



NASAA Insight

The Voice of State & Provincial Securities Regulation
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NASAA, SEC Sign Agreement Designed to Promote Greater Sharing of Information

Leaders of NASAA and the Securities and Exchange Commission (SEC) in February signed an information-sharing agreement as new rules to facilitate intrastate crowdfunding offerings and regional offerings take effect.

Under the Memorandum of Understanding (MOU), federal and state securities regulators will be better able to monitor the effects of the new rules and also guard against fraud.

"This agreement will strengthen collaboration among state and federal securities regulators to help expand small-business investment opportunities while also protecting investors," said NASAA President Mike Rothman. "Ongoing dialogue is essential to carry out our responsibilities going forward. With this MOU in place, we have an opportunity to share information that will bolster our efforts to support small business capital formation and prevent fraud."

"The agreement not only builds on an already productive relationship between the SEC and state regulators, it also offers additional insights and protections as we help companies grow and create jobs while providing new opportunities to investors," said Acting SEC Chair Michael Piwowar.



NASAA President and Minnesota Commissioner of Commerce Mike Rothman (left) and SEC Acting Chair Michael Piwowar at the MOU signing ceremony at SEC headquarters in Washington, DC.

NASAA Outlines Legislative Priorities for 115th Congress

As the 115th Congress began taking shape, NASAA released a series of recommendations regarding ways to strengthen investor protection and facilitate healthy capital formation.

"Our legislative priorities are designed to help members of the 115th Congress protect their constituents in the fight against investment fraud; ensure honest and transparent markets; and allow responsible capital formation, for even the smallest of companies, without undermining investor protection," said Mike Rothman, NASAA President and Minnesota Commissioner of Commerce.

Rothman outlined five priorities that state securities regulators will support in legislation introduced in the 115th Congress, including those designed to:

- Preserve and promote protections for retail investors;
- Strengthen laws to prevent financial exploitation of America's growing senior population;
- Protect the integrity of securities markets;
- Enhance collaboration between securities regulators; and
- Maintain state authority to act as laboratories to grow jobs through capital formation.

"We encourage Congress and the Administration to promote financial regulatory policies that hold true to our shared responsibility to look out for investors and preserve the integrity of our capital markets," Rothman said.

For details on NASAA's legislative priorities, see pages 4-5.

President's Message: Mike Rothman



As I near the midway point of my term, I am very pleased to report significant progress on one of my top priorities — strengthening collaboration among state and federal securities regulators.

In February, on behalf of NASAA, I signed a Memorandum of Understanding (MOU) with the Securities and Exchange

Commission intended to facilitate greater sharing of information between state and federal securities regulators.

I want to recognize and thank my predecessor, Judith Shaw, for having the forethought last year to get the ball rolling on this MOU. And thank you to the NASAA and SEC staff for working together to get the MOU finalized.

This will be an important initiative as we continue to explore additional ways to collaborate in carrying out our mission to protect investors and the integrity of the financial markets.

State securities regulators throughout the nation work with their counterparts in the SEC's regional offices. The NASAA Corporate Office staff has a strong working relationship with the SEC's staff at headquarters. Yet, given the dynamic nature of the securities markets, there is always room to build and strengthen our relationships at every level.

The MOU provides an additional avenue for state and federal securities regulators to collaborate and share information.

In recent years, we have seen significant changes to the laws governing capital formation. As a result of both the JOBS Act and rulemaking by the SEC, the regulatory framework under which small companies can raise money has changed dramatically.

It is essential that in today's post-JOBS Act environment we have a collaborative structure as set out in this MOU for ongoing dialog between state and federal securities regulators. Sharing information on the newly enacted and expanded registration exemptions will help ensure the effectiveness and efficiency of these new rules and will help us monitor the market for bad actors. We must remain vigilant that these new exemptions work to enhance capital formation without harming investors.



Representatives of NASAA and the SEC gather after the signing ceremony of a joint Memorandum of Understanding as new rules to facilitate intrastate crowdfunding offerings and regional offerings take effect. Joining Acting SEC Chair Michael Piwowar (center) and SEC staff, the NASAA delegation included President Mike Rothman, President-elect Joe Borg, Past President Judith Shaw, Executive Director Joseph Brady, General Counsel Valerie Mirko, Director of Policy Mike Canning, Deputy Director of Policy and Associate General Counsel Anya Corman and Counsel Mark Stewart.

Save the Date:
September 24-26, 2017
NASAA Annual Conference
Seattle



NASAA Tells Congress The Financial CHOICE Act Would Reverse Critical Investor Protections and Send Regulatory Policies in the Wrong Direction

In a statement submitted to the House Financial Services Committee, the North American Securities Administrators Association (NASAA) said the Financial CHOICE Act of 2017, if enacted in its current form, “would dramatically change regulatory policies in the wrong direction,” weaken important reforms and protections put in place by the Dodd-Frank Act in response to the financial crisis, and expose investors and the securities markets to significant, unnecessary and new risks.

“It is clearly evident that the changes contemplated by the bill would significantly undermine and compromise the ability of regulators to effectively enforce financial laws and regulations,” said Mike Rothman, NASAA’s President and Minnesota Commissioner of Commerce, in a written statement submitted to the committee for an April 26, 2017 hearing on a discussion draft of the financial deregulatory legislation.

“By attempting to eviscerate so many critically important reforms – weakened oversight of private securities markets and reforms; watered down provisions intended to expand fiduciary obligations to investment professionals; lowered standards for securities sold to the investing public; diluted

“NASAA’s message to Congress is simple and clear: Please continue your commitment to protecting investors and do not undermine the important and overdue reforms implemented in the wake of the financial crisis.”

► NASAA President Mike Rothman

rules that keep “bad actors” out of our securities markets; among many others – the legislation blithely aims to sweep away in one stroke scores of essential protections and modernizations to our financial regulatory architecture that were literally decades in the making,” Rothman said.

Rothman said NASAA also objects strongly to the bill’s Section 391, which would mandate the adoption of policies governing the coordination of state and federal enforcement actions. Calling the requirement “overbroad and misguided,” Rothman said it is unnecessary and potentially very disruptive in the realm of securities regulation given that state and federal securities regulators already collaborate on a voluntary basis to share information and leverage resources efficiently.

“NASAA has great concerns about hampering this voluntary state-federal collaborative framework through Section 391 as written,” he said.

“NASAA’s message to Congress is simple and clear: Please continue your commitment to protecting investors and do not

undermine the important and overdue reforms implemented in the wake of the financial crisis, either directly through legislative repeals, or indirectly through a lack of appropriate funding or delayed execution,” Rothman said. “It is incumbent upon members of Congress and regulators to demonstrate

an unwavering commitment to Main Street investors and continue to take the steps necessary to protect them.”

NASAA’s statement addresses troubling aspects relating to capital formation and investor protection, while it also supports the SeniorSafe Act and other positive provisions.

A full copy of the statement is available on the NASAA website at www.nasaa.org.

In testimony before the House Committee on Financial Services on April 28, 2017, Maryland Securities Commissioner Melanie Senter Lubin (center) represented NASAA and urged Congress to remember the lessons learned from the financial crisis of 2008 as it considers provisions in the Financial CHOICE Act that will weaken critical investor protections. “The reforms and investor protection provisions in the Dodd-Frank Act were born of necessity: trust in the market needed to be restored if our system of capital formation was to thrive,” Lubin said. “By passing the Dodd-Frank legislation into law, Congress signaled the beginning of a new era of financial market oversight and investor protection, including reforms intended to better empower state securities regulators to protect citizens from fraud and abuse. The Financial Choice Act neither improves nor builds upon the critical safeguards that Congress crafted in response to the financial crisis.”



NASAA Legislative Agenda

Advancing a Legacy of Investor Protection

"Preserving the integrity of our nation's financial markets through a responsible regulatory framework that ensures the rules are enforced, encourages financial innovation, and provides essential protections for investors is an integral responsibility of government at both the federal and state levels. We encourage Congress and the Administration to promote financial regulatory policies that hold true to our shared responsibility to look out for investors and preserve the integrity of our capital markets."

► **NASAA President Mike Rothman**

1. **Preserve and Promote** Protections for Retail Investors

- Provide for a fiduciary standard for broker-dealers consistent with the standard applicable to investment advisers. All financial services professionals should act in the best interests of clients. Establishing a fiduciary duty standard governing the conduct of broker-dealers and their agents is crucial for the protection of investors and to enhance investor confidence in the securities markets.
- Ensure regulators' independence and ability to take timely action. Imposing unduly complex and overly burdensome requirements on agency rulemaking through legislation impedes the ability of regulators to address problems in a timely manner. Any such delay could threaten the well-being of American investors and the integrity of U.S. securities markets.
- Maintain federal rules that disqualify felons and other "bad actors" from private offerings. Congress should not take any steps to weaken provisions of current law that help keep fraud out of the private placement markets, and should explore initiating reforms to improve oversight of the private placement market, including Regulation D, Rule 506 offerings.

2. **Strengthen** Laws to Prevent Financial Exploitation of America's Growing Senior Population

- Enact the bipartisan SeniorSafe Act. The SeniorSafe Act will better protect people aged 65 and over from financial exploitation by increasing the likelihood it will be identified by financial services professionals and reported to regulators, Adult Protective Services agencies, and law enforcement authorities.
- Establish a federal grant program to support state efforts to protect vulnerable older Americans. A federal grant program would bolster senior investor protection efforts already underway in many states by facilitating the hiring and training of staff to investigate and prosecute cases of exploitation and by supporting state efforts to partner with financial services providers and others who may be well-positioned to detect exploitation.
- Direct the Government Accountability Office (GAO) to study the economic cost of senior financial exploitation. Congress should direct the GAO to initiate a comprehensive study to understand and quantify the economic costs and overall impact of senior financial exploitation.

For the 115th Congress

3. **Protect** the Integrity of Securities Markets

- Support a strong examination program for federally registered investment advisers. Congress should provide the SEC with resources and authority to improve oversight of federally registered investment advisers.
- Preserve important investor protections enacted in response to lessons of the financial crisis. Investors and securities markets continue to benefit from common-sense reforms enacted in the wake of the financial crisis, including policies that increase transparency regarding the activity of advisers to private funds, enhance systemic stability, minimize conflicts of interests, and hold bad-actors accountable.
- Modernize privacy laws without undermining legitimate law enforcement interests. State securities regulators appreciate bipartisan interest in modernizing privacy protections relating to information stored on Internet service providers, but urge Congress not to inadvertently or unjustifiably curtail crucial investigatory authorities used by state regulators and other civil law enforcement agencies.

4. **Enhance** Collaboration Between Securities Regulators

- Require that at least one member of the five-member Securities and Exchange Commission have experience serving as a state securities regulator. The appointment of even one SEC Commissioner with significant experience as a state securities regulator would dramatically improve coordination between state and federal securities authorities and bring a perspective informed by experiences from Main Street America where investor protection is personal and capital formation means real jobs.
- Encourage federal regulators to share pertinent information with state regulators regarding shared priorities. The SEC and states must take steps to share, collaborate and protect valuable information affecting our securities markets. As Congress considers or creates new structures to allow information sharing regarding cybersecurity and other matters among law enforcement agencies and regulators, we strongly urge the inclusion of state securities, insurance, and banking regulators in those discussions and in any new framework.

5. **Maintain** State Authority to Act as Laboratories to Grow Jobs Through Capital Formation

- Empower states to respond to the needs of small businesses and investors. State securities regulators strongly share Congress's desire to continue to improve access to capital for small and emerging businesses while protecting investors. Congress should continue to encourage federal-state collaborations aimed at helping small businesses responsibly access capital from investors and customers in their regions and localities.
- Prioritize the protection of retail investors in developing any new policies that would expand the private securities markets. As it considers modernizing the accredited investor definition, Congress should reaffirm that the definition is intended to provide a meaningful carve-out from the protections afforded by securities registration for offerings made to investors with the financial means and sophistication to evaluate for themselves an offering's risks.

A new feature of NASAA Insight, the Enforcement Close-up, offers readers an in-depth look at key enforcement-related issues for state securities regulators. This article was written by Holly Mack-Kretzler, an attorney in the enforcement unit of the Washington Securities Division and a member of the Enforcement Publications Project Group of NASAA's Enforcement Section.

The State of Washington v. Michael J. Reeder

Upholding the authority of a subpoena for bank records issued on less than probable cause

Key Takeaway

While a Special Inquiry Judge (SIJ) proceeding is not used often, it is an important investigative tool for prosecutors. It's especially important for investigating and prosecuting financial crimes. Upholding the use of the SIJ subpoena for bank records ensures that prosecutors can continue to gather evidence of suspected financial crimes in order to determine whether probable cause exists for an indictment.

Concluding that a subpoena issued by a "special inquiry judge" to obtain the defendant's bank records provided sufficient authority of law to justify the state's examination of the defendant's private affairs and that multiple convictions did not violate double jeopardy, the Supreme Court of Washington¹ on December 17, 2015, upheld a criminal conviction against Michael Reeder on 14 counts of securities fraud and 14 counts of theft in the first degree.

Background

Michael Reeder met William McAllister through a company that provided private real estate financing. Between March 2006 and June 2007, McAllister paid Reeder more than \$1.75 million across 14 payments to finance two real estate investments. The real estate transactions never occurred, and Reeder did not return McAllister's investment funds.

The Investigation

To determine how Reeder used McAllister's funds, the Washington Securities Division obtained bank records from multiple banks using subpoenas issued by a special inquiry judge (SIJ). Because Reeder repeatedly transferred cash and cashier's checks between multiple bank accounts, the bank records were extensive. A financial examiner from the Securities Division spent approximately 600 hours analyzing

the records, which included about 600 Currency Transaction Reports documenting cash transactions of \$10,000 or greater. The Division's examiner determined that Reeder commingled McAllister's funds with funds from other victims and withdrew more than \$3 million in cash or cashier's checks, including more than \$100,000 withdrawn at casinos in Washington State and Nevada. Reeder also used more than \$232,000 of these funds to pay loans and credit card bills.

The Proceedings

Reeder was charged with one count of securities fraud and one count of theft in the first degree for each of the 14 payments McAllister made to Reeder. Before trial, Reeder unsuccessfully moved to suppress the bank records, citing violations of Washington State's Constitution. Reeder was found guilty on all 28 counts, and the jury found aggravating facts supporting an exceptional sentence above the standard range for securities fraud and theft in the first degree. He was sentenced to 80 months for the securities fraud and 69 months for the first-degree theft.

Reeder appealed and the court of appeals affirmed. He then appealed to the Washington State Supreme Court, and the court granted review of two issues: whether the state violated Reeder's right to privacy when it obtained his bank records through an SIJ proceeding, and whether Reeder's sentence violated the prohibition against double jeopardy. In a 7-2 decision, the Washington Supreme Court affirmed the court of appeals on both issues.

At Issue

An SIJ is a neutral magistrate who has the authority to issue subpoenas if there is "reason to suspect crime or corruption."

² The SIJ proceeding was created in the same statute as the grand jury, and it is an additional investigatory tool for the prosecuting attorney. Like a grand jury, an SIJ proceeding is secret. The evidence collected through the SIJ process can be

¹ State v. Reeder, 365 P.3d 1243 (Wash. 2015).

² WASH. REV. CODE § 10.27.170.

presented at a grand jury or trial. The defendant can have access to the material that the prosecutor submitted to the SIJ upon proper application and a showing of good cause. Unlike a grand jury, though, an SIJ does not conduct investigations or decide whether to prosecute or issue indictments, and cannot issue subpoenas once a defendant is charged with a crime.³

Article 1, section 7 of the Washington State Constitution states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Bank records are private affairs protected by the Washington State Constitution, and the state must have sufficient authority of law to subpoena a bank for its customer’s records.⁴ An administrative subpoena issued by the state’s Securities

“The court analogized subpoenas issued by SIJs to subpoenas issued by federal grand juries, which do not need to be supported by probable cause, and determined that the purpose of the SIJ proceedings justified less than probable cause to issue a subpoena.”

Division is not sufficient “authority of law” because the Securities Administrator can issue a subpoena for records deemed relevant at his or her discretion. To be sufficient authority of law, the subpoena must be justified and subject to judicial review.

Reeder argued that an SIJ subpoena did not meet this test because it was justified by less than probable cause. The court disagreed, noting that an SIJ cannot issue a subpoena for bank records unless there is “reason to suspect crime or corruption” and the SIJ is a superior court judge and neutral magistrate.

The court also determined that “reason to suspect crime or corruption” is sufficient justification to disturb one’s private affairs. The purpose of the SIJ proceeding is to assist the prosecutor in gathering evidence that can be turned over to a grand jury, and it is similar to a federal grand jury in its structure, limitations, and purpose.

The court analogized subpoenas issued by SIJs to subpoenas issued by federal grand juries, which do not need to be supported by probable cause,⁵ and it determined that the

purpose of the SIJ proceedings justified less than probable cause to issue a subpoena.

Next, the court determined that Reeder’s sentence did not violate double jeopardy. Reeder was convicted of 14 counts of fraud and 14 counts of theft in the first degree. He argued that this violated double jeopardy because he was punished multiple times for the same offense. The court disagreed.

The Washington Constitution protects against double jeopardy with the same scope of protection as the Fifth Amendment. When a defendant is convicted of violating a statute multiple times, the court must determine what unit of prosecution the legislature intended to be punishable under the statute.

Washington State’s securities fraud statute prohibits misleading acts in connection with the offer, sale, or purchase of a security. The definition of sale includes every contract of sale of a security for value. Reeder argued that the intended unit of prosecution was the security, and that there could be only one count of securities fraud because there was only one security. The court disagreed. It determined that the legislature intended that the unit of prosecution be each transaction or sale because the definition of sale included every sale of a security. In this case, each payment by McAllister to Reeder was a sale, and Reeder made misleading statements or actions in connection with each sale.

In Washington State, a person is guilty of first-degree theft if he or she commits theft of property or services that exceed \$1,500 in value. Generally, prosecutors have discretion on whether to aggregate the crimes or charge them separately. Reeder argued that the statute was ambiguous as to whether multiple acts of theft in an ongoing plan could be punished separately.

Reeder argued that an ongoing criminal impulse is one crime, and that the ambiguity in the statute dictated that the statute be construed in his favor. The court disagreed, noting that the evidence supported that Reeder fraudulently gained control over McAllister’s property in 14 different transactions. As such, it was within the prosecutor’s discretion to charge Reeder with a count of first-degree theft for each transaction.

³ Washington’s SIJ proceedings are based on Michigan’s SIJ statute, which requires that an SIJ have probable cause to issue a subpoena, MICH. COMP. LAWS § 767.3. The *Reeder* court distinguished Washington’s SIJ proceedings from Michigan’s, explaining that Michigan law allows the SIJ to issue indictments while Washington law does not. *Reeder*, 365 P.3d at 1249 n.10.

⁴ *State v. Miles*, 156 P.3d 864 (Wash. 2007).

⁵ *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991).

NASAA: Because Every Investor Deserves Protection

About NASAA

The North American Securities Administrators Association (NASAA) is a voluntary association of securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada and Mexico.

Organized in 1919, NASAA is the oldest international organization devoted to investor protection.

As the preeminent organization of securities regulators, NASAA is committed to protecting investors from fraud and abuse, educating investors, supporting capital formation and helping ensure the integrity and efficiency of financial markets.



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NASAA Survey Finds Most Members Use Multi-Jurisdictional Approach to Fighting Financial Exploitation of Seniors

A new NASAA survey shows three-quarters of all state and provincial securities regulators are working with other local agencies and organizations to fight senior financial exploitation and nearly half participate in a formal council to address state- or provincial-wide issues of senior financial abuse.

The survey was conducted by NASAA's Senior Issues and Diminished Capacity Committee during the fourth quarter of 2016 to determine how NASAA members are working to fight senior financial abuse.

A multi-disciplinary approach in the area of senior financial abuse is thought of as a network of parties working as a team to facilitate change in elder abuse detection, prevention, or treatment.

The survey also provided insight into the benefits of a multi-jurisdictional approach.

"The agencies involved are able to quickly share information and help the senior individuals who need help," one respondent said. Another pointed to "much better coordination between various agencies; cases that might not have been brought before are being brought more often."