



NASAA

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March 7, 2017

The Honorable Elizabeth Warren  
United States Senate  
317 Hart Senate Office Building  
Washington, DC 20510

Re: Amendment #4 to S. 327, The Fair Access to Investment Research Act

Dear Senator Warren:

On behalf of the North American Securities Administrators Association (“NASAA”),<sup>1</sup> I write to express support for your amendment to S. 327, The Fair Access to Investment Research Act of 2017. Your amendment will provide essential clarity regarding Congress’s intent in using the term “qualified purchaser” in the Securities Act of 1933 (“Securities Act”) by amending Section 18(b) of the Securities Act to align it with the definition of the same term in section 2(a)(51)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(51)(A)).

Congress enacted the National Securities Markets Improvement Act (“NSMIA”) in 1996, which added Section 18(b)(3) to the Securities Act. Section 18(b)(3) provides that certain securities that are offered or sold to “qualified purchasers” will be deemed “covered securities” and thus exempt from state regulatory review. In enacting this provision, Congress explained that while the U.S. Securities and Exchange Commission (“Commission”) was granted the authority to establish various definitions for the term “qualified purchaser,” that authority is limited to the extent that “in all cases...the definition be rooted in the belief that ‘qualified purchasers’ are sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary.”<sup>2</sup> Similarly, the Senate Committee on Banking, Housing, and Urban Affairs explained that “qualified purchasers” were the types of purchasers that, based on their wealth and sophistication, did not need the protection of state registration laws.<sup>3</sup>

On April 5, 2012, the Jumpstart Our Business Startups Act (“JOBS Act”) was signed into law. Title IV (as implemented in Section 18(b)(4)(D) of the Securities Act) provided that Regulation A securities would be covered securities and exempt from state registration to the extent that the securities were sold on a national securities exchange or sold to “qualified purchasers.” The Commission implemented Title IV through rulemaking by, in part, defining “qualified purchaser” to include “any person” to whom securities are offered or sold pursuant to a

<sup>1</sup> The oldest international organization devoted to investor protection, NASAA 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.

<sup>2</sup> H.R. Rep. 104-622, at 31 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 3877, 3893-94 (emphasis added).

<sup>3</sup> See S. Rep. 104-293, at 15 (1996).

Regulation A Tier 2 offering. By defining “qualified purchaser” in this manner, the Commission effectively erased the term “qualified” from the statute and defined “qualified purchaser” as simply any (sophisticated or unsophisticated) purchaser.

As stated in NASAA’s March 24, 2014 comment letter to the Commission, this definition of the term “qualified purchaser” is contrary to the plain meaning of Sections 18(b)(3) and 18(b)(4)(D) of the Securities Act, the legislative history of the provisions, and prior Commission pronouncements.<sup>4</sup> Congress clearly established a standard for “qualified purchaser” that looks to the *qualification* of the person buying the security and not the entity selling the security. In other words, the term “qualified purchaser” was intended to refer to persons who could, based on qualifying factors such as wealth, income, or sophistication, fend for themselves (as opposed to anyone to whom the security is offered or to certain purchasers of a specified type of security). In fact, even the plain meaning of “qualified” is “having the necessary skill, experience, or knowledge to do a particular job or activity.”<sup>5</sup>

The SEC’s decision to disregard Congress’s plain intent when adopting rules to implement Title IV of the JOBS Act established an alarming precedent with potentially far-reaching implications for the oversight of our securities markets. Unless and until Congress clarifies and appropriately limits the application of the term “qualified purchaser” under the Securities Act, including by specifying minimum qualifying characteristics such as wealth, income, or sophistication, this provision constitutes an invitation for the SEC to circumvent the will of Congress and preempt state oversight of private offerings to retail investors by regulation.

Again, NASAA strongly supports your amendment to S. 327 to define the term “qualified purchaser” in a manner that is consistent with Congress’s intent and the necessity of responsible investor protection. Please do not hesitate to contact me, or Michael Canning, NASAA Director of Policy, at (202) 737-0900, if we may be of any additional assistance.

Sincerely,



Mike Rothman  
NASAA President  
Minnesota Commissioner of Commerce

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<sup>4</sup>Letter from Andrea Seidt, NASAA President and Ohio Securities Commissioner, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated Mar. 24, 2014; available at <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Comment-File-S7-11-13-03242014.pdf>; see also Brief of NASAA as *Amicus Curiae* Supporting Petitioners, *Lindeen v. SEC*, 825 F.3d 646 (D.C. Cir. 2016) available at <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/08/Amicus-Curiae-Brief-of-the-NASAA-and-Addendum-Combined.pdf>.

<sup>5</sup>The Merriam-Webster Dictionary, available at [merriam-webster.com/dictionary/qualified](http://merriam-webster.com/dictionary/qualified).