Editor’s Note

The year 2019 is upon us and there are big plans for the State Regulation of Securities Committee. Leading off this January issue is a message from our Committee Chair, Richard Alvarez, introducing the Committee’s new strategic plan. Next, we have an analysis regarding the efforts to have a federal securities regulator for Canada, which may be a topic of conversation at the upcoming Business Law Section Spring Meeting in Vancouver, British Columbia.

State enforcement efforts, especially against fraudulent or unregistered offerings of securities utilizing or claiming to utilize blockchain technologies, is detailed in our next article. Additionally, we have an update to a previously run article regarding state registration requirements as an issuer-dealer for issuers undertaking public securities offerings under Regulation A under the Securities Act without engaging a broker-dealer. Finally, we have an introduction to, and a draft whitepaper of a proposed model rule to be submitted to NASAA regarding regulation of investment adviser solicitors.

As part of the State Regulation of Securities Committee strategic plan, I intend to increase the number of issues of the Blue Sky Bugle that are published each year. However, I cannot do that without you, our committee members who are all qualified to share insights and opinions by submitting articles for publication in the Bugle. If you have any questions about submitting articles, feel free to contact me at andrew@crowdchecklaw.com.

Message from the Chair

Each year, leadership of the ABA’s Business Law Section asks its committee chairs to develop a strategic plan that sets out the long term objectives for each committee. The plan is expected to take into account six ‘strategic goals’ for each committee, including two or three key action steps that are planned for the next year to help achieve a committee’s long term plan.

At our committee meeting held during the recent Fall Business Law Section conference, I presented a summary of our committee strategic plan. The principal categories comprising the strategic plan include:

- **Creation** - of expert content on topics related to the subject matter of the committee;
- **Access** - to publication and distribution of blue sky specific content;
- **Collaboration** - promote engagement with and among committee members through the use of technology;
- **Membership Enhancement** - to improve the 'value proposition' of committee membership;
- **Engagement** - to increase participation of committee members, as well as non-members, in committee activities; and
- **Professional Growth** - to provide opportunities to committee members to develop as professionals.

The State Regulation of Securities Committee has long been the principal source of information concerning blue sky issues and topics, including recommendations on and advocacy in support of new and proposed state legislation and regulation, collaboration and cooperation with our regulator colleagues and a forum for discussing issues of importance to blue sky practitioners.

In order to continue and enhance the work and influence of the committee on all issues relating to blue sky regulation, it is vital that we committee members work to improve the work and impact of our committee so that it remains the go-to source for blue sky learning.
The strategic plan lays out what I hope is a realistic game plan to sustain this influence, through achievable short-term action steps that will support the long term goals of the committee. Some examples of short-term action steps that can be taken by the committee/committee members include:

- support and promote the Blue Sky Bugle as the source of substantive blue sky information by encouraging members to write one article on a particular blue sky topic per quarter;
- participate in CLE programs and presentations with other Business Law Section committees; and
- encourage more frequent postings on our committee ListServ.

The complete strategic plan is attached for your review: I encourage you to review it and to email me with any comments on the plan and any suggestions on how to improve the plan and, by extension, our committee.

We are all busy and it is often hard to carve out the extra time to devote to outside activities such as the committee but I continue to believe that committee membership - and more active involvement in the committee - can be a valuable part of our professional life. It can increase our awareness of important issues and developments in our practice area, can expose us to other practitioners who would benefit from our collective experience thereby potentially enhancing our own practices and provides a forum for committee members to demonstrate expertise to the larger legal community that impacts many corporate and securities practices across the country. I encourage you to join me in working to improve our committee and our committee experience through greater participation in committee activities by supporting the initiatives set out in the committee strategic plan.

My warmest wishes to all for a Happy, Healthy and prosperous New Year!

### Committee Strategic Plan

**COMMITTEE LEADERSHIP:**

Chair: Richard I. Alvarez  
Vice Chair: Martin Hewitt  
Mentor: N/A  
Succession: Currently, the Vice Chair will succeed to the current Chair once the current Chair's term expires, while actively seeking interested/younger committee members to groom as potential future chairs.

**COMMITTEE STRATEGIC PLAN:**

Following is the Committee's main long-term objectives, with related short-term action steps designed to reach the stated long-term objectives:

1. **Creation:** The Committee should be the principal source of ABA learning in the area of Blue Sky Law. To achieve this, more robust content on blue sky issues relevant to business and securities lawyers should be regularly created and disseminated.

   Short-term action steps:
   
   a) Identify at least one substantive Blue Sky Law topic per quarter for a Committee Member to write about for possible publication;  
   b) Encourage development of Blue Sky research tools that can be promoted to and used by non-Blue Sky practitioners;  
   c) Create CLE programs to create opportunities for ABA members to learn of developments in Blue Sky Law.

2. **Access:** Promotion of the Blue Sky Bugle is paramount. Encourage Committee Members to provide content for inclusion in the Blue Sky Bugle on a more regular basis.

   Short-term action steps:
   
   a) Challenge each Committee Member to provide at least one article per year for inclusion in the Blue Sky Bugle;  
   b) Actively promote the Bugle's publication - perhaps on the Business Law website.
3. **Collaboration**: Encourage more frequent use of Committee ListServ as a forum for the exchange of ideas and practice tips, the announcement of new state laws, regulations and related developments affecting Blue Sky practice, and as a means of fostering and maintaining professional relationships with other Blue Sky practitioners.

Short-term action steps:

   a) Circulate ListServ communications with Committee Members at least bi-weekly;
   b) Encourage Committee Members to be more 'frequent posters' by promoting the value of sharing news, ideas, comments and concerns on a more regular basis.

4. **Enhance Membership**: Actively promote co-sponsor opportunities with other Business Law Section Committees to highlight role of Blue Sky Law across all sectors of business and securities law practices.

Short-term action steps:

   a) Communicate with chairs of small business, middle market, private equity, M&A and venture committees and related task forces - to start - of the availability of our Committee's interest in participating in, and co-sponsoring (as opportunities present) panels and CLE programs where Blue Sky Law is an integral, but sometimes forgotten, component of a complete issue analysis;
   b) Promote to Committee Members the importance attending non-Committee programs to highlight developments and practice areas that would inform and enhance their practice.

5. **Engagement**: Encourage Committee members to promote Committee activities and programs to non-Blue Sky lawyers at their firms.

Short-term action steps:

   a) Encourage Committee Members to host programs outside regular Business Law Section meetings to promote the idea that business and securities lawyers need to focus more intently and frequently on Blue Sky Law issues when representing their clients.

6. **Professional Growth**: See Strategic Goals #3 and #4 above.

**COMMITTEE ANALYSIS**:

We continue to foster open communication and collaboration with state Blue Sky regulators, to the continuing benefit of Committee Members and their clients. Further, we routinely ask various regulators to speak at our meetings. To that end, we have changed the time of our annual meeting to make it easier for our colleagues from the various state regulatory authorities to join in robust discussions and brainstorming.

**SECTION RESOURCES**:

Given the narrow Committee focus - state Blue Sky Law - our meetings often conflict with meetings held by other committees who would benefit from the participation by members of our Committee. Also, many of our industry Committee Members practice in other specialties - i.e., broker-dealer and investment advisor - and oftentimes those meetings conflict with our Committee Meeting. It would be beneficial to take these conflicts into account when creating meeting schedules.

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**Will Canada Finally End Up with a Securities and Exchange Commission**

*By Michel Gélinas and Cara Cameron, Davies Ward Phillips & Vineberg LLP*

**A. Introduction**

The Supreme Court of Canada ("SCC") has paved the way to a national securities regulator with its recent unanimous decision finding that the proposed federal *Capital Markets Stability Act* is constitutional because its primary purpose is to regulate systemic risk across Canada’s capital markets and, as a result, falls
within the Canadian Parliament’s general trade and commerce powers under the
Canadian Constitution Act, 1867.

B. Background

Canada is the last country in the G20 without a national securities regulator. In short, in Canada, there is no federal equivalent to the Securities and Exchange Commission (“SEC”) in the United States. Instead, each province has both its own securities legislation and regulator. While there has historically been a conscious effort to harmonize securities legislation across Canada, material differences still exist. This adds (many believe unnecessary) complexity and compliance costs and complicates enforcement actions. Moreover, Canada's smallest province, Prince Edward Island, has a population of 150,000 while, Canada's largest province, Ontario, has a population of 14 million. In fact, Canada's four largest provinces together account for 87% of the country's GDP. As a result, some industry participants feel that it simply does not make economic sense to have a separate regulator for each of Canada’s 10 provinces and three territories. The federal government previously attempted to create a national securities regulator. However, this attempt was struck down by the SCC when it held in 2011 that the federal government's proposed Securities Act was not a valid exercise of the federal government’s power to regulate trade and commerce in Canada. However, the SCC left open the possibility that a voluntary federal regulatory scheme could be constitutional, which the federal government sought to implement with the proposed federal Capital Markets Stability Act.

C. The Proposed Cooperative System

The SCC’s decision to strike down the Securities Act was analyzed by the federal government and alternative legislation was carefully crafted with the objective of withstanding any constitutional challenge. As a result of this exercise, the federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon entered into a Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System to create a cooperative pan-Canadian securities regulator (“Cooperative System”). The Cooperative System has four components:

1. The Capital Markets Stability Act ("Draft Federal Act"), which is a complementary federal statute that would regulate systemic risk in Canada's economy.

2. A national securities regulator called the Capital Markets Regulatory Authority ("CMRA").

3. The Capital Markets Act ("Model Provincial Act"), which is a standardized provincial and territorial statute administered by the CMRA. The Model Provincial Act would address the day-to-day aspects of securities regulation and each participating province/territory would enact a statute that mirrors the Model Provincial Act.

4. The CMRA and its board of directors would operate under the supervision of a Council of Ministers chosen from the cabinet of each participating province/territory and the federal Minister of Finance. The Council of Ministers is the body that would propose amendments to the Model Provincial Act.

Five provinces and two territories, including Quebec and Alberta (two of the four largest Canadian provinces), did not join the Cooperative System. These provinces are opposed to the Cooperative System because, among other things, (i) they view it as a power grab by the federal government (Canada has a long history of constitutional challenges relating to the division of powers between provincial and federal governments), (ii) they believe in the importance of having a local regulator that understands the complexities and peculiarities of the province’s market, and (iii) they believe in the maxim that “if it ain’t broke, don't fix it”.

D. The Supreme Court’s Decision

Because of provincial opposition (as it was the case for the federal Securities Act that was struck down by the SCC in 2011), the Cooperative System was challenged before the Canadian courts. In a nutshell, it was argued that the Cooperative System is unconstitutional because it unduly fetters the provinces’ legislative authority. However, the SCC held that the Draft Federal Act is not intended to displace provincial and territorial securities legislation, but rather to complement it by addressing economic objectives that are national in character. This means, as a practical matter, that a province may opt into the Cooperative
System, but is under no obligation to do so and may retain its current provincial system. The new draft legislation was thus not unconstitutional.

E. Going Forward

Notwithstanding the SCC’s decision, the Cooperative System is likely to remain controversial given the current resistance to the concept in some provinces, notably Alberta and Quebec. The federal government's hope is that the dissenting provinces will, over time, see the benefit of a national securities regulator and opt in - or that, eventually, a newly elected government in opposing provinces may see things differently than the current provincial governments.

Some commentators have said that the SCC’s decision may mark a turning point for Canadian securities law, but that remains to be seen. One of Canada's most influential newspapers, The Globe and Mail, recently published an article stating that half a regulator is like a half fence: it won't do the job. "It further expressed the view that, unless all of the provinces and territories join the new federal program, Canada would be better off sticking with the current system, however imperfect. At least all the players understand how the current system works.

It is unclear what will come out of the recent decision of the SCC. One thing is certain: Canada is unlikely to have a national regulator that is the equivalent of the SEC anytime soon.

About the authors:

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Cara Cameron is a partner at Davies Ward Phillips & Vineberg LLP and has a wide range of experience in complex litigation before all levels of court, including the Supreme Court of Canada. She has particular expertise in contractual disputes; shareholders' rights disputes; and commercial fraud and debt recovery actions, including injunctions, seizures, Anton Piller (civil search) orders, Mareva (asset-freezing) injunctions and Norwich orders; as well as white collar investigations and defence. She also has extensive mediation and arbitration experience. Cara can be reached at: ccameron@dwpv.com

State Regulatory Authority Over Digital Assets

By Greg Strong and Jacob Shulman, DLx Law LLP

Introduction

State securities regulators have been the first line of defense for investors in fraudulent investment schemes involving digital assets. A recent series of coordinated enforcement actions brought by state securities regulators, with the possibility of additional actions, in connection with fraudulent offers of digital assets has resulted in a number of scams being shuttered. State securities regulators, in tandem with state consumer protection authorities, have the tools needed to protect investors and consumers from fraud and other misconduct in connection with digital assets. Stamping out fraud and protecting investors and consumers is critical to allowing legitimate entrepreneurs, developers, and businesses pursue to develop and implement blockchain technology-based solutions and platforms and for those solutions to flourish within the confines of state laws.

Operation Cryptosweep

State securities regulators have been quick to investigate and bring enforcement actions in the Initial Coin Offering ("ICO") space. Recently, state securities regulators brought a series of coordinated actions that targeted the sale of digital tokens dubbed Operation Cryptosweep. At the federal level, the Securities and Exchange Commission (the "SEC") has taken a more measured approach when it comes to enforcement with respect to digital assets. The SEC has chosen to focus their enforcement efforts on matters seemingly designed to provide specific guidance to participants in the space. Operation Cryptosweep on the other hand
is more far reaching, involving more than 200 active investigations as of the last published update. State securities regulators have always been the "boots on the ground" to protect retail investors from fraudulent investment schemes, and their efforts to investigate and combat fraud in this space complement the focused and deliberate approach taken by the SEC.

Operation Cryptosweep was coordinated through the North American Securities Administrators Association ("NASAA"), a voluntary association of state securities regulators, with 67 state, provincial, and territorial securities administrators. In April 2018, NASAA organized a task force to coordinate investigations into ICOs and cryptocurrency-related investment products. On May 21, 2018 NASAA announced that members from more than 40 jurisdictions throughout North America have participated in "Operation Cryptosweep", resulting in "nearly 70 inquiries and investigations and 35 pending or completed enforcement actions... since the beginning of May." The coordinated effort includes the Information Demand Letters from the New York State Attorney General to various digital asset exchanges, cease and desist orders, and investor alerts. Then NASAA President Joe Borg at the time commented, this is "just the tip of the iceberg."

On August 28, 2018 NASAA released an update regarding Operation Cryptosweep indicating more than 200 active investigations into Initial Coin Offerings were underway. Generally these investigations involved suspected fraud, but state regulators were also uncovering many other potential state securities law violations. Additionally, the 2018 NASAA Enforcement Report was released on October 10, 2018 and highlighted the work of NASAA members in this area. NASA President and Vermont Commissioner of Financial Regulation Michael S. Pieciak attributed the uptick in enforcement with respect to unregistered firms and individuals to the NASAA membership's increased focus on crypto-assets.

The Texas State Securities Board has led the enforcement charge among state securities regulators. They issued an Emergency Cease and Desist Order on December 20, 2017 against USI-Tech Limited alleging a fraudulent offering of investments tied to bitcoin mining. The Emergency Order alleged that the securities offered for sale were not registered or exempt, that the salespersons were not registered as dealers or agents, and that there were multiple disclosure violations including an intentional failure to disclose key material facts. This Order paved the way for Operation Cryptosweep and the many similar orders that followed from the collective effort. This effort included a number of other Cease and Desist Orders entered by the Texas State Securities Board, some of which are summarized in an Enforcement Report issued on April 10, 2018 and updated on September 30, 2018.

Alabama has also been very active in this area recently. According to Greg Bordenkircher, chief litigator at the Alabama Securities Commission ("ASC"), about 20 percent of all the active cease-and-desists by states are coming out of Alabama. Bordenkircher indicates that Alabama is coordinating with Federal and State regulators and praised the work of the SEC and CFTC while noting that, "the states have really got boots on the ground. There's more of us than there are of them."

Bordenkircher and his team in Alabama look for "red flags" that indicate an operation may be fraudulent when looking into ICOs. These include: 1) the use of multiple IP addresses that all point back to the same entity or location; 2) the use of phony physical addresses that do not correspond with legitimate business locations; 3) the use of location masking or appearing to have a presence in a jurisdiction when not in fact located in that jurisdiction; 4) a misguided or misapplied blockchain pitch; 5) the use of copied-and-pasted data and photos on website; and 6) making unrealistic claims about returns or the finances of the sponsor entity. Once an investigation uncovers a sufficient number of red flags and there is suspected fraud, a cease-and-desist letter is sent ordering the target entity to cease and desist from violating the securities laws and that typically gives a target 30 days to respond and raise an objection. Faced with such a letter, a target can respond or simply close up shop (either in the state or disappear entirely).

Alabama issued at least nine (9) Cease and Desist Orders in connection with Operation Cryptosweep in 2018. One of the first actions pursued by the ASC involved Chain Group Escrow Service ("CGES"), an entity offering an opportunity to earn guaranteed profits by pooling investments in trade group accounts that would use the investment funds to make money buying and selling cryptocurrency. The ASC issued a Summary Order to Cease and Desist, finding that CGES was offering investment contracts, and thus securities, because the "investment plans require investors to invest money into the common investment plan in order to pool their investments with other investors. Investors share and expect a profit, as represented by CGES, and the profit is derived from the
State Securities Regulators have also looked into how digital assets are being exchanged in the secondary market. New York’s Attorney General, for example, sent information demand letters to digital asset exchanges requesting information regarding ownership and control, basic operation and fees, trading policies and procedures, outages and other suspensions of trading, internal controls, privacy and money laundering, protection against risks to customer funds, and written materials including policies, terms, and conditions. These inquiries and the responses (or non-responses) gave rise to the publication of the Virtual Markets Integrity Initiative Report (the “Report”) on September 18, 2018. The Report details the key findings of the initiative, launched “to protect and inform New York residents who trade in virtual or “crypto” currency.” The Report “addresses areas of particular concern to the transparency, fairness, and security of virtual asset trading platforms” and goes on to find the following issues: 1) trading platforms have many potential conflicts of interest, 2) trading platforms have yet to take serious steps to impede abusive trading, and 3) protections for customer funds are limited. In describing their authority to pursue the initiative, issue the information requests, and publish the Report, the Attorney General’s Office referenced their enforcement authority over “laws that protect investors and consumers from unfair and deceptive practices and that safeguard the fairness and integrity of the financial markets.” The reference to protecting consumers from unfair and deceptive practices is an explicit reference to the consumer protection authority of the Attorney General’s office, and may foreshadow future application of state consumer protection laws to transactions involving digital assets.

**State Consumer Protection Statutes**

State consumer protection laws may apply to the offer or sale of digital assets in certain circumstances. Consumer protection laws are most likely to be applied to the sale of digital assets when a determination has been made that those assets are not securities. For instance, Wyoming has enacted legislation exempting “open blockchain tokens” from the definition of security in the Wyoming state securities laws. If faced with colorable complaints from purchasers of digital assets that meet the definition of open blockchain tokens and are thus excluded from the definition of security, Wyoming regulators might use their consumer protection authority to investigate and bring enforcement actions if necessary and appropriate. The Wyoming Consumer Protection Act (the “Act”) is enforced by the Consumer Protection Unit at the Wyoming Attorney General’s Office and the Act prohibits, among other things, unfair and deceptive acts and practices in the course of business in connection with a consumer transaction. A consumer transaction includes “the advertising, offering for sale, sale or distribution of any merchandise to an individual for purposes that are primarily personal, family or household . . .” Merchandise is defined to include any service or any property, tangible or intangible, real, personal or mixed, or any other object, ware, good, commodity, or article of value wherever situated. The Wyoming definition of merchandise is similar to the definition of merchandise in consumer protection statutes in other jurisdictions. Therefore, a digital asset sold in Wyoming that is something other than a security will likely be subject to this law.

Similar legislation was introduced very recently in Colorado. The proposed law, the Colorado Digital Token Act, defines digital tokens and exempts digital tokens from registration as securities as long as certain prerequisites are met. The definition of digital token in the proposed Colorado legislation involves three components: 1) creation by deploying computer code to a blockchain network or in response to verification or collection of transactions relating to a digital ledger or blockchain; 2) recordation in a database that is chronological, consensus-based, decentralized, and mathematically verified in nature; and 3) capable of being traded or transferred between persons without an intermediary or custodian of value. The offer or sale of a digital token under this law is exempt from registration if the following prerequisites are met: 1) the offer occurs after the Colorado Securities Commissioner promulgates rules and the offer complies with the proposed legislation and those rules; 2) the issuer files a notice of intent with the Securities Commissioner; 3) the primary purpose of the digital token is consumptive; 4) the issuer markets the digital token for consumptive purposes and not investment purposes; and 5) the consumptive purpose can be realized at the time of sale or will be available within 180 days of sale if certain other factors are met. If the proposed legislation is passed, digital tokens that meet these requirements will be exempt from registration as securities in Colorado, but not necessarily exempt from the definition of security. In this scenario, the digital token might still be subject to the securities laws if it is deemed to be a security (for example the antifraud provisions of the securities act might still apply) or
might be subject to Colorado consumer protection law in the event the digital token is not deemed a security.

Wyoming provides a ready example of the potential application of consumer protection laws to digital assets that do not fall within the definition of a security, mainly because of the recent legislation exempting open blockchain tokens from the definition of a security. As securities regulators refine their approach to assessing digital assets we can expect more clarity with respect to when a digital asset, or the sale of a digital asset, will be treated as a security or a securities transaction. We expect to see securities regulators recognize that certain digital assets are not securities and that the application of the securities is therefore not warranted. When those assets are not treated as securities, or transactions involving those assets are not treated as securities transactions, it is likely that the application of state consumer protection statutes will fill the regulatory void to protect consumers with legitimate complaints.

**Conclusion**

State securities laws have been a powerful weapon in combating fraud in the digital asset space. In addition to securities laws, states have statutes designed to protect consumers from fraud and other misconduct in consumer transactions. Regardless of whether a digital asset is considered a security or not, purchasers of digital assets have adequate protections under state law.

**Update: State Issuer-Dealer Registration Requirements**

*By Sara Hanks and Jeanne Campanelli, CrowdCheck Law LLP*

The Securities and Exchange Commission’s (“SEC”) amendments to Regulation A went into effect on June 19, 2015. Those amendments provided companies with greater access to capital through the ability to raise up to $50 million in public offerings exempt from SEC registration, and an expanded ability to “test the waters” and ascertain investor interest.

Regulation A does not require that a company use an intermediary such as a broker-dealer to market the offering. However, companies issuing securities in a public offering without the involvement of a registered broker-dealer should be aware that the company itself may be required to register in certain states as an issuer-dealer.

Offerings made under Tier 2 of Regulation A are preempted from state review. Securities sold under Tier 2 are "covered securities" under Section 18 of the Securities Act of 1933, which provides that no state may require registration or qualification of covered securities or transactions in those securities.

However, this exemption is limited to the registration requirements for the offering of the securities. It does not impact the registration requirements for the people making the offering.

Currently, Arizona, Florida, Nebraska, New York, North Dakota, and Texas all require issuers to register as dealers in the state if they are not using a registered broker-dealer in an offering of securities. Additionally, Alabama, Nevada, New Jersey and Washington each require an agent of the issuer to register with the state. New York’s Martin Act, as ever, is an outlier in this area, and the filing required is essentially a notice filing that will not hold up the progress of a Regulation A offering. The other five states requiring issuer-dealer registration, and four states requiring agent registration, however, impose substantive requirements.

The following discussion provides an update on issuer-dealer and agent of the issuer registration based on experienced gained since the first iteration of this article appears in the Blue Sky Bugle in 2016.

**Registration as an issuer-dealer**

*Arizona*

Under Section 44-1801(9)(b) of the Arizona Revised Statutes, issuers are defined as dealers of securities when offers and sales are not made through a registered dealer. All dealers are subject to the registration requirements of Section 44-1941.

An issuer must submit a Form BD to the Arizona Securities Division together with a $100 registration fee, audited financial statements prepared under U.S. GAAP, a consent from the issuer's auditor, an affidavit that no sales have been made in
the state, and evidence that the qualifying principal of the issuer has taken
securities exams or has equivalent financial or business experience.

Any officer or director responsible for making offers and sales of securities must
be designated as a qualifying principal of the issuer and may also be required to
register as an agent of the issuer. However, examiners in the state appear to have
a certain amount of discretion in regards to registration of agents. Agents are
required to submit certain information in Form U-4, together with a $45 filing fee,
proof of passage of a written examination to determine the business experience
of the applicant, and proof of lawful residence in the United States. In some
cases, the issuer's officers and directors may be considered to have sufficient
financial or business experience by virtue of their positions to qualify for a waiver
from the examination requirement.

**Florida**

Under Section 517.021(6)(a)(2) of the Florida Statutes, issuers are defined as
dealers of securities. Under Section 512.12(1) no issuer may make offers or sales
of securities in or from offices in Florida or from offices outside Florida unless the
issuer has been registered with the Division of Securities as a dealer. As such,
any Florida based issuer must be registered in Florida prior to making any sales
into any other state.

To register as an issuer-dealer in Florida, an issuer must submit a Form BD
through Florida's electronic filing system, as well as the Form OFR-DA-5-91:
Issuer/Dealer Compliance Form in which the issuer seeks an examination waiver
for its associated persons, audited financial statements and, if the date on the
balance sheet is more than 90 days prior to the submission, an unaudited balance
sheet as of a date within 90 days of submission, corporate governance
documents, and a $200 filing fee.

The issuer must also register at least one person as a qualifying principal, who
must file a Form U-4 together with a $50 registration fee per associated person.
Issuers are allowed to register up to five persons who are then exempt from the
usual examination process for associated persons of a dealer. The qualifying
principal and all executive officers, directors and controlling persons named in the
Form BD must submit fingerprints, even if they do not register as associated
persons.

**Nebraska**

Nebraska represents a special case for issuer-dealer registration; so much so that
it often does not make sense for an issuer to register or sell securities in the state
without a Nebraska-registered broker-dealer. Nebraska rules require that any
sales of securities pursuant to an offering under Tier 2 of Regulation A be made
through a Nebraska-registered agent of a Nebraska-registered broker-dealer.
Issuers selling without a broker-dealer will themselves have to register as an
issuer-dealer. However, under Chapter 5 of Title 45 of the Nebraska
Administrative Code, issuer-dealer registration is only available to issuers that are
located in Nebraska or have qualified the securities to be sold in the state,
effectively eliminating the preemption benefits of qualification under Tier 2 of
Regulation A.

For issuers that do decide to proceed with an issuer-dealer application in the
state, the issuer will be required to file the Nebraska Application for Registration
as Issuer-Dealer, financial statements, a surety bond of $25,000 (less for issuers
with net assets of less than $25,000), and a filing fee of $100. Following
registration as an issuer-dealer, the issuer will be required to file quarterly reports
with the state.

Issuers with multiple officers and directors must have two persons register as
agents of the issuer. Those persons are required to submit an Application for
Registration as Issuer-Dealer Agent, filing fee of $40, criminal history request of
$15, and demonstrate passage of the Nebraska Securities Law Exam or FINRA
Series 63 exam.

**North Dakota**

North Dakota utilizes a very broad definition of "broker-dealer" under Section 10-
04-02 of the North Dakota Securities Act. As a result, any person that effects
transactions of securities in the state for their own account meets the definition of
broker-dealer.

Under North Dakota rules, issuers are required to submit North Dakota Form S-4,
the constitutive documents of the issuer, Form U-2, Form U-2A, an Affidavit of
Issuer/Dealer Activity, and a filing fee of $200.
Officers and directors of the issuer are required to register as agents of the issuer in the state. To register, agents of an issuer-dealer must file the North Dakota Form S-5, and pay a filing fee of $60. North Dakota allows for two officers or directors of the issuer to register as agents without being required to pass a written examination. Additional agents are required to pass the Series 63, or Series 66 and Series 7 exams.

Texas

Section 4(C) of the Texas Securities Act provides for the registration of issuers as dealers when offers and sales are not made through a registered dealer.

The specific registration requirements are found in Rule §115.2 of the State Securities Board. Issuers are required to file the Form BD, Form U-4 for a designated officer and each agent to be registered, copies of the constitutive documents of the issuer, audited financial statements and, if the date on the balance sheet is more than 90 days prior to the submission, an unaudited balance sheet as of a date within 90 days of submission certified by the issuer's CFO on Form 133.18, and a $75 fee.

A designated officer is required to be registered. The issuer may be required to register agents as well if other officers and directors of the issuer are undertaking any selling activity. Rule §115.3 of the State Securities Board provides for the requirements for registration of such persons. In addition to the Form U-4 filed with the Form BD, each of these people are required to have passed a securities exam accepted by the State Securities Board. For officers and directors or issuers selling their own securities under Tier 2 of Regulation A, passage of the Series 63 or Series 66 exam, or passage of a state administered exam is required. The filing fee for each person is $35.

Agent of the issuer registration

Alabama

Alabama does not provide for an exemption from registration as an agent for officers and directors of the issuer selling the securities of the issuer. As such, under Section 8-6-2(2) of the Alabama Securities Act, any officer or director representing an issuer in effecting sales of securities is defined as an agent of the issuer. An officer or director not undertaking any selling activities is not an agent of the issuer merely by being an officer or director. The officer or director must undertake selling efforts to require registration as an agent.

Section 830-X-3-.02 of the Alabama Administrative Code provides what information is required to register as an agent in the state. An agent of an issuer is required to register as a Restricted/Issuer Agent. The registration filing includes the Form U-4, and evidence of passage of the FINRA Series 63 or Series 66 exam, and a fee of $60.

Nevada

Similarly to Alabama, Nevada does not provide an exemption from registration as a sales representative for officers and directors of the issuer selling the securities of the issuer. Under Section 90.285 of the Nevada Revised Statutes, any officer or director representing an issuer in effecting sales of securities is defined as sales representative of the issuer. An officer or director not undertaking any selling activities is not a sales representative of the issuer merely by being an officer or director. The officer or director must undertake selling efforts to require registration as a sales representative.

The registration requirement for sales representative of an issuer includes the filing of the Form U-4, evidence of passage of the Series 63 or Series 66 exam, and a fee of $125. While Nevada has a provision to request a waiver from the exam requirements for officers and directors of the issuer under Section 90.372 of the Nevada Revised Statutes, that waiver is only available for registered offerings and offerings under Rule 506 of Regulation D.

New Jersey

Section 49:3-56 of the New Jersey Securities Act provides for the registration of issuer-agents. The specific registration requirements are in Sections 13:47-3.3 and 13:47-4.2 and 4.4 of the New Jersey Administrative Code. An officer of the issuer must submit a Form U-4, a Form NJBOS4 authorizing the completion of a criminal history background check and fingerprints, together with a $60 filing fee. The agent must also complete Form NJBOS5 online to request an examination waiver.

Washington
Chapter 460-23B of the Washington Administrative Code sets out the registration requirements for salespersons for issuers. An officer or director of an issuer that is a corporation or general partner or manager of an LLC that seeks to register in connection with a single offering of the issuer who will receive no commissions or similar remuneration directly or indirectly in connection with the offer or sale of the issuer's securities does not need to pass an examination.

Conclusion

Non-compliance with these states' issuer-dealer rules may result in both regulatory sanctions and investor suits. Issuers not choosing to use a registered broker-dealer to market their Regulation A offerings are faced with three options: pay a broker to act as "broker of record" in all states (since most brokers do not offer the option of acting as broker of record in a limited number of states) and pay broker fees for that service; go through the issuer-dealer registration process, including having an officer take the Texas exam or any other required exam; or chose not to make a Regulation A offering in these states. None of these options is optimal.

State Regulation of Investment Adviser Solicitors

By Shane Hansen, Richard Alvarez, Robert Boresta, and Matthew Boos

IA solicitors - persons who, for a fee, refer clients to investment advisory firms - play an important role in matching investors seeking professional investment advice with persons/firms that provide professional investment management services.

While federal law easily handles regulation of these relationships - through the application of SEC Rule 206(4)-3 - state regulation of IA solicitors is a confusing hodgepodge of statutory definitional exemptions, inconsistent and non-uniform rules and orders, or no regulation at all, leaving solicitors to navigate a treacherous state regulatory landscape in order to engage in solicitation activities. According to the SEC, states are not preempted from regulating third-party solicitors for SEC-registered investment advisers that are not its "supervised persons"-most are not.

NASAA had - in 2009 - attempted to address the regulation of IA solicitors by drafting a proposed model rule covering the activities of IA solicitors. Unfortunately, it never moved beyond a draft proposal stage due to the lack of consensus among state regulators.

Against this backdrop, we have formed a working group to encourage NASAA's development of a model rule to address these recurring concerns. We have produced a whitepaper framing the state regulatory issues facing IA solicitors and identifying important public policy considerations. The whitepaper serves as a predicate for further discussions with NASAA, with the goal of developing a new proposed model rule that, hopefully, builds consensus among state regulators and industry participants.

A preliminary working draft of the white paper was delivered to Andrea Seidt and Linda Cena, Chair and Vice Chair, respectively, of NASAA's Investment Adviser Section at a recent meeting of the Section held in New Orleans. The IA Section has requested additional input about current solicitors' relationships and context to further support their deliberations. In order for our Committee to finalize the whitepaper we are publishing the latest draft in this edition of the Bugle. We welcome any and all comments, questions, suggestions, and your experiences in advising IAs and/or solicitors about state regulation about these activities. Our contact included at the bottom of this issue of the Blue Sky Bugle.

Model State Solicitors Rule Whitepaper - Draft

DRAFT - December 19, 2018

This whitepaper has been prepared for the Investment Adviser Section of the North American Securities Administrators Association ("NASAA") to summarize what we believe to be important public policy considerations, policy-making objectives, and the current status of state regulation of solicitors for registered investment advisers ("RIAs"). It is intended to frame a discussion with the goal of...
This whitepaper has been prepared by a working group of the State Regulation of Securities Committee, Business Law Section, American Bar Association (collectively, the "ABA"). The views expressed in this whitepaper represent the views of the working group only and have not been reviewed or approved by the full Committee, the Business Law Section, the ABA's House of Delegates, or the Board of Governors. Therefore, this whitepaper does not represent the official position of the ABA, its Business Law Section, or the full Committee.

**Public Policy Considerations**

Americans save too little and would benefit from professional guidance to better plan and more effectively invest for their futures. This is an immediate concern for "baby boomers" nearing or already at retirement, many of whom are likely to outlive their savings. Younger adults should be strongly encouraged to start methodically saving sooner because their Social Security and health care benefits may be reduced in future years and their life expectancy is likely to increase before their retirement. However, many retail investors do not personally know investment advisers, do not know where to start looking, do not understand the relevant professional skills and credentials, and so would benefit from a referral from a reputable source.

Referrals of prospective investors to RIAs, including financial planners, is important to address this urgent need for professional investment guidance about retirement savings. However, regulatory uncertainty discourages many reputable sources of referrals from becoming involved. Referrals could be facilitated by clarifying the scope of a solicitor's activities and appropriately balancing the need of retail investors for referrals with their protection from disreputable solicitors, bearing in mind that solicitors perform no investment advisory services.

Many Americans have trusted relationships with banks, broker-dealers, accounting firms, law firms, insurance companies and/or agencies, professional associations, and other types of affinity groups (together with the individuals employed or associated with them, "corporate solicitors") with whom investors have a business, professional, or similar relationship; and in some cases with individuals whom they know as a result of a personal relationship ("individual solicitors"). These types of solicitors take into consideration their own reputations when making referrals. These relationships, whether corporate or personal, distinguish these kinds of trusted relationships from a "cold caller" who may be in the business of marketing third-party investment advisory services. Trusted relationships could be used to encourage investor referrals to RIAs if the regulatory framework for a solicitor's activities is clearly articulated and uniformly administered.

Clarifying state regulation of solicitors, including the permissible scope and limitations of their activities, is needed to encourage referrals to state-registered investment advisers ("State-RIAs"), as well as SEC-registered federal covered investment advisers ("SEC-RIAs"). The lack of state-level clarity and uniformity results in recurring uncertainty about the permissibility of third-party referral arrangements and applicable regulatory requirements-inevitably leading to a general lack of compliance with important investor protections or the avoidance of third-party referral arrangements altogether.

A model state rule could define the activities that constitute "solicitation" for both State-RIAs and SEC-RIAs; it could include appropriate investor protections relevant to those limited activities; and it could do so without imposing the full panoply of regulatory requirements generally applicable to RIAs and their representatives. For example, compliance with the Rule's conditions could provide an exemption from state registration as an investment adviser ("IA") or investment adviser representative ("IAR"), while substituting more cost-effective investor protections targeted to the investors' evaluation and reliance upon a referral. SEC Rule 206(4)-3, *Cash Payments for Client Solicitations* ("SEC Solicitors Rule") is a useful starting point.

Important public policy considerations with respect to solicitor's activities were articulated by the Securities and Exchange Commission ("SEC") in its 1979 adopting release for the SEC Solicitors Rule. The Rule is predicated upon disclosure, transparency, and supervision of solicitors' activities in lieu of additionally requiring solicitors to be themselves separately registered. The rule's requirements are not onerous. They include, among other things, having a written solicitor's agreement governing, and a solicitor's disclosure brochure explaining, the terms of the solicitor's relationship and related compensation, supervision of the solicitation-related activities, and related recordkeeping for examination. In the 40 years since the SEC's adoption of the rule in 1979, RIAs and the public have
generally understood that compensated referrals are permissible subject to comparatively light disclosure-based regulatory requirements.

The SEC does not require a solicitor to be registered as an IA; rather, the SEC Solicitors Rule requires the SEC-RIA to supervise the solicitor's solicitation-related activities. Indeed, as a result of the bifurcation of IA regulation under the National Securities Markets Improvement Act of 1996 (NSMIA), solicitors would be prohibited from SEC registration because their limited activities never entail having clients' assets under management or providing investment advice. Typically, a solicitor would not come within the scope of the federal term "investment adviser representative" as defined by the SEC in Rule 203A-3, Definitions, because a solicitor is not engaged by and does not render investment advice to a client.

Policymaking Objectives

In developing a model state solicitor's rule we believe important public policy and investor protection considerations should include, among others:

- Enabling transparent solicitation and referral relationships similar to the protections in the SEC Solicitors Rule by a wide array of corporate solicitors (e.g., broker-dealers, banks, accounting firms, law firms, professional associations, affinity groups, etc.), as well as individual solicitors, with both State-RIAs and SEC-RIAs, by-
  - Clarifying the scope of permissible activities of a solicitor, related limitations, conditions, and prohibitions;
  - Explicitly stating that IA and/or IAR registration is required when a putative solicitor goes beyond the scope of activities permitted under a conditional registration exemption;
  - Explicitly stating if and when a referral or recommendation of an IA itself triggers IA registration; and
  - Removing impediments to forming solicitor/referral relationships, including exempting corporate and individual registration (and Series 65 exam requirement) when the exemption's conditions are satisfied;
- Applying a cost-benefit analysis weighing the limited scope of solicitation-related activities against the cost of initial and on-going registration as an IA and/or IAR (including all associated requirements) when more targeted activities-based alternatives are available and provide more effective investor protections;
- Developing appropriate investor protections to be uniformly applied to solicitation activities that cross state boundary lines;
- Mitigating potential confusion created by the Investment Adviser Public Disclosure (IAPD) system's public reports for IARs in these respects:
  - No differentiation between individual solicitors having a limited scope of permissible activities as compared with an IAR who is authorized to provide investment advice;
  - Reporting individual solicitors as having IAR relationships with multiple investment advisers (where permissible); and
  - Identifying individual solicitors as IARs when the solicitor relationship (and related compensation) applies to a corporate-level relationship (e.g., a bank, accounting firm, law firm, affinity group, or other organization);
- Clearly defining the limited role and requirements applicable to solicitors in order to remedy widespread non-compliance with existing but widely misunderstood regulatory customs and practices;
- Clarifying if, when, and to what extent state solicitor rules apply to third-party solicitors for SEC-RIAs (subject to NSMIA's limitations);
- Better ensuring that investors receive appropriate written disclosures of all conflicts of interest associated with the referral, including the terms, conditions, relationships, and compensation, as well as any relevant regulatory history pertinent to an investor's acting upon the solicitor's referral; and
- Flexibility in the electronic delivery of these disclosure documents reflecting the accelerating shift to on-line relationships, electronic communications (including email, website, and application-based communications), and investment services.

Overview of State-level Solicitor Regulation

Based on a state-by-state chart summarizing state securities regulation (attachment omitted but available upon request) and further input, it appears that 22 states have adopted a rule or order addressing the activities of a solicitor in some respect, but with significant differences in their scope and requirements. A few states cross-reference the investment adviser’s compliance with SEC Rule 206(4)-3, Cash Payments for Client Solicitations ("SEC Solicitors Rule"); however,
investment adviser representative under this adviser who has filed a notification under Section 405, or a broker-dealer registered under this Act is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this Act, a federal covered investment adviser who has filed a notice under Section 405, or a broker-dealer registered under this Act, with which the individual is employed or associated as an investment adviser representative.
Registration Depository (IARD) System serves important public policy objectives.

Generally speaking, state registration of IAs and IARs on the Investment Adviser Representative Registration Requirement and Exemptions of the USA 2002 requires an IAR to be registered with the state-RIA or SEC-RIA with whom he or she is associated. If a corporate solicitor is not itself registered as an IA, then its IARs must be registered by and with the RIA for whom the solicitation is made. In practice, however, many RIAs are unwilling to register a third-party solicitor as its IAR for one or more reasons:

- A solicitor’s business does not involve giving investment advice, and a solicitor’s making a referral to the RIA is inherently different than performing investment advisory services for which the RIA's other IARs are engaged by a client to perform;
- Many state-RIAs are unaware of solicitor registration requirements because a majority of states have no solicitor's rule addressing these limited activities; and
- Many SEC-RIAs believe compliance with the SEC Solicitors Rule is alone sufficient, and are unaware of inconsistent state-by-state requirements.

When NSMIA bifurcated federal and state regulation of RIAs, the regulation of third-party solicitors for SEC-RIAs was briefly analyzed and addressed by the SEC in Release No. IA-1633, Rules Implementing Amendments to the Investment Advisers Act of 1940 (May 5, 1997). The SEC’s analysis of NSMIA concludes that states are permitted to regulate third-party solicitors (i.e., those persons outside the scope of a “supervised person”). However, this view is buried in this lengthy and now old SEC release-leading to a widespread misunderstanding that compliance with the SEC’s rule alone is sufficient, thus creating the need for greater state regulatory clarity and certainty for solicitor relationships.

Among the 22 states with solicitor-related rules or orders, 19 states expressly regulate solicitors for State-RIAs; without extensive state-by-state research it is presently unknown whether actual practice in those states also regulates third-party solicitors for SEC-RIAs. Only the solicitor rules in Alaska, Oklahoma, and Wisconsin explicitly include third-party solicitors for SEC-RIAs (federal covered advisers). Georgia has a unique exclusion from its definition of an IA permitting attorneys and accountants to make referrals under specified conditions with respect to persons with whom he or she has an existing client relationship in connection with such profession. Without extensive state-by-state research it is unknown if, in practice, the remaining states that simply rely upon the broad definitions of “investment adviser representative” and “investment adviser” to regulate solicitors do so with respect to both State-RIAs and SEC-RIAs; these states do not otherwise require solicitor-specific disclosures, brochure deliveries, or written agreements. The time and cost required to engage counsel to conduct extensive research is not conducive to facilitating the formation of solicitor relationships. Inconsistent treatment by different states creates public misunderstanding, inadvertent non-compliance, all of which further discourages solicitor relationships.

**Important Investor Protections**

Investors’ understanding and reliance upon referrals to RIAs should be predicated upon the disclosure of conflicts of interest, notably related compensation. Like the SEC Solicitors Rule, a model solicitors rule could prescribe solicitor disclosures applicable to State-RIAs in a manner similar to the SEC Solicitors Rule.

Disclosures would include a description of the relationship(s) between the solicitor and the RIA, just as they do with the SEC Solicitors Rule. Conflict disclosures should include, for example, all direct and indirect compensation to be received by the solicitors, as well as any additional fees or charges that may be incurred by the investor. While not specifically prescribed by the SEC’s rule, prescribed disclosures could mandate descriptions of any regulatory action relevant to an investor’s decision to act upon a solicitor’s referral. A short description of the solicitor’s due diligence supporting the referral could be included, along with a short description of the solicitor’s primary business.

**Should Solicitor Registration be Required?**

Generally speaking, state registration of IAs and IARs on the Investment Adviser Representative Registration Depository (IARD) System serves important public policy objectives.
are required to be registered and tested by the Series 65 exam. For corporate solicitors it is unclear which, if any, individual officers discourage the creation and benefits of referral relationships.

Types of Imposing on the because that is well securities regulation that referral it is unnecessary to an investment adviser but does not pass the Series 65 (or 66) examination creates an compliance and the facilitation of referral.

Given the limited scope of a solicitor's activities, requiring an individual solicitor to make the tests (1) screening out "bad actors" from providing investment advisory services; and (2) making registration-related information about investment services providers publicly available. With respect to solicitors, we believe that the first objective can be accomplished by regulating the RIA, rather than the solicitor. In light of the limited role played by a solicitor in making a referral, the second objective can be more cost-effectively accomplished through the solicitor's disclosure brochure rather than requiring the filing of either Form ADV, Part 1, or Form U4-neither include instructions pertaining to solicitors or solicitation activities.

More specifically, preventing "bad actors" who have been disqualified from the securities, banking, and insurance industries from receiving compensation related to investment advisory services through a "back door" is a public policy priority. However, this public policy objective can be accomplished by proscribing RIAs from paying referral fees to disqualified persons. Recordkeeping requirements related to referral fee payments allow for examination of those payments and payees.

Assuring that investors receive information about a solicitor and its relationship with an RIA can be more effectively accomplished through the delivery of a solicitors disclosure brochure. Because a solicitor would be proscribed from providing investment advice, the scope of relevant information about a referral is narrow. Both Forms ADV, Part 1 applied to a corporate solicitor, and Form U4 applied to an individual solicitor, gather and publicly report vastly more information than is relevant to the limited activities of a solicitor. When viewed by an investor on the Investment Adviser Public Disclosure (IAPD) website, much of the information reported about a solicitor would likely confuse and overwhelm an investor because much of it would be irrelevant to the decision whether to follow through on a referral.

Completing a registration application on either Form ADV, Part 1, or Form U4 is confusing when applied to a solicitor because both forms are designed to gather so much more information relevant to the selection and regulation of an RIA. Adapting the instructions to Form ADV, Part 1, and Form U4 to explain their application to solicitors would unnecessarily complicate their primary uses. Creating a separate electronic form tailored to solicitors would be both expensive and unwarranted in light of its very limited purpose. A solicitors disclosure brochure is a cost-effective alternative.

Registration of solicitors creates unintended consequences when applied to the limited activities of a solicitor. For corporate solicitors, registration as an investment adviser triggers extensive regulatory requirements that are almost entirely irrelevant to the limited activities of a solicitor (and hence confusing to the applicant), including (in many states) bonding, GAAP accounting and balance sheets, client service contracts, and other generally applicable requirements. For individual solicitors, registration triggers examination requirements (Series 65 or 66).

For individual solicitors, registration poses the threshold question about having the necessary entitlements for access to the WebCRD System for filing the Form U4. Many RIAs are reluctant to register solicitors because, as publicly reported on the IARD website, a solicitor appears to have the same apparent authority as the firm's IARs actually performing investment advisory services.

Some solicitors may desire referral relationships with more than one RIA. For example, different advisory firms may have the relevant skills, knowledge and expertise relevant to different investor age groups. Enabling solicitors to make referrals to more than one RIA is in the best interests of investors. However, many states prohibit dual-firm IAR registration unless the firms are affiliated by common ownership or control (for a summary, see the IARD fee chart highlighted attachment omitted but available upon request).

**Should Qualification Examinations be Required?**

Given the limited scope of a solicitor's activities, requiring an individual solicitor to pass the Series 65 (or 66) examination creates an unnecessary impediment to compliance and the facilitation of referral arrangements. A solicitor recommends an investment adviser but does not give investment advice. In order to make that referral it is unnecessary to test the depth of the individual's knowledge of securities regulation that would apply to actually giving investment advice because that is well beyond the proscribed scope of solicitation activities. Imposing on the solicitor the same examination requirement applicable to all types of investment advisory services is disproportionately burdensome. It also discourages the creation and benefits of referral relationships.

For corporate solicitors it is unclear which, if any, individual officers or employees are required to be registered and tested by the Series 65 exam when the referral
fees flow to the corporate entity, some of which may or may not flow through to any individual. For some corporate solicitors like affinity groups (e.g., AARP) there may never be an individual personally introducing its members to an RIA.

When solicitation activities are limited to making referrals, the public policy served by nonetheless requiring the Series 65 examination is not apparent. Requiring the exam does create obstacles to establishing referral relationships. Devising a pragmatic, cost-effective model rule would give investors greater awareness and access to IAs, while enhancing investor protection through relevant and targeted disclosures under a model rule.

Supervision in Lieu of Registration

In view of a solicitor's limited scope of activities, coupled with the full disclosure of the relationship between the solicitor and RIA, with the added protection of a "bad actors" disqualification, the SEC's supervision-based approach is an appropriate balance of cost-effective regulation and investor protection.

A number of alternatives could achieve investor protection without registration, building upon state and SEC regulation of the RIA. An RIA's record-keeping requirements could include retaining evidence of the RIA's due diligence (both initial and periodic) to determine that a solicitor is not subject to "bad actor" disqualifications. The solicitor's disclosure brochure could include representations that the solicitor is not subject to such disqualifications—a breach of which would violate state anti-fraud prohibitions subject to both regulatory and civil sanctions. The RIA-solicitor's written agreement could also require representations and warranties from the solicitor that no such disqualifications exist, and imposing a notification obligation if a disqualifying event should occur in the future.

Next Steps

We hope this whitepaper helps to highlight the important public policy to encourage investor referrals to RIAs from trusted sources, and the importance of developing a model rule to clarify and address the disparity among state regulatory practices in regulating solicitors. We look forward to discussing the various points outlined in this whitepaper. We would be pleased to assist NASAA with its development of a model solicitors rule.

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