



NASAA

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**By email to: [chairmanoffice@sec.gov](mailto:chairmanoffice@sec.gov)**

The Honorable Jay Clayton  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: Follow Up to October 8 Meeting and Request for Recommendations from the North American Securities Administrators Association (NASAA)<sup>1</sup>**

Dear Chairman Clayton:

I am writing to thank you and your team for taking the time to meet with my NASAA colleagues and me on October 8, and to follow up on your request for recommendations regarding steps that can be taken to improve transparency in the private securities marketplace.

NASAA has reservations and concerns about the further expansion of the private securities marketplace. We have filed numerous comment letters with the Commission over the years detailing state experiences with fraud in the Regulation D, Rule 506 market, and we have made specific recommendations for improving transparency and investor protections in these offerings.<sup>2</sup> Our overall view is that there should be greater transparency concerning all private offerings. Regulatory proposals affecting the private markets should be based on solid data, and the Commission should measure the efficacy and impact of any such changes once they have been adopted.

The perspectives of state regulators on the private markets are rooted in our experience developing regulatory regimes by which small companies raise investment capital and in our enforcement responsibilities. Effectively regulated markets serve both companies and investors. However, when it comes to private offerings, all too often state regulators are called upon to assist retail investors who have been targeted by unregistered and/or criminal actors operating under the auspices of registration exemptions. Even where fraud is not present, the opaque and illiquid nature of these securities oftentimes results in retail investors assuming excessive risk, or realizing

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<sup>1</sup> Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, 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.

<sup>2</sup> See, e.g., <https://www.sec.gov/comments/s7-06-13/s70613-430.pdf>.

extraordinary investment loss. Hence, state concerns are deeply held and informed by painful and tragic lessons learned on the job.

Although state regulators may not share all aspects of the SEC's current vision for the future of the private markets, I was heartened to learn that you share many of our concerns relating to a sub-set of Regulation D offerings. During our recent meeting, we understood you to focus on offerings made by operating companies valued at less than \$50 million. While we understand that pooled investment vehicles raise the most money under Regulation D, smaller operating company offerings represent a significant number of offers, and those deals are more likely to involve retail investors. Further, given the data cited in our comment letters, smaller operating companies have a higher risk of failure making the offerings that much more risky for retail investors. I was therefore gratified by your invitation to recommend specific steps that the Commission should take to address mutual concerns for those offerings most likely to be directed toward, and to affect, retail investors.

Enclosed, please find a summary of recommendations for improving the collection of information about Regulation D offerings that meet these criteria. It is NASAA's position that these and other enhancements to transparency should be applied across the entire Regulation D marketplace. However, we agree that the segment of the marketplace you identified poses particular risks to retail investors. We also agree that a focus on that segment of the market, at least initially, would yield a significant "bang for the buck" in terms of investor protection. The information collected through the proposed enhancements would be valuable both to regulators and policymakers in helping to protect investors and inform future policy.

Again, thank you for your time last week and for your attention to NASAA's views. We appreciate your receptiveness to our concerns and your observations about the markets and the regulatory proposals the Commission has made. I am looking forward to working with you and your SEC colleagues during my term as NASAA president. In the meantime, please contact me if you have any questions about the enclosed recommendations.

Sincerely,



Lisa Hopkins  
NASAA President and West Virginia Senior Deputy Securities Commissioner

CC: The Honorable Caroline A. Crenshaw, Commissioner  
The Honorable Allison Herren Lee, Commissioner  
The Honorable Hester Peirce, Commissioner  
The Honorable Elad Roisman, Commissioner

## **Recommendations:**

While NASAA has advocated for the adoption of the Form D revisions proposed by the Commission in 2013,<sup>3</sup> the enhancements recommended below would be especially valuable in helping retail investors evaluate exempt offerings, and assisting regulators in understanding this segment of the private markets and identifying areas of concern.

- (1) The Commission should require the filing of a Form D concurrent with the beginning of a general solicitation where such a solicitation aims to promote the sale of securities to natural persons.<sup>4</sup> The lack of a pre-solicitation filing makes it impossible for state securities regulators and investors alike to efficiently determine whether an offering is being conducted in accordance with the securities laws. Failures to observe regulatory requirements – even where those requirements exist only as safe harbors – are both indications of and precursors to fraud. This is especially problematic for smaller exempt offerings that are publicly advertised.
- (2) The Commission should amend the Form D to capture additional data points that include:
  - the issuer’s website address;
  - the identities of the issuer’s control persons;
  - a clarification box for issuers who select “other” as the industry group;
  - the addition of separate fields to indicate whether an issuer is filing an Advance Form D or a closing Form D amendment (provided that the Commission chooses to require advance filings and closing amendments as recommended);
  - a narrative description of the uses of proceeds, including specific disclosures on the amounts to be used to retire existing securities, pay offering expenses, acquire assets outside of the ordinary scope of the business, finance acquisitions, for working capital, and to discharge indebtedness;<sup>5</sup>
  - an indication as to whether the offering involves a general solicitation, and the types of general solicitation that will be used;
  - a description of the methods that will be used to verify accredited investors;

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<sup>3</sup> See *Proposed Rule: Amendments to Regulation D, Form D and Rule 156*, SEC Release No. 33-9416 (Jul. 10, 2013), available at <https://www.sec.gov/rules/proposed/2013/33-9416.pdf>.

<sup>4</sup> In 2013, the SEC proposed amendments that would have required the filing of Form D fifteen days before an issuer engages in general solicitation. For our purposes, it would be sufficient to simply require the filing at any time prior to the use of general advertising. The critical issue is that the Form D be publicly accessible before an issuer begins to publicly solicit investors.

<sup>5</sup> This should not replace disclosure of use of proceeds to be paid to affiliates (Item 16 of current Form D).

- indications as to the amounts raised from non-accredited investors, whether natural persons or legal entities;
  - an indication that all investors – accredited and non-accredited – will receive the same information;
  - a selection that reads “not public,” rather than “decline to disclose,” for use by companies whose revenues are not yet disclosed publicly;
  - a revision of Form D Item 12 to explicitly reference finders as persons that should be listed as “recipients” of sales compensation in the offering along with persons associated with brokers or dealers;
  - an estimate of the number of new full-time and part-time jobs the offering is expected to create during the 1-year period following the completion of the offering.
- (3) The Commission should require the filing of closing amendments to Form D. Failure to file the closing amendment by the issuer could result in a loss of the exemption if it is not cured by the issuer. The filing of closing amendments to Form D is critical to understanding the nature of smaller sized private offerings, including how these offerings are conducted, and the role they may play in providing capital to small businesses and job creation.
- (4) Finally, the Commission should require a brief legend on all internet-based general solicitations. A legend containing a unique short phrase will readily identify the offering as one being conducted under Rule 506(c) and make it easy for the Commission to monitor online advertising.