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*Via electronic submission to rule-comments@sec.gov*

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**RE: *Proposed Rule Amendments to Facilitate Intrastate and Regional Securities Offerings;  
17 CFR PART 230; Release Nos. 33-9973; 34-76319; File No. S7-22-15***

Dear Mr. Fields,

The North American Securities Administrators Association, Inc. (“NASAA”)<sup>1</sup> submits the following comments in response to the Proposed Rule Amendments to Facilitate Intrastate and Regional Securities Offerings, Release Nos. 33-9973 and 34-76319 (“Release”). The Release describes proposed revisions to Rule 147 under the Securities Act of 1933 (“Securities Act”) and amendments to Rule 504 of Regulation D. As more specifically set forth below, NASAA believes these amendments will allow small and emerging companies to raise capital while maintaining important investor protections.

NASAA members are the state securities regulators who work closely with small and local businesses in their capital formation efforts, and who want those businesses to thrive and provide jobs. NASAA members also have a duty to protect investors, and in that role frequently interact with investors who have been victimized by fraudulent or unsuitable private placements. As the regulators closest to the businesses that rely on Rules 147 and 504, and the investors that participate in those offerings, we appreciate the opportunity to comment on the proposed rule amendments and look forward to working with the U.S. Securities and Exchange Commission (“Commission”) to achieve the shared goal of facilitating capital formation while protecting investors.

State securities regulators assisted smaller companies with capital raising efforts since before passage of the Jumpstart Our Business Startups Act (“JOBS Act”)<sup>2</sup> through various limited offering exemptions. These exemptions, tied to federal rules 504 and 505 of Regulation

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<sup>1</sup> NASAA is the association of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum for these regulators to work with each other in an effort to protect investors at the grassroots level and to promote fair and open capital markets.

<sup>2</sup> Pub. L. No. 112-106, 126 Stat. 306.

D, Section 3(a)(11) of the Securities Act of 1933 (“Securities Act”) and its “safe harbor” Rule 147, and Section 4(a)(2) of the Securities Act, were designed in part to facilitate local, community-based offerings. NASAA and state securities regulators also have implemented coordinated review programs to facilitate both national and regional offerings,<sup>3</sup> and are adapting those programs to encompass new methods of capital raising, including securities crowdfunding.

Even before passage of the JOBS Act, states began developing state-based crowdfunding exemptions, through rule, statute and order. As of this month, 29 states plus the District of Columbia have adopted or are finalizing rulemaking implementing crowdfunding exemptions,<sup>4</sup> and 12 additional states are actively considering crowdfunding exemptions.<sup>5</sup> Of the 30 state-level crowdfunding exemptions, 29 are premised on the offering qualifying under Section 3(a)(11), the federal intrastate offering exemption, and its “safe harbor” Rule 147. Maine’s exemption is premised on reliance on the federal exemption in Rule 504 of Regulation D, and Mississippi and Vermont dually offer intrastate crowdfunding under Section 3(a)(11) and interstate crowdfunding under Rule 504. Many other states are exploring a dual option for crowdfunding, including a regional review approach under Rule 504.

We commend the Commission for revisiting and proposing to modernize Rules 147 and 504, which have not been updated since 1974 and 1992, respectively. Detailed below are NASAA’s comments to the proposed rule amendments, including a discussion of the federal intrastate broker-dealer exemption and Rule 505, as requested by the Commission.

## **I. Securities Act Rule 147**

Statutory Parameters. The Commission has proposed that Rule 147 be amended as a stand-alone, separate federal exemption pursuant to the Commission’s general exemptive authority under Section 28 of the Securities Act. As amended, Rule 147 would no longer serve as a “safe harbor” under Section 3(a)(11), although Section 3(a)(11) would continue to be an available federal offering exemption.

NASAA does not support this approach. Rather, the Commission should retain Rule 147 as the existing safe harbor under Section 3(a)(11) and adopt an additional exemption to facilitate intrastate offerings pursuant to its general exemptive authority. Twenty-seven of the 30 state crowdfunding exemptions explicitly reference Rule 147.<sup>6</sup> The proposed amendments would eliminate the safe harbor and require states to modify their exemptions to accommodate removal of Rule 147 from Section 3(a)(11). This presents challenges in both instances. The safe harbor

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<sup>3</sup> NASAA’s coordinated view programs are available at [www.coordinatedreview.org](http://www.coordinatedreview.org).

<sup>4</sup> Alabama, Arizona, Colorado, District of Columbia, Georgia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, Oregon, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin. The exemptions are currently effective in twenty-seven of the thirty state crowdfunding jurisdictions. Minnesota and New Jersey are finalizing rulemaking, and New Mexico is working on draft regulations.

<sup>5</sup> Alaska, California, Connecticut, Hawaii, Missouri, Nevada, New Hampshire, North Carolina, Rhode Island, Utah, West Virginia and Ohio are actively considering crowdfunding exemptions.

<sup>6</sup> Of the state crowdfunding jurisdictions referenced in Footnote 3, only Iowa and Vermont do not explicitly reference Rule 147. Maine relies on Rule 504 rather than Section 3(a)(11).

provides guidance to states and issuers in ensuring compliance with Section 3(a)(11). Further, removal of Rule 147 from Section 3(a)(11) would require state legislative and/or rulemaking action, leaving state crowdfunding exemptions unavailable and dormant pending such action. Moreover, issuers currently rely on Section 3(a)(11) and Rule 147 to conduct forms of exempt intrastate offerings other than state crowdfunding initiatives. Removing Rule 147 as a safe harbor would present the same challenges for those exempt offerings, and severely restrict viable local capital raising options.

Although NASAA believes that Rule 147 should remain a safe harbor under Section 3(a)(11), NASAA supports the creation of a new exemption, with many of the features described in the Release, to provide an additional capital raising tool for small business issuers to access capital on a local basis.

Scope of Exemption. Existing Rule 147 applies to securities offered and sold only to individuals residing in the state or territory where the issuer resides and is doing business. There is no offering limitation, or cap, under existing Rule 147. The proposed amendments to Rule 147 would make the exemption available only to offers and sales if the issuer (1) registers the offer and sale in a state where all purchasers reside, or (2) relies on an exemption from registration in a state that limits the amount of securities an issuer may sell pursuant to such exemption to no more than \$5 million in a 12-month period and imposes an investment limitation on investors. Currently, as noted in the Release, Illinois is the only state with a crowdfunding provision allowing for a maximum aggregate offering amount up to \$4 million in a 12-month period. All other state crowdfunding exemptions limit the aggregate offering amount to between \$1 million and \$2.5 million.<sup>7</sup> In addition, all state crowdfunding exemptions limit the aggregate individual investment limitations, unless the purchaser is an accredited investor.<sup>8</sup>

Given that established state crowdfunding exemptions have offering and investor caps, NASAA is not opposed to caps, but we do recognize the potential disparate impact on larger versus smaller states with different resident populations and gross domestic products.<sup>9</sup> We also recognize, however, that issuers may be able to rely on other capital raising options such as Section 3(b) of the Securities Act in order to raise larger amounts. We would prefer that any limitations be imposed through the state legislative and/or rulemaking process, which may be better situated to make a determination of what those limitations should be. However, if the cap

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<sup>7</sup> Many states, however, do not include in the total offering limitation offers or sales to officers, directors, partners, or individuals occupying a similar status or performing similar functions with respect to the issuer, or persons owning ten to twenty percent or more of the outstanding securities of the issuer.

<sup>8</sup> Mississippi also allows a “qualified purchaser,” defined in Section 2(a)(51) of the Investment Company Act of 1940, to invest an unlimited amount. Additionally, Wisconsin created a new category of “certified investor” (an investor with less income or net worth to meet the accredited investor definition) that is exempt from the individual investor caps, and Vermont created a new category of “certified investor” that may invest up to \$25,000.

<sup>9</sup> “The folly of this approach is further demonstrated by imposing the same \$5 million dollar amount on intrastate offerings, regardless of whether the state is California with 39 million residents and a gross domestic product (GDP) of more than \$2 trillion or it is Wyoming with 584,000 residents and a GDP of \$38 billion.” Dissenting Statement at Open Meeting on Crowdfunding and Small Business Capital Formation (Oct. 30, 2015), SEC Commissioner Michael S. Piowar, *available at* <http://www.sec.gov/news/statement/piowar-regulation-crowdfunding-147-504.html>.

remains in place, we recommend that the Commission incorporate an automatic, periodic review of any such limitations and an annual adjustment for inflation.

General Solicitation and Advertising. Section 3(a)(11) and Rule 147 provide that all offers and sales must be made in the relevant state or territory. Any offer made outside of the state or territory would void the exemption and may expose issuers to liability under state and federal law. Rule 147 does not specify what constitutes an out-of-state offer. While issuers may look for guidance in the Commission's Compliance and Disclosure Interpretations ("C&DIs"),<sup>10</sup> issuers and their counsel have expressed concern that crowdfunding activity over the Internet, such as the use of an issuer's publicly available website, or even a single social media post, may constitute an interstate offer and expose them to liability.

The proposed amendments to Rule 147 would require issuers to limit sales to in-state residents, but no longer limit offers by the issuer to in-state residents. According to the Release, issuers could engage in general solicitation and advertising out-of-state in order to locate potential in-state investors using any form of mass media, including unrestricted publicly available websites, so long as all sales of the securities are made to residents of the state or territory in which the issuer has its principal place of business. The Release states:

"Given that amended Rule 147 would allow offers to be accessible by out-of-state residents, the proposed amendments would require an issuer to include a prominent disclosure on all offering materials used in connection with a Rule 147 offering, stating that sales will be made only to residents of the same state or territory as the issuer. This proposed disclosure requirement is intended to advise investors who are not residents of the state in which sales are being made that the intrastate offering would be unavailable to them."

NASAA supports these proposed changes in any new federal exemption but only to the extent that any proposed prominent disclosure<sup>11</sup> is required on all general solicitation and advertising materials.<sup>12</sup> Further, while we support modernizing the current provisions regarding restrictions on offers under federal law, any such effort must preserve state authority over these offerings, including the authority to impose additional disclosure requirements regarding offers and sales made to persons within a state.

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<sup>10</sup> See Compliance and Disclosure Interpretations: Securities Act Rules, U.S. SEC. & EXCH. COMM'N, Questions 141.03, 141.04, and 141.05, *available at* <http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm> (last updated Aug. 6, 2015).

<sup>11</sup> Rule 147, as proposed to be amended, would require the following disclosure: "Sales will be made only to residents of the same state or territory as the issuer. Offers and sales of these securities are made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of nine months from the date of the sale by the issuer of the securities, any resale of the securities (or the underlying securities in the case of convertible securities) by a purchaser shall be made only to persons resident within the purchaser's state or territory of residence." Proposed Rule 147(f)(3).

<sup>12</sup> NASAA would also support revisions to existing Rule 147 that are consistent with the proposed "Manner of Offering" revisions to Rule 147, as proposed to be amended.

Issuer Residency. Section 3(a)(11) requires that an issuer be a resident of the same state or territory in which investors or offerees reside. Currently, Rule 147 provides that if the issuer is an organized business entity, it must be incorporated or organized in the state, and have its principal office located in the state. This restriction prevents many locally owned and operated companies from using the exemption as companies commonly incorporate in a state different than their principal business and office (Delaware or Nevada, for example) in order to take advantage of well-established bodies of tax, corporate, or partnership law. NASAA supports replacing the incorporation or organization requirement with the proposed “principal place of business” standard, and agrees with the Commission that the locus of entity formation should not affect the ability of an issuer to be considered “resident” for purposes of an intrastate offering.<sup>13</sup> NASAA believes that the principal place of business standard, along with the “doing business” test discussed below, sufficiently demonstrate the in-state nature of the issuer’s business.

Doing Business Standard. Section 3(a)(11) requires that an issuer also be “doing business” within the same state or territory in which investors or offerees reside. A safe harbor “doing business” test is set forth in Rule 147, which provides that an issuer must meet three separate 80 percent tests, and have their principal office located in the state, in order to be “doing business” within the state or territory. Those tests require that the issuer (a) derive 80 percent of their gross revenue from operations in the state, (b) have at least 80 percent of their assets located in the state, and (c) use at least 80 percent of the net offering proceeds in the state. Issuers and their counsel must often engage in a difficult legal and financial analysis, prior to reliance on the exemption, to ensure compliance with each of the 80 percent rules and some legitimate issuers find compliance impossible. For example, an online business based in one state, and seeking to raise money in that state, may derive a majority of sales from out of state customers. An issuer may also intend to use 80 percent of their net offering proceeds in the state, but only be able to deploy 60 percent of those proceeds. Finally, it may be difficult to calculate whether 80 percent of gross revenues are derived from operations in the state, or whether 80 percent of net proceeds are being used in the state.

NASAA supports the Commission’s proposed disjunctive approach to the 80 percent tests, where an issuer could qualify for the exemption by meeting one rather than all of the 80 percent tests. We would also support the Commission’s proposed technical revisions to simplify the structure of those tests and clarify application, and the inclusion of an alternative, additional test based on the location of a majority of the issuer’s employees. A disjunctive approach would enable different types of issuers (e.g., a brick and mortar business versus an online business) to confirm local residency and demonstrate the in-state nature of their business. Finally, we support the proposed nine-month waiting period before an issuer may change their principal place of business and rely on an exemption in another state. We believe that the “doing business” standard, along with other proposed amendments to Rule 147, would prevent forum shopping by an issuer contrary to the intended purpose of the exemption. The Release also asks whether the 80 percent thresholds should be lowered. As part of our suggested periodic review, we would support an evaluation of the 80 percent thresholds to determine whether the exemption succeeds in facilitating the goal of small business capital formation while protecting investors.

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<sup>13</sup> Given the nature of the intrastate exemption, which is premised on offers made within a state or territory from a company based in that state or territory, we believe the exemption should be limited to U.S.-organized companies.

Purchaser Residency. In determining a purchaser's residence that is a legal entity, NASAA supports the proposed amendments to Rule 147 that would replace the "principal office" requirement with the "principal place of business" standard, consistent with the standard for issuers. NASAA would also support inclusion of a reasonable belief standard, as proposed by the Release, to determine the purchaser's residency, consistent with Regulation D. Thus, reasonable belief may be determined by the existence of the fact or by establishing that the issuer had a reasonable belief that the purchaser of the securities in the offering was a resident of such state or territory.<sup>14</sup> Under existing Rule 147, the exemption is lost for the entire offering if securities are offered or sold to one investor that was not in fact a resident. We agree that a reasonable belief standard will provide more certainty for issuers about availability of the exemption and increase its utility without sacrificing investor protection. Finally, NASAA does not support removal of the required written representation of purchaser residency requirement. Rather, NASAA believes that this requirement should remain in place but may be construed as evidence of, but not be dispositive of, a reasonable belief of purchaser residency. In other words, obtaining a written representation should not, without more, be sufficient to establish a reasonable belief. As with Rule 506(c), self-certification or merely "checking the box" should not be sufficient; reasonable belief entails a substantive inquiry.<sup>15</sup>

Limitations on Resale. Existing Rule 147 prohibits resales to non-residents within a nine-month period following the last sale of securities by the issuer. This rule is designed to ensure that the securities have "come to rest" in the state before any out-of-state redistribution. The Release posits that this requirement is unduly restrictive because it is based on circumstances beyond the investor's control. The proposed amendments to Rule 147 would change the existing method of calculating this time period by relating the nine-month resale restriction back to each individual purchase instead of last sale of securities. In addition, compliance with the resale provision will no longer determine availability of the Rule 147 exemption. Thus, an issuer can avail itself of the exemption without ensuring that post-issuance resales by investors are made in compliance with the nine-month holding period. NASAA supports these proposed changes and believes that a nine-month holding period from the date of sale sufficiently demonstrates the purchase was for investment without an intent to distribute out-of-state or avoid registration. Moreover, if an issuer takes reasonable steps to comply with the limitations on resale, they should not lose the original exemption if the purchaser later doesn't comply with those resale restrictions. Finally, we believe that securities issued under amended Rule 147, that have not been registered, should be considered "restricted securities" under Rule 144(a)(3).

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<sup>14</sup> As proposed in the Release, the reasonable belief standard is determined on the basis of all the facts and circumstances, which "could include, but would not be limited to, for example, a pre-existing relationship between the issuer and the prospective purchaser that provides the issuer with sufficient insight and knowledge as to the prospective purchaser's primary residence . . . [or] evidence of the home address of the prospective purchaser as documented by a recently dated utility bill, paystub, information contained in state or federal tax returns, or any state-issued documentation, such as a driver's license or identification card." NASAA supports inclusion of nonexclusive guidelines in determining "reasonable belief," supported by the existence of facts such as the location of the purchaser's home or the state issuing the purchaser's driver's license. To the extent further guidance may be necessary, we believe that the Commission could provide such guidance through C&DIs.

<sup>15</sup> See, e.g., 17 CFR §230.506, requiring a substantive inquiry to verify accredited investor status.

The proposed amendments to Rule 147 also include technical modifications to the requirement that issuers disclose in writing the limitations on resale in Rule 147(e), the requirements for stop transfer instructions for the issuer's transfer agent in Rule 147(f), and those requirements for the issuance of new certificates that are presented for transfer. The amendments also note that current Rule 147 does not specify to whom or when such disclosure should be provided. While not commenting on the technical amendments, NASAA supports the Commission's proposal to clarify in the text of the amended rule the specific language of the required disclosure (i.e., the disclaimer), and the requirement that the disclosure should be prominently provided to each offeree and purchaser at the time any offer or sale is made pursuant to the exemption. We continue to believe that such disclosures are important investor protections. Finally, we believe that all offerees and purchasers must continue to receive written disclosures, rather than, as proposed, permitting offerees to receive verbal disclosures if the offer is communicated verbally.

Integration. Current Rule 147 provides that offers or sales of securities taking place either prior to the six-month period immediately preceding, or after the six-month period immediately following, a Rule 147 offering will not be integrated with any offers or sales of securities by the issuer made in reliance on the exemption. The proposed amendments to Rule 147 will expand the scope of the safe harbor consistent with the SEC's most recently adopted integration safe harbor—Rule 251(c) of Regulation A. The new safe harbor would exclude from integration *any* prior offers or sales of securities by the issuer, as well as certain subsequent offers or sales of securities by the issuer occurring within six months after the completion of an offering. Thus, there would be no integration with any offer or sale that occurs before the offering under Rule 147, that is subsequently made pursuant to a registration or in reliance on certain exemptions from registration, or that occurs more than six months after completion of the offering under Rule 147.

NASAA supports including registered offers and sales and certain other exempt offerings occurring within six months after completion of the offering in the integration safe harbor ((g)(2) in the proposed amendments) but does not support providing a safe harbor for any and all prior offers or sales of securities by the issuer ((g)(1) in the proposed amendments). The purpose of integration is to prevent an issuer from structuring a single transaction into multiple exempt offerings to avoid securities registration. By including all prior offers and sales in the integration safe harbor, an issuer could avoid registration by conducting an unlimited amount of exempt offerings just prior to a Rule 147 offering, thus defeating the purpose of the safe harbor. Regulation A is a quasi-registration subject to regulatory oversight by the Commission and the states while a Rule 147 offering may be exempt at both the federal and state level. In determining the contours of an integration safe harbor for an amended Rule 147, we believe that a better comparison than Rule 251(c) of Regulation A is Rule 502(a) of Regulation D, which restricts its safe harbor for private offerings to offers and sales made more than six months before, or more than six months after, a Regulation D offering. NASAA urges removal of the proposed (g)(1) and restricting the safe harbor to offers or sales of securities that take place *prior to* the six-month period immediately preceding the offering.

Intrastate Broker-Dealer Exemption. State-based crowdfunding exemptions allow the use of an intermediary. In some states, the use of an intermediary is mandated.<sup>16</sup> The intermediary may be a federal and/or state registered (i.e., intrastate)<sup>17</sup> broker-dealer. States limit the activities of an intrastate broker-dealer.<sup>18</sup> In the crowdfunding context, many intermediaries are small businesses operating intrastate and exclusively online. For those businesses, federal broker-dealer registration can be cost prohibitive. The SEC's Guide to Broker-Dealer Registration provides, however, in its intrastate broker-dealer discussion that information posted on the Internet that is accessible to a person out of state would be deemed interstate and require federal broker-dealer registration.<sup>19</sup> For these intrastate intermediaries, their online activity may subject them to Commission action and potentially other adverse consequences.

NASAA suggests that the Commission clarify that the intrastate broker registration exemption for an entity is not vitiated solely because the firm has a web presence, provided that the entity continues to operate and conduct sales intrastate. This could be accomplished through guidance that with appropriate disclaimers intrastate broker-dealers could advertise and use the Internet without having to register federally, although state registration may still be required. This would be consistent with the Commission's treatment of a website for a foreign financial services firm, where mere presence on the Internet does not require registration as a broker-dealer in the United States.<sup>20</sup>

The Release also asks whether use of an intermediary should be required, rather than optional, at the federal level. NASAA does not support requiring an intermediary as many state crowdfunding jurisdictions do not require an intermediary. One benefit of the existing federal exemption is that it provides states with the flexibility to craft intrastate exemptions tailored to their local population. Intrastate crowdfunding for many local businesses and residents provides an opportunity to conduct low-cost direct public offerings without the necessity of an intermediary. Mandating the use of an intermediary would interfere with this community-based model, and may deter use of the exemption in smaller states with less intermediary interest.

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<sup>16</sup> An intermediary is required in Arizona, Florida, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Nebraska, New Jersey, Texas, and Wisconsin.

<sup>17</sup> Section 15(a)(1) of the Securities Exchange Act of 1934 provides an exemption from broker-dealer registration for a broker-dealer whose business is "exclusively intrastate and who does not make use of any facility of a national securities exchange." 15 U.S. Code § 78o(a)(1).

<sup>18</sup> An intrastate broker-dealer, commonly referred to in state crowdfunding exemptions as a website platform or website portal, must limit its activity to facilitating intrastate crowdfunding transactions, and generally cannot (i) offer investment advice or recommendations; (ii) solicit purchases, sales, or offers to buy the securities offered or displayed on its website or portal; (iii) compensate employees, agents, or other persons for such solicitation or based on the sale of securities displayed or referenced on its website or portal; or (iv) hold, manage, possess, or otherwise handle investor funds or securities.

<sup>19</sup> SEC Guide to Broker-Dealer Registration, *available at* <http://www.sec.gov/divisions/marketreg/bdguide.htm> (stating "[a]lso, information posted on the Internet that is accessible by persons in another state would be considered an interstate offer of securities or investment services that would require Federal broker-dealer registration.")

<sup>20</sup> In evaluating its own jurisdiction regarding U.S. investors' exposure to foreign offerings posted on the internet, the SEC has indicated foreign issuers and financial service providers would need to implement precautionary measures reasonably designed to ensure U.S. investors are not being targeted and that no sales to U.S. investors are ultimately made. *See* SEC Release no. 33-7516 (March 23, 1998), *available at* <https://www.sec.gov/rules/interp/33-7516.htm>.



Finally, NASAA encourages the Commission and the Financial Industry Regulatory Authority to work together with NASAA and its members to address potential issues that may present themselves in the registration of federal crowdfunding “funding portals” that may be precluded from acting as an intermediary in an intrastate crowdfunding offering. While some state crowdfunding exemptions contemplate that a federally registered “funding portal” may be able to conduct intrastate crowdfunding, it is not clear if this is permissible given the JOBS Act directive that a broker-dealer exemption for a funding portal is available only where the business is conducted solely in compliance with the federal crowdfunding rules.<sup>21</sup>

Additional Suggestions. NASAA recommends including in Rule 147 a bad actor disqualification under Rule 506(d), which is already a feature of most state crowdfunding exemptions. We also recommend excluding investment companies subject to the Investment Company Act, including private equity funds, from using Rule 147. Rule 147 is intended to allow small, local companies to raise capital from local residents. Many of those residents will be unsophisticated investors. Certain issuers such as pooled investment vehicles may not be able to make fulsome disclosures to less sophisticated investors within a simplified offering document, as opposed to a registered offering. Those issuers, as well as certain other types of issuers,<sup>22</sup> should be unable to use this exemption.

## **II. Securities Act Rule 504**

Rule 504 of Regulation D provides issuers with an exemption from registration for offers and sales of securities up to \$1 million in a twelve-month period, subject to certain limitations. If an issuer registers their offering in a state that provides for the registration of such securities, and that requires the public filing and delivery of a substantive disclosure document to investors, Rule 504 offers certain advantages over other exemptions.<sup>23</sup> An issuer can generally solicit using any method of advertising (interstate ads, website promotion, social media, etc.), and the shares are not restricted (i.e., freely tradeable) upon issuance. Rule 504 allows issuers to conduct an offering in multiple states, and provides an opportunity for states to coordinate a regional review of the offering.<sup>24</sup> The vast majority of states currently require registration of Rule 504

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<sup>21</sup> 15 U.S. Code § 78c(a)(80) (“The term ‘funding portal’ means any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to section 4(6).”)

<sup>22</sup> NASAA would also recommend excluding holding companies (i.e., companies whose principal purpose is owning stock in, or supervising the management of, other companies), blind pools, commodity pools, public companies subject to Exchange Act, and blank check companies (i.e., development state companies that either have no specific business plan or purpose or have indicated that their business plan is to engage in merger or acquisition with an unidentified company or companies or other entity or person).

<sup>23</sup> Maine has adopted an abbreviated version of the SCOR form. SCOR refers to the Small Company Offering Registration, or Form U-7, adopted by NASAA on April 29, 1989 and revised on September 28, 1999. SCOR was designed for use by companies seeking to raise capital through a public offering of securities exempt from registration with the SEC under SEC Regulation A, Rule 504 of SEC Regulation D (“Rule 504”), or Section 3(a)(11) of the Securities Act of 1933. The completed SCOR Form is the main disclosure document for offerings being registered in all states accepting SCOR.

<sup>24</sup> Even where there is no regional review, an issuer may qualify the offering in another state under a de minimus or limited offering exemption (for example, exemptions modeled after Section 202(14) of the Uniform Securities Act

offerings, and NASAA and a number of states are exploring a new regional, interstate crowdfunding approach based upon Rule 504. Registration under Rule 504, however, is currently underutilized, in part due to the low offering cap of \$1 million.

The Commission has proposed increasing the Rule 504 offering cap to \$5 million, and imposing the bad actor disqualification under Rule 506(d) to Rule 504 offerings. NASAA strongly supports both proposed amendments. Increasing the Rule 504 offering cap will allow a greater population of small businesses to use this capital raising tool. As noted above, Maine currently permits interstate crowdfunding under the federal exemption in Rule 504 and Mississippi and Vermont dually offer intrastate crowdfunding under Section 3(a)(11) and interstate crowdfunding under Rule 504. Many other states are presently exploring a dual option for crowdfunding, including additional regional review programs under Rule 504.

We believe an increase in the Rule 504 offering cap will encourage new interstate, regional approaches to state crowdfunding and other small business offerings that rely on Rule 504, and will provide greater utility to a regional review of those offerings. We also strongly support a more uniform set of bad actor triggering events across Regulation D, Rule 147, and Regulation A. We believe that bad actor disqualifications based on Rule 506(d) should be extended to both Rule 504 and Rule 147, as this would align with bad actor disqualification provisions already included in state crowdfunding exemptions.

### **III. Securities Act Rule 505**

The Release concludes by questioning the utility of Rule 505 in light of the proposed changes to Rules 147 and 504, and asks whether Rule 505 should be repealed, modified, or replaced with a new exemption. NASAA would support a review by the Commission of Rule 505 to consider whether modifications may and/or should be made to modernize the exemption; for example, reviewing the aggregate offering amount or information requirements. NASAA is strongly opposed, however, to one proposed new feature—providing “covered security status” under Section 18 of the Securities Act “by either enacting a new ‘safe harbor’ pursuant to Securities Act Section 4(a)(2) or by defining purchasers of securities issued in an offering pursuant to the exemption as ‘qualified purchasers,’ pursuant to Securities Act Section 18(b)(3).”<sup>25</sup>

The original objective in the creation of Regulation D was “to develop a basic framework of limited offering exemptions that can apply uniformly at the federal and state levels.”<sup>26</sup> Rule 505 was designed specifically to be a uniform and coordinated federal-state exemption. In 1983, NASAA adopted a model exemption, the Uniform Limited Offering Exemption (“ULOE”),

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of 2002, which provides a notice-filing exemption for small private offerings of up to 25 sales a year). Some states also have a self-executing (i.e., no notice filing) exemption for up to 10 sales a year. *See* Section 402(b)(9) of the Uniform Securities Act of 1956.

<sup>25</sup> *See* Letter from NASAA to Mary Jo White, Chair, SEC (Mar. 24, 2014), available at <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Comment-File-S7-11-13-03242014.pdf>

<sup>26</sup> Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales, Release No. 33-6389, 17 CFR Parts 230 and 239 (Mar. 8, 1982).

designed to provide an exemption at the state level for offerings that are exempt at the federal level under Rules 505 and 506 of Regulation D. In fact, the Regulation D adopting release noted that any additional state terms in Rule 505 did not detract from the goal of increased federal-state uniformity, noting: “Certain additional terms, for instance, relate to valid state interests of jurisdiction which are not appropriately addressed in a federal regulation. Similarly, certain additional terms relate to the mechanics of regulating limited offering exemptions at the state level which cannot be included effectively in a federal rule.”<sup>27</sup> We caution against considering a new framework for Rule 505 that is contrary to the rule’s original intent and purpose—to be a coordinated federal-state exemption and “to achieve a uniform system of federal-state limited offering exemptions that facilitates capital formation consistent with the protection of investors.”<sup>28</sup> We look forward to working with the Commission to examine Rule 505 to ensure that it continues to be a useful tool both at the federal and state level.

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Should you have any questions regarding the comments in this letter, please do not hesitate to contact Joseph Brady, NASAA’s Executive Director, at [jb@nasaa.org](mailto:jb@nasaa.org), or Anya Coverman, NASAA’s Deputy Director of Policy, at [ac@nasaa.org](mailto:ac@nasaa.org), or 202-737-0900.

Sincerely,



Judith M. Shaw  
NASAA President  
Maine Securities Administrator

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*