



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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July 27, 2021

The Honorable Maxine Waters
Chairwoman
House Committee on Financial Services
2129 Rayburn House Office Building
Washington D.C., 20515

The Honorable Patrick McHenry
Ranking Member
House Committee on Financial Services
2129 Rayburn House Office Building
Washington D.C., 20515

Re: July 28, 2021 Full Committee Markup

Dear Chairwoman Waters and Ranking Member McHenry:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing to express our views regarding several legislative proposals scheduled to be considered by the Committee on Wednesday, July 28, 2021. I appreciate your attention to NASAA’s views.

(1) Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2021 (H.R. 935)

H.R. 935, as amended,² would establish an exemption from registration requirements under federal securities laws for persons serving as brokers in certain merger and acquisition (“M&A”) deals. The exemption established by H.R. 935 would be consistent with de-facto federal policy set forth in a 2014 no-action letter issued by the staff of the U.S. Securities and Exchange Commission (“SEC”), and broadly consistent with the 2015 NASAA Model Rule Exempting Certain Merger & Acquisition Brokers from Registration.³

State securities regulators have for many years shared Congress’s interest in establishing a more streamlined regulatory framework for persons serving as brokers in M&A deals that involve the transfer of securities. Indeed, as the Committee will recall, NASAA supported earlier versions of this legislation, including bills that passed the U.S. House of Representatives.⁴

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² See [an amendment in the nature of a substitute](#) offered by Mr. Huizenga.

³ See David Blass, Chief Counsel and Associate Director of the SEC’s Division of Trading and Markets, [M&A Brokers No-Action Letter](#) (Feb. 4, 2014); NASAA, [Model Rule Exempting Certain Merger & Acquisition Brokers from Registration](#) (adopted Sept. 29, 2015).

⁴ See NASAA, [Letter to Hon. Bill Huizenga Re: Huizenga Amendment to H.R. 1675, the Capital Markets Improvement Act of 2016](#) (Feb. 3, 2016); NASAA, [Letter to HFSC Re: October 11, 2017 Full Committee Markup](#)

NASAA is pleased to note that H.R. 935 includes two important protections modeled on aspects of NASAA's 2015 NASAA Model Rule Exempting Certain Merger & Acquisition Brokers from Registration. Specifically, the bill includes statutory disqualification provisions that prevent any broker or associated person who is subject to a bar or suspension from association from claiming the exemption. Further, the bill also clarifies the inapplicability of the exemption to any M&A deal where one party or more is a shell company.

NASAA strongly supports H.R. 935, as amended, and urges the bill's passage.

(2) Order Flow Improvement Act (H.R. 4617)

H.R. 4617, as amended,⁵ would require the SEC to study and consider prohibiting or limiting the payment for order flow ("PFOF") in the form of exchange rebates or payments from market centers to broker-dealers. The study would examine, among other issues associated with PFOF, conflicts of interest based on PFOF arrangements and the impact of PFOF on the quality of order execution. The legislation also directs the SEC to revise its rules consistent with the results of this study, and clarifies that the SEC has authority to regulate, ban, or limit such payments at any time.

NASAA supports a market structure that provides all investors with fair trading access, disclosure, and interaction, including increased price competition and reduced transaction costs. At this time, NASAA has many questions about the effects on retail investors of apparent agreements between brokerages and high-frequency traders to trade away from exchanges and other "lit" markets. NASAA also has general concerns that certain PFOF practices carry an intrinsic conflict of interest and could potentially corrupt the regulatory framework for best execution.

At the same time, U.S. NASAA members are mindful that policies that prohibit or restrict PFOF could impact investors and markets in ways that are not now readily apparent. For example, the experience in Canada with banning PFOF teaches that brokers may simply find other ways to extract revenue if regulators do not address PFOF-equivalents as well.⁶

As a preliminary matter, therefore, Congress and regulators require a more complete understanding of how PFOF impacts retail investors, and whether investors who choose to purchase securities through online trading platforms with relatively simple fee structures and

(Oct. 10, 2017); NASAA, [Letter to Hon. Bill Huizenga, Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2019](#) (Mar. 28, 2019).

⁵ See [an amendment in the nature of a substitute](#) offered by Mr. Sherman.

⁶ In Canada, which effectively banned PFOF, brokers use the exchange pricing mechanisms, combined with special order types, to do many of the same things that PFOF achieves in the U.S. *See, e.g.*, Canadian Securities Administrators, [CSA Staff Notice and Request for Comment 23-323, Trading Fee Rebate Pilot Study](#) (Dec. 18, 2018); The Board of the International Organization of Securities Commissions, [Report on Order Routing Incentives, CR07/2016](#) (Dec. 2016).

processes would remain invested in the market if they had to switch providers or pay commissions. In the interim, NASAA believes that more vigorous examination and enforcement by the SEC and the Financial Industry Regulatory Authority, Inc. (“FINRA”) of trading rules is appropriate as a means to deter firms from violating currently applicable trading rules.⁷

NASAA supports H.R. 4617, as amended, and urges its passage.

(3) Short Sale Transparency and Market Fairness Act (H.R. 4618)

H.R. 4618, as amended,⁸ would (i) shorten the reporting period for Section 13(f) of the Securities Exchange Act of 1934 (“Exchange Act”) disclosures from quarterly to monthly, (ii) require such reports to be filed within 10 days of the end of each month, and (iii) expand the list of items to be disclosed to include certain derivatives. The bill would also (iv) direct the SEC to complete rulemaking pursuant to Section 929X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires aggregate short positions to be disclosed on Form 13F, and (v) direct the SEC to study and report to Congress on the use of confidential filing requests.

State securities regulators share Congress’s interest in making our capital markets fairer and more transparent. As the closest regulators to investors, state securities regulators have a strong record of identifying trends and developments before they impact the larger financial system. Disclosures such as those required under Section 13(f) are an important data point that state securities regulators use to advise on, and respond to, trends and developments.

NASAA supports H.R. 4618, as amended. However, NASAA respectfully suggests that lawmakers consider amending the bill to require the SEC to explain in its report to Congress whether and to what extent the SEC provides each member of the Financial Stability Oversight Council, including the non-voting member who is a state securities regulator, with information from the Section 13(f) disclosures that the SEC deems confidential.

(4) “To amend the Securities Act of 1934 to prohibit trading ahead by market makers, and for other reasons” (H.R. 4619)

This legislation, as amended,⁹ would prohibit market makers from “trading ahead” or engaging in insider trading. The chief executive officer of each market maker would certify annually that they have performed reasonable due diligence during the reporting period to ensure that the market maker has not engaged in prohibited activities. In addition, the proposal would direct the SEC to conduct rulemaking to implement this prohibition on trading ahead and prescribe personal liability for violations of the prohibition.

⁷ FINRA issued guidance on June 23, 2021 to make clear that member firms may not let PFOF interfere with their duty of best execution. See FINRA Reminds Member Firms of Requirements Concerning Best Execution and Payment for Order Flow, [Reg. Notice 21-23](#) (June 23, 2021). While NASAA takes no position on the merits of the guidance, NASAA believes it was important for FINRA to make its position clear and it will be important for FINRA to enforce its best execution rules vigorously going forward.

⁸ See [an amendment in the nature of a substitute](#) offered by Ms. Waters.

⁹ See [an amendment in the nature of a substitute](#) offered by Mr. Green.

State securities regulators share Congress’s interest in protecting retail investors from harmful conduct in the markets, including trading ahead. Such conduct erodes retail investor confidence in the markets and keeps much needed investment capital on the sidelines. State securities regulators recognize that FINRA also cares about protecting retail investors and has generally prohibited trading ahead of customer orders in FINRA Rule 5320, except for large orders and institutional accounts.¹⁰ NASAA respectfully would urge FINRA to consider whether its trading ahead rule advances the interests of retail investors given that, for example, FINRA Rule 5320’s protections against trading ahead are not extended automatically to institutional accounts,¹¹ including registered investment companies in which retail investors often invest their hard-earned money.

NASAA opposes insider trading and market manipulation in all forms as this conduct harms retail investors. Therefore, in addition to our support for H.R. 2655, the “Insider Trading Prohibition Act,”¹² NASAA supports H.R. 4619, as amended, and urges its passage.

(5) “To require the Government Accountability Office to carry out a study on the impact of the gamification of online trading platforms, and for other purposes” (H.R. ___)

This legislation, as amended,¹³ would require the Government Accountability Office (“GAO”) to conduct a study on the positive and negative impacts of “gamification, psychological nudges, and other design techniques of online trading platforms.” For purposes of this legislation, gamification means “tactics or strategies used to engage customers and incentivize or nudge them to transact and spend time on an investment platform, including increased use of notifications, prizes, use of ladders and leader boards, psychological tools, and design elements to incentivize customers to spend more time on an investment platform, to increase rapid trading, and to increase the number of trades.” Additionally, the proposal would require the GAO to issue a report to the SEC and Congress with all findings and determinations made in carrying out the study. Importantly, this legislation would require the GAO to consult with interested stakeholders, including NASAA and the SEC’s Office of the Investor Advocate.

State securities regulators share Congress’s interest in preventing manipulative market practices, especially when those practices target novice investors. In its Legislative Agenda for the 117th Congress, NASAA urges Congress to join NASAA members in directing more

¹⁰ Under FINRA Rule 5320, institutional accounts and large customer orders that are in excess of 10,000 shares and at least \$100,000 in value, are not subject to Rule 5320 automatically. Instead, brokers must disclose to these customers whether or not they might trade ahead of their orders. When such a disclosure is made, these customers can ‘opt-in’ to Rule 5320 coverage. If a customer does not opt-in, then, they are ‘consenting’ to their broker trading ahead of their order. See [FINRA Rule 5320](#), Supp. Material .01 Large Orders and Institutional Account Exceptions.

¹¹ For purposes of FINRA Rule 5320, the term “institutional account” means the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.” See [FINRA Rule 4512\(c\)](#).

¹² NASAA, [Letter to the Hon. Jim Himes re: H.R. 2655, the “Insider Trading Prohibition Act”](#) (May 17, 2021).

¹³ See [an amendment in the nature of a substitute](#) offered by Mr. Casten.

attention to the unique challenges and risks facing newer investors.¹⁴ As we explained, Millennial and Gen Z investors are especially susceptible to financial insecurity and disproportionately at risk of being targeted by bad actors.¹⁵

Consistent with the view that policymakers should do more in this area, NASAA supports this legislation, as amended, and urges its passage.

(6) The Financial Exploitation Prevention Act of 2021 (H.R. 2265)

The Financial Exploitation Prevention Act of 2021, as amended,¹⁶ has three main parts. First, it would require registered open-end investment companies and the transfer agents who service them to contact customers who hold non-institutional accounts directly with the company to request information for a trusted contact who can be notified if the company or transfer agent identifies possible financial exploitation. Second, it would allow the company or transfer agent in limited circumstances to postpone the date of payment upon redemption of any redeemable security. Among other requirements, the company or transfer agent must reasonably believe the redemption was requested through the financial exploitation of a security holder. Also, the security holder must be (i) an individual age 65 or older or (ii) an adult who the company or agent reasonably believes cannot protect their own interests due to the adult's mental or physical impairment ("Specified Adults").¹⁷ Third, H.R. 2265, as amended, would require the SEC, in consultation with NASAA and other policymakers, to submit a report to Congress that includes recommendations regarding the regulatory and legislative changes necessary to address the financial exploitation of security holders who are Specified Adults.¹⁸

State securities regulators have been at the forefront of crafting regulatory measures aimed at protecting older and vulnerable investors from financial exploitation, and we share Congress's interest in doing more to protect this growing segment of our population. As this

¹⁴ Among other efforts, one state securities regulator sued Robinhood Financial LLC for "aggressive tactics to attract inexperienced investors, its use of gamification strategies to manipulate customers, and its failure to prevent frequent outages and disruptions on its trading platform." See [MSD-Robinhood-Financial-LLC-Complaint-E-2020-0047.pdf \(state.ma.us\)](#).

¹⁵ According to a survey from Prudential Financial, roughly 1 in 3 Millennial workers have exhausted their emergency savings during the course of the COVID-19 pandemic, compared to just 16 percent of Baby Boomers and 27 percent of Gen X-ers. Millennials were also more likely to: withdraw from their retirement plans to make ends meet, notice an increase in debt over the last year, and delay a professional goal because of their financial concerns. See Prudential Financial, Inc., [Pulse of the American Worker Survey: Road to Resiliency](#) (Jan. 2021).

¹⁶ See [an amendment in the nature of a substitute](#) offered by Ms. Wagner.

¹⁷ These provisions in H.R. 2265, as amended, are broadly consistent with the SEC staff's 2018 no-action letter and the 2016 NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation, which is now the basis for law and regulation in 32 states. See Jennifer Palmer, Senior Counsel in the SEC's Division of Investment Management, [Investment Company Act of 1940 – Section 22\(e\), Investment Company Institute No Action Letter](#) (June 1, 2018); NASAA, [NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation](#) (adopted Jan. 22, 2016); [NASAA's list of jurisdictions](#) that have enacted legislation or regulations based on the NASAA model act (last updated July 2021). See generally FINRA, SEC Approves Rules Relating to Financial Exploitation of Seniors, [Reg. Notice 17-11](#) (Mar. 30, 2017).

¹⁸ This requirement recognizes the longstanding efforts of state and federal policymakers to provide Congress with recommendations and information regarding senior financial exploitation. See, e.g., Stephen Deane, Engagement Adviser in the SEC's Office of the Investor Advocate, [Elder Financial Exploitation: Why it is a concern, what regulators are doing about it, and looking ahead](#) (June 2018).

Committee knows, NASAA has long urged Congress to take additional action. For example, NASAA has encouraged Congress to (1) update and strengthen the SEC’s authority to impose civil penalties on securities law violators, particularly recidivists; (2) establish a federal senior investor taskforce within the SEC to consult with state securities regulators and law enforcement authorities regarding scams impacting seniors; (3) direct the GAO to study the costs, causes, and barriers to reporting the financial exploitation of seniors; (4) amend the Victims of Crime Act of 1984 to establish eligibility for seniors victimized by financial exploitation to be reimbursed from state victim compensation programs; and (5) fund a federal grant program that state securities regulators can access to protect senior investors through education, rulemaking, and enforcement.¹⁹

NASAA applauds the Committee for advancing this important legislation. NASAA would be pleased to support its enactment at such time as the following changes are made:

- A. Clarify the relationship between this legislation and state law so that nothing in this legislation can be construed to preempt or limit any provisions of state law unless the legislation provides a greater level of protection to investors. Lawmakers may wish to use the ‘no preemption provision’ in the 2018 Senior Safe Act as a model for drafting a preemption provision.²⁰
- B. Incorporate a requirement that, if a company or transfer agent reasonably believes that financial exploitation of a Specified Adult may have occurred, may have been attempted, or is being attempted, it must promptly notify the SEC, the relevant state securities regulator, and the relevant adult protective services agency. Lawmakers may wish to use language from the NASAA model act to draft an equivalent notification requirement for this legislation.²¹

Thank you again for your consideration of NASAA’s views. Should you have any questions, please do not hesitate to contact me or Mike Canning, NASAA’s Director of Policy & Government Affairs, at mcanning@nasaa.org and Kristen Hutchens, NASAA’s Associate Director of Policy & Government Affairs, and Policy Counsel, at khutchens@nasaa.org.

¹⁹ [Access NASAA’s federal legislative agendas to learn more.](#)

²⁰ See 12 U.S.C. § 3423(c) (“Relationship to State law. Nothing in this section shall be construed to preempt or limit any provision of State law, except only to the extent that subsection (a) provides a greater level of protection against liability to an individual described in subsection (a)(2)(A) or to a covered financial institution described in subsection (a)(2)(B) than is provided under State law.”).

²¹ See NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation, Section 7 and its [associated legislative commentary](#). The model act provides broker-dealers and investment advisers with the authority to delay disbursing funds from an eligible adult’s account for up to 15 business days if the broker-dealer or investment adviser reasonably believes that a disbursement would result in the financial exploitation of the eligible adult. If the broker-dealer or investment adviser delays a disbursement, it must notify people authorized to transact business on the account (unless these individuals are suspected of the financial exploitation), notify the state securities regulator and the adult protective services agency, and undertake an internal review of the suspected exploitation. The state securities regulator or adult protective services agency may request an extension of the delay for an additional 10 business days. Extensions beyond that could be ordered by a court.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Hopkins". The signature is fluid and cursive, with the first name "Lisa" being more prominent than the last name "Hopkins".

Lisa Hopkins
NASAA President
General Counsel and Senior Deputy Commissioner of Securities, West Virginia

CC: The Honorable Brad Sherman
The Honorable Al Green
The Honorable Bill Huizenga
The Honorable Ann Wagner
The Honorable Sean Casten