INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

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Andrea Seidt, Chair
NASAA Investment Adviser Section
Andrea.Seidt@com.state.oh.us

Elizabeth Smith, Group Chair
Investment Adviser Regulatory Policy and Review Project
Elizabeth.Smith@dfi.wa.gov

A. Valerie Mirko, General Counsel
NASAA Legal Department
750 First Street, NE, Suite 1140
Washington, DC 20002
vm@nasaa.org

Re: NASAA's Proposed IA Model Rule for Information Security and Privacy Under the Uniform Securities Acts of 1956 and 2002

Dear Mss. Sedit, Smith, and Mirko:

The Investment Company Institute appreciates the opportunity to comment on the Request for Public Comment Regarding a Proposed IA Model Rule for Information Security and Privacy Under the Uniform Securities Acts of 1956 and 2002 published by NASAA on September 23, 2018 ("NASAA's Proposal"). NASAA's Proposal has three components: a proposed information security and privacy rule; a recordkeeping requirement; and an amendment to NASAA's Model rule relating to unethical businesses. In our view, NASAA's Proposal will go a long way to ensuring that state-registered advisers give the necessary attention to their information security efforts and that they document such efforts to ensure that they are comprehensive and deliberative. We support NASAA's efforts to focus investment advisers on these issues. We also support NASAA's related various efforts to provide state-registered advisers tools and information relating to cybersecurity to better secure their clients' non-public personal information. We believe these efforts are a necessary complement to NASAA's Proposal to

make sure that advisers better understand how to effectively protect the confidentiality and security of their non-public information. While the Institute supports NASAA's efforts, we recommend revisions to its current proposal as discussed below.

NASAA's Proposed Information Security and Privacy Rule

The Institute supports NASAA's proposed information security and privacy rule. In our view, the rule is appropriately tailored to ensure that it includes the necessary components of an effective security program. Importantly, it also will enable an adviser to tailor its physical and cybersecurity policies and procedures to the adviser's business model, taking into account the size of the firm, type(s) of service provided, and the number of locations of the investment adviser. We recommend, however, that subsection (b) of the proposed rule be revised to be consistent with 2015 amendments to the Gramm-Leach-Bliley (GLB) Act. Among other things, proposed subsection (b) will require an investment adviser to deliver annually a copy of its privacy policy to each client. When originally enacted, the GLB Act required financial institutions – including investment advisers – to annually deliver a copy of their privacy policy to their clients. This provision, however, was amended in 2015. Effective December 4, 2015, the Fixing America's Surface Transportation Act amended this annual delivery requirement. Pursuant to these amendments, a financial institution is not required to deliver its privacy policy annually if it has not changed its policies and practices since it last delivered its annual privacy notice to its clients. We recommend that NASAA revise its proposed rule to be consistent with these 2015 amendments.

NASAA's Proposed Recordkeeping Rule Amendment

This portion of NASAA's Proposal would revise the recordkeeping requirements under the Uniform Securities Acts of 1956 and 2002 to require an adviser to maintain records to document its compliance with the proposed Information Security and Privacy Rule. We believe this is an important component of NASAA's proposal as it will require an investment adviser to document its compliance with the rule. We recommend, however, that this provision be revised in relevant part as follows:

> (a) Every investment adviser registered or required to be registered under the Act <u>that maintains its principal office and place of business in this state</u> shall make and keep true, accurate and current the following books, ledgers and records:

This amendment is necessary to confirm the authority of any state that adopts NASAA's proposal to that state's authority under Section 222(b) of the Investment Advisers Act of 1940 as enacted by the National Securities Markets Improvements Act of 1996 (NSMIA). Section 222 prohibits any state from enforcing any law or regulation "that would require an investment adviser to maintain any books or records in addition to those required under the laws of the State in which it maintains its principal office and place of business if the investment adviser (1) is registered or licensed in the State in which it

maintains its principal office and place of business; and (2) is in compliance with the applicable books and records requirements of the State in which it maintains its principal office and place of business." While this provision only prohibits a state from *enforcing* any law or regulation relating to recordkeeping, we believe it prudent for states not to adopt or enact recordkeeping provisions that they are legally prohibited from enforcing. It is for this reason that we recommend that this provision be revised to be consistent with the states' authority under NSMIA.

NASAA's Proposed Unethical Business Practices Model Rule Amendments

This component of NASAA's Proposal will include as an unethical business practice, "failing to establish, maintain, and enforce a required policy or procedure." This provision is intended to ensure that any violation of a requirement to maintain a required policy or procedure can also be sanctioned as an unethical business practice. We oppose this provision on two bases. First, we fail to understand why this provision is necessary aside from the proverbial "piling on" in an enforcement action. If an investment adviser has a legal requirement to create and maintain specified policies and procedures, it would appear that a state may file an enforcement action against any adviser that fails to comply with such provision. As such, we do not understand why a state would need additional authority under its unethical business practice rule to sanction such violation by additionally alleging that the violation constitutes an unethical act. Secondly, we struggle to understand how violating a substantive requirement of law is "unethical." As defined by Miriam Webster, the term "unethical" means "not conforming to a high moral standard; morally wrong; not ethical." We cannot concur with NASAA that an adviser's failure to comply with a substantive provision of law amounts to morally wrong or unethical conduct. Indeed, we note from our review of the current Model rule, that no other provision in it appears to conflate a violation of a substantive provision of law into morally wrong behavior. Due to the fact that a violation of a regulatory requirement is not the substantive equivalent of unethical conduct, we strongly encourage NASAA not to equate the two in connection with its current proposal or in connection with any future regulatory requirement.

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The Institute appreciates the opportunity to share these comments with NASAA on its proposal. If you have any questions concerning these comments, please do not hesitate to let me know.

Regards,

Tamara K. Salmon
Associate General Counsel