

July 5, 2014

Via Electronic Mail at rule-comments@sec.gov

Honorable Mary Jo White, Chair
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

**Re: Comments on SEC Proposed Rule Amendments for Small and Additional
Issues Exemptions Under Section 3(b) of the Securities Act; Release Nos. 33-
9497, 34-71120; 39-2493 File Number S7-11-13**

Dear Chair White:

This letter will supplement my Comment Letter to the Commission dated March 24, 2014.¹ The purpose of this supplemental letter is to address some of the comments and arguments presented to both the Commission and the public at large regarding the Commission's proposed rules implementing Title IV of the JOBS Act (the "Proposed Rules") since the formal end of the comment period on March 24, 2014.

In particular, I note the both the volume and intensity of comments emanating from the North American Securities Administrators Association (NASAA), as well as some of its members and proxies, since the formal comment period closed on March 24, 2014 – comments which are uniformly opposed to the SEC's proposal to allow all investors to participate in Title IV Regulation A+ offerings while foregoing state level review.

The principal concern advanced by NASAA is that the Commission's proposal to circumvent state level review entirely, something expressly permitted by Title IV, has gone too far by removing the ability of state securities administrators of 50 states to also independently review and approve these offerings. In furtherance of this concern, NASAA and some of its members have argued that the Commission's proposed rules exceed the authority given to the Commission by Congress, and state securities administrators are uniquely well positioned to protect investors in their locality. As a solution,

¹ Letter from Samuel S. Guzik to the Commission, dated March 24, 2014, <http://www.sec.gov/comments/s7-11-13/s71113-59.pdf>.

NASAA offers its recently unveiled coordinated multi-state review process, intended to speed the process of state review in some 50 states.

The Bi-Partisan Mission of Congress Under the JOBS Act

My concerns are somewhat different than NASAA's, as I believe were the concerns of Congress when it enacted the JOBS Act, and Title IV in particular – enhanced avenues of capital formation for small business, and the resulting job creation and economic stimulus.

Often the ebb and flow of federal securities legislation is dictated by the national political climate. This was certainly the case with the enactment of the Dodd-Frank Act of 2010, which was largely a reaction to the collapse of our financial markets, and the toll it took on both our financial markets and investors' pocket books. Hence, this legislation was, first and foremost, an investor protection statute. Indeed, out of Dodd-Frank Act even came the creation of a new office at the SEC, Office of Investor Advocacy – something that in calmer times might have been viewed with the same importance as bringing ice to the Eskimos.

The JOBS Act had a very different mission. Though it did not negate the historical role of the SEC to protect investors and maintain market integrity, its focus was on job creation, principally for smaller businesses. It did so by easing pre-existing barriers to capital formation. In the case of Title IV, the principal barrier intended to be eliminated was the cumbersome state blue sky review procedure. Not insignificantly, the burden and expense of this process fell disproportionately on small business. And the streamlined coordinated review process was no answer to Congress's concerns. For those states that imposed "merit" review, it removed none of the uncertainty and expense – and most importantly, it did not remove the often arbitrary state standards that often blocked the offer and sale of securities deemed too risky for the ordinary investor.

And unlike Title III, Title IV was constructed by Congress as a relatively simple regimen, protecting investors through robust disclosure in the form of audited financial statements and periodic disclosure. It was left to the discretion of the SEC to determine who could participate free of state entanglement, and on what terms. The tersely worded Title IV left to the discretion of the SEC the power and duty to implement through rulemaking, such matters as the nature and scope of disclosure, and determining who would be a "Qualified Investor" for purposes of bypassing the often impenetrable barrier of state blue sky review.

The solution fashioned by the Commission in its Proposed Rules was both elegant and logical. It linked the Congressional mandate of robust initial and ongoing disclosure with a mechanism designed to reduce risk to all investors – limiting the investment amounts based upon income and net worth. It also recognized the importance of allowing all investors to participate in these SEC registered offerings, unlike the new pathway for accredited investors created by Title II of the JOBS Act.

I would have been content to leave the final rulemaking process to the Commission, based upon where the public record stood at the end of the formal comment period on March 24, 2014. However, the record did not end on that date. Indeed since such date NASAA has unleashed a barrage of criticism and commentary – targeted at narrowing the definition of "Qualified Purchaser" – thus leaving Title IV offerings wishing to be inclusive of ordinary investors to the vagaries of the state blue sky review process.

I am concerned that this onslaught of criticism and commentary by NASAA threatens to set back the bold and necessary actions reflected in the Proposed Rules, leaving Title IV much as its predecessor Regulation A, a mostly useless historic relic.

Out of concern for the importance of Title IV as both a necessary and important tool for small business capital formation and the revitalization of the small cap IPO, I write to the Commission in order to create a more balanced record, with the hope that the squeaky wheel of NASAA will not get the grease, and correspondingly, small business will not once again get the shaft.

NASAA’S Goals are Inconsistent with the Purposes of the JOBS Act

Though NASAA and state securities administrators have historically served an important role in securities regulation, particularly in local enforcement efforts and regulating broker-dealers and investment advisors, in recent years they have served as an impenetrable barrier to small business capital formation – through the state review process. The result – while there are a number of available avenues for capital formation which are not impeded by state blue sky review – NASAA has continued to resist the elimination of all barriers to capital formation which do not require state by state review and approval – mostly in the name of investor protection – and in some cases in the interest of protecting small businesses from bad actors.

In the context of this letter, suffice it to say that NASAA has been uniformly against all aspects of the JOBS Act. Some noteworthy examples follow.

Title II

NASAA has been staunchly opposed to the general solicitation provisions of Title II, It has warned of the onslaught of widespread securities fraud which would proliferate with the advent of public solicitation of previously “private” placements. In the more than nine months since Title II was implemented, none of these fears appear to have been borne out by reality.

Yet NASAA continues on offense, railing against the dangers of public solicitation. Apparently, in their view, the only safe investment is one that is approved by state regulators – a view that has as a toxic byproduct, the choking off of capital for small businesses – businesses which often bear the greatest investment risk – and which are also most underserved by the historical, pre-JOBS Act capital market structure.

From Advocacy to Propaganda - NASAA Warns of the Danger of “Angel” Investors

Though the goals of NASAA of protecting investors is laudatory, unfortunately it appears that in recent months, the doctrine and rhetoric of NASAA have shifted from advocacy to propaganda – reflective of the unwillingness of NASAA to accede to the disruptive power of the Internet, and the myriad of opportunities it creates both for enhanced investor protection and enhanced methods of capital formation for small business.

A recent, stunning example of NASAA’s willingness to attack *any* type of financing that does not undergo state review and approval is found on NASAA’s recent annual listing of top investor threats. In particular, NASAA has recently identified a top threat to small business.

Let's take a look at Angel investors – NASAA recently has.

Angel investors are an important source of seed capital to startups and young businesses which hold great commercial potential. More often than not, their capital comes with strings attached – mentoring, and exposing new ventures to extensive commercial and financial networks. Perhaps the only person who could truly claim to be victimized by an Angel investor would be the Devil himself? It appears, however, that NASAA lives in an alternate reality.

According to an article posted by NASAA on its website in 2014, Angel investors are identified as one of the top emerging threats to small business. The article was prefaced with a quote from NASAA's current President, Andrea Seidt:

Top Investor Threats

“With the roll out of rules required by the JOBS Act, investors and small business owners alike must be on heightened alert for questionable investment offers and services.” - NASAA President Andrea Seidt

Following is an excerpt from an article appearing in 2014 on NASAA'S Website, identifying Angel investors as a top threat to small business:

New Threats to Small Businesses

Capital-raising Pitfalls: Recent law changes and newly available capital from investors including “angels” – affluent individuals who provide capital for a business startup – have changed the business funding landscape. The new and enhanced opportunities to raise capital through crowdfunding, public advertising for investors under JOBS Act regulations and angel funding “solutions” also carry risks for unwary entrepreneurs.²

Title IV – NASAA'S Concern for Small Business – And its Solution

NASAA's concern for small business does not end simply with protecting them against the dangers of Angel investors. Indeed, in the context of Title IV, NASAA also comes with solutions – in this case – the newly unveiled, “streamlined” coordinated multi-state review process for Regulation A and Regulation A+ offerings. Such a proposal might have been timely 20 years ago. But in the context of Title IV, as envisioned by Congress and embraced by small business and capital market stakeholders – it is at best, too little, too late – something akin to re-inventing the flat tire. The streamlined review is still a review, with all the attendant costs and uncertainties – the same costs and uncertainties which made Regulation A a dead letter for nearly 80 years – and the same costs and uncertainties which Congress presumably intended to eliminate when it enacted Title IV. And for states with merit review, the streamline process may simply be an accelerated path to a dead end for businesses deemed too risky by state administrators.

² <http://www.nasaa.org/3752/top-investor-threats/>

And who is the beneficiary of this newly adopted streamlined state level review? Well, according to Andrea Seidt, the President of NASAA, the beneficiaries of this new system of review are small businesses themselves, especially those seeking to raise the higher dollar amounts now allowed under Title IV. Apparently, this point was lost both on Congress and in the GAO Report addressing the deficiencies in Regulation A. In a Press Release issued by NASAA on May 12, 2014, announcing that the new NASAA streamlined process was officially open for business, NASAA President Seidt is quoted as saying:

“It would be a shame if the SEC *denied small businesses the opportunity* to take advantage of a streamlined and efficient state process to raise capital at the higher threshold.” [emphasis added]

Yes, it might be a shame for state securities examiners, who find themselves with a dwindling workload – but certainly not for small businesses and small business job creation.

NASAA and Congressional Intent Behind Title IV

NASAA and some of its members have vociferously expressed their views to the Commission that it was not Congress’ intent in enacting Title IV to entirely pre-empt the authority of state securities administrators. Hence their objection to defining “Qualified Purchaser” to include all investors – as the Commission has done in the Proposed Rules.

Support for NASAA’s position surfaced on June 3, 2014, in a Comment Letter signed by Congressman Stephen F. Lynch and 19 other members of the House of Representatives.³ On its face, this letter appears to be persuasive evidence of the intent of Congress in enacting Title IV of the JOBS Act to leave blue sky review in tact for offerings involving ordinary investors. However, this letter, when placed in proper context, provides persuasive support for the exact opposite proposition.

First, I note that of the 20 members of the House of Representatives who have signed onto the June 3 letter, none are members of the House Financial Services Committee. Also of importance, this letter was *not* signed by any of the other 435 members of the House of Representatives.

Perhaps most importantly, and what is not yet in the record, is that this June 3 letter is *not* a spontaneous outcry by members of Congress. Rather, it represents the end of a lobbying process by NASAA, which started in the halls of Congress in or about February 2014 as a form letter circulated by NASAA to members of Congress. Thus, what is probative, is that after four months of intense lobbying on “The Hill” by NASAA, its representatives and its paid lobbyists, only 20 of 435 members of the House of Representatives were willing to sign onto the June 3 form letter.

The Commission need not, and should not, take my word for this. Instead it ought to inquire of NASAA and its representatives as to the origin of this June 3 letter.

³ Letter from Rep. Stephen Lynch to Chair White, dated June 3, 2014, <http://www.sec.gov/comments/s7-11-13/s711113-114.pdf>.

NASAA's Voice is Loud and Strong – But it is not Representative of the 50 States it Appears to Speak For

NASAA has vast resources at its disposal, including paid lobbyists and a full time staff of attorneys. It also has unprecedented access to the Commission: (i) an “official” liason – the SEC Office of Small Business Policy; and (ii) according to Commissioner Aguilar, he serves as the “unofficial liason.” And NASAA’s voice has been both loud and powerful in lobbying against JOBS Act reforms, including hiring outside counsel to assist it with advocating against state pre-emption in Title IV, and an unprecedented number of meetings by NASAA officials with SEC Commissioners and Division chiefs since the comment period ended on March 24, 2014. However, NASAA’s views are not necessarily representative of the 50 state securities administrations of which it is comprised. I note that less than a majority of the 50 states have even submitted letters to the Commission addressing Title IV Proposed Rules.

Of greater importance, NASAA does not speak for the 50 states it purports to represent or their legislatures. One example – despite the opposition of NASAA to the Title III JOBS Act crowdfunding legislation, both before and after its enactment, a growing number of states have nonetheless adopted or are actively considering implementation of intrastate crowdfunding legislation. As is the case with Congress and the JOBS Act, state legislative priorities have shifted from investor protection to economic growth and job creation.

And perhaps, most importantly, NASAA does not speak to the needs of small business. However, Congress has in the form of the JOBS Act.

My initial comment letter cited to an article I published in the Harvard Law Forum on Corporate Governance and Financial Regulation in January 2014, which applauded the Commission for taking a bold stance in favor of small business capital formation, a stance which was historic in that this was the first time that the Commission, by doing so, had placed itself in an adversarial posture with NASAA.

Ironically, months later it was a *former General Counsel of NASAA* who reached out to me regarding my January 2014 article. In his words, we were “on the same page.” And it was this same *former General Counsel of NASAA* who Tweeted to the world on May 6, 2014:



Rex Staples

@adamnlawyer

Let's think hard about Reg. A+, what's really going on and what's at stake as Samuel Guzik . . . has.

<https://blogs.law.harvard.edu/corpgov/2014/01/15/regulation-a-offerings-a-new-era-at-the-sec/> 05:23 PM - 06 May 14

I too hope that the Commission will think hard about Regulation A+, what's really going on and what's at stake. Most importantly I hope that the Commission stays on the same page it was on in December 2013, in step with small business and the need to revitalize Regulation A and capital markets which serve small business, when it promulgates final rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Guzik', with a stylized flourish at the end.

Samuel S. Guzik
Guzik & Associates