



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Securities Division

September 7, 2007

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Electronic Filing and Simplification of Form D
Release Nos. 33-8814; 34-5580; 39-2446
File No S7-12-07

Dear Ms. Morris:

The Massachusetts Securities Division (the "Division") welcomes this opportunity to comment on the U.S. Securities and Exchange Commission's (the "Commission" or the "SEC") proposals to mandate the electronic filing of SEC Form D and to revise Form D and Regulation D in connection with electronic filing (the "Proposals").

The Massachusetts Securities Division (the "Division") is a department within the Office of the Secretary of the Commonwealth of Massachusetts. The Securities Division is charged with the responsibility to implement and enforce the Massachusetts securities laws. As such, the Secretary of the Commonwealth is the chief securities regulator for Massachusetts.

Form D is an Important Tool in State Securities Regulation.

As the Commission has noted, Form D has functioned, at least since 1986, as a uniform notification form that could be filed with both state and federal regulators.¹ Form D is used in several state notice-filing and securities exemption provisions.² By adopting SEC Form D, the states have provided issuers with a simpler and more uniform state exemption and notice filing process.

¹ SEC Release 33-6663 (October 2, 1986) [51 FR 36385]

² See, e.g., Massachusetts regulation 950 CMR 14.402(B)(9)(g)

The states currently receive Form Ds for many exempt offerings sold that are offered and/or sold within their boundaries. The Form Ds give the states useful information about the issuers and persons involved in non-public offerings.

Form Ds are particularly valuable in state enforcement actions. The Form D provides important information about the securities offered, including practical information (addresses, telephone numbers, etc.) to allow the states to locate issuers and promoters. Moreover, an issuer that has failed to file a Form D with the Commission or with a state may be conducting an offering in violation of the registration, exemption, or notice filing requirements for securities.

1) The Commission Should Send the States Information About Regulation D Offerings Taking Place in Those States

In the Proposals, the Commission anticipates establishing a searchable database that the states may search to determine if new Form D information that is of interest to them has been filed with the Commission. We ask the Commission to go further and affirmatively send to the states Form D information for issuers that propose to offer or sell their securities in those states.

Massachusetts is prepared to work with the Commission to help set up such a notification system. We believe the North American Securities Administrators Association (“NASAA”) could also assist the Commission in establishing such a system.

2) Issuers Should Indicate on Form D the States Where They Propose to Offer or Sell Securities

In Item 7 of the proposed new Form D, issuers will designate the states to which the Form D is directed. We ask that the new Form D instead ask the issuer to list the states where it proposes to offer or sell its securities.

Simply asking an issuer to list the states to which the Form D is directed will often give the states incomplete information. The states are already seeing poor compliance with the Regulation D notice-filing requirements: some issuers simply fail to make required state notice filings. Telling the states where the issuer intends to direct the Form D will not necessarily help the states detect issuers that have failed to make the required notice filings. Requiring issuers to tell a state where they propose to offer or sell securities will provide the states with more useful information to uncover notice filing violations and other problems.

3) Include Information About Finders in the Selling Person Information

Item 12 of the proposed new Form D should specifically reference “finders” and the payment of “finders’ fees.” Part C, Item 4 of the Form D currently calls for this information, and the Division finds it useful. Moreover, because the proposed Item 12 does not mention finders, the item appears to prompt the issuer to list only registered

broker-dealer firms and their representatives, and perhaps to omit other types of selling persons.

The Division supports including a space in Item 12 to list a registered broker-dealer's and/or agent's CRD number. The CRD number is a useful tool to identify selling persons and determine whether they are properly registered. Also, it should be a simple matter for any issuer using a registered selling person to obtain the CRD number.

4) List 10% or Greater Holders of the Issuer's Securities as "Related Persons"

We ask that the Commission not delete the current requirement that issuers identify the owners of 10% or more of a class of their equity securities as "related persons" on the Form D. Such investors are presumptively control persons of the issuer, so it is appropriate to list them among the related persons on Form D. There is abundant precedent for treating substantial shareholders as persons who may influence or control an issuer. For example, under Section 16 of the Exchange Act, such 10%-or-greater security holders are required to report their trading in securities of a public company.

While the Division recognizes that some 10%-or-greater investors want their investments in certain issuers to remain private, this information is often material to other investors and useful to regulators. We note that in some securities frauds, securities law violators have stayed in the background while exerting control over those issuers, even though those violators have not been officers or directors of the issuer. The related person information in the current Form D can help regulators find these bad actors.

The Division also notes that information about 10% holders and other control persons may or may not be provided in the private placement memorandums for many exempt offerings. It is not safe to assume that such information will be included in an issuer's PPM, even if the information is material. This is particularly the case if inadequate disclosure or fraud may be an issue.

5) Signature Line - Undertaking to Furnish Information on Written Request

The Division agrees with the Commission's proposal to include in the Form D's signature line an undertaking by the issuer to furnish to the states and the Commission, upon their written request, the information provided to offerees. This undertaking will be useful to state enforcement efforts.

The Division understands that this undertaking does not contradict, and would not affect, the limitations that the National Securities Market Improvement Act (NSMIA) places on the ability of the states to require information in notice filings for federal covered securities under Section 18 of the Securities Act of 1933. However, this undertaking will serve as a useful reminder to issuers that the states can obtain this information when warranted, and it should help promote compliance generally.

6) Preserve Use of Proceeds Information in Form D

While the Division understands the Commission's desire to reduce burdens on filers and simplify Form D, we ask that the Commission preserve the Use of Proceeds information that appears in Part C, Sections 4 & 5 of the current Form D. This information is useful in state enforcement actions, and serves as a tool to detect unregistered selling persons and finders.

Providing information use of proceeds should not be a burden for most filers since virtually every issuer will need to describe how the proceeds of the offering will be used.

7) Make Form D Filing a Condition of the Regulation D Exemptions

The Division asks the Commission to make the filing of a Form D a condition of the availability of the Regulation D exemptions. It is logical to make the Form D notice part of compliance with Regulation D.

We note that the simplified electronic Form D is likely to be less burdensome for most issuers than the current paper Form D, so filing the Form D should be less of a hurdle. Also, because the Regulation D exemptions are non-exclusive exemptive rules and safe harbors, issuers would still have recourse to the other in the Securities Act and SEC rules if they wish to avoid making any regulatory filings.

Because filing a Form D currently is not a condition of the Regulation D exemptions, it is hard for regulators and the public to use the filing or non-filing of a Form D as an indicator of securities law compliance. The Release for the Proposals highlights this difficulty, stating "Our Web site advises potential investors in Regulation D offerings to check whether the company making an offering has filed a Form D notice and advises that "[i]f the company has not filed a Form D, this should alert you that the company *might not be in compliance* with the federal securities laws"."³ (emphasis added) Investors and regulators will be able to draw clearer inferences regarding securities law compliance if filing Form D is a condition of the exemptions.

8. The Commission Should Take Steps to Keep Assure that Private Offerings Under Regulation D Will Be Truly Non-Public

The Commission anticipates posting Form Ds on the EDGAR database. This will give the broad public unprecedented information about non-public offerings that heretofore have been invisible to most investors.

The Division notes that the Commission has eliminated any place in Form D where "free writing" could occur, so as to avoid abuse in the form of solicitation or advertising in such filings.

The Division urges the Commission to be vigilant that issuers will not tie publicity efforts for their offerings to the electronic Form D filings so as to make those filings part of a

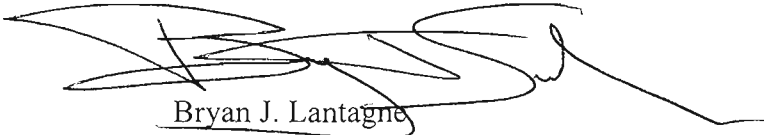
³ SEC Release No. 33-8814 (at page 7), quoting <http://www.sec.gov/answers/formd.htm>

public solicitation or advertising. We have repeatedly encountered issuers who try to conduct public offerings under the claim of the Rule 506 private offering exemption. We urge the Commission affirmatively enforce the manner of offering requirements for non-public offerings.

We also urge the Commission to be vigilant about issuers that will claim the SEC has approved or endorsed their offerings because they have filed a Form D on the Commission's Web site. This problem already exists under both state and federal securities laws, but we can foresee that unscrupulous promoters will point to their electronically-posted Form D as a sign that their offering is legitimate and of high quality. The Commission should act affirmatively to prevent this problem when the electronic Form D first comes into use.

Please contact me at (617) 727-3548, if you have questions about these comments or I can assist in any way.

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan J. Lantagne", written over a horizontal line.

Bryan J. Lantagne
Director
Massachusetts Securities Division
Office of the Secretary of the Commonwealth