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Commissioner Andrea Seidt
Investment Adviser Section Chair
NASAA Legal Department
750 First Street, NE, Suite 1140
Washington, DC 20002
VIA ELECTRONIC MAIL: Andrea.Seidt@com.state.oh.us

Re: MODEL RULE FOR INFORMATION SECURITY AND PRIVACY UNDER THE UNIFORM SECURITIES ACTS OF 1956 AND 2002

Dear Commissioner Seidt:

We are responding to the request of The North American Securities Administrators Association, Inc. ("NASAA") for comments on a proposed investment adviser model rule to address information security and privacy. We recognize the time and effort invested by NASAA and its staff in formulating the proposed rule and appreciate the opportunity to comment.

Stark & Stark, PC is a law firm, with offices in New Jersey, New York, and Pennsylvania. Our clients include, among others, investment advisers registered with the United States Securities and Exchange Commission and various states that provide services to retail, high net worth and institutional clients that may ultimately be affected by the proposed model rule. These comments, while informed by our experience in representing these clients, represent our own views and are not intended to reflect the views of any of the firm's clients.

We applaud NASAA for taking steps in proposing a model rule to address the increased risks associated with cybersecurity. We also appreciate NASAA's recognition that any cybersecurity framework imposed on investment advisers must be reasonable in relation to the investment adviser's business model.

However, we want to take this opportunity to raise three concerns with the proposed rule.

I. The National Institute of Standards and Technology ("NIST") Framework Should Remain Voluntary

While we believe that the NIST Framework is a valuable resource for investment advisers to consider in implementing their own policies and procedures, and in fact we counsel many of our clients in creating their information security programs in reliance on that framework, it should remain a voluntary framework. NASAA should recognize that no single approach to cybersecurity

prevention and detection is appropriate for any organization. Cybersecurity is a nascent and constantly evolving field and selecting a single framework for a model rule and future state laws could present unique challenges at a later date. Also, requiring investment advisers to follow a specific framework does not harmonize with the first aspect of the proposed rule that requires investment advisers to adopt policies and procedures that are "reasonably designed". We believe that NASAA should adopt a model rule that is flexible and principle-based.

NASAA and state regulatory authorities would remain free to adopt interpretive guidance that investment advisers with policies and procedures that track the NIST Framework would meet the requirement of having "reasonably designed" policies and procedures in this area. This would provide NASAA and various states with the ability to later adopt guidance without amending their law or regulation.

II. States Lack Authority to Require Federal Covered Advisers to Establish Cybersecurity Policies

All regulatory requirements imposed by state law on federal covered investment advisers relating to their advisory activities or services is preempted by Section 203A(b) of the Investment Advisers Act of 1940, unless specifically preserved by the Investment Advisers Supervision Coordination Act ("Coordination Act").[1] There exists extensive guidance and literature concerning this preemption. The U.S. Securities and Exchange Commission has correctly noted that a state's authority is limited with respect to "Commission-registered advisers under state investment adviser statutes to investigate and bring enforcement actions with respect to fraud or deceit against an investment adviser or a person associated with an investment adviser.[2] NASAA historically took the position that state regulatory requirements that "flow from" state registration are preempted.[3] Not maintaining policies and procedures addressing cybersecurity is not fraudulent at common law. These policies and procedures would also appear to "flow from" state registration. Therefore, the requirement for a Commission-registered adviser to be subjected to state law requiring these specific policies and procedures would overstep U.S. Congress' intent to preempt state regulation.

III. Unnecessary to Continue Annual Delivery of Privacy Notice

We appreciate NASAA placing its focus on the delivery of privacy policies by state-registered investment advisers. We continue to believe that the delivery of an initial privacy policy is crucial for both retail and institutional investors. We also believe investors should continue to receive updates to privacy policies as they are amended. However, we respectfully disagree with

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[1] *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Rel. No.-1633, available at https://www.sec.gov/rules/final/ia-1633.txt.
[2] *Id.*
[3] *Id.*

NASAA's proposed rule to make it mandatory for state-registered investment advisers to deliver their privacy notice on an annual basis.

As you may be aware, in late 2015, the U.S. Congress amended the Gramm-Leach-Bliley Act as part of the Fixing America's Surface Transportation Act (FAST Act). This amendment provided an exception that resulted in the vast majority of financial institutions from having to deliver annual privacy notices to customers. We believe that any rule making adopted by NASAA should track the requirements of the FAST Act and provide similar exceptions from the annual delivery requirement.

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Thank you for giving us the opportunity to comment on NASAA's rules regarding privacy and cybersecurity.

Yours truly,

Max L. Schatzow

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