



NASAA

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September 12, 2007

Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

VIA E-MAIL: rule-comments@sec.gov

**Re: Electronic Filing and Simplification of Form D
File Number S7-12-07, Release Nos. 33-8814; 34-2446; IC-27878**

Dear Ms. Morris:

The North American Securities Administrators Association (“NASAA”)¹ appreciates the opportunity to comment on the above referenced Release (“Release”). We strongly support the proposed modernization and simplification of the form and process used to give notice of offerings under Regulation D and section 4(6). NASAA believes electronic filing of Form D will be beneficial to issuers, especially small businesses, regulators, investors, researchers, and the public in general.

Currently, Form D is used to make notice filings with almost all the states and territories when issuers file with the Commission. Using a federal form to satisfy state filing requirements has promoted uniformity in federal and state securities regulation. Our nation’s capital markets have benefited from this uniform approach to regulation and NASAA strongly urges the Commission to continue it. Our comments below reflect the importance of maintaining the use of Form D as an effective regulatory tool in state as well as federal law.

1. **The Commission must work with the states to ensure “one-stop” electronic filing is both efficient and legally effective with the states.**

NASAA strongly supports an electronic one-stop filing system for Form D. This will not happen without further development of the proposal to implement mandatory electronic filing of Form D with the Commission. The SEC proposal neither resolves how an issuer will designate and file with the states nor how the issuer will submit filing fees to the designated states. In order for “one-stop” filing to be both efficient and legally effective, the filing system must allow the issuers to direct the Form with the required filing fee to the designated states. Issuers would undoubtedly be frustrated by a system that allows only electronic filing with the Commission and leaves them to file by paper in each state or requires them to send fees separately to each state. Without an automated mechanism to provide notice and related fees to the designated states, the Commission will fall short of its mission to achieve a streamlined national system of filing that enhances capital formation.

NASAA is very supportive of the efforts to require electronic filing and streamline the filing process and stands ready to work with the SEC so that we can address the technological issues to create an efficient system that will satisfy state filing and fee requirements. NASAA believes that the technological

¹ The oldest international organization devoted to investor protection, the North American Securities Administrators Association, Inc. (“NASAA”) was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

solutions to provide simultaneous filing with the states are available to us in the market place today. NASAA envisions a system that, upon designating a state when filling out Form D in EDGAR, directs the issuer to a NASAA hosted site that lists the fee for the selected state and provides for an electronic payment to the state. The system would provide for payment by means of electronic funds transfer and credit card transactions. The completed Form D would then be entered in EDGAR and also would be distributed by the NASAA hosted site to the selected state. No filing fees would be collected by the Commission in any event. Issuers utilizing this distribution and payment system would be charged a modest service charge to defray the costs of the NASAA provided site and service. The Commission would have no direct involvement or responsibility for the state distribution and payment system. The Commission would be responsible for allowing issuers to select the state and forwarding the Form D to the NASAA provided site. Issuers as well as the selected states would obtain documented confirmation of the filings.

2. Amending Regulation D to require the filing of Form D as a condition to the availability of federal exemptions is necessary to cause issuers to file and to ensure the validity of the information collected through the filing system.

The Commission should require the filing of the Form D with the Commission as a condition to the availability of the exemptions set forth in Regulation D. The fact that filing is not currently a condition to the availability of the exemptions at the federal level creates confusion as to the necessity of filing with SEC as well as the states and serves as a roadblock to enforcement efforts. Requiring the filing of the Form D as a condition to the availability of the exemptions set forth in Regulation D would eliminate this confusion and promote compliance and uniformity. It would also serve to curtail the growing litigation on this issue.² Finally, it would help ensure that information compiled from the Forms was not derived solely from a self-selected subset of voluntary filers, but the universe of those conducting Regulation D and section 4(6) offerings.

3. Prohibition of “free writing” is necessary to safeguard against general solicitation.

Restrictions on “free writing” in the electronic filing system are necessary to safeguard against the use of electronic filing as a means to conduct general solicitation as discussed in the Release. Prospective investors may seek the information available in the electronic filing system in search of investment opportunities. This potential drawback of electronic filing is magnified by the fact that, as the SEC itself notes, “Form D filings ... have become a source of disclosure for investors.” Filers should be given no opportunity to include text that would amount to general solicitation in the filing of a Form D.

The electronic filing system should incorporate additional safeguards against general solicitation. One safeguard could be to make it clear in the adoption preamble that the availability of electronic filing does not eliminate the prohibitions on advertising and general solicitation. A second safeguard could be to amend Regulation D to require companies to return any unsolicited payments submitted to purchase securities. If the Commission allows issuers to accept unsolicited purchases, the electronic filing system might be in danger of becoming a worldwide web offering database. A third safeguard would be to limit public access to information contained in certain data fields, such as Contact Information in Item 2.

Another safeguard could involve the inclusion of prominent warnings, perhaps as part of a “terms of use” screen, to those who search Form D filings that:

- A. The filings themselves are not a solicitation of an offer to buy or a solicitation of an offer to sell securities.

² For example, *Risdall v. Brown-Wilbert, Inc.*, No. A06-1233, 2007 WL 1893181 (Minn. App. July 3, 2007) and *Consol. Mgmt. Group, LLC v. DuFauchard*, No. C 06-04203 JSW, 2006 WL 2691411 (N.D. Cal. Sept. 20, 2006).

- B. Only those with a substantial pre-existing relationship with the issuer may purchase securities that are the subject of the filing.
- C. The issuer is required to return any payments submitted from those with which it lacks a substantial pre-existing relationship.
- D. Persons who have a substantial pre-existing relationship with the issuer should not rely solely on the information contained in the Form D filing to decide whether to invest in the offering.
- E. The information contained in the Form D is limited as it is intended to provide notice to regulators that the issuer is conducting an offering. Request a copy of the private placement memorandum or other information from the issuer for more complete information.

We believe these additional safeguards are appropriate to ensure, with the advent of electronic filing, the ability to access filings online is not used to defeat the prohibition on general solicitation in Regulation D offerings.

4. The proposed elimination of disclosure of beneficial owners and control persons in the Form D is unwarranted and will have a negative impact on investor protection.

The Commission should not revise the Form to eliminate disclosure of control persons as proposed in the Release. Beneficial owners of 10% or more of a class of an issuer's equity securities have a degree of control that has been recognized as material to investors. Beneficial owners as control persons should also subject the issuer to disqualification if they have committed prior "bad acts." The proposed elimination of this information is based ostensibly on privacy concerns. However, the Release does not articulate the basis on which these beneficial owners are entitled to privacy. Further, it is unclear that widespread desire for privacy has been established – the SEC itself indicates that issuers have asked for confidential treatment of this information only from "time to time."

While the Release notes that information identifying beneficial owners is available in the private placement memorandum provided to investors, if it is material, NASAA believes that regulators need access to this information in order to screen out "bad actors" disqualified from conducting an offering under Regulation D. State exemptions designed to coordinate with Regulation D exemptions contain disqualification provisions that are triggered by actions against beneficial owners, among others. Even the SEC's proposed disqualification provisions contained in proposed Rule 502(e) of the companion release apply to beneficial owners. The elimination of the identification of beneficial owners from the Form D is unjustified and would effectively hamper the efforts of regulators to prevent issuers from making offerings that involve "bad actors."

The Form should not be used, in effect, to rewrite the long-standing definition of beneficial owner. We therefore urge the SEC to retain the requirement to disclose each beneficial owner having the power to vote or dispose, or direct the vote or disposition of, 10% or more of a class of equity securities of the issuer.

5. The system should require the completion of all data fields in order to maximize investor protection and the validity of the data collected by the system.

In order to ensure that issuers provide adequate notice of a private or limited offering conducted under Regulation D or section 4(6) and to minimize the need for follow-up correspondence requesting completion of the Form, the Commission should require that filers complete each data field in the Form as discussed in the Release. If all the data fields are not completed, the filing should not be accepted. The Commission should also prevent "free writing" and other responses to items in Form D that will dilute the integrity of the information requested and affect the ability to search the information provided.

6. Requiring the filing of updated information in annual filings and amendments will help maximize investor protection and ensure the validity of the data collected by the system.

Form D filings contain information that is used by regulators for screening and enforcement purposes as well as for responding to inquiries from the public. The proposal to require an annual filing with updated information and amendments when there are material changes will ensure that the information available to regulators, investors, researchers, and the public is relatively current. Current information will allow the states to more effectively screen private and limited offerings conducted in their states to prevent offerings by those subject to disqualification and to aid enforcement efforts. It also will allow them to provide better information to members of the public who inquire about an issuer or a particular offering. For these reasons, NASAA strongly supports the Commission's proposals to require annual filings and amendments and to require the updating of all data fields contained in the Form when an annual filing or amendment is made.

7. Exempting public companies from the Form D filing requirement will weaken investor protection, threaten the validity of the data collected by the system, and decrease uniformity between state and federal filing requirements.

The Release questions whether public companies should be exempted from making a Form D filing and asks if they should instead be allowed to file this information as part of their annual and quarterly reports to the Commission. The Release contains neither a discussion of such an exemption nor a justification for it. An exemption from the notice filing requirement would eliminate notice to regulators of private and limited offerings. Further, it might eliminate the uniformity between state and federal filing requirements that now exists, and will add compliance costs, research burdens, and potential inadvertent violations. Until interactive data technology is widely implemented in a manner that will ensure that regulators are provided with notice of offerings, no exemption from filing should be considered.

8. Disclosure of the estimated expenses and uses of proceeds of the offering should not be eliminated from the Form D.

The elimination of information regarding expenses and uses of proceeds of the offering from Form D could have a serious negative impact on the enforcement information available to regulators. Being able to compare the offering document (what is disclosed to investors) with the Form D (what is reported to regulators) is a useful way to detect and investigate potential wrongdoing.

The information regarding the use of proceeds should be retained in the new Form D because it is valuable and there are ways to address the reporting problems cited by the SEC. In the Release, the primary reason given for eliminating this information from the Form D is that, in the past, a vast majority of issuers responded that proceeds were to be used for "general corporate purposes." Rather than eliminating this information altogether, the electronic Form D could be revised to require better information. For example, the Form could be revised to require the issuer to enter use of proceeds information in a series of checkboxes identifying the intended use of proceeds that does not provide a "general corporate purposes" option. The Form could require the issuer to enter figures that add up to 100% of the offering amount, or a prompt would indicate that the question is incomplete. This would result in keeping information valuable to regulators, investors, and researchers intact, while eliminating the useless categorization of expenses to be used for "general corporate purposes."

9. The inclusion of CRD numbers for selling persons will better protect investors and promote efficiency.

The inclusion of CRD numbers in Form D for persons who receive sales compensation and already have a CRD number will serve to maximize investor protection and promote efficiency by improving the ability of regulators to identify and screen those involved in the offering. This information will contribute to the streamlining of the filing process by eliminating the challenge for regulators trying to screen recipients of sales commissions when there are persons with similar and sometimes the same names in the CRD system. Not only will regulators be able to quickly screen the offerings to determine if the agents are registered or exempt from registration as broker-dealers or sales agents, but it will also eliminate the need to send follow-up correspondence to filers to clarify the identity of a person for whom there is a similar or identical name with a disciplinary history that would disqualify the offering. This information would also aid regulators in their enforcement efforts.

After carefully reviewing the Form, it appears the Form needs further refinement so that an issuer will know to identify a sales compensation recipient even when that person is not registered. As presented in the Release, an issuer who does not read the instructions to the Form may mistakenly assume that it does not need to identify recipients of sales compensation unless it has a CRD number. To eliminate potential confusion, this item should first question “Is the recipient a member or associated with FINRA?” and require a “yes” or “no” checkbox response. If the answer is checked “yes,” a drop-down would provide a blank for the CRD number. In the alternative, a “no” answer would populate the CRD blank with “N/A” or another indication that an unregistered person, who does not have a CRD number, is nevertheless receiving compensation.

10. The signature block should be revised to include a consent to state jurisdiction and venue.

NASAA supports the revision of the signature section on the Form to combine the state and federal signature sections and eliminate the need for the filing of a consent to service of process (Form U-2) with the states. While the proposed signature block contained in the Release combines the state and federal signature sections, it fails to fully eliminate the need to file a consent to service of process with the states because it does not incorporate the consent to jurisdiction and venue contained in the Form U-2.

The only discussion in the Release for not including the consent to jurisdiction and venue language in the signature block of the proposed Form D is a footnote indicating that this would be consistent with the signature requirement in Form ADV. Due to this subtle change, investors may unintentionally waive their right to a local venue that is otherwise currently available in connection with offerings made in reliance on Regulation D and filed with many of the states.

An issuer that wants to offer or sell securities in a given state should submit to jurisdiction and not force investors to plead and prove jurisdiction and venue in their state. Without further revision of the signature block in the proposed Form D, states may continue to require the filing of a separate consent to service of process to obtain the consent to jurisdiction and venue contained in the Form U-2. For these reasons, NASAA urges the revision of the signature block to include a consent to jurisdiction and venue.

11. The Form should be revised to collect information regarding the type of offering.

Item 10 of Form D should be revised to collect information on the type of offering that will be conducted rather than merely questioning whether the offering is part of a business combination transaction. We ask that the Commission revise proposed Item 10 to provide a drop-down format for issuers to specify whether the offering is to raise capital; is part of a merger, acquisition, exchange offer or other business combination; is a rescission offering; or other. This revision would facilitate the collection of valuable information concerning the types of offerings conducted under Regulation D and section 4(6) and would also allow regulators to determine compliance of prior offerings.

12. The Form D should retain the “Name of Offering” field to avoid confusion and maximize efficiency.

The Release would eliminate the question that identifies the name of the offering, even though it is not uncommon for an issuer to make multiple offerings, each with a unique name. Prospective investors often call regulators to inquire as to whether an offering has been filed and they are sometimes aware only of the name of the offering. It is common for certain types of offerings, such as oil and gas deals, to have multiple offering names even though made by a single issuer. In addition, pursuant to public information laws, regulators are often called upon to locate Form D filings and, for litigation purposes, to certify whether a filing was made for a particular offering. Without the name of the particular offering, regulators may be unable to fulfill these requests. Further, the ability to confirm that a particular offering has or has not been filed is critical to administrative, civil, or criminal proceedings initiated by regulators. For these reasons, the Form should contain a question soliciting the name of the offering. In order to avoid confusion caused by the placement of this question on the current Form D, the offering name could be solicited after Item 3.

13. A field for a “contact person” for the offering should be included in Item 2.

It would be helpful to regulators, investors and others if the Form included the identification of the individual who should be contacted for additional information. Contact may be necessary in connection with the filing itself, for enforcement purposes, in the context of litigation, and other reasons. Further, it appears that Item 2 could easily accommodate placing a contact person’s name next to the contact telephone number. For these reasons, an additional field for a “contact person” should be included in Item 2. The Form should also accommodate contact information for additional issuers when more than one issuer is identified.

14. The Form should not permit an issuer to “Decline to Disclose” its revenue range.

Item 5 of Form D proposes to include revenue range information to help determine the types and sizes of issuers that rely on Regulation D. The Release states that a private company might consider its revenue range to be confidential information. According to the Release, 95% of the filings last year were made by private companies. If 95% of those filing Form D are likely to choose “decline to disclose” because they consider their revenue to be confidential, the data generated by Item 5 would not be effective as a tool for assessing the use of Regulation D exemptions by small businesses. For this reason, the Form D should not include a “decline to disclose” option in Item 5.

15. The Jurisdictions of Foreign issuers need to be identified.

The instructions to Item 1 of Form D are not clear as to whether there will be a drop-down for designating foreign jurisdictions for the incorporation or organization of the issuer. The same is true for the principal business location of the issuer. An increasing number of offerings are being made by issuers organized or principally located outside the United States. Form D should identify the location of the issuer and the jurisdiction of incorporation or organization, including those in foreign countries.

Thank you for considering our comments on the proposals contained in the Release. Should you have any questions regarding the comments in this letter, please contact the undersigned or Rex Staples, General Counsel for NASAA, at rs@nasaa.org or (202) 737-0900 or Michael E. Stevenson, Securities Administrator for the State of Washington and Chair of NASAA’s Corporation Finance Section, at mstevenson@dfi.wa.gov or (360) 902-8824.

Sincerely,

A handwritten signature in black ink, appearing to read "J.P. Borg". The signature is stylized with a large initial "J" and a long, sweeping underline.

Joseph P. Borg
NASAA President and
Director, Alabama Securities Commission