

NASAA Insight

The Voice of State & Provincial Securities Regulation



Fall 2012

A. Heath Abshure of Arkansas Takes NASAA Helm

Arkansas Securities Commissioner A. Heath Abshure began a one-year term as NASAA's president at the organization's annual conference in September.

Abshure said his presidency will focus on NASAA's response to a rapidly changing regulatory environment. "I want to focus on what we can do, and if we harmonize our efforts, what we can become," he said.

"Considering our illustrious history, our excellent track record, our universal reputation for fighting the good fight, and our physical presence throughout all of North America, we stand poised to be the most thoughtful, appropriate, and influential voice whenever changes to the system of securities regulation are being considered," he said.

"We must show that our role strikes the most reasonable balance between investor protection and capital formation. If the JOBS Act is any indication, lawmakers appear willing to sacrifice reasonable regulation for perceived economic growth. However,



NASAA President and Arkansas Securities Commissioner A. Heath Abshure delivers the presidential address at NASAA's 2012 Annual Conference on September 11.

reasonable regulation is essential to facilitate the investor trust necessary for economic growth," Abshure said. "But all too often, lawmakers believe that unregulated markets promote growth. We must persuade lawmakers that this belief is misguided and prove that we are the best option to promote capital formation while at the same time maximizing safe and secure investing for consumers."

Abshure also announced NASAA's new Board of Directors, including: President-elect Steven Irwin, Pennsylvania Securities Commissioner; Past President Jack E. Herstein, Assistant Director of the Nebraska Department of Banking & Finance; Fred Joseph, Colorado Securities Commissioner; Chris Naylor,

Indiana Securities Commissioner; Douglas Brown, Manitoba Securities Commission Director of Legal, Enforcement & Registrations; Matt Kitzi, Missouri Securities Commissioner; Melanie Lubin, Maryland Securities Commissioner; and Patricia Struck, Wisconsin Securities Administrator.

NASAA Urges Caution as SEC Mulls Solicitation Rule

With the Securities and Exchange Commission facing mounting pressure from Congress to complete rules mandated by the JOBS Act, NASAA is urging the agency to approach with extreme caution a rule to allow the general solicitation and advertising of private offerings under Regulation D Rule 506.

In addition to allowing promoters to advertise private offerings, Title II of the JOBS Act also requires issuers to take reasonable steps to verify that "purchasers" are accredited investors. NASAA President and Arkansas Securities Commissioner Heath Abshure said states are interested in ways that the verification may take place without being an undue burden on the capital raising process.

"States also are concerned about the activities of advertising platforms, which the new changes allow, as well as the overall impact of increased internet offerings of privately placed securities," Abshure said.

In a September 13 statement submitted during a joint hearing by two House subcommittees, Abshure noted that the JOBS Act contains a 90-day limit for the changes to Rule 506, but Abshure urged the SEC not

to rush through the process. Abshure added that "the amendments that many proponents of the changes to Rule 506 would suggest are neither simple nor straightforward, and the SEC must grapple with very complex issues in its rulemaking."

NASAA also submitted formal comments on the proposed rule to the SEC. Abshure said the SEC must establish what it means for an issuer to take reasonable steps to verify that all purchasers are accredited, and noted that the SEC will need to provide clarity in articulating the scope of ancillary services and compensation that are permissible for unregistered platforms. The SEC also should make changes to the Form D and its filing requirements, he said.

"If the Title II rules are not carefully drafted to consider the effect of general solicitation and advertising on the market, they could facilitate the undesired effect of decreasing investor confidence, subjugating the overall intent of the JOBS Act," he said.

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President's Message: Heath Abshure



I want to thank all who joined us in California in September at NASAA's 95th Annual Conference. I am looking forward to a productive year ahead. I'd like to begin my tenure as NASAA's president with a few words of thanks.

To all of my fellow regulators: thank you for your hard work and support as we fought against the changes to Rule 506, crowdfunding and other preemptive provisions of the JOBS Act. We also fought Round One of the battle against imposition of a self-regulatory organization on state-registered investment advisers. Thank you for your help during the past year, and for your ongoing efforts as we continue to oppose state and federal legislation that may corrupt the delicate balance between investor protection and capital formation.

To the staff of the Arkansas Securities Department: your dedication and professionalism have allowed me to serve as NASAA's president, and I thank you for your continued effort during the upcoming year.

And to Jack Herstein, much thanks for your excellent leadership of NASAA. Your performance as President was exemplary, and I have learned greatly from watching you during this past year. I am very lucky to have the benefit of your advice and experience during the upcoming year.

No one can do this job alone. I take great comfort in the individuals comprising the Board, the Section Committee chairs, and all of the other Project Group and committee members in NASAA. I am surrounded by some of the smartest and most capable people with whom I have ever worked. Thank you all for the value of your experience, insight, and wisdom.

I am very pleased and excited to be working with a fantastic Board of Directors: President-elect Steve Irwin of Pennsylvania, Past President Jack Herstein of Nebraska, Treasurer Fred Joseph of Colorado, Secretary Chris Naylor of Indiana, Patricia Struck of Wisconsin, Melanie Lubin of Maryland, Douglas Brown of Manitoba, and Matt Kitzi of Missouri.

Likewise, I am eager to work with NASAA's Section Chairs and other appointees for the upcoming year, including Corporation Finance Section Chair Bill Beatty of Washington, Investment Adviser Section Chair Linda Cena of Michigan, Broker-Dealer Section Chair John Cronin of Vermont, Investor Education Section Chair Daphne Smith of Tennessee, and Enforcement Section Chair Judy Shaw of Maine.

I also have reappointed Ron Thomas of Virginia to serve as New Member Advocate and Matt Neubert of Arizona as Ombudsman.

I look forward to serving the NASAA membership this year as we move our agenda forward. Please feel free to contact me at any time.

Executive Director's Message: Russ Iuculano



The NASAA Corporate Office congratulates President Abshure on his timely inaugural remarks. We look forward to working with him to achieve his goal of speaking with one voice to remedy unfairness in laws and regulations that threaten to harm investors and "advancing our status as the most effective and balanced securities regulator in

North America."

Our first chance to pursue that goal arises with JOBS Act implementation, especially the SEC's recent proposed rule to eliminate the prohibition against general solicitation and advertising for private offerings conducted under Rule 506. While we were pleased that the SEC chose to publish the proposed rule for comment rather than adopting it as an interim final rule, the proposed amendments fail to provide any guidance to investors or industry. Instead, the proposed rule does nothing more than restate language that is

already in the JOBS Act, and fails to incorporate any of the suggestions received in early July from NASAA, its members and other investor advocates. For example, we asked the SEC to clarify what would be considered "reasonable steps to verify" whether someone is an accredited investor, and we asked them to require the filing of a Form D before the use of general solicitation.

This is an important opportunity for NASAA and its members to urge the SEC to recognize the importance of setting meaningful safeguards for the offering of unregistered investments to the public via general solicitation. To that end, NASAA recently submitted a detailed comment letter to the SEC expressing our profound disappointment, urging the Commission to address concerns expressed earlier, and adding additional comments to support the need for inclusion of meaningful protections for investors, as called for by Congress. By relaxing the restrictions on private placements, the JOBS Act could unwittingly open a floodgate of fraud. We need a cacophony of voices to underscore the consequences to investors if the SEC fails to address this significant risk.

Broker-Dealer Compliance

NASAA's Coordinated Examinations Identify Top BD Violations and Suggest Best Practices

NASAA identified the top broker-dealer compliance violations and offered a series of recommended best practices to help BDs improve their compliance practices and procedures.

A total of 236 examinations, conducted between January 1 and June 30, 2012, found 453 types of violations in five compliance areas. The greatest frequency of violations (29 percent) involved books and records, followed by supervision (27 percent), sales practices (24 percent), registration & licensing (14 percent), and operations (6 percent).

The top five types of violations found involved: failure to follow written supervisory policies and procedures, suitability, correspondence/e-mail, maintenance of customer account information, and internal audits.

About half (44 percent) of the examinations involved one-person branch offices; 23 percent were home offices; 20 percent were branch offices with two to five agents; 11 percent were branch offices with more than five agents; and 2 percent were non-branch offices.

NASAA recommended 10 best practices to help broker-dealers develop compliance practices and procedures in the following areas: suitability; supervisory procedures; exception reports; branch office audits; selling away; outside business activity; advertisements; correspondence; customer complaints; and working with seniors.

Protecting Senior Investors

NASAA Commends CFPB for Joining Fight Against Senior Investment Fraud

NASAA sent a comment letter to the Consumer Finance Protection Bureau concerning consumer financial products and services, financial literacy efforts, and fraudulent or deceptive practices affecting the lives of older Americans and their families.

According to NASAA's 2010 enforcement survey, 35 percent of all enforcement actions initiated by state securities agencies involved senior victims. "Investment fraud involving seniors is a perpetual problem, and given the growing senior population in the United States, this problem only can be expected to grow," NASAA said.

The letter outlined the efforts of NASAA and its members to educate the public about senior investment fraud and highlighted some of the key initiatives by NASAA members.

"NASAA members form a nationwide network of experts on the front lines of investor protection and education," the letter said. "We commend the Consumer Financial Protection Bureau for joining this fight and we welcome further questions and an ongoing dialogue about effective strategies to help seniors avoid investment fraud."

Native American Outreach

NASAA Investor Education Section Launches Native American Investor Outreach Initiative

NASAA's Investor Education Section introduced an investor outreach initiative to provide investor education resources to Native American and First Nation populations in the United States and Canada.

The Native American Outreach initiative is designed to help raise investor awareness and reduce the risk of investment fraud following two recent billion-dollar settlements reached between Native American plaintiffs and the federal government.

The program addresses the specific needs and concerns of the Native American and First Nations audience and offers specific training and instructions for outreach coordinators. As part of the initiative, each NASAA member received a Native American Outreach Toolkit at NASAA's Annual Conference.

Top Investor Traps

NASAA Warns Investors of Emerging Threats from Exploitation of New, Existing Federal Laws

NASAA's Enforcement Section released its annual list of investor traps that includes many long-standing or persistent threats as well as practices that attempt to exploit new and existing federal laws.

"A con artist will use every trick in the book to take advantage of unsuspecting investors, including exploiting well-intended laws, in order to fatten their wallets," said Jack E. Herstein, NASAA Past-President and Assistant Director of the Nebraska Department of Banking & Finance, Bureau of Securities.

NASAA members are particularly concerned about two provisions of the recently passed JOBS Act that expand crowdfunding to allow businesses to raise money from investors and allow the general solicitation and advertising of private placement offers.

New Threats

- Crowdfunding and Internet Offers
- Inappropriate Advice or Practices from Investment Advisers
- Scam Artists Using Self-Directed IRAs to Mask Fraud
- EB-5 Investment-for-Visa Schemes

Persistent Threats

- Gold and Precious Metals
- Risky Oil and Gas Drilling Programs
- Promissory Notes
- Real Estate Investment Schemes
- Reg D/Rule 506 Private Offerings
- Unlicensed Salesmen Giving Liquidation Recommendations

NASAA Urges Caution on Reg D Rule

JOBS Act Rulemaking Rush Could Threaten Investor Protection

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Abshire added that if the rules lack clarity, they will lead to litigation between state regulators and issuers, and judges will ultimately be required to provide greater clarity.

Abshire also noted that many of the rulemakings required by the Dodd-Frank Act are long overdue. “We have encouraged the SEC to prioritize its investor-protection rules ahead of the exemptions in the JOBS Act, and we urge Congress not to pressure the SEC to act hastily, especially where ill-considered changes could have a devastating impact on the delicate balance between investors and industry,” he said.

“As the closest regulators to the investing public, state securities regulators see first-hand the dangers investors face when legislation is not implemented in a careful and deliberate fashion,” he said.

For example, state regulators have seen a dramatic increase in reliance on the Rule 506 exemption by unscrupulous promoters over the last decade.

State securities regulators who routinely screened bad actors from raising money through private securities offerings were stripped of this authority in 1996 when Congress passed the National Securities Markets Improvement Act (NSMIA). Since then, use of the securities exemption found in Rule 506 has increased significantly, as have related cases of investment fraud.

In 2011, states brought more than 200 enforcement actions for fraudulent Rule 506 offerings. “These private placement offerings have been identified by NASAA as a top trap facing investors in the last several years,” Abshire noted.

“Given the complexity of the issues involved in the changes to Rule 506, plus the enormous impact those changes will have on how these risky investments will be offered, we strongly urge the SEC to craft rules that reflect a balanced regulatory approach—providing sufficient guidance to issuers and intermediaries while protecting investors from fraud and abuse,” Abshire said.

NASAA on JOBS Act Implementation

Small business capital is vital to our economy. However, implementation of legislation designed to foster the flow of capital to small businesses must be done responsibly and carefully.

States, as the primary regulator of small business offerings, have a direct interest in the SEC’s rulemaking and implementation of the JOBS Act. Below is a glance at NASAA’s views on two other key JOBS Act provisions:

Crowdfunding: NASAA supports efforts to establish a rational regulatory framework for crowdfunding as long as it represents a reasonable balance between the needs of small business issuers and the protection of the investors who will fund those businesses.

To be successful, crowdfunding requires a balanced regulatory approach that minimizes unnecessary costs and burdens on small businesses while protecting their investors from fraud and abuse.

It is imperative for the SEC and FINRA to establish high standards for issuers and funding portals, or intermediaries.

NASAA submitted preliminary comments to the SEC urging it to adopt specific disclosure requirements for

crowdfunding issuers, recommending types of investor education materials that intermediaries should be required to use and has made suggestions related to financial statements, background checks, escrow requirements and several other issues.

Regulation A+: It remains to be seen whether the new Regulation A+ will be used with any greater frequency than the old Regulation A, especially considering the new alternative of crowdfunding and the expanded Rule 506.

To the extent that Regulation A+ is used, however, the increase in the cap from \$5 million to \$50 million will mean that the offerings are more broadly disbursed.

NASAA plans to develop and propose to its members for adoption a uniform system of review that will strike a careful balance between the interests of capital formation and investor protection.

NASAA has begun discussions with interested groups such as the American Bar Association to determine how Regulation A+ can achieve the most reasonable balance necessary in order to achieve its full potential. This includes the development of an electronic filing system that could accommodate multistate Regulation A+ offerings.

Abshure: NASAA to add Offense to Defense *"It's time for us to take some shots on goal."*

The following is adapted from remarks delivered by NASAA President Heath Abshure at the NASAA Annual Conference, September 11, 2012.

My emphasis this year will be our response to the rapidly changing regulatory environment. I want to focus on what we can do, and if we harmonize our efforts, what we can become.

If we harness our potential and speak as one, we will be the most reasonable, trusted, and influential securities regulator in North America.

State securities regulators in the United States are basically preempted from essential broker dealer and corporation finance regulation.

We still have regulatory authority over state registered investment advisers, but we just witnessed the first step toward preemption in that area—the push for a self-regulatory organization. While the first round of that battle may be over, I have no doubt that Round Two will start soon.

We have long maintained a defensive position, using our admirable enforcement record to defend against further attacks on our jurisdiction. But, reliance on our enforcement efforts has done little to stem the tide of preemptive legislation coming out of Washington.

The securities markets are too large and too diverse for one government regulator to oversee.

Given the size and complexity of the market, we are presented with a unique opportunity. We should conduct a critical self-examination, consider the changes to securities regulation brought about by globalization and rapidly changing technologies, and stake our claim to those areas where we are the most efficient, effective, and appropriate regulator—the regulator most likely to serve as a valuable resource to issuers, investors, and the industry.



Heath Abshure, Arkansas

The markets are larger and more complicated than ever before. But, we have robust tools that enable us to act as one and speak with one voice. Rather than acting and regulating as separate entities, we have the ability to consider important issues collectively and issue uniform guidance in a timely manner.

It is clear to me, and I to hope most people in this room, that we should have an active voice that is not only heard by lawmakers, but heeded.

However, history has proved that not to be the case. This is what we must change. How do we change this?

We get aggressive. We add offense to our defense. We focus not only on protecting our existing jurisdiction, but utilizing our capabilities and expertise to expand our jurisdiction and influence.

We must show that our role strikes the most reasonable balance between investor protection and capital formation.

We have to exhibit our ability to craft and implement regulations that are reasonable, efficient, and effective. The new Regulation A+ presents us with an opportunity to show Washington and the industry what we can accomplish.

The investment adviser switch presented the same sort of opportunity. The Investment Adviser section and our membership excelled during the switch process, serving as invaluable resources to all those involved.

Now it is up to us to prove that through reasonable, effective and efficient regulation of state-registered investment advisers, a self-regulatory organization is an unnecessary burden.

However, Regulation A+ and state-regulated investment advisers are not enough. We should strive to be leaders in the timely development of uniform laws and regulations to address the rapidly changing issues in the markets. This includes responses to developments in all areas of regulation, including broker-dealers and enforcement.

Considering our illustrious history, our excellent track record, our universal reputation for fighting the good fight, and our physical presence throughout all of North America, we stand poised to be the most thoughtful, appropriate, and influential voice whenever changes to the system of securities regulation are being considered.

As a nod to my friends from the North, I would like to quote Wayne Gretzky. He said "You miss 100 percent of the shots you don't take." It is time for us to take some shots on goal.

NASAA Conference Focuses on Innovation, Investor



Securities experts and reform advocates discuss the progress of Dodd-Frank since its passage. Moderated by Oregon Division of Finance & Corporate Securities Administrator David Tatman (center), the panel includes (from left): Jennifer Taub, Associate Professor of Law at Vermont Law School; Ken Bentsen, Executive Vice President, Public Policy and Advocacy for the Securities Industry and Financial Markets Association (SIMFA); David Min, Assistant Professor of Law, Irvine School of Law, University of California; Akshat Tewary, Founding Member of Occupy the SEC; and Thomas Quaadman, Vice President of the U.S. Chamber of Commerce for Capital Markets Competitiveness.



Arkansas Securities Commissioner and new NASAA President Heath Abshire delivers his Presidential Address.



Past-president Jack E. Herstein (left) hands over the gavel to Heath Abshire of Arkansas, who succeeds him as President of NASAA.

Pennsylvania Securities Commissioner Steven Irwin (right) moderates a panel on how the presidential election will affect Main Street and Wall Street. Panelists included noted political scientists Carl Luna (center), of Mesa College and the University of San Diego, and Jonathan Rodden, a national fellow at the Hoover Institution at Stanford University, where he also serves as associate professor.



Protection and the Road to Economic Recovery



Irving Faught, Oklahoma Securities Administrator and 2012 Annual Conference Chair, opens the 95th Annual Fall Conference in Coronado, California.



Jack E. Herstein of Nebraska reflects on a year of accomplishment as NASAA President before introducing his successor, Heath Abshire of Arkansas, as NASAA's new President.



In his keynote address, USA Today Investing Columnist John Waggoner outlined the history of market manias and urged NASAA members to continue to build strong relationship with the media.



*Frank Partnoy, the George E. Barrett Professor of Law and Finance, and the Founding Director of the Center for Corporate and Securities Law for University of San Diego, speaks about his book, *Wait: the Art and Science of Delay*, which discusses how decisions, especially those related to securities and investing, benefit from being made at the last possible moment.*



Securities regulators, legal experts and crowdfunding advocates explore the impact of the JOBS Act on the capital formation and investor protection. Moderated by Washington Securities Division Director William Beatty (left), the panel includes (from right): Rick Fleming, Deputy General Counsel for NASAA; William Rice, Alberta Securities Commission Chair and Chief Executive Officer; Yoichiro "Yokum" Taku, Corporate and Securities Partner at Wilson Sonsini Goodrich & Rosati; and Alice Ning, Management Consultant and Founder of TapCaps.

NASAA: Because Every Investor Deserves Protection

About Us

The North American Securities Administrators Association (NASAA) is a voluntary association of securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada and Mexico.

Organized in 1919, NASAA is the oldest international organization devoted to investor protection.

As the preeminent organization of securities regulators, NASAA is committed to protecting investors from fraud and abuse, educating investors, supporting capital formation and helping ensure the integrity and efficiency of financial markets.



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NASAA Public Policy Conference

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Investment Advisers

NASAA Sets IARD System Fee Waiver for IA Firms *Reduced System Fees Reinstated for IARs*

NASAA recently announced the waiver of the Investment Adviser Registration Depository (IARD) system fees for investment adviser firms and the reinstatement of substantially reduced initial set-up and annual system fees paid by investment adviser representatives (IARs). Fees for IAs and IARs have been waived since 2008.

"Setting substantially reduced IARD fees for individual investment adviser representatives will allow us to ensure that the IARD system maintains a sufficient operating reserve without charging firms, many of which operate small businesses in local communities," said Heath Abshure, NASAA President and Arkansas Securities Commissioner.

For 2013, the initial IARD set-up and renewal fee will be \$10 for IARs. These fees were \$45 when the IARD system first became operational.

"By reinstating the system fees for IARs at a reduced level, we will be able to maintain a reserve for on-going operations and enhancements," Abshure said. "We will continue our efforts to ensure that the system operates efficiently and NASAA's Board of Directors will continue to monitor the system's revenues and make future adjustments, including waiving the system fees as we have done in the past, if warranted."

The IARD system is an Internet-based national database sponsored by NASAA and the SEC. The system contains the employment and disciplinary histories of more than 28,000 investment adviser firms and more than 290,000 individual investment adviser representatives. IARD system fees are used for user and system support and for enhancements to the system.