

Comments of Folio Investments, Inc. regarding NASAA’s Statement of Policy Regarding The Use Of Electronic Offering Documents and Electronic Signatures (“SOP”) dated October 3, 2016.

We appreciate the opportunity to submit our comments as to the SOP.

As an online brokerage and clearing firm supporting individual self-directed investors, registered investment advisors, and other broker-dealers, we appreciate NASAA’s efforts to provide a framework for the online presentation of, and agreement to, securities offering documents. The internet provides significant opportunities to make investing more efficient, cost-effective and accessible. We think it is important that any statement by NASAA regarding online investing be clear, avoid the potential for misinterpretation, and not unduly restrict access to online investing or impose unnecessary costs or burdens. With these objectives in mind, we submit the following comments, which we hope will be incorporated into the final proposal approved by NASAA’s board.

1. Certain provisions of the SOP could be read to require that securities offerings be conducted in both an electronic format and through off-line means. For instance, Section I.G states that “[i]nvestment opportunities shall not be conditioned on participation in [an issuer’s] electronic offering documents and subscription initiative,” and Section II.A.3 states that “[i]nvestment opportunities shall not be conditioned on participation in the electronic signature initiative.”

These provisions seem to assume that issuers will conduct all offerings through both online and offline means, and they make sense for such offerings. However, as NASAA understands, some issuers conduct their securities offerings only through online means. This will increasingly be the case as technology develops and investors become increasingly comfortable conducting business online. We assume NASAA is not attempting through the SOP to create a requirement that issuers make offerings available through offline means as a condition to raising capital online. Such a requirement would impose unnecessary costs and burdens on issuers, without any reason to think such a requirement is appropriate or warranted.

We therefore suggest that language be added to the SOP to make it clear that it is not intended to, and does not, impose an obligation on issuers to make offerings available offline when conducting an online offering. This could be noted as a separate provision within Section I.

In addition, for the same reasons, we suggest inclusion of the underlined, or equivalent, language in Sections I.G and II.A.3:

Section 1.G Where offerings are conducted both through electronic means and in an off-line format, investment opportunities shall not be conditioned on participation in an issuer’s electronic offering documents and subscription initiative.

Section II.A.3 Where offerings are conducted both through electronic means and in an off-line format, investment opportunities shall not be conditioned on participation in the electronic signature initiative.”

2. As NASAA understands, many investors make their own investment decisions, and many investors provide investment discretion to a professional, such as an investment advisor or broker-dealer. The SOP does not appear, however, to take into account these approaches to investing. In particular, Section I.B.1 requires that “the issuer or agent acting on behalf of the issuer . . . review all documentation with the prospective investor ... discuss investment options dependent upon suitability and review the documents and instructions on how to complete the subscription agreement.” While the requirements of the provision are appropriate for situations where an investment professional has recommended a transaction and the investor retains the authority to make the investment decision, it fails to take into account situations where self-directed investors or intermediaries acting pursuant to discretionary authority are making the investment decision.

We assume that NASAA does not intend this provision to preclude the availability of online investing to self-directed investors or investment professionals acting pursuant to discretionary authority. This would of course make online offerings unavailable to very large and important categories of investors. We also note that the document review and suitability requirements of the provision are not necessary where self-directed investors or investment professionals acting pursuant to discretionary authority are making the investment decision.

Therefore, to clarify that NASAA does not intend to preclude the availability of online investing to these categories of investors, and to make clear that the requirements of the provision do not apply as to self-directed investors or investment professionals acting pursuant to discretionary authority, we suggest inclusion of the underlined, or equivalent, language in Section I.B.1:

Before 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 on suitability, and (iii) review the documents and instructions on how to complete the subscription agreement, except where (a) the investor is making his or her own investment decision without a recommendation from the issuer or the agent to the investor that would require a suitability determination, and is reviewing and subscribing to an offering on the website of an issuer or its agent, or (b) the subscription request is being submitted by an intermediary, such as a representative of a registered investment advisor or broker-dealer, to whom the investor has granted discretionary authority as to the selection of investments.