

NOTICE OF REQUEST FOR PUBLIC COMMENT ON PROPOSED REVISIONS TO THE UNIFORM APPLICATION TO REGISTER SECURITIES (FORM U-1)

September 22, 2022

Deadline for Public Comment: October 22, 2022

The Corporation Finance Section Committee (“Section Committee”) and the Business Organizations and Accounting Project Group (“Project Group”) of the North American Securities Administrators Association, Inc. (“NASAA”) seek public comment on proposed revisions to the Uniform Application to Register Securities (“Form U-1”), attached hereto as Exhibit A. The Project Group is proposing to amend the Form U-1 to require that preliminary proxy statements, definitive proxy statements, definitive additional materials, and soliciting material be filed with NASAA members within two business days after filing such materials with the Securities and Exchange Commission (“SEC”).

Comments on the proposed revisions to the Form U-1 should be submitted on or before the deadline above. We are only accepting comments by electronic mail. Comments should be emailed to NASAAComments@nasaa.org, with a copy to the Section Chair, Bill Beatty (bbeatty@dfi.wa.gov), and the Project Group Chair, Michelle Webster (michelle.webster@dfi.wa.gov). All comments received in response to this request will be posted to NASAA’s website (www.nasaa.org) without edit or redaction after the close of the comment period, though inappropriate comments will not be posted. Accordingly, please do not include any information in your comment that you do not wish to become publicly available. After the close of the comment period, the Section Committee and the Project Group will review all comments and consider whether to present the proposed amendments to the Form U-1, in their current or revised form, to the NASAA Board of Directors for potential adoption by vote of the NASAA membership.

Background

A fundamental shareholder right is the right to have a say in the affairs of a company by voting. The proxy voting process is the primary way for shareholders to learn about matters being put to shareholder vote, make their views known to management, and participate effectively at annual or special meetings.¹

¹ See <https://www.sec.gov/spotlight/proxymatters.shtml>. Today, few shareholders of companies subject to the federal proxy rules attend meetings to vote in person; rather, the primary way for shareholders to learn about matters to be decided upon at a meeting and to vote on the election of directors is through the proxy process. See <https://www.sec.gov/rules/proposed/2016/34-79164.pdf>.

Under Section 14(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and SEC rules adopted thereunder, registrants² and others that solicit shareholders’ votes and proxies are required to furnish shareholders with proxy statements describing the matters up for shareholder vote.³ Generally, these proxy statements and additional soliciting materials must be filed with the SEC either prior to or no later than the date they are first sent or given to shareholders.⁴

In recent years, members of the Project Group have noted instances in which issuers conducting registered offerings have sought shareholder approval on – and furnished proxy solicitation materials in connection with – certain matters that raise investor protection concerns. For example, Project Group members have encountered issuers that have proposed to remove certain NASAA Statement of Policy-derived shareholder rights and protections from their governing documents while the offering remained registered at the state level.⁵ Issuers are required to adopt shareholder rights and protections included in applicable NASAA Statements of Policy as a condition of state registration, and it is not contemplated that these rights and protections can be stripped out while the offering remains state-registered. In addition, members of the Project Group have reviewed proxy statements that present disclosure concerns regarding the proposed removal of such protections.⁶

Currently, no Statements of Policy or forms published by NASAA require issuers to file proxy solicitation materials with state regulators. The Form U-1, which is used by issuers to

² Federal proxy rules apply only to classes of equity securities registered under Section 12 of the Exchange Act. One means of Section 12 registration is under Section 12(g) of the Exchange Act, which requires the registration of any class of equity securities of an issuer having total assets exceeding \$10 million, which is held of record by either 2,000 persons or 500 non-accredited investors. Issuers such as non-traded real estate investment trusts (“REITs”) subject to state registration requirements may register classes of equity securities under Section 12(g) once they reach these asset and shareholder thresholds, and may remain subject to state registration requirements unless certain events occur. Issuers may also voluntarily register a class of equity securities under Section 12(g). Business development companies (“BDCs”), including those subject to state registration requirements, must first “elect” to be regulated as a business development company under the Investment Company Act of 1940, and as a prerequisite must have a class of securities registered under Section 12 of the Exchange Act or have filed a registration statement thereunder. *See* 15 U.S.C. § 80a-53(a). In other words, BDCs are Section 12 registrants, typically under Section 12(g) of the Exchange Act, from “day one.” Accordingly, some issuers subject to state registration requirements are also subject to the federal proxy rules by virtue of registering a class (or classes) of securities under Section 12(g) of the Exchange Act.

³ *See* 17 C.F.R. § 240.14a-3; 17 C.F.R. § 240.14a-101.

⁴ *See* 17 C.F.R. § 240.14a-6.

⁵ The NASAA Statement of Policy Regarding Real Estate Investment Trusts (“REIT SOP”) requires that non-traded REITs adopt certain shareholder rights and protections in their governing documents. In one instance, a non-traded REIT proposed to remove REIT SOP-derived protections related to proposed roll-up transactions *while simultaneously proposing to engage in a roll-up transaction*. In another instance, a non-traded REIT proposed to shareholders an amendment and restatement of its charter that would be filed if the REIT’s board of directors determined to effectuate a “potential liquidity event.” This amendment and restatement, referred to as a “potential springing charter,” would have stripped away nearly all of the shareholder rights and protections required by the REIT SOP.

⁶ In the example involving the REIT that proposed a “potential springing charter” described above, members of the Project Group identified a number of omissions in the REIT’s proxy statement, particularly with respect to the risks to investors posed by certain amendments, that members of the Project Group believed were significant and if disclosed in their totality may have influenced shareholders to vote otherwise. *See* Footnote 5.

register their offerings in multiple states, requires that applicants agree to file with NASAA members additional documents that have been filed with the SEC so long as the applicant's registration remains in effect in that state. However, this requirement is currently limited to registration or offering statement amendments and the final prospectus or any further amendments or supplements thereto. NASAA Statements of Policy that may apply to the applicant's offering limit subsequent filing requirements to marked copies of amendments and supplements to an application.⁷ Moreover, NASAA members do not all require the filing of proxy solicitation materials.⁸

Given the potential substantive and disclosure issues that may be raised in connection with proxy solicitations, the Project Group believes that requiring issuers to timely file related materials with NASAA members is imperative to enforcing NASAA Statements of Policy and state anti-fraud laws.⁹ As proxy solicitation materials are filed with the SEC and furnished to shareholders in advance of the annual or special meeting at which shareholders are being asked to vote, NASAA members may be alerted to proposals that implicate NASAA Statements of Policy, or otherwise present disclosure concerns, and issue comments accordingly.

For the reasons set forth above, the Project Group is proposing amendments to the Form U-1 to require issuers to file proxy solicitation materials with NASAA members within two business days after filing such materials with the SEC.

Discussion and Analysis of the Proposed Amendments

In order to effect this filing requirement, the Project Group is proposing to amend Item 8 of the Form U-1. Item 8(b) of the Form U-1 currently requires an applicant to agree that, so long as its registration remains in effect, the applicant will file with NASAA members within two business days after filing with the SEC: (1) any amendments other than delaying amendments to the federal registration or offering statement; and (2) the final prospectus, or any further amendments or supplements thereto. The Project Group is proposing to add a third set of filings to this requirement; namely, preliminary proxy statements, definitive proxy statements, definitive additional materials, and soliciting material.

⁷ The REIT SOP and the NASAA Omnibus Guidelines require an issuer to file a marked copy of all amendments and supplements to an application as soon as the amendment or supplement is available.

⁸ Although proxy solicitation materials are generally not required to be filed under many current state rules, states are often empowered by statute to require, in a registration by coordination, additional information or records filed by the issuer under the Securities Act of 1933, and to require an issuer to file reports to keep reasonably current the information contained in the registration statement and to disclose the progress of an offering. *See* Sections 303(b) and 305(i) of the Uniform Securities Act of 2002. Proxy solicitations may include proposals that implicate or otherwise seek to undo NASAA Statement of Policy requirements intended to protect investors and could change the terms of the offering as well as affect the accuracy of the disclosure contained in the registration statement.

⁹ The Project Group acknowledges that issuers do file other reports with NASAA members that discuss the matters being put to a shareholder vote. For example, reporting issuers must file a Form 8-K under certain circumstances. The Form 8-K may be used to report the outcome of a shareholder vote. However, these filings are not as comprehensive as a preliminary or definitive proxy statement, or may report events that have already occurred. The Project Group believes that requiring a timely filing of proxy solicitation materials will allow NASAA members sufficient time to raise their concerns in advance of any shareholder meeting.

The specific filings identified in this proposed amendment relate to the different categories of proxy solicitation materials that are filed with the SEC under Schedule 14A. Schedule 14A lists the categories of proxy solicitation materials that are filed with the SEC and sets out the information required to be included in a proxy statement. The Project Group believes that the requirement to make these filings will ensure that NASAA members receive timely notice of any proposals that implicate NASAA Statements of Policy and/or raise anti-fraud concerns, and will allow for timely review of any materials used to obtain or otherwise influence a shareholder's vote.¹⁰ The Project Group seeks comment on whether this list should be modified to exclude certain types of proxy solicitation materials in the interest of balancing investor protection and reducing compliance burdens.

Rule 14a-6(e)(2) under the Exchange Act permits certain preliminary proxy statements prepared in connection with mergers, consolidations, acquisitions, or similar matters to be filed with the SEC on a confidential basis, and provides that these proxy statements are not available for public inspection until filed in definitive form. At this time, the Project Group is not persuaded that excluding these confidential submissions from the Form U-1 filing requirement is necessary or appropriate. The Project Group notes that Section 6(e) of the Securities Act of 1933 permits emerging growth companies ("EGCs") to submit draft registration statements for confidential, non-public review so that EGCs may begin the SEC review process without publicly revealing sensitive commercial and financial information to their competitors.¹¹ EGCs that also seek state registration submit these same draft registration statements to NASAA members without any apparent issue.¹² Further, given the significance of mergers, consolidations, acquisitions, or similar matters, the Project Group believes that it is imperative to view these proxy statements in their preliminary form to determine whether NASAA Statement of Policy-derived rights and protections are implicated and whether shareholders have been provided with material information necessary to make an informed decision. Accordingly, the proposed Form U-1 amendments expressly require that confidential filings made pursuant to Rule 14a-6(e)(2) be filed with NASAA members.¹³ The Project Group seeks comment on

¹⁰ The federal proxy rules contain anti-fraud provisions, however, the Project Group believes that NASAA members are best equipped to review and comment on proxy solicitations that implicate NASAA Statements of Policy or other state concerns.

¹¹ See H.R. REP. 112-406, 7, 2012 U.S.C.C.A.N. 278, 280 ("Finally, H.R. 3606 permits EGCs to pre-file confidential registration statements, thereby allowing them to begin the SEC review process without publicly revealing sensitive commercial and financial information to their competitors.").

¹² Project Group members have reviewed draft registration statements submitted by non-traded REITs that expressly state they are relying on Section 6(e) of the Securities Act of 1933, as well as draft registration statements submitted by non-traded BDCs that indicate they are emerging growth companies. The Project Group is unaware of any concerns expressed by issuers or their counsel in filing these same draft registration statements with NASAA members. The Project Group is also aware that non-EGCs may submit draft registration statements to the SEC in accordance with a nonpublic review process created by the SEC's Division of Corporation Finance in 2017. See https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded#_ftn3. To the extent that issuers rely on this expanded nonpublic review process and also submit draft registration statements to NASAA members, the Project Group is unaware of any issues.

¹³ Although confidential filings made pursuant Rule 14a-6(e)(2) are a subcategory of preliminary proxy statements filed with the SEC, the Project Group has expressly included a reference to these filings for avoidance of doubt.

whether there any potential concerns with submitting these preliminary proxy statements to NASAA members.

As discussed above, the Project Group is proposing amendments that would require the filing of proxy solicitation materials that are filed with the SEC. Therefore, these proposed amendments would not create additional filing requirements for companies that are not subject to the federal proxy rules and that are only distributing materials required by state corporate law.¹⁴ The Project Group believes that its proposed amendments strike the appropriate balance between addressing the circumstances that gave rise to the concerns noted above and reducing compliance burdens on issuers. The Project Group seeks comment as to whether the Form U-1 should be amended to require these types of filings as well.

A marked copy of the Form U-1 with the proposed amendments is attached as Exhibit A.

¹⁴ For example, a non-traded REIT that does not yet have a class of shares registered under Section 12 of the Exchange Act would not be required to file with NASAA members any proxy solicitation materials that it prepares solely in accordance with state corporate law and does not file with the SEC. However, once this REIT (or any other issuer) files proxy solicitation materials with the SEC (either voluntarily or through the operation of Section 12), it will be required to file such with NASAA members.

EXHIBIT A – PROPOSED FORM U-1 AMENDMENTS

Uniform Application to Register Securities Form U-1

1. Issuer name and other identifying information

Name of Issuer <input style="width: 95%; height: 20px;" type="text"/>		Entity Type: Choose an entity type. <input style="width: 95%; height: 20px;" type="text"/>
Previous Name <input type="checkbox"/> None <input style="width: 95%; height: 20px;" type="text"/>		
Jurisdiction of Incorporation/Organization: <input style="width: 80%; height: 20px;" type="text"/>	Indicate provision under which Issuer seeks registration or exemption federally: Choose a federal provision.	
Date of Incorporation/Organization: <input style="width: 80%; height: 20px;" type="text"/>		
Date filed with SEC: <input style="width: 80%; height: 20px;" type="text"/>	SEC Filing Number(s) (if any): <input style="width: 80%; height: 20px;" type="text"/>	
Choose SEC Effectiveness Status (date). <input style="width: 80%; height: 20px;" type="text"/>		

2. Issuer principal place of business

Street Address Line 1 <input style="width: 95%; height: 20px;" type="text"/>		Street Address Line 2 <input style="width: 95%; height: 20px;" type="text"/>	
City <input style="width: 80%; height: 20px;" type="text"/>	State/Province/Country <input style="width: 80%; height: 20px;" type="text"/>	ZIP/Postal Code <input style="width: 80%; height: 20px;" type="text"/>	Phone No. <input style="width: 80%; height: 20px;" type="text"/>

3. Contact information of correspondent to whom notices and communications may be sent

Last Name <input style="width: 80%; height: 20px;" type="text"/>	First Name <input style="width: 80%; height: 20px;" type="text"/>	Firm Name <input style="width: 80%; height: 20px;" type="text"/>
Street Address Line 1 <input style="width: 95%; height: 20px;" type="text"/>		Street Address Line 2 <input style="width: 95%; height: 20px;" type="text"/>
City <input style="width: 80%; height: 20px;" type="text"/>	State/Province/Country <input style="width: 80%; height: 20px;" type="text"/>	ZIP/Postal Code <input style="width: 80%; height: 20px;" type="text"/>
Phone <input style="width: 80%; height: 20px;" type="text"/>	Fax <input style="width: 80%; height: 20px;" type="text"/>	E-mail <input style="width: 80%; height: 20px;" type="text"/>

4. Total offering amount, commissions, and filing fees

Description of Securities	Total Offering		
Offering Price (\$)	No. of Shares/Units	Amount (\$)	
<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>
<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>
<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>
<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>
<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>
Total:		<input style="width: 95%; height: 20px;" type="text"/>	<input style="width: 95%; height: 20px;" type="text"/>
Maximum commission to be charged: <input style="width: 80%; height: 20px;" type="text"/>		Filing/examination fees enclosed? <input type="checkbox"/>	

Note: Please include any footnote disclosures in the response form field at the bottom of Item 5.

5. Jurisdictions where offering is proposed and offering size/amount

Mark the jurisdictions below where the Issuer seeks to register pursuant to each jurisdiction's applicable laws, and include the number of shares and offering amount for each jurisdiction:

Jurisdiction	No. of Shares or Units	Amount (\$)	Jurisdiction	No. of Shares or Units	Amount (\$)
<input type="checkbox"/> AL			<input type="checkbox"/> MT		
<input type="checkbox"/> AK			<input type="checkbox"/> NE		
<input type="checkbox"/> AZ			<input type="checkbox"/> NV		
<input type="checkbox"/> AR			<input type="checkbox"/> NH		
<input type="checkbox"/> CA			<input type="checkbox"/> NJ		
<input type="checkbox"/> CO			<input type="checkbox"/> NM		
<input type="checkbox"/> CT			<input type="checkbox"/> NY		
<input type="checkbox"/> DE			<input type="checkbox"/> NC		
<input type="checkbox"/> DC			<input type="checkbox"/> ND		
<input type="checkbox"/> FL			<input type="checkbox"/> OH		
<input type="checkbox"/> GA			<input type="checkbox"/> OK		
<input type="checkbox"/> GU			<input type="checkbox"/> OR		
<input type="checkbox"/> HI			<input type="checkbox"/> PA		
<input type="checkbox"/> ID			<input type="checkbox"/> PR		
<input type="checkbox"/> IL			<input type="checkbox"/> RI		
<input type="checkbox"/> IN			<input type="checkbox"/> SC		
<input type="checkbox"/> IA			<input type="checkbox"/> SD		
<input type="checkbox"/> KS			<input type="checkbox"/> TN		
<input type="checkbox"/> KY			<input type="checkbox"/> TX		
<input type="checkbox"/> LA			<input type="checkbox"/> UT		
<input type="checkbox"/> ME			<input type="checkbox"/> VI		
<input type="checkbox"/> MD			<input type="checkbox"/> VT		
<input type="checkbox"/> MA			<input type="checkbox"/> VA		
<input type="checkbox"/> MI			<input type="checkbox"/> WA		
<input type="checkbox"/> MN			<input type="checkbox"/> WV		
<input type="checkbox"/> MS			<input type="checkbox"/> WI		
<input type="checkbox"/> MO			<input type="checkbox"/> WY		

Footnotes to Items 4 and 5:

6. Offering status by jurisdiction

List the jurisdictions, if any, in which the securities are eligible for sale to the public:

List the jurisdictions, if any, which have refused, by order or otherwise, to authorize sale of the securities to the public, or have revoked or suspended the right to sell the securities or in which an application has been withdrawn:

7. Additional documents

Submitted herewith as part of this application are the following documents (documents on file may be incorporated by reference):

(a) One copy of the Registration or Offering Statement and Prospectus in the latest form on file under the Securities Act of 1933

Included Not Included

(b) Underwriting Agreement, Agreement among Underwriters, and Selected Dealers Agreement

Included Not Included

(c) Indenture

Included Not Included

(d) Issuer's charter or articles of incorporation as amended to date

Included Not Included

(e) Issuer's by-laws as amended to date

Included Not Included

(f) Signed copy of opinion of counsel filed with Registration or Offering Statement pursuant to the Securities Act of 1933

Included Not Included

(g) Specimen

Included Not Included

(h) If an earning computation or similar requirement is required to be met in any jurisdiction, attach a separate sheet as an exhibit showing compliance

Included Not Included

(i) One copy of all advertising matter to be used in connection with the offering

Included Not Included

(j) Others (list each):

8. Acknowledgements, Consent to Service of Process, and Signature

The applicant hereby applies for registration or acceptance for filing of the above described securities under the applicable laws of each jurisdiction in which this application is filed and in consideration thereof agrees so long as the registration remains in effect that it will:

- (a) Advise the authority of each jurisdiction in which this application is filed of any change prior to registration in any of the information contained herein or in any of the documents submitted with or as part of this application.
- (b) File with the authority of each jurisdiction in which this application is filed within two business days after filing with the Securities and Exchange Commission (i) any amendments other than delaying amendments to the federal registration or offering statement, designating the changed, revised, or added material or information by underlining the same; ~~and~~ (ii) the final prospectus, or any further amendments or supplements thereto; and (iii) any preliminary proxy statements (including confidential filings made pursuant to 17 C.F.R. § 240.14a-6(e)(2)), definitive proxy statements, definitive additional materials, or soliciting material.
- (c) Notify the authority of each jurisdiction in which this application is filed within two business days (i) upon the receipt of any stop order, denial, order to show cause, suspension or revocation order, injunction or restraining order, or similar order entered or issued by any jurisdiction or other regulatory authority or by any court, concerning the securities covered by this application or other securities of the issuer currently being offered to the public; or (ii) upon the receipt of any notice of effectiveness or qualification by the Securities and Exchange Commission.
- (d) Notify the authority of each jurisdiction in which this application is filed at least two business days prior to effectiveness or qualification by the Securities and Exchange Commission of (i) any request by the issuer or applicant to any other jurisdiction or regulatory authority for permission to withdraw any application to register the securities described herein; and (ii) a list of all jurisdictions in which applications have been filed and from which the issuer or applicant has received notice that the application does not comply with applicable requirements and cannot or does not intend to comply with the requirements of such jurisdiction(s).
- (e) Furnish promptly all such additional information and documents in respect to the issuer or the securities covered by this application as may be requested by each jurisdiction in which this application is filed prior to registration or acceptance for filing.

The issuer hereby irrevocably appoints the Securities Administrator or other legally designated officer of the jurisdiction(s) in which this application is filed, as its agents for service of process upon whom may be served any notice, process or pleading in any action or proceeding against it arising out of, or in connection with, the sale of securities and the undersigned does hereby consent that any such action or proceeding against it may be commenced in any court of competent jurisdiction and proper venue within the jurisdiction in which this application is filed by service of process upon the officers so designated with the same effect as if the undersigned was organized or created under the laws of that jurisdiction and have been served lawfully with process in that jurisdiction. It is requested that a copy of any notice, process, or pleading served hereunder be mailed to:

Name

Address

The issuer has read this notice, knows the contents to be true, and has duly caused this notice to be signed on its behalf by the undersigned duly authorized person.

Signature

Name of Signer (Print)

Title

Date

Signature Instructions:

The Form U-1 shall be signed by the issuer's principal executive officer or principal financial officer. If the issuer is a foreign person, the Form U-1 shall also be signed by its authorized representative in the United States.

A signature includes a manual signature or, if the Form U-1 is electronically filed, the name shall be typed in the signature field. By typing a name in this field, the signatory acknowledges and represents that the entry constitutes in every way, use or aspect, his or her legally binding signature. Where a typed signature is used, the original document must be manually signed before or at the time the filing is made electronically and shall be retained by the issuer for a period of five years. Upon request, the issuer shall furnish to the applicable Administrator a copy of any or all documents retained pursuant to this section.