



**November 2, 2016**

NASAA Legal Department  
Mark Stewart, Counsel  
NASAA  
750 First Street NE, Suite 1140  
Washington, DC 20002

***VIA EMAIL***

Bill Beatty, Chair of the Corporation Finance Section  
([Bill.Beatty@dfi.wa.gov](mailto:Bill.Beatty@dfi.wa.gov))

Dan Matthews, Chair of the Business Organizations and Accounting Project Group  
([Dan.Matthews@dfi.wa.gov](mailto:Dan.Matthews@dfi.wa.gov))

Anya Coverman, NASAA Deputy Director of Policy and Associate General Counsel  
([ac@nasaa.org](mailto:ac@nasaa.org))

Mark Stewart, NASAA Counsel  
([nasaacomment@nasaa.org](mailto:nasaacomment@nasaa.org))

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

Dear Chair Beatty, Chair Matthews, Ms. Coverman and Mr. Stewart,

FS Investments (formerly Franklin Square Capital Partners) thanks NASAA, its Corporation Finance Section Committee (the "Committee"), and its Business Organizations and Accounting Project Group (the "Project Group") for the opportunity to comment on the proposed Statement of Policy Regarding the Use of Electronic Offering Documents and Electronic Signatures (the "Proposed SOP"). Founded in Philadelphia in 2007, FS Investments' mission is to enhance and better diversify mainstream investors' portfolios by combining strong investor protections and industry-leading best practices with access to asset classes, strategies and investment managers typically available only to institutions and wealthy individuals.

FS Investments greatly appreciates the spirit of open-minded collaboration with which the Committee and Project Group have approached the development of the Proposed SOP. From our initial introduction of the issue to NASAA at its inaugural Capital Formation Roundtable in 2015, the receptiveness shown by NASAA officials and staff has been remarkable. The process thus far has been marked by greater and earlier cooperation between NASAA and members of the regulated community, and is exemplary of the good that can be achieved for investors and the capital markets when regulators and industry participants come together as partners in furtherance of a common cause. We believe this approach is the formula for transforming likely opposition into buy-in and support. While the subject matter of the Proposed SOP may be less controversial than other policy changes advanced by NASAA, we sincerely hope that the successful partnership forged between NASAA and members of industry in crafting the Proposed SOP is looked upon as a model for the development of future policy statements and amendments.

Against this backdrop, FS Investments is proud to strongly support the Proposed SOP. Without detracting from this support, we have concerns with one change made to the October release of the Proposed SOP. Specifically, Section I.B.1 was added after the May release of the Proposed SOP and appears to create three new conditions an issuer or its agent must satisfy in order to use electronic subscription agreements under the Proposed SOP.

**Section I.B.1.** [B]efore completion of any subscription agreement, the issuer or agent acting on behalf of the issuer must: (i) review all documentation with the prospective investor, (ii) discuss investment options dependent upon suitability, and (iii) review the documents and instructions on how to complete the subscription agreement.

We agree that each of these steps should be taken by a financial advisor during or prior to completion of a subscription agreement, whether paper or electronic. However, specifically with respect to subclause (ii), we question whether the Proposed SOP is the best document to address that issue, and whether it is appropriate to make the discussion of investment options a precondition to the use of electronic subscription agreements. Our questions with regard to subclause (ii) are premised on four observations:

1. Subparagraphs (i) and (iii) are procedural in nature and appear to pertain primarily to providing investors with the assistance necessary to properly fill out a subscription agreement, which may appropriately be of greater importance in the context of electronic documents than of paper documents. Subclause (ii), however, does not appear to relate to the process of completing a subscription agreement, but rather to the investment decision itself. Accordingly, subclauses (i) and (iii) seem more germane to a guideline provision related to assisting customers in the *completion* of subscription agreements, while the discussion of investment options under subclause (ii) should occur well prior to the point of execution.
2. While section I.B states that electronic subscription process should be “administered in a manner that is similar to the administration of subscription agreements in paper form,” there does not appear to be any similar requirement to discuss investment options in connection with the use of a paper subscription agreement.<sup>1</sup>
3. Section I.B.1 allows the three conditions to be satisfied by either the issuer or an agent of the issuer. An issuer, however, may be prohibited under state law and FINRA rules from discussing investment options with a prospective investor unless the issuer is licensed as a securities dealer. Assuming, then, that responsibility for the section I.B.1.ii discussion would fall to a licensed dealer acting on behalf of the issuer, there is no requirement under FINRA rules for member firms or registered representatives to discuss other investment options in connection with a recommendation.<sup>2</sup>

---

<sup>1</sup> We note that the use of subscription agreements is optional under both the NASAA Omnibus and REIT Guidelines, and that those statements of policy do not require a discussion of investment options. See, e.g., NASAA Omnibus Guideline III.D.

<sup>2</sup> See, FINRA Rule 2111 and its accompanying FAQ, available at: <http://www.finra.org/industry/faq-finra-rule-2111-suitability-faq>.

4. There is no guidance in the Proposed SOP or elsewhere as to what a financial advisor's obligations would be with respect to the section I.B.1.ii discussion. For example, would the advisor have any recordkeeping requirements? If so, would the section I.B.1.ii recordkeeping requirements differ from an advisor's other recordkeeping obligations under FINRA rules, the Securities Exchange Act of 1934, or applicable Labor Department regulations? Would there be any prohibitions related to the investment options discussed? Would the discussion trigger any disclosure obligations? The amount and nature of guidance necessitated by section I.B.1.ii seems to move rapidly away from the subject of electronic subscription agreements.

Accordingly, we recommend the following revision:

**Section I.B.1.** [B]efore completion of any subscription agreement, the issuer or agent acting on behalf of the issuer must: ~~(i) review with the prospective investor all appropriate documentation related to the prospective investment with the prospective investor, (ii) discuss investment options dependent upon suitability, and (iii) review the including~~ documents and instructions on how to complete the subscription agreement.

\*\*\*\*\*

FS Investments strongly supports the Proposed SOP. We sincerely thank NASAA, the Committee, and the Project Group for the opportunity to comment on the Proposed SOP, and are grateful to NASAA for taking up this issue and investing significant time, effort and resources into moving the Proposed SOP forward. We greatly appreciate the willingness of the Project Group to address issues raised during the initial public comment period, and to make the changes evident in the current release. We are encouraged by and have truly enjoyed the cooperation. Please contact Seth Hertlein at 202-350-9877 or [seth.hertlein@fsinvestments.com](mailto:seth.hertlein@fsinvestments.com) to discuss in greater detail any aspect of this letter or the Proposed SOP.

Sincerely,



Seth A. Hertlein  
Senior Counsel

FS Investments