



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF ECONOMIC JUSTICE  
INVESTOR PROTECTION BUREAU

December 8, 2020

**GUIDANCE ON MANDATORY FILING OF FORM D WITH ELECTRONIC FILING  
DEPOSITORY FOR FEDERAL COVERED REGULATION D DEALERS (13 NYCRR 10.1  
(a)(3) AND 10.11 (b))  
EFFECTIVE DECEMBER 2, 2020**

Beginning on December 2, 2020<sup>1</sup>, issuers selling Federal Regulation D Covered Securities<sup>2</sup> should provide notice to New York State through the North American Association of Securities Administrators (“NASAA”) Electronic Filing Depository (“EFD”) (<https://www.efdnasaa.org/>).

Issuers of Real Estate Securities are currently still required to file the Form 99 as prescribed by the Real Estate Finance Bureau (“REF”) (<https://ag.ny.gov/bureau/real-estate-finance-bureau>). Issuers of Theatrical Securities that fall under Regulation D may either notice file through EFD or by filing the Form 99<sup>3</sup>. Issuers of Unit Investment Trusts may also file Form NF through EFD.

Generally, no new Form 99’s or Form 99 renewals will be accepted by the Investor Protection Bureau after February 1, 2021. Amended Form 99s for issuers that have received a registration number for a Form 99 submitted to the Office that have not yet filed through EFD will be accepted until December 2, 2024. After December 2, 2024 all active Regulation D Covered Securities Dealers, other than theatricals and filings to REF, must have a notice filing record on EFD.

Any Form D notice filed with New York must be completed according to Form D instructions. **Once a notice filing is filed through the EFD system, along with payment of the appropriate fee through EFD, New York considers such notice filing complete, pending any notification of deficiency to the filer.** In other words, notice filers may engage in continued sales activity in New York unless New York contacts them regarding a deficiency and instructs them to stop. Nothing under GBL-359-e or 13 NYCRR 10, or this guidance excuses any false statement or material

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<sup>1</sup> Complete Form 99 filings filed with the Department will continue to be accepted in lieu of the Form D filing, at the filer’s option, for a transition period through Feb 1, 2021.

<sup>2</sup> “Federal Regulation D Covered Securities” are any security or securities that meet the definition of covered securities, or that will meet such definition upon completion of the transaction, under Sections 18(b)(4)(F) of the Securities Act of 1933 (15 USC 77r (b)(4)(F)). 13 NYCRR 10.10(a)(4)

<sup>3</sup> There will continue to be no fee required for theatrical filings notice filed on the Form 99. However, Theatrical issuers choosing to file through EFD will be required by the system pay the appropriate issuer registration fee of \$300/\$1,200 based on the offering amount. There will be no refunds for payments through EFD.

omissions on any Form D notice filed with New York. False statements and omissions to New York may constitute a fraudulent practice under Article 23-A of the General Business Law. Any Form D that notice filing with New York regarding an issuance that was not actually qualified for an exemption claimed on that Form D at the time of filing is void *ab initio* even if such Form D was notice filed in New York and no deficiency was communicated to the filer at the time.

### **Filing on EFD.**

- [Visit https://www.efdnasaa.org/ and register an account.](https://www.efdnasaa.org/)
- [Notice file your Form D through EFD and pay the required fee. See https://www.efdnasaa.org/Contact for system user manuals.](https://www.efdnasaa.org/Contact%20for%20system%20user%20manuals)

### **No Refunds for EFD Filing Payments.**

- EFD takes the filer through the filing process and clearly confirms the payment to be made. EFD provides notice before the filer makes payment of the exact fees to be paid to New York State. It is the filer's responsibility to ensure that such fees are correct. OAG does not issue refunds of filing fees for filings made through EFD.
- Pay the correct registration fee. No refunds shall be made for overpayments.

### **New York is a Multi-issuer Jurisdiction**

- New York is a multi-issuer jurisdiction and each issuer must file through EFD, pay the appropriate fee and make amendments as appropriate.

### **Form D must be accurate and complete.**

- New York requires that Form D filings be complete, including by listing all related persons and persons receiving, or expected to receive, sales compensation, as defined and prescribed by the Form D instructions.<sup>4</sup> A Form D accepted for filing may be later invalidated if such

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<sup>4</sup> Specifically, Form D instructions state, in part:

“Item 3. Related Persons. Enter the full name and address of each person having the specified relationships with any issuer and identify each relationship: • Each executive officer and director of the issuer and person performing similar functions (title alone is not determinative) for the issuer, such as the general and managing partners of partnerships and managing members of limited liability companies; and • Each person who has functioned directly or indirectly as a promoter of the issuer within the past five years of the later of the first sale of securities or the date upon which the Form D filing was required to be made. If necessary to prevent the information supplied from being misleading, also provide a clarification in the space provided. Identify additional persons having the specified relationships by checking the box provided and attaching Item 3 continuation page(s)....”

Item 12. Sales Compensation. Enter the requested information for each person that has been or will be paid directly or indirectly any commission or other similar compensation in cash or other consideration in connection with sales of securities in the offering, including finders. Enter the CRD number for every person identified and any broker and dealer listed that has a CRD number. CRD numbers can be found at <http://brokercheck.finra.org>. A person that does not have a CRD number need not obtain one in order to be listed, and must be listed when required regardless of whether the person has a CRD number. In addition,

filing was incomplete. An amended Form D must be filed as required in the Form D general instructions.

### **State Notice and Further State Notice**

- EFD filers are not required to submit either the State Notice or Further State Notice as part of the alternative filing method through EFD.

### **Consent to Service through EFD**

- EFD filers are not required to submit a separate Form U2 filing to the Department of State. The Department will accept the agreement by the securities issuer on Form D and through EFD that such issuer has consented to service of process in New York State on any of New York's officers, including the Secretary of State.

### **Optional filing on EFD for issuers with an active Form 99 on file, also known as first time digitization.**

- At the issuer's option, they may file a Form D with EFD, even though they have a current registration statement on file via a Form 99.
- Any such issuer must pay the full registration fee for a new 4 year period and submit all required information through EFD. Any such issuer will receive a new filing id and new registration date through EFD.
- Once filed through EFD, the issuer must submit all further related filings (i.e. amendments and renewals) through the EFD system.
- Generally, no new Form 99's or Form 99 renewals will be accepted by the Investor Protection Bureau after February 1, 2021.

### **Issuer Agent Registration**

- Any salesperson of a dealer must pass the series 63 or 66 and register with New York. FINRA member issuer agents must be registered as an agent through CRD. Non-FINRA member issuer agents must register by submitting [NY Form M-2](#) and meeting exam and fingerprinting requirements.
- Any officer of the issuer listed as a related person on the Form D notice filed with New York, need not register in connection with the sale of such issuance.

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check the State(s) in which the named person has solicited or intends to solicit investors. If more than five persons to be listed are associated persons of the same broker or dealer, enter only the name of the broker or dealer, its CRD number and street address, and the State(s) in which the named person has solicited or intends to solicit investors.”