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NASAA

December 12, 2013

The Honorable Mary Jo White
U.S. Securities & Exchange Commission
100 F. Street, NE
Washington, D.C. 20549

RE: Rulemaking Under Title IV of the JOBS Act (Regulation A+)

Dear Chair White,

Since the filing of a our comment letter with the Commission on April 10, 2013, the members of the North American Securities Administrators Association, Inc. (NASAA) have made significant progress in the development of a multi-state review process for offerings conducted under Section 3(b)(2) of the Securities Act of 1933. As the Commission finalizes its proposal for what is commonly known as Regulation A+, we urge you to consider the work we are doing to create a state-level review process that is efficient and practical for issuers who intend to sell unrestricted shares to retail investors.

State regulators want offerings under the new Regulation A+ to be an attractive alternative to offerings conducted under Rule 506 of Regulation D. Toward that end, we did an honest self-assessment of existing state processes and examined the concerns expressed in the GAO's recent study of offerings conducted under current Regulation A.[1] While the GAO study did not isolate blue sky law as the sole or even the primary reason for disuse of Regulation A,[2] we recognize that Regulation A+ will involve larger and more broadly dispersed offerings that elevate the need for uniformity in the states' rules. For that reason, NASAA undertook a year-long effort to address and resolve each and every state-level issue raised in the GAO report.

Under our proposed protocol for Regulation A+ offerings, a copy of which is attached, the state-level filing and review process will be completely overhauled into a modern, streamlined system with functionality similar to the CRD/IARD licensing system. Filings will be made in one place and distributed electronically to all states, and "lead" examiners will be appointed as the primary point of contact for both the disclosure and merit review states. Each state in which registration is sought will then have ten business days to review an application for registration and submit comments or concerns to the lead examiners, but the lead examiners alone will interact with the issuer to resolve any deficiencies. Importantly, once a lead examiner clears the application, the decision is binding on all other states.

[1] United State Government Accountability Office Report to Congressional Committees, Securities Regulation: Factors That May Affect Trends in Regulation A Offerings, July 2012.
[2] According to the GAO Report, "Multiple factors appear to have influenced the use of Regulation A[, including] the type of investors businesses sought to attract, the process of filing the offering with SEC, state securities laws, and the cost-effectiveness of Regulation A relative to other SEC exemptions." *Id.*

In addition to streamlining the process, our proposal scales back some of NASAA's longstanding review guidelines to make this type of offering an attractive option for small businesses, even startups. For example, we are eliminating the requirement that promoters maintain a minimum level of equity in the business, and we are shortening the escrow period for promotional shares. NASAA worked closely with industry stakeholders in developing these changes and remains dedicated to implementing modifications that would improve the efficiency and quality of the new state system.

As required by NASAA's procedures, the proposed protocol for Regulation A+ offerings was submitted first to the members of NASAA for comment earlier this Fall. We also discussed the proposal at a face-to-face meeting of all members in October to make sure everyone understood the contours of the new system, especially the new binding nature of lead examiner review. I am pleased to report that the members expressed nothing but strong support for the proposal and, like me, are equally dedicated to taking whatever steps are necessary to enhance the state filing experience for Regulation A+ and all multi-state offerings.

Following the period for internal comment by NASAA members, the proposal was posted on NASAA's website and distributed for public comment on October 30, 2013. It was published as a 30 day comment period, but we anticipate receiving additional comments and welcome them. While commenters to date have made some constructive suggestions that NASAA is considering as part of the final release, they all seem to recognize that the proposal represents a monumental step forward for state regulation of multi-state offerings.

Now that public comments have been received, NASAA has considerable flexibility in the adoption of the coordinated review program. We could vote on the proposal at any time upon 21 days notice to our members, but we are awaiting the Commission's action to ensure that the state and federal rules are in sync. Once the proposal is adopted by the NASAA membership as an official NASAA statement of policy, we anticipate that most if not all U.S. NASAA members will be able to implement it simply by signing onto the new Coordinated Review Protocol Memorandum of Understanding ("MOU") without attendant statutory or regulatory changes.[3] Once finalized, it will be my and the NASAA Board of Directors' first order of business to get the MOU signed by all 51 U.S. jurisdictions as quickly as possible.[4]

NASAA is aware of efforts by commenters and others to persuade the Commission to adopt a definition of "qualified purchaser" that would effectively preempt, either in part or entirely, state regulation of Regulation A+ offerings. Those efforts should not be heeded. "Qualified purchaser" is not a new term in federal securities law; neither is the term "accredited investor." Congress has used both terms to reflect its clear intent regarding registration requirements for

[3] See, e.g., Section 608 of the Uniform Securities Act (2002) and Section 420 of the Uniform Securities Act of 1956.
[4] NASAA has had great success in securing signatures like this in important initiatives, including all members' agreement to share resources in the area of investment adviser examinations, as reflected in an MOU that was created in anticipation of the switch of mid-sized advisers from federal to state registration pursuant to the Dodd-Frank Act.

offerings directed to these separate sets of investors. It would be wholly inappropriate for the Commission to redefine or misapply either of these terms in contravention of Congress' intent.

Moreover, with respect to the Regulation A+ provisions of the JOBS Act specifically, Congress carefully and extensively considered whether or not the new exemption should preempt state authority. After weighing the perceived merits of preempting state law and the risk to investors that could arise from such action, Congress affirmatively judged that states should not be preempted from review of offerings under the exemption, citing both the "high-risk" nature of these offerings and the "essential" function that state review plays in discouraging fraud.[5]

On November 2, 2011, the House of Representatives voted unanimously to remove preemptive provisions from its version of the legislation, and the Senate concurred.[6] For the Commission to propose a rule that would, by regulation, undermine Congress' recent judgment and clear, longstanding intention in this regard would be ill-advised and subject to challenge.

We urge you – in the strongest terms – to resist calls to preempt the states through the definition of a qualified purchaser. State-level review will help the Commission root out fraud and abuse in this new marketplace and will give investors confidence that securities sold in these offerings are subject to an adequate level of scrutiny. Working together, the Commission and the states will be strongly positioned to protect our citizens and make Regulation A+ a success for small business filers.

We appreciate our long partnership with the Commission in matters of mutual interest, and we look forward to working with you in this area. If you have any questions, please contact me at [redacted] or NASAA President-Elect Bill Beatty at [redacted]

Sincerely,

Andrea Seidt

Andrea Seidt
NASAA President
Ohio Securities Commissioner

[5] The House Committee Report accompanying H.R. 1070, the Small Company Capital Formation Act of 2011, provides that "There was one contentious issue that arose during the markup that had nothing to do with the principle of an exemption limit increase, but instead with new language preempting state law. This language preempts state securities law for Regulation A securities offered or sold by a broker or dealer, creating a class of security not subject to state level review, but which will not receive adequate attention at the federal level. Regulation A securities are sometimes high-risk offerings that may be susceptible to fraud, making the protections provided by state review essential. To address these concerns, the Democrats offered an amendment to clarify that state securities would only be preempted if the Regulation A security is sold on an exchange or sold only to a qualified purchaser." See House Committee Report 112-206.

[6] Congressional Record Volume 157, Number 166 (Wednesday, November 2, 2011), pp. H7229-H7232.

cc: Luis A. Aguilar, Commissioner
Daniel M. Gallagher, Commissioner
Michael S. Piwowar, Commissioner
Kara M. Stein, Commissioner
Keith F. Higgins, Director, Division of Corporation Finance

Attachments:

1. Notice of Request for Public Comment: Proposed Coordinated Review Program for Section 3(b)(2) Offerings
2. NASAA Comment Letter Dated April 10, 2013

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NASAA

April 10, 2013

Submitted electronically to rule-comments@sec.gov

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street NE
Washington D.C. 20549-1090

Subject: Comments on SEC Regulatory Initiatives under the Jumpstart Our Business Startups Act: Title IV – Small Company Capital Formation

Dear Ms. Murphy:

The North American Securities Administrators Association, Inc. ("NASAA")[1] submits the following advance comments concerning the adoption of an exemption under Section 3(b)(2) of the Securities Act of 1933 ("Act"), as authorized by Title IV of the Jumpstart Our Business Startups Act ("JOBS Act").[2]

NASAA members have a strong interest in facilitating capital formation in Section 3(b)(2) offerings. Moreover, because these are public offerings that will not be subject to federal registration, the role of NASAA member jurisdictions in the regulation of these offerings is essential to investor protection. Ultimately, oversight by state regulators will contribute to the success of a public marketplace for these offerings. Therefore, in adopting rules applicable to Section 3(b)(2) offerings, we urge the Commission to be mindful of the important role of the states in regulating this new market.

The members of NASAA's Small Business/Limited Offerings Project Group met in January to design a protocol for the coordinated multi-state review of Section 3(b)(2) offerings. The project group also met with members of the ABA Business Law Section's working group on Section 3(b)(2) offerings to discuss the need for a coordinated review program and the guidelines that would be appropriate for 3(b)(2) offerings. NASAA members are committed to designing and implementing an efficient review program that facilitates capital formation in these offerings while providing an appropriate level of investor protection.

1 The oldest international organization devoted to investor protection, the North American Securities Administrators, Inc. was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

2 Pub. L. No. 112-106, 126 Stat. 306 (2012), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-112publ106/pdf/PLAW-112publ106.pdf.

We suggest that the federal and state requirements for these offerings should be harmonized to the fullest possible extent. Toward that end, the comments set forth below are intended to assist the Commission in designing and implementing a Section 3(b)(2) exemption that is compatible with the state review program. We also request the cooperation of the Commission staff to work with NASAA to implement a "one-stop" electronic filing system for state review of Section (3)(b)(2) offerings.

1. **NASAA strenuously objects to suggestions to define "qualified purchaser" in Section 3(b)(2) or any other offerings based on whether or not the sale was effected through a registered broker-dealer or based on investor qualifications that are commensurate or inferior to current "accredited investor" thresholds.**

Section 401 of the JOBS Act provides that a security sold to a "qualified purchaser" in a 3(b)(2) offering will be treated as a covered security under Section 18 of the Securities Act of 1933. Because states are preempted from requiring registration of covered securities, the definition of a qualified purchaser is a matter of great importance to state regulators and the investors we strive to protect.

NASAA is deeply disturbed by the advance comments of the ABA Federal Regulation of Securities Committee[3] and others[4] suggesting that the Commission define "qualified purchaser" in a manner that is commensurate with or even less stringent than[5] the criteria for an "accredited investor," or to define it in such a manner that would render any sale of securities through a registered broker-dealer a covered security. In the debate and eventual passage of the JOBS Act, calls to broadly preempt state securities registration requirements with respect to securities offered under Section 3(b)(2) were rejected. Instead, recognizing the important role of states in the regulation of these offerings, Congress limited the preemption to two narrowly-tailored conditions.

In addition, the suggestions of the ABA and others would make it easier for fraudsters to utilize this exemption due to the lack of rigorous federal or state review. The fraud that would result would undermine the market for these types of offerings and hamper the ability of legitimate issuers to raise capital under the exemption. The fact that the securities will be freely tradable, unlike those issued in Rule 506 and other exempt offerings, exacerbates the potential for fraud and abuse and increases the importance of state regulation.

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[3] Letter from Catherine T. Dixon, Chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, to SEC (Sept. 7, 2012), at http://www.sec.gov/comments/jobs-title-iv/jobstitleiv-13.pdf (hereinafter ABA Comment Letter).

[4] *See, e.g.*, Letter from William R. Hambrecht, Chairman and CEO, WR Hambrecht+Co., to SEC (Jan. 4, 2013), at http://www.sec.gov/comments/jobs-title-iv/jobstitleiv-21.pdf.

[5] Letter from Rutheford B. Campbell, Jr., William L. Matthews Professor of Law, University of Kentucky, to Elizabeth M. Murphy, Secretary, SEC (Nov. 13, 2012), at http://www.sec.gov/comments/jobs-title-iv/jobstitleiv-18.pdf (suggesting that the Commission define "qualified purchaser" as any investor who purchases securities in a Section 3(b)(2) offering).

As pointed out by NASAA in the past,[6] when Congress enacted the National Securities Markets Improvement Act of 1996 ("NSMIA") and defined "covered security" to include sales to "qualified purchasers," it clearly intended for the definition of qualified purchaser to require greater investor qualifications than those of "accredited investors." The legislative history indicates that qualified purchaser was to be defined to include "sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary."[7] In both legislation and Commission rule-making, it has been recognized that while accredited investors may not need all the protections afforded by the registration process, offerings to those types of investors remain subject to specific limitations designed to provide some minimal level of investor protection. For example, notice filings containing specified information about the offering are required to be filed with the Commission in sales to accredited investors under Rule 506. In addition, Congress mandated the adoption of disqualification provisions under Rule 506 to protect accredited investors from offerings by "bad actors" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

The suggestion that investors who purchase securities through registered broker-dealers should not be afforded the protections of either federal or state registration defies registration requirements under the Securities Act of 1933, the Investment Company Act of 1940, and all state securities laws. One need only look as far as the enforcement orders of the Commission, FINRA, and the states to discover the unfortunate reality that registration as a broker-dealer fails to provide the same investor protection that is provided by the securities registration process. Never has the registration of a broker-dealer alone been recognized as an adequate substitute for the investor protections provided by the registration process, and recent history affirms the fallacy of such recognition.[8]

While NASAA does not object to the adoption of rules to define a qualified purchaser, the definition must be based on qualifications that are sufficiently greater than the definition of an accredited investor whereby the benefits of further limitation on sales to these types of investors are far outweighed by the associated burdens. In this regard, if the Commission pursues defining qualified purchaser under the Securities Act of 1933, NASAA again suggests the adoption of the same thresholds as those contained in the definition of "qualified purchaser" under the Investment Company Act of 1940 ('40 Act).[9] To be deemed a qualified purchaser under the '40

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[6] Letter from Patricia D. Struck, NASAA President and Wisconsin Securities Administrator, to Nancy M. Morris, Federal Advisory Committee Management Officer, SEC (Mar. 28, 2006), at http://www.sec.gov/rules/other/265-23/rastaples1692.pdf. *See also*, Letter from Joseph P. Borg, NASAA President and Director of the Alabama Securities Commission, to Jonathan G. Katz, Secretary, SEC (Mar. 4, 2002), at http://www.sec.gov/rules/proposed/s72301/borg1.htm (hereinafter NASAA Qualified Purchaser Letter).

[7] H.R. Rep. No. 622, 104th Cong. 2d Sess. at 31 (1996).

[8] *See, e.g.*, Press Release, SEC, SEC Charges J.P. Morgan and Credit Suisse With Misleading Investors in RMBS Offerings (Nov. 16, 2012), at http://www.sec.gov/news/press/2012/2012-233.htm; Press Release, FINRA, FINRA Sanctions Eight Firms and 10 Individuals for Selling Interests in Troubled Private Placements, Including Medical Capital, Provident Royalties and DBSI, Without Conducting a Reasonable Investigation (Nov. 29, 2011), at http://www.finra.org/newsroom/newsreleases/2011/p125193; Press Release, NASAA, State Securities Regulators Announce $1.3 Billion Settlement with Wells Fargo Investors in Auction Rate Securities Investigations (Nov. 18, 2009), at http://www.nasaa.org/2171/state-securities-regulators-announce-1-3-billion-settlement-with-wells-fargo-investors-in-auction-rate-securities-investigations/.

[9] *See* NASAA Qualified Purchaser Letter, *supra* note 6.

Act, a natural person must generally own not less than $5,000,000 in investments and an entity must generally own and invest on a discretionary basis not less than $25,000,000 in investments.[10] Investors who meet these thresholds have been recognized by Congress as not generally needing the protections afforded by registration of investment companies under the '40 Act. These established thresholds are sufficiently high that "there is a reasonable probability that the investors included in the definition would be financially sophisticated and capable of assuming risk" as contemplated by Congress in enacting NSMIA.[11]

In the alternative, we would again propose that the term be defined consistent with the thresholds established in the Investment Advisers Act of 1940 for "qualified clients." While inferior to the qualified purchaser standard under the '40 Act, the qualified client definition attempts to define those clients of an investment adviser more likely to be financially sophisticated and capable of evaluating and assuming the risks of performance based fee arrangements. The qualified client definition is subject to adjustments for inflation and generally requires that a natural person have either (i) $1,000,000 under the management of the investment adviser, or (ii) net worth of more than $2,000,000 exclusive of the investor's primary residence.[12] As we suggested in our 2002 comment letter on the definition of qualified purchaser, we urge that both of these thresholds be satisfied for qualified purchasers. While either of these thresholds may be sufficient to allow clients to enter into performance based fee arrangement with investment advisers, they are not as effective in the case of the definition of qualified purchaser in light of the absence of the fiduciary relationship that exists between an investment adviser and its clients.[13]

2. An exemption adopted under Section 3(b)(2) must require fulsome disclosure and the format for disclosure should follow the format of the Form 1-A.

In adopting an exemption under Section 3(b)(2), it is imperative that the Commission mandate the use of an offering statement and its contents to provide fulsome disclosure to prospective investors. Congress clearly intended such a mandate when it required 3(b)(2) issuers to:

> prepare and electronically file with the Commission and distribute to prospective investors an offering statement, and any related documents, in such form and with such content as prescribed by the Commission, including audited financial statements, a description of the issuer's business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters.[14]

Not only did Congress express its intent for the Commission to mandate specific disclosure requirements, but the need for mandated disclosure to protect investors is magnified by several factors, including: (1) the fact that issuers will be able to sell to investors regardless of their qualifications; (2) the ability to engage in general solicitation; (3) the higher permitted offering

[10] 15 USC 80a-2(a)(51).
[11] *Id.*
[12] 17 CFR § 275.205-3.
[13] NASAA Qualified Purchaser Letter, *supra* note 6.
[14] Section 401 of the JOBS Act.

amount as compared to Reg. A offerings; and (4) the ability to solicit indications of interest prior to ever filing the offering statement with the Commission. For these reasons, we urge the Commission to mandate the use and filing of a fulsome disclosure document.

NASAA members have long accepted the disclosure mandated in Form 1-A for Regulation A offerings, and we believe Form 1-A provides an appropriate level of disclosure for offerings exempt under Section 3(b)(2). NASAA was also responsible for the drafting of the question and answer style disclosure format of Model B of Form 1-A, and we believe the Model B disclosure format facilitates capital formation by small business issuers whose officers and directors may be the primary drafters of the disclosure document.

In drafting its rules, we further encourage the Commission to accept the question and answer disclosure format of the latest Small Company Offering Registration (SCOR) form, which was promulgated by NASAA in 1989 and has been updated since that time. NASAA is committed to further updating the SCOR form in cooperation with the Commission staff to ensure a mutually acceptable question and answer disclosure document that is designed for Section 3(b)(2) offerings and facilitates robust and adequate disclosures.

3. NASAA strongly urges the Commission to proscribe offerings under Section 3(b)(2) by blank check companies and SPACs.

Offerings by blank check companies and special purpose acquisition companies (SPACs)[15] are generally prohibited as fraudulent offerings under state securities laws.[16] NASAA members have found that "sales of blank check blind pool securities contain inadequate disclosure of facts about the issuer and the offer, tend to work a fraud upon the purchasers thereof and cannot be justified for any useful economic purpose."[17] For these reasons, we urge the Commission to proscribe these types of offerings under Section 3(b)(2), which if permitted at all, would be more appropriately conducted in an offering subject to federal registration.

4. NASAA strongly urges the Commission to proscribe the use of financial projections in Section 3(b)(2) offerings in the absence of their review and expression of an unqualified opinion thereon by a licensed certified public accountant.

State law may not permit the use of financial projections in registered offerings due to the inherent potential for fraud and abuse and the possible lack of any reasonable bases for the projections. The higher offering amount permitted under Section 3(b)(2) as compared to Regulation A elevates these concerns, and the freely tradable nature of the securities contributes to the need for such a prohibition in the interest of investor protection. Thus, NASAA strongly urges the commission to proscribe the use of financial projections in Section 3(b)(2) offerings. As an alternative, NASAA urges the Commission to allow the use of financial projections only if

[15] *See* Blank Check Company, SEC, at http://www.sec.gov/answers/blankcheck.htm.
[16] Resolution of the North American Securities Administrators Association, Inc., Declaring Blank Check Blind Pool Offerings to be Fraudulent Practices (Apr. 29, 1989), available at http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Resolution-Regarding-Blank-Check-and-Blind-Pool-Offerings.pdf.
[17] *Id.*

they are reviewed or compiled and contain the the expression of an unqualified opinion thereon by a licensed certified public accountant.

5. **NASAA strongly urges the Commission to appropriately condition the ability of issuers to solicit indications of interest prior to the filing of an offering statement.**

Section 401 of the JOBS Act will allow issuers to solicit indications of interest in an offering prior to the filing of any offering statement with the Commission. This raises concerns that issuers may pre-condition the market with potentially false or misleading statements, effectively negating the likelihood of investors reviewing final offering materials that may contain substantially different terms or revised disclosures. For this reason, we urge the Commission to place appropriate conditions on the ability to solicit indications of interest prior to the filing of an offering statement in Section 3(b)(2) offerings. In this regard, we believe it is appropriate to restrict the ability to solicit indications of interest prior to the filing of an offering statement to those solicitations conducted by registered broker-dealers or to solicitations in firmly underwritten offerings. The involvement of a registered broker-dealer or an underwriter will provide a minimal degree of assurance that the risk of pre-conditioning the market with potentially false or misleading statements is mitigated.

We further recommend that the Commission adopt specific disclosure requirements in any solicitations of interest to ensure that prospective investors are appropriately advised of the tentative nature of the offering and are urged to read the final offering statement. At a minimum, these advisements should include those prescribed by Rule 254(b)(2).[18]

6. **NASAA urges the adoption of a uniform disqualification provision for offerings under Regulation D, Section 4(a)(5), Regulation A, and Section 3(b)(2).**

As urged by NASAA in the past, we continue to advocate for the adoption of a uniform disqualification provision for "bad actors" that would apply to all offerings under Regulation D, Section 4(a)(5), Regulation A, and the new exemption under Section 3(b)(2).[19] The creation of a different disqualification provision for Section 3(b)(2) offerings, in addition to those that already exist, would only serve to create confusion and increase compliance costs.

7. **Should the Commission permit the use of Section 3(b)(2) by Real Estate Investment Trusts (REITs) and Business Development Companies (BDCs), NASAA urges the Commission to consider tailored disclosure requirements.**

Real Estate Investment Trusts (REITs) and Business Development Companies (BDCs) currently register their securities using Form S-11 and Form N-2, respectively. The unique nature of REITs and BDCs with respect to, among other things, the nature and timing of their capital formation and investment strategies, fee structures, and liquidity, necessitate disclosure fitting for

[18] 17 CFR § 230.254(b)(2).
[19] Letter from David S. Massey, NASAA President and Deputy Securities Commissioner, North Carolina Department of the Secretary of State, to Elizabeth M. Murphy, Secretary, SEC (July 25, 2011), *at* http://www.sec.gov/comments/s7-21-11/s72111-35.pdf.

these specific entities. Should the Commission permit the use of Section 3(b)(2) by Real Estate Investment Trusts (REITs) and Business Development Companies (BDCs), NASAA would appreciate the opportunity to work with the Commission to develop appropriate disclosure requirements for REITs and BDCs.

8. NASAA urges the Commission to restrict the ability of selling security holders to rely on Section 3(b)(2) in the absence of the approval of the offering by a majority of an issuer's independent directors upon a finding that the offering is in the best interests of both the selling security holders and the issuer.

In its present form, Regulation A limits the amount of securities that may be offered by selling security holders and prohibits resales by affiliates "if the issuer has not had net income from continuing operations in at least one of its last two fiscal years."[20] This limitation protects the investing public from selling security holders who may have superior information about the issuer from dumping their investments in the public markets.

NASAA members are disturbed by recent offerings whose sole purpose is to provide liquidity to venture capital and private equity investment firms, which have better negotiating power and access to information than the average investor in a public offering. We are concerned these offerings may be abusive of not only investors that purchase securities in the resale, but also of the issuers themselves. For example, in a recent application by Applied Medical Corporation, the company is seeking registration of outstanding securities held by a venture capital firm pursuant to demand registration rights. The prospectus discloses in no uncertain terms that the issuer's board of directors and executive officers believe the offering, which will not provide any proceeds to the issuer, is not in the best interests of the company.[21] We do not believe these offerings are what Congress contemplated when passing the JOBS Act because these offerings do not provide capital to the issuers or otherwise contribute to job creation. Accordingly, the Commission should not allow the market for Section 3(b)(2) offerings to be muddied with offerings by selling security holders such as venture capital and private equity firms who had superior negotiating power at the time of their investment, have greater access to information, and seek to offload their investments on public investors. For these reasons, we urge the Commission to restrict the ability of selling security holders to use the exemption.

In the alternative, we urge the Commission to require the approval of a majority of an issuer's independent directors as a condition of Section 3(b)(2) for offerings involving selling security holders. While such a provision would not protect public investors from venture capital and private equity firms with superior negotiating positions and access to information, it would at least serve to mitigate the risk of offerings that are not in an issuer's best interests and do nothing to increase an issuer's access to capital or facilitate job creation. These offerings would instead

[20] 17 CFR § 230.251(b).

[21] The prospectus further discloses that the underwriter selected by the venture capital firm may not be acting in the best interests of the company, its existing stockholders, or its potential investors. Shockingly, the prospectus goes on to suggest that information posted on the underwriter's website may contradict the disclosure set forth in the prospectus, which we understand may mean that misleading statements and omissions are being made in connection with this offering.

be subject to SEC registration and would therefore be more likely to be listed on an exchange, providing greater protection to public investors than that provided in an offering exempt from federal registration. We note that such a provision would need to provide that demand registration rights cannot form the basis for the approval of the offering by independent directors.

9. NASAA urges the Commission to adopt meaningful reporting requirements for Section 3(b)(2) issuers to protect the investing public and facilitate secondary trading.

As we have suggested previously,[22] we continue to urge the Commission to adopt meaningful reporting requirements for offerings conducted under Section 3(b)(2) offerings to facilitate secondary trading. In this age of internet communications, social media, and online trading, meaningful reporting requirements are essential to provide a level of investor protection for securities that are not federally registered.[23] The reporting requirements ultimately adopted must be fulsome enough to mitigate potential fraud in this area in light of the fact that the securities offered under Section 3(b)(2) are not subject to federal registration and will not necessarily be subject to exchange listing requirements, but will be freely tradable nonetheless.

Conclusion

NASAA appreciates the opportunity to provide these comments to the Commission. We look forward to working with the Commission staff to ensure maximum coordination of a the exemption under Section 3(b)(2) with state law requirements and to facilitate a "one-stop" filing system. Should you have any questions regarding the comments in this letter, please contact the undersigned; Rick Fleming, Deputy General Counsel for NASAA, at [redacted] or [redacted]; or Bill Beatty, Securities Administrator for the State of Washington and Chair of NASAA's Corporation Finance Section at [redacted] or [redacted]

Sincerely,

A. Heath Abshure
President

[22] Letter from Jack Herstein, NASAA President and Assistant Director, Nebraska Department of Banking & Finance, to Elizabeth M. Murphy, Secretary, SEC (July 3, 2012), at http://www.sec.gov/comments/jobs-title-ii/jobstitleii-40.pdf.

[23] See, e.g., Eleazar David Melendez, Twitter Stock Market Hoax Draws Attention of Regulators, TheHuffingtonPost.com, Inc., Feb. 1, 2013, *at* http://www.huffingtonpost.com/2013/02/01/twitter-stock-market-hoax_n_2601753.html.

NOTICE OF REQUEST FOR PUBLIC COMMENT: PROPOSED COORDINATED REVIEW PROGRAM FOR SECTION 3(b)(2) OFFERINGS

The Board of Directors of the North American Securities Administrators Association, Inc. ("NASAA") has authorized release for public comment the accompanying materials regarding a new proposed coordinated review program for offerings exempt from registration federally under Section 3(b)(2) of the Securities Act of 1933.

Public Comment Period

The public comment period will remain open until November 30, 2013. To facilitate consideration of comments, please send comments to Jan Owen (JanLynn.Owen@dbo.ca.gov), Chair of the Corporation Finance Section Committee; Faith Anderson (faith.anderson@dfi.wa.gov), Chair of the Small Business/Limited Offerings Project Group; and Rick Fleming (rf@nasaa.org); Deputy General Counsel for NASAA. We encourage, but do not require, comments to be submitted by e-mail. Hard copy comments can be submitted at the following address:

NASAA
ATTN: Rick A. Fleming, Deputy General Counsel
750 First Street, NE, Suite 1140
Washington, DC 20002

Need for a Coordinated Review Program for Section 3(b)(2) Offerings

Section 3(b)(2) of the Securities Act of 1933 was enacted as part of the Jumpstart Our Business Startups Act ("JOBS Act") and has been otherwise referred to as "Regulation A+." This section provides an exemption from federal registration for public offerings of securities of up to $50 million. The Act provides for preemption of state registration requirements only where the securities offered are listed on a national securities exchange or offered or sold to qualified purchasers. Thus, we anticipate that many Section 3(b)(2) offerings will be required to be registered in the states where the offerings will be made. The members of the Small Business/Limited Offerings Project Group have designed a coordinated review program for Section 3(b)(2) offerings to maximize efficiency and coordination among the states.

Accompanying this memo, we have included the following materials concerning the proposed coordinated review program:

- Review Protocol for NASAA Coordinated Review of Section 3(b)(2) Offerings;
- Memorandum of Understanding Among Members of the North American Securities Administrators Association, Inc. Concerning Participation in Coordinated Review of Section 3(b)(2) Offerings; and
- Application for Coordinated Review of Section 3(b)(2) Offering (Form CR-3(b)(2)-1).

In designing the proposed coordinated review program, the members of the Project Group considered the feedback provided to us by the members of the Reg. A+ Working Group of the State Regulation of Securities Committee of the American Bar Association's Business Law Section, as well as internal comments received from NASAA members. The Project Group members believe the proposed coordinated review program appropriately balances the suggestions of the Reg. A+ Working Group with the need for investor protection and the internal comments received from NASAA members.

Proposed Coordinated Review Program

The proposed coordinated review program contemplates a one-stop filing for all states in which registration is required through the Electronic Filing Depository ("EFD") system currently in development by NASAA. The program administrator would select a lead merit examiner and a lead disclosure examiner from among the states in which registration is sought. If the issuer is not applying for registration in a state that applies merit standards, then only a lead disclosure examiner would be identified. The lead examiners would be responsible for drafting and circulating a comment letter to the participating jurisdictions. The lead examiners would also be responsible for seeking resolution of those comments with the issuer or issuer's counsel. As with existing coordinated review programs for registered public offerings, the issuer would have the option of withdrawing from select states or from coordinated review altogether. It is currently contemplated that Washington would serve as the program administrator.

By having the lead merit and disclosure examiners draft the initial comment letter, we believe there will be greater uniformity and less duplication of efforts among the states as compared to existing coordinated review programs. In the existing coordinated review programs, which include those for direct participation programs and equity offerings that are federally registered, each participating state submits comments to the lead examiners based on each state's individual review of the offering materials. This can result in a significant duplication of effort and varying comments. While individual states would continue to be afforded the opportunity to suggest additional comments and to ask for the inclusion of comments specific to an individual state's laws, each individual state would not be required to draft duplicative comments on the same issues. For example, where an issuer would be required to have independent directors, the lead examiners would draft that initial comment instead of having every participating state draft the same comment.

The coordinated review program would not be restricted to common stock offerings. As such, the Review Protocol specifies that comments will be based on whatever statements of policy are applicable. For copies of the statements of policy for various types of securities, see http://www.nasaa.org/regulatory-activity/statements-of-policy/.

The Review Protocol incorporates the following exceptions to existing statements of policy:

- The Statement of Policy Regarding Promoters' Equity Investment shall not apply;
- The Statement of Policy Regarding Promotional Shares shall apply except that one-third (1/3) of any promotional shares required to be locked-in or escrowed shall be released on the first, second, and third anniversary of the date of completion of the offering such that

all shares shall have been released from lock-in or escrow by the third anniversary of the date of completion of the offering; and

- The Statement of Policy Regarding Loans and Other Material Affiliated Transactions shall apply except that the disclosure document shall not be required to include representations by counsel to the issuer as contemplated in Section VII.C.3 of the policy.

Relief from these particular provisions is based on the comments received from the Reg. A+ Working Group. The Statement of Policy Regarding Promoters' Equity Investment is considered a potential "deal killer" for start-up companies by promoters who may not have put cash or physical assets into their companies, but who have contributed considerable "sweat equity." The members of the Project Group concluded that enforcement of the requirements of this statement of policy are not necessary to ensure appropriate investor protections are in place for these types of offerings. Other mechanisms, such as promotional share escrow or lock-in requirements, can be used to ensure that promoters' interests are aligned with public investors without disqualifying an offering. As such, the coordinated review program has been designed so that this Policy would not apply.

The Reg. A+ Working Group members also suggested that the promotional shares escrow or lock-in requirements in the Statement of Policy Regarding Promotional Shares should be relaxed for Section 3(b)(2) offerings. While the Project Group members did not believe the 180-day escrow or lock-in suggested would be sufficient to protect public investors, it was determined that the periods contemplated in the statement of policy were longer than necessary to protect public investors. The proposed coordinated review program is therefore designed to provide for shortened escrow or lock-in periods.

Finally, the review program is designed so that the disclosure document would not be required to include statements indicating issuer's counsel has performed due diligence as contemplated by the Statement of Policy Regarding Loans and Other Material Affiliated Transactions. The Reg. A+ Working Group pointed out that "counsel are generally not considered to be obliged under the securities laws to affirmatively perform due diligence concerning the disclosures in the offering materials." Further, it has been questioned as to whether administrative agencies may impose such requirements on counsel given the exclusive authority of state bar associations to regulate their members. For these reasons, the Project Group designed the review program such that this particular requirement would not apply to Section 3(b)(2) offerings. The Project Group has also made a suggestion to the Corporation Finance Policy Project Group to remove this requirement.

NASAA Coordinated Review of Section 3(b)(2) Offerings

Review Protocol

1. Applicants desiring coordinated multi-jurisdictional review of an offering to be conducted under Section 3(b)(2) of the Securities Act of 1933 shall file a request for coordinated review, along with required exhibits and filing fees, through the Electronic Filing Depository. The State of Washington is the program coordinator. Applicants shall indicate in what jurisdictions the offering is to be registered through coordinated review.

2. Washington will contact all participating jurisdictions to identify both a lead merit examiner and a lead disclosure examiner. If the issuer has not applied in a jurisdiction that applies merit standards, only a lead disclosure examiner will be identified. The lead examiner(s) will be identified within three (3) business days after receipt of the application for coordinated review.

3. The lead examiner(s) will draft and circulate a comment letter to the participating jurisdictions within ten (10) business days after their identification as lead examiner(s) by the program administrator. If the issuer has applied in a jurisdiction that applies merit standards, the lead merit examiner will include comments consistent with applicable NASAA Statements of Policy. The lead merit examiner shall apply and draft comments based on the applicable statements of policy, with the following exceptions:

    a. The Statement of Policy Regarding Promoters' Equity Investment shall not apply;
    b. The Statement of Policy Regarding Promotional Shares shall apply except that one-third (1/3) of any promotional shares required to be locked-in or escrowed shall be released on the first, second, and third anniversary of the date of completion of the offering such that all shares shall have been released from lock-in or escrow by the third anniversary of the date of completion of the offering; and
    c. The Statement of Policy Regarding Loans and Other Material Affiliated Transactions shall apply except that the disclosure document shall not be required to include representations by counsel to the issuer as contemplated in Section VII.C.3 of the policy.

4. The participating jurisdictions shall have five (5) business days from the circulation of the draft comment letter by the lead examiners to submit additional comments or corrections to the lead examiners. If a jurisdiction does not submit comments to the lead examiners within five (5) business days, the lead examiners can assume the jurisdiction has no comments. After the expiration of the five (5) business days for review of the draft letter by the participating jurisdictions, the lead examiner(s) shall have three (3) business days to make any necessary revisions and send the initial comment letter to the issuer.

5. If the initial application is amended by adding more participating jurisdictions, the initial ten (10) business day review period will be extended to five (5) business days from the date the final amendment is received. Amendments to the application for purposes of adding

jurisdictions must be made prior to the expiration of the initial ten (10) business day review period. If an issuer seeks to add a jurisdiction after this time, the issuer may be required to pursue registration independently and be subject to non-coordinated review standards in each of the additional jurisdictions.

6. The lead examiners will communicate with the applicant and participating jurisdictions, as necessary, to resolve any outstanding comments. The lead jurisdictions will reply to each issuer's response to each coordinated review letter no later than five (5) business days after receipt of the issuer's response.

7. Participating jurisdictions will receive same-day notice from the lead disclosure examiner and the lead merit examiner when that lead examiner clears the application.

8. Once the lead disclosure examiner has cleared the application, all participating disclosure jurisdictions agree to clear the application.

9. Once the lead merit examiner has cleared the application, all participating merit jurisdictions agree to clear the application.

MEMORANDUM OF UNDERSTANDING AMONG MEMBERS OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. CONCERNING PARTICIPATION IN COORDINATED REVIEW OF SECTION 3(b)(2) OFFERINGS

WHEREAS, The states participating in the Coordinated Review of Section 3(b)(2) offerings desire to achieve maximum uniformity and coordination in state regulatory standards in order to assist applicants seeking to register Section 3(b)(2) offerings; and

WHEREAS, These states desire to undertake their regulatory responsibilities regarding Section 3(b)(2) offerings in the most efficient and effective manner by sharing information, coordinating activities, and identifying regulatory priorities;

NOW, therefore, this state agrees as follows:

I. To participate in a coordinated review system for Section 3(b)(2) offerings pursuant to the attached Review Protocol; and

II. To adhere to the applicable NASAA Statements of Policy for registered securities offerings, as amended from time to time, that have been adopted by the state either for disclosure or merit purposes, whichever is applicable, unless all participating states agree to alter such Statements of Policy.

_____
State

_____
Name

_____
Title

_____
Date

Please return this signed form to: North American Securities Administrators Association, Inc.
ATTN: Rick A. Fleming, Deputy General Counsel
7501 First Street NE, Suite 1140
Washington, D.C. 20002

APPLICATION FOR COORDINATED REVIEW OF SECTION 3(b)(2) OFFERING

Form CR-3(b)(2)-1

The Applicant hereby requests coordinated multi-jurisdictional review of an application for registration of an offering being made in reliance on the exemption from federal registration under Section 3(b)(2) of the Securities Act of 1933.

Please note this coordinated review program is not available to offerings registered under Section 5 of the Securities Act of 1933. Blank check offerings do not qualify for this coordinated review program. This program may not be available to an offering even if the offering fits within the initial screening criteria.

The state of [Washington] is acting as the Administrator of the coordinated review program. There is no additional fee for coordinated review.

The coordinated review process will take a minimum of 30 days. The Applicant should consider this time frame and file the application as soon as possible after filing with the Securities and Exchange Commission.

The Applicant agrees to resolve comments through the Lead Disclosure and the Lead Merit states until such time as the Lead states agree that the comment should be resolved through direct contact between the Applicant and the state with the unresolved comment.

Jurisdictions of Application

Set forth below are the jurisdictions participating in this coordinated review program. [NOTE: The list will be modified to reflect only states who agree to participate.] This coordinated review program is available only if the issuer intends to register in two or more of the participating jurisdictions. Please indicate the jurisdictions in which you intend to file an application to register the offering through coordinated review. **Issuers are cautioned to identify all states in which they intend to utilize the coordinated review process. In accordance with the review protocol, it may not be possible to include additional states at a later date.**

❑Alabama (M)	❑Idaho (M)	❑Missouri (M)	❑Pennsylvania (M)
❑Alaska (M)	❑Illinois (D)	❑Montana (M)	❑Rhode Island (D)
❑Arizona (M)	❑Indiana (M)	❑Nebraska (M)	❑South Carolina(M)
❑Arkansas (M)	❑Iowa (M)	❑New Hampshire (D)	❑South Dakota (D)
❑California (M)	❑Kansas (M)	❑New Jersey (D)*	❑Tennessee (M)
❑Colorado (D)	❑Kentucky (M)	❑New Mexico (M)	❑Texas (M)
❑Connecticut (D)	❑Louisiana (D)	❑New York (D)	❑Utah (D)
❑Delaware (D)	❑Maine (M)	❑Nevada (D)	❑Vermont (M)
❑District of Columbia (D)*	❑Maryland (D)	❑North Carolina (D)	❑Virginia (M)
	❑Massachusetts (M)	❑North Dakota (M)	❑Washington (M)
❑Florida (D)	❑Michigan (M)	❑Ohio (M)	❑West Virginia (D)*
❑Georgia (D)	❑Minnesota (M)	❑Oklahoma (M)	❑Wisconsin (D)
❑Hawaii (D)	❑Mississippi (M)	❑Oregon (M)	❑Wyoming (D)

M = Merit Review Jurisdiction D = Disclosure Review Jurisdiction

*NOTE: DC, NJ and WV reserve the right to make substantive comments in select areas.

The Applicant understands that any application filed in a state subsequent to the initial filing may be reviewed separately and may involve application of non-coordinated review standards. The Applicant should understand that the merit states participating in this program will be using certain NASAA Guidelines and/or Statements of Policy as the uniform standard. For information on the standards to be applied, please review the coordinated review program information website at http://www.coordinatedreview.org.

Consent to Service of Process

The Applicant irrevocably appoints the Securities Administrator or other legally designated officer of the jurisdiction in which the issuer maintains its principal place of business and any jurisdiction in which this application is filed, as its agents for service of process, and agrees that these persons may accept service on its behalf, of any notice, process or pleading, and further agrees that such service may be made by registered or certified mail, in any federal or state action, administrative proceeding, or arbitration brought against it arising out of, or in connection with, the sale of securities or out of violation of the laws of the jurisdictions so designated. The Applicant further hereby consents that any such action or proceeding against it may be commenced in any court of competent jurisdiction and proper venue within the jurisdictions of application so designated hereunder by service of process upon the Securities Administrators or other legally designated officers so designated with the same effect as if the Applicant was organized or created under the laws of that jurisdiction and have been served lawfully with process in that jurisdiction. It is requested that a copy of any notice, process, or pleading served hereunder be mailed to:

Name

Address

Dated this _____ day of _____, 20___.

Authorized Representative:

_____
Signature

_____
Print Name

_____
Title

_____
Name of Issuer