

**MEMO# 35898**

October 24, 2024

# **Developments Regarding NASAA's EFD System for Mutual Fund State Registrations**

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TO: Chief Compliance Officer Committee  
Operations Committee  
SEC Rules Committee

Transfer Agent Advisory Committee RE: Developments Regarding NASAA's EFD System for Mutual Fund State Registrations

This memorandum provides a summary and status update on a topic that was initially introduced to the Transfer Agent Advisory Committee during its June 12, 2024 committee meeting, the SEC Rules and CCO Committees on a call held on September 12, 2024, and the Operations Committee during its October 9, 2024 committee meeting.

## **Executive Summary**

The North American Securities Administrators Association ("NASAA") has been encouraging states to require mutual funds to submit state registration filings through an electronic filing system called Electronic Filing Depository ("EFD") that NASAA developed and maintains. Mutual funds (through their filing service providers) are currently unable to use EFD due to a number of operational and other challenges.

The State of Alaska has indicated that it plans to require the use of EFD as the only means to file fund registrations, making it the first state to do so. As a result of successful ICI outreach to the Alaska Division of Banking and Securities, we have been able to persuade Alaska to delay implementation of the EFD requirement until June 30, 2025. But this delay neither prevents the eventual requirement of the use of EFD, nor does it prevent other states from following Alaska's lead and also mandating EFD for mutual fund filings.

Given that requiring the exclusive use of EFD in its current form effectively would prevent our members from selling mutual funds to residents of Alaska and other applicable states, we are taking this issue very seriously and considering next steps to prevent states from mandating EFD for mutual fund filings.

## **Background**

NASAA, the trade organization serving state securities regulators, developed the EFD system in 2014 and has been encouraging states to implement EFD for various state filings, including Form D (private placements) and UIT notice filings for some time. In recent years, however, NASAA has been campaigning to get states to expand their use of EFD to include mutual fund registration and renewal notice filings as well. Notably, NASAA charges filers a usage fee to submit state filings through EFD and this cost would be borne by funds. Only a handful of states currently have an ability to accept mutual fund filings through EFD (and none to our knowledge are doing so satisfactorily), but none make it a requirement.

Most mutual funds engage one of several service providers (the "Bulk Filers") to facilitate state notice filings across all 50 states and several additional territories. The Bulk Filers currently use a filing system called BlueExpress, an Application Programming Interface or API, to complete mutual fund notice filings in a majority of jurisdictions. The Bulk Filers have used BlueExpress for many years to transmit their clients' mutual fund notice filings to states without any known issues or disruptions. In contrast to EFD, there are no direct costs to funds associated with the use of BlueExpress.

## **Operational and Other Concerns with EFD**

The required use of EFD for mutual fund filings presents a number of concerns for our members:

- **EFD Usage Fee.** NASAA charges a usage fee for filers to access EFD. Because the existing filing system is free of charge, this usage fee would impose an additional cost on funds to register in states that utilize EFD. Additionally, NASAA can increase the fee at any time. See section 5.2 of attached NASAA EFD Filer Terms of Use.
- **Capacity Issues.** The Bulk Filers have been engaging with NASAA in a test environment for several months. They have yet to see evidence that EFD can handle the volume of filings required - at times thousands per day. In addition, NASAA has stated that it will be transitioning to a new third party technology consultant to support EFD, and no updates will be made to the system in the interim. It is unclear if and when EFD will be updated to make the changes required to accommodate the Bulk Filers' needed capacity.
- **Payment Issues.** Today, the Bulk Filers send payments for the filings they complete for their clients directly to the applicable states. When using EFD, the Bulk Filers will have to submit these payments through NASAA, which, after deducting its user fees, will in turn deliver the amount due to each applicable state. The Bulk Filers have multiple concerns with the payment process under EFD, including that this process will not enable them to demonstrate a chain of custody and confirmation of timely payment for internal control purposes. NASAA has acknowledged that the timing for forwarding the registration payment to states will vary.
- **User Terms.** When a filer accesses EFD it is required to click through and agree to a user agreement (see attachment).[\[1\]](#) The terms of this agreement are strongly tilted in NASAA's favor. These provisions include strict limitations on NASAA's liability for any damages (including as a result of their negligence) (sections 9.3 and 9.4), the ability to increase fees at any time, the ability to change the user terms at any time with no notice, and the ability to terminate user access to the platform with no notice and without cause (section 5.2), among others.

## **Legal Issues with Mandate of EFD**

If a state mandates the use of EFD for mutual fund filings and does not permit any

alternative means of filing (such as paper), and the Bulk Filers are unable to use EFD due to the above issues, securities issued by any mutual fund that cannot make a notice filing cannot be offered in that state. This would impact not only new fund sales, but also the ability of existing investors to buy subsequent shares, including through retirement platforms with automatic investment features. Intermediaries and fund firms would both be exposed to liability as a result.

ICI has engaged outside counsel to explore the following legal theories:

- **Potential NSMIA Issues.** Requiring the use of EFD to the exclusion of any other system (e.g., BlueExpress) or even filing via paper may raise issues under the National Securities Markets Improvement Act of 1996 ("NSMIA") which prohibits a state from imposing its own registration and qualification requirements on securities offerings in that state. While NSMIA allows states to collect certain fees for funds to register their shares for sale, if a state mandates use of a filing system that is completely unworkable in practice, and/or subjects funds to additional liabilities through the system's user terms, that arguably would violate NSMIA. Morgan Lewis, our outside counsel assisting us with these issues, has explored the likelihood of success of such an argument in more depth and provided us a memo. The NSMIA argument is fairly novel, and Morgan Lewis believes there is a strong argument that an EFD mandate would be preempted by NSMIA.
- **Potential Antitrust Issues.** Morgan Lewis also explored whether there are antitrust concerns with NASAA, as a private actor, seeking to mandate use of EFD by the states. We shared a letter regarding these concerns with NASAA in August 2023. The basis for a potential antitrust claim would be that a directive mandating EFD that essentially "shuts down" competing mutual fund filing alternatives would violate principles of fair trade and competition and impermissibly ratify a private restraint on competition, with adverse and discriminatory impacts on interstate commerce.

## **Communications with NASAA, States, and Members**

Over the course of several months in 2023, ICI exchanged letters and emails with NASAA regarding our concerns with the use of EFD for mutual fund filings.

After Alaska's announcement in March 2024 that it will not permit use of alternatives to EFD after January 2025, ICI immediately reached out to engage the Alaska Division of Banking and Securities on our concerns. Although initially resistant to speaking with us, we ultimately did have a series of calls with the Director of this Division in September. On September 25, Alaska announced that it would delay the effective date of the EFD mandate to June 30, 2025, presumably to provide more time to resolve the outstanding issues with the EFD system. While we are pleased with the outcome of our successful advocacy in Alaska, the delay only changes the timing of Alaska's announced mandate and does not preclude other states from adopting similar deadlines and filing requirements. We will continue to assist in a resolution that is workable for our members.

We and the Bulk Filers have repeatedly expressed our concerns to NASAA regarding states' plans to exclusively adopt EFD, and specific to Alaska, with the deadline imposed. NASAA has stated that they have no influence over Alaska's (or any state's) decision to adopt EFD for mutual fund notice filings. ICI has participated in several recent calls with senior staff at NASAA to discuss our concerns and share with them our direct outreach to states. Following these calls, NASAA has increased their interaction and testing with the Bulk Filers, seemingly taking the operational issues more seriously.

We raised this issue with ICI's Transfer Agent Advisory Committee ("TAAC") in June of this year. Member representatives on the TAAC have reached out to the Bulk Filers and many have also escalated the matter through their internal channels. We also raised the issue with members of the SEC Rules Committee and the Chief Compliance Officers Committee in a call in September, and the Operations Committee at a meeting in October. We plan to keep members apprised of our progress on this issue and welcome member input and direction.

## **Other States and Next Steps**

A number of other states, including North Dakota, Rhode Island, Tennessee, and Virginia, have implemented EFD and discontinued the use of BlueExpress. So far, however, Alaska is the only one to announce an intention to mandate EFD to the exclusion of any other filing option. All other states have continued to accept paper filings as an alternative. Tennessee for example, recently announced its intent to discontinue BlueExpress and require the use of EFD for electronic mutual fund notice filings, but has indicated that it will allow paper filing as an alternative for the foreseeable future. ICI had a conversation with the Tennessee securities regulator to understand their decision-making process in transitioning to EFD, as well as to alert them of the current challenges with EFD. We will continue to engage with applicable states as they take similar actions, as we recognize that reverting to filing fund registrations by paper is not an optimal, nor likely sustainable, outcome for funds or states.

NASAA maintains an EFD [website\[2\]](#) listing which states have EFD capabilities. ICI also intends to conduct proactive outreach in the states and territories that have yet to make EFD-related announcements to the filing community. [\[3\]](#) We also are evaluating whether we should take any additional actions (legal or otherwise) with respect to Alaska.

Amy McDonald  
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Kelly O'Donnell  
Director, Transfer Agency and Operations

## **Notes**

[\[1\]](#) Although a fund's service provider would be the entity agreeing to the EFD user terms, the preamble to the user terms extends this agreement to the fund with the filing obligation: "If You are entering the Agreement in Your capacity as an employee, agent, or contractor of an entity, You represent and warrant that such entity: (i) has authorized You to enter into the Agreement and to use the EFD System and Website generally and (ii) has agreed to be responsible for Your activities conducted via the EFD System and Website generally and for Your compliance with the terms and conditions of the Agreement." See page 3 of attachment.

[\[2\]](#) <https://www.efdnasaa.org/About/EFDStates>. Note that although North Dakota is listed as EFD required, as of the date of this memo North Dakota continues to accept mutual fund filings via BlueExpress.

[\[3\]](#) A non-exhaustive list of priority states includes: Alabama, Delaware, Georgia, Louisiana, Massachusetts, New Jersey, Pennsylvania, Puerto Rico, South Carolina, Vermont, and Washington. This list may change or expand over time.

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