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NASAA

June 18, 2013

The Honorable Jeb Hensarling
Chairman
House Committee on Financial Services
2129 Rayburn House Office Building
Washington DC, 20515

The Honorable Maxine Waters
Ranking Member
House Committee on Financial Services
B-301 Rayburn House Office Building
Washington DC, 20515

Re: H.R. 1105, the Small Business Capital and Job Preservation Act

Dear Chairman Hensarling and Ranking Member Waters:

On behalf of the North American Securities Administrators Association (NASAA),[1] I'm writing to express concerns with H.R. 1105, the Small Business Capital and Job Preservation Act. NASAA appreciates and shares the desire of the Committee to facilitate job creation. Investor confidence in our markets is strengthened through efforts that are designed to bring transparency to the marketplace and promote accountability. Unfortunately, H.R. 1105 could frustrate this goal by establishing an exemption from the registration requirements in federal law designed to promote transparency and accountability. Moreover, while NASAA considers the inclusion of fund leverage limits in the bill to be an improvement, we believe Congress would be remiss to ignore the question of the size of funds, in terms of assets, in making determinations about which private equity firms should be subject to the registration exemption.

The Dodd-Frank Act provided exemptions for advisers who solely advise "venture capital funds" as defined by the SEC and for advisers who solely advise private funds and have assets under management in the United States of less than $150 million; however, in each case such exempted advisers remain subject to SEC recordkeeping and reporting requirements. H.R. 1105 would insert an additional exemption for private equity fund advisers from registration or reporting requirements.[2] Unlike the exemptions contained in Dodd-Frank, H.R. 1105 does not limit the exemption to advisers *solely* to private funds nor does it contain a cap that would limit the exemption to smaller advisers.

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 The Senate/House Conference Committee that consider the Dodd-Frank Act in 2010 removed a provision in the Senate version of the bill which would have exempted private equity fund advisers from registration with the SEC.

Furthermore, at least two fundamental components of the proposed legislation are so vague that they undermine any benefits the bill purports to confer on small business.

First, the bill is unclear as to what, if any, reporting requirements are required for private equity fund advisers. Section 2 provides that an adviser to a "private equity fund," regardless of assets under management, would be exempt from both registration and reporting requirements. This proposed exemption from all registration and reporting requirements would seem to run contrary to the basic and obvious interest of investors in private equity funds, since registration under the Investment Advisers Act serves to protect investors from conflicts of interest and other risks associated with entrusting their assets to advisers. The exemption would to have the unintended consequence of depriving the SEC of important regulatory information critical for assessing systemic risk and protecting investors. The registration regimes long in place for advisers, and recently the reporting regimes established under Dodd-Frank for certain private fund advisers, are designed to help insure that regulators and investors have access to important information. The inclusion of fund leverage limits in the bill attenuate NASAA's concerns with respect to systemic risk, and we understand that private equity funds were not a catalyst of the financial crisis of 2008; however, this information is nevertheless critical to regulators and investors alike. Specifically, regulators use the information to measure risk and assess compliance; investors use the information to guide choices in picking advisers and understanding their operations.

Second, even if the language in H. R. 1105 were clarified, the legislation would remain significantly ambiguous as to the type and size of adviser to which it would apply. This is because the legislation does not define "private equity fund" but rather delegates this task to the SEC, which would be given six months to promulgate rules necessary to establish the record keeping and reporting obligations of these advisers. Though the bill appears to treat advisers to "private equity funds" similar to advisers to venture capital funds for the purposes of exemption, it fails to include the limits currently applicable to the exemption for advisers to venture capital funds. Without more specificity and a clear definition of what constitutes a "private equity fund", it is unknown what types of entities are covered by the exemption. This is problematic because without statutory clarification of the universe of "private equity," any assessment of risk to financial stability posed by such capital investment would be invalid. Moreover, it seems unwise to establish an exemption before defining what is covered by the exemption; as AFL-CIO Policy Director Damon Silver testified to the Committee on May 23rd:

> There is no fundamental legal distinction between private equity funds, hedge funds and venture capital funds. These are terms that describe broad investment strategies, not legal structures. So the bill directs the SEC to define what a private equity fund is. And there is no telling how broad or narrow, or gameable, such a definition will be.[3]

Moreover, the enactment of the JOBS Act and the removal of the long-standing prohibition on general solicitation and advertising in Regulation D, Rule 506 offerings reinforces NASAA's belief that, as a general matter, the risk to investors and regulators that would

3 Testimony of Damon A. Silvers, Policy Director and Special Counsel of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) before the Subcommittee on Capital Markets and Government Sponsored Enterprises. Hearing entitled *"Legislative Proposals to Relieve the Red Tape Burden"* May 23, 2013

accompany the exemptions contemplated by H.R. 1105 far exceed the bill's potential benefits as a tool for capital formation and job creation.

Thank you for your consideration of these concerns. We look forward to working with you as these bills move through the legislative process. If you have questions, or if NASAA can be of assistance, please contact me or Michael Canning, NASAA's Director of Policy, at (202) 737-0900.

Sincerely,

A. Heath Abshure

NASAA President and Arkansas Securities Commissioner