September 15, 2025

Mr. Nicholas J. Schilling, Jr.
Supervisory Official, Office of Legal Policy
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Docket No. OLP182 – Federal Preemption of State Blue Sky Registration for Section 12 Issuers Will Boost Capital Formation and Increase Investor Access

Dear Mr. Schilling:

On behalf of the Institute for Portfolio Alternatives ("IPA"),[1] thank you for the opportunity to assist you in identifying state laws with harmful out-of-state economic impact. The IPA's members include more than 350 companies and 50,000 individuals championing alternative and private market investments, including the largest national and global asset managers and distributors (banks and other financial institutions) of alternative investments, law firms, fintech companies, and other industry partners.

Finishing the Job: The Case for Exempting State Blue Sky Registration for Federally Registered, Non-Exchange Listed Securities

An essential purpose of the federal securities laws is to ensure that America's financial markets efficiently allocate capital to growing companies. Federal regulation of securities rests on a regime of objective disclosure. Section 5 of the *Securities Act of 1933* ("Securities Act") and Section 12 and Section 15(d) of the *Securities Exchange Act of 1934* ("Exchange Act") help ensure that investors receive full, fair, and complete disclosure about publicly issued securities so that investors can make an informed investment decision and hold public companies accountable for their actions.

[1] For over 40 years, the IPA has advocated for increased investor access to private market and alternative investment strategies with low correlation to equity markets as part of a diversified portfolio and subject to effective investor protections. These strategies include real estate, credit, infrastructure, private equity, venture capital and other real assets through public and private investment vehicles. These portfolio diversifying investments, representing over $1 trillion in capital formation over the past 25 years, are a critical component of an effectively balanced investment portfolio and serve an essential capital formation function for our national, state and local economies.

The Securities and Exchange Commission ("SEC") is the primary federal regulator for securities offerings. States, under what is known as "state blue sky law," have traditionally conducted a "merit review" of offerings—a subjective assessment where state regulators decide, based on their own judgment and preferences, which securities they consider acceptable for investors. This approach often delays investment product launches – and sometimes stops them entirely. Congress recognized that this harms capital formation and, since 1996, has preempted state merit review of almost all offerings.

However, federally registered, non-exchange listed securities ("registered securities"), such as real estate investment trusts ("REITs") and business development companies ("BDCs"), which are offered by the largest asset management companies in the U.S. and globally and distributed by highly regulated financial professionals, remain subject to subjective state merit review despite being the type of offering for which state review is least justified: public offerings that the SEC has already reviewed and registered, and for which issuers must make continuous, full disclosure to shareholders. These products also provide investors with access to innovative and non-correlated asset classes (such as private real estate and private credit) that they may not otherwise have access to, enhancing diversification and long-term portfolio resilience.

State Blue Sky Laws Inhibit Capital Formation and Deny Investor Choice

State registration review consistently undermines and conflicts with federal registration review. The current landscape of state blue sky law is a patchwork of ever-shifting, inconsistent, contradictory, and misguided requirements that make product uniformity near-impossible, impede capital formation, restrict investor choice and create undue burden and expense for both product sponsors and investors.

Different state requirements can include conflicting investor net income and net worth limitations (which differ from federal law), concentration limits (which do not even exist under federal law) and other features that make state registration exceedingly challenging and often untenable for issuers.

State securities regulators can prioritize their own judgment over data and investor choice. A single state regulator, irrespective of pertinent data and pre-existing federal registration, can arbitrarily determine that a product is not good enough for investors, and in so doing, dictate decision-making in all other states. As an example, in 1980, before exchange-traded securities were made exempt from state review, the Massachusetts securities commission denied the sale of Apple's initial public offering in that state.

Subjective state merit review also undermines the integrity of our public financial markets. As a result of state blue sky laws, companies are increasingly shifting to private placements that are neither subject to SEC registration nor state blue sky laws.

State securities commissions frequently issue staff bulletins and incorporate statements of policy from the North American Securities Administrators Association ("NASAA"). Many state securities commissions essentially use NASAA as their nongovernmental organization ("NGO") to develop state rules for capital markets. Further, state commissioners often automatically or summarily incorporate into state law the policies of their NGO – NASAA – without engaging in formal rulemaking.[2]

Economic Benefits of Preempting State Blue Sky Registration

It is time to finish the job of federal preemption and end the anomalous state merit review of publicly offered securities, which would benefit America's economy in the following ways:

- Establishing parity for registered securities with other public products, such as mutual funds and other exchange-traded securities.
- Democratizing investor access to portfolio diversifying investment vehicles that support job creation, housing production, commercial property development, small and mid-sized businesses and broader economic growth.
- Maintaining effective and comprehensive investor protections through robust federal registration, ongoing disclosure, and through working with a qualified financial professional.
- Promoting strong and healthy public financial markets by thwarting the increasing shift from registered investment products to private placements, which require less disclosure and reporting.
- Catalyzing future innovation for unique registered securities amid an evolving economy and investment ecosystem.

Available Policy Actions to Federally Preempt State Blue Sky Registration for Public Securities

- The SEC can amend Rule 146 under the *Securities Act*, which interprets Section 18 of the *Securities Act*. By amending Rule 146, the SEC would fulfill a fundamental objective of the federal securities laws, which is to ensure that investors receive full, fair, and complete disclosure.

[2] The Buckeye Institute, an independent research and educational institution in Ohio, issued an analysis of the role of NGOs in rulemaking and cautioned that "state officials should remain vigilant to ensure that new regulatory provisions and model rules are drafted in the light of day, not behind closed NGO doors." "Beware the Trojan Horse of Rulemaking Nongovernment Organizations" 2, (December 19, 2024).

Amending Rule 146 would reaffirm the federal policy that, with this disclosure, an investor should be free to make her own investment decision, encourage capital formation and its efficient allocation, give new life to the public markets, and encourage innovation to meet the needs of the American investor.

The SEC has an opportunity to rationalize federal-state regulation, foster capital formation, and ensure that the SEC remains the preeminent securities regulatory authority by eliminating the last vestige of patchwork state merit review of publicly registered securities. The SEC exercised this broad authority to define "qualified purchaser" in 2015 when it adopted the Regulation A+ amendments (as part of the 2012 JOBS Act). The SEC can exercise its authority again and define "qualified purchaser" to include any investor in a public offering of securities registered under Section 5 of the Securities Act and registered (or to become registered by virtue of the offering) under Section 12 of the *Exchange Act*. It can do so with a simple amendment to Rule 146 under the *Securities Act*.

With this change, state securities commissions would retain the ability to investigate and bring enforcement actions with respect to fraudulent securities transactions and unlawful conduct, to require issuers to file with the states any document filed with the SEC, solely for notice purposes and the assessment of fees, and to enforce filing and fee requirements by suspending the offer or sale of securities within a given state for the failure to file or pay the appropriate fee.

Executive Order to Increase Access to Alternative Investments in Retirement Plans

On August 7, President Trump issued an Executive Order, *Democratizing Access to Alternative Assets for 401(k) Investors* (the "Order"), which directs the Department of Labor and SEC to review existing policies and regulations and adopt rules that move our country closer to the goal of retirement security for all Americans.

The Order expressly states that the SEC, in an effort to "facilitate access to investments in alternative assets by participants" in defined contribution retirement plans, to also consider "revisions to existing SEC regulations and guidance relating to accredited investor and qualified purchaser status to accomplish the policy objectives of this order."

Investing in non-exchange listed REITs and BDCs provides a reliable, wealth-building avenue for retirement savers—many firms offering these products are also building innovative solutions for 401(k) retirement savers--and state blue sky laws stand in stark contrast with the goals set forth by the Order. Establishing federal preemption of state blue sky laws would align with the new policy of the United States promoting investor access to alternative investments.

Thank you for considering IPA's recommendations to address state policies that negatively impact capital formation and investor choice. We look forward to supporting you in your efforts to strengthen America's economy. Please contact Jeff Evans, IPA head of government affairs, at jevans@ipa.com with questions.

Sincerely,

Anya Coverman
President & CEO