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NASAA

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Submitted by SEC Webform
Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File No. S7-2026-17: Registered Offering Reform

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. ("NASAA"),[1] I am writing in response to U.S. Securities and Exchange Commission ("SEC" or the "Commission") Release Nos. 33-11418, 34-105513, and IC-36160, *Registered Offering Reform* (the "Proposal"), which seeks to broaden Form S-3 eligibility, allow Form S-1 filers to incorporate by reference, extend well-known seasoned issuer communication permissions to more issuers, allow more business development companies and registered closed-end investment companies to use short-form registration statements, expand variable annuity advertising rules to more insurance products, and preempt state registration of unlisted registered offerings.

The Commission should withdraw its proposal to amend Rule 146 of the Securities Act of 1933 (the "Securities Act") to define "qualified purchaser" for purposes of Securities Act Section 18(b)(3) ("Section 18(b)(3)") as "any person to whom securities are offered or sold pursuant to an offering registered under the Securities Act" (the "Proposed Definition"). The Proposed Definition would harm investors by depriving them of protections provided through state registration that have no federal equivalent. The Commission's rationale for doing so is flawed because it ignores the Commission's responsibility to consider investor protection, the role states play in providing protections similar to those the Commission requires for other registered offerings, and the Commission's inability to fill the gaps the Proposed Definition would create. The Proposed Definition is also flawed because it does not compare the limited benefit to issuers against the substantial costs to investors and is based on an improper reading of the Commission's ability to define the term "qualified purchaser."

[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, México, Puerto Rico, the U.S. Virgin Islands, and Guam. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

I. <u>The Proposed Definition Is Not Consistent with the Protection of Investors</u>.

Section 18(b)(3) requires any rule defining "qualified purchaser" to be consistent with the protection of investors.[2] The Proposal posits that Commission disclosure review alone is sufficient to protect investors in registered offerings not listed on a securities exchange ("unlisted offerings").[3] That is, however, not the case given the limitations of the Commission's disclosure review rules and procedures. As explained below, certain unlisted offerings present substantial and unique investor protection challenges that are only addressed through state registration and qualification review ("state registration").

A. State Registration of Unlisted Offerings Is Effective and Efficient.

State registration is essential to the regulation of certain unlisted offerings, particularly non-traded business development companies ("BDCs"), non-traded real estate investment trusts ("REITs"), other direct participation programs ("DPPs"), and certain public debt offerings. While the Proposal vaguely describes state registration as a matter of varying frameworks based on multiple model acts combined with potentially different substantive standards,[4] the reality is more coordinated and consistent.

State registration of these offerings is generally derived from a framework of uniform guidelines adopted by a majority of states.[5] It is correct that some states scrutinize offering terms to protect their citizens by requiring independent governance and adequate shareholder rights, minimizing conflicts of interest, evaluating sponsor and advisor qualifications, and establishing concentration limits, suitability standards, and fair marketing practices.[6] States also review offering documents closely to make sure fees, compensation, expenses, and redemption terms are

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2 The rule reads "[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. In prescribing such rule, the Commission may define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors."

3 Proposal at 186-87, 263.

4 *Id.* at 184.

5 *See* Testimony of Rick Fleming before the Senate Committee on Banking, Housing, and Urban Affairs on "The JOBS Act a Year and a Half: Assessing Progress and Unmet Opportunities" at 3-4 (Oct. 30, 2013).

6 Also included in a full picture of state registration should be the fact that states have devoted substantial time to mitigating burdens by developing models, engaging in common training, operating coordinated review programs, and building a public filing infrastructure that operates similar to the Commission's EDGAR system. *See* Coordinated Review, NASAA (last visited July 27, 2026); *Coordinated Review*, NASAA (last visited July 27, 2026); NASAA Electronic Filing Depository (last visited July 27, 2026). Also germane to the types of unlisted products focused on in this letter, NASAA has created an Advisory Committee to its Direct Participation Programs Policy Project group to consult with industry, self-regulatory, and professional experts on regulatory issues in this space.

disclosed clearly and accurately.[7] For debt offerings, certain states scrutinize the ability of issuers to service the debts they seek to offer and evaluate trust indenture protections.[8] Despite the fact that requiring issuers to address shortcomings in these areas is unquestionably beneficial to investors, the Commission does none of these things when it reviews offerings.

B. The Proposed Definition Would Reduce Investor Protections Over Complex and Costly Direct Participation Program Investments.

The Proposal mentions "non-traded BDCs" as an example of the sort of unlisted offerings the Commission believes should be preempted from state registration.[9] Closely related are non-traded REITs; i.e., both are illiquid alternative DPP investments comprised of portfolios of high-risk assets, such as leveraged real estate holdings or high interest loans in small and middle market companies. The issuers of these investments are not small businesses in need of the Commission's help to spur capital formation; as of the fourth quarter of 2025, publicly offered non-traded BDCs reportedly held approximately $247 billion in assets under management, while publicly offered non-traded REITs held approximately $169 billion.[10] These are also concentrated markets made up of a few dozen large issuers.[11] Further, despite concerns about the health of the public capital markets described in the Proposal, capital growth in this industry is very healthy.[12]

More importantly, both types of offerings present special investor protection concerns – particularly to the retail investors to whom they are primarily marketed – including limited redemption and exit opportunities, opaque pricing and valuation processes, non-transparent

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7 *See* NASAA Statement of Policy Regarding Real Estate Investment Trusts ("REIT SOP") (Jan. 1, 2026); NASAA, Omnibus Guidelines (May 7, 2007).

8 *See* NASAA Statement of Policy Regarding Debt Securities ("Debt SOP") (Sept. 12, 2023).

9 Proposal at 183-84.

10 Johnathan Rickman, *Nontraded BDC Fundraising Falls, Returns Rally in Q4 2025*, BLUE VAULT (May 24, 2026); Johnathan Rickman, *Nontraded REIT Fundraising Rebounds in Q4 2025*, BLUE VAULT (May 18, 2026).

11 *Nontraded BDC Fundraising Falls, Returns Rally in Q4 2025*, *supra* note 10 (tracking 22 open and 2 closed non-traded BDCs); BLUE VAULT, *Blue Vault Publishes Q4 2025 Nontraded REIT Full Industry Review* (May 1, 2026) (tracking 43 non-traded REITs).

12 *See* David Dawkins, *BDCs at $500bn: Enhanced Transparency into Private Credit*, PREQIN (May 5, 2026) (illustrating (at Fig. 1) the growth of non-traded BDC funds since 2021); Joe Palmisano, *Retail Capital Pushes 2025 Alts Fundraising to $204B*, Connect Money (Jan. 29, 2026) (reporting that non-traded registered and private BDC fundraising surpassed $63 billion in 2025, up 13.9 percent year over year; private non-traded REIT fundraising increased 80.9 percent to $9.5 billion; and public non-traded REIT fundraising held steady at $5.7 billion); Andrew Berlin, *BDC Quarterly Wrap: 1Q26, LSTA* (June 9, 2026) (highlighting that in the first quarter of 2026, non-traded and private BDCs increased 4.9 percent year); FUSE Research Network, *Non-Traded BDCs Surge to $171B: A Top Growth Story in Alts* (Aug. 19, 2025) (finding rapid growth in non-traded and private BDCs since 2020, outpacing REITs and other funds).

holdings, and high front-end fees, commissions, management fees, and fees on profits.[13] Given the extremely high cost and illiquid nature of these investments, retail investors can and do lose significant sums while investing and can be trapped in investments they cannot get out of when they need their money.[14]

These are the kinds of structural concerns addressed during state registration. For example, to help mitigate the risks that come with these products, many states require reasonable minimum income or net worth thresholds before retail investors can purchase non-traded REITs, non-traded BDCs, and other DPPs. Many states also address the risks that can come with over-concentration through the use of tailored concentration limits in these illiquid investment programs.[15] State protections like these reduce the likelihood that retail investors with limited means will concentrate excessive portions of their savings in complex and illiquid investments. The Proposed Definition is being promulgated at a particularly precarious time for retail investors; while product sponsors are seeking broader distribution of alternative investments in retirement accounts and other retail investment channels, the liquidity and performance of non-traded REIT and BDC assets are declining, funds are suspending their liquidity programs, and investors are having trouble exiting.[16]

While important, Commission disclosure review alone is insufficient as compared to the existing protections provided through state review to protect investors in these circumstances. In the case of non-traded BDCs and non-traded REITs in particular, disclosures can be "lengthy, dense, and utilize technical industry jargon that is difficult for most retail investors (and even some

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13 *See* Ohio Dep't of Com., Div. of Sec., Proposed Revisions to O.A.C. 1301-6-3-09 at 8-9 (June 2023) ("OH Div. Sec. Report") (quoting UMB Fund Servs. and Fuse Rsch. Network, *State of the Market: Non-Traded REITs and BDCs* (July 2022)).

14 Non-traded REITs are perennially a leading source of investor complaints. *See* FINRA, *Dispute Resolution Services Statistics Top 15 Security Types in Customer Arbitrations* (showing non-traded REITs as the third most numerous type of security at issue in customer complaints for a four-year span running through May 2026). Non-traded BDCs are also confronting increasing private fraud claims. *See* Henninger S. Bullock et al., *Emerging Litigation Risks in Private Credit*, MAYER BROWN (June 4, 2026).

15 Such protective measures are warranted because non-traded DPPs perform worse for investors than their exchange-traded peers. One study that measured the performance of 140 non-traded REITs against a diversified portfolio of traded REITs found that non-traded REITs underperformed traded REITs by at least $59.2 billion, due primarily to large upfront fees and "conflicts of interest which permeate the organizational structure of non-traded REITs ...." Joshua Mallett & Craig McCann, *Further on the Returns of Non-Traded REITs*, SLCG ECONOMIC CONSULTING at 1-2 (May 2022).

16 *See*, *e.g.*, Khac Phu Nguyen, *Apollo Caps $25 Billion Fund Withdrawals After 16.8% Redemption Requests*, YAHOO! FINANCE (June 23, 2026) (noting that multiple funds faced with double digit redemption requests all capped redemptions at 5 percent); Hugh Leask, *Blackstone restricts flagship fund withdrawals as private asset fears reemerge*, CNBC (June 5, 2026, at 15:08 EDT) (reporting a 5 percent redemption cap after redemption requests hit 10 percent in the second quarter); THEREALDEAL, *Starwood freezes SREIT redemptions as liquidity crunch deepens* (May 1, 2026, at 15:00 EDT).

investment professionals) to understand."[17] The Commission concedes that "merit-based review conducted by some states may, in some cases, offer investor protections distinct from the Commission staff's disclosure-based review …."[18] In the case of these complex and illiquid products, the Commission admits its approach provides fewer investor protections. That fact alone is reason enough for the Commission to decline to advance the Proposed Definition.

C. The Proposed Definition Would Reduce Investor Protections Over Debt Offerings.

Commission disclosure review also does not compare to the quality of protection provided by state registration of debt offerings. Some states may require an issuer to demonstrate a reasonable ability to service its debts, such as by disclosing an earnings-to-fixed-charges ratio. In some cases, states may deny registration when it is unlikely the issuer would be able to repay the debt. States may also require that debt securities be offered and sold pursuant to trust indentures that comply with federal law and include investor protections such as disclosure of events of default, ongoing reporting to an independent trustee, restrictions on conflicts of interest, preservation of holders' rights in the event of significant corporate transactions, and continued accrual and payment of interest until redemption or conversion.[19] Unlike disclosure review, state merit review can permit regulators to conclude that an offering should not be sold to investors because its terms are unfair, inequitable, or otherwise inconsistent with investor protection. The Commission, on the other hand, has no such authority and will let such offerings be sold to retail investors.

D. State Registration of Unlisted Offerings Provides Many of the Same Protections as Exchange Listing Requirements and the Commission's Registered Investment Company Offering Rules.

The Commission justifies the Proposed Definition and resulting preemption of state law in part by asserting that state merit review can impose "potentially different" substantive standards on issuers.[20] The implicit point is that Commission disclosure review is less burdensome. But that is not the full picture. The Commission's case for preemption is faulty because it ignores the fact that the great majority of registered offerings are subject to substantive protections above and beyond disclosure review, and that those substantive protections are similar to state standards.

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[17] OH Div. Sec. Report, *supra* note 13, at 9.

[18] Proposal at 263.

[19] These aspects of state registration protections can be found in the Debt SOP, *supra* note 8.

[20] Proposal at 184. The Commission describes state merit review standards generally as those directed to determining '"substantive weaknesses in structure, financial strength or fairness to investors."' Proposal at 261 n. 627 (quoting Cohn, Securities Counseling, Merit Review § 12.8).

First, any issuer that seeks to list an offering on an exchange must satisfy that exchange's listing requirements.[21] If an issuer seeks to list on multiple exchanges, it must meet multiple "potentially different" sets of exchange requirements.[22] Like states, exchanges regard investor protection to be part of their missions,[23] and exchanges accordingly require some of the same protections required by certain states. For instance, exchanges typically require independent directors, just as certain states do.[24] Exchanges also require issuers to have provisions that protect investor voting rights, including in merger situations, just like certain states.[25] Exchanges and certain states also both require protections against related party transactions.[26]

Second, the Commission imposes extensive substantive protections on registered investment company ("RIC") offerings pursuant to the Investment Company Act of 1940 (the "40 Act"). As just a few examples, RICs require at least 40 percent independent directors on fund

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21 Because exchanges impose substantive protection measures on issuers, state securities laws have recognized exchange-listed securities as being outside of the need for state regulation, even before the passage of the National Securities Markets Improvement Act of 1996 ("NSMIA"). *See* UNIF. SEC. ACT OF 1956 § 402(a)(8).

22 At last count, there are 29 exchanges. SEC, *National Securities Exchanges* (Jan. 7, 2026).

23 *See* NASDAQ LISTING RULE 5101; NYSE Regulation Mission Statement (last visited July 17, 2026). The Commission also requires exchanges to have rules to "prevent fraudulent and manipulative acts and practices" and "in general, to protect investors and the public interest." Securities Exchange Act of 1934 ("Exchange Act") § 6(b)(5), 15 U.S.C. § 78f(b)(5).

24 *Compare* NYSE Listed Company Manual § 303A.01 (requiring a majority of board directors to be independent) *and* NASDAQ LISTING RULE 5605(b)(1) (same), *with* REIT SOP, *supra* note 7, § II.B.3 (Jan. 1, 2026) (requiring a majority of trustees to be independent).

25 *Compare* NYSE Listed Company Manual § 313 (protecting shareholder voting rights by limiting corporate actions or issuances that disparately reduce or restrict voting rights) *and* NASDAQ LISTING RULE 5640 (same) *and* CBOE BZX EXCHANGE RULE 14.10(j) (July 16, 2026) (same) *and* NYSE American Company Guide § 713 (requiring shareholder approval before significant stock issuances that could affect shareholders' ownership or corporate control) *and* NASDAQ LISTING RULE 5635 (requiring shareholder approval before stock issuances in connection with acquisitions, equity compensation, changes of control, and certain non-public transactions), *with* REIT SOP, supra note 7, § VI.B (protecting shareholder voting rights and approval over mergers, governance changes, and other fundamental transactions) *and* NASAA Statement of Policy Regarding Unequal Voting Rights (Sept. 11, 2016) (requiring justification and disclosure for unequal voting rights). As yet another example of the diversity of exchange rules, the Long-Term Stock Exchange's rules seek to increase shareholder voting power the longer an investor holds his/her shares. LTSE Listing Standards Rule 14.413.

26 *Compare* NYSE Listed Company Manual § 312.03(b) (requiring shareholder approval for certain related party equity issuances), *with* REIT SOP, *supra* note 7, §§ V.A-D, G (requiring trustee approval of certain transactions with sponsors, advisors, trustees, and affiliates, and requiring such transactions to be fair and no less favorable than unaffiliated transactions).

boards,[27] restrict affiliate transactions to prevent conflicts of interest and self-dealing,[28] limit leverage through asset coverage requirements for borrowings,[29] and mandate formal compliance programs with a Chief Compliance Officer who reports to the Board.[30] RICs are also required to extensively disclose their fees and expenses, as well as their purchase, redemption, and exchange procedures.[31]

In other words, the Commission imposes substantive protections on RICs that go well beyond disclosures in order to protect RIC investors. Also, just as is true with many unlisted offerings, RICs must go through multiple registration processes; i.e., they must register under both the 40 Act and the Securities Act. In fact, RICs must be registered under the 40 Act in order to be able to register under the Securities Act.[32] Last, the sorts of investors that the Commission feels comfortable excluding from RIC protections are sophisticated persons who qualify as "qualified purchasers" under 40 Act Section 3(c)(7). While the Proposal focuses on the burdens imposed by states beyond Commission disclosure review, it fails to consider or compare the costs and benefits the same sorts of burdens the exchanges and the Commission impose on the great majority of registered offerings.[33]

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27 40 Act § 10(a), 15 U.S.C. § 80a-10(a); *see also* Interpretive Matters Concerning Independent Directors of Investment Companies, Rel. No. IC-24083 (Oct. 14, 1999) (citing to 40 Act Section 10(a) which prohibits a board from being composed of more than 60 percent "interested persons"). Further, even for funds relying on certain exemptive rules under the 40 Act, independent directors must constitute a majority of the board, independent directors must select and nominate other independent directors, and legal counsel for independent directors must be independent. Role of Independent Directors of Investment Companies, Rel. Nos. 33-7932, 34-43786, and IC-24816 (Jan. 16, 2001).

28 40 Act § 17(a), 15 U.S.C. § 80a-17(a); *see also* GuideStone Financial, et.al, SEC Staff No-Action Letter (Dec. 27, 2006) ("Section 17(a) [of the 40 Act] was designed to prevent self-dealing and other forms of overreaching of a registered investment company by its affiliates."). Section 17(d) and Rule 17d-1 further prohibit affiliated investment vehicles from participating in joint transactions absent exemptive relief from the Commission. 40 Act § 17(d), 15 U.S.C. § 80a-17(d); 17 CFR § 270.17d-1.

29 40 Act § 18(f)(1), 15 U.S.C. § 80a-18(f)(1).

30 17 CFR § 270.38a-1.

31 40 Act § 8(b), 15 U.S.C. § 80a-8(b); 17 CFR § 274.11A (designating Form N-1A as the registration statement for open-end management investment company offerings).

32 40 Act § 7(a), 15 U.S.C. § 80a-7(a) (prohibiting an investment company from publicly offering its securities unless it is registered under the 40 Act). A RIC's Securities Act registration statement contains a check box to affirm that the RIC is registered under the 40 Act.

33 While Section I.B. of this comment letter describes the very sizable non-traded BDC and non-traded REIT markets, those markets are dwarfed by the market capitalization held in exchange-traded securities and particularly in RICs. *See* SIFMA, *Capital Markets Outlook* at 23 (2026) (stating that the "[t]otal U.S. equity market cap was $68.2 trillion in 2025 …."); *see also* ICI, *2026 Investment Company Fact Book* at 12 (stating that RICs "managed $45.1 trillion in total net assets at year-end 2025 …."). While Section II.B.2.a. of the Proposal mentions exchange listing standards, it does so to explain disclosure requirements, not substantive protections.

The comparison between state, exchange and Commission substantive standards is not only about the similarity of burdens; it is about the similarity of purposes. State substantive standards are not meant to favor one business model over another, as opponents of merit review often claim. Instead, state substantive standards are meant to ensure that offerings are fair by considering business-neutral issues, such as whether the issuer has sound corporate governance, controls in place to mitigate conflicts of interest, or the ability to pay investors. In the context of exchange-listed securities and RICs, the Commission finds these same kinds of protections to be virtues as demonstrated by the fact that the Commission approves all exchange rules[34] and writes all RIC rules. In other words, federal requirements that go beyond disclosure review are integral parts of the federal securities laws. And it seems very unlikely that the Commission would support abolishing all exchange rules or asking Congress to repeal the 40 Act.

Therefore, there is a significant weakness in the Proposal's methodology. By failing to consider the substantive protections provided by exchange rules and RIC requirements, the Commission does not fully describe how the federal securities laws protect investors. It is far more expansive than through disclosure alone. Further, by not describing federal investor protections fully, the Proposal suggests a false dichotomy between the Commission's disclosure review process and the reviews conducted by states, including merit review.

A more accurate picture is that the burdens the federal government imposes on offerings under its jurisdiction are materially similar to the kinds of burdens imposed by state registration on offerings under their jurisdictions. The Proposal does not explain why substantive protections are worthwhile in the largest public registered markets, but should be deprived to other parts of the public registered markets that are being protected by the states. The Proposal cannot do so because it fails to account for the full federal picture. At the same time, the Commission must concede that these sorts of 'merit' protections are necessary and useful because the Commission is ultimately the master of all of these rules and requirements. In fact, even the Commission's only action to define a "qualified purchaser" under Section 18(b)(3) involves a registration exemption that contains a concentration limit; i.e., a merit provision.[35] This approach makes the Commission a merit regulator in the public markets.

Recognizing that the great majority of registered offerings are subject to substantive protections beyond disclosure review, the Proposed Definition must then be seen in a different light. What the Proposed Definition would actually do is create an enormous new investor protection gap by allowing whole classes of registered offerings to issue with materially less scrutiny and fewer substantive protections than most other SEC-registered offerings.

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34 *See* Exchange Act § 19(b), 15 U.S.C. § 78s(b); and SEC, Commission Review of SRO Rules (July 13, 1998).

35 17 C.F.R. § 230.251(d)(2)(i)(C).

The Commission's reasoning for suggesting states be preempted, namely that state review requirements are "likely to be unduly burdensome … *in light of … the investor protections that the Federal securities laws provide for such offerings*,"[36] fails to acknowledge that (1) such remaining federal protections would be minimal, while (2) most other registered offerings would still be protected by substantive measures that the Commission has either approved or written itself.

More importantly, the Proposal is silent when it comes to explaining how the Commission would provide investors a level of protection anywhere close to that already provided through state review. Instead, the Proposal is clear that the Commission has no plans to replace these protections. What state registration does – and what Commission disclosure review alone cannot do – is make offerings safer and more fair before they are sold to retail investors. This is the real cost of preemption; the Proposed Definition would prevent states from protecting investors from offerings that contain exploitative clauses designed to favor the issuer and its insiders over investors.

The Proposal's only response to its negative consequences is to point out that the Proposed Definition would not alter the ability of states to bring enforcement actions.[37] While maintaining antifraud authority is absolutely critical, it is not a substitute for laws designed to prevent harms from occurring in the first place. By the time a regulator brings an enforcement action, investors have already been hurt and their money is usually already gone. The Commission approves and employs merit protections for parts of the public market it supervises, and so it must agree that there are circumstances where regulators should ensure that offerings contain substantive protections before they sold to investors.

Yet, the Proposal provides no explanation as to why such protections are inappropriate for unlisted offerings. That, too, is a significant weakness in the Proposal's methodology. For reasons explained above, certain unlisted offerings are among the most costly, complex, and risky products being offered to retail investors. Put differently, the Proposal does not closely consider the risks associated with the products that would be affected by the Proposed Definition and therefore cannot reasonably claim it has considered investor protection adequately.

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36 Proposal at 184 (emphasis added).

37 *Id.* at 188, 263.

E. Commission Review Cannot Replace State Registration.

The Proposal candidly explains that Commission review of offering documents is sporadic. As the Proposal puts it, staff review would be "potential."[38] The Proposal also explains that Commission review in the ordinary course is generally not timely, pointing out that "Commission staff undertake *some* level of review of each reporting company at least once every three years and reviews a significant number of companies more frequently."[39]

It is important, especially given that the Commission now seeks sole responsibility to review these offerings, to ensure that the Commission has the resources to carry out this work. A Government Accountability Office ("GAO") report published in March found that the Commission lost about 18 percent of its staff in the last fiscal year.[40] A majority of Commission staff surveyed reported that "departing employees had either unique knowledge or specific subject-matter expertise, resulting in a loss of institutional knowledge."[41] This is a particular concern for the Division of Corporation Finance ("Division"), where disclosure review is arranged along industry lines and staffed by personnel trained to understand technical, industry-specific disclosures. Staff departures have already affected the Division's work; as the GAO report states, "one supervisor said their manager *lowered their team's goals for disclosure reviews by 20 percent* in 2025 because of the loss in personnel."[42] Although the Commission recently posted four attorney positions and one law clerk position for the Division,[43] the Division lost 14 percent of its staff last year, numbering 58 positions.[44] It appears the Division lacks the staffing to conduct basic reviews of these offerings, let alone replace state registration and the investor protection benefits it provides.

Further, last August the Commission's Office of Inspector General ("OIG") identified concerns with the Division's disclosure review program ("DRP") and warned that problems could grow if the Division took on more issuer review.[45] The concerns identified in the GAO and OIG reports are likely to grow worse. The significant loss of staff has occurred at the same time the

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38 *Id.* at 187.

39 *Id.* at 188 n. 462 (emphasis added).

40 U.S. GOV'T ACCOUNTABILITY OFF., GAO-26-107813, SECURITIES AND EXCHANGE COMMISSION: RECENT WORKFORCE REDUCTIONS AND OTHER PERSONNEL MANAGEMENT CHANGES (2026) ("GAO Report").

41 *Id*.

42 *Id.* at 20 (emphasis added).

43 SEC, *Disclosure Review Attorney*, USAJOBS (July 2026); SEC, *Disclosure Review Attorney*, USAJOBS (July 2026); SEC, *Disclosure Law Review Clerk*, USAJOBS (July 2026).

44 GAO Report, *supra* note 40, at 10. While it must be the case that not every departing Division employee was involved in disclosure review, a prior Division Director reported that "70% [of Division staff] are focused on disclosure review." Erik Gerding, Former Dir., SEC Div. of Corp. Fin., The State of Disclosure Review (June 24, 2024).

45 OFF. OF INSPECTOR GEN., REP. NO. 586 IMPROVED DOCUMENTATION AND GUIDANCE CAN HELP STRENGTHEN CORPORATION FINANCE'S DISCLOSURE REVIEW PROGRAM at i, 4 (2025) ("OIG Report").

Commission is attempting to develop a regulatory framework for digital assets and has increased access for nonpublic companies to submit draft registration statements.[46] In other words, the Commission plans to give much more work to far fewer staff.

Just as important, as explained above, the Commission's approach to reviewing offerings is not just a matter of bandwidth; the problem lies in a review process that fails to address certain critical weaknesses in offerings. While the Division reviews offerings only for compliance with Securities Act requirements, states will review where appropriate for disclosures consistent with NASAA's statements of policy. Further, while the Commission "does not evaluate the merits of any transaction or determine whether an investment is appropriate for any investor,"[47] many states will evaluate whether an offering contains extraordinary investment risks, including excessive fees, unreasonable leverage, inappropriate conflicts of interest, unsuitable investor eligibility standards, or other substantive terms that may adversely affect retail investors.

The importance of state registration is evident from the fact that some states have been able to stop abusive and unfair offerings, which later turned out to be frauds, that the Commission missed.[48] For example, between 2006 and 2014, the Commission registered multiple non-traded REIT offerings of United Development Funding ("UDF"),[49] while the Ohio Division of Securities declined to do so. It was ultimately revealed that UDF was operating a Ponzi scheme that harmed some 30,000 investors across the country.[50] Using its registration code, the Ohio Division of Securities spotted "significant red flags" in UDF's offering documents and financial statements.[51] Because of Ohio's state registration procedures, Ohio investors were not among UDF's victims.[52]

In another example from this last February, the Washington Department of Financial Institutions ("DFI") brought fraud charges against iCap Enterprises, its founders and related parties (collectively, "iCap"), alleging that, after failing to generate adequate revenue from its real estate investments, iCap abandoned legitimate business operations and began to run a Ponzi scheme.[53] iCap allegedly relied on federal registration exemptions before seeking to register an offering with

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46 *Id.* at 6.

47 SEC, *Filing Review Process* (last updated Sept. 27, 2019).

48 *See* OH Div. Sec. Report, *supra* note 13, at 64 (noting that the Commission "given resource constraints, only conducts sporadic and 'selective' rather than full reviews of registration statements.").

49 *See, e.g.*, Prospectus, Registration No. 333-127891 (May 15, 2006); UDF III, L.P., Registration Statement (Aug. 26, 2005); UDF V, Registration Statement, (Feb. 26, 2014).

50 OH Div. Sec. Report, *supra* note 13, at 85 (arguing that the $960 million taken from investors could have been deployed to other sponsors had the fraudulent offering been screened out).

51 *See id.* at 64.

52 *See id.* at 44.

53 WASH. STATE DEP'T OF FIN. INSTS., *Washington Department of Financial Institutions Takes Action Against iCap and Founders Over Ponzi Scheme* (Feb. 17, 2026).

the Commission and the DFI. The Commission approved iCap's application,[54] while the DFI rejected it after determining that iCap could not make the required payments to investors. Subsequently, the DFI performed an investigation and brought charges alleging, among other things, that iCap "failed to deploy investor funds on legitimate business operations and relied on new investors to cover interest obligations to existing investors."[55]

As set out above, it is evident that state registration provides tangible benefits for investors that will not otherwise be provided by the Commission. Section 18(b)(3) requires any rule defining "qualified purchaser" to be consistent with the protection of investors. There is no reasonable way the Commission can claim the Proposed Definition meets this requirement, and it should therefore be withdrawn from the Proposal.

II. The Proposed Definition Is Arbitrary and Capricious.

A. The Proposal Does Not Quantify the Benefits to Issuers or the Costs to Investors.

The Proposal states that complying with state registration requirements "rais[es] the cost of accessing the capital markets,"[56] but does not quantify those costs because the Commission claims it does not "have data to estimate" such costs.[57] The Commission assumes they "are likely to be burdensome."[58] For at least some unlisted offerings, none of that is correct. For instance, for the average non-traded BDC or non-traded REIT offering, a report by the Ohio Division of Securities, derived from public data filed with the Commission, suggests those costs are de minimis, at no more than 1 percent of the total offering amount of such offerings.[59] That finding makes sense because issuers of such offerings can typically contemplate and address anticipated state disclosure and other requirements at the same time they draft federal disclosure requirements in their registration statements.[60]

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[54] iCap Vault 1, LLC, Registration Statement (Sept. 18, 2020).

[55] Statement of Charges and Notice of Intent to Enter Order to Cease and Desist; to Impose a Fine and Charge Costs; and to Deny Future Registrations, In re iCap Enters., Inc., et al., Order No. S-23-3608-26-SC01 ¶ 16, at 5 (Was. Dep't of Fin. Insts. Sec. Div. Feb. 17, 2026).

[56] Proposal at 183.

[57] *Id.* at 261.

[58] *Id.* at 185.

[59] *See* OH Div. Sec. Report, *supra* note 13, Appendix G (compiling "Blue Sky Expenses as % of Maximum Offering" information and including excerpts from multiple issuers' "Other Expenses Of Issuance and Distribution" itemizations on SEC Form N-2).

[60] *See, e.g.,* EQT Exeter Real Estate Income Trust, Inc., Registration Statement (July 7, 2023) (providing state-specific suitability disclosures, including income and net worth standards and limits on investments).

On the other hand, the Proposal makes no attempt to either quantify or qualitatively measure the costs to investor protection of preempting state registration but rather speculates in a single paragraph that certain investor protections "may" be removed but any resulting risk "could be mitigated" by the investor protections for federally registered offerings.[61] This level of analysis falls short of what the Commission is required to do to measure the potential costs of its proposal in order to perform an adequate economic analysis, or to make a determination that the Proposed Definition is in the public interest. Just using the costs of the two cases cited above, where Commission disclosure review missed frauds, it is evident that the costs to investors can be severe.[62]

The economic consequences to investors of a rule proposal are valid parts of the Commission's obligation to measure anticipated costs and benefits. As the former Chief Economist and Director of the Commission's Division of Risk, Strategy, and Financial Innovation (now the Division of Risk and Economic Analysis) explained, "… in certain rulemakings, issues related to investor protection also may show up on the other side of the ledger as a cost," particularly "if the Commission is evaluating a regulatory approach that provides less investor protection than an alternative proposed by a commenter."[63] That is the case here; NASAA urges the Commission to withdraw the Proposed Definition primarily due to the costs it will impose on investors.[64] NASAA also believes that, with respect to the Proposed Definition, the Commission should include within its economic analysis the alternative of not amending Rule 146 as proposed.[65] In prior rulemakings

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61 *See* Proposal at 263.

62 OH Div. Sec. Report, *supra* note 13, at 85 (citing costs of UDF fraud at $960 million); WASH. STATE DEP'T OF FIN. INSTS., *supra* note 54 (finding $250 million raised).

63 Craig M. Lewis, Former Chief Economist and Dir., SEC Div. of Risk, Strategy, and Fin. Innovation, Speech at the Pennsylvania Association of Public Employee Retirement Systems Annual Spring Forum: Investor Protection Through Economic Analysis at 5 (May 23, 2013) ("Lewis Speech").

64 Anticipating that the Commission may respond that its economic analysis burden extends only to considerations of efficiency, competition and capital formation, three observations are apparent. First, the Commission acknowledges the potential link between reduced investor protection as a result of the Proposed Definition and harms to capital formation. *See* Proposal at 263. Second, the commandment emanating from NSMIA to consider whether an action will promote efficiency, competition and capital formation also requires the Commission to consider investor protection. *See* Securities Act § 2(b), 15 U.S.C. § 77b(b), and Exchange Act § 3(f), 15 U.S.C. § 78c(f). The concepts are linked in text and the legislative history behind these provisions makes clear that Congress understood investor protection to be the foundational consideration. *See* H.R. REP. NO. 104-622 at 31 (1996) (stating that "[Exchange Act Section 3(f)] makes clear that matters relating to efficiency, competition, and capital formation *are only part of the public interest determination*, which also includes, among other things, consideration of the protection of investors. *For 62 years, the foremost mission of the Commission has been investor protection, and this section does not alter the Commission's mission*.") (emphasis added). Third, with respect to Section 18(b)(3) in particular, the only limiting principles in the text are the references to "investor protection" and the "public interest." The Commission would have to ignore multiple expressions of legislative intent, in text and history, to conclude that it is not obligated to rigorously evaluate costs to investors.

65 The Commission's own guidance for conducting economic analyses directs the staff to consider "including the alternative of not adopting a rule." Memorandum from the Division of Risk, Strategy, and Financial Innovation

and studies, the Commission has considered and attempted to qualitatively evaluate and, where possible, quantify the degree to which rulemakings would impose costs on investors.[66] The Commission needs to undertake the same level of effort here.

The economic analysis supporting the Proposal cannot be considered acceptable under Administrative Procedure Act standards until the Commission considers costs to investors and determines that those costs are worth the asserted benefits.[67] The Commission's unsupported claim that the benefits of the Proposed Definition are immeasurable appears to be premature. The Commission may also claim that the costs to investors are also difficult to measure. That may also be premature and we ask the Commission to reconsider what is available to evaluate such costs. For instance, the Commission could derive an estimation of the cost of frauds associated with certain unlisted offerings from federal and state public enforcement filings, and it could derive an estimation of the costs to investors of unfair terms in certain unlisted offerings, for instance, from FINRA arbitration records, based on investor complaints related to non-traded BDCs and REITs. A state regulator has already shown how this data can be useful.[68] The Commission also has voluminous relevant internal nonpublic information available to it, including tips, complaints, and referrals, records of investor interactions with the Office of Investor Education and Assistance and the Ombuds, examination records, and enforcement files. With no cost to the Commission other than the time necessary to perform adequate investigation and analysis, the Commission has enough information within its reach to evaluate costs to investors.

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and the Office of the General Counsel to the Staff of the Rulewriting Divisions and Offices Regarding Current Guidance on Economic Analysis in SEC Rulemakings at 1 (Mar. 16, 2012).

66 *See* Craig M. Lewis, *The Economic Implications of Money Market Fund Capital Buffers* (SEC Div. of Econ. and Risk Analysis, Working Paper 2014-01, 2013) (finding that money market capital buffers larger than what is sufficient to provide price stability under normal market conditions would reduce investor returns and significantly reduce the utility of the product to investors); *see also* SEC Rel. Nos. 33-11211, 34-97876, Money Market Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N-CSR and Form N-1A at 204, 224-28 (July 12, 2023) (acknowledging that the rule would impose liquidity fees directly on redeeming shareholders as a cost of the regulatory design); SEC Rel. No. 34-86031, Regulation Best Interest: The Broker-Dealer Standard of Conduct at 375-76 (June 5, 2019) (acknowledging that the rule would impose compliance costs on broker-dealers, which could affect retail investors through changes in the availability, choice, and cost of investment services).

67 *See Business Roundtable et al. v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (vacating rule after finding that the Commission "neglected its statutory responsibility to determine the likely economic consequences of Rule 14a-11 and to connect those consequences to efficiency, competition, and capital formation" and faulting the Commission for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule"); *Michigan v. EPA*, 576 U.S. 743, 753 (2015) (holding that it was unreasonable for administrative agency to ignore costs of regulatory action, particularly where costs greatly outweighed benefits); and *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (holding that NHTSA rescission of passive restraint standards was arbitrary and capricious in part because agency took no account of critical distinctions between types of seatbelts, failed to articulate a basis for requiring non-detachable seatbelts, and therefore failed to make a rational connection between the facts and the agency's judgment).

68 *See* OH Div. Sec. Report, *supra* note 13, Appendix C.

Further, regardless of the means, the Commission must still consider all of the facts necessary to make a rational decision.[69] The Commission should perform a rigorous qualitative analysis of costs before it can claim that such costs are not quantifiable. As Mr. Lewis explained regarding the difficulty of evaluating the benefits and costs of investor protection, "the evaluation of benefits and costs always begins with developing a general framework that is entirely qualitative. Only once this framework has been developed does the analysis progress to quantifying benefits and costs, where possible, and evaluating the benefits and costs of the proposed regulatory approach and reasonable alternatives." [70]

As the discussion in this comment letter makes clear, the sorts of offerings the Commission proposes to preempt states from reviewing carry significant risks for retail investors, are a frequent source of investor losses and complaints, and can be vehicles for fraud.[71] The Proposal does not evaluate significant aspects of the proposed action, including the likelihood and costs of increased investor harms if issuers of unlisted offerings are free to ignore state registration requirements. In this case, the Commission has failed to recognize the insubstantial costs of state registration to certain unlisted offerings contained in its own public data, and it fails to weigh those benefits against the likelihood that its removal of a layer of regulatory protection will harm investors. The Commission's single paragraph on potential investor costs does not satisfy any standard of acceptable rigor in agency rulemaking.

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69 *See Chamber of Commerce v. SEC*, 85 F.4th 760, 774 (5th Cir. 2023) (concluding that Commission is not necessarily obligated to perform quantitative analyses, but nonetheless holding that Commission acted arbitrarily and capriciously for not considering all relevant factors and ignoring commenters' suggestions of available data and means to quantify costs).

70 Lewis Speech, *supra* note 63, at 6 (May 23, 2013).

71 As yet another example, see SEC, AR Capital, LLC, et al., Former Reit Manager and Executives to Settle SEC Charges for More than $60 Million, Lit. Rel. No. 24537. (July 17, 2019).

B. The Proposal Ignores Substantive Investor Protection Measures That Apply to Other Registered Offerings.

The Commission's failure to acknowledge in the Proposal that the federal securities laws require substantive protections for exchange-listed offerings and RIC offerings also renders the Proposal arbitrary and capricious for three reasons. First, by ignoring the costs the Commission deems necessary and appropriate for other registered offerings, it cannot reasonably determine that state registration costs are unduly burdensome to achieve similar investor protections. Second, by ignoring the role substantive protections play in other registered offerings, the Proposal mischaracterizes the protections provided by the federal securities laws generally. Third, the Proposal does not explain why materially less investor protection would be acceptable for unlisted offerings, especially where those offerings come with higher costs and less liquidity, and are marketed directly to retail investors.

The Commission should withdraw the Proposed Definition because it has not adequately considered the costs and benefits to issuers and investors associated with state review. In our experience in reviewing these offerings, we believe that a fair comparison of the costs associated with state review are significantly outweighed by the benefits to investors such that it would be difficult to claim that the Proposed Definition would be in the public interest or consistent with the protection of investors.

III. The Commission Misinterprets the Extent of Its Powers Under Section 18(b)(3).

A. The Definition of "Qualified Purchaser" Under Section 18(b)(3) Is Limited to Sophisticated Investors.

The legislative history of NSMIA specifically surrounding Section 18(b)(3) and the intended definition of "qualified purchaser" makes clear that the preemptive power Congress granted to the Commission is meant to be used only in circumstances where the investors to whom an offering is directed are sophisticated enough not to need the protection of state regulation. When the House Commerce Committee described the preemptive power granted under Section 18(b)(3), it stated that:

> "In all cases, however, the Committee intends that the Commission's definition 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."[72]

The Senate Committee on Banking, Housing, and Urban Affairs similarly described the "qualified purchasers" who could be preempted from state blue sky laws as follows:

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[72] H.R. REP. NO. 104-622 at 31 (1996) (emphases added).

> "*Based on their level of wealth and sophistication*, investors who come within the definition of 'qualified purchasers' do not require the protections of registration."[73]

The Commission previously held precisely the same understanding. In 2001, the Commission proposed to amend Rule 146 to define a "qualified purchaser" under Section 18(b)(3) as "any accredited investor as defined in Sec. 230.501(a)"[74] because it recognized that:

> "NSMIA's legislative history indicates that qualified purchasers for purposes of the Securities Act preemption of state regulation should include investors that, by virtue of their financial sophistication and ability to fend for themselves, do not require the protections of registration under the state securities laws."[75]

Indeed, the Commission concluded that the language of the Commerce Committee Report "makes clear that the *primary factor* for our consideration in defining qualified purchaser *must be the financial sophistication of these investors*."[76] Against this specific analysis of the legislative history of NSMIA – as it applies to Section 18(b)(3) – the Proposal cites the opening language of the Commerce Committee Report,[77] and does not mention the Commission's 2001 proposal.

Further proof that the term "qualified purchaser" is limited to sophisticated investors is found in the other place where NSMIA added the term to the federal securities laws; namely, 40 Act Section 3(c)(7). As the Commission explained in its 2001 proposal regarding this definition, "Congress determined that the level of a person's investments should be used to measure the person's financial sophistication in the context of the 1940 Act."[78] In other words, when seen in context, the concept of a "qualified purchaser" is conceived of consistently across NSMIA as being

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73 S. REP. NO. 104-293 at 15 (1996) (emphasis added).

74 Defining the Term "Qualified Purchaser" Under the Securities Act of 1933, SEC Rel. No. 33-8041, 66 FR 66839, 66847 (proposed Dec. 19, 2001) ("2001 Proposal").

75 *Id.* at 66841.

76 *Id.* at 66845 (emphases added). The Commission's 2001 understanding of the term "qualified purchaser" is the correct one for two reasons. First, the House Committee told the Commission that it "intends that the Commission move promptly to adopt such a rule or regulation to give effect to the provision." H.R. REP. NO. 104-622 at 31 (1996). The Commission was acting at that time in an expressly faithful attempt to carry out a legislative mandate in the manner intended by Congress. The Proposed Definition, on the other hand, has scant claim to be carrying out the will of Congress. Second, the Supreme Court has found that, historically, respect for an agency's interpretation of a federal statute was "especially warranted" when that interpretation was "issued roughly contemporaneous with enactment of the statute and remained consistent over time." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (citations omitted). The Proposed Definition does not measure up to this standard but rather expresses a current agency policy preference contrary to congressional intent.

77 Proposal at 185-86.

78 2001 Proposal, *supra* note 75, at 66842.

reserved for persons sophisticated enough not to need certain forms of regulatory protection. The Proposed Definition therefore runs against the grain of the statute overall.

Agency interpretations of ambiguous statutory terms that contravene legislative intent have failed to survive judicial scrutiny, even where Congress has given an agency the power to define a statutory term.[79] Courts have also held that it is appropriate to interpret ambiguous statutory terms in relation to the overall construction of the statute in which they appear.[80] Here, the legislative history surrounding Section 18(b)(3) in particular has a well-defined limit, recognized by both houses of Congress and previously by the Commission itself. That intention is confirmed by the overall construction of NSMIA. These factors point to the conclusion that preemption of state registration of securities offerings per Section 18(b)(3) was meant to be a limited tool for use where investors did not need the protection of state regulation.

As explained above, that is not the case when it comes to certain of the offerings the Commission proposes to preempt. States play a vital role in the regulation of unlisted offerings that the Commission cannot fill. Conversely, these same factors show that preemption was not meant to be a tool to eviscerate the dual federal-state responsibility to regulate securities offerings.[81] If that were Congress' intention, it would have done so explicitly. For the reasons described above, state registration of unlisted offerings is neither duplicative nor unnecessary, preservation of state regulation over those offerings is consistent with the purposes of NSMIA, and the Proposed Definition exceeds the authority Congress granted to the Commission under Section 18(b)(3).

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79 *See*, *e.g.*, *Council for Urological Interests v. Burwell*, 790 F.3d 212, 221-24 (D.C. Cir. 2015) (finding Department of Health and Human Services reading of a definitional grant under the Stark Law to be "tortured" because Secretary's interpretation failed to adequately address the Act's legislative history, particular a Conference Report).

80 *See Loper Bright Enters.*, 603 U.S. at 392 n. 4 (2024) (stating that "statutes can be sensibly understood only 'by reviewing text in context.'") (quoting *Pulsifer v. United States*, 601 U.S. 124, 133 (2024)); *see also Nat'l Assn. of Private Fund Mgrs. v. SEC*, 103 F.4th 1097, 1111 (5th Cir. 2024) (finding that "'[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"') (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (citation omitted)).

81 The Proposal cites *Lindeen v. SEC*, 825 F.3d 646 (D.C. Cir. 2016), for the proposition that "the Commission is not prohibited from concluding that all offerees and purchasers in an offering are qualified purchasers."[81] Proposal at 185. Outside of its decision to uphold the Commission's application of the definition of "qualified purchaser" to purchasers of Regulation A Tier 2 offerings, the value of *Lindeen* is in doubt. *Loper Bright Enters. v. Raimondo* overturned *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), under which *Lindeen* was decided. However, the *Loper* court also held that prior federal court holdings regarding "specific agency actions" that relied on the *Chevron* framework are "still subject to statutory *stare decisis* despite [our] change in interpretive methodology." *Loper*, 603 U.S. at 376. Federal courts following *Loper* have applied this distinction. *See In re: MCP No. 185 et al. v. FCC*, 124 F.4th 993, 1002-03 (6th Cir. 2025) (holding that *stare decisis* applied only to a particular FCC ruling not at issue in the case, and therefore that a prior holding applying *Chevron* did not bind the court). While the specific agency action upheld in *Lindeen* may remain precedent, the *Lindeen* court's deference to the Commission's reading of Section 18(b)(3) is an invalidated interpretive methodology.

CONCLUSION

The Commission should withdraw the Proposed Definition because it would substantially harm investors based on an arbitrary and capricious rationale that defies Congress' understanding of the purpose of Section 18(b)(3). NASAA appreciates the opportunity to comment on the Proposal. Thank you for considering these views. Should you have any questions about this letter, please contact either the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,

Marni Rock Gibson

Marni Rock Gibson
NASAA President