

**AMERICAN BAR ASSOCIATION**

**Section of Business Law**

321 N. Clark Street  
Chicago, Illinois 60610  
(312) 988-5588  
FAX: (312) 988-5578  
e-mail: [businesslaw@abanet.org](mailto:businesslaw@abanet.org)  
website: [www.ababusinesslaw.org](http://www.ababusinesslaw.org)

September 7, 2007

**via Email and First Class Mail**

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

Email address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Re: File No. S7-12-07

Dear Ms. Morris:

The Committees on State Regulation of Securities and Federal Regulation of Securities (together, the “Committees” or “we”) of the Section of Business Law (the “Section”) of the American Bar Association (the “ABA”) appreciate the opportunity to comment on Securities and Exchange Commission (the “Commission”) Release No. 33-8814, 72 Fed. Reg. 37376 (July 9, 2007) (the “Release”), relating to the electronic filing and simplification of Form D.

The views expressed in this letter have not been approved by the House of Delegates or Board of Governors of the ABA, and should not be construed as representing policy of the ABA. In addition, this letter does not represent the official position of the Section, nor does it necessarily reflect the views of all members of the Committees.

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## **I. OVERVIEW**

Overall, we strongly support the Commission's efforts to simplify Form D and modernize the information capture process through the technological means that are available today. Form D has long been a source of consternation among practitioners who are faced with disparate state requirements, ambiguous and seemingly redundant or inapplicable information requests, restrictive filing deadlines and, in some instances, excessive state filing fees. Though the Release has not addressed all of these issues, we believe it represents a recognition of the needs of issuers (in particular, smaller ones) to have a streamlined Form D filing process when raising capital.

Central to much of what has been proposed by the Commission is a need to ease the costs and burdens of reporting information contained in Form D. Though a number of the proposals in the Release are consistent with this goal, we are concerned that many others, as currently conceived, may actually impede or fail to further the Commission's goals.

Summarized below are our principal comments. These comments and others are discussed in greater detail in the following sections of this comment letter.

- the proposed electronic filing system should include a mechanism for the centralized collection of filing fees;
- issuers should not be required to file annual updates for offerings lasting more than a year;
- the proposed electronic filing system should not require issuers to indicate the first date of sale;
- issuers should be permitted to engage in free-writing to clarify their responses;
- the unified signature page should not include an undertaking to provide offering materials to the Commission and states for Rule 506 and new Rule 507 offerings;
- the 15-calendar-day post sale time frame for filing Form D should be extended to at least 30 calendar days, and Rule 503 should clarify when a "sale" takes place for purposes of triggering a filing;
- issuers should not be required to report the names of individual recipients of sales compensation or CRD numbers where such individuals are associated with a broker or dealer and issuers should not be required to report individual recipients of sales compensation where there is no associated broker or dealer;
- non-reporting companies should not be required to obtain EDGAR access codes;

- the proposed electronic filing system should permit the saving of drafts of Form D from session to session;
- a confidential filing alternative should be available for issuers that have made no public disclosure of the offering; and
- the filing deadline of 5:30 p.m. Eastern time should be extended to 10:00 p.m. Eastern time and a filing should be deemed due on the next business day if the due date falls on a weekend or holiday.

## **II. DISCUSSION OF SPECIFIC PROPOSALS**

### **A. One-Stop Filing**

We commend the Commission's efforts to implement a uniform online filing system that would simultaneously satisfy state law notice filing requirements. We agree that, if properly implemented, it would reduce significantly the costs and burdens of preparing and filing Form D with the Commission and with state securities regulators.

However, we are deeply concerned that absent swift adoption of conforming laws or rules by state regulators, the concept of "one-stop" filing will simply languish in limbo. We fear that rather than create one uniform filing for issuers, the new electronic filing system will, inadvertently, spawn a dual filing system where filers will, on the one hand, electronically file Form D at the federal level and, on the other, file in paper form at the state level. This concern is compounded by a lack of indication in the Release from the Commission that its proposals to have received state endorsement, and the pace at which attempts to create uniformity among the states have advanced in the past.<sup>1</sup>

There are several aspects of "one-stop" filing about which we have particular reservations, emanating partly from a desire to reduce filing burdens and partly from a desire to delineate clear boundaries as a result of federal preemption under the National Securities Markets Improvement Act of 1996 ("NSMIA").

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<sup>1</sup> For example, five years since the adoption of the Uniform Securities Act of 2002, only 13 states and the U.S. Virgin Islands have enacted it. *See*, Uniform Securities Act (2002) fact sheet, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-usa.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-usa.asp) (last visited Sep. 2, 2007). Further, not all states accept electronic filings of initial broker-dealer registrations through the Financial Industry Regulatory Authority's "Central Registration Depository"; some still require paper filings of all or certain documentation. *See* Chart at 1 Blue Sky L. Rep. (CCH) ¶ 6531.

## 1. Collection and Delivery of Filing Fees

We note the absence of a mechanism to collect state filing fees.<sup>2</sup> In this regard, we anticipate that state regulators are unlikely to endorse one-stop filing unless they are assured that a system is in place to guarantee the collection and delivery of filing fees. Moreover, if issuers are required to pay filing fees separately, either in paper (e.g., by separately sending in a check to the state) or through an external system that does not seamlessly integrate into the Commission's proposed electronic filing system, such a requirement will substantially defeat the Commission's goal of filing through one centralized and integrated system.<sup>3</sup>

Accordingly, we respectfully urge the Commission to include a mechanism for the centralized collection of state filing fees. We propose that prior to submitting a Form D, a filer be taken to a payment page (similar to payment pages one finds on e-commerce sites) that would allow the payment of filing fees by credit card or from a lockbox of pre-delivered funds (by wire, check or cash) for all the states selected in the dropdown menu under Item 7 of proposed electronic Form D.<sup>4</sup> Upon validation of the inputted credit card information or verification of receipt of funds in the lockbox, as applicable, the issuer would then be permitted to submit Form D, which would simultaneously constitute filing with both the Commission and all the selected states without any further action required.

If the Commission adopts an online payment system by credit card but does not provide the option of pre-delivering funds to a lockbox, issuers, particularly their counsel, that do not have a credit card or do not have a credit card that is authorized for purposes such as online payment of state filing fees (for example, as a matter of firm policy) should have a hardship exemption available upon a proper showing of "good cause." In

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<sup>2</sup> Electronic Filing and Simplification of Form D, Release Nos. 33-8814, 34-55980, 39-2446, IC-27878, 72 Fed. Reg. 37376 (proposed Jul. 9, 2007) (hereinafter "Release"), at 37378, n. 34.

<sup>3</sup> While NSMIA would appear to defer to the states in the fixing of their filing fees, ultimately, the reduction of administrative burdens as a result of the efficiencies of a one-stop filing system should be passed onto issuers (and thus to their investors) through the reduction and harmonization of state filing fees. To the extent filing fees are required, we would welcome at the very least harmonization and reduction of filing fees among the states as a step towards reducing the filing fee burden on issuers (and ultimately on investors). With no obvious justification, variations in filing fees among the states range from nothing in Delaware and Indiana at the low end to \$1,500 in Puerto Rico and the Virgin Islands at the high end. Most states (Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin and Wyoming) charge a flat fee; others (Arkansas, Massachusetts, Minnesota, Montana, Puerto Rico, Texas, and Vermont) base the fee on the amount of the offering; one (Alaska) bases the fee on the duration of the offering; while one (Maine) bases the fee on the number of types or classes of securities sold. We believe that together with a uniform "one-stop" filing system there should be a uniform flat filing fee per state of not more than \$200.

<sup>4</sup> Obviously, if Form D is being filed with the Commission and/or with a state that does not levy fees, then the issuer should be able to proceed directly to the Form D submission page.

this respect, we note that the California Department of Corporations has implemented an electronic filing system for the Limited Offering Exemption Notice under Corporations Code § 25102(f)<sup>5</sup> or the Department's Rule 260.103<sup>6</sup> that permits payment by credit card only, and such system provides for "hardship" exemptions. We respectfully caution the Commission that members of the Committees have expressed concerns about the way the California electronic payment system operates in practice and suggest that it may not be appropriate to model any electronic payment system on the current California system other than its hardship exemption.<sup>7</sup>

## 2. Unification of Signature Requirements

We welcome the unification of federal and state signature requirements into a single signature requirement. In a combined federal and state form, it is unnecessary to retain two separate signatures, and doing so has created an unnecessary burden on issuers in the past.<sup>8</sup> Nevertheless, there are two particular aspects of the combined signature requirements that are of concern, one of which relates to the consent to service of process discussed below and the other, the undertaking to provide offering materials, discussed in Part II D below.<sup>9</sup>

While we support the incorporation of a consent to service of process into the combined signature requirement, we encourage the Commission to clarify the provisions of NSMIA reserving the states' respective rights to require delivery of a consent to service of process in the case of Rule 506 and new Rule 507 offerings.

As pointed out by the Commission in the Release, the proposed consent to service of process is different from the consent to service of process currently contained in Form U-2 in two respects: the proposed consent to service of process does not have to be notarized and does not contain a consent to venue and jurisdiction.<sup>10</sup> We are concerned that states will continue to insist upon the paper filing of Form U-2, thereby defeating the

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<sup>5</sup> CAL. CORP. CODE. § 25102(f) (2004).

<sup>6</sup> CAL. CODE REGS., tit. 10, § 260.103 (2004).

<sup>7</sup> In particular, members of the Committees have stated that if a filing is being made from a law firm with multiple offices or multiple attorneys, the system is set up in a way that all filings from that law firm will automatically appear as being from the first person to file from the law firm and charged to the credit card used in that first filing, regardless of whether other persons from the same law firm make a filing or use another credit card.

<sup>8</sup> For example, signatories of Form D often execute the federal signature page and forget to sign the state signature page, resulting in unnecessary delays and late filings. In addition, there is lack of uniformity among the states with respect to whether a state signature page is required and if so, whether original signatures or copies will be accepted.

<sup>9</sup> We are not addressing in this comment letter the certifications related to proposed Rule 502(e) which will be addressed in a separate ABA comment letter on Revisions of Limited Offering Exemptions, Release Nos. 33-8828, IC-27922, 72 Fed. Reg. 45116 (Aug. 10, 2007).

<sup>10</sup> See Release, 72 Fed. Reg. at 37382.

purpose of electronic filing.

Section 18(c)(2)(A) of the Securities Act of 1933, as amended (the “Securities Act”) preserves a state’s right to receive a “consent to service of process”; however, it does not permit a state to receive a consent to jurisdiction and venue.

We would therefore urge the Commission to declare that in the case of Rule 506 and new Rule 507 offerings an issuer who executes proposed electronic Form D is satisfying the state’s rights as preserved under Securities Act § 18(c)(2)(A) and that no other consent, paper or otherwise, may be mandated. Considering that the Securities Act is a federal statute and that states are limited by preemption with respect to such offerings, we believe the Commission should use this authority to interpret Securities Act § 18(c)(2)(A) and that an explicit declaration from the Commission will make it more difficult for a state to take a contrary position.

### **3. Date of First Sale**

Without engaging in any explanatory comment in the Release, the proposed electronic Form D appears to include a completely new requirement that the issuer indicate either the “Date of First Sale” or select “First Sale Yet to Occur” with respect to each state to which Form D is directed.<sup>11</sup>

Currently, the Commission does not require this information and only a handful of states require the issuer to report the date of first sale.<sup>12</sup> Aside from lack of clarity with respect to what constitutes “date of first sale” (see discussion in Part III C below), we are gravely concerned that any failure to file in the current time frame of 15 calendar days from the date of first sale will be used by state regulators to extract late filing penalties,<sup>13</sup> or worse still, as a means of circumventing federal preemption by claiming that Rule 506 or new Rule 507 is unavailable due to non-compliance with Rule 503(a),<sup>14</sup> despite the fact that the filing of Form D is not a condition to the availability of the Regulation D exemptions.<sup>15</sup> Neither the increased exposure to late filing penalties nor the increased risk of claims by states that the issuer engaged in the unregistered sale of securities serves to reduce the filing burdens of the issuer.

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<sup>11</sup> See *id* at 37394.

<sup>12</sup> By reason of rule or practice, the following states ask for the first date of sale: Idaho, Maryland, Missouri, New Hampshire and Virgin Islands.

<sup>13</sup> The following states impose penalty fees on late filers by law or rule: Idaho, Iowa, Kansas, Maine, Missouri, New Hampshire, North Dakota, Ohio, South Dakota and Virgin Islands.

<sup>14</sup> For example, by rule or practice, the state securities regulators of Idaho and Maine take the position that a filing after thirty days precludes reliance on Rule 506 for that state.

<sup>15</sup> Release, 72 Fed. Reg. at 37377.

Accordingly, we urge the Commission to remove any requirement to state the date of first of sale.

#### **4. Battle of the Forms**

Securities Act § 18(b)(4)(D) provides that a state is not prohibited from “imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 4(2) that are in effect on September 1, 1996.” The notice filing requirements in effect on September 1, 1996, were the first five pages (Parts A-D) of current Form D.

Hence, with the proposed adoption of a new electronic Form D, a state that is opposed to such form may make the argument that new electronic Form D is not substantially similar to the Form D in effect on September 1, 1996, or that its statutes and/or rules require use of the current Form D and that under Securities Act § 18(b)(4)(D), the state may continue to require the version of Form D in effect prior to adoption of the new electronic form. The net effect of that argument would be that an issuer would be required to file current Form D in paper form in that state.

The continued use of current Form D in conjunction with filing new Form D electronically will cause issuers additional and unnecessary filing burdens and defeat the whole purpose of electronic filing.

Accordingly, we urge the Commission to explicitly declare that the new electronic Form D is substantially similar to the current Form D for the purposes of Section 18(b)(4)(D). As mentioned earlier, as the Securities Act is a federal statute and the states are limited by preemption with respect to Rule 506 offerings, we believe the Commission should use this authority to interpret Section 18(b)(4)(D).

#### **5. Flexible Filing Options**

The Preliminary Notes to Regulation D provide that “attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption.”

We hope that with the adoption of one-stop filing, this will not change and that the various filing strategies that are available in the offline world will similarly be available in the online world. For example, an issuer may simply wish to file Form D with a particular state or states and not with the Commission where that issuer is comfortable with relying on the Securities Act § 4(2) private placement exemption at the federal level. Accordingly, in such a case, an issuer should have the flexibility to designate whether or not the Commission will receive Form D and should not be required to file with the Commission just because it is filing with one or more states. One-stop filing efficiencies should not be at the expense of flexible filing options.



Accordingly, we urge the Commission to clarify that issuers will have the same filing flexibility as currently available.

## **B. Annual Updates and Amendments**

We welcome the Commission's proposed clarifications on the subject of when to file an amendment. This has long been a source of confusion among issuers and we hope that the adoption of such clarifications will bring much more certainty into this area. At the same time, with the goal of easing filing burdens in mind, we are concerned that the proposals in this area will propagate unnecessary and excessive filings. In particular, we are opposed to filing annual updates in any offering and would like to address any potential ambiguities as to when to file amendments.

### **1. Annual Updates**

The Release proposes that the Form D filing must be updated annually in connection with offerings lasting more than a year.<sup>16</sup> We believe strongly that this proposition dramatically contradicts the aim of simplification and compounds (rather than eases) the burdens of filing Form D. We observe that over the course of its existence, the Form D filing requirement has become progressively less burdensome, culminating ultimately with a proposal to actually suspend the filing requirement altogether in 1996.<sup>17</sup> In particular, the six-month annual update requirement and termination of offering filing were previously deleted in 1986,<sup>18</sup> and the filing itself ceased being a condition of the exemption in 1989.<sup>19</sup>

At present, the Commission does not specifically require annual updates and only a handful of states require annual updates.<sup>20</sup> Amendments are typically filed only to report a material change in facts during the pendency of an offering in accordance with Rule 503(d). In the Release, the Commission has proposed that an annual update be filed between January 1 and February 14 from the later of the filing of Form D or the most recent amendment;<sup>21</sup> a requirement that, in its present form, will at the very least be sure to generate confusion.

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<sup>16</sup> See Release, 72 Fed. Reg. at 37381.

<sup>17</sup> See Phase Two Recommendations of Task Force on Disclosure Simplification, Release Nos. 33-7301 & 34-37,263, 61 Fed. Reg. 30,405 (May 31, 1996) (proposing, *inter alia*, elimination of Form D filing).

<sup>18</sup> See Securities Act Release No. 6663, [1986- 1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,032 (Oct. 2, 1986).

<sup>19</sup> See Regulation D, Securities Act Release No. 6,825, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,404 (Mar. 14, 1989).

<sup>20</sup> The following states require annual updates: Alaska, Georgia, Illinois, Mississippi, Montana, New Hampshire, North Dakota and South Carolina.

<sup>21</sup> See Release, 72 Fed. Reg. at 37380-81.

It is not entirely clear from the Release whether an issuer may wait more than one year from the filing date before filing an annual update. For example, if an issuer were to file an initial Form D in November 2007, could the issuer wait until January 1 – February 14, 2009 or should the issuer file the “annual” update two or three months later in 2008? Clearly, from the standpoint of easing issuers’ burdens, it makes no sense to file an “annual” update in the latter situation.

Of course, this presupposes that no state annual updates are required. If an issuer is, in addition, required to file an annual update in a state requiring annual updates (and we suspect that the list of annual update states will grow given the Commission’s lead in this area and the prospect of levying additional filing fees), calculations of when and where to file become much more complex since, in the absence of coordination, state annual updates are typically tied to the anniversary of the filing date in the particular state. So does the Commission’s proposal mean that if the issuer files Form D in January 2008 with the Commission and in June 2008 amended its filing to add New Hampshire, would the issuer be required to file an annual update with New Hampshire in June 2009 and file with the Commission during the proposed January 1–February 14, 2010 period, or would the issuer be exempted from filing with the Commission in the proposed January 1– February 14, 2010 period because a prior amendment was made in June 2009? And if an issuer files Form D in January 2008 with both the Commission and New Hampshire, then in June 2008 amends Form D to add Pennsylvania, would that issuer still be required to update Form D annually with New Hampshire in January 2009 (in the absence of conforming rules), even though the issuer may not necessarily need to file an annual update with the Commission because of the June 2008 amendment?

In short, in the absence of conformity between the Commission and the states, annual updates will lead to much confusion and complexity and, as alluded to above, open the door for other states to promulgate annual update requirements which will inevitably lead to the levying of annual filing fees on issuers, all at additional cost and burden to the issuer, particularly small businesses.

We also note that such a requirement so disproportionately affects issuers in pooled investment vehicles, which are typically sold on a continuing basis, that it should be more explicitly identified as such – and may be a rule change more properly proposed under the rule-making authority set forth in the Investment Company Act of 1940, as amended (the “Investment Company Act”).<sup>22</sup>

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<sup>22</sup> The Commission has also proposed to require issuers to disclose the specific paragraph under Section 3(c) of the Investment Company Act, pursuant to which the issuer claims exclusion from the definition of “investment company.” Without conceding that the Commission has the authority to require such disclosure, we urge the Commission to limit disclosure to Sections 3(c)(1) and 3(c)(7) companies only, as recently suggested by the Committee of Federal Regulation of Securities of the American Bar Association in its comment letter to the Commission dated March 12, 2007 (in response to Release No. 33-8766). We also urge the Commission to clarify in Form D itself (either in the instructions and/or in the body of the form) that the provision of such disclosure is solely for informational purposes as indicated by the

We therefore strongly urge that the Commission withdraw this provision from the proposal as being incompatible with the Release's stated aims of simplifying Form D.<sup>23</sup> Correspondingly, we urge the Commission to remove proposed Item 8 which requires the issuer to report whether it intends the offering to last more than one year.

However, at the very least, in the event that the Commission proceeds with this requirement, we would urge the advance coordination with the states such that an annual update (whether it will be due within a specified date range or at the anniversary of the original filing) be consistent with the filings that may be required by the states. In other words, any annual update should be able to be made at one time by filing with the Commission and any necessary states. Absent this coordination, the annual update requirement will result in an even more complex array of burdensome and costly rules.

## **2. Amendments**

The Release proposes clarifications to the circumstances when amendments to Form D are to be filed. As stated above, we welcome these clarifications and generally agree with their scope. We nevertheless suggest that the Commission revise its proposals in accordance with the suggestions below:

### *a. Amendments to Correct Mistakes*

The requirement to amend Form D in the instance of a mistake of fact should be limited to "material" mistakes of fact rather than any mistake of fact. An innocuous misspelling of a name, for example, should not trigger the time and expense required to file an amendment.

### *b. Additional Recipients of Sales Compensation*

The Release provides that an amendment is required to reflect a change in information previously filed, subject to a list of six exceptions that include the amount of securities sold and the number of investors.<sup>24</sup> Consistent with the 1986 amendments eliminating updates, it seems the purpose behind the exceptions with respect to amount of securities sold and the number of investors is to avoid overburdening the issuer with subsequent updates as an ongoing offering progresses. Accordingly, we believe that the list of exceptions should include the addition of recipients of sales compensation.

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Commission in the Release, and is not a condition of the Investment Company Act exclusion on which the issuer is relying.

<sup>23</sup> For the same reason, we are opposed to any requirement to report the termination of an offering that lasts more than a year.

<sup>24</sup> See Release, 72 Fed. Reg. at 37380-81.

The exclusion of additional recipients of sales compensation from the list of excepted changes will effectively require an issuer to update the amount of securities sold and the number of investors when making an amendment to reflect the addition of a recipient of sales compensation, undermining the very exceptions that are intended to reduce the issuer's filing burdens.<sup>25</sup> Moreover, Form D is purely a notice filing for the offering of securities made without registration under the Securities Act;<sup>26</sup> it is not a broker-dealer registration compliance form.

Accordingly, we urge the Commission to add additional recipients of sales compensation to the list of exceptions.

c. *Information on Related Persons*

The Release provides that in offerings lasting more than one year, no amendment is required to information on related persons, if the change was due solely to the filling of a vacant position upon the death or departure in the ordinary course of business of the previous occupant of the position.

Consistent with the Commission's goal of easing filing burdens, we propose that such exception apply to all offerings regardless of duration of the offering and apply to the addition of any related person in the "ordinary course of business" regardless of the reason.

d. *Addition of New States in Ongoing Offering*

Though the Release indicates that the issuer is required in the proposed electronic form to designate the states to which Form D is directed,<sup>27</sup> the Release does not address the procedure if an issuer wishes to add an additional state or states in the course of an ongoing offering where the issuer has already filed Form D electronically with the Commission and/or a state or states. In such an instance, the issuer should be able to file with that state an "as filed" version of the Form D filed with the Commission. It should not be assumed that the addition of a state would fall into the rubric of an amendment, thereby necessitating the update of Form D and creating an unnecessary burden for the issuer.

Accordingly, we urge the Commission to clarify that where an issuer in an ongoing offering wishes to file in an additional state or states, it would at least have the

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<sup>25</sup> Inclusion of additional recipients of sales compensation in the list of excepted changes also bypasses the need to address the question of whether an individual recipient of sales compensation who is the sixth (or more) individual associated with a broker-dealer needs to be disclosed in an amendment when, according to proposed instructions to Item 12, only up to five individuals need to be disclosed.

<sup>26</sup> See Release, 72 Fed Reg. at 37376.

<sup>27</sup> See *id* at 37380.

flexibility of determining whether to file an “as filed” version of Form D or an updated version, in the same way that an issuer has that choice today.

### **3. Grandfather Provisions**

The Release did not address how existing paper Form D filers will be impacted by the proposals relating to annual updates and amendments.

We believe it would be overly burdensome to require such Form D filers to comply with the proposed annual update rules and amendments as currently contemplated. As the Release points out, when generating an amendment to the proposed electronic Form D, the new online system would likely make available to the issuer the version of the Form D to be amended, thereby enabling an issuer to respond only to changed items.<sup>28</sup> However, for existing paper Form D filers, this option will not be available and they will have to go through the time and expense of filling out a brand new form. Such a process does not comport with the Release’s stated goals.

We respectfully propose that the Commission explicitly amend Regulation D to clarify that any Form D filed prior to the adoption of the final rules on Electronic Filing and Simplification of Form D is exempted from compliance with the new rules relating to annual updates and amendments for ongoing offerings.

### **C. Free-Writing**

According to the Release, electronic Form D would not contain a place where so-called “free-writing” could occur.<sup>29</sup> Where an explanation is required to clarify an issuer’s response, an issuer would be forced to respond without explanation, at the risk of filing inaccurate or misleading information.

Examples of occasions where we believe free-writing is appropriate include the following:

- *Proposed Item 1 (Year of Incorporation/Organization).*

In Item 1 of proposed electronic Form D, the issuer is required to specify a date of incorporation or organization; no option is provided when the issuer is yet to be formed.<sup>30</sup> In some cases, an issuer files Form D prior to its formation, particularly an issuer which

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<sup>28</sup> See Release, 72 Fed. Reg. at 37381.

<sup>29</sup> See *id* at 37834. However, we note that the proposed electronic form would in some limited manner permit the issuer to describe the type of entity and security offered where “Other” is selected.

<sup>30</sup> In the current Form D, an option exists to indicate whether a limited partnership is to be formed. This option was omitted from the proposed electronic Form D. See *id* at 37379.

volunteers to make a pre-offer/sale filing in New York on Form 99.<sup>31</sup> However, in such instances, no applicable response to Item 1 is available, and it is unclear what the appropriate response would be absent an ability to explain that the issuer has not been formed.

- *Proposed Item 3 (Related Persons).*

In Item 3 of proposed electronic Form D, the issuer is required to specify the name and address of each executive officer, director and promoter. The instructions to proposed electronic Form D explain that each executive officer and director includes persons performing similar functions for the issuer such as general and managing partners of partnerships and managing members of limited liability companies. However, if an issuer is a limited partnership or limited liability company whose general partner or managing member is a corporation or other entity, in reporting the executive officers and directors of the general partner or managing member, clarification is necessary lest it appear that the persons reported are themselves the general partners or managing members of the issuer.

- *Proposed Item 9 (Type of Securities Offered).*

In Item 9 of proposed electronic Form D, an issuer is required to indicate the types of securities offered. We believe that the categories of securities listed are too rigid and that because of overlaps among the categories, an explanation in the “Other” section will all too often become inevitable and necessary.<sup>32</sup> We are concerned that due to the free-writing prohibition, there will not be enough space to accurately describe the securities being sold, bearing in mind that many offerings involve more than one type of security and usually require more than one or two words to capture the essence of the securities offered. Moreover, where multiple issuers are being reported and one issuer is selling one type of security and the other is selling another type of security (e.g., a debt security of one issuer and a guarantee by the other issuer), there would be no ability to reflect such a fact in the absence of explanation.

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<sup>31</sup> An issuer can file the Form D at any time before first sale if it has determined to make the offering. Release, 72 Fed. Reg. at 37383, n. 81.

<sup>32</sup> In the proposed instructions to Item 9, it is stated that issuers should use the ordinary dictionary and commonly understood meanings of these categories. For example, “debt securities” are, according to proposed instructions to Item 9, securities representing money loaned to an issuer that must be repaid to the investor at a later date. However, in the case of a garden variety security such as a debt instrument convertible into common stock, neither “Debt”, “Equity”, “Option, Warrant or Other Right to Acquire Another Security” nor any combination of the aforesaid accurately conveys the security indicated. Moreover, if more than one category were indicated, it would create the implication that more than one security is being sold when this may not be the case. Accordingly, it would be most accurate to describe such convertible debt under the “Other” option.

- *Proposed Item 10 (Business Combination Transaction).*

In Item 10 of proposed electronic Form D, an issuer is required to indicate whether the offering is being made in connection with a business combination transaction, such as a merger, acquisition or exchange offer. Current Form D requires the issuer to indicate whether the transaction is simply an exchange offer. The addition of the words “in connection with a business combination” creates ambiguity. For example, is a private placement immediately preceding an anticipated reverse merger an offering made in connection with a business combination? It would seem so from the language of proposed Item 10, though it would be misleading to suggest that such private placement involves a reverse merger prior to the reverse merger taking place, unless of course clarification of this fact is made.

- *Proposed Item 13 (Offering and Sales Amount).*

In Item 13 of proposed electronic Form D, an issuer is required to report the total offering amount and total amount sold.<sup>33</sup> Given the multitude of permutations of offerings being made nowadays, the reporting of these items is overly restrictive and will require explanation in many instances. For example, offerings that are structured with a minimum and maximum offering amount or discretion to increase the size of the offering do not fit neatly into the information disclosures of Item 13 and would require clarification. Similarly, offerings involving the receipt of securities in addition to or instead of cash, would require some form of explanatory note. And what about a qualified financing that follows a bridge round into which the bridge financing converts? In such instance, an issuer would want to clarify that the qualified financing includes the bridge financing, especially where the bridge financing has previously been reported in an earlier Form D. And what about a fund that feeds along with other feeder funds into a master fund? In such case, it is common to report the total offering amount of the master fund while reporting the total sales of the feeder fund, facts that most certainly should be clarified in a footnote. And what if the proceeds raised are in a foreign currency? For the sake of clarity, the issuer would want to disclose the exchange rate used to calculate the dollar amount of such proceeds.

In addition, we note that if free-writing is nevertheless prohibited, the static nature of Form D will prevent clarification in instances which at present cannot be foreseen.

According to the Commission, the rationale behind the prohibition on “free-writing” is to prevent the possibility of turning Form D into a marketing document to attract investors.<sup>34</sup> We agree with the Commission that Form D should not be abused in

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<sup>33</sup> As discussed in the proposed instructions to Item 13, we support the ability of an issuer to indicate that the amount of the offering is “indeterminate” if the amount is undetermined or cannot be calculated at the present time.

<sup>34</sup> See Release, 72 Fed. Reg. at 37384.

such a manner; however, it is difficult to comprehend how clarifying a response to ensure its accuracy, as in the examples above, would transform Form D into a marketing document. In addition, the Form D will be on file and the Commission can inquire of the issuer if any free-writing seems problematic.

The risk that Form D may become a marketing document is not the Commission's only concern. The Commission's prohibition on free-writing also dovetails into the Commission's proposed safe harbor from the prohibition on "general solicitation" and "general advertising".<sup>35</sup>

As presently proposed, the safe harbor would insulate the issuer from violating the prohibition on general solicitation and general advertising if the issuer has made a good faith and reasonable attempt to comply with the requirements of Form D.<sup>36</sup> While we support the Commission's proposal to create such a safe harbor (a necessity as long as prohibitions on general solicitation and general advertising remain a hallmark of most Regulation D offerings), we do not believe that such safe harbor should be used to justify the prohibition on free-writing.

If an issuer is engaging in free-writing for the sole purpose of clarifying a response that would otherwise be inaccurate or misleading, we believe that the language of the safe harbor as proposed is broad enough to shield the issuer where such clarification is being made in good faith and with a reasonable attempt to comply with the requirements of Form D.

We are cognizant of the Commission's implicit desire to strike a delicate balance between making Form D publicly accessible on the Internet while at the same time maintaining the prohibition on general solicitation and general advertising. However, this should not be at the expense of the integrity of the information reported in Form D. It places issuers in an unacceptable situation where they must elect one of two bad choices: either to submit potentially inaccurate or misleading information on Form D or not to submit Form D at all, each with its attendant risks.<sup>37</sup> From the Commission's perspective, the lack of free-writing will, we believe, contribute to poorer quality of information collection and potentially divert precious enforcement resources.<sup>38</sup>

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<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at 37384. Ideally, a parallel safe harbor should be adopted by the individual states to provide issuers with the same level of comfort in non-covered securities offerings under Regulation D where general solicitation and general advertising are prohibited.

<sup>37</sup> While the filing of a Form D is not a condition of Rule 506, a failure to file the form or the filing of a form with material omissions or misrepresentations could subject the issuer to civil action by the Commission under the Securities Act § 20 or criminal prosecution under Securities Act § 24. Similar remedies may be available to states under Blue Sky laws. Sanctions might also be imposed under general statutes relating to false filings with governmental agencies.

<sup>38</sup> The Commission indicated that one of the purposes of the new electronic Form D is to improve collection of data for enforcement and rulemaking efforts. *See* Release, 72 Fed. Reg. at 37378.



Accordingly, we respectfully urge the Commission to permit free-writing for the sole purpose of clarifying a response, and also to clarify the language of the safe harbor so that free-writing for the sole purpose of clarifying a response in Form D will not run afoul of the safe harbor if made in accordance with its terms.

#### **D. Undertaking to Provide Offering Materials**

The Release proposes that the combined signature requirement will include an undertaking to provide offering information to the Commission and the states upon request.<sup>39</sup> The Release further indicates that by executing the undertaking, the issuer will not be affecting any limits NSMIA imposes on the states to require the information<sup>40</sup> without specifically imposing the limits of NSMIA in the language of the undertaking itself.

Under Securities Act § 18(c)(2)(A), states are only entitled to require the “filing of any document filed with the Commission pursuant to this title” as part of permitted notice filings. Therefore, since offering materials are not filed with the Commission as part of a filing under Rule 503 for a Rule 506 offering, offering materials need not be filed with states except in the course of a bona fide fraud case, as permitted by Securities Act § 18(c)(1).

We are concerned that without absolute clarity on this proposal, there will be uncertainty as to what new affirmative responsibilities the issuer will have upon executing the undertaking.<sup>41</sup> Put another way, an undertaking that does not clearly delineate the NSMIA limitations will invite complexity for Rule 506 and new Rule 507 filers that will controvert the aim of simplification.

This is not merely theoretical. Issuers’ obligations under NSMIA’s preemption have been less than clear to some of the states in the past.<sup>42</sup> We fear that the interpretation of what is preempted will vary from state to state, and that the undertaking will be used to regulate federally preempted offerings through the “back door,” with states routinely asking issuers to file offering materials in all cases, and reviewing and commenting on such materials in a purported exercise of permitted anti-fraud authority

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<sup>39</sup> See *id* at 37382.

<sup>40</sup> See *id*.

<sup>41</sup> For example, it could be asserted that the signing issuer knew about the NSMIA preemption, but was waiving it in the undertaking.

<sup>42</sup> For example, New York continues to maintain a separate pre-offering/pre-sale filing (in addition to Form D) that is considerably broader in nature and scope than Form D and inconsistent with NSMIA. See the “Private Offering Exemptions and Exclusions Under the New York State Martin Act and Section 18 of the Securities Act of 1933” position paper of the Committee on Securities Regulation of the New York State Bar Association available at [http://www.nysba.org/MSTemplate.cfm?Section=Securities\\_Regulation&Template=/ContentManagement/ContentDisplay.cfm&ContentID=78774&MicrositeID=49](http://www.nysba.org/MSTemplate.cfm?Section=Securities_Regulation&Template=/ContentManagement/ContentDisplay.cfm&ContentID=78774&MicrositeID=49) (last visited Sep. 2, 2007).

under NSMIA. We believe the intent of NSMIA was to place the burden on the regulator to assert the necessity of such materials, not as part of “fishing expeditions,” but rather as part of legitimate fraud investigations.

In the current version of Form D, the federal signature in Part D on page 5 of Form D includes an undertaking to the Commission to provide any offering information given to non-accredited investors *solely when filing under Rule 505*. In contrast, the current state signature in Part E on page 6 of Form D provides, among other things, a general undertaking to provide offering materials to a state administrator upon written request without exception. That undertaking and the others in Part E are derived from the “Uniform Limited Offering Exemption” enacted pre-NSMIA by a number of states to coordinate with Rules 505 and 506;<sup>43</sup> post-NSMIA, all of these undertakings are inapplicable to Rule 506 offerings.<sup>44</sup>

It is clear from Securities Act § 18(c)(2)(A) that if Congress meant to preserve or permit an obligation to provide offering materials in covered securities transactions in cases where they are not filed with the Commission, it would have explicitly stated so (along with the precisely stated enumeration of other preserved state requirements). Moreover, the Senate, House and Conference reports on NSMIA make clear that Congress did not intend to permit the states to use the enforcement powers reserved to them to “reconstruct in a different form the regulatory regime for covered securities that Section 18 has preempted.”<sup>45</sup>

We therefore strongly urge the Commission either to tailor the undertaking strictly such that it is inapplicable to Rule 506 and new Rule 507 offerings, or alternatively to remove the undertaking altogether.

## **E. Sales Compensation Reporting**

### **1. Names of Associated Persons of Broker or Dealer**

Item 12 of proposed electronic Form D carries with it the requirement to identify the name of the broker or dealer and up to five individual recipients of sales compensation where such individuals are associated with a broker or dealer. If there are more than five such recipients, the issuer need only identify the name of the broker or dealer.

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<sup>43</sup> See NASAA Reports (CCH) ¶ 6201.

<sup>44</sup> Typically, a Form D filer under Rule 506 will not be concerned with the federal undertaking, as it is clear on its face that it applies only to Rule 505 offerings involving non-accredited investors. However, we believe that, as a prophylactic measure, many Rule 506 filers mark the state signature undertakings as “Inapplicable” to avoid any possible misconstruing of the undertakings.

<sup>45</sup> H.R. Rep. No. 104-622, at 34 (1996).

As the Release indicated, this is a carryover from current Form D.<sup>46</sup> We believe that requiring the issuer to name individual recipients requires the issuer to go to extra and unnecessary lengths to ascertain from the broker or dealer the names of the individuals, information that is often not known to the issuer and not readily apparent. For example, if an issuer is reporting prospectively, it is not always clear who the actual individual recipient(s) of sales compensation are going to be – the broker or dealer is generally free to add or remove selling agents to an issuer’s offering. In addition, what constitutes sales compensation is not always clear and requires the issuer to draw legal conclusions (at expense to the issuer); for example, is an individual recipient of sales compensation someone who received a bonus as a result of sales of the issuer’s securities even if that individual did no selling him/herself?

In light of the above, we believe that provision of the name of the broker or dealer should be sufficient for the purposes of Form D, especially since the relationship between the broker or dealer and its selling agents is already heavily regulated by the Financial Industry Regulatory Authority and the contractual relationship for the payment of sales compensation is made between the issuer and broker or dealer, not the individual selling agent.

## **2. CRD Numbers and Unregistered Broker-Dealers**

If the Commission nevertheless decides to continue requiring the names of individual recipients of sales compensation where they are associated with a broker or dealer, we propose that the Commission eliminate its new proposal to require disclosure of the CRD number.<sup>47</sup> Moreover, we propose that individual recipients of sales compensation who are not associated with brokers or dealers, such as finders, be excluded from disclosure in Item 12.<sup>48</sup>

We are concerned that the absence of a CRD number and the inclusion of a recipient of sales compensation in the absence of a broker or dealer will place the issuer at risk of enforcement action, even though the conduct of the individuals disclosed on Form D may not rise to the level set forth in Section 3(a)(4) or 3(a)(5) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) (or satisfies one of the exclusions in those sections by virtue of their status, as in the case of certain banking institutions under Exchange Act § (3)(a)(4)(B)). As a result, an issuer may opt not to file Form D and instead simply rely on the Securities Act § 4(2) private offering exemption. This, of course, frustrates the information gathering component of Form D for both the Commission and states and does not give the issuer comfort that it falls within the Regulation D safe harbor.

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<sup>46</sup> See Release, 72 Fed. Reg. at 37381.

<sup>47</sup> See *id.*

<sup>48</sup> In Instruction 12 to proposed electronic Form D, the issuer is required to include finders in its reporting of sales compensation.

We are aware of the ongoing efforts and discussion to clarify the circumstances under which payment of sales compensation can be made to non-registered broker dealers, including a modified form of registration for finders or an alternative federal exemption based on state regulation.<sup>49</sup> We support these efforts and urge the Commission to finalize its analysis of the issue and prepare a solution. Until some substantive advance can be made in this area, we believe the Commission should forestall the use of Form D as a broker-dealer registration compliance tool.

### **3. Further Clarification**

We call upon the Commission to take this opportunity to declare that the identification requirements for recipients of sales compensation are limited to United States sales, or at the very least clarify that they are applicable to both United States and foreign sales.

## **F. Technological Proposals**

The Commission's stated goal is to make filing Form D information as easy as many tasks commonly performed by people using the Internet today.<sup>50</sup> We believe that two particular aspects of the electronic filing procedure, the requirement to obtain EDGAR filing codes prior to filing and the inability to save a draft version of Form D, are inconsistent with this stated goal and could have the individual or combined effect of discouraging use of Form D among issuers, particularly small businesses. After discussing these two aspects of the filing procedure, we make some additional suggestions designed to enhance and facilitate the introduction of the new electronic Form D.

### **1. EDGAR Filing Codes**

The Release proposes that issuers who do not already have EDGAR filing codes and who have not been assigned a Central Index Key code ("CIK") would be required to obtain those codes in order to be able to file Form D electronically.<sup>51</sup>

The process of obtaining the codes involves filing Form ID electronically and then authenticating the filing in paper, either two days before or after, with a notarized version of Form ID. This requirement will most heavily impact non-reporting

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<sup>49</sup> See generally Task Force on Private Placement Broker-Dealers, ABA Section of Business Law, *Report and Recommendations of the Task Force on Private Placement Broker-Dealers*, 60 BUS. LAW. 959 (May 2005), available at [http://www.abanet.org/buslaw/tbl/tblonline/2005\\_060\\_03/home.shtml#2](http://www.abanet.org/buslaw/tbl/tblonline/2005_060_03/home.shtml#2) (last visited Sep. 2, 2007); 7 TEX. ADMIN. CODE §115.11 (establishing a regulatory disclosure scheme applicable to finders).

<sup>50</sup> See Release, 72 Fed. Reg. at 37378.

<sup>51</sup> See *id* at 37385.

companies, believed by the Commission to comprise about 95% of Form D filers, who would be unlikely to have EDGAR filing codes or a CIK.<sup>52</sup>

Based on the experience of members of the Committees, particularly with respect to Form 3, 4 and 5 filings, the requirement of supplying a notarized authentication to obtain the EDGAR filing codes has caused filers unnecessary delays and is cumbersome. Signatories of Form ID do not always have ready access to notaries and even if they do, are required to take time out of busy schedules to supply the necessary authentication in the two-day time frame. For issuers whose signatories are not in the United States, the process of notarization is even more difficult and costly due to the different roles performed by notaries outside the United States.<sup>53</sup> This is not the only problem that plagues the Form ID process. Members of the Committees bemoan the problem of multiple CIKs for a single issuer,<sup>54</sup> the lack of clarity of Form ID itself, the expiration of codes, and the difficulties of tracking down previously assigned codes.

For this reason, we believe that obtaining the EDGAR filing codes will unnecessarily burden the Form D filing process for non-reporting companies and almost certainly increase non-compliance with the requirement to file Form D within the 15-calendar-day time frame, given the inevitability of delays.<sup>55</sup>

We note that other branches of the government accept filings over the Internet without additional authentication measures. For example, the Internal Revenue Service's "Free File" program accepted 3.9 million individual tax returns online in 2006<sup>56</sup> and the United States Patent and Trademark Office (the "USPTO") accepted 93.8% of the

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<sup>52</sup> See *id* at 37388, n. 111.

<sup>53</sup> In most European and Latin American countries, a notary is a lawyer subject to extra qualification and oversight requirements, whose role is substantially different from that of a U.S. notary public. They are usually much less accessible and charge higher fees than U.S. notaries.

<sup>54</sup> Unbeknownst to many issuers, the Commission now issues a CIK to every issuer that files Form D that has not previously been assigned a CIK. As a result, in some instances, such as where an issuer becomes a reporting company, an issuer applies for and is assigned a brand new CIK, unaware that it may already have been issued a CIK from a previous Form D filing. In other instances, such as where an issuer changes its form of organization, name, or address, or when a subsequent Form D filing is made, a new CIK is automatically issued even though it is the same issuer.

<sup>55</sup> We note with particular concern that the Release estimates the burden of Form ID being 9 minutes per response, an estimate which does not comport with the experiences of several members of the Committees. Since the Commission has routinely issued CIKs to paper Form D filers without the filer's having to apply, it would seem logical that a CIK application should not be needed. If the Commission believes a CIK is essential for tracking filings, however, it could continue its past practice of issuing a CIK upon receipt of an electronically filed Form D, and the issuer could thereafter notify the Commission to resolve any confusion if that results in more than a single CIK for the same issuer.

<sup>56</sup> Final Audit Report – The Modernized e-File Project Can Improve Its Management of Requirements (Audit # 200720002), (Jul. 9, 2007), <http://www.treas.gov/tigta/auditreports/2007reports/200720099fr.html> (last visited Sep. 2, 2007).

354,775 applications filed online in 2006,<sup>57</sup> each without any special authentication.

Though the Release did not discuss the justification behind requiring EDGAR filing codes, it appears the reason behind such requirement is for security purposes.<sup>58</sup> In the case of reporting companies, we support a process of authentication (though not necessarily the system in place currently) as both necessary and warranted as a result of the effect that a fraudulent filing could have on the marketplace. In contrast, due to the inherent private nature of non-reporting companies, we believe the same level of security measures is unwarranted when balanced against the additional burdens of authentication.

Accordingly, to alleviate the burden on non-reporting companies, we propose that the requirement to supply EDGAR filing codes in order to file Form D should be limited to reporting companies only.

## **2. Saving Incomplete Forms**

The Commission stated in the Release that an issuer should have all necessary information available prior to going online and filling out Form D,<sup>59</sup> because the system would not provide a way to save an incomplete form online from session to session.<sup>60</sup> Moreover, time-outs following the user's last activity would be implemented due to cost and technical limitations.<sup>61</sup>

The proposed time-out feature (which is understandable) and the complexity of the information required by Form D, together with the attendant implications of supplying inaccurate information, virtually require that a prudent filer prepare a Form D offline by filling in the relevant fields on a specially created offline template, and once the template is complete, inputting all the information online. Aside from the risk of inadvertently inputting incorrect information, inability to save an incomplete form imposes an additional and unnecessarily time-consuming stage to the electronic filing process (including additional legal fees for those having a law firm file on their behalf). Filers that opt to fill in Form D online without preparing an offline template risk submitting incomplete or inaccurate information especially if there is a pressure to submit the form before the session times out.

It is perplexing that in this day and age the proposed online filing system for Form D will not be able to accommodate the saving of an incomplete form for use in the next online session. The Financial Industry Regulatory Authority's online filing system,

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<sup>57</sup> United States Patent and Trademark Office, Performance and Accountability Report 2006 at 33, 135, <http://www.uspto.gov/web/offices/com/annual/2006/2006annualreport.pdf> (last visited Sep. 2, 2007).

<sup>58</sup> See Release, 72 Fed. Reg. at 37386.

<sup>59</sup> See *id.* at 37385, n. 96.

<sup>60</sup> See *id.* at 37385.

<sup>61</sup> See *id.*

COBRADESK, permits the saving of sessions, as does the USPTO online filing system, otherwise known as the Trademark Electronic Application System (“TEAS”).

In its Final Rule adopting “Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5” the Commission did not adopt the suggestions of many commenters that filers may save incomplete forms for the next online session.<sup>62</sup> Partly in response, the financial printing industry has developed self-filing software programs to supplement the deficiencies of the Form 3, 4 and 5 online filing process.<sup>63</sup> Among the primary functionalities of such self-filing software programs is the ability to save a session. It would not be unreasonable to anticipate that the financial printing industry will develop supplemental self-filing programs for the proposed online Form D, resulting in increased costs for issuers, particularly small businesses, who will be hardest hit.

Accordingly, we strongly urge the Commission to provide a filer with the ability to save a partially completed form until the next log-on session. We suggest that this can be readily accomplished by allowing the download of a file (containing the inputted information) to the filer’s local computer and permitting the upload of the file when a new session commences, automatically populating the fields with responses previously inputted. This is the system that is currently utilized by the USPTO’s TEAS. We believe that if a system for saving sessions were adopted, the Commission’s online filing system would not be burdened with the costs associated with the alternative of storing in the Commission’s own system thousands of incomplete Form Ds.<sup>64</sup>

Additionally, we propose, as an extra precaution, that the proposed online filing system prompt the user (as does TEAS) with a pop-up window at a prescribed interval (perhaps five minutes) before the time-out, warning that the session is about to expire and permit the user to extend the session by clicking an “OK” button in the pop-up window.

### **3. Viewing Form D Prior to Filing**

The Commission indicated in the Release that an issuer would be able to download and print the filing before and after submission<sup>65</sup> but it was unclear whether an online user friendly version of Form D would be viewable before downloading or printing.

Accordingly, in the interest of enhancing the user interface, we propose the

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<sup>62</sup> See Final Rules: Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5, Release Nos. 33-8230, 34-47809, 35-27674, IC-26044, 68 Fed. Reg. 37179 (June 23, 2003).

<sup>63</sup> See, e.g., “Vintage 16” of Vintage Filings, LLC and the “Forms 3, 4 and 5 Filer” of Command Financial Press.

<sup>64</sup> It also would preserve the confidentiality of partially completed Form D as the information on a partially completed Form D would not reside on the Commission’s servers.

<sup>65</sup> See Release, 72 Fed. Reg. at 37385.

Commission include the option of viewing a user-friendly display version of Form D (in a format such as HTML) that may be accessed before hitting the "SUBMIT" button.

#### **4. "As-Filed" Electronic Form D**

We urge the Commission to build into the electronic filing system a means for printing a hard copy of the "as-filed" electronic Form D for a twofold purpose: first, for record-keeping purposes and second, to enable the issuer to manually sign the "as-filed" electronic Form D for the purpose of filing in paper with those states who are yet to adopt one-stop electronic filing rules or regulations.

#### **5. Phase-In Period**

We support a period of voluntary electronic filing of at least twelve months so that the Commission can address the technical and other practical issues that inevitably arise with any new system. It would also give states an additional opportunity to adopt conforming one-stop filing rules<sup>66</sup> as well as implement any infrastructure necessary to facilitate the online collection of filing fees.

#### **G. Public Accessibility of Form D Online**

The Release proposes that Form D will be available on the Commission's website, available to regulators and members of the public who choose to access it.<sup>67</sup> In one sense, this does not represent a radical departure - Form D filings have always been "publicly available," in that they were available from the Commission's public reference room or through disclosure services.<sup>68</sup> However, the appearance of Form D on the Commission's website would significantly increase its public accessibility, which we believe might well result in issuers making less use of the Form D than is currently the case.

We are aware of a number of investment-oriented publications that track venture-backed financings using the Form D filings. In addition, some third party vendors are currently tracking the paper filings of Form D to do targeted marketing. Companies that have recently filed a Form D are reporting that they are immediately spammed by offers of loans, products and services. Up to now, these third parties generally have had to go to the time and effort of paying someone to search the paper filings. If filings are made electronically, freely available on the Commission's website, the combination of Form D's greater accessibility and data mining technologies is virtually certain to cause an increase in the amount of such "off-label use" by third parties. In fact, we are aware

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<sup>66</sup> It is our hope that a critical mass of states adopt conforming one-stop filing rules before the launch of any voluntary electronic filing system.

<sup>67</sup> See Release, 72 Fed. Reg. at 37385.

<sup>68</sup> See *id.*



that some venture funds now require their term sheets to provide that no Form D may be filed without their consent. This trend away from Form D is likely to accelerate if an electronic, non-confidential filing of Form D were to be mandated.

Although many privately-held companies have websites and issue regular press releases about their activities, just as public companies do, many other privately-held companies prefer to maintain a lower profile. Such companies do not make public announcements of their financings or other activities, particularly if they are working in a new technology area where competition to develop new products or services is intense. These companies often go to great lengths to avoid unwanted publicity, sometimes asking their attorneys, for example, not to mention their financing transactions in law firm marketing materials. The electronic posting of Form D may create a business problem for these companies, by making information publicly available about their private financings that they had not otherwise wanted or been required to disclose.

Form D was originally adopted as an information-gathering system to assess the effectiveness of Regulation D as a capital-raising device for small businesses.<sup>69</sup> Over the years, as the Release acknowledges, the Commission has also used the filings as a way for it (and investors) to track compliance with the federal securities laws.<sup>70</sup> We are concerned that the Commission, in trying to encourage the greater use of Form D for more private offerings, is inadvertently encouraging the use of Form D by third parties for purposes far beyond either its original intent or its current use, and making it less useful for issuers in the process.

Rule 506 under Regulation D was designed to provide issuers a safe harbor so that an offering that complied with its restrictions would qualify for the Securities Act § 4(2) private placement exemption. In addition, because securities issued in Rule 506 offerings are “covered securities,” issuers relying on Rule 506 receive the benefit of federal preemption of compliance with disparate exemptions under state Blue Sky laws. Rule 506 thus offers significant compliance advantages to the issuer. With the accessibility of Form D on the Commission’s website, many issuers would therefore have to forgo some of the protection available under the Regulation D safe harbor, for what are essentially unrelated business reasons.

We respectfully suggest that the ultimate result of the Commission's proposed change will be the decreased use of Form D by certain kinds of issuers. As a result, the Commission may find itself with less information about the private offering market than it currently receives.

We suggest that, as an alternative, the Commission allow companies to make Form D filings on a confidential basis. Confidential filing would only be available to

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<sup>69</sup> See *id* at 37376, n. 14.

<sup>70</sup> See *id* at 37377.

companies that had made no public disclosure of the offering, whether by “tombstone” ad, press release, or other media publication. Using such a confidential filing procedure, the Form D would be available for the Commission's information and the states to whom Form D is sent, but neither the fact of the filing nor the information in Form D would be available to third parties for a specified period, e.g. one year, from filing.<sup>71</sup> We understand that this type of confidential filing procedure has been used by the Commission in the past, for example in connection with proxy statements for certain business combinations. The availability of a confidential filing procedure would, in our view, keep the use of Form D a viable option for more companies, and therefore continue to provide the Commission with useful information about the private offering market.<sup>72</sup>

## **H. Deemed Date of Filing**

Two particular issues arise in the context of the deemed date of filing: the first addresses the time during which a filing may be made on a business day, and the second addresses the issue of what happens when the due date falls on a weekend or holiday.

### **1. Cut-Off Time for Filing**

The Release indicated that Rule 13 of Regulation S-T would determine the filing date of electronically filed Form D.<sup>73</sup> According to Rule 13, generally a filing by direct transmission beginning on or before 5:30 p.m. Eastern time on a business day is deemed filed that day and, if such a filing were to begin after that time, it would be deemed filed on the next business day.

We anticipate that a 5:30 p.m. filing deadline will create additional and unnecessary administrative burdens, especially for filers that are natural persons or are located in the western part of the United States or outside the United States, particularly because of the short filing deadline of 15 calendar days.<sup>74</sup> Moreover, as Form D is purely a notice filing to the Commission and state regulators, a 5:30 p.m. deadline is no more arbitrary than any other after hours deadline.

Filings made under Rule 462(b) and filings on Forms 3, 4 and 5 may be made until 10:00 p.m. in order to be considered filed as of the same day. When the Commission issued its release on “Mandated Electronic Filing and Website Posting for

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<sup>71</sup> For purposes of the Freedom of Information Act of 1966, as amended and Rule 80 promulgated thereunder, Form D filings would be excepted from publication by virtue of being trade secrets and commercial or financial information obtained from a person and privileged or confidential.

<sup>72</sup> Parenthetically, we note that implementation of a confidential filing procedure would greatly reduce the need for a new safe harbor for general solicitation and general advertising and the Commission's concerns regarding free-writing would be significantly obviated.

<sup>73</sup> See Release, 72 Fed. Reg. at 37384.

<sup>74</sup> See our proposal to extend the 15-day time frame in Part III B *infra*.

Forms 3, 4 and 5”,<sup>75</sup> commenters resoundingly called for an extended filing deadline, which resulted in the Commission amending its proposal to extend the filing deadline to 10:00 p.m.<sup>76</sup>

Accordingly, we respectfully urge the Commission to accord electronic Form D filers the same preferential treatment as Rule 462(b) and Form 3, 4 and 5 filers by extending the filing cut-off time from 5:30 p.m. Eastern time to 10:00 p.m. Eastern time.

## **2. Due Date Falling on a Weekend or Holiday**

Under the current EDGAR filing system, filings may be made on business days between 6:00 a.m. and 10:00 p.m. Eastern time. Rule 0-3 under the Exchange Act provides that when the due date of a filing falls on Saturday, Sunday or a holiday, the filing will be considered timely filed if it is filed on the first business day following the due date.

There is no corresponding rule promulgated under the Securities Act (including Rule 13 of Regulation S-T) and the instructions of proposed electronic Form D are silent.<sup>77</sup> As a result, since Form D is a filing being made under the Securities Act, if the fifteenth day falls on a weekend or a holiday, the issuer will be required, under the new electronic filing system, to file Form D on the preceding Friday or the day before the holiday, with the effect of reducing an already short filing period.<sup>78</sup>

In contrast, when filing current Form D, the instructions provide that Form D shall be deemed filed on the earlier of the date received by the Commission or if received after the due date, the date it was mailed by United States registered or certified mail. As certain post offices are open on the weekend (for example, the main post office in Manhattan is open twenty-four hours a day, seven days a week), it means that it is still possible to file in paper form on the weekend if the due date falls on such day.

Accordingly, the move to an electronic filing system will inadvertently reduce an already short filing period for issuers, increasing filing burdens on the issuer. We therefore urge the Commission to amend the rules of the Securities Act to provide for a

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<sup>75</sup> See Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5, Release Nos. 33-8170, 34-47069, 35-27627, IC-25872, 67 Fed. Reg. 79465 (Dec. 27, 2002).

<sup>76</sup> See Final Rule: Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5, Release Nos. 33-8230, 34-47809, 35-27674, IC-26044, 68 Fed. Reg. 25787 (May 7, 2003).

<sup>77</sup> By contrast, Rule 424 under the Securities Act imposes prospectus filing periods premised on “business days,” an undefined term.

<sup>78</sup> If the fifteenth day falls on a Sunday, the issuer will be required to file on the preceding Friday (assuming Friday is not a holiday), which will give the issuer thirteen days post-sale to file. If the fifteenth day falls on a Monday which is a holiday, the issuer will be required to file on the preceding Friday which will give the issuer an even shorter period of twelve days post-sale to file.

corresponding rule to Rule 0-3 of the Exchange Act for electronic Form D filings.

## **I. Identifying and Contact Information**

There are two particular aspects of the identifying and contact information that we would like to raise with the Commission, those relating to multiple issuers and the use of “care of” addresses.

### **1. Multiple Issuers**

We support the Commission’s proposal to permit the identification of multiple issuers on one form rather than file separate forms.<sup>79</sup> However, according to the Release, the proposed electronic form would not provide for the submission of more than one place of business or telephone number in a multiple issuer offering. We propose that the Commission permit each issuer in a multiple issuer offering to state its address and telephone number. We perceive a particular need so as to avoid any implication that the issuers are affiliated in any way, if they are not, especially if the information reported on Form D will be publicly accessible online.

### **2. “Care of” Addresses**

While we agree with the Commission that post office box numbers are an unacceptable place of business information, we do not support the Commission’s proposed prohibition on the use of “care of” addresses.<sup>80</sup>

There are many instances where the issuer, a limited liability company or limited partnership for example, will operate out of the offices of its managing member or general partner (which might operate a number of limited liability companies and limited partnerships). Lease restrictions or practical concerns may preclude separate listings for each issuer in a building’s directory or on an office door. Accordingly, mail directed to the particular entity might not be deliverable and even personal delivery might be problematic unless the address is “care of” the managing member or general partner, as applicable.

We therefore request that the Commission reconsider its prohibition on the use of “care of” addresses.

## **J. Revenue Range**

We do not support the Commission’s proposal to identify the revenue range. We

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<sup>79</sup> See Release, 72 Fed. Reg. at 37379, n. 39.

<sup>80</sup> See Release, 72 Fed. Reg. at 37379.

do not believe that an issuer should be required to report this information in a notice filing.

For many small businesses, an issuer's revenue range is private company information, and it is likely many issuers will opt out of this disclosure by choosing the "Decline to Disclose" option. Opting out will substantially reduce the integrity of the information being collected by the Commission and will potentially create a negative implication against an issuer not making such disclosure.

At its essence, Form D is a notice filing and, as such, we believe that, notwithstanding the Commission's proposed safe harbor on general solicitation and general advertising, reporting a revenue range undercuts the prohibitions on general solicitation and general advertising of those exemptions of Regulation D to which such prohibitions are applicable.

Accordingly, we propose that the Commission eliminate any such requirement.<sup>81</sup>

## **K. Certain Deletions**

There are several components to the proposals that we believe are squarely consistent with the aim of easing the costs and burdens of preparing and filing Form D and for which we wish to express our support. These include: (1) deleting references to ULOE and deleting the state-by-state appendix; (2) deleting the requirement to report offering expenses and uses of proceeds; (3) deleting the requirement to report 10% beneficial owners; and (4) deleting the name of the offering.

### **1. ULOE and the State-by-State Appendix**

We agree with the Commission that Form D filers who might be availing themselves of ULOE would generally mark the Form D as a 505 filing, and that the majority of filers do not need or use the exemption. Removing it will not result in any loss of information. Moreover, the ULOE provisions in Form D can also present uncertainty and concern for issuers who are unfamiliar with ULOE and who might undertake research or investigation only to confirm that those provisions in the Form D do not apply to them. We also agree with the Commission that completing the state-by-state appendix is burdensome without sufficient benefits.

### **2. Offering Expenses and Proceeds**

We agree with the Commission that the offering expenses and use of proceeds requirements do not yield information meaningful to an evaluation of the claimed exemption or for rulemaking efforts – especially when the time and resources necessary

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<sup>81</sup> For the same reasons, we do not support reporting the value of an issuer's assets, whether as a range or by any other method.

to complete these sections is taken into account. The figures reported are not subject to any accounting standard, the categories are subject to interpretation, and if the figures are reported as estimates, which is invariably the case, they are of limited use.

### **3. 10% Beneficial Owners**

We agree with the Commission that reporting 10% beneficial owners provides little to further the regulatory objectives that are the focus of Form D information, and that individual investors will have access to this information to the extent that it is necessary or relevant to them. Removing these requirements will reduce the time and resources necessary to prepare the form, especially in the context of startups and private funds, as well as do much to eliminate privacy concerns of investors in private companies.

### **4. Name of Offering**

We support the Commission's proposal to eliminate the name of the offering and agree with the Commission that naming offerings is now uncommon and unnecessary.

### **L. Other Potential Disclosures**

Consistent with Commission's goal of reducing filing burdens, we do not support reporting additional items of information such as the CUSIP number, trading symbol or Commission file number (where applicable). Though seemingly innocuous requests, these do not appear to be useful information requests and in the aggregate unnecessarily add to the issuer's filing burdens.

## **III. FURTHER REFORMS**

We believe that the Commission could go further in its slate of measures to modernize and improve capital-raising and reporting requirements for smaller companies.<sup>82</sup> In particular, we believe the Commission should take this opportunity to further ease the burdens of issuers in their capital-raising efforts and we make three proposals to the Commission designed to ease such burdens.

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<sup>82</sup> The proposals contained in the Release are but one of six main proposals announced by the Commission on May 23, 2007. See Commission Press Release dated May 23, 2007 entitled "Proposed Modernization of Smaller Company Capital-Raising and Disclosure Requirements" available at <http://www.sec.gov/news/press/2007/2007-102.htm>.

**A. Elimination of Form D**

We respectfully urge the Commission to re-consider eliminating Form D for Regulation D and Securities Act § 4(6) exemptions, or the very least, for Rule 506 filings.<sup>83</sup>

As previously acknowledged by the Commission, notice filings are not required when making offerings under other exemptions from Securities Act registration, such as an intrastate offering under the Rule 147 safe harbor.<sup>84</sup> Furthermore, when balancing the information collected in Form D by the Commission and the states against the time and expense required to prepare and file Form D, not to mention, in many cases, excessive state filing fees, we believe that issuers, and ultimately investors, are better served by the elimination of Form D.

**B. Extension of 15-Calendar-Day Filing Deadline**

We believe the Commission should take this opportunity to extend the period for filing Form D beyond 15 calendar days after first sale<sup>85</sup> and we respectfully urge the Commission to do so.

We believe that 15 calendar days is far too short a time frame to gather all the information required to accurately fill out the form, obtain necessary approvals with respect to the information, and coordinate signatures.<sup>86</sup> These problems are compounded where issuers or their signatories are abroad or in different time zones or where the issuer fails to timely inform the Form D preparer of the consummation of a first sale because, as discussed below, the precise time is not always clear.

As discussed elsewhere in this comment letter, failure to file on time at best exposes the issuer to late filing fees and penalties levied at the state level<sup>87</sup> and at worst, places issuers at unnecessary risk of claims by the state or investors that the issuer engaged in the unregistered sale of securities.<sup>88</sup>

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<sup>83</sup> In 1996, the Commission proposed to eliminate the Form D filing requirement. *See* Release, 72 Fed. Reg. at 37377.

<sup>84</sup> *See* Phase One Recommendations of Task Force on Disclosure Simplification, Exchange Act Release Nos. 33-7300 & 34-37,262, 61 Fed. Reg. 30,397, 30,397 (May 31, 1996).

<sup>85</sup> *See* Release, 72 Fed. Reg. at 37383, n. 81.

<sup>86</sup> Even if electronic Form D permits electronic signature of the form, as a matter of risk management, most law firms would still insist upon receiving a manually signed Form D from their clients for their own records.

<sup>87</sup> *See supra* note 13 and text accompanying note 13.

<sup>88</sup> Although failure to file a timely Form D with the Commission may constitute a violation of Rule 503, it is not a condition to availability of the exemptions set forth in Rule 504, 505 or 506.

We believe that there is no investor protection or other critical regulatory reason why Form D needs to be filed in such a short time frame. By extending the time frame the Commission will ease issuer filing burdens and improve the integrity of the Commission's information collection, both stated goals of the Release. Accordingly, we propose that the 15-calendar-day filing period be extended to at least 30 calendar days after the date of first sale.

### **C. The Need to Define "First Sale"**

We respectfully urge the Commission to adopt a definition of "first sale" that reflects both legal interpretations and market realities and promotes administrative certainty and consistent application of the Form D filing deadline.

In question 82 of the Interpretive Release on Regulation D, the staff of the Commission's Division of Corporation Finance set forth its view that in a minimum-maximum offering where subscription funds are held in escrow pending receipt of minimum subscriptions, first sale for the purposes of Rule 503 takes place when the first subscription agreement is received and the deposit of the first funds into escrow.<sup>89</sup>

We believe that the staff's position in question 82 conflicts with the decision in Keith v. Lighthouse Securities, Ltd.,<sup>90</sup> in which the court held that even though the plaintiff-investors submitted binding subscription agreements to invest in a limited partnership at varying dates outside the absolute 3-year from date of sale statute of limitations under Securities Act § 13, applicable to antifraud claims under Securities Act § 12(2), the "sale" did not take place until the partnership's general partner accepted the subscriptions and funds were released from escrow to the partnership, at a date within the 3-year period.<sup>91</sup>

The same reasoning should apply to determining the starting date for Form D filings – even though investors' subscription agreements may be stated to be binding on such investors, if there are conditions precedent (such as a sale of a minimum amount of the securities, delivery of certain opinions of counsel, obtaining certain governmental licenses or approvals, or satisfaction of certain other conditions) to an issuer's acceptance of those subscriptions, its receipt of the offering proceeds, and the issuance of the securities to investors, there can be no "sale" until all of such conditions are either satisfied or waived in accordance with the offering terms, i.e., it takes both parties to make a "sale."

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<sup>89</sup> See Securities Act Release No. 6455 (Mar. 3, 1983).

<sup>90</sup> 1997 Fed. Sec. L. Rep. (CCH) ¶ 99,547 (D. Conn. June 17, 1997).

<sup>91</sup> See *id.*



We also believe the staff's position in question 82 is inconsistent with the well-stated rationale of the decisions in Sacks v. Food Management Sys., Inc.<sup>92</sup> and Herber v. Omega Oil Corp.<sup>93</sup> both of which interpreted a filing requirement under the Illinois Securities Act similar to the Form D filing requirement. In those decisions, the federal District Court for the Northern District of Illinois recognized that the term "sale . . . cannot have the broad sweep given it" in the Illinois Securities Act or "there would be no way to comply [with the filing requirement]."<sup>94</sup> Both decisions concluded that the "most reasonable interpretation of the term 'sale'" in this context is the point at which the transaction has been completed, otherwise information required in the filing would be uncertain and subject to change prior to the actual consummation of the sale.<sup>95</sup> The same analysis applies to the filing of Form D before the actual consummation of a sale.

It serves no informational purpose to require a Form D filing in an instance where an offering may not actually be consummated, or where a filing may provide premature information. For example, applying the position in question 82 to a "best-efforts" offering in which a minimum amount of securities has to be sold within a 90-day period, if investor A submits a binding subscription to the issuer on day 2, the issuer would be required to file a Form D by day 17, even though no other investors ever subscribe for securities by day 90, the offering is withdrawn, and investor A's funds are held in escrow and returned to him by the escrow agent on day 90. Alternatively, if a Form D were filed by day 17 in the foregoing example, but 25 other investors subscribed for the securities from days 18 through 89 and the offering were consummated on day 90, the issuer would only be obligated to report the sale to investor A, but not the sales to the other 25 investors. We do not believe that filing a Form D under either of those circumstances on day 17 in compliance with question 82 would serve any useful purpose.

Further in reality of practice, most issuers and attorneys do not view a sale as having occurred until the actual closing date, and often do not inform those charged with filing Form D that an offering is in progress or a closing is contemplated or a subscription agreement has been received, in advance of the closing date (and in actual practice, those charged with filing Form D often do not hear about the offering until sometime after the closing date).

For these reasons, we respectfully urge the Commission to adopt a definition of "first sale" for purposes of Regulation D that is the consummation of the first closing of a sale of securities in the offering. We suggest that the consummation of the first closing be evidenced by the issuer's acceptance of subscriptions, the delivery to the issuer of the

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<sup>92</sup> No. 74 C 1100, 1974 U.S. Dist LEXIS 8536 at \*5 (N.D. Ill. May 14, 1974).

<sup>93</sup> No. 85 C 384, 1985 WL 3614 (N.D. Ill. Nov. 4, 1985).

<sup>94</sup> Sacks 1974 U.S. Dist LEXIS 8536 at \*5 – 6; Herber, 1985 WL 3614 at \*10.

<sup>95</sup> Sacks 1974 U.S. Dist LEXIS 8536 at \*6; Herber, 1985 WL 3614 at \*10.

purchase price or other consideration due at closing<sup>96</sup> for such securities and the issuance of the securities to the investors (regardless of whether certificates or other instruments, if any, evidencing the securities are actually delivered at closing or to be delivered after the closing).

#### **IV CONCLUDING REMARKS**

The advance from a paper filing to an electronic filing is a much welcomed move by the Commission and with proper state coordination bears much promise for streamlining the Form D filing process.

We commend the Commission for eliminating from Form D those requirements that have unnecessarily burdened issuers over the years. At the same time, we believe that many of the proposals of the Commission undermine its proposed improvements. The Commission itself concluded in the Release that “the overall information collection burden of Form D *would remain approximately the same as it is today.*”<sup>97</sup> This is clearly at odds with the Commission’s goal of easing the filing burdens of the issuer and we strongly urge the Commission to consider our suggestions which we believe would introduce additional improvements and efficiencies into the Form D filing process.

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<sup>96</sup> It is our expectation that the phrase “or other consideration due at closing” would encompass the various forms of consideration that may be delivered by an investor at closing in lieu of a cash purchase price, including property, promissory notes, other securities, and contractual commitments (such as, among other things, leases, vendor contracts, loan agreements or services agreements where the lessor, vendor, lender or service provider conditioned such agreement on the issuance of the securities, and contractual commitments by investors in a private fund to satisfy future capital calls by the issuer regardless of whether there is a capital contribution at such closing). So long as any such promissory note or contractual commitment is binding at closing, future performance of the related obligations would not be deemed subsequent sales.

<sup>97</sup> See Release, 72 Fed. Reg. at 37387 (emphasis added).

Nancy H. Morris, Secretary  
U.S. Securities and Exchange Commission  
September 7, 2007  
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We appreciate any consideration given by the Commission to the foregoing comments, and would be happy to discuss these comments further with the Commission staff, should that be necessary or desirable.

Respectfully submitted,

STATE REGULATION OF SECURITIES  
COMMITTEE

By: /s/ Ellen Lieberman  
Ellen Lieberman, Chair

FEDERAL REGULATION OF  
SECURITIES COMMITTEE

By: /s/ Keith F. Higgins  
Keith F. Higgins, Chair

Drafting Committee:

Gary M. Emmanuel (Chair)	Mike Liles, Jr.
Daniel H. Aronson	Jayson Mallie
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