

SEC Proposes to Mandate Electronic Filing of Exemptive Applications

Introduction

The SEC has proposed Amendments (“Amendments”)¹ to the Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) system rules to modernize EDGAR and mandate more electronic filings.² Increased electronic filing would give investors earlier access to exemptive applications under the Investment Company Act of 1940 (“40 Act”) and certain Securities Act of 1933 (“33 Act”) filings and would accelerate the exemptive application process by permitting the SEC Staff to access and respond to applications more rapidly.

The proposed Amendments would:

- require all 40 Act exemptive applications to be submitted electronically;
- eliminate the “technical difficulties” temporary hardship filing exemption found in Regulation S-T Rule 201;
- eliminate certain burdensome filing requirements found in 40 Act Rule 0-2; and
- require electronic submission of Regulation E filings under the 33 Act for small business investment companies (“SBICs”) and business development companies (“BDCs”).

¹ Rel. Nos. 33-8859 and IC-28042 (Nov. 2, 2007).

² See, e.g., Mandated EDGAR Filing for Foreign Issuers, Rel. No. 33-8099 (May 14, 2002); Mandated EDGAR Filing and Web Site Posting, Rel. No. 33-8230 (May 7, 2003); Rulemaking for EDGAR System, Rel. No. 33-8590 (July 27, 2005); Electronic Filing of Transfer Agency Forms, Rel. No. 34-54864 (Dec. 4, 2006).

Discussion

Mandatory Electronic Applications Under the 40 Act

Currently, Regulation S-T mandates electronic submissions of filings by all domestic and foreign registrants, as well as provides the general requirements and procedures for electronic filing;³ however, Rule 101 of Regulation S-T specifically prohibits the electronic filing of any application for exemptive relief.⁴ The Amendment would eliminate the prohibition and mandate the filing of any exemptive application, whether new or amended.

The proposed Amendments would codify the SEC's view that filings are more valuable to investors if they are available via electronic means. Requiring exemptive applications to be submitted electronically furthers the goal of EDGAR of facilitating the dissemination of information to the investing public by making the information contained in the filings readily

³ The EDGAR Filer Manual under Regulation S-T requires each submission to be classified as a particular “submission type” to aid the routing of submissions to the correct SEC office for review. The Amendments would change the submission types to 40-APP, 40-OIP, and 40-6B, while eliminating submission type 60-C. Submission type 40-APP would be used for most submissions processed by the Division of Investment Management's Office of Investment Company Regulation. Applications by employees' securities companies covered by Section 6(b) of the 1940 Act, despite typically being processed by the Office of Investment Company Regulation, would use submission type 40-6B. Finally, the new submission type 40-OIP would be used for submissions processed by the Division's Office of Insurance Products.

⁴ Rule 101(a)(2)(iv).

available and easily searchable.⁵ The SEC also expects the new electronic submission requirement to create a uniform electronic repository of exemptive applications, which would benefit applicants by allowing them to easily refer to previous applications as models.

It is important to note, however, that the Amendments would neither require nor allow submissions made under the Investment Advisers Act of 1940 (“Advisers Act”) to be filed electronically. Instead, any applicant seeking to submit an exemptive application under both the 40 Act and the Advisers Act would be required to submit the 40 Act application electronically and the Advisers Act application in a separate paper filing.

Eliminating Temporary Hardship Exemption for 40 Act Applications

Currently, a filer may obtain a temporary hardship exemption under Rule 201 of Regulation S-T if the filer encounters unanticipated technical difficulties that prevent the timely submission of an electronic filing by filing a legended paper copy of the filing and then submitting an electronic copy of the filing within six business days. While this temporary hardship exemption is self-executing, the exemption can only extend beyond the six-business day limit if the filer has obtained a continuing hardship exemption from the SEC pursuant to Rule 202 of Regulation S-T.

The Amendment would revise Rule 201 by eliminating the temporary hardship exemption for submission of applications under the Act, because there are no exigent circumstances or deadlines requiring “timely submission” associated with these filings. However, the continuing hardship exemption under Rule 202 would still be available if the applicant was unable to electronically submit the application without undue burden or expense. Moreover, the Amendment would not change the fact that, in rare circumstances, the SEC Staff could use its delegated authority pursuant to Rule 13(b) of Regulation S-T to adjust any filing date if necessary.

⁵ Currently, the applications for orders of exemptive relief are submitted in paper and are accessible only via the SEC’s Public Reference Room or electronically from private sources, which typically charge fees for copies.

Eliminating Burdensome Requirements of Rule 0-2

The Amendments to Rule 0-2 under the 40 Act, which governs the form of any application, would streamline existing requirements for applications for orders that do not have specifically prescribed forms. The Amendments would eliminate the requirement to have verifications of applications and statements of facts made in connection with the application notarized, because it would be unnecessary in an electronic filing context. The Amendments would also eliminate the requirement that applicants include “proposed notices” of the proceeding initiated by the filing as exhibits to the application, because the SEC Staff has found these exhibits to be of limited value. Finally, the Amendments would delete the provision that requires paper filing of all applications for orders under the 40 Act, regardless of any allowance to file electronically.

Electronic Regulation E Filings by SBIC and BDCs

Regulation E under the 33 Act provides an exemption for small business investment companies and business development companies regulated by the 40 Act from registering their securities. In order to qualify for the exemption, these regulated entities must make certain filings with the SEC, such as notifications of an offering (Rule 604, Form I-E), sales material used in connection with the offering (Rule 607), and reports of sales in the offering (Rule 609, Form 2-E). Currently, most of the SBICs and BDCs submit these required filings electronically but must also send a paper copy to the SEC.

Conclusion

The proposed Amendments represent another advance in the SEC’s effort to facilitate the efficient submission of applications and the dissemination of information to investors.



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