BETTER MARKETS

SPECIAL REPORT

More Than Ever, the States Have a Vital Role To Play in Investor and Consumer Protection

As Federal Protections Against Financial Fraud and Abuse Are Gutted, the States Help Fill the Void

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September 9, 2025

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INTRODUCTION

Federal deregulation is well underway, just as new threats to investors and consumers are emerging. The Trump Administration has undertaken an aggressive campaign to deregulate the financial industry and the financial markets. It is implementing massive layoffs and budget cuts at the federal agencies that protect investors and police the financial markets; appointing agency heads who believe in minimal regulation and industry-friendly enforcement; firing Senate-confirmed agency leaders to establish partisan control of agencies designed to be politically balanced; and issuing executive orders that call for important rules to be repealed and independent agencies to submit to White House control.[1] At the same time, new threats to investors and consumers are rapidly emerging, from an endless wave of new cryptocurrency investments to an increasing reliance on artificial intelligence (AI) in finance.

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This perfect storm of federal deregulation in the face of mounting risks to investors and consumers requires a range of responses. Those responses include steadfast court challenges to the Administration's lawless actions, more private actions by injured investors to recover damages and deter financial abuses, and improved investor education so investors and consumers are better equipped to protect themselves. And one of the most vital responses to the broad rollback of federal financial regulation is the strongest possible state regulation and enforcement in the areas of securities, banking, and insurance.

The states are key to limiting the damage. The states already play a major role in overseeing the financial markets. The states have regulated securities for over 100 years, and they have long played a key role in overseeing banking, consumer protection, and insurance. Now their expertise, resources, and commitment to fair dealing in the financial markets are more important than ever to help compensate for the rapidly shrinking role of the federal agencies. The states can aggressively exercise the considerable regulatory and enforcement authority they already have, and in some areas, they can expand their authority to better protect investors and consumers.

The stakes are high. This state involvement, which has always been a mainstay of investor protection, is now essential to help limit the damage from federal deregulation, which will inevitably spur a surge in predatory practices among many brokers, advisers, banks, payday lenders, debt collectors, and other financial firms. Without the states at their side, Americans will suffer ever-greater financial losses and economic insecurity. We also know that when state regulators are unable to act because of preemption—when federal law overrides state law—the risk of systemic instability rises, increasing the odds of another financial crisis as we saw in 2008.[2]

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[1] *See generally* Better Markets, Trump Tracker, *The Trump Administration is making historic changes to financial policy and our regulatory system*, *https://bettermarkets.org/trump-tracker/; see also, e.g.*, Charlie Savage, *Trump Issues Order to Expand His Power Over Agencies Congress Made Independent*, THE NEW YORK TIMES (Feb. 18, 2025), https://www.nytimes.com/2025/02/18/us/trump-executive-order-sec-ftc-fcc.html.

[2] *See generally* Lei Ding *et al.*, *The Preemption Effect: The Impact of Federal Preemption of State Anti-Predatory Lending Laws on the Foreclosure Crisis* (2010); Arthur E. Wilmarth, Jr., *The Dodd–Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. LAW 893, 896-98, 909-19 (2011); Rohit Chopra & Seth Frotman, *State Enforcement as a Federal Legislative Tool*, 62 HARV. J. ON LEGIS. 1, 10-12 (Winter 2025); Kathleen C. Engel & Patricia A. McCoy, THE SUBPRIME VIRUS 157-63 (Oxford Univ. Press 2011).

Many states are already ramping up their efforts to protect investors and consumers. The states have shown their resolve to help address federal deregulation and to fill in where federal protections are being lost.[3] Here are just a few examples, some of which are highlighted in more detail below:

- Many state attorneys general have initiated, joined, or supported lawsuits challenging the Administration's attempts to gut financial regulators and remove agency heads without cause.[4]
- The states have been policing the crypto markets for years through their enforcement actions, and they continue to do so, with some also adopting regulatory frameworks to protect their citizens from the predations of the crypto industry.[5]
- Twelve states have recently adopted measures to prevent medical debt from appearing on credit reports,[6] even as the CFPB abandons its rule in court.[7]
- Inspired by Illinois, 11 states are pursuing limits on card swipe fees.[8] And New York has recently moved forward with a rule to limit overdraft and nonsufficient funds fees charged by state-chartered depository institutions.[9] Meanwhile, Congress and the President have nullified the CFPB's overdraft rule via a Congressional Review Act resolution of disapproval.[10]
- Although the SEC has abandoned its defense of its climate risk disclosure rule,[11] California's version will take effect in early 2026, providing retail and institutional investors with material information they have long sought to help them make prudent investment decisions.[12]

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[3] Dustin McDaniel & Grace Garver, *AGs Take Up Consumer Protection Mantle Amid CFPB Cuts*, LAW360 (June 13,2025), https://www.law360.com/articles/2351121/ags-take-up-consumer-protection-mantle-amid-cfpb-cuts; Allen Denson, Alice Hrdy, & Daniel Tehrani, *How State AG Consumer Finance Enforcement Is Expanding*, LAW360 (June 30, 2025), https://www.law360.com/articles/2354396.

[4] *See, e.g.,* Press Release, New York Attorney General, *Attorney General James Leads Multistate Coalition to Defend the Consumer Financial Protection Bureau*, New York Attorney General (Feb. 20, 2025), *https://ag.ny.gov/press-release/2025/attorney-general-james-leads-multistate-coalition-defend-consumer-financial*; Craig Clough, *21 Democratic AGs Back Susman Godfrey In Trump EO Fight*, LAW360 (APR. 24, 2025); see generally *Litigation Tracker: Legal Challenges to Trump Administration Actions*, JUST SECURITY (last updated on July 1, 2025), https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-TRUMP-ADMINISTRATION/.

[5] *See* Section I.C.2. *infra*.

[6] *State Protections Against Medical Debt: A Look at Policies Across the U.S.: July 2025*, THE COMMONWEALTH FUND (July 15, 2025), https://www.commonwealthfund.org/publications/fund-reports/2025/jul/state-protections-against-medical-debt-look-policies-across-us.

[7] *Cornerstone Credit Union League v. CFPB*, Case No. 4:25- CV-16-SDJ (E.D. Tex.) (order entered July 11, 2025, approving consent decree vacating rule).

[8] Justin Bachman, *Swipe fee foes find legislative support in almost a dozen states*, PAYMENTS DIVE (Mar. 28, 2025), https://www.paymentsdive.com/news/interchange-card-swipe-fee-state-legislature-bills-illinois/743826/.

[9] Stephen Aschettino, Tarrian Ellis & Benjamin Saul, *NY Banking Brief: All The Notable Legal Updates In Q2*, LAW360 (July 9, 2025), https://www.law360.com/articles/2362437/ny-banking-brief-all-the-notable-legal-updates-in-q2; *see generally State Attorneys General Step Up Consumer Financial Services Enforcement*, MORGAN LEWIS (May 28, 2025), https://www.morganlewis.com/pubs/2025/05/state-attorneys-general-step-up-consumer-financial-services-enforcement.

[10] A.J. Dhaliwal, Mehul Madia & Maxwell Earp-Thomas, *President Trump Signs Resolution Nullifying CFPB Overdraft Fee Rule*, SHEPPARD MULLIN (May 15, 2025), https://www.consumerfinanceandfintechblog.com/2025/05/president-trump-signs-resolution-nullifying-cfpb-overdraft-fee-rule/.

[11] Press Release, SEC, *SEC Votes to End Defense of Climate Disclosure Rules,* SEC (Mar. 27, 2025), https://www.sec.gov/newsroom/press-releases/2025-58.

[12] *Complying With California's New Climate Disclosure Laws – Takeaways for Reporting Companies from the California Air Resources Board's May 29 Public Workshop*, ROPES & GRAY (May 30,2025), https://www.ropesgray.com/en/insights/viewpoints/102kcwe/complying-with-californias-new-climate-disclosure-laws-takeaways-for-reporting. The California laws have been challenged in federal court but they have survived so far. *Chamber of Commerce v. Calif. Air Resources Board*, Case No. 2:24-cv-00801-ODW (C.D. Cal.).

- A number of states are challenging efforts by KalshiEX, LLC to use the federally-regulated derivatives markets as a shield against state oversight of the gaming industry, as the CFTC has abdicated its responsibility to enforce the federal provisions clearly banning such conduct.[13]

In fact, a prominent law firm with a long track record of challenging federal regulation in court has formed a task force focused on the state litigation front, given the enhanced role of the states that the firm foresees.[14]

This state role is fully consistent with our federalist system. This strong role for the states rests squarely on bedrock principles of federalism. The founders always envisioned a primary role for the states in protecting their citizens, unless Congress expresses a clear intent to preempt state law.[15] As Justice Brandeis explained nearly a century ago, the states serve as laboratories of democracy, where "courageous states" are free to adopt novel economic approaches to societal problems.[16] And there is no question that our financial system now faces the emergence of many new "societal" challenges in finance, from rapidly evolving AI to digital engagement practices and thousands of new cryptocurrency investments.

Inevitable resistance lies ahead. Of course, the states have always faced headwinds in protecting consumers and investors, including budgetary limitations, political pressures within states, and aggressive industry lobbying for nationwide uniformity and deregulation. Also looming is the threat of preemption, which can eliminate or narrow state authority.[17] Notwithstanding these challenges, however, the states must do all they can to protect consumers and investors from fraud and abuse and maintain the integrity and stability of our financial markets. Policymakers, public interest advocates, and the public at large should stand by the states and fully support their critical role in this era of federal deregulation.

This report reviews the states' key role and additional steps they can take to protect American investors and consumers. Here we provide a snapshot of what states do to help protect consumers and investors in the securities, lending, and insurance markets. We also highlight some areas where increased state engagement would go even further to help maintain the integrity of the financial markets and protect Americans from financial fraud and abuse. These examples are just a sampling of the ways states can step into the breach created by the Administration's zealous deregulation.

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[13] *See, e.g., KalshiEX, LLC v. Martin*, Defendants' Supplemental Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Case No.: 25-cv-1283-ABA (D. Md.) (challenge to Maryland's ban on Kalshi's unlicensed gaming contracts in Maryland).

[14] Emily Sawicki, *Gibson Dunn Launches State Attorneys General Task Force*, LAW360 (May 14, 2025), https://www.law360.com/securities/articles/2339575 (citing fact that state attorneys general are increasingly taking a more expansive, sophisticated and comprehensive approach to pursuing investigations and litigation).

[15] U.S. CONST., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also New York State Telecommunications Ass'n v. James,* 101 F.4th 135, 148 (2d Cir. 2024) ("[C]onsumer protection law is a field traditionally regulated by the states, [and] compelling evidence of an intention to preempt [by Congress] is required in this area.") (quoting *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990)); *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1191 (9th Cir.) (same), *cert. denied*, 139 S. Ct. 567 (2018)).

[16] *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[17] For example, the Department of Justice and the National Economic Counsel recently announced an initiative to identify state laws they believe unduly burden the economy and to develop strategies for neutralizing those laws through preemption or other "federal legislative or regulatory means." Press Release, Department of Justice, *Justice Department and National Economic Council Partner to Identify State Laws with Out-Of-State Economic Impacts* (Aug. 15, 2025), https://www.justice.gov/opa/pr/justice-department-and-national-economic-council-partner-identify-state-laws-out-state.

ANALYSIS

– I –

SECURITIES REGULATION

A. Introduction

The states have been regulating the securities markets for over 100 years, with Kansas adopting the first comprehensive "Blue Sky" or state securities law in 1911, well before the SEC was created. Today, each state has adopted its own securities statute, and they largely follow a common template, the Uniform Securities Act, developed by the National Conference of Commissioners on Uniform State Laws.[18] This approach helps promote uniformity in state securities regulation while at the same time affording each state the opportunity to strengthen its law and regulations in ways they believe are necessary to better protect investors. In this section on securities regulation, we review the general scope of state authority and then highlight the states' key role in four areas: bringing enforcement actions against a wide variety of misconduct; policing the cryptocurrency market; raising the standards among financial advisers; and helping to curb abuses in the use of pre-dispute mandatory arbitration agreements.

B. The States' Vital Role in Securities Regulation

The states' authority over the *national* securities market has been cut back significantly over the past three decades, largely at the urging of the financial services industry and its allies in Congress. Most notably, in 1996, Congress passed the National Securities Markets Improvement Act (NSMIA). That law prevents the states from reviewing or conditioning the registration of "covered" securities. Those include securities to be listed on national securities exchanges and those issued by mutual funds.[19] NSMIA also preempted state authority over certain private or exempt offerings, which pose heightened risks to investors.[20] And it limited the states' ability to establish certain requirements for broker-dealers such as those relating to capital, margin, and record-keeping, if those requirements differ from, or are in addition to, the federally-established requirements.[21] In addition, Congress circumscribed the states' authority to require the "registration, licensing, or qualification" of the large, federally-registered investment advisers.[22]

Nevertheless, the states continue to play a critical role in securities regulation and enforcement. They license brokers-dealers doing business in their states, they regulate investment advisers (IAs) with less than $100 million in assets under management, and they license all individual IA representatives, regardless of firm size. They also register intrastate offerings and some private offerings and they conduct exams of the firms within their borders. And the states are instrumental in maintaining the systems that give investors critical information about the backgrounds and business models of brokers and advisers, all through the Central Registration Depository and the Investment Adviser Registration Depository.[23] These bedrock activities play a key role in ensuring that brokers and advisers adhere to the law and that investors have

[18] *See* NASAA, Uniform Securities Acts, https://www.nasaa.org/industry-resources/uniform-securities-acts/.

[19] 15 U.S.C. § 77r(a), (b).

[20] SEC, Overview of Capital-Raising Exemptions, https://www.sec.gov/files/2024-ospb-overview-capital-raising-exemptions-table-2.pdf.

[21] 15 U.S.C. § 78o(i)(1).

[22] Preemption of state law since NSMIA has continued to be a controversial issue. *See, e.g., Lindeen v. SEC*, 825 F.3d 646 (D.C. Cir. 2016) (rejecting challenge by Montana and the Commonwealth of Massachusetts to preemption of state authority over an expanded private offering exemption known as Reg A+).

[23] North American Securities Administrators Association, *CRD & IARD*, https://www.nasaa.org/industry-resources/crd-iard/.

the information they need to navigate the financial markets. In addition, the federal laws that limited the states' regulatory oversight of certain aspects of the national securities markets expressly preserved the states' authority to enforce laws against fraud and abuse, as discussed below.

C. Four Key Areas Where States Can Fill Gaps

Here are some areas where the states play an especially critical role and will be called upon to do even more in the years ahead.

1. Enforcement

Enforcement lies at the heart of the states' role in overseeing the securities markets. The states have long brought enforcement actions against scam artists who victimize their residents with ponzi schemes, unregistered securities, and other abusive securities offerings. And their enforcement authority extends well beyond local misconduct. The same federal laws that preempted much of the state's regulatory authority also expressly preserved their ability to combat fraud against any broker or adviser and as to any type of securities offering. Specifically, the states can investigate and bring enforcement actions addressing "fraud or deceit" in securities transactions (including nationally offered securities) or other "unlawful conduct by a broker or dealer."[24] Similarly, the Investment Advisers Act provides that nothing in the Act shall prohibit the securities commission of any state from "investigating and bringing enforcement actions with respect to fraud or deceit against an investment adviser or person associated with an investment adviser."[25] And "fraud" and "deceit" are broad concepts that cover a range of misconduct.[26]

The states have an impressive enforcement track record. They bring enforcement actions addressing a wide variety of violations involving traditional stocks, ponzi schemes, social media fraud, promissory notes, and digital assets.[27] Sometimes the state securities regulators band together with other states and with the SEC to bring joint enforcement actions addressing systemic abuses by major firms that are national in scope. A classic example was the 2003 research analyst conflicts of interest case, a collaborative enforcement action against Wall Street abuses spearheaded by the New York Attorney General. It addressed a widespread practice of firms' issuing misleading investment recommendations based on research skewed by pressure from the firms' investment management divisions.[28] Years ago, the states were similarly instrumental in tackling penny stock fraud and day trading abuses.

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[24] 15 U.S.C. § 7r(c)(1)(A).

[25] 15 U.S.C. § 80b-3a(b).

[26] *See Zuri-Invest AG v. Natwest Fin. Inc.*, 177 F. Supp. 2d 189, 193 (S.D.N.Y. 2001):

> "[S]tates retain the ability to protect investors through application of state anti-fraud laws. . . . In addition, legislative history indicates that it was the '[Commerce] Committee's intention not to alter, limit, expand, or *otherwise affect in any way* any State statutory or *common law* with respect to fraud or deceit . . . in connection with securities or securities transactions.' Commerce Committee Report at 34, *reprinted in* 1996 U.S.C.C.A.N. at 3897. A more clear cut statement against preemption would be hard to find. . . ."

See also CBA Pharma, Inc. v. Perry, Case No. 22-5358, 2023 WL 129240, at *2 (6th Cir. Jan. 9, 2023) ("[F]ederal preemption of state regulation of covered securities is not absolute, as NSMIA preserves state jurisdiction over fraud and deceit violations involving covered securities").

[27] Press Release, NASAA, *NASAA Releases 2024 Enforcement Report* (Oct. 22, 2024), https://www.nasaa.org/73977/nasaa-releases-2024-enforcement-report/.

[28] *Wall Street Analyst Conflicts of Interest Settlement*, Hearing before the Committee on Banking, Housing and Urban Affairs, United States Senate (statement of Christine A. Bruenn, NASAA President and Maine Securities Administrator) (May 7, 2003), https://www.nasaa.org/882/wall-street-analyst-conflicts-of-interest-global-settlement/.

More recently, the states have brought numerous multi-state enforcement actions against prominent financial firms for violations ranging from inflated commissions to supervision failures and the dissemination of misleading information about the risks associated with margin accounts and options trading. Examples include:

- *NASAA Announces Multimillion Settlement with Five Firms* (June 9, 2025), https://www.nasaa.org/76033/nasaa-announces-multimillion-settlement-with-five-firms/ (multimillion-dollar settlement resulting from an investigation conducted by state securities regulators into the practice of charging unreasonable commissions to retail customers on small dollar transactions by Edward Jones, LPL Financial, RBC, Stifel, and TD Ameritrade);
- *NASAA Announces $106 Million Multi-State Settlement with Vanguard,* (January 17, 2025), *https://www.nasaa.org/74734/nasaa-announces-106-million-multi-state-settlement-with-vanguard/* (settlement for failing to supervise certain registered persons and failing to disclose potential tax consequences to investors following a change in investment minimums for certain target date retirement funds);
- *NASAA Announces $17 Million Multi-State Enforcement Settlement with Edward Jones* (January 8, 2025), https://www.nasaa.org/74391/nasaa-announces-17-million-multi-state-enforcement-settlement-with-edward-jones/ (settlement resulting from an investigation into the broker-dealer's handling of front-load commissions for Class A mutual fund shares);
- *State Securities Regulators Announce $10 Million Settlement with Robinhood for Failing Investors* (Apr. 6, 2023), https://www.nasaa.org/67820/state-securities-regulators-announce-10-million-settlement-with-robinhood-for-failing-investors/ (settlement stemming from Robinhood platform outages in March 2020, when hundreds of thousands of investors were relying on the Robinhood app to make trades, and further addressing deficiencies at Robinhood in its review and approval process for options and margin accounts).

The states' enforcement authority is more important than ever in light of two current trends. **First**, the SEC is retreating from its role as a tough cop on the Wall Street beat. For example, SEC Chair Paul Atkins has recently reiterated his longstanding opposition to imposing civil monetary penalties on corporations.[29] And the agency's deputy director of enforcement recently observed that firms can expect a "more sympathetic ear" from the now Republican-led commission when it comes to arguing down penalties, adding that it's possible that some cooperative firms will not even have to hire an outside compliance consultant.[30] As the SEC thus softens its enforcement efforts, the states can continue to compensate by deploying their extensive enforcement experience and taking action against not only the local scam artists but also the major Wall Street firms engaged in systemic and nationwide abuses.

The **second** key trend calling for greater state enforcement lies in the new threats to investors that are steadily emerging, largely driven by technological advances. Chief among them is the **cryptocurrency craze** (discussed below). Many other threats loom. They include the prospect of around-the-clock trading on the stock exchanges. This expansion in market trading will inevitably foster harmful trading addictions among investors. It will also increase investors' vulnerability to fraud and market manipulation during all-night trading sessions marked by low liquidity, high volatility, and even investor fatigue.[31]

Another threat to investors comes with the expanding use of **AI in finance**. In a recent letter to the Hill

[29] Benjamin Schiffrin, *The SEC Must Hold Individuals Accountable for Corporate Misconduct*, BETTER MARKETS (June 10, 2025), https://bettermarkets.org/newsroom/report-the-sec-must-hold-individuals-accountable-for-corporate-misconduct/.

[30] Jessica Corso, *SEC To Have 'Sympathetic Ear' On Penalty Talks, Official Says*, LAW360 (May 14, 2025), https://www.law360.com/articles/2339688/sec-to-have-sympathetic-ear-on-penalty-talks-official-says.

[31] Benjamin Schiffrin, *Report: Let's Not Make the Same Mistakes with Stock Trading as We Made With Sports Gambling*, BETTER MARKETS (May 14, 2025), https://bettermarkets.org/newsroom/report-lets-not-make-the-same-mistakes-with-stock-trading-as-we-made-with-sports-gambling/.

urging Congress to preserve the states' authority to combat fraud, manipulation, and similar abuses, NASAA cautioned that according to the FBI's Internet Crime Complaint Center, criminals are using AI-generated text, images, audio, and video to perpetrate financial fraud on a wide scale, contributing to the $50.5 billion lost to online scams over the past five (5) years."[32]

According to the FBI's Internet Crime Complaint Center, criminals are using AI-generated text, images, audio, and video to perpetrate financial fraud on a wide scale, contributing to the $50.5 billion lost to online scams over the past five (5) years.

And yet another potential source of increased fraud and abuse lies in **private or "exempt" offerings**. Those securities offerings pose heightened risks to investors because they are not subject to the robust disclosure requirements in the securities laws that apply to public, registered stock offerings. They therefore deprive investors of reliable information about the issuers' financial condition, business model, use of funds, and other important features of the investment. Private offerings also suffer from a lack of liquidity and they pose difficult valuation challenges. All of these features create a rich environment for securities fraud. An enforcement report from NASAA aptly raises the alarm:

> Although legitimate businesses may rely on private offering exemptions to lawfully raise capital, illegitimate issuers continue to exploit the exemptions to defraud the general public. Regulation D [the most widely used private offering exemption] ensures that illegitimate issuers no longer need to file registration statements with federal regulators, and for all practical purposes their actions are exempt from federal review. Coupled with the federal preemption of state regulation, Regulation D allows white-collar criminals and bad actors to act in a regulatory vacuum—devoid of meaningful oversight and mechanisms to prevent abuse. Not surprisingly, state regulators reported numerous instances of misconduct tied to Regulation D private offerings. In 2020, state securities regulators opened 196 investigations and 67 enforcement actions involving offerings reliant upon the law. This includes 69 investigations and 24 enforcement actions relating to Rule 506(c), which generally permits issuers to publicly advertise unregistered securities so long as they limit sales to accredited investors.[33]

Yet on the Hill and elsewhere, there is a push to expand access by retail investors to private offerings, even though many of those investors lack either sufficient expertise to evaluate such investments or sufficient wealth to absorb the losses that often result from such investments.[34] Proponents of the private markets even seek access to Americans' retirement accounts.[35]

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[32] Letter from Leslie M. Van Buskirk, NASAA President and Administrator, Division of Securities Wisconsin Department of Financial Institutions to The Honorable Tim Scott (R-SC) and The Honorable Elizabeth Warren (D-MA) (July 7, 2025), https://www.nasaa.org/wp-content/uploads/2025/07/NASAA-Letter-to-Congress-Regarding-the-States-as-Fraud-Fighters-7.7.25.pdf.

[33] *See Beyond Silicon Valley: Expanding Access to Capital Across America*, Hearing before the House Financial Services Committee (statement of Amanda W. Senn, Director, Alabama Securities Commission), at note 17 (Mar. 25, 2025) (citing 2022 NASAA Enforcement Report), https://www.nasaa.org/75210/written-testimony-amanda-senn-house-financial-services-committee-beyond-silicon-valley-expanding-access-capital/.

[34] *See generally* Benjamin Schiffrin, *Fact Sheet: Chair Atkins' Agenda Is the Industry's Agenda*, BETTER MARKETS (Aug. 11, 2025), https://bettermarkets.org/analysis/chair-atkins-agenda-is-the-industrys-agenda/.

[35] *See* Benjamin Schiffrin, *Private Securities Offerings Should Be the Exception, Not the Rule*, BETTER MARKETS (May 19, 2025), https://bettermarkets.org/newsroom/report-private-securities-offerings-should-be-the-exception-not-the-rule/; Benjamin Schiffrin, *The Rise of the Private Markets Poses Risks for Retail Investors and Capital Formation*, BETTER MARKETS (Nov. 18, 2024), https://bettermarkets.org/wp-content/uploads/2024/11/Better_Markets_Private-Markets-FS-11-18-24.pdf.

All of these trends will inevitably lead to more fraud, abuse, and exploitation of investors in violation of the securities laws. The states will be key players in the fight to detect, investigate, and bring enforcement actions against this misconduct. That will be essential to deter violations, hold wrongdoers accountable, and provide relief for victims.

2. Cryptocurrency Investments

A prime example of the states' key role in protecting investors can be found in their regulatory and enforcement work in the crypto arena. New cryptocurrency investments and related products are proliferating at an astonishing pace, posing multiple threats to investors. These offerings have been marked by the failure to register them with regulators, poor disclosure, outright fraud, market manipulation, extreme volatility, high fees, hacks, and noncompliance with anti-money laundering requirements.[36] And yet under the Trump Administration and on the Hill, they are rapidly acquiring a gloss of legitimacy. The SEC has done an about-face since January 2025, abandoning a long list of enforcement actions against crypto purveyors who clearly violated the securities laws; it is adopting a pro-crypto regulatory stance.[37]

A number of states have taken action to *regulate* crypto investments. For example, in 2015, the New York State Department of Financial Services (NYDFS) established a licensing requirement for those engaged in virtual currency activities in the state. It was regarded as a pioneering framework designed to help ensure consumer protection, transparency, and compliance with state regulations in the virtual currency market.[38] In October of 2023, California adopted a law, the Digital Financial Assets Law, A.B. 39, establishing a comprehensive licensing regime for digital asset companies operating in California.[39] The law requires licensure with California's Department of Financial Protection and Innovation (DFPI) and compliance with various safety and soundness requirements, recordkeeping rules, and disclosure requirements. Further, the law grants the DFPI broad examination and enforcement powers, including the authority to bring enforcement proceedings against any entity that "has engaged, is engaging, or is about to engage in" digital financial asset business activity.[40]

Beyond their regulatory initiatives, the states have for years been a major force in combatting crypto abuses through their *enforcement* actions. The states can and do consider many crypto offerings to be securities subject to their jurisdiction, and they bring enforcement actions for a range of crypto violations. NASAA recently highlighted the states' role:

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[36] Fact Sheet, *Crypto 101: Bait-and-Switch, False Promises, Influence Peddling and a Growing Threat to our Financial System and Main Street*, Better Markets (Nov. 14, 2024), https://bettermarkets.org/wp-content/uploads/2024/11/Better_Markets_Crypto_Lame_Duck_Fact_Sheet-11.14.24.pdf.

[37] Benjamin Schiffrin, *Fact Sheet: Having Won Almost 100% of Its Cases Against the Crypto Industry, the SEC Baselessly Surrenders*, Better Markets (Mar. 12, 2025), https://bettermarkets.org/wp-content/uploads/2025/03/Better_Markets_Fact_Sheet_Crypto_Enforcement-3.12.25.pdf; MacKenzie Sigalos, *SEC Chair Atkins says crypto innovation 'has been stifled' as regulators push for change*, CNBC (Apr. 25, 2025), https://www.cnbc.com/2025/04/25/sec-chair-atkins-says-crypto-innovation-been-stifled-at-roundtable-.html; *see generally* Better Markets, *Standing up to the Lawless Crypto Industry* (June 13, 2025), https://bettermarkets.org/analysis/setting-the-record-straight-on-crypto-ftx-sam-bankman-fried-jamie-dimon-the-sec-and-cftc-and-the-revolving-door/ (an extensive compilation of materials on cryptocurrency risks and the regulatory capitulation to crypto now unfolding).

[38] 23 CRR-NY § 200 *et seq.*; 23 NYCRR Part 200; New York Department of Financial Services, *Virtual Currency Business Licensing*, https://www.dfs.ny.gov/virtual_currency_businesses.

[39] CA AB39, 2023-2024, Digital Financial Assets Law, https://legiscan.com/CA/text/AB39/2023.

[40] Josh Boehm *et al.*, *Seven Things to Know About California's New Crypto Licensing Bill*, Paul Hastings (Oct. 24, 2023), https://www.paulhastings.com/insights/client-alerts/seven-things-to-know-about-californias-new-crypto-licensing-bill; *see also* Aislinn Keely, *Pa. Joins States Requiring Licenses For Crypto Exchanges*, Law360 (June 30, 2025), https://www.law360.com/banking/articles/2358844?nl_pk=571445c6-faed-4157-a1c8-7dc528e82b3e&utm_source=newsletter&utm_medium=email&utm_campaign=banking&utm_content=2025-07-01&read_more=1&nlsidx=0&nlaidx=3.

> Since 2017, state securities regulators have taken over 330 enforcement actions involving fraudsters in the crypto ecosystem. Broadly, the fraud underlying these cases pertained to securities offerings, trading platforms, investment advisory services, Ponzi schemes, and crypto mining. There were even some cases where fraudsters went after already defrauded crypto investors, claiming they could help them recover their losses.[41]

NASAA's annual enforcement report shows that their state members are seeing a significant increase in violations relating to digital assets, drawing much of the states' enforcement focus.[42]

A recent example comes from Oregon. On April 18, 2025, the Oregon Attorney General filed an enforcement action in state court against Coinbase, Inc. and its parent corporation.[43] Oregon's detailed complaint alleges that Coinbase "has for years operated an illegal securities business in Oregon through its cryptocurrency trading platform and its practice of selling high-risk and unregistered securities to Oregonians," "injuring thousands of Oregon residents."[44] The complaint seeks fines, disgorgement of profits from sales to Oregon residents, and restitution or damages.[45] Coinbase is fighting to remove the case to federal court,[46] but whatever the outcome, the case stands as a recent and compelling example of a state acting to protect investors in the face of the SEC's decision to abandon a long list of crypto cases. Many other states have impressive track records in policing the crypto markets. [47]

Bills currently moving in Congress may well restrict the states' ability to regulate or bring enforcement actions against purveyors of crypto, but the states should do all they can for as long as possible.

Bills currently moving in Congress may well restrict the states' ability to regulate or bring enforcement actions against purveyors of crypto,[48] but the states should do all they can for as long as possible. As NASAA has persuasively shown, the states provide an essential layer of protection against crypto predators. As former NASAA President and Alabama Securities Commissioner Joseph Borg said over five years ago, "The persistently expanding exploitation of the crypto ecosystem by fraudsters is a significant threat to Main Street investors in the United States and Canada, and NASAA members are committed to combating this threat."[49]

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[41] *See* NASAA letter, *supra* note 32.

[42] *NASAA 2024 Enforcement Report*, at 11-13 (Oct. 22, 2024), https://www.nasaa.org/73977/nasaa-releases-2024-enforcement-report/.

[43] *State of Oregon ex rel. Dan Rayfield, Attorney General for the State of Oregon v. Coinbase Inc.& Coinbase Global Inc.*, Case No. 25CV24235 (Circuit Court of the State of Oregon for the County of Multnomah, filed Apr. 18, 2025).

[44] *Id.,* Complaint at 1, 164.

[45] *Id.* at 165.

[46] *State of Oregon v. Coinbase, Inc.*, Case No. 3:25-cv-00952 (D. Or. filed June 2, 2025).

[47] *See also, e.g., Cordero v. Coinbase Inc.,* Case No. 3:25-cv-04024 (N.D. Cal.) (alleging use of hidden fees); New York State Attorney General's Office, *Investing & Finance: Cryptocurrency*, https://ag.ny.gov/resources/individuals/investing-finance/cryptocurrency; Press Release, California Department of Financial Protection & Innovation, *DFPI Fines Coinme $300,000 Related to Crypto Kiosk Violations, Secures $51,700 in Restitution for Victims* (June 25, 2025), https://dfpi.ca.gov/press_release/dfpi-fines-coinme-300000-related-to-crypto-kiosk-violations-secures-51700-in-restitution-for-victims/.

[48] GENIUS Act of 2025, S.394, 119th Congress (2025-2026), https://www.congress.gov/bill/119th-congress/senate-bill/394; Digital Asset Market Clarity Act of 2025, H.R.3633, 119th Congress (2025-2026), https://www.congress.gov/bill/119th-congress/house-bill/3633; *see also* Letter from Better Markets to Senator Tim Scott, Chairman, Senate Banking, Housing, and Urban Affairs Committee (Aug. 5, 2025) (analyzing discussion draft related to digital asset market structure), https://bettermarkets.org/wp-content/uploads/2025/08/Senate-Banking-RFI-Response-Better-Markets.pdf.

[49] *See* NASAA letter, *supra* note 31, at 1.

3. Adviser Duties

At the federal level, broker-dealers are not subject to the same standards of loyalty applicable to investment advisers, who are subject to a fiduciary duty. For decades, investors have suffered losses at the hands of broker-dealers who have been allowed to dispense conflicted, self-serving investment advice at the expense of their clients. In 2019, the SEC adopted Regulation "Best Interest," claiming that it significantly raised the standards for broker-dealers.[50] It ostensibly requires broker-dealers, when recommending any securities transaction or investment strategy involving securities to a retail customer, to act in the best interest of the retail customer at the time the recommendation is made. The SEC expressly declined to apply the Investment Advisers Act fiduciary duty to brokers or to adopt a new uniform fiduciary standard that would apply to both broker-dealers and investment advisers. The sad fact is that "Reg BI" remains weak on its face and poorly enforced.[51]

However, the states have the opportunity to further elevate their standards of conduct applicable to broker-dealers. A number of states already apply a fiduciary standard to broker-dealers in their states.[52] Others can do the same through rulemaking. A prime example is the fiduciary duty rule adopted in Massachusetts in 2020.[53] The Secretary of the Commonwealth promulgated the state rule expressly for the purpose of compensating for the weaknesses in the SEC's "Reg BI." Among other things, it requires broker-dealers that provide investment advice to adhere to the duties of "utmost care and loyalty to the customer," including the duty to "[m]ake recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer."[54] This state-level fiduciary rule raises the standard of conduct applicable to broker-dealers serving Massachusetts customers, even if the broker-dealer is located outside Massachusetts or the recommendation is made outside Massachusetts (*i.e.*, online).[55]

Massachusetts applied the rule in an enforcement action against Robinhood, a popular online trading platform that relies heavily on digital engagement practices to stimulate high levels of investor trading. Robinhood challenged the rule but the state's highest court upheld it.[56] The court rejected Robinhood's argument that the state law was preempted by the SEC's Reg BI. The court observed that in Reg BI, the SEC expressly declined to lay down a flat prohibition against similar state rules. Furthermore, the court rejected the notion that the Massachusetts rule *conflicted* with the SEC's rule, observing that "[a]s both Congress and the SEC have made clear, the central 'purposes and objectives'. . . of Federal law as it pertains to broker-dealer standards are to improve investor protection." Therefore, the court stated, "we

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[50] *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019).

[51] *See* Stephen Hall & Micah Hauptman, *The FinReg Blog (Duke Law Global Financial Markets Center) | XY Planning Network, LLC v. SEC: Broker Conflicts of Interest, Regulation "Best Interest," and Investors' False Sense of Security* (Mar. 5, 2020), https://bettermarkets.org/newsroom/finreg-blog-duke-law-global-financial-markets-center-xy-planning-network-llc-v-sec-broker/; Press Release, NASAA, *NASAA Report Finds that Many Broker-Dealer Firms Still Place Their Financial Interests Ahead of Their Customers Despite Implementation of Regulation Best Interest* (Nov. 4, 2021), https://www.nasaa.org/60748/nasaa-report-finds-that-many-broker-dealer-firms-still-place-their-financial-interests-ahead-of-their-customers-despite-implementation-of-regulation-best-interest/; FINRA, *FINRA Highlights Firm Practices from Regulation Best Interest Preparedness Reviews*, https://www.finra.org/rules-guidance/key-topics/regulation-best-interest/preparedness.

[52] *See, e.g.,* Michael Finke & Thomas P. Langdon, *The impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, Journal of Financial Planning (July 2012), https://www.financialplanningassociation.org/sites/default/files/2020-09/JUL12%20JFP%20Finke.pdf.

[53] 950 Code Mass. Regs. § 12.207(1)(a) (2020).

[54] 950 Code Mass. Regs. § 12.207(2)(b)(1)-(3).

[55] *SJC Holds Broker-Dealers Serving Massachusetts Customers to a Fiduciary Standard*, Boston Bar Journal (May 17, 2024), https://bostonbar.org/journal/sjc-holds-broker-dealers-serving-massachusetts-customers-to-a-fiduciary-standard/. For a Better Markets recap of the court's decision, see *Actions in the Federal Courts – Month in Review Newsletter*, Better Markets (Aug. 30, 2023), https://bettermarkets.org/newsroom/actions-in-the-federal-courts-month-in-review-newsletter-august-2023/.

[56] *Robinhood Financial LLC v. Galvin*, 492 Mass. 696 (2023).

conclude that the Regulation Best Interest constitutes a regulatory floor that does not foreclose State regulation to more clearly protect investors."[57]

The Massachusetts rule and the court's decision upholding it against a preemption challenge indicate that other states can similarly strengthen their standards applicable to broker-dealers dispensing advice to their retail clients. That type of heightened standard will prove especially valuable as new types of financial products and technologies appear on the market, including cryptocurrencies, AI-generated products and services, and digital engagement practices. [58]

4. Forced Arbitration

Investors who want to open a brokerage account or obtain investment advice are almost invariably forced to agree to the arbitration of any future dispute with the firm. That means that if the firm violates the law and victimizes the client, the client cannot go to court to seek relief, no matter how egregious the firm's misconduct may have been or how much damage the investor may have suffered. Instead, they are forced into a private dispute resolution process that favors the industry, relies on arbitrators who are free to ignore the law, provides limited forms of relief, offers no meaningful rights of appeal, and often charges investors huge up-front fees for accessing the process.[59] The harm to investors is magnified where forced arbitration clauses prevent investors from joining class actions, which enable a large number of victims of fraud and abuse to hold firms accountable for systemic and widespread wrongdoing.[60] The abusive deployment of mandatory pre-dispute arbitration clauses is particularly acute among investment advisers that force their clients into arbitration.[61]

Pre-dispute mandatory arbitration has been the scourge of investors ever since the Supreme Court ignored the plain language of the securities laws and blessed this form of investor abuse in 1987.[62] In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress gave the SEC explicit authority to prohibit or limit the use of forced, pre-dispute arbitration clauses,[63] but the agency has failed to act and is unlikely to do so in the foreseeable future. Therefore, whatever state authorities can do to mitigate the harms from forced arbitration will prove invaluable to investors.

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[57] *Id.* at 722.

[58] The states can also strengthen the fiduciary duty for investment advisers, at least for those IAs that register with the states, making it stronger than the disclose-and-manage model embraced by the SEC. *See Upfront And Ongoing RIA Compliance Obligations Of State Vs SEC-Registered Investment Advisers*, KITCES (Nov. 2, 2022), https://www.kitces.com/blog/sec-state-registered-investment-advisers-compliance-rules-regulations-differences-documents-application-process/.

[59] Better Markets, *The Dirty Dozen – Why Mandatory Arbitration Is Unfair* (Oct. 11, 2017), https://bettermarkets.org/newsroom/dirty-dozen-why-mandatory-arbitration-unfair/.

[60] In July 2017, the CFPB adopted a rule specifically to ban the use of arbitration clauses that preclude participation in class actions by consumers of financial products and services. However, in November 2017, President Trump signed a joint resolution passed by Congress disapproving the rule under the Congressional Review Act (CRA), thus nullifying it. Press Release, CFPB, *CFPB Issues Rule to Ban Companies From Using Arbitration Clauses to Deny Groups of People Their Day in Court* (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/. Note that FINRA, the broker-dealer self-regulatory organization, eventually prohibited the use of class action waivers by their members, although it also prohibits class arbitrations. FINRA, Regulatory Notice 21-16, Predispute Arbitration Agreements in Customer Agreements (Apr. 21, 2021), https://www.finra.org/sites/default/files/2021-04/Regulatory-Notice-21-16.pdf.

[61] Press Release, Better Markets, *Investor Protection Advocates Call on SEC to Ban Mandatory Pre-Dispute Arbitration Clauses* (Feb. 5, 2024), https://bettermarkets.org/newsroom/investor-protection-advocates-call-on-sec-to-ban-mandatory-pre-dispute-arbitration-clauses/.

[62] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (securities fraud claims under the Securities Exchange Act can be subject to forced arbitration agreements); *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989) (securities fraud claims under the Securities Act of 1933 are also arbitrable).

[63] Public Law 111-203 (2010). Section 921 of the Dodd-Frank Act amends Sec. 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) and Sec. 205 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–5).

Along these lines, some states have prohibited the use of pre-dispute arbitration clauses by investment advisers. Virginia's rules on "dishonest or unethical practices" among IA representatives provide that "[f]or purposes of this section, any mandatory arbitration provision in an advisory contract shall be prohibited."[64] One basis for this approach is that the use of such clauses by investment advisers violates the adviser's fiduciary duty and can therefore be prohibited. This position follows logically, since under the fiduciary duty, advisers are required to act in the client's best interest, and depriving clients of a choice in where to bring their claims against the adviser is not in the client's best interest.

A recent scholarly analysis of the issue focuses on the need for regulators to at least make sure that investment advisers cannot impose unduly self-serving conditions on the contractual obligation to arbitrate.[65] It suggests, for example, that NASAA might develop a model rule applicable to state-registered investment advisers, which could include a number of prohibitions and requirements relating to forced arbitration agreements. The suggested list of terms includes these:

(1) at the time of agreement, disclose the costs and procedures involved in arbitration, as well as any existing arbitration awards, regardless of expungement;

(2) provide for an equitable cost-sharing structure, ensuring that neither party bears disproportionate financial burdens;

(3) allow for limited discovery as necessary to promote fairness in resolving disputes;

(4) require the forum be at a location convenient to the investor;

(5) prohibit one-way fee shifting provisions;

(6) prohibit the use of hedge clauses; and

(7) not include provisions that serve to limit or waive the fiduciary obligations of the RIA as defined by applicable law.[66]

This is no substitute for a ban on the use of forced arbitration agreements; investors should be given the choice as to whether they want to arbitrate their claims or take them to court. And if arbitration offers the benefits that its proponents so ardently claim—those who say it is fair, quick, and inexpensive—then surely investors will opt for the process over litigation. But meanwhile, to the extent states can prohibit at least the most unfair terms in arbitration agreements, especially in the IA space, investors will benefit enormously.

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[64] *See* 21VAC5-80-200; *see also* Recommendation of the SEC Investor Advisory Committee Regarding the Use of Mandatory Arbitration Clauses By Registered Investment Advisers, at 7 (Dec. 10, 2024), https://www.sec.gov/files/investment/approved-investment-adviser-arbitration-recommendation-060525.pdf.

[65] *See* Adam Gana, James Fallows Tierney, & Zahra Hodjat, *Arbitration of Investment Adviser Disputes Is Unfair*, Accepted at Case Western Reserve Law Review (forthcoming) at 30 (Feb. 18, 2025) ("If the clauses are fundamentally unfair—unreasonably shifting risk, reducing the other party's rights to seek redress, or imposing hidden costs or risks—then the relationship's fiduciary nature demands that the modification of duties not disadvantage the principal. If the fiduciary includes terms in a contract that unreasonably favor the fiduciary's interests at the expense of the beneficiary, even if superficially disclosed, this can itself be seen as undermining core fiduciary duties—or perhaps even as itself a violation of the duty of loyalty."); *id*. at 31 ("The adviser's role as a fiduciary means that any term shifting undue risk to the client—like a mandatory arbitration clause severely limiting the client's legal remedies—may be inherently suspect if it appears designed to benefit the adviser at the client's expense. Even if disclosed, the adviser's willingness to present a skewed term runs counter to the spirit of loyalty: attempts to insert unfair, self-serving terms signal that the fiduciary is prioritizing its own gain over the client's best interest."); *id*. at 36 ("[W]hen RIAs use their superior knowledge and bargaining power to impose one-sided contracts that limit their liability, increase the cost of dispute resolution, or restrict clients' legal options, they are acting inconsistent with the duty of loyalty.").

[66] *Id.* at 48-50.

– II–

BANKS AND NONBANKS

A. Introduction

Banks and credit unions, along with a variety of nonbank financial firms, are the bread and butter of Americans' financial lives, providing the necessary staples such as bank accounts, auto loans, mortgage loans, and small business loans. Making sure these institutions treat their customers fairly is therefore vitally important. Similarly, regulatory guardrails that help prevent runs and panics are necessary to safeguard the stability of the financial system. The regulatory landscape related to banks and nonbanks is complicated, and federal preemption has curtailed the states' authority in significant ways. But the states nevertheless play an important regulatory and enforcement role in the oversight of these institutions, including state depository institutions, credit unions, and nonbanks financial providers.

With the passage of the Dodd-Frank Act in 2010, the states gained significantly broader authority, especially in the regulation of nonbanks and the enforcement of consumer protection laws. The law also clarified and narrowed the scope of federal preemption of state consumer protection laws. This expanded authority promises to be an important tool in financial regulation, as the current Administration is intent on abolishing the Consumer Financial Protection Bureau (CFPB) or rendering it powerless. Below, we canvass the states' authority over banks and nonbanks, along with examples of their work protecting Americans from abusive practices. And we highlight areas where the states can do even more to help fill the gaps created by the dismantling of the CFPB.

B. State Authority Over Traditional Banks, Thrifts, and Credit Unions

States retain significant authority to regulate and enforce laws against banks and similar financial institutions. The extent of that power depends largely on whether the institution is state or federally chartered and on whether the state's law is preempted by federal standards.[67]

1. State-Chartered Banks, Thrifts, and Credit Unions

States serve as primary regulators of state-chartered banks, thrifts, and credit unions, working in conjunction with the Fed and the FDIC (and the National Credit Union Administration for insured state credit unions), depending on whether the bank is a member of the Federal Reserve System. State agencies examine these institutions for safety, soundness, and legal compliance; enforce consumer protection laws; approve or deny charters, mergers, and branch openings; and impose penalties or refer cases for prosecution.[68]

[67] Wilmarth, *supra* note 2, at 944 ("Dodd–Frank establishes a new preemption standard for national banks and federal thrifts that refers only to 'State consumer financial laws' and does not mention state laws of general application. Accordingly, Dodd–Frank's new preemption standards and requirements do not alter the applicability of general state laws to national banks and federal thrifts.").

[68] *See generally Bank Supervision by Federal Regulators: Overview and Policy Issues*, CRS (Dec. 28, 2020), https://www.congress.gov/crs-product/R46648.

2. National Banks, Federal Savings Associations, and Federal Credit Unions and the Scope of Preemption

National Banks. National banks are regulated primarily by the OCC under the National Bank Act (NBA), dating back to 1863.[69] The OCC conducts supervisory examinations of national banks for safety, soundness, and compliance with federal laws. For decades, the OCC took an aggressive view of federal preemption, arguing that state laws did not apply to national banks if they interfered in any way with banking powers under the NBA. But the Dodd-Frank Act clarified the scope of this preemption.[70] It established a three-part test and reaffirmed the *Barnett Bank v. Nelson* standard established by the Supreme Court in 1996, under which a state consumer financial law is preempted essentially if it "prevents or significantly interferes" with a national bank's ability to exercise its powers.[71]

The U.S. Supreme Court recently affirmed this standard for analyzing whether the NBA preempts state laws regulating banks chartered under the NBA, specifically whether state laws governing escrow account interest applied to national banks.[72] The Court rejected "a clear line," instead holding that lower courts must conduct a "nuanced comparative analysis" to determine whether the "nature and degree of the interference" by the state law on a national bank is impermissible. And after conducting that analysis, "[if] the state law prevents or significantly interferes with the national bank's exercise of its powers, the law is preempted."[73]

Thrifts. Federal thrifts—also known as federal savings associations—have historically been subject to a significantly preemptive framework under the Home Owners' Loan Act (HOLA), enacted in 1933.[74] HOLA originally established *field preemption*, meaning federal law was presumed to occupy the entire regulatory space, superseding state laws. But the Dodd-Frank Act pared this back, establishing a conflict preemption standard similar to that under the National Bank Act.[75] This essentially means that states can enforce consumer protection laws against federal thrifts so long as doing so doesn't "significantly interfere" with their operations or directly conflict with federal rules.[76]

Credit Unions. Federally chartered credit unions are regulated by the National Credit Union Administration (NCUA). In general, the same principles of preemption apply: state laws can govern unless they are inconsistent with federal requirements or impose undue burdens on the federally chartered firm.

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[69] 12 U.S.C. § 38 *et seq*.

[70] *See* Dodd-Frank Act § 1044 (incorporating the *Barnett Bank* standard); Dodd–Frank Act § 1041(a)(1) (providing that the CFPA does not annul state law "except to the extent that a state law is inconsistent with the provisions of [the CFPA] and then only to the extent of the inconsistency."); Danyeale I. Hensley, *Section 1044 of Dodd-Frank: When Will State Laws Be Preempted under the OCC's Revised Regulations*, 16 N.C. Banking Inst. 161 (2012); Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. Rev. 1273, 1296 n.160 (2011); Jamelle C. Sharpe, *Legislating Preemption*, 53 Wm. & Mary L. Rev. 163 (2011); Michael Bolos, *The Application of Dodd-Frank's Dual Preemption Standard to State UDAP Laws*, 14 U. Pa. J. Bus. L. 289 (2011).

[71] *Barnett Bank of Marion Cty., N. A. v. Nelson*, 517 U.S. 25 (1996).

[72] *Cantero v. Bank of America, N.A.,* 602 U.S. 205 (2024).

[73] Arthur E. Wilmarth, *On Remand in Cantero, the Second Circuit Should Reject Bank of America's Preemption Claim and Hold That New York's Interest-on-Escrow Law Applies to National Banks*, 20 Rutgers Bus. L. Rev. 76 (2024); Boris Bershteyn *et al*., *Supreme Court Clarifies Standard for Analyzing National Bank Act Preemption*, Skadden (June 6, 2024), https://www.skadden.com/insights/publications/2024/06/supreme-court-clarifies-standard-for-analyzing-national-bank-act-preemption; *see also* Jon Hill, *NY AG Says Capital One Denied Millions In Account Interest*, Law360 (May 14, 2025) (case alleging deception in promotion of savings accounts under state and federal law, following CFPB abandonment of case), https://www.law360.com/banking/articles/2340157; *The People of the State of New York v. Capital One, N.A.*, Case No. 1:25-cv-4037 (S.D.N.Y.).

[74] 12 U.S.C. §§ 1461-1470.

[75] *See* Dodd-Frank Act § 1046, 12 U.S.C. § 1465; Wilmarth, *supra* note 2, at 942-44.

[76] Wilmarth, *supra* note 2, at 925–935.

3. Expanded State Enforcement Authority Over Federally Chartered Banks Under the Dodd-Frank Act

One of the most important developments in this space was the passage of the Consumer Financial Protection Act (CFPA), which was part of the Dodd-Frank Act. The Dodd-Frank Act was passed in the aftermath of the 2008 financial crisis to fundamentally reform the regulation of the financial system so it would be more stable, fair, and transparent. Congress recognized that an important element of this reform would be the establishment of a new, independent agency—the Consumer Financial Protection Bureau—empowered and dedicated to protecting consumers from abusive practices by banks and nonbanks offering financial products and services. Congress also recognized the vital role that states can play in protecting consumers, especially through their enforcement work. The law therefore gave the states significantly expanded authority to enforce not only state consumer protection laws but also CFPB rules and other federal consumer financial protection statutes.

Under the CFPA, state attorneys general (AGs) may bring civil actions against national banks and federal savings associations for violations of regulations that the CFPB has promulgated (although states may not bring actions against national banks for violations of provisions of the CFPA itself unless those provisions have been incorporated in CFPB regulations).[77] Thus, state AGs are empowered to enforce CFPB regulations, including those applicable to national banks and thrifts.[78] And, subject to the preemption boundaries discussed above, the states may also bring civil actions under their own UDAP/UDAAP (unfair, deceptive, or abusive acts and practices) statutes, which frequently track or exceed federal protections.[79]

C. State Authority Over Nonbank Financial Companies

State regulatory and enforcement authority is perhaps most important with respect to *nonbank* financial firms. These include nonbank payday lenders, debt collectors, mortgage servicers, auto lenders, fintech platforms, and others. Although the CFPB has extensive authority over nonbanks under the Dodd-Frank Act,[80] it is clearly withdrawing from its oversight and enforcement in the nonbank market.[81] Therefore, the states' authority will be critically important.

[77] 12 U.S.C. § 5552(a)(2)(B).

[78] However, 12 U.S.C. § 5552(b) "ensures that CFPB will have the right to participate in all enforcement proceedings brought by state AGs under the CFP Act or CFPB's regulations." Wilmarth, *supra* note 2, at 924–25.

[79] Chopra & Frotman, *supra* note 2, at 16–21.

[80] For example, the Dodd-Frank Act gave the CFPB broad authority to supervise "nondepository" or nonbank entities such as mortgage lenders, student loan companies, payday lenders, and other large companies offering consumer products or services. 12 U.S.C. § 5514. That authority includes exclusive rulemaking, examination, and enforcement powers.

[81] Kate Berry, *CFPB shifts enforcement to states, stops nonbank oversight*, American Banker (Apr. 17, 2025), https://www.americanbanker.com/news/cfpb-shifts-enforcement-to-states-stops-nonbank-oversight; Consumer Financial Protection Bureau, *Defining Larger Participants of the Consumer Reporting Market: Advance Notice of Proposed Rulemaking*, 90 Fed. Reg. 38409 (August 8, 2025); Consumer Financial Protection Bureau, *Defining Larger Participants of the International Money Transfer Market: Advance Notice of Proposed Rulemaking*, 90 Fed. Reg. 38412 (August 8, 2025); Consumer Financial Protection Bureau, *Defining Larger Participants of the Automobile Financing Market: Advance Notice of Proposed Rulemaking*, 90 Fed. Reg. 38415 (August 8, 2025); Consumer Financial Protection Bureau, *Defining Larger Participants of the Consumer Debt Collection Market: Advance Notice of Proposed Rulemaking*, 90 Fed. Reg. 38418 (August 8, 2025).

1. State Regulatory Authority Over Nonbanks

Independent nonbanks are subject to state jurisdiction because they are state-chartered. States have long had consumer protection laws modeled on the Federal Trade Commission Act, barring unfair and deceptive business practices by a wide range of businesses.[82] Many states also impose licensing, disclosure, and conduct requirements on various types of nonbank financial firms. The Dodd-Frank Act further expanded this authority. Section 1041 provides that state law shall apply to state-chartered institutions and nonbanks, except where the state law in question is inconsistent with Title X of the Dodd-Frank Act, "and then only to the extent of the inconsistently." State laws are not inconsistent with Title X if the protection those laws afford is greater than the protection under Title X.[83] This is a "floor" as opposed to a "ceiling" model, meaning that states are free to go beyond federal standards in protecting their residents, subject to these limits.[84] This means states can regulate payday lenders, installment loan companies, debt settlement firms, and fintech platforms that offer loans or financial products. The states' role here is increasingly important, as the CFPB scales its oversight of nonbank firms.[85]

2. State Enforcement Authority Over Nonbanks

States have robust enforcement authority over nonbanks. They can enforce their own state laws against nonbanks doing business within their borders. In addition, Section 1042(a) of the CFPA gives state AGs and regulators explicit authority to bring actions against nonbank financial companies in state or federal court to enforce—

- any provision of the CFPA;
- any CFPB-issued regulation; or
- any other federal consumer financial law.[86]

This includes the CFPB's prohibition on unfair, deceptive, and abusive acts and practices and the 18 "Enumerated Consumer Laws," such as the Truth in Lending Act and the Fair Debt Collection Practices Act. Other notable examples of the Enumerated Consumer Laws state AGs are empowered to enforce include:

- **Fair Credit Reporting Act (FCRA)** – Governs access to and use of credit reports.
- **Equal Credit Opportunity Act (ECOA)** – Prohibits discrimination in lending based on race, sex, religion, and other characteristics.
- **Truth in Savings Act (TISA)** – Requires disclosure of terms and interest on deposit accounts.
- **Electronic Fund Transfer Act (EFTA)** – Protects consumers in electronic payments and ATM/debit card transactions.

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[82] *See generally* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 Antitrust L.J. 911 (2017).

[83] 12 U.S.C. § 5551(a).

[84] William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1554–56, 1586–89 (2007) (explaining the advantages of federal statutory schemes that establish a "floor" of minimum federal standards but allow individual states to experiment by adopting more protective measures).

[85] Jon Hill, *CFPB Mulls Cuts To Oversight Reach In 4 Nonbank Markets*, Law360 (Aug. 7, 2025), https://www.law360.com/banking/articles/2374549?nl_pk=b835bf9d-f9ac-4fa6-8cfb-8cc96c0a6c3d&utm_source=newsletter&utm_medium=email&utm_campaign=banking&utm_content=2025-08-08&read_more=1&nlsidx=0&nlaidx=3.

[86] 12 U.S.C. § 5552(a); *see also* Wilmarth, *supra* note 2, at 924-25.

- **Real Estate Settlement Procedures Act (RESPA)** – Ensures transparency in mortgage and closing processes.
- **Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act)** – Regulates mortgage loan originators.
- **Home Mortgage Disclosure Act (HMDA)** – Requires mortgage data reporting to prevent discrimination.
- **Credit Repair Organizations Act (CROA)** – Regulates companies offering credit repair services.
- **Consumer Leasing Act (CLA)** – Requires disclosure of lease terms in consumer leases.

Importantly, states can act against nonbanks independently of the CFPB—and often do.[87] According to the CFPB, states have brought over 50 enforcement actions against nonbank firms under Section 1042, with many resulting in significant relief for consumers.[88] About 15 of those lawsuits involved direct collaboration with the Bureau.[89] Even if the CFPB has brought or is currently bringing an action against a nonbank firm, states may still separately sue companies over the same conduct concurrently.[90]

One of the many benefits of granting states such authority to enforce federal consumer protection laws against nonbank firms is that it allows states to address conduct that may be challenging or impossible to address under state law.[91] In addition, Section 1042(d) expressly preserves the authority of state regulators to enforce applicable state consumer protection laws, state securities laws, and state insurance laws.[92] This cooperative "dual enforcement" of federal consumer financial law benefits the public in multiple ways:

[87] In 2022, the CFPB issued an interpretive rule explaining the authority of states to enforce the CFPA under Section 1042. *See Authority of States to Enforce the Consumer Financial Protection Act of 2010*, 87 Fed. Reg. 31940 (May 26, 2022). The current CFPB leadership has now sought to rescind portions of this guidance in an attempt to restrict state authority under the Dodd-Frank Act. *See* Authority of States To Enforce the Consumer Financial Protection Act of 2010; Rescission, 90 Fed. Reg. 20,565 (May 15, 2025).

[88] Chopra & Frotman, *supra* note 2, at 6; *see also* Julie Manganis, *Hometap Can't Escape Mass. AG's Consumer Protection Suit*, Law360 (Aug. 22, 2025), https://www.law360.com/banking/articles/2380045?nl_pk=b835bf9d-f9ac-4fa6-8cfb-8cc96c0a6c3d&utm_source=newsletter&utm_medium=email&utm_campaign=banking&utm_content=2025-08-25&read_more=1&nlsidx=0&nlaidx=6; Michael Stratford, *New York sues Zelle, alleging 'widespread' fraud*, POLITICO Pro (Aug. 13, 2025), https://subscriber.politicopro.com/article/2025/08/new-york-sues-zelle-alleging-widespread-fraud-00506931.

[89] *See, e.g.*, First Amended Complaint, *Bureau of Consumer Fin. Prot. ex rel. Healey v. Commonwealth Equity Grp.*, LLC, Case No. 1:20-cv-10991 (D. Mass. Sept. 16, 2020); Complaint, *Bureau of Consumer Fin. Prot. ex rel. Rutledge v. Candy Kern-Fuller*, Case No. 6:20-cv-00786 (D.S.C. Feb. 20, 2020).

[90] *See also* Authority of States To Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940, 31942 (May 26, 2022) ("State attorneys general and regulators may bring (or continue to pursue) actions under section 1042 even if the Bureau is pursuing a concurrent action against the same entity"); *see also Pennsylvania v. Navient Corp.*, 967 F.3d 273, 295 (3d Cir. 2020) (holding that Pennsylvania could bring a parallel enforcement action against a company after the CFPB had already taken action against the same company); *R. & R., Texas v. Colony Ridge, Inc.*, Case No. 23-cv-4729, 2024 WL 4553111, at *5 (S.D. Tex. Oct. 11, 2024) (same with respect to Texas).

[91] *See* Chopra & Frotman, *supra* note 2, at 27; Wilmarth, supra note 2, at 924-25.

[92] 12 U.S.C. § 5552(d). "Thus, the CFP Act does not impair the enforcement powers granted to state AGs or state securities or insurance officials by valid state laws." Wilmarth, *supra* note 2, at 925.

> The interplay among federal and state authorities under Title X will benefit the public in at least four ways. First, federal and state officials will take different approaches in addressing the challenge of protecting consumers of financial services, and the resulting alternative strategies will produce fruitful experimentation and innovation. . . . Second, dual regulation promotes dialogue among federal and state officials, which in turn facilitates learning and regulatory improvement. . . . Third, overlapping federal and state authorities offer "alternative forms of relief" and thereby provide "an additional source of protection if one or the other government should fail to offer adequate protection. . . . Fourth, overlapping federal and state lawmaking and enforcement roles can promote beneficial "regulatory competition."[93]

And empowering states to enforce federal consumer financial laws can give them broader authority than they can exercise under state law:

> Specifically, in certain instances, the states' ability to enforce the protections of the CFPA itself and the CFPA's prohibition on violating the Enumerated Consumer Laws has allowed them to take action to address a broader set of practices than they might otherwise be able to under state law. For example, state statutes may enumerate only a specific set of prohibited actions, be found to be preempted by federal law, or have hurdles or other limitations that dampen the effectiveness of state consumer protections, such as a prohibition only on deceptiveness and/or unfairness. Accordingly, Congress implicitly recognized that state law may be insufficient to address certain practices, especially activity that may have a nationwide effect, and empowered states to take action regarding the full scope of conduct addressed by the federal consumer financial laws and actors covered by the CFPA.[94]

3. Examples of States Using the Dodd-Frank Act Enforcement Authority To Hold Nonbanks Accountable for Financial Wrongdoing

One of the many benefits of providing states with the expanded enforcement authority under the Dodd-Frank Act is that it enables states to swiftly respond to new and emerging risks and harms in their community that, if left unchecked, could ultimately have a nationwide impact. Recent cases illustrate how states are using this authority in localized and community-specific ways.

In 2023, Kentucky and Tennessee sued Solar Titan USA, alleging the solar energy company misled consumers about loan terms and tax credits. The states alleged that the companies violated the CFPA by misrepresenting to consumers "that they would generally be eligible for a substantial tax credit that was not actually available to all homeowners and by incorrectly describing when billing on loans would begin."[95] Given that the lawsuit targeted violations in a narrow geographic area, this made it an ideal case for state, rather than federal, enforcement."

[93] Wilmarth, *supra* note 2, at 949–50.

[94] Chopra & Frotman, *supra* note 2, at 27–28.

[95] *See Tennessee ex rel. Skrmetti v. Ideal Horizon Benefits, LLC*, Case No. 3:23-cv-46, 2023 U.S. Dist. LEXIS 34118 (E.D. Tenn. Dec. 14, 2023); s*ee also* Chopra & Frotman, *supra* note 2, at 25.

In another case, Minnesota sued Chadwick Banken for exploiting Muslim homebuyers with predatory "contract for deed" loans.[96] Minnesota has one of the largest Muslim populations in the United States, and Minnesota alleged that Banken targeted Muslim home purchasers "by selling them homes on grossly unfair terms using contract terms that are designed to fail." Invoking Section 1042 of the Dodd-Frank Act, the state alleged that Banken "leverage[d] Muslim customer[s'] religious beliefs to extract both higher down payments and increased monthly installment payments than contracts offered to non-Muslims" by framing the Muslim-targeted loans as being "Sharia compliant." The alleged scheme, involving hundreds of home sales, had a large impact on this particular Muslim community. But the operation largely evaded the scrutiny of federal regulators. The lawsuit thus highlighted the way local knowledge—of both communities and regional scams—enables states to identify and respond to financial abuses. These examples show how state regulators can tailor enforcement to the local conditions in their communities, rather than relying on federal regulators. [97]

4. Examples of States Enhancing Consumer Protection at the State Level

The state of New York recently enacted a new law that provides New Yorkers with enhanced consumer protections in the face of a retreating FTC and CFPB. The bill aims to simplify the process of cancelling recurring online subscriptions and to standardize online retail returns and refunds; crack down on overdraft fees that target low-income consumers; establish licensing and oversight of "buy-now-pay-later" loans; and more.[98] Other states can adopt such measures establishing licensing regimes and supervisory authority over not only buy-now-pay-later loans but also over other nonbank financial products, such as fintech apps, AI tools, and others. For example, California's Department of Financial Protection & Innovation recently announced new rules to register and regulate debt settlement services, education financing, income-based advances ("earned wage access"), and student debt relief providers.[99]

In Pennsylvania, Governor Josh Shapiro recently announced new consumer protection tools that aim to help Pennsylvanians more easily report scams and predatory practices.[100] Governor Shapiro also announced that it was "expanding Pennsylvania's use of the enforcement authority granted to states under the Dodd-Frank Act, allowing state regulators to enforce federal consumer protection laws when federal agencies fail to act." According to Governor Shapiro, this includes "investigating predatory lending, student loan servicing abuses, insurance fraud, and deceptive financial practices."[101]

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[96] *See State of Minnesota ex rel. Ellison v. Banken*, Case No. 27-cv-24-8179 (Dist. Ct. of Fourth Jud. Dist., Hennepin Cnty., Minn. May 14, 2024).

[97] Dustin McDaniel & Grace Garver, *AGs Take Up Consumer Protection Mantle Amid CFPB Cuts*, Law360 (June 13, 2025), https://www.law360.com/banking/articles/2351121.

[98] Press Release, Office of Governor Kathy Hochul , *Governor Hochul Signs New Legislation to Protect Consumers and Keep Money in New Yorkers' Pockets as Part of the FY 2026 Budget* (May 9, 2025), https://www.governor.ny.gov/news/governor-hochul-signs-new-legislation-protect-consumers-and-keep-money-new-yorkers-pockets.

[99] Press Release, California Department of Financial Protection & Innovation, *DFPI Announces New Rules to Expand Protections for California Consumers* (Oct. 22, 2024), https://dfpi.ca.gov/press_release/dfpi-announces-new-rules-to-expand-protections-for-california-consumers/; *see also* Craig R. Heeren, *Lessons from PayPal's $2 Million Cybersecurity Settlement with the New York State Department of Financial Services*, Faegre Drinker (Feb. 14, 2025), https://www.discerningdata.com/2025/lessons-from-paypals-2-million-cybersecurity-settlement-with-the-new-york-state-department-of-financial-services/.

[100] Press Release, Office of Governor Shapiro, *Governor Shapiro Launches New Consumer Protection Tools to Help Pennsylvanians Report Scams and Predatory Practices* (May 01, 2025), https://www.pa.gov/governor/newsroom/2025-press-releases/gov-shapiro-launches-new-consumer-protection-tools-help-pennsylv.html (announcing "a new, centralized consumer protection hotline, website, and email address to make it easier for Pennsylvanians to report scams, resolve financial and insurance issues, and access help from the Commonwealth").

[101] *Id*.

States are also establishing their own "mini-CFPBs," such as New Jersey's Office of Consumer Finance or California's Department of Financial Protection and Innovation (DFPI).[102] Other states have proposed a variety of other measures to boost state-level consumer protections.[103]

5. Where States Can Do More

The states now have strong regulatory and enforcement tools at their disposal to police the ever-expanding network of nonbank financial service providers. Making the most of those tools will help fill the void being created by the Administration's dismantling of the CFPB and other deregulatory steps. Here are additional steps to consider:

- **Expand supervision of nonbank firms**, particularly high-tech firms that offer a range of financial services from lending to payment processing. This is especially important in light of the dramatic recent scale back in nonbank oversight at the CFPB.[104]
- **Assert broader regulatory authority** by adopting stronger disclosure rules, rate caps, or lending standards tailored to emerging risks. Consider also incorporating the "abusive" standard into state law, which captures conduct that can sometimes escape the "unfair" and "deceptive" standards.[105]
- **Increase enforcement capacity** by better funding AG offices and creating specialized consumer financial protection units.
- **Empower private enforcement** by equipping consumers with private rights of actions for state law consumer protection claims.[106]
- **Leverage Section 1042 more frequently**, especially in redressing localized harm that may not trigger federal action.
- **Coordinate more systematically with other states and willing federal partners**, building multistate coalitions to tackle interstate misconduct.
- **Enforce dormant or underused statutes** such as insurance codes and usury laws and apply them to modern consumer harms.

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[102] *See, e.g.*, *California Department of Financial Protection & Innovation: What We Do*, https://dfpi.ca.gov/about/what-we-do/.

[103] *Maryland Enacts Earned Wage Access Legislation* (June 4, 2025), https://www.consumerfinancemonitor.com/2025/06/04/maryland-enacts-earned-wage-access-legislation/; *State Regulators Are Stepping Up Consumer Protection Efforts. Here's What That Means for Compliance*, PERFORMLINE (May 30, 2025), https://performline.com/blog-post/state-regulators-stepping-up-consumer-protection-what-it-means-for-compliance/; Kevin Hardy, *States look at shoring up consumer protections as Trump hobbles federal watchdog*, STATELINE (Mar. 3, 2025), https://stateline.org/2025/03/03/states-look-at-shoring-up-consumer-protections-as-trump-hobbles-federal-watchdog/;

[104] Kate Berry, *CFPB shifts enforcement to states, stops nonbank oversight*, AMERICAN BANKER (Apr. 17, 2025), https://www.americanbanker.com/news/cfpb-shifts-enforcement-to-states-stops-nonbank-oversight.

[105] Consumer Financial Protection Bureau, *Strengthening State-Level Consumer Protections: Promoting Consumer Protection Federalism* 21 (January 2025), https://files.consumerfinance.gov/f/documents/cfpb_strengthening-state-level-consumer-protections_2025-01.pdf.

[106] David A. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 BOS. U. L. REV. 559, 606 (1968) ("Coordination of public and private remedies and procedures is at least as essential as federal and state cooperation.").

– III –
INSURANCE

A. Introduction

Insurance companies have an enormous impact on the lives and financial well-being of all Americans, who depend on insurance products to protect against risks that threaten their lives, homes, personal property, and businesses. Many insurance products are purely insurance contracts, as they simply require an insurance company to make a payment to an insured in the event of a specified type of loss. However, other products issued by insurance companies are predominantly investment vehicles, including variable annuities and fixed- indexed annuities (indexed annuities). Their returns hinge in part on the performance of investments or indices, thus exposing the purchaser to investment or market risk.[107] They are also exceedingly complex, and they often saddle investors with high costs and poor returns, while locking up their money for years. Investors and retirement savers need protection against the risks posed by these products. Those protections are primarily a matter of state regulation, and in one vital respect discussed below, they need to be strengthened: the state rules governing annuity sales.

B. Regulatory Oversight

State insurance regulators have maintained a nearly exclusive grip on insurance regulation for a century and a half. A Supreme Court decision dating back to 1869 held that insurance was not subject to federal regulation under the Commerce Clause of the U.S. Constitution, Article I, Section 8, Clause 3.[108] The Court later reversed that decision in 1944, holding that the federal government could indeed regulate insurance companies under the authority of the Commerce Clause and further that the federal antitrust laws applied to the insurance industry.[109] That decision alarmed the insurance industry and others, prompting Congress just a year later to pass the McCarran–Ferguson Act.[110]

The McCarran-Ferguson Act exempts the business of insurance from most federal regulation. It essentially declares that the business of insurance will be subject to state regulation and that a federal law will not preempt any state law governing insurance "unless such [federal] Act specifically relates to the business of insurance."[111] The states have zealously fought to protect their regulatory authority over the insurance industry. They have done so largely through the efforts of the association of state insurance regulators, known as the National Association of Insurance Commissioners or "NAIC." As the NAIC has explained, "[f]ollowing the passage of the McCarran-Ferguson Act, state insurance regulators working through the NAIC began creating the legal framework needed to strengthen state regulation and limit any future intervention by the federal government."[112]

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[107] Variable annuities involve subaccounts that invest in the market, creating the potential for signific gains but also losses. The returns on indexed annuities derive from the performance of a market index such as the S&P 500, with caps on potential gains but also floors against losses.

[108] *Paul v. Virginia*, 75 U.S. 168 (1869).

[109] *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

[110] 15 U.S.C. §§ 1011-1015.

[111] 15 U.S.C. §§ 1011, 1012(a) and (b). *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30-43 (1996) (holding that a Florida law prohibiting most national banks from selling insurance was preempted by 12 U.S.C. § 92 because the federal statute "specifically relates to the business of insurance" by expressly authorizing national banks to sell insurance in towns with fewer than 5,000 residents); *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 499-509 (1993) (priority rules under the Federal Bankruptcy Code did not preempt an Ohio law that granted priority to the claims of policyholders against an insolvent insurance company because the Bankruptcy Code did not specifically refer to insurance companies).

[112] NAIC, McCarran-Ferguson Act, https://content.naic.org/insurance-topics/mccarran-ferguson-act.

The states each have their own insurance statutes, partly based on model laws developed by the NAIC.[113] As a general matter, the state insurance regulators are tasked with licensing companies and agents, monitoring the financial health of licensed insurers, approving rate filings and policy forms, examining companies, addressing consumer complaints, enforcing insurance laws, and overseeing the resolution of insolvent insurers.[114]

C. The Challenges Posed by Annuities

The states play a strong consumer protection role in traditional sales and claims handling complaints involving property and casualty insurance, health insurance, and life insurance. They also play an important role in overseeing the sale of annuities, an area where state protections should be strengthened.

The sale of annuities—especially indexed annuities—that are marketed and sold as investments and retirement planning products raise significant investor protection concerns. Those products generate huge and essentially guaranteed profits for insurance companies and the agents or "producers" that sell them. Yet they are extremely complex and difficult for investors to understand, and they can carry large commissions, lock up savings for years, and offer meager returns by virtue of caps and other features that dampen investors' gains. Investors and retirement savers therefore need protection against the intense conflicts of interest that motivate insurance companies and agents to sell them.

The problem is that unlike most insurance products, annuities are subject to a complex mix of state and federal regulation, and the protections for investors are inadequate with respect to indexed annuities in particular. While variable annuities are considered securities subject to SEC regulation, indexed annuities are not. The SEC sought to regulate indexed annuities by adopting Rule 151A in 2009 that classified those products as securities. However, in 2010, the D.C. Circuit vacated the rule based on perceived deficiencies in the SEC's economic analysis in support of the rule.[115] To ensure that the SEC could not fix or revisit the federal-level rule, insurance industry lobbyists secured a provision in the Dodd-Frank Act, Section 989J (known as the Harkin amendment) that cordoned off the SEC's oversight of those products.[116]

As to state securities regulation, the securities regulator in Illinois attempted to assert authority over indexed annuities, bringing an enforcement action alleging that an investment adviser also licensed as an insurance agent had committed fraud in the sale of indexed annuities to his client.[117] However, the Illinois Supreme Court rejected that position and vacated the administrative order imposing sanctions, holding that indexed annuities are insurance products, not securities. Barring enforcement by the state insurance commissioner, the investment adviser in question escaped oversight in its sale of the indexed annuities.

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[113] NAIC Model Laws, Regulations, Guidelines and Other Resources—Spring 2025, https://content.naic.org/sites/default/files/committee-model-law-table-of-contents.pdf.

[114] *What Do Insurance Regulators Do,* NAIC, https://content.naic.org/sites/default/files/about-state-insurance-regulators.pdf; Maryland Insurance Administration, *Key Responsibilities, https://www.insurancebusinessmag.com/us/companies/maryland-insurance-administration/535029/#Key%20responsibilities*.

[115] *American Equity Investments Life Insurance Co. v. SEC*, 613 F. 3d 166 (2010); *cf. SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959) (holding variable annuities are investments subject to SEC regulation).

[116] *See generally The Dodd-Frank Wall Street Reform and Consumer Protection Act: Insurance Provisions*, at 3, Congr. Res. Serv. (2010) (observing that Harkin amendment was "broadly aimed at returning indexed annuities solely to state oversight"), https://www.everycrsreport.com/files/20100817_R41372_8783cd073ee14af0ba8e739ff31bf47063a236d0.pdf.

[117] V*an Dyke v. White*, 131 N.E.3d 511 (2019).

Finally with respect to regulatory jurisdiction over indexed annuities, to the extent that indexed annuities are purchased by retirement savers for their retirement accounts, such sales *are* subject to the requirements in the Employee Retirement Income Security Act (ERISA), administered by the U.S. Department of Labor. That law provides strong protections against the abuses and conflicts of interest among those who recommend a broad range of products to retirement savers, including all types of annuities. But here the problem is loopholes. For over 40 years, the DOL rules implementing those protections have suffered from enormous gaps, enabling many sales of fixed indexed annuities to fall outside the protections of ERISA. In April 2024, the DOL adopted a new rule that largely closed the loopholes, but that rule was promptly challenged in court by the insurance industry and stayed pending the litigation.[118] It appears that the DOL under the Trump Administration is likely either to abandon its defense of the rule or to rewrite the rule and dilute its protections.

Thus, *federal* protections against abuses in the sale of indexed annuities are either non-existent (SEC) or riddled with loopholes (DOL). And state securities regulators lack jurisdiction over indexed annuities. That means that investors and retirement savers must depend on state insurance protections, but they are notoriously weak and must be strengthened.[119] While the NAIC has created a model rule that it claims addresses the conflicts of interest that motivate agents to push annuities on their clients, the reality is that the rule does little to protect consumers. Some form of the model rule has been widely adopted among the states,[120] but individual states can and should strengthen the rule and address the weaknesses identified below.

D. The Weak Provisions in the NAIC's Model Rule Governing Annuity Sales

The NAIC's Suitability in Annuity Transactions Model Regulation (#275) was initially adopted in 2003. It has been revised multiple times, most notably in 2020, supposedly to incorporate a "best interest" standard for annuity recommendations made by insurance agents. The rule became the focus of intense debate in the battle over the DOL fiduciary duty rule, which was written to ensure that advisers recommending a wide range of investment products to retirement savers acted in the best interest of their clients. The insurance industry fought desperately to fend off a strong DOL rule by arguing in part that protections against adviser conflicts of interest already existed, at least for insurance products, in the form of the NAIC model rule.

However, claims that the NAIC's model rule offers real protections to retirement savers in the form of a genuine "best interest" requirement are false or at best disingenuous.

- The model rule expressly *disclaims* that it creates "a fiduciary obligation or relationship," providing only that it creates a regulatory obligation. (Sec. 6A(1)(d))
- It imposes a "best interest" standard in name only. It does not actually prohibit producers or insurers from placing their interests ahead of their customers' interests. Instead, it feebly provides that an insurance producer "has met" their best interest obligation if they simply have "a reasonable basis to believe the recommended option effectively *addresses* the consumer's financial situation and *insurance needs*." (Sec. 6A(1)(a)(iii))

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[118] *See, e.g., American Council of Life Insurers v. U.S. Department of Labor*, Case No. 4:24cv482 (N.D. Tex.); *American Council of Life Insurers v. U.S. Department of Labor*, Case No, 24-10890 (5th Cir.) (appeal).

[119] Better Markets Comment Letter to the Department of Labor on proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary (Jan. 2, 2024), https://bettermarkets.org/wp-content/uploads/2024/01/Better-Markets-Comment-Letter-DOL-Retirement-Security-and-Prohibited-Transaction-Exemption.pdf.

[120] *The NAIC Annuity Suitability "Best Interest" Model Regulation*, NAIC (May 2025), https://content.naic.org/sites/default/files/government-affairs-brief-annuity-suitability-best-interest-model.pdf

- The provisions regarding conflicts of interest are doubly weak, in substance and in scope. First, as to substance, the model rule merely requires that a producer "avoid or reasonably *manage and disclose* material conflicts of interest." (Sec. 6A(3)). And it guts this provision by excluding entirely from the scope of the definition of "material conflict of interest" any "*cash compensation or noncash compensation*"—even though such forms of compensation obviously create the most intense conflicts of interest. (Sec. 5I(2)) Thus, the model rule fails to address the huge commission payments, all-expense paid vacations, sports and theatre tickets, and other forms of cash and noncash compensation that annuity companies use to encourage agents to sell their annuities, often at the expense of retirement savers. The NAIC model rule essentially imposes no meaningful duty to address the powerful conflicts of interest associated with these products.

- The model rule also does not cover annuity recommendations *inside 401(k)s or 403(b)s*. Plan sponsors, and thereby plan participants, do not receive even the standard's thin protections from recommendations to include sub-optimal annuities as an investment option. (Sec. 4B)

- The model rule is further limited in scope because it expressly does not require "analysis or consideration of any products *outside* the authority and license of the producer or other possible alternative products or strategies available in the market at the time of the recommendation." (Sec. 6A(1)(c))

- The model rule generally applies only to the individual agents, known as "producers," who are licensed to "sell, solicit, or negotiate" insurance; it does not apply to the insurance companies responsible for supervising the producer, reducing the incentives that companies have to police annuity sales. (Secs. 5L, 5M(1), and 6A)

- Finally, there is no evidence that state insurance regulators have actually been enforcing the model rule to derive whatever limited consumer protection benefits it can provide.

The weaknesses in the NAIC model rule are especially damaging because the annuity products now widely offered to retirement savers are notoriously complex and investors are compelled to rely on their insurance agents for guidance. Yet with such a weak state-level set of rules currently in place governing the sale of annuities, those investors are largely at the mercy of the conflicts of interest motivating those agents. In addition, the volume of retail annuity sales is huge, reaching nearly half a trillion dollars in 2024. Indexed annuities totaled $125.5 billion that year, up 31% from 2023, representing the third consecutive year of record indexed annuity sales.[121]

E. What the States Can Do

Every state should adopt a stronger version of the NAIC model rule, one that corrects the deficiencies cited above and actually prevents both agents and insurance companies from advising clients to purchase annuities that are not in their clients' best interest. That would go a long way toward creating more meaningful investor protections in an increasingly important sector of the financial markets. The states can further strengthen those protections by rigorously enforcing stronger rules protecting purchasers of annuities.

[121] *LIMRA: 2024 Retail Annuity Sales Power to a Record $432.4 Billion (Jan. 28, 2025),* https://www.limra.com/en/newsroom/news-releases/2025/limra-2024-retail-annuity-sales-power-to-a-record-$432.4-billion/.

CONCLUSION

State regulators have a central role in the oversight of our financial markets. They have the authority, resources, expertise, and commitment to advance the public interest by protecting consumers and investors from a wide range of abuses that so often accompany the offer and sale of financial products and services. The states remain closest to the communities affected by financial misconduct and are therefore in the best position to act when those harms arise. As the federal government increasingly retreats from protecting consumers and investors, it is vital that states continue—and, where possible, strengthen—their important regulatory and enforcement roles in the financial markets.

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