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VIA EMAIL (Michael.Pieciak@vermont.gov; Dan.Matthews@dfi.wa.gov;
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NASAA Legal Department
Mark Stewart, Counsel
NASAA
750 First Street, NE
Suite 1140
Washington, DC 20002

Re: Proposed Statement of Policy Regarding the Use of Electronic
Offering Documents and Electronic Signatures

Dear Mr. Stewart:

On behalf of the Alternative & Direct Investment Securities Association (“ADISA”)¹, we are submitting this comment letter regarding the proposed Statement of Policy Regarding the Use of Electronic Offering Documents and Electronic Signatures (the “SOP”). ADISA appreciates the opportunity to provide comments on behalf of its members.

ADISA also appreciates the time and thought that went into drafting the SOP and believes that it is certainly a step in the right direction with respect to modernizing the state securities laws in connection with the electronic age in which we currently operate. ADISA’s concerns are focused on the following areas:

1. Expanding the scope of the delivery of electronic documents to include not only offering documents and subscription agreements but also marketing materials. In addition, clarifying that the ability to deliver documents electronically includes not only the issuer but also the agents of the issuers, including, without limitation, broker-dealers and their registered representatives and registered investment advisers and their investment adviser representatives.
2. Making the guidance of the SOP consistent with existing Securities and Exchange Commission (“SEC”) guidance regarding electronic delivery, including SEC Releases 33-7233 (October 6, 1995), 33-7288 (May 9, 1996) and 33-7856 (May 4, 2000)

¹ ADISA (Alternative & Direct Investment Securities Association), is the nation’s largest trade association for the non-traded alternative investment space. ADISA represents over 4,000 financial industry members, reaching over 30,000 investment professionals (with over \$142 billion AUM) who handle over 1 million investors.

(collectively, the “SEC Releases”), including the use of multi-offering subscription documents and investor consent from offering to offering.

3. Defining security breach and tailoring the consequences relating to the discovery of such security breach to the actual circumstances of such breach.

Expand the Scope of Delivery

The SOP permits the issuer to deliver offering documents, including subscription documents, “over the Internet or by other electronic means.” ADISA believes that the ability to deliver offering documents should include not only the issuer, but also the issuer’s agents, such as broker-dealers, including their registered representatives, and registered investment advisers, including their investment adviser representatives. It is typically not the issuer who directly provides offering documents to investors. Clarifying the ability of the issuer’s agents to do so is in keeping with the public policy behind the SOP.

In addition, electronic delivery should also include not only the offering documents and the accompanying subscription agreements, but also the marketing materials that comprise the sales kit typically delivered in connection with a potential investment. Given that these documents are delivered together currently, electronic delivery of these same documents should not pose any additional issues not already addressed in other NASAA statements of policy.

Harmonize the SOP with the SEC Releases and other SEC guidance

The SEC Releases address many of the same concerns with respect to updating, formatting, form and consent. Making the SOP consistent with the SEC Releases ensures that there is no confusion amongst the various constituencies regarding a different federal and state securities procedure. The SEC Releases, since 1995, have a thorough and well developed body of guidance with respect to electronic delivery of securities documents that NASAA could use in further harmonizing its SOP. One such example is the proposed prohibition in the SOP on links to or from external documents or content (hyperlinks). The SEC Releases permit hyperlinks to outside content with certain caveats, such as a disclaimer recognizing that the information they are about to view is or is not the issuer’s, depending on the circumstances. The SOP should similarly provide issuers and their agents with the ability to conform their electronic delivery methods and maintenance of the information to that already provided by the federal securities laws and developed since 1995.

Given the changes in the publicly registered, non-traded direct participation program industry over the past 5 years, with sponsors having multiple offerings across different product types, requiring investors to electronically sign separate subscription documents for each offering as well as requiring investors to give consent to electronic delivery with each and every offering seems overly burdensome and time consuming. The SEC Releases provide specifically for global consent to electronic delivery, relating to all documents of any issuer, so long as the consent is informed. See SEC Release 33-7856, Section II.A.2. The SEC Releases also allow investors to consent to electronic delivery over the telephone. Given the over 10 year history of the SEC Releases with respect to global consent, the SOP should conform its requirements with respect to consent and multiple program subscription documents to those federal securities laws

already in effect. The ability to abuse the electronic delivery and electronic signature authority seems rather remote so that an investor should be able to consent to all manner of electronic communication and signature without having to fill out multiple forms each time.

Define Security Breach and Limit the Suspension of the Electronic Subscription Process

The SOP states that “in the event of discovery of a security breach at any time in any jurisdiction, the electronic subscription process will be suspended and notification will be made to the Administrator and all investors.” Emphasis added. The SOP, however, does not define the term “security breach.” There are many types of security breaches, not all of which should be treated the same, especially since some types of security breaches may not compromise any information or personal data. While any kind of breach is a cause for concern, the response to such breach should be tailored to the type, extent and scope of the particular security breach. The SOP should define security breach and include some level of materiality, scope and type, in order to determine an adequate response up to and including suspension of the entire electronic subscription process and notification of investors.

Once there is a security breach at any time in any jurisdiction, the electronic subscription process must be suspended. The SOP does not, however, address under what conditions the electronic subscription process can be re-established, if indeed there are any or the ability to have an electronic subscription process is forever foreclosed to the issuer.

Particular attention should be paid to the process of suspending the electronic subscription process given that on any particular day, electronic subscription documents are in different stages of the process and in different parts of the process. Some will have been submitted to the broker-dealer, some might be in the review process at the broker-dealer home office, some might be awaiting approval by the issuer and some might already be at the transfer agent awaiting entry into the database. If there must be a suspension of the electronic subscription process the SOP should provide guidance on the mechanics of stopping as well as restarting the process. In addition, the SOP should make clear whether a suspension of the electronic subscription process permits the issuer and its agents to continue to deliver offering documents electronically or whether all methods of electronic communications are suspended.

The SOP also states that if a security breach happens at any time in any jurisdiction, all investors must be notified. Does the notification extend to all investors in the offering from the beginning of the offering? In what form is the notification – a letter to each and every investor, a notice on the website of the issuer? If the security breach happened to a small family office in a particular state, whether or not any personal data or information was compromised, the resulting suspension of the electronic subscription process for the entire offering and resulting notification of all investors seems to be completely disruptive and overly burdensome.

ADISA believes that requiring data protection processes and procedures with respect to those in the distribution chain is a much more effective regime than trying to shut down an entire subscription process once it has begun because of an undefined security breach and may have

ADISA Comment Letter

limited effect on a small number of investors out of thousands of potential investors in a given offering.

ADISA believes that this is an important step forward with respect to the offerings of publicly registered, non-traded direct participation programs and appreciates the opportunity to provide its comments on the proposed SOP. ADISA would appreciate an opportunity for a meeting with the NASAA project group to further discuss our concerns and assist in creating appropriate language for the SOP.

Sincerely,



Michael A. Bendix
President

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