NASAA

**NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.**
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December 12, 2022

The Honorable Robert Menendez
Chairman
Subcommittee on Securities, Insurance, and Investment of the U.S. Senate Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Tim Scott
Ranking Member
Subcommittee on Securities, Insurance, and Investment of the U.S. Senate Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Opportunities to Strengthen Our Support for Diverse Entrepreneurs and Investors

Dear Chairman Menendez and Ranking Member Scott:

On behalf of the North American Securities Administrators Association ("NASAA"),[1] I write in support of your efforts to examine how capital markets serve diverse entrepreneurs and investors, and opportunities to strengthen our support to these communities. Your work will help inform the ongoing regulatory policy discussions related to investor protection and responsible capital formation occurring at the state and federal levels of government. As outlined below, we urge Congress to strengthen diversity by **(1)** empowering state regulators to expand access to capital in their states; **(2)** fostering enhanced coordination and collaboration between the states, the U.S. Securities and Exchange Commission ("SEC"), and federal advisory committees such as the SEC's Asset Management Advisory Committee ("SEC AMAC"); and **(3)** passing S. 374, Improving Corporate Governance Through Diversity Act of 2021. Without further deregulating our capital markets and undermining investor protection, Congress can take steps such as these to expand access to capital among communities that historically and presently are underrepresented in our capital markets.

## I. Congress Should Empower State Regulators to Expand Access to Capital, Not Preempt their Authority

For over a century, state securities regulators have been on the frontlines of making our securities markets safer, more efficient, and more inclusive. For example, we have long been

[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 grassroots investor protection and responsible capital formation.

leaders in public-private efforts to expand awareness and understanding of our markets among the next generation of investors and entrepreneurs in the United States.[2]

Today, we continue to work hard to protect and educate investors, promote responsible capital formation, and support inclusion and innovation in our capital markets. Among other activities, we license firms and their agents, investigate violations of the law, file enforcement actions when appropriate, and educate the public about investment fraud. In addition, NASAA's Diversity, Equity, and Inclusion ("DEI") Committee, which presently includes regulators representing 14 states and two Canadian provinces, fosters DEI initiatives within NASAA, at state securities agencies, and within the securities industry.[3] In all that we do, we strive to implement NASAA's DEI Statement, which the full NASAA membership adopted in 2021.[4]

As you know, efforts are underway on Capitol Hill to pass legislation that would restrict the role of regulation, particularly state regulation, in responsible capital formation. In April 2022, lawmakers included 29 of these bills, many of which have been introduced in the current and recent Congresses, in a discussion draft of the JOBS Act 4.0 package.[5]

NASAA supports several of the bills in this package.[6] For example, we support S. 3391, Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act. This legislation would allow certain brokers, called merger and acquisition brokers, to organize sales and purchases of ownership and control of private companies without registering as "broker-dealers" with the SEC and the Financial Industry Regulatory Authority. In fact, as recently as December

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[2] *See, e.g.*, NASAA, Millennial Money Mission (learn more) and Intrastate Crowdfunding Resources (learn more).

[3] NASAA's 2022-2023 DEI Committee includes representation from California, Delaware, Georgia, Kentucky, Maryland, Michigan, Minnesota, Nebraska, New Mexico, New York, Ohio, Texas, Washington, and Wisconsin, as well as Quebec and New Brunswick.

[4] *See* NASAA, North American Securities Administrators Association Approves Statement on Diversity, Equity, and Inclusion (Sept. 20, 2021) ("The new statement articulates NASAA's commitment to promote DEI to further its mission to protect investors, advance responsible capital formation and ensure the integrity and efficiency of the capital markets.").

[5] *See, e.g.*, Banking Republicans Roll Out Capital Formation Legislation to Mark 10th Anniversary of JOBS Act (Apr. 4, 2022).

[6] NASAA opposes the following proposals in the draft JOBS Act 4.0, many of which will weaken, if not outright eliminate, existing state authority to protect investors: **(1)** H.R. 3448, Helping Startups Continue to Grow Act; **(2)** S. 3919, Reporting Requirements Reduction Act of 2022; **(3)** S. 3945, Restoring Shareholder Transparency Act of 2022; **(4)** S. 3965, Increasing Access to Adviser Information Act; **(5)** S. 3097/H.R. 5795, Main Street Growth Act; **(6)** S. 3976, Expanding American Entrepreneurship Act; **(7)** S. 3914/H.R. 4227, Developing and Empowering Our Aspiring Leaders Act of 2022; **(8)** S. 3939/H.R. 5458, Small Entrepreneurs' Empowerment and Development Act; **(9)** S. 3922/H.R. 8998, Unlocking Capital for Small Businesses Act of 2022; **(10)** S. 4292, Small Business Audit Correction Act of 2022; **(11)** S. 3961/H.R. 5598, Access to Small Business Investor Capital Act; **(12)** S. 3931/H.R. 2990, Gig Worker Equity Compensation Act; **(13)** S. 3948/H.R. 4262, Increasing Investor Opportunities Act; **(14)** S. 3967, Improving Crowdfunding Opportunities Act; **(15)** S. 3966, Facilitating Main Street Offerings Act; **(16)** S. 3916, Increasing Opportunities for Retail Investors Act; and **(17)** S. 3930, Administrative Enforcement Fairness Act of 2022. We continue to review several proposals in the package, including S. 3921/H.R. 4776, Equal Opportunity for all Investors Act. We also support several proposals, including S. 3391/H.R. 935, Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act.

1, 2022, we called on Congress to pair and pass S. 3391 with S. 3529, Empowering States to Protect Seniors from Bad Actors Act, which would establish a grant program at the SEC that state securities and insurance regulators could use to enhance their efforts to protect and educate older Americans from financial fraud and other abuses.[7]

Of the 29 bills in the JOBS Act 4.0 package, however, we oppose 17 of them and are especially concerned about four (4) bills. Those four bills, which are outlined in the table below, would strip state governments of important investor protection and capital formation authority to register and regulate certain securities offerings, professionals, and transactions.

| **Anti-State Authority Legislation in the JOBS Act 4.0** | |
|---|---|
| S. 3939, Small Entrepreneurs' Empowerment and Development (SEED) Act | Exempts so-called "micro-cap offerings" – or offerings valued at $500,000 or less in a single year – from core regulatory protections of the Securities Act of 1933, including registration and disclosure protections, and preempts the authority of states to require registration with or notice to the states of these offerings. |
| S. 3967, Improving Crowdfunding Opportunities Act | Prohibits state governments from requiring securities issuers to report information to the state regarding trades of their securities made through funding portals. |
| S. 3966, Facilitating Main Street Offerings Act | Undermines responsible capital formation and investor protection by preempting state securities regulation of secondary trading of Regulation A securities issued in Tier 2 offerings. |
| S. 3922, Unlocking Capital for Small Businesses Act | Exempts "finders" from registration under federal law and prohibits the states from registering "finders," and imposes a broker-dealer-light regulatory regime on private placement brokers. |

[7] *See* NASAA Letter to Appropriations Committee Leadership Regarding Securities Policy Riders (Dec. 1, 2022). NASAA remains grateful for Senator Tim Scott's willingness to cosponsor S. 3529. This legislation enjoys bipartisan support in Congress, as well as support from AARP, SIFMA, and other industry and investor advocates.

In our experience, the states are better positioned than the federal government to decide whether it would be helpful to the entrepreneurs, small businesses, and investors in the state to impose these types of regulatory requirements in addition to federal requirements. In many jurisdictions, the state government has imposed one or more of these requirements.[8]

While the reasoning varies, states generally have exercised their authority because they have witnessed firsthand the value that comes from having small businesses and investment professionals engage directly with local regulators in their state, especially regarding small-dollar offerings where the federal government's outreach is limited.[9] The state government's engagement helps entrepreneurs better understand their options for raising capital. It also deters fraud and other misconduct that can harm business owners and investors alike. Last, it facilitates investor access to information necessary to make informed investment decisions, thus enhancing the fairness and efficiency of our capital markets.

Of note, in many cases, the states tailor at least some of their engagement with entrepreneurs, small businesses, and investors to specific communities that historically have been underrepresented in our capital markets such as women entrepreneurs and investors. By tailoring the content or event, the states strive to expand awareness, understanding, and participation in our capital markets by people of all ages and backgrounds located in all corners of the United States and beyond.[10]

In turn, NASAA strongly believes that further restricting the role of the states in responsible capital formation would have a counterproductive effect on our collective efforts to expand awareness and understanding of our capital markets among historically and presently underrepresented communities. As we emphasize and further explain below, Congress should be empowering the states to do more, not less, to promote responsible capital formation in the United States.

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[8] *See, e.g.*, Written Testimony of NASAA President and Maryland Securities Commissioner Melanie Senter Lubin delivered to the U.S. Senate Committee on Banking, Housing, and Urban Affairs (July 28, 2022); Mike Rothman, NASAA President and Minnesota Commissioner of Commerce, The JOBS Act at Five: Examining Its Impact and Ensuring the Competitiveness of the U.S. Capital Markets (Mar. 22, 2017); NASAA, The JOBS Act: an Investor Protection Disaster Waiting to Happen (Mar. 22, 2012).

[9] *See* SEC, Office of the Advocate for Small Business Capital Formation, Annual Report for Fiscal Year 2021 (Dec. 9, 2021); SEC, Small Business Capital Raising Hub. Note that NASAA supports H.R. 7977, Promoting Opportunities for Non-Traditional Capital Formation Act. This bill would require the SEC's Advocate for Small Business Capital Formation (the "Advocate") to provide educational resources and host events to promote capital raising options for traditionally underrepresented small businesses and businesses located in rural areas. In addition, it would require the Advocate to meet at least annually with representatives of state securities regulators to discuss opportunities for collaboration and coordination with respect to these efforts. *See* NASAA Letter to HFSC Leadership Regarding H.R. 7977 (June 10, 2022).

[10] *See, e.g.*, Alabama's She Can (learn more); Georgia's She Leads (learn more); Iowa's SMARTHer Money (learn more); Montana's dedicated resources for capital formation (learn more); New Mexico's Native American Outreach (learn more); Pennsylvania's Investing in Women Initiative (learn more). Georgia created its She Leads outreach specifically to help women understand how they can increase their wealth through investing and entrepreneurship. Other states take the same or similar approach to serving underrepresented communities

## II. Congress Should Foster Enhanced Coordination and Collaboration Between Regulators to Promote Diversity in the Asset Management Industry

In addition to preserving the authority of state securities regulators, Congress should be elevating the voices and experiences of state securities regulators by encouraging state participation in all relevant federal working groups. Failure to include them as voting members of federal advisory councils, committees, task forces, and other working groups creates inefficiencies and missed opportunities for all of us to better support diverse entrepreneurs and investors.

As you may recall, state securities regulators play a critical role in the regulation of asset managers. In 2021, there were approximately 17,500 state-registered investment advisers. In general, small investment advisers (less than $25 million of regulatory assets under management ("RAUM")) and mid-sized investment advisers (between $25 million and $100 million of RAUM) are registered with and primarily regulated by one or more state securities administrators. Conversely, large investment advisers (greater than $100 million of RAUM) generally are registered with the SEC and are primarily subject to federal regulation instead of state regulation. In some cases, a small or mid-sized investment adviser may be permitted or required to register with the SEC instead of with one or more states and, in more limited circumstances, a small or mid-sized investment adviser may be registered with the SEC and one or more states.[11] With respect to the investment advisers under their jurisdiction, both the SEC and the state securities regulators require use of the Form ADV (also known as the Uniform Application for Investment Adviser Registration) as an investment adviser registration document. Once investment adviser registration is granted, the Form ADV must be amended at least annually and whenever material changes occur.

Despite the critical role of the states, the SEC AMAC had only one state securities regulator who served on the committee and he served only as a non-voting member. While there appear to be no plans at this time for the SEC to reconstitute the SEC AMAC, the SEC should consider including at minimum one state securities regulator on any such future committee and making her or him a voting member.[12]

Regarding the SEC AMAC's July 2021 Report and Recommendations on Diversity and Inclusion in the Asset Management Industry,[13] NASAA applauds the SEC AMAC for leading in this area and preparing thoughtful, data-driven recommendations. We agree with the spirit of

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[11] Learn more at https://www.nasaa.org/industry-resources/investment-advisers/. *See also* SEC, Investor Adviser Registration.

[12] The SEC AMAC has been inactive since the end of 2021. *See, e.g.,* SEC Chair Gensler, Remarks Before the Asset Management Advisory Committee (Nov. 3, 2021). At present, there appear to be no plans at the SEC to reconstitute the committee. Consistent with congressional mandates to include the states, the SEC includes one state securities regulator as a non-voting member of the SEC's Small Business Capital Formation Advisory Committee and one state securities regulator as a voting member of the SEC's Investor Advisory Committee. Access more information about the SEC's advisory committees.

[13] Access the SEC AMAC's recommendation at sec.gov.

these recommendations and are eager to discuss them with the appropriate SEC staff and/or past or future members of the SEC AMAC, particularly the recommendations related to Form ADV.

## III. At the Earliest Opportunity, Congress Should Pass S. 374, Improving Corporate Governance Through Diversity Act

Last, we urge Congress to strengthen diversity in our capital markets by passing S. 374, Improving Corporate Governance Through Diversity Act. As a general matter, NASAA supports efforts to increase broader participation in our capital markets and gender, racial, and ethnic diversity in corporate America. Institutional investors and other stakeholders in our capital markets have pointed to growing research demonstrating links between human capital diversity on the one hand and the financial performance of the corporation on the other hand. Among other enhancements, this legislation would foster more diversity in corporate America by facilitating additional, better disclosure by public companies and requiring the SEC to establish a Diversity Advisory Group. While S. 374 does not call explicitly for the inclusion of a state securities regulator to serve in this advisory group, we applaud lawmakers for directing the SEC to include representatives of state and local governments in this advisory group.[14]

In closing, I want to commend you and your colleagues for working on a bipartisan basis to examine and explore ways to better serve diverse communities. Ultimately, entrepreneurs, small businesses, investors, and taxpayers benefit when we all work together in a positive and effective manner. If NASAA can be of assistance at any point in these discussions, please do not hesitate to contact me or Kristen Hutchens, NASAA's Director of Policy and Government Affairs, and Policy Counsel, at khutchens@nasaa.org.

Sincerely,

Joey Brady
NASAA Executive Director

CC: Members of the U.S. Senate Committee on Banking, Housing, and Urban Affairs
Members of the U.S. House Committee on Financial Services

[14] *See* NASAA Letter to HFSC Leadership Re: April 20, 2021 Full Committee Markup (April 20, 2021) (expressing support for H.R. 1277, Improving Corporate Governance Through Diversity Act).