

REQUEST FOR PUBLIC COMMENT REGARDING A PROPOSED MODEL STATUTE, A PROPOSED MODEL RULE, AND A PROPOSED SOLICITATION OF INTEREST FORM TO PERMIT TESTING THE WATERS IN REGULATION A – TIER 1 OFFERINGS

December 7, 2016

The North American Securities Administrators Association (“NASAA”) is requesting public comment regarding a proposed model statute and a proposed model rule that would permit testing the waters in Tier 1 offerings conducted under federal Regulation A. In addition, public comment is requested on the accompanying Solicitation of Interest form that would be filed with state securities regulators prior to conducting a testing the waters campaign.

Comments are due by January 6, 2017. To facilitate consideration of comments, please send comments to William Beatty (bbeatty@dfi.wa.gov), Chair of the Corporation Finance Section; Faith Anderson (Faith.Anderson@dfi.wa.gov), Chair of the Small Business/Limited Offerings Project Group; Anya Coverman (nasaacomment@nasaa.org), NASAA Deputy Director of Policy and Associate General Counsel; and Mark Stewart (nasaacomment@nasaa.org), at the NASAA Corporate Office. We encourage, but do not require, comments to be submitted by e-mail. Hard copy comments may be submitted at the address below.

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

Note: After the comment period has closed, NASAA will post to its website the comments it receives as submitted by the authors. Parties should therefore only submit information that they wish to make publicly available. Further, the following notice will appear on NASAA’s website where comments are posted: NASAA, its agents, and employees accept no responsibility for the content of the comments posted on this Web page. The views, expressions, and opinions expressed in the comments are solely those of the author(s).

I. Background

Section 3(b)(2) of the Securities Act of 1933 was enacted as part of the Jumpstart Our Business Startups Act (“JOBS” Act) and has been otherwise referred to as “Regulation A+.” This provision provides an exemption from federal registration for public offerings of securities of up to \$50 million in a twelve month period. Further, the Act provided for preemption of state registration requirements where the securities are (1) offered or sold on a national securities exchange; or (2) offered or sold to “qualified purchasers.”

The Securities and Exchange Commission (“SEC”) adopted final amendments to existing federal Regulation A on March 25, 2015.¹ The new rules provide for two tiers of offerings under Regulation A. Offerings of up to \$20 million may be made under the rules applicable to Tier 1 offerings. Offerings of up to \$50 million may be made under Tier 2, which, among other things, triggers ongoing reporting requirements. There is no minimum offering amount for Tier 2 offerings, thus an offering that might otherwise qualify under Tier 1 may instead be made under Tier 2. Pursuant to the SEC’s final rules, offerings under Tier 2 are made to “qualified purchasers” and therefore the states are preempted from requiring registration of these offerings.

II. The Existing Coordinated Review Program

In response to the JOBS Act, NASAA members adopted a coordinated review program for Section 3(b) offerings to streamline the multi-state registration process for these offerings. The program allows issuers to file an application for coordinated review by filing the form and the offering materials by email with the Program Administrator. The State of Washington currently serves as the Program Administrator and as such, is responsible for redistributing these materials to all of the participating jurisdictions selected by the issuer on the application form. Filing fees must continue to be submitted to each participating jurisdiction.

The Program Administrator selects a lead disclosure examiner and a lead merit examiner from among the jurisdictions in which registration is sought, assuming both disclosure and merit jurisdictions are selected on the application form. The lead examiners are responsible for drafting and circulating a comment letter to the participating jurisdictions. By having the lead merit and disclosure examiners draft the comment letter, the participating jurisdictions can ensure greater uniformity in comments and efficient allocation of resources.

The program provides that merit comments will be based on existing NASAA statements of policy. Further, the Review Protocol incorporates the following relief from existing statements of policy:

- The Statement of Policy Regarding Promoters’ Equity Investment shall not apply;
- The Statement of Policy Regarding Promotional Shares shall apply except that one-third (1/3) of any promotional shares required to be locked-in or escrowed shall be released on the first, second, and third anniversary of the date of completion of the offering such that all shares shall have been released from lock-in or escrow by the third anniversary of the date of completion of the offering; and
- The Statement of Policy Regarding Loans and Other Material Affiliated Transactions shall apply except that the disclosure document shall not be required to include representations by counsel to the issuer as contemplated in Section VII.C.3. of the policy.

¹ Amendments to Regulation A, SEC Release No. 33-9741 (Mar. 25, 2015), *available at* <http://www.sec.gov/rules/final/2015/33-9741.pdf>.

III. Proposal to Permit Testing the Waters

Under the SEC's final rules, issuers are permitted to solicit indications of interest in a testing the waters campaign in either a Tier 1 or Tier 2 offering prior to making any filing with the SEC. Further, states are preempted from requiring registration of testing the waters campaigns under Tier 2. Issuers are interested in and have been conducting testing the waters campaigns under Tier 2 since the final rules went effective.

Issuers have expressed that they would like to be able to test the waters over the internet in offerings they intend to conduct under Tier 1. State requirements in this regard, however, can vary.

The Corporation Finance Section Committee ("Committee") within NASAA believes that testing the waters can be a valuable exercise for issuers that are interested in conducting an offering. It can provide an issuer with information about whether anyone is interested in investing in its securities, what the appropriate pricing of those securities may be, and where interested investors may reside. The Committee understands, however, that jurisdictions have legitimate concerns regarding testing the waters campaigns. Issuers that test the waters without any regulatory oversight may willingly or unwittingly engage in fraud and precondition the market based on fraudulent statements. Prior regulatory review of testing the waters materials serves to mitigate or eliminate such risks.

To address the concerns of issuers that would like to test the waters in Tier 1 offerings while ensuring appropriate regulatory oversight, NASAA's Small Business/Limited Offerings Project Group has drafted the enclosed model administrative rule and optional model statutory amendment to permit testing the waters under the coordinated review program. While the filing of the proposed Solicitation of Interest Form would be required prior to testing the waters in order to take advantage of the coordinated review program, filing fees would not be required until an application for registration is submitted.

IV. Proposed Model Administrative Rule, Proposed Model Statutory Amendment, and Solicitation of Interest Form

NASAA is now requesting public comment on the accompanying proposed model rule, proposed model statutory amendment (for states seeking additional, specific statutory amendment authority), and a proposed Solicitation of Interest Form.

The proposed model rule allows an issuer that intends to register an offering under federal Regulation A to solicit indications of interest from prospective investors if the following conditions are satisfied:

- The issuer is organized under the laws of a state or territory of the United States, D.C., or a province of Canada;
- The issuer files a solicitation of interest form and any advertising materials with the administrator at least 15 calendar days prior to the initial solicitation of interest;

- Neither the issuer nor an person acting on its behalf may solicit or accept any money or subscriptions;
- Neither the issuer nor any person acting on its behalf may make any sales until at least seven calendar days after delivering a final offering circular; and
- Certain legends must appear in any solicitation of interest materials.

Certain offerings are disqualified, including those involving bad actors, companies that are in the development stage, blank check offerings, companies involved in petroleum or other mining or extractive industries, and those made by pooled investment vehicles. The proposed rule also contains an insignificant deviations provision, a waiver provision, an integration provision, and a provision preserving the administrator's enforcement authority.

The proposed model statutory amendment language may assist states seeking additional, specific statutory amendment authority.

The proposed model rule and model statutory amendment are attached as Exhibit A.

The proposed Solicitation of Interest Form would be required to be filed with regulators and provided to prospective investors. The form contains basic information about the issuer and the offering.

The proposed Solicitation of Interest Form is attached as Exhibit B.

Exhibit A

PROPOSED MODEL RULE:

Solicitations of Interest Prior to the Filing of the Registration Statement.

(a) Applicability. An offer, but not a sale, of a security made by or on behalf of an issuer for the sole purpose of soliciting indications of interest in receiving an offering circular for such security is exempt from [STATUTORY CITE] if the following conditions are satisfied:

(1) The issuer is or will be a business entity organized under the laws of, and with a principal place of business in, a State or Territory of the United States, the District of Columbia or a Province of Canada; and

(2) The issuer intends to register the security or sell the securities in reliance on an exemption under [the Act], and conduct its offering in accordance with 17 C.F.R. § 230.251 *et seq.*

(b) General Requirements.

(1) Initial Filing. Fifteen (15) calendar days prior to the initial solicitation of interest under this rule, the issuer must file with the [Administrator]:

(A) A Solicitation of Interest Form;

(B) All materials to be used to conduct solicitations of interest, including, but not limited to, scripts of any broadcasts to be made, any information to be posted on the internet, and copies of any notices to be published; and

(C) All materials filed with the SEC in compliance with 17 C.F.R. § 230.255.

(2) Amendments. Seven (7) calendar days prior to usage, the issuer must file any amendments to the foregoing materials or additional materials to be used to conduct solicitations of interest with the [Administrator], except for materials provided to a particular offeree pursuant to a request by that offeree.

(3) Unapproved Materials. The [Administrator] may notify the issuer in writing if the materials submitted in accordance with paragraph (b) above fail to conform to the provisions of this Rule or the Act, or has been otherwise determined to be unfair or deceptive. Neither the issuer nor any person acting on its behalf may distribute or use any materials that the [Administrator] has notified the issuer it may not use.

(4) Sales. During the solicitation of interest period, neither the issuer nor any person acting on its behalf may solicit or accept money, subscription, or commitment to purchase securities.

(5) Offeree Holding Period. Neither the issuer nor any person acting on its behalf may make any sale until at least seven (7) calendar days after delivering a final offering document to any offeree solicited under this rule.

(6) Waiting Period. The issuer and any person acting on its behalf must cease all communications with offerees made in reliance on this section after an application is filed with the [Administrator], and may not make any sales until at least twenty (20) calendar days after the last communication made by the issuer in reliance upon this rule.

(7) Waiver. The [Administrator] may waive any condition of this exemption, upon written request by the issuer describing cause and need for the waiver. Unless the [Administrator] expressly waives any provision of this rule then all provisions apply to each offer.

(c) Communications. The issuer must comply with the requirements set forth in this subsection (c). Failure to do so will not result in the loss of the exemption from the requirements of this section, but is a violation and may be actionable by the [Administrator] under [the Act] and constitutes grounds for denying or revoking the exemption as to a specific security or transaction.

(1) Legend. Any published notice, script for broadcast, or any other printed communication must contain at least the identity of the chief executive officer of the issuer, a brief and general description of its business and products, and the following legends:

(A) No money or other consideration is being solicited and none will be accepted;

(B) No sales of the securities will be made or commitment to purchase accepted until delivery of an offering circular that includes complete information about the issuer and the offering;

(C) An indication of interest made by a prospective investor involves no obligation or commitment of any kind; and

(D) This offer is being made pursuant to an exemption from registration under federal and/or state securities laws. Neither the federal nor the state authorities have confirmed the accuracy or determined the adequacy of this document or any other document presented to you in connection with this offering. No sale may be made until the offering statement is qualified by the Securities and Exchange Commission and is registered [or declared exempt] in this state.

(2) Extemporaneous Communications. Except for scripted broadcasts and published notices, the issuer does not communicate with any offeree about the contemplated offering unless the offeree is provided with the most current Solicitation of Interest Form at or before the time of the communication or within seven (7) calendar days from the communication.

(d) Disqualifications. This exemption is not available for offerings:

(1) That are disqualified under 17 C.F.R. § 230.262, unless the issuer does not know, and in the exercise of reasonable care could not know, that the offering is disqualified;

(2) By a development stage company without a specific business plan or purpose, or in which the issuer has indicated that its business is to engage in a merger or acquisition with an unidentified company or companies, or other unidentified entities or persons, or without an allocation of proceeds to sufficiently identifiable properties or objectives (i.e., “blind pool” or “blank check” offerings);

(3) By an issuer engaged in or proposing to engage in petroleum exploration or production, mining, or other extractive industries; and

(4) By a hedge fund, commodity pool, private equity fund, or similar investment vehicle.

(e) Effect of Non-Compliance. A failure to comply with any condition of subsections (b) or (c) of this section will not result in the loss of this exemption from the requirements of [the Act] for any offer to a particular individual or entity if the issuer shows:

(1) The failure to comply did not pertain to a condition directly intended to protect that particular individual or entity;

(2) The failure to comply was insignificant with respect to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable condition of subsections (b) and (c).

(f) Waiver. The [Administrator] may waive any condition of this exemption upon a showing of good cause by the issuer. Compliance, attempted compliance, a lack of objection or order by the [Administrator] with respect to any solicitation of interest under this exemption does not constitute a waiver of any condition or confirm the availability of this exemption.

(g) Integration. Offers made in reliance on this section shall not result in a violation of registration provisions of [the Act] by virtue of being integrated with subsequent offers or sales of securities unless such subsequent offers or sales would be integrated under federal securities laws.

(h) Enforcement Authority. An exemption from registration established only through reliance upon section (e) above does not render the failure to comply with this rule un-actionable as a violation and is enforceable by the [Administrator] under [the Act] and constitutes grounds for denying or revoking the exemption as to a specific security or transaction under [the Act].

[Optional: The following language may assist states seeking additional, specific statutory amendment authority.]

For states that have adopted the Uniform Securities Act (2002), the proposed language may be added as a new Section 202(24), as a new, second paragraph of Section 203, or as a standalone provision in a new Section 205. For states that have adopted the Uniform Securities Act (1956), the proposed language may be added as a new exemption at the end of Section 402(b) or as a standalone provision in a new Section 402(e) or a new Section 402.1, for example.]

PROPOSED MODEL STATUTORY AMENDMENT:

The securities administrator may, by rule adopted or order issued, exempt the offer, but not the sale, of a security made by or on behalf of an issuer without registering the offering for the sole purpose of soliciting an indication of interest in receiving an offering circular for such security, made in accordance with federal Regulation A, 17 C.F.R. § 230.251 *et. seq.*, and effected in accordance with the terms and conditions of any such rule or order. Nothing in this subsection limits the securities administrator's ability to adopt rules exempting other transactions.

Exhibit B

SOLICITATION OF INTEREST FORM
Form CR-3(b)-SOI

Note to users: This form sets forth the minimum information required for soliciting indications of interest under the laws of the jurisdictions participating in both coordinated review of offerings under Section 3(b)(2) of the Securities Act of 1933 and Regulation A adopted thereunder and the Testing the Waters Protocol. You may include additional information if you think it is necessary or desirable. Remember that any discussion in this document is subject to the anti-fraud provisions of state and federal securities laws and must thereby be complete. Also, any discussion of potential rewards of the proposed investment must be balanced by a discussion of possible risks. You may alter the graphic presentation of the form in any way so long as the minimum information is clearly presented.

Name of Issuer

Street address of principal place of business: _____

Issuer telephone number: _____

Jurisdiction of incorporation or legal organization: _____

Aggregate amount of proposed offering: _____

Name of Chief Executive Officer: _____

THIS IS A SOLICITATION OF INTEREST ONLY, NO MONEY OR OTHER CONSIDERATION IS BEING SOLICITED AND NONE WILL BE ACCEPTED.

NO SALES OF THE SECURITIES WILL BE MADE OR COMMITMENT TO PURCHASE ACCEPTED UNTIL THE DELIVERY OF A FINAL OFFERING CIRCULAR THAT INCLUDES COMPLETE INFORMATION ABOUT THE ISSUER AND THE OFFERING.

AN INDICATION OF INTEREST MADE BY A PROSPECTIVE INVESTOR INVOLVES NO OBLIGATION OR COMMITMENT OF ANY KIND.

THIS OFFER IS BEING MADE PURSUANT TO THE REQUIREMENTS OF FEDERAL AND STATE SECURITIES LAWS. NEITHER THE FEDERAL NOR THE STATE AUTHORITIES HAVE CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT OR ANY OTHER DOCUMENT PRESENTED TO YOU IN CONNECTION WITH THIS OFFER. NO SALE MAY BE MADE UNTIL THE OFFERING STATEMENT IS QUALIFIED BY THE SEC AND IS REGISTERED IN YOUR JURISDICTION.

The issuer: has never conducted business operations
(check one) is in the development stage.
 is currently conducting operations.
 has shown a profit in the last fiscal year.
 other (specify: _____).

Business:

1. Describe in general what business the issuer does or proposes to do, including what products or goods are or will be produced or services that are or will be rendered.
2. Describe in general how these products or services are to be produced or rendered and how and when the issuer intends to carry out its activities.

Offering Proceeds:

3. Describe in general how the issuer intends to use the proceeds of the proposed offering.

Key Personnel:

4. Provide the following information for all officers and directors or persons occupying similar positions: name, title, office street address, telephone number, employment history (include employers, titles, and dates of positions held during the past five years), and education (include degrees earned, schools, and dates).

Jurisdictions of Solicitation of Interest:

The issuer will solicit indications of interest in the jurisdictions participating in coordinated review indicated below. Issuers are cautioned to identify all jurisdictions in which they intend to solicit indications of interest using coordinated review. It may not be possible to include additional jurisdictions at a later date.

<input type="checkbox"/> Alabama	<input type="checkbox"/> Indiana	<input type="checkbox"/> Nebraska	<input type="checkbox"/> South Carolina
<input type="checkbox"/> Alaska	<input type="checkbox"/> Iowa	<input type="checkbox"/> Nevada	<input type="checkbox"/> South Dakota
<input type="checkbox"/> Arkansas	<input type="checkbox"/> Kansas	<input type="checkbox"/> New Hampshire	<input type="checkbox"/> Tennessee
<input type="checkbox"/> California	<input type="checkbox"/> Kentucky	<input type="checkbox"/> New Jersey	<input type="checkbox"/> Texas
<input type="checkbox"/> Colorado	<input type="checkbox"/> Louisiana	<input type="checkbox"/> New Mexico	<input type="checkbox"/> US Virgin Islands
<input type="checkbox"/> Connecticut	<input type="checkbox"/> Maine	<input type="checkbox"/> North Carolina	<input type="checkbox"/> Utah
<input type="checkbox"/> Delaware	<input type="checkbox"/> Maryland	<input type="checkbox"/> North Dakota	<input type="checkbox"/> Vermont
<input type="checkbox"/> District of Columbia	<input type="checkbox"/> Massachusetts	<input type="checkbox"/> Oklahoma	<input type="checkbox"/> Virginia
<input type="checkbox"/> Georgia	<input type="checkbox"/> Michigan	<input type="checkbox"/> Ohio	<input type="checkbox"/> Washington
<input type="checkbox"/> Hawaii	<input type="checkbox"/> Minnesota	<input type="checkbox"/> Oregon	<input type="checkbox"/> West Virginia
<input type="checkbox"/> Idaho	<input type="checkbox"/> Mississippi	<input type="checkbox"/> Pennsylvania	<input type="checkbox"/> Wisconsin
<input type="checkbox"/> Illinois	<input type="checkbox"/> Missouri	<input type="checkbox"/> Puerto Rico	<input type="checkbox"/> Wyoming
	<input type="checkbox"/> Montana	<input type="checkbox"/> Rhode Island	

Application and Consent to Service of Process:

The issuer hereby requests coordinated multi-jurisdictional review of this Solicitation of Interest Form and any other materials to be used to solicit indications of interest in an offering made in reliance on the exemption from federal registration under Section 3(b) of the Securities Act of 1933 and Regulation A adopted thereunder pursuant to the Testing the Waters Protocol. The issuer undertakes to submit any additional materials to be used to solicit indications of interest for review prior to use pursuant to the Testing the Waters Protocol.

The issuer irrevocably appoints the Securities Administrator or other legally designated officer of the jurisdiction in which the issuer maintains its principal place of business and any jurisdiction in which this application is filed, as its agents for service of process, and agrees that these persons may accept service on its behalf, of any notice, process or pleading, and further agrees that such service may be made by registered or certified mail, in any federal or state action, administrative proceeding, or arbitration brought against it arising out of, or in connection with, the sale of securities or out of violation of the laws of the jurisdictions so designated. The issuer further hereby consents that any such action or proceeding against it may be commenced in any court of competent jurisdiction and proper venue within the jurisdictions of application so designated hereunder by service of process upon the Securities Administrators or other legally designated officers so designated with the same effect as if the issuer was organized or created under the laws of that jurisdiction and have been served lawfully with process in that jurisdiction. It is requested that a copy of any notice, process, or pleading served hereunder be mailed to:

Name

Address

Dated this _____ day of _____, 20____.

Authorized Representative:

Signature

Print Name

Title

Name of Issuer