



Via electronic submission to NASAAComments@nasaa.org
cc: bbeatty@dfi.wa.gov and michelle.webster@dfi.wa.gov

October 22, 2022

NASAA Corporation Finance Section
William Beatty, Section Chair
Michelle Webster, Project Group Chair

c/o North American Securities Administrators Association, Inc. (“NASAA”)
750 First Street, N.E., Suite 1140
Washington, D.C. 20002

Re: Proposed Revisions to the Uniform Application to Register Securities (Form U-1) (the “Proposal”)

Dear Section Members, Mr. Beatty and Ms. Webster:

The Institute for Portfolio Alternatives (the “Institute”) welcomes the opportunity to comment on the Proposal, which would amend the Form U-1 to require the submission to each jurisdiction in which the issuer’s securities offering is registered of proxy statements and proxy solicitation materials filed with the U.S. Securities and Exchange Commission (the “SEC”). The Institute represents the sponsors and distributors of alternative products, including non-listed REITs and business development companies, interval funds, and tender-offer funds.¹

The Institute appreciates NASAA’s concerns regarding an offering registered in the states pursuant to Form U-1 (each, a “State-Registered Offering”), and looks forward to working with you to address these concerns in a reasonable and practical manner. However, the Institute believes that NASAA should delay final action with respect to the Proposal in its current written form. The Proposal would conflict with the SEC’s timeline for the review of proxy statements and lead to stockholder confusion. If, however, the Proposal is adopted, the Institute respectfully suggests that the scope and timing of any review of such proxy materials filed with the SEC (“Proxy Materials”) be aligned with the concerns and goals stated by NASAA in the Proposal.

¹ For more than 35 years, the Institute has advocated for increased investor access to portfolio diversifying investment strategies, accompanied by straightforward disclosure about their risks and benefits and strong investor protection from inappropriate sales practices. Our members include the asset management companies that sponsor diversifying investments, wirehouse broker-dealers, independent broker-dealers, regional broker-dealers, registered investment advisers, law firms, accounting firms, transfer agents, valuation firms, due diligence firms, and technology firms.

1. The Proposal Would Conflict with the SEC's Proxy Review Process and Confuse Stockholders.

The Proposal would conflict with the SEC's review of Proxy Materials. It would permit state securities administrators to apply conditions to proxy statements that are different from those imposed by the SEC, such as additional disclosure requirements. Moreover, the Proposal would interfere with the federal procedure for proxy statement review by the SEC. Under the federal proxy rules, a proxy statement containing a proposal to amend the issuer's charter must be filed initially as a preliminary proxy statement and, if the SEC has not contacted the issuer within 10 calendar days thereafter, the issuer may file the definitive proxy statement and mail it to its stockholders. Issuers often file the definitive proxy statement and mail it immediately thereafter. Given that very few state securities administrators currently review and issue comments on SEC filings within 10 calendar days, it seems unlikely that state-level review of proxy statements would be completed simultaneously with the SEC's review. If state securities administrators take more than the the 10-day SEC review and notification period to review and comment on a filed proxy statement, they would issue their comments well after the definitive proxy statement had been mailed to thousands of stockholders, many who may have already voted on the proposals.

Moreover, each issuer would have to monitor the comments from various states. It would be nearly impossible to determine which states, if any, would comment on Proxy Materials, or when any comments would be issued from each state. An issuer could not efficiently plan its proxy solicitation, especially when such solicitations are usually time sensitive. The issuer will not be able to discern whether, upon completion of the 10-day period established by the SEC, it will be able to send out the definitive proxy statement without risk of receiving comments at different times from various states.

In short, the Proposal would present a risk to the issuer and stockholders that a definitive proxy statement might have to be amended and Proxy Materials might have to be redistributed to stockholders, and result in confusion among stockholders wondering why they are being asked to return the proxies more than once. This problem will be especially detrimental to the issuer and its stockholders when a non-routine question is being posed and time is of the essence.

This Proposal would disrupt the federal process for proxy statement review by the SEC and would undermine the federal scheme for the issuance of definitive proxy statements. It would create an expensive and cumbersome process that the SEC had not envisioned when it adopted its proxy rules, and it would unnecessarily increase the cost of soliciting stockholder votes, with the increased costs having an adverse impact on the stockholders, as the owners of the issuer. Further, what would be the consequences for an issuer who submits Proxy Materials and then receives comments from a state securities administrator after the meeting has taken place and the stockholders have approved the proposal? It is unclear whether any state securities administrator possesses the authority to require an issuer to commence a new proxy solicitation.

To avoid unintended outcomes that could result in significant undue burden and delay, negatively impacting stockholders, we respectfully urge NASAA not to adopt the Proposal as written.

2. **If the Proposal is Adopted, the Institute Requests the Establishment of Appropriate and Workable Parameters Consistent with NASAA’s Stated Goals.**

- A. *The submission requirement should apply only to proxy statements that propose a revision that conflicts with, or the removal of, a charter provision required by a NASAA Statement of Policy.*

The Proposal states that NASAA is proposing these changes because members of NASAA’s Business Organizations and Accounting Project Group have noted “instances in which issuers conducting registered offerings have sought stockholder approval on – and furnished proxy solicitation materials in connection with – certain matters that raise investor protection concerns.”² The Proposal then specifically cites two instances in which issuers with State-Registered Offerings solicited stockholder approval of proposals to amend their charters to remove certain NASAA Statement of Policy-derived stockholder rights and protections.³ However, the Proposal does not cite any examples of proxy materials that raised investor protection or disclosure concerns that did not also involve the amendment of the issuer’s charter.

The Institute understands and appreciates NASAA’s desire to enforce the NASAA Statements of Policy with respect to issuers engaged in State-Registered Offerings, and if the Proposal is adopted, that issue should be its focus. If NASAA adopts the Proposal despite the issues it will create that are discussed above, then the Institute respectfully requests that it be limited to proxy solicitations that propose a revision that conflicts with, or the removal of, a charter provision required by a NASAA Statement of Policy – unless these changes were requested by a state securities administrator.

The Proposal should not apply to proxy solicitations regarding other types of proposals, including those concerning routine matters. The SEC does not require a preliminary proxy statement to be filed for these routine matters and subjecting these materials to a state review process would cause undue compliance burdens, as noted earlier. The Proposal also should not apply to charter amendments proposed at the request of state securities administrators in order to more closely align the language in the charter with the corresponding language in a NASAA Statement of Policy. Given that any such proposal would be submitted to stockholders for approval in compliance with the request of a NASAA member, the Institute does not believe that it is necessary for NASAA members to review a proxy statement containing such a proposal.

- B. *Issuers should only be required to submit preliminary proxy statements.*

The Proposal would require the submission of all Proxy Materials filed with the SEC for review and comment, including preliminary and definitive proxy statements, definitive additional materials and soliciting material. While NASAA proposes that this does not create a significant additional burden because the issuer is filing these materials with the SEC anyway, the Institute would like to point out that that the SEC typically reviews only preliminary proxy statements.

² Proposal at 2.

³ *Id.*

The Proposal would result in review and comment from multiple jurisdictions throughout the proxy solicitation process. Further, definitive additional materials are typically reminders to vote and it seems unnecessary to cause the issuer (and its stockholders) to incur the cost and legal expense of delivering such materials to all state securities administrators.

Further, if the review is limited to the preliminary proxy statement (subject to the timing limitation noted in 2.C. below), the issuer will be better able to assess when it can consider its Proxy Materials to be in final form and ready to be mailed to commence the solicitation. We have recommended that the Proposal, if adopted, apply only to proposals to revise or remove charter provisions required by a NASAA Statement of Policy. Such a proposal likely will be time sensitive and for that reason the issuer must have some reasonable expectation that the review can be completed before the charter revision must go into effect. By limiting state review to the preliminary proxy statement, the issuer will have confidence that, once the state review has been completed, it can send the definitive proxy statement and solicit stockholder votes. If, however, state securities administrators comment later in the process on documents such as the definitive proxy statement or on definitive additional materials, the issuer may find itself in the difficult and expensive position of amending, re-filing and redistributing materials to its stockholders. Further, the issuer may have to re-solicit votes from stockholders who had already cast their vote earlier in the process. This would cause the proxy solicitation process to become more cumbersome and expensive, which negatively impacts the return to stockholders, given that they are the owners of the issuer. It also could result in confusion on the part of stockholders who do not understand why revised versions of materials are being circulated and/or why they are being asked to vote a second time.

C. State securities administrators should be required to notify issuers of impending comments within a specified period, similar to the SEC.

As noted earlier, if the SEC has not contacted the issuer within 10 calendar days after the preliminary proxy statement is filed, the issuer may file the definitive proxy statement and mail it to its stockholders. If the Proposal is adopted, the Institute respectfully requests that a deadline be imposed by which a state securities administrator must notify the issuer if it will have comments. Even if NASAA accepts our recommendation to limit review to the preliminary proxy statement, issuers need to be able to gauge when comments will be issued and from which jurisdictions, in order to ensure that there will be sufficient time to complete the proxy solicitation.

For the reasons noted earlier, if the issuer's Proxy Materials are subject to review and comment throughout the solicitation process, possibly until right before the date of the meeting, it could create an undue compliance burden for the issuer and its stockholders. This could include the amendment, re-filing, and redistribution of materials to stockholders, re-soliciting votes from stockholders that had already voted, and postponement of the meeting to give stockholders sufficient time to review revised solicitation materials. Postponement of the meeting could result in not only increased cost, but also logistical burdens resulting from having to locate and reserve a meeting space for the new meeting date. For these reasons, the Institute respectfully requests that NASAA revise the Proposal such that state securities administrators must notify the issuer if they expect to have comments within 10 days after the preliminary proxy statement is submitted by the issuer and then deliver any comments to the issuer no later than 10 business days after the end of that initial 10-day notification period. This requirement would provide an issuer with the certainty needed to plan for filing and mailing the definitive proxy statement,

such that the amendments and re-solicitations described earlier would not be necessary and the issuer can avoid the confusion, delay and increased cost that could create (which cost is borne by the stockholders, as the owners of the issuer). The Institution believes this is a reasonable parameter that would still permit NASAA to achieve its stated goals, while also not causing an undue regulatory burden. Without this parameter, the issuer will be subject to an extended period of uncertainty as to whether a NASAA member may issue comments on its proxy statement, causing an undue delay for the proxy solicitation process.

For the reasons set forth above, we respectfully request that if NASAA adopts the Proposal, in order to ensure that this new requirement does not result in an unintended regulatory compliance burden, NASAA should first revise the Proposal to:

- require submission only of preliminary proxy statements that propose a revision that conflicts with, or the removal of, a charter provision required by a NASAA Statement of Policy;
- exclude from this requirement the submission of any preliminary proxy statement containing a charter amendment proposal requested by a state securities administrator; and
- require state securities administrators to notify the issuer if they will have comments within 10 days after receipt of the preliminary proxy statement is submitted by the issuer and then deliver any comments to the issuer no later than 10 business days after the end of that initial 10-day notification period.

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Thank you again for the opportunity to share our views on this important subject. We hope that NASAA finds our comments constructive. If you have questions about anything in this letter, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact me at (202) 548-7190.

Sincerely,



Anya Coverman
President & CEO
Insitute for Portfolio Alternatives