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NASAA

November 4, 2010

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Subject: Adding Disqualification Requirements to Regulation D Offerings, Title IX Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, File No. DF Title IX – Regulation D Disqualification

Dear Ms. Murphy:

The North American Securities Administrators Association, Inc. ("NASAA")[1] appreciates the opportunity to provide comments prior to the Securities and Exchange Commission's ("Commission") release of proposed rules to adopt disqualification provisions applicable to Rule 506 offerings as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.[2] NASAA has long advocated for the adoption of disqualification provisions for securities offerings under Rule 506 and is extremely pleased that Congress has recognized this need. While NASAA believes that the disqualification provisions set forth in Rule 262[3] and Section 926 of the Dodd-Frank Act are a good starting point, Congress has delegated the adoption of such provisions to the Commission and we believe some adjustments to these provisions are necessary to provide adequate investor protection and to provide for greater uniformity. Our comments below suggest certain adjustments to the disqualification provisions set forth in Rule 262 and Section 926 of the Dodd-Frank Act to adequately protect investors from private offerings involving recidivists and to promote uniformity.

1. **NASAA strongly recommends the ultimate adoption of disqualification provisions that would apply to all private offerings under Regulation D.**

[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] Public Law No. 111-203 [hereinafter Dodd-Frank Act].
[3] 17 C.F.R. §230.262.

In the Commission's Regulation D rule-making release from 2007,[4] the Commission proposed disqualification provisions that would have applied to all offerings made under Regulation D, not just those under Rule 506. NASAA submitted comments commending the proposed adoption of disqualification provisions that would have applied to all offerings made under Regulation D to provide needed investor protection that would not be detrimental to legitimate issuers.[5] NASAA continues to support the adoption of disqualification provisions that would apply to all private offerings under Regulation D. Were the Commission to adopt new disqualification provisions applicable only to Rule 506 offerings and the provisions varied from those applicable to Rule 505 offerings, it would create confusion and an opportunity for issuers to engage in regulatory arbitrage by choosing to use an exemption under Regulation D that has the least restrictive disqualification provisions, including Rule 504 which currently is not subject to any disqualification provisions. To prevent the opportunity for regulatory arbitrage and to protect investors from those who have already violated securities and other relevant laws, NASAA urges the Commission to adopt disqualification provisions that would prevent recidivists from engaging in any private offerings under Regulation D.

2. NASAA strongly recommends the ultimate adoption of disqualification provisions that apply broadly to all classes of relevant persons.

The Dodd-Frank Act directs the Commission to adopt disqualification provisions that are substantially similar to the provisions of Rule 262. The format of Rule 262 sets forth disqualification triggers according to three categories of persons:

- The issuer, any of its predecessors or any affiliated issuer;
- Any director, officer or general partner of the issuer, beneficial owner of 10 percent or more of any class of its equity securities, any promoter of the issuer presently connected with it in any capacity, any underwriter of the securities to be offered, or any partner, director or officer of any such underwriter; and
- Any underwriter of such securities.

We submit that the disqualification triggers listed in Rule 262 for each of these classes of persons should disqualify a private offering if *any* of these disqualifications apply to *any* of these persons, rather than on a class specific basis. In fact, that is how the disqualification provisions were formatted in the Commission's 2007 Reg. D Release and is consistent with similar disqualification provisions contained in model rules promulgated by NASAA[6] that have been adopted by states. Offerings that involve any persons who have a history of misconduct relevant in a securities offering should be subject to registration, which would allow regulators the opportunity to evaluate the

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[4] Revisions of Limited Offering Exemptions in Regulation D, Release No. 33-8828, 72 Fed. Reg. 45,116 (Aug. 10, 2007), *available at* http://www.sec.gov/rules/proposed/2007/33-8828fr.pdf [hereinafter 2007 Reg. D Release].

[5] Letter from Karen Tyler, NASAA President and Commissioner of the North Dakota Securities Department, to Nancy M. Morris, Secretary, Securities and Exchange Commission (Oct. 26, 2007), *available at* http://www.sec.gov/comments/S7-18-07/s71807-57.pdf [hereinafter NASAA Comment Letter].

[6] UNIFORM LIMITED OFFERING EXEMPTION; MODEL ACCREDITED INVESTOR EXEMPTION, adopted Apr. 27, 1997, *available at* http://www.nasaa.org/content/Files/Model_Accredited_Investor_Exemption.pdf.

adequacy of disclosure provided in the offering documents or, in the alternative, whether an order denying registration is appropriate. In order to provide greater uniformity and in the interest of investor protection, the disqualification provision ultimately adopted by the Commission should apply all disqualification triggers to all relevant persons.

3. **NASAA urges the ultimate adoption of disqualification provisions that would disqualify an offering if any of the issuer's officers or beneficial owners of 10% or more of an issuer's equity securities have violated relevant laws and regulations.**

Rule 262 provides for disqualification based on actions involving beneficial owners of 10% or more of any class of equity securities or officers of an issuer, among others. In its 2007 Reg. D Release, however, the disqualification provision proposed by the Commission would not have been triggered by acts of officers and 10% beneficial owners. In the NASAA Comment Letter, NASAA urged the adoption of a disqualification provision that would have included 10% beneficial owners and officers of the issuer. NASAA commented that 10% beneficial owners and officers of an issuer have long been presumed to hold a degree of control over an issuer and have been included in disqualification provisions under Rule 262, Rule 505, and the Model Accredited Investor Exemption ("MAIE"). In the interest of uniformity and investor protection, NASAA urges the Commission to follow Rule 262 and adopt disqualification provisions that include 10% beneficial owners and officers of the issuer.

4. **NASAA urges the ultimate adoption of disqualification provisions that would be triggered by past violations committed by underwriters.**

Rule 262 provides for disqualification based on actions involving underwriters, however the Commission's 2007 Reg. D Release proposed to exclude underwriters, including broker-dealers and private placement agents, as well as partners, directors, or officers of underwriters from the proposed disqualification provision under Regulation D. The Release rationalized their exclusion based on the fact that they do not directly control issuers or the decision to conduct an offering.[7] As NASAA commented previously, issuers that sell a securities offering through an underwriter that has violated relevant laws and regulations or that is controlled by persons that have done so should, however, be subject to disqualification because underwriters play a critical role in securities offerings and issuers rely on them to sell their securities. It is thus necessary for the protection of investors to disqualify a private offering that has not been through the registration process if the underwriter has committed past violations.

Furthermore, subjecting an offering to disqualification based on the past disciplinary history of underwriters and partners, directors, and officers of an underwriter would encourage issuers to screen those selling their securities. Excluding underwriters and their partners, directors, or officers from the disqualification provisions ultimately adopted would also be inconsistent with the MAIE and existing federal law.

[7] 2007 Reg. D Release, *supra* note 4 at 45,131.

5. **The disqualification provisions ultimately adopted by the Commission should provide that an offering is disqualified if any relevant person has been convicted of any criminal offense involving fraud or deceit, the making of a false filing with a state, or that otherwise indicates that an offering should be registered in order to protect investors.**

Through Section 926 of the Dodd-Frank Act, Congress has delegated the adoption of disqualification provisions to the Commission and has provided that the disqualification provisions are to be "substantially similar" to those provided for in Rule 262. Given the discretion granted to the Commission to adopt disqualification provisions, the Commission should adopt disqualification provisions that make adjustments to the provisions contained in Rule 262 that are appropriate in the interest of investor protection and uniformity with state laws. This comment and many that follow are made considering the rule-making discretion granted to the Commission and the need for greater investor protection and uniformity with model state laws.

Rule 262 and Section 926 of the Dodd-Frank Act provide for disqualification based on felony or misdemeanor convictions "in connection with the purchase or sale of any security or involving the making of any false filing with the Commission." As asserted by NASAA in the past, an offering should be disqualified under Regulation D if any relevant person has been convicted within the last ten years of a criminal offense involving fraud or deceit, the making of a false filing with a state, or involving a commodity future or option contract, or an aspect of a business involving securities, commodities, investments, franchises, insurance, banking or finance. Such provisions are included in the MAIE and the Uniform Securities Act of 2002 ("USA (2002)") with the exception of crimes stemming from making a false filing with a state.[8] Convictions involving the making of a false filing with a state should also be included in the disqualification provision because such a filing is just as egregious as making a false filing with the Commission. The fact that a person involved in the offering has been convicted of any of these crimes within the past ten years raises concerns that the person may not comply with laws and regulations concerning the offer and sale of securities. For the protection of investors and the benefit of uniformity, the disqualification provisions ultimately adopted by the Commission should include convictions for all of these types of crimes within the last ten years.

6. **NASAA urges the ultimate adoption of provisions that would disqualify an offering if any relevant person has filed a registration statement that is currently subject to an injunction or an administrative order entered under state or foreign securities laws.**

Rule 262(a)(1) disqualifies an offering if the issuer, any of its predecessors or affiliates, or any underwriter of the securities has filed or was named in a registration statement that is the subject of an order of the Commission denying or suspending registration. As

[8] The MAIE disqualifies an issuer from using the exemption if any of the relevant persons "within the last five years, has been convicted of any criminal offense in connection with the offer, purchase or sale of any security, or involving fraud or deceit." MODEL ACCREDITED INVESTOR EXEMPTION § (D)(1)(b). *See also* USA (2002) § 412(d)(3), (d)(11)(A).

noted above, the Commission is not required to adopt verbatim the disqualification provisions in Rule 262 and should make adjustments where appropriate.

The disqualification provision proposed in the Commission's 2007 Reg. D Release also provided for disqualification based on a permanent or temporary injunction of a court, as well as stop orders and similar orders entered by states. In the NASAA Comment Letter, we advocated for the expansion of that provision to provide for disqualification based on similar orders entered under foreign securities laws. Because an injunction or similar order entered under state or foreign securities laws is no less relevant in the context of a private offering, NASAA urges the Commission to exercise the rule-making discretion granted to it by Congress and include injunctions and orders entered under state or foreign securities laws in connection with a registration statement as a basis for disqualification in the rules ultimately adopted by the Commission.

7. **Disqualifications based on adjudications and determinations should be included in the rules ultimately adopted by the Commission; Orders, judgments and decrees of courts and regulatory agencies, as well as adjudications and determinations, should not be limited to those entered within the last 5 years where they remain effective or unsatisfied.**

Rule 262 provides for disqualification in connection with "orders, judgments, or decrees entered within 5 years…permanently restraining or enjoining, [a] person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the Commission." The proposed disqualification provision in the 2007 Reg. D Release would have also disqualified offerings on the basis that a person "[w]ithin the last 5 years, has been the subject of an adjudication or determination, after notice and opportunity for hearing, by a federal or state regulator that the person violated federal or state securities or commodities law or a law under which a business involving investments, insurance, banking, or finance is regulated."

This is another area where the Commission should not consider itself constrained by what is currently included in Rule 262 and should instead make appropriate adjustments to the disqualification provisions contained therein in the interest of investor protection and uniformity with state laws. The disqualification provisions ultimately adopted by the Commission should include adjudications and determinations as proposed in the 2007 Reg. D Release, as well as those involving franchise law violations. The disqualification rules should also include orders, judgments and decrees involving commodities, franchises, insurance, banking, or finance, and false filings with states. They should not, however, require that such actions be entered within the last five years if the person remains subject to the action consistent with language contained in §412 of the USA (2002) and the protection of investors. Requiring an issuer to apply for registration in this context would allow regulators the opportunity to evaluate whether the offering documents provide adequate disclosure of these items or, in the alternative, whether an offering should be denied registration.

8. **The rules ultimately adopted by the Commission should provide for disqualification of an offering based on all relevant administrative orders, including those entered by regulatory authorities in similar industries.**

Rule 262 does not provide for disqualification based on state administrative orders and limits disqualification based on federal administrative orders to those entered under federal securities laws and to United States Postal Service false representation orders. Section 926 expands on the disqualifications included in Rule 262 to include relevant state administrative orders and those of a federal banking agency or the National Credit Union Administration. Section 926 only includes final orders, however, and it does not include other types of administrative orders that are relevant in the context of a private offering, including administrative orders entered under state and federal franchise, commodities, investment, or finance laws. In its 2007 Reg. D Release, the Commission proposed a disqualification provision that would have included cease and desist orders "issued under federal or state securities, commodities, investment, insurance, banking or finance laws." The USA (2002) is also broader in this regard.[9] Further, Section 926 addresses only certain types of administrative orders, specifically those that provide for certain bars and that prohibit fraudulent, manipulative, or deceptive conduct.

In the interest of investor protection and uniformity with state laws, NASAA urges the Commission to exercise the rule-making discretion granted to it by Congress in the Dodd-Frank Act and adopt disqualification rules that provide for disqualification based on all relevant state and federal administrative orders, including those entered under franchise, commodities, investment, or finance laws. Further, the rules that are adopted should not limit disqualification to orders that impose certain bars or that prohibit fraudulent, manipulative, or deceptive conduct.

9. **The disqualification provisions ultimately adopted by the Commission should disqualify an issuer from making a private offering under Regulation D based on relevant foreign actions.**

The disqualification provisions ultimately adopted by the Commission should provide that an issuer is disqualified from making a private offering in reliance on Regulation D where the issuer has been the subject of a relevant foreign action. We suggest the inclusion of language similar to that contained in USA (2002) § 412(d)(11), which provides an administrator with authority to take disciplinary action against an applicant or registrant that:

> after notice and opportunity for a hearing, has been found within the previous 10 years:
>
> (A) by a court of competent jurisdiction to have willfully violated the laws of a foreign jurisdiction under which the business of securities, commodities, investment, franchises, insurance, banking, or finance is regulated;

[9] Sec. 412(d)(5) and (12).

(B) to have been the subject of an order of a securities regulator of a foreign jurisdiction denying, revoking, or suspending the right to engage in the business of securities as a broker-dealer, agent, investment adviser, investment adviser representative, or similar person; or
(C) to have been suspended or expelled from membership by or participation in a securities exchange or securities association operating under the securities laws of a foreign jurisdiction.

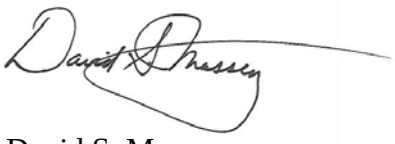
Because foreign actions are no less relevant in the context of a private offering than domestic actions, an issuer that would be subject to disciplinary action under this provision should not be permitted to conduct a private offering under Regulation D and deprive investors of the protections afforded by the registration process. For this reason, we urge the Commission to exercise its rule-making discretion and ultimately adopt a disqualification provision that includes administrative and court orders entered under the securities laws of foreign jurisdictions.

10. Any provision in the disqualification rules ultimately adopted by the Commission allowing for a waiver where good cause is shown should be conditioned upon a finding by the Commission that a waiver will not be prejudicial to an action by a state or other regulator.

As indicated in our previous comments on the 2007 Reg. D Release, a disqualification waiver should be conditioned on a finding that it would not prejudice an action by a state or other securities regulator in the interest of regulatory cooperation and the protection of investors.

Should you have any questions regarding the comments in this letter, please contact the undersigned; Rex Staples, General Counsel for NASAA, at rs@nasaa.org or (202) 737-0900 x.107; or Heath Abshure, Securities Administrator for the State of Arkansas and Chair of NASAA's Corporation Finance Section at habshure@securities.arkansas.gov or (501) 324-9260.

Sincerely,



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