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NASAA

March 19, 2010

The Honorable Christopher J. Dodd
Chairman
Committee on Banking, Housing,
and Urban Development
Washington, D.C. 20510

The Honorable Richard C. Shelby
Ranking Member
Committee on Banking, Housing,
and Urban Development
Washington, D.C. 20510

RE: "Restoring American Financial Stability Act of 2009" Committee Print released March 15, 2010

Dear Chairman Dodd, Ranking Member Shelby and Members of the Committee:

The members of the North American Securities Administrators Association (NASAA)[1] support a bipartisan approach to financial services regulation that is designed to promote confidence in our markets through meaningful protection for investors. Included in the Committee Print are several proposals, long advocated by NASAA, which help accomplish that goal. For example, we are pleased that the proposed bill recognized the proven track record of state securities regulators and would increase state regulatory authority over investment advisers with assets under management of $100 million or less, an increase from the current $25 million threshold.

However, it is troubling that the latest version of the Committee Print is a mixed bag of proposals that, in some cases, substitute accountability and protection with delay and dilution of the protections Main Street investors deserve immediately.

Section 913. Study and Rulemaking Regarding Obligations of Brokers, Dealers and Investment Advisers.

We are profoundly disappointed that the latest bill draft has removed the single most important protection for individual investors – requiring that stockbrokers providing investment advice act in their clients' best interest. This long overdue requirement has been replaced by an industry-supported yearlong study. Instead of offering protections, the reform package offers delay in the form of yet another study of matters that have been reviewed in the past.

The fiduciary duty standard of care, imposed under the Investment Advisers Act of 1940, would protect investors by providing up-front disclosure of the agent's conflicts of interest that may bias a recommendation, disclosure of commissions and fees paid for products such as a variable annuity, and the legal obligation to act in the client's best interest, not merely what is "suitable." In short, it would require stockbrokers to put their clients' interests ahead of their own.

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

The study language is the culmination of a massive lobbying effort by some in the financial services industry that strongly oppose up-front commission and fee disclosure for products, and have conducted a three-month misinformation campaign to preserve the status quo.

State securities regulators urge you to resist the myths perpetuated by industry groups that have worked to undermine the protections offered by the original Section 913. For example, they have argued that imposing a fiduciary duty on financial professionals giving investment advice will significantly change their business models, including the ability to charge a commission. Nothing could be further from the truth! In fact, the original Section 913 language contained explicit language clarifying that there would be no such effect. In addition, the original language would not have limited the ability of broker dealers to sell proprietary products or to sell from a limited menu of products.

Investors, particularly senior investors, need help and clarity now and shouldn't be forced to wait for yet another study designed to derail efforts to secure the protections they need and deserve.

Section 921. Authority to Issue Rules Related to Mandatory Predispute Arbitration.

It is standard industry practice for broker-dealers and investment advisers to include in their customer agreements a mandatory predispute arbitration provision that forces public investors to submit all disputes that they may have with the firm and/or its associated persons to arbitration. Moreover, investors are denied any choice in choosing that forum as these provisions require disputes to be handled in the industry forum administered by FINRA. NASAA believes the "take-it-or-leave it" clause in client contracts is inherently unfair to investors, and they should be given a meaningful choice between binding arbitration and civil litigation.

We are disappointed that the latest version of Section 921 removes the requirement that the SEC engage in rulemaking on arbitration within 180 days. Rather, the revised Section 921 grants the SEC optional rulemaking without any deadline.

Congress should require the SEC to conduct a rulemaking that gives investors the right to choose whether arbitration is the proper course of action for their situation and this rulemaking should commence in a timely manner. NASAA believes investors deserve choice and that mandatory securities arbitration must end now.

Section 926. Authority of State Regulators Over Regulation D Offerings.

The original Discussion Draft closed a regulatory gap that is currently allowing promoters to offer risky, even fraudulent, private placement offerings to investors without either federal or state regulatory oversight.

We continue to encourage the Committee to return to the states the full authority to regulate private placement offerings made under SEC Rule 506 of Regulation D. In its current form, the Committee Print merely provides states the ability to review certain Form D filings in those cases where the SEC does not perform its own review within 120 days. While this provision attempts to remedy the current situation in which there is essentially no federal or state regulation for private placements, it is a disappointment for the investing public and merits further review including the disqualification provisions for individuals who have violated securities laws.

A recent law review article, "Private Placements: A Regulatory Black Hole,"[2] proposes a return to state supervision of designated private placements. We wholeheartedly support Professor Johnson's statement, "This modest proposal would foster capital formation, protect investors, and provide for a more rational and efficient legislative framework to regulate private securities transactions."

Section 111. Financial Stability Oversight Council Established.

NASAA agrees that the responsibility of identifying and collecting information regarding risks to the U.S. financial system should be conducted by the Financial Stability Oversight Council. This approach provides for the assurance of success in evaluating and controlling systemic risk in the marketplace.

However, we believe that it is essential to add state banking, insurance and securities regulators as members of the Council to formalize regulatory cooperation and communication among all federal and state regulators, resulting in more effective oversight of our intertwined financial markets. For example, a state securities regulator would bring to the Oversight Council the insights of a team of "first responders" who see trends developing at the state level, which have the potential to impact the larger financial system. This holistic approach is effective and efficient. It creates a body with access to all relevant information regarding the accumulation of risk in our financial system, and it draws upon the existing expertise and proficiency of each functional regulator.

Conclusion

Although we may disagree on the specifics of the latest Committee Print, state securities regulators look forward to continuing to work with the Senate Banking Committee as it moves forward toward our shared goal of protecting our nation's investors and restoring their faith and confidence in financial regulators and markets alike.

Sincerely,

Denise Voigt Crawford

Denise Voigt Crawford
NASAA President
Texas Securities Commissioner

[2] Jennifer J. Johnson. (February 22, 2010). Private Placements: A Regulatory Black Hole, *Delaware Journal of Corporate Law*, 35(1). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557357