle to small companies' capital formation, which the Commission now points to in support of the preemptive provisions of Regulation A.

Throughout the years, Congress has continually and unequivocally recognized and preserved the critical role state securities regulation plays in the dual state-federal regulatory system governing the securities industry. When Congress has determined that this historical balance needed adjusting, it has always made clear its intention to preempt state law and narrowly tailored such preemption to uphold the important investor protections afforded by state regulation—and only Congress can make such a determination. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947); *see also, infra*, Part I.B.2. The Commission here, however, has usurped the authority of Congress and disrupted this balance without a clear mandate to do so.

B. The Commission's Preemption of State Securities Regulators in the Final Regulation A Rule is Contrary to Express Statutory Language and the Dual State-Federal Securities Regulatory Framework.

As explained above, Congress and, until now, the Commission have recognized and maintained the dual state-federal partnership when it comes to securities regulation and investor protection, including for Regulation A offerings. Here, however, the Commission has adopted a definition of "qualified purchaser" for Regulation A that preempts state authority. This disrupts the state-federal partnership and far exceeds the authority Congress granted to the Commission.

1. The Commission Exceeded its Authority by Defining "Qualified Purchaser" as Any Purchaser.

Contrary to Congress' preservation of the important role of state regulation, the Commission implemented Title IV of the JOBS Act by amending Regulation A, 17 CFR 230.251 through 230.263, by defining "qualified purchaser" in a manner that improperly expanded the preemptive reach of the exemption beyond the clear language and intent of the JOBS Act and NSMIA.

Specifically, the Commission defined "qualified purchaser" as "any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A." Adopting Release, 80 Fed. Reg. at 21,895. Because Section 18(b)(4)(D) of the 1933 Act, 15 U.S.C. § 77r(b)(4), makes Regulation A securities sold to "qualified purchasers" covered securities and state securities registration and qualification laws are preempted as to covered securities, the Commission's

Final Rule preempts state securities registration laws with respect to any Tier 2 offering. The Commission, as Congress has made clear, however, lacks the authority to define "qualified purchaser" without any relation to the qualifications of the purchaser.

"Qualified purchaser" is not defined in the 1933 Act, but, in Section 18(b)(3), Congress authorized the Commission to define "qualified purchaser." *See* 15 U.S.C. § 77r(b)(3) ("A security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule."). There is no question that Congress authorized the Commission to define "qualified purchaser." The question is whether the Commission, in defining the term as any purchaser, exceeded its delegated authority by effectively removing the word "qualified" from the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), remains the leading case when evaluating an agency's interpretation of a statute it administers. Under *Chevron's* two-step test, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of the Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-843. Only if "a statute is silent or ambiguous with respect to

the specific issue" does the court look to whether the agency's interpretation is "a permissible construction of the statute." *Id*.

The question before the Court can be resolved under *Chevron's* first step by simply looking to the unambiguous language used by Congress. Congress used the word "qualified" to modify "purchaser." "Qualified" is defined without ambiguity as "having the necessary skill, experience, or knowledge to do a particular job or activity." The Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/qualified (last visited Aug. 27, 2015). Congress mandated that the Commission define the term "qualified purchaser" to include substantive requirements for purchasers. In contrast, the Commission's definition does not require a purchaser have any particular "skill, experience, or knowledge" to be deemed "qualified." Under the Commission's definition, a "qualified purchaser" is "any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A." Adopting Release, 80 Fed. Reg. at 21,895. The Commission exceeded its authority by erasing the term qualified from the statute, and defining "qualified purchaser" as simply a purchaser, and it cannot cure its faulty definition of "qualified purchaser" through the inclusion of certain investor limitations. *See* Petitioners' Brief at 59-60.

Moreover, had the JOBS Act contained ambiguity, the Commission's interpretation of the Act would be unreasonable under *Chevron* step two in light of

clear Congressional intent to avoid the blanket preemption of state registration requirements in Regulation A offerings. *See id*. at 52-60. The Commission's definition of "qualified purchaser" thwarts Congress' intent to limit federal preemption and preserve the joint regulatory framework for Regulation A offerings by creating blanket federal preemption for any participant in a Tier 2 offering, regardless of the participant's experience, sophistication, income, wealth, or any other substantive qualifying factors whatsoever.

2. The Commission's "Qualified Purchaser" Definition Disrupts the Dual State-Federal Regulatory Framework.

The Commission's Final Rule, adopting a definition of "qualified purchaser" without *any* relation to *any* characteristic, trait, knowledge, sophistication—or even wealth—clearly overreaches, going far beyond Congress' intent. As explained in Section I.A.1-3, *supra*, Congress has preserved the joint securities regulatory scheme, while, at times, adjusting the balance in the system by clearly and narrowly preempting state securities laws where it has determined appropriate. Here, the Commission, acting outside of its delegated authority, chose to define "qualified purchaser" in such a way as to broadly cut out state regulation, despite Congress describing state review of Regulation A offerings as "an essential [feature]." 157 CONG. REC. H7231 (daily ed. Nov. 2, 2011) (statement of Rep. Peters). Had Congress intended to disrupt the dual regulatory framework to the extent done so in the Commission's Final Rule, despite consistently crafting

legislation to preserve it, Congress would have done so clearly and explicitly. Instead, the Commission has acted contrary to the express language of the statute and the role of state regulation it was intended to preserve.

In overstepping its authority and preempting state law absent a clear Congressional directive, the Commission's Final Rule also runs afoul of the Constitution's Supremacy Clause, U.S. CONST. art. VI, cl. 2, and offends the delicate balance of power of our dual, federal-state system. There is a long recognized presumption against preemption. *See Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the state were not to be superseded unless that was the clear and manifest purpose of Congress."); *accord*, *Bates v. Dow Agrosciences*, LLC, 544 U.S. 431, 449 (2005); *Medtronic*, *Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *N. Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655 (1995); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 668 (1993). Intrusions on traditional state authority will only be given effect when a statute's language makes it "absolutely certain that Congress intended" such a result. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). The presumption against preemption is founded on the principles of state sovereignty and the preservation of the traditional police powers of the states found in the Tenth Amendment. U.S. CONST. amend. X. To enhance these safeguards and further preserve the ideals of

federalism, in addition to the presumption against preemption, the Supreme Court has required a clear statement of Congress's intent to preempt state law. *Gregory*, 501 U.S. at 460-61; *see also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1986) (When "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so '*unmistakably clear* in the language of the statute.'" (emphasis added)).

The presumption against preemption and the clear statement requirement apply to circumstances in which *Congress* seeks to preempt state law. When an administrative agency attempts to preempt state law, the paramount concerns of protecting state sovereignty and preserving the states' traditional police powers become even more elevated. Further, "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001) (citation omitted).

As detailed above, there is certainly no clear statement from Congress that would support the wholesale preemption of state authority found in the Commission's Final Rule. In fact, Congress expressly rejected such preemption, and there is no support for the Commission's "qualified purchaser" definition to be

found in the plain text or legislative history of the statute, which clearly point to the need for some level of sophistication before one can be a "qualified purchaser." The Commission lacked the authority to define "qualified purchaser" as it did, and it further compounded its error when it failed to properly analyze the costs of doing so.

II. The Commission's Cost Benefit Analysis Failed to Adequately Assess the Impact of State Efforts to Reduce Costs to Issuers and the Potential Adverse Impact on Investors that Comes with the Preemption of State Review.

The Commission failed to satisfy its statutorily mandated obligations when considering the economic impact and the costs and benefits of promulgating its Final Rule. The Commission did not adequately address the potential costs and benefits of its "qualified purchaser" definition, as it failed to properly analyze the impact of NASAA's Coordinated Review Program on lowering the costs of state law compliance—the perceived higher costs of which were a primary reason the Commission cited in support of its preemptive "qualified purchaser" definition—and the costs to investors as a result of removing important state oversight of these types of offerings.

A. The Commission Failed to Meet its Statutory Obligation to Consider the Economic Impact of its Rules.

The Commission failed to comply with the Administrative Procedures Act, 5 U.S.C. § 551 *et seq*. ("APA"), and its "statutory obligation to determine as best it

can the economic implications of the rule," *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005), making the Commission's action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

As this Court has made clear, the Commission has a statutory obligation to consider the economic impact of its rules. *Chamber of Commerce*, 412 F.3d at 143; *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 176-177 (D.C. Cir. 2009); *Bus. Roundtable and Chamber of Commerce v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011). When the Commission does not adequately address the economic impact of its rules, it has not complied with the APA, and "makes promulgation of the rule arbitrary and capricious and not in accordance with law." *Business Roundtable*, 647 F.3d at 1148 (citing *Chamber of Commerce*, 412 F.3d at 144).

The Commission's statutory obligation to consider the economic impact of the rule here stems from Section 2(b) of the 1933 Act, which provides that in its rulemakings "the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b). In practice, this requires the Commission to balance the costs and benefits of its rules. Here, the Commission failed to adequately consider the potential cost reductions likely to result from NASAA's fully implemented, streamlined, Coordinated Review Program described below.

B. The Commission Failed to Adequately Consider NASAA's Coordinated Review Program's Costs and Ease of Use.

State regulators, through NASAA, have developed and implemented a Coordinated Review Program for Regulation A Offerings ("the Program") that helps to streamline state registration of offerings under both Section 3(b)(1) and 3(b)(2) of the 1933 Act.[1] The Program was officially approved by more than 90% of the U.S. NASAA membership on March 7, 2014, and, currently, 47 states and the District of Columbia, Puerto Rico, and the U.S. Virgin Islands participate in the Program.

1. The Coordinated Review Program Allows for a Modern, Streamlined Review of Regulation A Offerings.

The Program—which levies no separate or additional fees on users—was designed and implemented to reduce the perceived burdens and costs associated with registering Regulation A offerings with multiple states by providing for the electronic submission of offering materials with one state, known as the program administrator, instead of each state in which an issuer wishes to sell securities. The Program also simplifies the registration process through its lead examiner model,

[1] In designing this Coordinated Review Program and its protocols, representatives of NASAA met with and sought feedback from the ABA Business Law Section's working group on Section 3(b)(2) offerings. The need for such a Program and the guidelines that should apply to such offerings were thoroughly discussed. Furthermore, NASAA received support for the Program through NASAA's public comment process.

removing the complexity of interacting with multiple examiners and responding to comments in each state in which the offering is being reviewed. The Program also streamlines and simplifies the state registration process by requiring state review to be based on applicable NASAA Statements of Policy—uniform standards that the participating states have agreed to apply to such offerings. Further, the Program offers relief from some provisions of the NASAA Statements of Policy, including changes to certain merit review standards to accommodate the needs and special circumstances of startup companies. Finally, the Program is not restricted to common stock offerings, allowing issuers to structure their offerings in myriad ways.

The Program's protocol establishes that after an issuer files its registration materials with the program administrator, the program administrator will select a lead merit examiner and a lead disclosure examiner from among the states in which registration is sought. The lead examiners are responsible for drafting and circulating a comment letter noting any potential deficiencies in the offering materials to the participating jurisdictions. The lead examiners are also responsible for seeking resolution of those comments with the issuer or its counsel. This provides a single point of contact for the issuer, greatly reducing the costs and time associated with responding to multiple comments from multiple states. The Program addresses any perceived burden of state registration by including strict

review and comment timeframes for the participating states, generally no more than 21 business days from start to finish for an offering with no application deficiencies.

2. NASAA's Coordinated Review Program for Regulation A Offerings Addresses Concerns Raised in the GAO Report Relied upon by the Commission in the Adopting Release.

In support of its improper preemptive definition of "qualified purchaser," the Commission relied heavily on the findings of a 2012 Government Accountability Office Report ("GAO Report"), U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-839, SECURITIES REGULATION: FACTORS THAT MAY AFFECT TRENDS IN REGULATION A OFFERINGS (2012), that indicated costs of state law compliance could be one factor—of many—discouraging the use of Regulation A. Adopting Release, 80 Fed. Reg. at 21,856-63; 21,868-69; 21,886-88. The Program effectively addresses the concerns regarding the costs of state law compliance raised in the GAO Report.

The GAO Report identified a number of factors that limited or discouraged issuer use of the exemption, including a comparatively low $5 million offering limitation, a slow and costly filing process associated with *both* state and Commission review, and the availability of other exemptions under the federal securities laws. GAO Report at 15-16. The Commission, however, relied heavily upon the GAO's identification of state law compliance as a potential factor in the

disuse of existing Regulation A, concluding "[w]ith respect to time and compliance costs associated with state qualification, we believe preemption will likely reduce issuers' costs." Adopting Release, 80 Feg. Reg. at 21,886. The Commission, then, in the same sentence, states: "although we lack comprehensive, independent data to estimate the precise amount." *Id*.

The Commission cites two estimates of the costs associated with state law compliance provided by two commenters, who estimated costs related to state law compliance costs between $50,000 and $100,000. *Id*. Taking the high end of this cost estimate—which estimated legal fees for an issuer registering its offering in all 50 states—$100,000 represents only a de minimis 0.02% of the maximum offering amount of $50 million allowed under the Commission's new rules.[2]

The Commission also notes that preempting state law would "eliminate the burdens of responding to multiple reviews and thus provide a more streamlined review process." *Id*. at 21,886. However, the Program described above, through its lead examiner model, streamlines and improves the efficiency of the state review process through the coordination of the filing and review process. The

[2] The Commission also includes a table that outlines certain compliance fees related to Initial Public Offerings from 1992-2014, including fees related to state-law compliance. While not completely analogous to state-law compliance fees associated with a Regulation A offering, the compliance fees of these offerings were estimated to be between only 0.02% to 0.35% of the offering amount. Adopting Release, 80 Fed. Reg. at 21,871.

Commission, however, dismisses this cost reducing benefit of the Program, stating "we are aware of only a few issuers that have utilized the coordinated review process, so currently there is limited evidence available to us to evaluate the effectiveness and timeliness of coordinated review, especially in the event that more potential Regulation A issuers seek qualification under this process." *Id*. at 21,887. In one instance, the Commission determined that the cost of state law compliance was too high, while admitting there was little to no evidence to support that conclusion, but then points to a lack of evidence of the success of Coordinated Review to dismiss the Program's usefulness. The Commission cannot have it both ways.

In fact, the Commission appears to have completely disregarded the comments of an issuer that participated in the Program and extolled its benefits. *See generally* Letter from Nick Bhargava, Executive Vice President, Groundfloor Finance, Inc., to Mary Jo White, Chair, SEC (November 18, 2014), *available a*t http://www.sec.gov/comments/s7-11-13/s71113-139.pdf. The comments, submitted by the startup company Groundfloor Finance, Inc., describe the issuer's experience with the Program, noting "the Coordinated Review Program is able to deliver on its promises, increasing efficiency, while reducing costs." *Id.* at 6. Further, Groundfloor found the uniform application of the NASAA Statements of Policy helpful and easy to comply with. *Id*. at 1, 3. The Commission, however,

failed to fully address this positive, successful experience with the Program, instead expressing doubts that the Program could be successful. The Commission cannot simply dismiss the Program without a complete analysis of its costs, and more importantly, weighing the benefits it provides.

The Commission also failed to recognize the GAO Report data that indicated issuers' use of Regulation A, while admittedly limited, in fact increased between the period of 1992 to 1997. GAO Report at 8. In 1992, the Commission increased the Regulation A offering limit from $1.5 million to $5 million and began allowing issuers to "test the waters" i.e. solicit interest in an offering prior to the offering becoming effective. *Id*. at 9. The Commission did not disturb state law requirements in its 1992 amendments. Here, the Commission ignored the fact that an increase in the offering limit and allowing issuers to test the waters spurred the use of Regulation A in the past, despite the continued application of state registration requirements. Given the increase in the use of Regulation A noted in the GAO Report, the Commission has not explained why now state law must be preempted in light of the offering limit increase. The Commission's lack of explanation provides further evidence that the Commission did not fully consider the costs and benefits of the Program and state review of Regulation A offerings.

C. The Commission Failed to Fully and Adequately Assess the Costs Associated with Eliminating the Important Investor Protections Afforded by State Review.

When defining "qualified purchaser," the Commission also failed to comply with the APA, 5 U.S.C. § 551 *et seq*., and its "statutory obligation to determine as best it can the economic implications of the rule," *Chamber of Commerce*, 412 F.3d at 143, because it did not consider fully the costs associated with removing the important investor protections offered by state-level review. The Commission instead focused only on the potential costs to issuers of state law compliance and state law's potential deterrent effect on the use of Regulation A.

As described above and articulated by this Court, the Commission has an obligation to adequately examine the economic impact of its rules, and when it does not, the rules cannot stand. *Business Roundtable*, 647 F.3d at 1148 ("the Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule."). While historically the Court has focused on the costs to businesses related to complying with new Commission rules, *Chamber of Commerce*, 412 F.3d at 143-144; *Business Roundtable*, 674 F.3d at 1,149-51, equally important to the Commission's cost benefit analysis are the costs associated with reducing investor protection. 15 U.S.C. § 77b(b) ("the Commission shall also consider, in addition to *the protection of investors*, whether the action will promote efficiency, competition, and capital

formation." (emphasis added)). Here, the Commission once again failed to fully examine the economic impact of its rules. Specifically, the Commission failed to examine any of the harm investors might incur in the absence of state review in the area of small and thinly traded company offerings.

In the Adopting Release, the Commission only makes vague reference to the benefits of state regulation, but recognized "that the preemption of state qualification for Tier 2 offerings may have an impact on investor protection by eliminating one level of government review." Adopting Release, 80 Fed. Reg. at 21,886. The Commission concludes, however, "[w]e are unable to predict how the amendments to Regulation A will affect the incidence of fraud that may arise in Regulation A offerings." *Id*. at 21,887. The Commission immediately explained how such indeterminable harm will be mitigated by the other provisions of the proposal. *See id*. ("Several factors could mitigate these potential impacts.").

While the Commission claims it cannot determine how the elimination of state registration laws will affect the incidence of fraud, analogous data should be readily available to the Commission in light of investors' experience with preemption and microcap issuers in the Regulation D, Rule 506 context. For the past three consecutive years, Regulation D, Rule 506 offerings have been the single most common investment product or scheme involved in state enforcement actions. NASAA, 2013 ENFORCEMENT REPORT 3 (2013), *available at*

http://www.nasaa.org/wp-content/uploads/2013/10/2013-Enforcement-Report-on-2012-data.pdf; NASAA, 2012 ENFORCEMENT REPORT 3 (2012), *available at* http://www.nasaa.org/wp-content/uploads/2012/10/2012-Enforcement-Report-on-2011- Data.pdf; NASAA, 2011 ENFORCEMENT REPORT 2 (2011), *available at* http://www.nasaa.org/wp-content/uploads/2011/08/2010-Enforcement-Report.pdf. That was the case even before the Commission permitted general solicitation and general advertising in new Rule 506(c). *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 78 Fed. Reg. 44771 (Jul. 24, 2013) (to be codified at 17 C.F.R. §§ 230, 239 and 242). While Regulation D does not entail the same qualification and review process as Regulation A, the data concerning fraud and abuse in that market is certainly a starting point for the Commission to evaluate the economic impact when state securities laws are preempted. The Commission, however, did not fully examine this data or explain why it was not instructive to their analysis.

Further, while the Commission recognized that state review and qualification of these types of offerings offers a benefit to investors, and removing that protection could result in investor harm, the Commission was satisfied that such harm could be mitigated by Commission review of these offerings and that the benefits outweighed the costs. The Commission also recognized the concern noted by commenters that the Commission may lack the resources necessary to

adequately review the new offerings it expected to receive as a result of the Regulation A expansion—especially in light of state law preemption. Adopting Release, 80 Fed. Reg. 21,887. In recent years the Commission itself has noted the strain on its resources. *See* Chair Mary Jo White, Testimony on SEC Budget, Before the Subcommittee on Financial Services and General Government, Committee on Appropriations, United States House of Representatives, May 7, 2013, *available at* http://www.sec.gov/News/Testimony/Detail/Testimony/1365171516034#.UzCgb6hdU2Y. The Commission, however, dismissed the concerns raised here, stating:

> We anticipate a possible increase in the burden on Commission resources as a result of the increase in the Regulation A maximum offering size and other provisions intended to make Regulation A more attractive to prospective issuers. However, we believe this increase would also occur under the alternative of no state preemption for Tier 2 offerings.

Adopting Release, 80 Fed. Reg. 21,881. The Commission's response to concerns that its resources could be further strained under the expansion of Regulation A essentially says, "our resources will be strained either way." That is not an adequate or reasoned response to the concerns that investors will be harmed when states are foreclosed from reviewing these offerings and the Commission does not have the resources to adequately review them. The Commission's review will either be shortcut at the expense of investors or too protracted to timely serve the needs of the issuer.

CONCLUSION

Because the Commission lacked the clear Congressional mandate required to effectuate the broad preemption contained in its definition of "qualified purchaser" and because it neglected its statutory obligation to fully consider the economic impact of its "qualified purchaser" definition, the Court should grant the Petitioners' request for review, and vacate the Commission's Final Rule to the extent the Commission exceeded its authority under *Chevron* and failed to comply with the provisions of the APA.

Respectfully submitted,

/s/ Anne-Valerie Mirko

Anne-Valerie Mirko
D.C. Circuit Bar Application Pending
Deputy General Counsel
NASAA
750 First Street, NE
Suite 1140
Washington, DC 20002
(202) 737-0900
vm@nasaa.org

Counsel for NASAA

Date: September 2, 2015

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,797 words, as determined by word-processing software and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Times New Roman font.

/s/ Anne-Valerie Mirko
Anne-Valerie Mirko

CERTIFICATE OF SERVICE

I certify that the above document will be served on September 2, 2015, by electronic notice for registered counsel and a copy will be served by first-class mail, postage pre-paid, for non-registered counsel.

/s/ Anne-Valerie Mirko
Anne-Valerie Mirko

ORAL ARGUMENT NOT YET SCHEDULED
Nos. 15-1149, 15-1150

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1149

Monica J. Lindeen, Montana State Auditor, ex officio
Montana Commissioner of Securities and Insurance,
Petitioner,
v.
United States Securities and Exchange Commission,
Respondent.

Consolidated with No. 15-1150

William F. Galvin, Secretary of the Commonwealth of Massachusetts,
Petitioner,
v.
United States Securities and Exchange Commission,
Respondent.

Petitions for Review of Final Rule of the
United States Securities and Exchange Commission

ADDENDUM TO THE AMICUS CURIAE BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

ANNE-VALERIE MIRKO, D.C. Cir. No. 56190
North American Securities
Administrators Association, Inc.
750 First Street, NE, Suite 1140
Washington, DC 20002
(202) 737-0900
vm@nasaa.org

Counsel for North American Securities Administrators Association, Inc.

TABLE OF CONTENTS

15 U.S.C. 77b(b)— Definitions; promotion of efficiency, competition, and capital formation (Exerpt)

(b) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

15 U.S.C. 80b-3a—State and Federal responsibilities

(a) Advisers subject to State authorities

(1) In general

No investment adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business shall register under section 80b-3 of this title, unless the investment adviser--

(A) has assets under management of not less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this subchapter; or

(B) is an adviser to an investment company registered under subchapter I of this chapter.

(2) Treatment of mid-sized investment advisers

(A) In general

No investment adviser described in subparagraph (B) shall register under section 80b-3 of this title, unless the investment adviser is an adviser to an investment company registered under the Investment Company Act of 1940, or a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940, and has not withdrawn the election, except that, if by effect of this paragraph an investment adviser would be required to register with 15 or more States, then the adviser may register under section 80b-3 of this title.

(B) Covered persons

An investment adviser described in this subparagraph is an investment adviser that-

(i) is required to be registered as an investment adviser with the securities commissioner (or any agency or office performing

like functions) of the State in which it maintains its principal office and place of business and, if registered, would be subject to examination as an investment adviser by any such commissioner, agency, or office; and

(ii) has assets under management between--

(I) the amount specified under subparagraph (A) of paragraph (1), as such amount may have been adjusted by the Commission pursuant to that subparagraph; and

(II) $100,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this subchapter.

(3) Definition

For purposes of this subsection, the term "assets under management" means the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services.

(b) Advisers subject to Commission authority

(1) In general

No law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person--

(A) that is registered under section 80b-3 of this title as an investment adviser, or that is a supervised person of such person, except that a State may license, register, or otherwise qualify any investment adviser representative who has a place of business located within that State; or

(B) that is not registered under section 80b-3 of this title because that person is excepted from the definition of an investment adviser under section 80b-2(a)(11) of this title.

(2) Limitation

Nothing in this subsection shall prohibit the securities commission (or any agency or office performing like functions) of any State from investigating and bringing enforcement actions with respect to fraud or deceit against an investment adviser or person associated with an investment adviser.

(c) Exemptions

Notwithstanding subsection (a) of this section, the Commission, by rule or regulation upon its own motion, or by order upon application, may permit the registration with the Commission of any person or class of persons to which the application of subsection (a) of this section would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of this section.

(d) State assistance

Upon request of the securities commissioner (or any agency or officer performing like functions) of any State, the Commission may provide such training, technical assistance, or other reasonable assistance in connection with the regulation of investment advisers by the State.

17 C.F.R. § 230.504—Exemption for limited offerings and sales of securities not exceeding $1,000,000.

(a) Exemption. Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.504 by an issuer that is not:

> (1) Subject to the reporting requirements of section 13 or 15(d) of the Exchange Act;
>
> (2) An investment company; or
>
> (3) A development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person, shall be exempt from the provision of section 5 of the Act under section 3(b) of the Act.

(b) Conditions to be met—

> (1) General conditions. To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502(a), (c) and (d), except that the provisions of § 230.502(c) and (d) will not apply to offers and sales of securities under this § 230.504 that are made:
>
> > (i) Exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery to investors of a substantive disclosure document before sale, and are made in accordance with those state provisions;
> >
> > (ii) In one or more states that have no provision for the registration of the securities or the public filing or delivery of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or

(iii) Exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to "accredited investors" as defined in § 230.501(a).

(2) The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504, in reliance on any exemption under section 3(b), or in violation of section 5(a) of the Securities Act.

Note 1: The calculation of the aggregate offering price is illustrated as follows:

If an issuer sold $900,000 on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

Note 2: If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

Title 3 of the Uniform Securities Act of 2002

SECTION 301. SECURITIES REGISTRATION REQUIREMENT.

It is unlawful for a person to offer or sell a security in this State unless:

(1) the security is a federal covered security;

(2) the security, transaction, or offer is exempted from registration under Sections 201 through 203; or

(3) the security is registered under this [Act].

SECTION 302. NOTICE FILING.

(a) [**Required filing of records.**] With respect to a federal covered security, as defined in Section 18(b)(2) of the Securities Act of 1933 (15 U.S.C. Section 77r(b)(2)), that is not otherwise exempt under Sections 201 through 203, a rule adopted or order issued under this [Act] may require the filing of any or all of the following records:

(1) before the initial offer of a federal covered security in this State, all records that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933 and a consent to service of process complying with Section 611 signed by the issuer and the payment of a fee of $[____];

(2) after the initial offer of the federal covered security in this State, all records that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933; and

(3) to the extent necessary or appropriate to compute fees, a report of the value of the federal covered securities sold or offered to persons present in this State, if the sales data are not included in records filed with the Securities and Exchange Commission and payment of a fee of $[___].

(b) [**Notice filing effectiveness and renewal.**] A notice filing under subsection (a) is effective for one year commencing on the later of the notice filing or the effectiveness of the offering filed with the Securities and Exchange Commission. On or before expiration, the issuer may renew a notice filing by filing a copy of those records filed by the issuer with the Securities and Exchange Commission that are required by rule or order under this [Act] to be filed and by paying a renewal fee of $[___]. A previously filed consent to service of process complying with 65 Section 611 may be incorporated by reference in a renewal. A renewed notice filing becomes effective upon the expiration of the filing being renewed.

(c) [**Notice filings for federal covered securities under Section 18(b)(4)(D).**] With respect to a security that is a federal covered security under Section 18(b)(4)(D) of the Securities Act of 1933(15 U.S.C. Section 77r(b)(4)(D)), a rule under this [Act] may require a notice filing by or on behalf of an issuer to include a copy of Form D, including the Appendix, as promulgated by the Securities and Exchange Commission, and a consent to service of process complying with Section 611 signed by the issuer not later than 15 days after the first sale of the federal covered security in this State and the payment of a fee of $[____]; and the payment of a fee of $[___] for any late filing.

(d) [**Stop orders.**] Except with respect to a federal security under Section 181(b)(1) of the Securities Act of 1933 (15 U.S.C. Section 77r(b)(1)), if the administrator finds that there is a failure to comply with a notice or fee requirement of this section, the administrator may issue a stop order suspending the offer and sale of a federal covered security in this State. If the deficiency is corrected, the stop order is void as of the time of its issuance and no penalty may be imposed by the administrator.

SECTION 303. SECURITIES REGISTRATION BY COORDINATION.

(a) [**Registration permitted.**] A security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination under this section.

(b) [**Required records.**] A registration statement and accompanying records under this section must contain or be accompanied by the following records in addition to the information specified in Section 305 and a consent to service of process complying with Section 611:

(1) a copy of the latest form of prospectus filed under the Securities Act of 1933;

(2) a copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy, or description of the security that is required by rule adopted or order issued under this [Act];

(3) copies of any other information or any other records filed by the issuer under the Securities Act of 1933 requested by the administrator; and (4) an undertaking to forward each amendment to the federal prospectus, other than 67 an amendment that delays the effective date of the registration statement, promptly after it is filed with the Securities and Exchange Commission.

(c) [**Conditions for effectiveness of registration statement.**] A registration statement under this section becomes effective simultaneously with or subsequent to the federal registration statement when all the following conditions are satisfied:

(1) a stop order under subsection (d) or Section 306 or issued by the Securities and Exchange Commission is not in effect and a proceeding is not pending against the issuer under Section 412; and

(2) the registration statement has been on file for at least 20 days or a shorter period provided by rule adopted or order issued under this [Act].

(d) [**Notice of federal registration statement effectiveness.**] The registrant shall promptly notify the administrator in a record of the date when the federal registration statement becomes effective and the content of any price amendment and shall promptly file a record containing the price amendment. If the notice is not timely received, the administrator may issue a stop order, without prior notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this section. The administrator shall promptly notify the registrant of an order by telegram, telephone, or electronic means and promptly confirm this notice by a record. If the registrant subsequently complies with the notice requirements of this section, the stop order is void as of the date of its issuance.

(e) [**Effectiveness of registration statement.**] If the federal registration statement becomes effective before each of the conditions in this section is satisfied or is waived by the administrator, the registration statement is automatically effective

under this [Act] when all the 68 conditions are satisfied or waived. If the registrant notifies the administrator of the date when the federal registration statement is expected to become effective, the administrator shall promptly notify the registrant by telegram, telephone, or electronic means and promptly confirm this notice by a record, indicating whether all the conditions are satisfied or waived and whether the administrator intends the institution of a proceeding under Section 306. The notice by the administrator does not preclude the institution of such a proceeding.

SECTION 304. SECURITIES REGISTRATION BY QUALIFICATION.

(a) [**Registration permitted.**] A security may be registered by qualification under this section.

(b) [**Required records.**] A registration statement under this section must contain the information or records specified in Section 305, a consent to service of process complying with Section 611, and, if required by rule adopted under this [Act], the following information or records:

(1) with respect to the issuer and any significant subsidiary, its name, address, and form of organization; the State or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) with respect to each director and officer of the issuer, and other person having a similar status or performing similar functions, the person's name, address, and principal occupation for the previous five years; the amount of securities of the issuer held by the person as of the 30th day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three years or proposed to be effected;

(3) with respect to persons covered by paragraph (2), the aggregate sum of the remuneration paid to those persons during the previous 12 months and estimated to be paid 70 during the next 12 months, directly or indirectly, by the issuer, and all predecessors, parents, subsidiaries, and affiliates of the issuer;

(4) with respect to a person owning of record or owning beneficially, if known, 10 percent or more of the outstanding shares of any class of equity security of the issuer, the information specified in paragraph (2) other than the person's occupation;

(5) with respect to a promoter, if the issuer was organized within the previous three years, the information or records specified in paragraph (2), any amount paid to the promoter within that period or intended to be paid to the promoter, and the consideration for the payment;

(6) with respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three years or proposed to be effected; and a statement of the reasons for making the offering;

(7) the capitalization and long term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill, or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous two years or is obligated to issue its securities;

(8) the kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a specification of the person or class; the basis on which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of each underwriter and each recipient of a finder's fee; a copy of any underwriting or selling group

agreement under which the distribution is to be made or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities that are to be offered otherwise than through an underwriter;

(9) the estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of the funds; and, if a part of the proceeds is to be used to acquire property, including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses in connection with the acquisition, including the cost of borrowing money to finance the acquisition;

(10) a description of any stock options or other security options outstanding, or to be created in connection with the offering, and the amount of those options held or to be held by each person required to be named in paragraph (2), (4), (5), (6), or (8) and by any person that holds or will hold 10 percent or more in the aggregate of those options;

(11) the dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous two years, and a copy of the contract;

(12) a description of any pending litigation, action, or proceeding to which the issuer is a party and that materially affects its business or assets, and any litigation, action, or proceeding known to be contemplated by governmental authorities;

(13) a copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering and any solicitation of interest used in compliance with Section 202(17)(B);

(14) a specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;

(15) a signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer;

(16) a signed or conformed copy of a consent of any accountant, engineer, appraiser, or other person whose profession gives authority for a statement made by the person, if the person is named as having prepared or certified a report or valuation, other than an official record, that is public, which is used in connection with the registration statement;

(17) a balance sheet of the issuer as of a date within four months before the filing of the registration statement; a statement of income and changes in financial position for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; and

(18) any additional information or records required by rule adopted or order issued under this [Act].

(c) [**Conditions for effectiveness of registration statement.**] A registration statement under this section becomes effective 30 days, or any shorter period provided by rule adopted or order issued under this [Act], after the date the registration statement or the last amendment other than a price amendment is filed, if:

(1) a stop order is not in effect and a proceeding is not pending under Section 306;

(2) the administrator has not issued an order under Section 306 delaying effectiveness; and

(3) the applicant or registrant has not requested that effectiveness be delayed.

(d) [**Delay of effectiveness of registration statement.**] The administrator may delay effectiveness once for not more than 90 days if the administrator determines the registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The administrator may also delay effectiveness for a further period of not more than 30 days if the administrator determines that the delay is necessary or appropriate.

(e) [**Prospectus distribution may be required.**] A rule adopted or order issued under this [Act] may require as a condition of registration under this section that a prospectus containing a specified part of the information or record specified in subsection (b) be sent or given to each person to which an offer is made, before or concurrently, with the earliest of:

(1) the first offer made in a record to the person otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(2) the confirmation of a sale made by or for the account of the person;

(3) payment pursuant to such a sale; or

(4) delivery of the security pursuant to such a sale.

SECTION 305. SECURITIES REGISTRATION FILINGS.

(a) [**Who may file**.] A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made, or a broker-dealer registered under this [Act].

(b) [**Filing fee.**] A person filing a registration statement shall pay a filing fee of $[___]. If a registration statement is withdrawn before the effective date or a preeffective stop order is issued under Section 306, the administrator shall retain $[___] of the fee.

(c) [**Status of offering.**] A registration statement filed under Section 303 or 304 must specify:

(1) the amount of securities to be offered in this State;

(2) the States in which a registration statement or similar record in connection with the offering has been or is to be filed; and

(3) any adverse order, judgment, or decree issued in connection with the offering by a State securities regulator, the Securities and Exchange Commission, or a court.

(d) [**Incorporation by reference**.] A record filed under this [Act] or the predecessor act within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the record is currently accurate.

(e) [**Nonissuer distribution**.] In the case of a nonissuer distribution, information or a record may not be required under subsection (i) or Section 304, unless it is known to the person filing the registration statement or to the person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

(f) [**Escrow and impoundment**.] A rule adopted or order issued under this [Act] may require as a condition of registration that a security issued within the previous five years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this State be impounded until the issuer receives a specified amount from the sale of the security either in this State or elsewhere. The conditions of any escrow or impoundment required under this subsection may be established by rule adopted or order issued under this [Act], but the administrator may not reject a depository institution solely because of its location in another State.

(g) [**Form of subscription.**] A rule adopted or order issued under this [Act] may require as a condition of registration that a security registered under this [Act] be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed under this [Act] or preserved for a period specified by the rule or order, which may not be longer than five years.

(h) [**Effective period.**] Except while a stop order is in effect under Section 306, a registration statement is effective for one year after its effective date, or for any longer period designated in an order under this [Act] during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this [Act] are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one year after its effective date. A registration statement may be withdrawn only with the approval of the administrator.

(i) [**Periodic reports.**] While a registration statement is effective, a rule adopted or order issued under this [Act] may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current and to disclose the progress of the offering.

(j) [**Posteffective amendments**.] A registration statement may be amended after its effective date. The posteffective amendment becomes effective when the administrator so orders. If a posteffective amendment is made to increase the number of securities specified to be offered or sold, the person filing the amendment shall pay a registration fee of $[__]. A posteffective amendment relates back to the date of the offering of the additional securities being registered if, within one year after the date of the sale, the amendment is filed and the additional registration fee is paid.

SECTION 306. DENIAL, SUSPENSION, AND REVOCATION OF SECURITIES REGISTRATION.

(a) [**Stop orders.**] The administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the administrator finds that the order is in the public interest and that:

> (1) the registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under Section 305(j) as of its effective date, or a report under Section 305(i), is incomplete in a material respect or contains a statement that, in the light of

the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) this [Act] or a rule adopted or order issued under this [Act] or a condition imposed under this [Act] has been willfully violated, in connection with the offering, by the person filing the registration statement; by the issuer, a partner, officer, or director of the issuer or a person having a similar status or performing a similar function; a promoter of the issuer; or a person directly or indirectly controlling or controlled by the issuer; but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or by an underwriter;

(3) the security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign, or state law other than this [Act] applicable to the offering, but the administrator may not institute a proceeding against an effective registration statement under this paragraph more than one year after the date of the order or injunction on which it is based, and the administrator may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another State unless the order or injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this section;

(4) the issuer's enterprise or method of business includes or would include activities that are unlawful where performed;

(5) with respect to a security sought to be registered under Section 303, there has been a failure to comply with the undertaking required by Section 303(b)(4);

(6) the applicant or registrant has not paid the filing fee, but the administrator shall void the order if the deficiency is corrected; or

(7) the offering:

> (A) will work or tend to work a fraud upon purchasers or would so operate; [or]

(B) has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participations, or unreasonable amounts or kinds of options[; or

(C) is being made on terms that are unfair, unjust, or inequitable].

(b) [**Enforcement of subsection (a)(7).**] To the extent practicable, the administrator by rule adopted or order issued under this [Act] shall publish standards that provide notice of conduct that violates subsection (a)(7).

(c) [**Institution of stop order.**] The administrator may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the administrator when the registration statement became effective unless the proceeding is instituted within 30 days after the registration statement became effective.

(d) [**Summary process.**] The administrator may summarily revoke, deny, postpone, or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the administrator shall promptly notify each person specified in subsection (e) that the order has been issued, the reasons for the revocation, denial, postponement, or suspension, and that within 15 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the administrator, within 30 days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) [**Procedural requirements for stop order.**] A stop order may not be issued under this section without:

(1) appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(2) an opportunity for hearing; and

(3) findings of fact and conclusions of law in a record [in accordance with the state administrative procedure act].

(f) [**Modification or vacation of stop order.**] The administrator may modify or vacate a stop order issued under this section if the administrator finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors.

SECTION 307. WAIVER AND MODIFICATION.

The administrator may waive or modify, in whole or in part, any or all of the requirements of Sections 302, 303, and 304(b) or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to Section 305(i).