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SPEECH

Remarks to the Annual Conference on Federal and State Securities Cooperation

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Good morning and welcome to the annual conference on federal and state securities cooperation, organized jointly by the North American Securities Administrators Association (“NASAA”) and the U.S. Securities and Exchange Commission (“SEC” or “Commission”).^[1] Inside the SEC, this gathering is often called the “Section 19(d) conference” after a provision of the Securities Act of 1933 (the “Securities Act”). That provision contains a declared statutory policy calling for greater federal and state cooperation in securities matters, including maximum effectiveness of regulation, maximum uniformity in regulatory standards, and minimum interference with the business of capital formation. However, we do not need a statute to tell us what the SEC and state securities regulators have long recognized — that we have shared goals and a common purpose to protect investors and strengthen our capital markets.

For the past two-and-a-half months, I have had the privilege of serving as the Chairman of the Securities and Exchange Commission on an acting basis. As we wait for the pending Senate confirmation of the SEC’s incoming chairman, I would like to take a few moments to pay tribute to the first commissioner

under whom I served. In the many challenges that I have faced in leading the SEC, whether it was dealing with personnel, organizational change, the media, interagency coordination, the executive branch, or the legislature, it would be his guidance, wisdom, and decision-making that I witnessed back then that I have repeatedly drawn upon now in my role as Acting Chairman.

That commissioner was William P. Wood, who headed the California Department of Corporations. Bill was a terrific mentor and a friend ever since I was appointed to work for him over 21 years ago.

Thus, there is no question that my role and experience as a state securities regulator has had a profound impact on how the SEC is run today. Similarly, that experience as a state regulator has allowed me to recognize the benefits of close federal-state coordination and the different perspectives that each of us bring. NASAA members, as state securities regulators, often oversee smaller local businesses and firms, whereas the SEC, as a federal agency, oversees firms that have a more national reach. However, over time these distinctions may have blurred. This conference provides us with a forum to consider how we can draw clearer lines to better conserve our resources and, importantly, those of taxpayers.

In this regard, there are two potential areas worth re-evaluating the divide between federal and state regulation. The first involves the threshold at which mid-sized investment advisers must register with the SEC, instead of a state.

The second is the types of securities transactions for which federal securities laws preempt state laws with respect to registration or qualification, and the degree of such preemption.

Periodic examination of the Dodd-Frank split for mid-sized investment advisers

Both of these issues have their roots in the National Securities Markets Improvement Act of 1996 (“NSMIA”).^[2] For regulation of investment advisers, NSMIA divided the role of the SEC and state securities authorities by the size of the advisers.^[3] At the time, NSMIA provided the states with the authority to oversee investment advisers with up to \$25 million in assets under management (“AUM”), with the SEC generally overseeing investment advisers with more than \$25 million in AUM. Congress set the \$25 million AUM

threshold to distinguish investment advisers with a national presence from those that were essentially local businesses.[4]

Fourteen years later, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) raised the NSMIA threshold by re-allocating responsibility for oversight to the states of certain mid-sized investment advisers, that is, those that had between \$25 and \$100 million of AUM, with the SEC generally responsible for advisers with more than \$100 million in AUM.[5] Notably, the Dodd-Frank Act provided the Commission with rulemaking authority to raise the \$100 million registration threshold.[6] Again, Congress intended that the SEC should focus its resources on larger investment advisers, and that the states could provide more effective surveillance of smaller firms.[7]

With the continued growth in advisers’ assets under management, the Dodd-Frank Act divide between state and federally-registered investment advisers may have again become unbalanced. Since 2012 when investment advisers were required to comply with Dodd-Frank Act’s requirements, the number of registered investment advisers has grown by approximately 45 percent to 15,411 advisers. Of these 15,411 advisers, there are 8,956 advisers that had between \$100 million and \$1 billion in AUM, up from 5,853 in 2012.[8] In addition, there are 4,756 advisers with more than \$1 billion in AUM, as compared to 2,921 in 2012.[9]

Good regulatory practice includes periodically reviewing our rules to ensure they remain fit for purpose given changes over time. It has now been 15 years since the Dodd-Frank Act. In my view, it is time to re-examine the mid-size adviser regulatory split and consider whether it should be adjusted. Doing so could help to ensure Congress’s intent that the SEC focus on the larger, more complex investment advisers while the states concentrate their resources on the smaller firms. In this regard, I have asked the SEC staff conduct such a periodic evaluation on whether the current split between the SEC and the states remains optimal. We value the perspective of our state regulatory partners and encourage you to engage with Division of Investment Management staff on this topic.

Reevaluating the roles of federal securities laws and state laws in regulating the

registration or qualification of securities transactions

Turning to the second topic, NSMIA also gave the federal securities laws exclusive jurisdiction to regulate the registration or qualification of certain types of securities transactions.^[10] Since NSMIA, other laws, including the JOBS Act,^[11] have expanded the types of securities transactions subject exclusively to federal regulation.^[12] I recognize that the concept of federal preemption has been long a concern with state regulators. However, it would be appropriate to re-consider whether federal preemption remains appropriately calibrated.

For instance, the question of whether federal laws preempt state laws can be complicated outside of a situation involving a traditional IPO.^[13] In a traditional IPO, the Securities Act preempts state registration requirements for the primary offering of securities listed on a national securities exchange.^[14] The Securities Act also preempts secondary trading of such securities for the same reason,^[15] and also because the company will be required to file reports under the Securities Exchange Act of 1934 (the “Exchange Act”).^[16]

On the other hand, consider if a company files a Form S-1 to register the primary offering under the Securities Act but does not list the securities on a national securities exchange. In this situation, the company’s primary offering of securities is subject to state registration requirements. With respect to secondary trading of such securities, state registration requirements also apply even if the company registers the resale under the Securities Act on Form S-1 or Form S-3. However, if a shareholder relies on Section 4(a)(1) of the Securities Act, including the Rule 144 safe harbor, to resell their shares, then state registration requirements do not apply.^[17] Do these results make sense? Where the company has expended time and resources to prepare a registration statement subject to review by the SEC staff, should that transaction also be subject to additional review by states, especially when such review may not yield additional protection for investors?

When the primary offering is not registered under the Securities Act, approximately half of the Act’s exemptions from registration also preempt state registration or qualification requirements.^[18] These include Rule 506(b), Rule 506(c), Regulation A – Tier 2, and Regulation Crowdfunding.^[19] However, unless such securities are listed on a national securities exchange or the company is subject to the Exchange Act’s reporting requirements, any

secondary trading of those securities will be subject to state registration or qualification requirements. Again, does this result make sense?

For another example, consider a small business that raised capital pursuant to Regulation A – Tier 2 and sold its securities to retail investors. Even though the company's sale to the investors were exempt from state registration requirements and the securities are not restricted securities, the investors cannot resell such securities without consideration of state securities laws. The marginal cost and added complexity of complying with state laws in this situation may adversely impact secondary liquidity, which in turn could make offerings pursuant to Regulation A – Tier 2 less attractive to investors and limit the ability of small businesses to raise capital.

As these scenarios highlight, the interplay between federal and state securities laws with respect to the registration or qualification of securities transactions should be reconsidered. This is particularly the case when a person needs to consider the registration requirements of not just a single state, but perhaps dozens of states. In addition to evaluating which securities transactions should receive federal preemption, we should also consider the degree of such preemption. It does not need to be all or nothing in the sense of full preemption or no preemption. There can be other alternatives. For example, we can have a system where a securities transaction needs to comply with the registration or qualification requirements of only a single state, such as the state where the company's headquarters are located, in addition to the federal securities laws. To the extent such requirements have been satisfied, then the company would not need to comply with the registration or qualification laws of every state in which the offer or sale occurs. This approach to preemption may have the effect of lowering costs and facilitating capital formation, especially for smaller companies, while maintaining investor protection.

I welcome input from the public and our state regulatory partners on this topic of reevaluating the roles of federal and state securities laws in regulating the registration or qualification of securities transactions. At the end of the day, all of us are in favor of strong capital markets and strong investor protection, while ensuring that costs are at the level needed to achieve those goals.

Conclusion

Thank you for your attention and for inviting me to speak at the 19(d) conference. This conference – and the work that all of you do – is important and necessary to help promote capital formation and to protect investors. Thank you for your dedication to public service.

[1] My remarks reflect solely my individual views as a commissioner and do not necessarily reflect the views of the full U.S. Securities and Exchange Commission or my fellow Commissioners.

[2] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996).

[3] NSMIA at § 303, enacting Section 203A of the Investment Advisers Act of 1940 (“Advisers Act”).

[4] See S. Rep. No. 293, 104th Cong., 2d Sess. (1996) at 4-5.

[5] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Rule 203A-1 under the Advisers Act provides a registration buffer for mid-sized investment advisers, such that they may, but are not required to, register with the SEC if they have AUM of at least \$100,000,000 but less than \$110,000 and they need not withdraw registration unless they have less than \$90,000,000 of AUM. 17 CFR § 275.203A-1.

[6] See Section 203A(2) (noting that the treatment for registration of mid-sized investment advisers is “\$100,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title.”). 15 U.S.C. § 80b-3a(2).

[7] See S. Rep. No. 111-176, 111th Cong., at 76 (2010).

[8] See Table 1.1 and 2.3, Investment Adviser Statistics, Securities and Exchange Commission, *available at* <https://www.sec.gov/data-research/investment-management-data> (<https://www.sec.gov/data-research/investment-management-data>).

[9] *Id.*

[10] NSMIA at § 102, amending Section 18 of the Securities Act.

[11] JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

[12] For example, the JOBS Act added preemption for Regulation Crowdfunding securities offered or sold pursuant to Section 4(a)(6) of the Securities Act, and added Section 18(b)(4)(D) to the Securities Act, which states that Section 3(b)(2) securities are covered securities for purposes of Section 18 if they are “offered or sold on a national securities exchange” or “offered or sold to a qualified purchaser, as defined by the Commission pursuant to [Section 18(b)(3)] with respect to that purchase or sale.”

[13] While NSMIA also created federal preemption for offer or sales of securities issued by an investment company registered under the Investment Company Act of 1940, these remarks will focus on preemption of securities issued under the Securities Act.

[14] See Section 18(b)(1)(A) of the Securities Act.

[15] *Id.*

[16] See Section 18(b)(4)(A) of the Securities Act.

[17] *Id.* This scenario assumes that the company continues to be subject to the reporting requirements of Section 15(d) of the Exchange Act. Additionally, resales made in reliance on Section 4(a)(7) of the Securities Act also do not need to comply with state registration requirement regardless of whether the company is subject to the reporting requirements of Section 15(d) of the Exchange Act, pursuant to Section 18(b)(4)(G) of the Securities Act.

[18] See Overview of Capital-Raising Exemptions, available at <https://www.sec.gov/files/2024-ospb-overview-capital-raising-exemptions-table-2.pdf> (https://www.sec.gov/files/2024-ospb-overview-capital-raising-exemptions-table-2.pdf).

[19] Section 18(b)(4)(C), (D), and (F) of the Securities Act.