

**GUARDD**  
enabling secondary markets

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VIA E-mail

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NASAA Legal Department  
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RE: Proposed Model Rule to Designate Nationally Recognized Securities Manuals for Purpose of the Manual Exemption and a Proposed Model Rule to Exempt Secondary Trading in Securities Issued by Regulation A – Tier 2 Issuers

Dear Ms. Anderson and Messrs. Beatty, Staley and Stewart –

We applaud and endorse the July 19, 2018 proposals by NASAA to facilitate secondary trading by updating the Manual Exemption and establishing an exemption for secondary trading of securities issued by Regulation A – Tier 2 issuers that comply with ongoing reporting requirements. We appreciate the opportunity to submit this comment letter in response to the Proposed Model Rules.

The Manual Exemption Should be Expanded to Include a Broader Range of Secondary Market Transactions

The Manual Exemption is predicated on ensuring that a core data set of current information about issuers is available to secondary market buyers and sellers of securities of those issuers. In the wake of the passage of the Jumpstart Our Business Startups Act of 2012 (the “JOBS Act”), a vast audience of investors was opened to original issue exempt securities. Many of these securities are unrestricted and, theoretically, freely tradable. However, there is little to no

secondary market for these securities largely due to the unavailability of post-offering ongoing reporting data. We believe that broader access to the type of corporate data presented in recognized securities manuals would spur liquidity in secondary trading of issuers that do not have such information readily available. Our view echoes the remarks of SEC Commissioner Luis Aguilar:

“The lack of a fair, liquid, and transparent secondary market for these securities is a longstanding problem that needs an effective solution. Indeed, I've spoken publicly about this very issue on a number of occasions, most recently less than two weeks ago at the annual SEC Speaks conference. This topic is increasingly urgent in light of certain new, or anticipated, Commission rules required by the JOBS Act that would result in a far wider range of small business securities needing to find liquidity in the secondary markets. Specifically, proposed rules under Regulation A-plus and Crowdfunding, and final rules under Rule 506(c) of Regulation D, would permit wide distributions of securities and also allow such securities to be freely-traded by security holders immediately upon issuance, or after a one-year holding period. These registration exemptions also provide– or are expected to provide– for lesser on-going reporting requirements than is required for listed securities.”<sup>1</sup>

SEC Commissioner Kara Stein issued a direct call to action by NASAA at a meeting of the SEC Advisory Committee on Small and Emerging Companies: “State laws provide a protective guardrail in an attempt to balance efficient capital formation with robust investor protections. That said, some posit that the current blue sky regime may negatively affect secondary market liquidity. . . . [I]f there are inefficiencies with blue sky compliance regimes, how can we adjust the current regime? For example, is there a means by which the North American Securities Administrators Association or NASAA, working with the states, can improve the availability of the manual exemption across more states?”<sup>2</sup>

In response to this call to action, we respectfully encourage NASAA and its member states to expand the Manual Exemption to set minimum disclosure reporting standards and parameters for secondary market trading of exempt securities originally issued under Regulation A+, Regulation D and Regulation Crowdfunding. We note that this would require a follow-on proposal to add a category of eligible issuers in subsection (E) to include the following category:

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<sup>1</sup> Public Statement of SEC Commissioner Luis Aguilar - <https://www.sec.gov/news/statement/need-for-greater-secondary-market-liquidity-for-small-businesses.html> (March 2015). See generally, Donald C. Langevoort, Primary Markets and the Securities Laws: Capital Raising and Secondary Trading, Columbia Law School (May 2017).

<sup>2</sup> Public statement of SEC Commissioner Kara Stein - <https://www.sec.gov/news/statement/stein-remarks-acsec-021517.html> (February 2017)

(iv) The issuer of the security has conducted an offering pursuant to Regulation A, as amended, Regulation D Rule 506 and/or Regulation Crowdfunding and the security is currently eligible for secondary trading.

Limitations could be imposed on secondary trading consistent with the initial offering requirements:

Regulation A+ – securities issued under both Tiers 1 and 2 are unrestricted and freely transferable immediately upon issuance to any investor subject to annual investment limits consistent with initial issuance. Tier 1 issuers have no ongoing post-offering reporting requirements and certain Tier 2 issuers can suspend their reporting after the mandatory post-offering reporting period is satisfied, but eligibility for the Manual Exemption would mandate an annual audit, semi-annual reviewed financials, and interim reporting on material events and changes.

Regulation D Rule 506 – securities are primarily sold to accredited investors (as defined in Regulation D Rule 501) and generally may be resold to accredited investors in compliance with Sections 4(a)(1) or 4(a)(7) of the Securities Act of 1933, as amended (the “Securities Act”), and/or the safe harbor in Rule 144 promulgated under the Securities Act. Issuers have no ongoing post-offering reporting requirements, but eligibility for the Manual Exemption would mandate semi-annual reviewed financials and interim reporting on material events and changes.

Regulation Crowdfunding – unaccredited purchasers are subject to investment limits and resale is limited within the first year with securities freely transferable one year after issuance. Regulation Crowdfunding imposes ongoing post-offering reporting obligations for annual updates and material changes to previously disclosed information until certain conditions occur. Eligibility for the Manual Exemption would follow the initial issuance purchaser limitations and issuer requirements for an annual audit for companies that raise over \$500,000 in a crowdfunded offering, and reviewed financials for companies that raise less than that threshold, plus semi-annual reviewed financials and interim reporting on material events and changes. Secondary market transactions should be conducted by or through broker-dealers or funding portals registered with the SEC and members of FINRA.

The proposed rigorous disclosure regime would be the barrier to entry for companies interested in supporting a robust secondary market for their securities. The economic cost of compliance would be offset by the increased appeal of an investment in a security with readily available corporate information and disclosure and improved potential for exit from the investment. As discussed below, the market for such securities is growing. It is well-established that companies are staying private longer. Investors who acquire (or would like to

acquire) such securities are actively seeking options for secondary markets. The reporting scheme would go a long way toward meeting this demand in a responsible manner with uniformity for compliance across a majority of states.

### The Exempt Securities Market is Growing

Jay Clayton, Chairman of the SEC, at a recent FINRA conference commented on market availability for retail investors: "I continue to worry that retail investors do not have access to as broad a slice of our capital markets as I would like them to have. Said another way, you have private capital and public capital. Retail investors can really only participate in the public capital, and to the extent private capital has become so robust, you've shrunk opportunities. That bothers me a bit. If that trend continues, a much more select group is participating in the growth of the economy." <sup>3</sup>

As of February 2018, prospective issuers have publicly filed offering statements for 290 Regulation A+ offerings, seeking up to approximately \$5 billion in financing. Of those, approximately 146 offerings seeking up to approximately \$2.5 billion have been qualified by the Commission and approximately \$400 million has been raised.<sup>4</sup>

Regulation D offerings comprise the vast majority of exempt financings--- trillions of dollars by some estimates<sup>5</sup>---but secondary trading of Regulation D securities that are out of the restriction period is practically non-existent.

Regulation Crowdfunding launched on May 16, 2016. Since then, over 1,150 companies (in 80 industries across 45 US States seeking up to \$681M in financing) have filed with the SEC with over \$145M committed by 149k investors and \$125M funded to date. The average success rate (as defined as exceeding a minimum funding target) for issuers is currently 66%. Successful companies are reporting \$290M of Revenues. The market is steadily growing with steady increases in size and number of filings. <sup>6</sup>

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<sup>3</sup> <http://www.finra.org/industry/conversation-sec-chairman-jay-clayton>

<sup>4</sup> Strength Indicators of Mini IPOs - study prepared by Audit Analytics, Derryck Coleman, Research Manager (February 2018). See also, Regulation A+: What Do We Know So Far – Study prepared by Anzhela Knyazeva for Mark Flannery, Director and Chief Economist of the SEC Division of Economic and Risk Analysis (November 2016) at p. 5.

<sup>5</sup> Alternative Asset Management 2020 – prepared by Price Waterhouse Coopers

<sup>6</sup> Source: Crowdfund Capital Advisors LLC.

### The Current Limited Secondary Market for Exempt Securities

We all acknowledge and agree the cornerstone of our securities laws is the full and fair disclosure and availability of information about issuers whose securities are purchased and sold in the US markets, both public and private. A robust secondary market helps both issuers and investors. With democratized free ongoing access to structured information about a company, its management, financials, business plans and more, investors can make an informed decision to buy or sell a security of that company both at the time of its primary offering and in secondary transactions. Without information, investors risk making poor investment decisions by being deprived of important details that would otherwise influence their choices. While the public markets provide avenues and processes for key company information to be disclosed and accessed, historically this information about private or other non-reporting companies was difficult to find in the best of cases.

The majority of issuers in qualified Regulation A+ offerings are not quoted on the over-the-counter market.<sup>7</sup> As noted in a recent SEC internal report, “[s]mall investors may be less well equipped to overcome informational asymmetries associated with small issuers. However, due to the presence of more extensive disclosure requirements in Regulation A+ (particularly, for Tier 2 issuers), Regulation A+ issuers may pose less information asymmetry than other small issuers that are not reporting companies and that have raised financing in reliance on other exemptions.”<sup>8</sup> [emphasis added]

The clear goal is to address the “information asymmetry” of issuers that are not reporting companies by establishing a baseline set of required data for market participants. This concept is central to the Manual Exemption and Proposed Model Rules.

### Introducing GUARDD

To address the “information asymmetry” problem and to support the development of vibrant secondary markets in unregistered securities, we have created GUARDD – a Global Utility Archival Retrieval Disclosure Database – to facilitate the disclosure and dissemination of private company information for investors, regulators, and market participants. GUARDD is an online database that will provide free access to regulators, investors and the public at large; issuers of securities will pay a subscription fee. GUARDD is designed as a resource for core corporate information on private companies that are not required to comply with an alternate and equivalent disclosure regime. This would include the resale of unregistered securities sold

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<sup>7</sup> Regulation A+: What Do We Know So Far at p.26. See also, Outcomes of Investing in OTC Stocks, prepared by Joshua White for Mark Flannery, Director and Chief Economist of the SEC Division of Economic and Risk Analysis (December 2016), discussion of OTC markets and how retail investor “outcomes might suffer disproportionately from growing informational disadvantages” at pp. 2, 15, 26.

<sup>8</sup> Id. at p. 30.

pursuant to offerings exempt from registration under: Regulation A+, Regulation Crowdfunding and Regulation D Rule 506.

We note that GUARDD subscribers will not be reporting through the SEC EDGAR database (even on a voluntary basis). Instead, they will be disclosing corporate information for the benefit of the investing public outside the EDGAR database. As such, they are not expected to trigger registration requirements under Section 12(g) of the Securities Exchange Act of 1934 (“Exchange Act”). However, all issuer information will be subject to other applicable federal and state securities laws, including, in particular, the proscription of false, misleading or incomplete disclosures in Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act.

The GUARDD database collects, stores and reports over 100 data points on each issuer (including company, industry, operations, officers, directors, advisors, auditors, legal counsel, contact information, profit and loss statement, balance sheet, capital stock report, auditor’s report, listing agent, offering information (amount raised, use of proceeds, fees, etc.), along with uploaded/supporting documents). This data is published online and available as a downloadable report. Supporting documents that corroborate the data are also available for download.

GUARDD is entering into an agreement with RIVIO Clearinghouse, which is a service of CPA.com, a subsidiary of the American Institute of Certified Public Accountants (AICPA), and Confirmation.com, the world’s leading provider of secure, online audit confirmations. RIVIO was developed to address increasing marketplace demand for source-driven financial information, and facilitates a more secure exchange of audit reports, financial statements and other key documents. It is a financial clearinghouse that maintains the integrity of documents that are prepared by CPAs and uploaded to secure servers for use by third parties.

The agreement between GUARDD and RIVIO will allow for compiled, reviewed, and audited data provided by licensed CPAs, together with supporting documents, to be transmitted to GUARDD. These documents are protected from alteration and the source is confirmed as a validly licensed CPA firm.

This unique relationship brings authentic private company data online, creating increased transparency into this opaque market. By making the data available online, the GUARDD platform allows for immediate distribution of information about private companies to investors and regulators throughout the United States. The agreement with RIVIO will provide integrity and credibility to the underlying data and documents.

### Suggested Revision to Proposed Model Rule

The essential requirement underlying both Proposed Model Rules is the availability of a core body of current, relevant information to support investment decisions by participants in the secondary market.

First Proposed Model Rule:

Recognition of Current Information Sources for Purposes of the Manual Exemption

For the reasons stated above and in the Model Rules Proposal we suggest that NASAA goes further in its proposal, to include the GUARDD database and equivalent information repositories with the amendment revised to read as follows:

“Nationally recognized securities manual or its electronic equivalent” shall mean: Fitch Investors Service, Mergent’s Investor Service, ~~and~~ OTC Markets Group, Inc. with respect to securities included in the OTCQX and OTCQB markets, GUARDD, or any equivalent online database that offers the same disclosure information about issuers and their securities, and that investors can access for free.

### Benefits of GUARDD as a Securities Manual

Making the suggested changes to the Proposed Model Rule has many benefits:

1. Access, standardization & transparency. Companies that file with GUARDD will be providing over 100 standard data points about their organization, management, operations, financial well-being and more. This will shed light on these private companies as well as provide (for the first time) a pathway for private companies to report key financial information about themselves, which will benefit investors, regulators and the general public. The information will be available to investors, regulators and the public at no cost.
2. Market efficiency. By creating a standard process for companies to upload their information and transmit it to the states, the GUARDD system will compel more issuers to report their information online, to meet the information and liquidity desires of current investors and attract new investors. GUARDD will allow issuers to file once and be compliant in all states that adopt the proposed exemption. The availability of the Manual Exemption from Blue Sky registration offers a powerful incentive for issuers to report to an approved resource like GUARDD, since investors could sell their securities in a secondary market transaction without unwittingly violating Blue Sky laws.
3. Liquidity. As previously noted, secondary trading of unregistered securities has been severely restricted by a lack of information and disclosure about issuers, the absence of secondary marketplaces, and the cost and complexity of compliance. Reducing these barriers



will increase investor interest in secondary markets, which in turn will expand interest in primary markets for exempt securities. Access, liquidity, and transparency are inter-connected elements that facilitate the flow of investment capital in both primary and secondary market transactions.

4. Data integrity & market confidence. The connectivity between GUARDD and RIVIO will provide many tangible benefits to users of the platform: CPA firm validation, source confirmation and authentication that documents are unaltered, reduced risk and liability exposure, control over document distribution and user notification and the ability to request documents and track their distribution.
5. Transparency for regulators. Companies that subscribe to GUARDD will complete disclosures about their businesses, their operations and their financial well-being. All of this information will be digitally recorded and can be analyzed by and reported to the SEC and state regulators. For the first time in 85 years, regulators can have an online tool to visualize where capital is flowing in the private capital markets, which can help them to further protect investors. Regulators AND investors will have real-time, actionable data for insight into a large part of the private capital markets.
6. Investor protection. Disclosure protects investors. Allowing issuers to report to GUARDD and have that information relayed to each state and available online will improve investors' access to information required to make more informed investment choices to buy or sell securities of the reporting issuers.
7. More Data analytics. More data online means more opportunity to analyze it and present it to investors and other consumers. Data analytics can educate new issuers, give investors more opportunities to compare companies in similar industries and show regulators and policy makers where the greatest economic impact is taking place.

Second Proposed Model Rule:

Secondary Trading Exemption for Securities of Regulation A –Tier 2 Issuers

We recognize and agree with the efforts by NASAA to adopt the recommendation of the Advisory Committee for Small and Emerging Companies regarding secondary trading of securities sold pursuant to Regulation A-Tier 2 by issuers that are current in their ongoing reporting obligations under Regulation A Rule 257(b).



We welcome the opportunity to engage in further dialog with NASAA on these Proposed Model Rules and the GUARDD disclosure regime.

Sincerely,



Douglas S. Ellenoff, Esq.  
Co-Founder, GUARDD and Founding Partner, Ellenoff Grossman & Schole LLP



James P. Dowd, CPA, CFA  
Co-Founder, GUARDD and CEO, North Capital Private Securities Corp.



Sherwood Neiss,  
Co-Founder, GUARDD and Principal, Crowdfund Capital Advisors LLC

## COMPARISON OF ONGOING REPORTING REQUIREMENTS

	Securities Exchange Act of 1934	USA 2002 Manual Exemption	Regulation A+ Tier 2	OTC Markets Alternative Reporting	Rule 15c2-11 Diligence requirements <sup>9</sup>	GUARDD
Registration statement, offering circular, PPM <sup>10</sup>	✓		✓	✓	✓	✓
Annual Report	✓	✓	✓	✓	✓	✓
Annual Audit (Balance Sheet and Income Statement)	✓	✓		✓	✓	Audit or reviewed financials <sup>11</sup>
Semi Annual Report with unaudited financials	✓	✓	✓	✓	✓	✓
Quarterly Report with unaudited financials	✓		Not applicable		✓	
Current Report reported within 4 business days or less of the reported event <sup>12</sup>	✓		✓	✓	✓	✓
Description of business and operations of issuer <sup>13</sup>	✓	✓	✓	✓	✓	✓
Identify officers and directors	✓	✓	✓	✓	✓	✓
Info regarding transfer agent or other party responsible for securities ledger	✓				✓	✓

<sup>9</sup> Rule 144(c) requires non-reporting issuers to make available substantially the same information detailed in Rule 15c2-11.

<sup>10</sup> Offering document will include comprehensive risk factors; financial reporting for up to 3 prior years (depending on corporate history), along with other information.

<sup>11</sup> Annual audit required for Reg A+ Tier 2 issuers and Reg Crowdfunding issuers that raised over \$500,000; Reviewed financials (by a CPA associated with and reporting through RIVIO or equivalent secured product) required for Reg A+ Tier 1, Reg D Rule 506, and Reg Crowdfunding (if the Reg CF issuer raised less than \$500K) issuers.

<sup>12</sup> Current report triggers include: entry into and termination of a material definitive agreement (a copy of the agreement must also be publicly filed); completion of an acquisition or disposition of assets; notice of a delisting or failure to satisfy a continued listing rule or standard or transfer of listing; unregistered sales of equity securities; material modifications to rights of security holders; changes in your company's certifying accountant; changes in control of the company; election of directors, appointment of principal officers, and departure of directors and principal officers; and amendments to charter and bylaws.

<sup>13</sup> Description of business includes: (i) exact name of the issuer and its predecessor (if any); (ii) address of its principal executive offices; (iii) state of formation; (iv) title and class of the security; (v) par or stated value of the security; (vi) number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year; (vii) nature of the issuer's business; (viii) nature of products or services offered; (ix) type and extent of the issuer's facilities; (x) financial information for such part of the 2 preceding fiscal years as the issuer or its predecessor has been in existence.

