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September 8, 2016

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Nancy Pelosi
Democratic Leader
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 2357 - Accelerating Access to Capital Act of 2016

Dear Speaker Ryan and Leader Pelosi:

On behalf of the North American Securities Administrators Association (NASAA),[1] I write to express strong concern regarding H.R. 2357, the Accelerating Access to Capital Act, which may be considered by the House of Representatives this week. State securities regulators have taken steps to help expand opportunities for small businesses to access investment capital including implementation of intrastate crowdfunding regimes and support of the SEC's recent proposal to modernize Rule 147 and increase the offering limits of Rule 504. We are, however, very concerned that the provisions of the H.R. 2357 that are discussed below would shift policies in the wrong direction, weakening oversight of our capital markets and placing retail investors needlessly at risk.

Section 2: (The Micro-Offering Safe Harbor Act of 2016)

Section 2 of the Accelerating Access to Capital Act would amend Section 4 of the Securities Act to create a new transactional exemption from registration for certain securities offerings, including offers to retail investors.[2] As presently constituted, the bill would permit the offering of private or unregistered securities to an unlimited number of unaccredited investors that may lack financial sophistication or wherewithal. For reasons that NASAA has already discussed extensively in comments to the Financial Services Committee regarding this legislation,[3] state securities regulators continue to question the practical necessity of this proposed exemption and the nature of the issuers it is intended to serve.[4] We note that there are already several provisions at the state and federal level that small, microcap issuers can rely upon for limited offerings to unaccredited investors, including intrastate crowdfunding and other limited offering exemptions.[5]

[1] The oldest international organization devoted to investor protection, the North American Securities Administrators, Inc. was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.
[2] Section 2 of the Accelerating Access to Capital Act incorporates stand-alone legislation that was reported by the House Financial Services Committee as "The Micro-Offering Safe Harbor Act of 2016" on June 17, 2016.
[3] See: Letter from NASAA President Judith M. Shaw to House Financial Services Committee Chairman Je Hensarling and Ranking Member Maxine Waters regarding June 15, 2016 Full Committee Markup. Accessible at http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2013/10/NASAA-Letter-to-HFSC-Re-6-15-16-Markup.pdf
[4] Indeed, there are already several provisions at the state and federal level that small, microcap, issuers can rely upon for limited offerings.
[5] For example, an existing, popular, exemption—Rule 506(b)—allows an issuer to sell its securities to up to 35 non-accredited, sophisticated, investors. Rule 506(c) allows an issuer to generally advertise its offering and make sales to accredited investors so long as it takes reasonable steps to verify accredited investor status.

Further, Section 2 would preempt state authority to review securities offerings that are by their nature local, state-based offerings. Preemption for this type of localized offering is inconsistent with investor protections afforded by state review, and would handcuff the regulators best positioned to regulate the marketplace for these offerings.

Section 3: (The Private Placement Improvement Act of 2016)

Section 3 of H.R. 2357 would prohibit the Securities and Exchange Commission ("SEC") from adopting proposed rules to implement common-sense reforms for Regulation D, Rule 506 offerings.[6]

Title II of the Jumpstart Our Business Startups ("JOBS") Act repealed the long-established prohibition on general solicitation and advertising of securities under Rule 506. When the SEC adopted rules to implement Title II, on July 10, 2013, it also voted to propose rules that could mitigate the risk to ordinary investors from 506 offerings, including by requiring a pre-filing of "Form D" when issuers intend to advertise Rule 506 securities to the general public, and by imposing meaningful penalties on issuers who fail to file a Form D.[7] Section 3 of H.R. 2357 would effectively prohibit the SEC from adopting these rules.

State securities regulators, pursuant to their antifraud authority, are the primary regulators of offerings under Regulation D, Rule 506, and fraudulent offerings involving Rule 506 offerings are routinely among the most frequent violations reported by state securities regulators. The SEC's proposal to require the timely filing of Form D and establish consequences for issuers who fail to file a Form D when conducting a Regulation D, Rule 506 offering, is a common-sense step that is long overdue.

Form D is a short form that captures basic information about the issuer including the issuer's business address, officers, directors, business type, and minimal information about the securities being offered. The information contained in a Form D is crucial to state securities regulators, who regularly encourage investors to "investigate before you invest." When investors contact their state regulators, particularly after learning about an offering through an advertisement or solicitation, Form D is often the only information available about an issuer when an investor calls. In addition to furnishing information that may allow regulators to look for "red flags" indicative of a fraudulent offering, Form D provides regulators with the only direct source of information about the "private placement" market generally. The modest burden that Form D may impose on issuers is vastly outweighed by the essential role that it plays in state and federal efforts to understand and police the Rule 506 marketplace.

State securities regulators oppose Section 3 of H.R. 2357 or any action by Congress that would further diminish the ability of regulators to effectively regulate the private placement marketplace, effectively address investor protection concerns associated with these offerings, or gather important data that provides minimal transparency of this otherwise opaque market.

Thank you for your consideration of NASAA's views. Please do not hesitate to contact me or Michael Canning, NASAA's Director of Policy, at (202) 737-0900, if we may be of any additional assistance.

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[6] Section 3 of the Accelerating Access to Capital Act incorporates stand-alone legislation that was reported by the House Financial Services Committee as "The Private Placement Improvement Act" on June 17, 2016.

[7] Amendments to Regulation D, Form D and Rule 156, SEC Release Nos. 33-9416, 34-69960, IC-30595. 78 Fed. Reg. 44806. (2013, July 24). Retrieved from gpo.gov/fdsys/pkg/FR-2013-07-24/html/2013-16884.htm

Sincerely,

Judith M. Shaw
NASAA President and Maine Securities Administrator